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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

Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018

Thank you for your letter dated 21 November 2018 and the opportunity to provide comments on the Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018 (the **Bill**) and for granting a short extension of time by which to provide our comments. The Queensland Law Society (QLS) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

Please note that in the time available to the Society and the commitments of our committee members, it is not suggested that this submission represents an exhaustive review of the proposed amendments. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles, which we have not identified.

The QLS Children's Law and Criminal Law Committees who have substantial expertise and practical experience have compiled this response. With respect to the Bill, we raise three main areas of concern:

- Reversal of the statutory presumption of bail for any adult, child or young person previously convicted of a terrorism offence or who are, or have been, subject to a control order made under the Commonwealth Criminal Code (clauses 4-6, 8-9 regarding adults, and clauses 26- 27 regarding children).
- Presumption against an order for parole being made by the Parole Board Queensland for persons who have demonstrated support for, or links to, terrorism activity unless there are exceptional circumstances (clauses 13-16).
- Presumption against the release of children and young people from detention to supervised release orders after serving 70% of the period of detention, unless a sentencing court makes an order for earlier release after serving between 50% and 70% of the detention period (clause 30).

Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018

1. Introductory comments

The Queensland Law Society supports cogent, evidence-based and proportionate legal responses to the threat of terrorism. We understand that counter-terrorism legislation must strike a balance between protecting the community and preserving fundamental principles of law. Preservation of the rule of law is of utmost importance. Failure to protect long-standing and established criminal law and children's law principles, especially regarding the deprivation of an adult or child's liberty, must not be taken lightly.

The Bill seeks to overturn long-standing principles of law regarding bail and parole. The proposed amendments are broad, susceptible to abuse, and may impinge on the rights and liberties of Queenslanders. QLS remains concerned that the overturning of well-established legal principles that preserve individuals' rights and liberties in the context of counter-terrorism could lead to the adoption of extraordinary measures in other areas of criminal and children's law.

The Society considers that the legislative amendments proposed in the Bill are not justified. There is no data or evidence to support the view that the current counter-terrorism regime is insufficient to deal with terrorist threats. We understand that these proposals form part of a Council of Attorneys General (COAG) agreement and other states have passed legislation to effect this commitment. However, the Society is not in a position to support these reforms.

2. Reversal of the presumption in favour of bail

2.1 Introductory comments regarding the reversal of the statutory presumption of bail

We understand that there are proposed amendments to the *Bail Act 1980*. These include a reversal of the statutory presumption of bail for any adult person previously convicted of a terrorism offence or who are, or have been, subject to a control order made under the Commonwealth Criminal Code. These amendments are largely similar to those proposed in the *Youth Justice Act 1992*, which governs the children's law system in Queensland.

The Society objects to the proposed reversal of the statutory presumption of bail in the *Bail Act 1980* and the *Youth Justice Act 1992*.

First, the proposed reversal does not accord with fundamental legislative principles. Section 4 of the *Legislative Standards Act (1992)* provides the Queensland Government with fundamental principles relating to the creation of legislation that underlie a parliamentary democracy based on the rule of law. Bail is a fundamental part of a democratic society and is an expression of the right to liberty. Any decision regarding the granting of bail to a defendant raises the questions fundamental to our justice system: a person's right to the presumption of innocence and to liberty.¹ Incursions on this right must not be taken lightly. In recognition of this importance, the fundamental legislative principles require that legislation does not reverse the onus of proof in criminal proceedings without adequate justification. Reversal of the legal burden of proof arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification.

Secondly, there has been no persuasive data or evidence to justify the reversal of the onus of proof or that the current bail regime is inadequate. Furthermore, under the existing provisions of the *Bail Act 1980*, if a person is a risk of committing terror offences, the court will find that

¹ Collins, K. (2000), Queensland Bail Laws. *Queensland Parliamentary Library: research publications and resource section*.

Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018

they are an unacceptable risk of committing offences and they will be remanded in custody. Therefore, the intended consequence of this legislation is to imprison people who the court would otherwise assess to be an acceptable risk with safeguards imposed by conditions. Therefore, there is no evidence to suggest our current bail standards are not sufficient to protect the community from such offenders.

2.2 *Bail Act 1980 provisions*

Clause 8 – Amendment of s 16 (Refusal of bail)

Clause 8 of the Bill seeks to amend section 16 of the *Bail Act 1980*, which deals with the refusal of bail. The proposed amendment requires the court to consider certain factors in determining bail matters. These include:

- (g) any promotion by the defendant of terrorism;
- (h) any association the defendant has or has had with—
 - (i) a terrorist organisation within the meaning of the Criminal Code (Cwth), section 102.1(1); or
 - (ii) a person who has promoted terrorism.

Section 16(2) of the *Bail Act 1980* deals with the refusal of bail. Section 16(2)(b) of the *Bail Act 1980* states that:

- (2) In assessing whether there is an unacceptable risk with respect to any event specified in subsection (1)(a) the court or police officer shall have regard to all matters appearing to be relevant and in particular, without in any way limiting the generality of this provision, to such of the following considerations as appear to be relevant—
 - (b) the character, antecedents, associations, home environment, employment and background of the defendant;

In our view, the existing requirements in section 16(2) of the *Bail Act 1980* has sufficient scope for any consideration of a defendant's associations or links to terrorist activity. Therefore, in our view, clause 8 of the Bill is unnecessary.

The Society also considers that the criteria listed in clause 8 of the Bill are vague, overly broad and may capture conduct and associations that do not amount to terrorist activity. It is also difficult to determine, on a practical level, whether a bail applicant and their legal representative will have access to the broad scope of the evidence being considered by the court. It will be difficult for a person to challenge a bail decision or demonstrate that they do not pose a risk if they are unaware that they are considered to have links, associations or affiliations with terrorism or persons or groups advocating support for terrorist acts. The effect of clause 8 will be to detain adults and young people whom the court would normally order a grant of bail.

Clause 9 – Insertion of new s 16A

Clause 9 of the Bill seeks to insert a new section 16A(1) into the *Bail Act 1980*. Proposed section 16A(1) deals with refusal of bail for defendants convicted of terrorism offences or subject to Commonwealth control orders. Clause 9 states:

- (1) This section applies in relation to a defendant if—

Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018

- (a) the defendant—
 - (i) has previously been convicted of a terrorism offence; or
 - (ii) is or has been the subject of a Commonwealth control order;
- and
- (b) the defendant is an adult.

In our view, section 16 of the *Bail Act 1980* is comprehensive enough to encompass situations contemplated by clause 9 of the Bill. More specifically, we consider that section 16(1)(a)(ii) of the *Bail Act 1980* is broad enough to apply to defendants who have previously been convicted of a terrorism offence or the subject of a Commonwealth control order. Section 16(1)(a)(ii) of the *Bail Act 1980* permits a court or police officer authorised under the *Bail Act 1980* to refuse a grant of bail if the court or police officer is satisfied

- (a) that there is an unacceptable risk that the defendant if released on bail—
 - (i) would fail to appear and surrender into custody; or
 - (ii) would while released on bail—
 - (A) commit an offence; or
 - (B) endanger the safety or welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else's safety or welfare; or

Therefore, the current provisions under the *Bail Act 1980* offer sufficient safeguards to protect the community from the release of potentially dangerous accused persons.

The Society is also concerned about proposed sections 16A(2) and 16A(3). These provisions state:

- (2) Despite any other provision of this Act, a court must refuse to grant bail to the defendant unless the court is satisfied exceptional circumstances exist to justify granting bail.
- (3) In considering whether exceptional circumstances exist to justify granting bail to the defendant, the court may have regard to any relevant matter.

The Society is concerned about the interference with the court's discretion to grant bail. The power to grant bail will be limited to a court and require an offender to satisfy that there are exceptional circumstances to justify a grant of bail.

2.3 Youth Justice Act 1992 provisions**Clause 26 – amendment of s 48 (Decisions about bail and related matters)**

Section 48 of the *Youth Justice Act 1992* discusses decisions about bail and related matters. Clause 26 of the Bill seeks to amend section 48 of the *Youth Justice Act 1992*. Clause 26(2) of the Bill seeks to include further factors to section 48(3) of the *Youth Justice Act 1992* in determining bail for a child. These include:

- (db) any promotion by the child of terrorism;
- (dc) any association the child has or has had with a terrorist organisation, or with a person who has promoted terrorism, that the court or officer is satisfied was entered into by the child for the purpose of supporting the organisation or person—

Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018

- (i) in the carrying out of a terrorist act; or
- (ii) in promoting terrorism;

In our view, section 48 of the *Youth Justice Act 1992* is comprehensive enough to encompass situations contemplated by clause 26 of the Bill. Section 48(3) of the *Youth Justice Act 1992* is exceptionally broad and mandates that:

- (3) The court or officer must have regard to any of the following matters of which the court or officer is aware—
 - (a) the nature and seriousness of the offence;
 - (b) the child's character, criminal history and other relevant history, associations, home environment, employment and background;
 - (e) any other relevant matter.

Therefore, in our view, clause 26 is unnecessary.

Clause 27 – insertion of new s 48A

Clause 27 of the Bill proposes to insert a new section 48A into the *Youth Justice Act 1992*. Proposed section 48A deals with releasing children found guilty of terrorism offences or subject to Commonwealth control orders and states:

- (1) This section applies in relation to a child in custody in connection with a charge of an offence if the child—
 - (a) has previously been found guilty of a terrorism offence; or
 - (b) is or has been the subject of a Commonwealth control order
- (2) Despite any other provision of this Act or the *Bail Act 1980*, a court must not release the child from custody unless the court is satisfied exceptional circumstances exist to justify releasing the child.
- (3) In considering whether exceptional circumstances exist to justify releasing the child, the court may have regard to any relevant matter.

The Society is concerned with clause 27 and does not support the reversal of the statutory presumption in favour of bail for a child.

First, as seen in relation to our commentary on clause 26 of the Bill, the Society also considers that section 48 of the *Youth Justice Act 1992* is comprehensive enough to encompass situations contemplated by clause 27 of the Bill. Of note is the fact that section 48(3)(e) of the *Youth Justice Act 1992* empowers the court to take into account "any relevant matter". The explanatory notes to the Bill do not provide any justification or evidence to demonstrate that section 48 of the *Youth Justice Act 1992* has been inadequate.

Secondly, the reversal of the onus of proof will have significant adverse impacts on children and young people. Reversing the presumption of innocence for a child aged between 10 and 14 does not accord with section 29 of the *Criminal Code Act 1899*, which recognises the age and immaturity of children and young people. Again, no evidence of increased terrorist activity by children or young people has been provided to justify the reversal of the statutory presumption of bail. As such, this reversal of the onus of proof is likely to result in the imprisonment of children because of their parents' activities.

Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018

Thirdly, issues raised in relation to clause 9 of the Bill and the requirement that "exceptional circumstances" are required to permit a grant of bail are also relevant to clause 27.

3. Creating a presumption against parole

3.1 *Corrective Services Act 2006 provisions*

Various amendments proposed to the *Corrective Services Act* creates a presumption against an order for parole by the Parole Board Queensland (**the Board**). The Society does not support these amendments for the reasons outlined below.

Clause 13 – Insertion of new ss 193B–193E

a) Proposed section 193B(1)

Clause 13 proposes the creation of new sections 193B–193E. The effect of the sections is to create a presumption against an order for parole being made by Parole Board Queensland for persons who fall into the categories specified in proposed section 193B(1). Proposed section 193B(1) states:

- 193B Deciding applications for parole orders made by prisoners with links to terrorism
- (1) This section applies in relation to a prisoner's application for a parole order if—
- (a) the prisoner has, at any time, been convicted of a terrorism offence; or
 - (b) the prisoner is the subject of a Commonwealth control order; or
 - (c) the parole board is satisfied the prisoner has promoted terrorism; or
 - (d) a report in relation to the prisoner given by the commissioner under section 193E states there is a reasonable likelihood the prisoner may carry out a terrorist act and any of the following apply—
 - (i) the prisoner has been charged with, but not convicted of, a terrorism offence;
 - (ii) the prisoner has been the subject of a Commonwealth control order;
 - (iii) the parole board is satisfied the prisoner is or has been associated with a terrorist organisation, or with a person who has promoted terrorism.
- (2) The parole board must refuse to grant the application under section 193(1) unless the board is satisfied exceptional circumstances exist to justify granting the application.

The Society does not support proposed section 193B for several reasons.

First, we consider that the Parole Board already has broad powers to amend, suspend or cancel parole orders by virtue of section 205 of the *Corrective Services Act 2006*. Section 205 of the *Corrective Services Act 2006* already obligates the Parole Board to take into account certain factors when deciding to amend, suspend or cancel a parole order, if the prisoner poses a serious risk of harm to someone else, or poses an unacceptable risk of committing an offence. Together with the requirement to give the prisoner an information notice and a reasonable opportunity to be heard, section 205 of the *Corrective Services Act 2006* already encompasses not only the objectives that clause 13 of the Bill is attempting to achieve, but affords the prisoner a greater level of fairness.

Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018

Secondly, the requirement for exceptional circumstances to obtain parole as seen in proposed section 193B(2) will mean that most prisoners will have no hope of parole. This poses a danger to the administration of justice, as there is no incentive to co-operate with the authorities or plead guilty to offences. It is a disincentive to rehabilitation. It removes an incentive for good behaviour while in custody and will not be conducive to good order within the prisons. In essence, the proposal is to prevent the release of prisoners who would otherwise be assessed by the Parole Board as an acceptable risk.

Thirdly, the Society is concerned about proposed section 193B(1)(d)(iii) and the application of this provision to prisoners who have mere "associations". As noted in our comments on proposed section 193D(e), this will have the effect of keeping people in prison because of the activities and actions of their relatives.

b) Proposed section 193D

Clause 13 also proposes the addition of proposed section 193D. Proposed section 193D states:

193D Parole board may ask commissioner for reports about prisoners' links to terrorism

The parole board may, by written notice given to the commissioner, ask the commissioner to give the board, for use under this division or division 5, a report in relation to any of the following matters—

- (a) whether a prisoner has, at any time, been convicted of or charged with a terrorism offence;
- (b) whether a prisoner is or has been the subject of a Commonwealth control order;
- (c) any promotion by a prisoner of terrorism;
- (d) the likelihood of a prisoner carrying out a terrorist act;
- (e) any association a prisoner has or has had with—
 - (i) a terrorist organisation; or
 - (ii) a person who has promoted terrorism

The Society is concerned with proposed section 193D.

In relation to proposed section 193D(a), the Society is concerned that this provision will apply to people who have previously been merely charged with an offence. That is, the regime will apply even if the person was exonerated. This is particularly relevant in Queensland where the test for charging an individual with an offence is the same as for arrest – reasonable suspicion alone.

Similarly, if a control order was imposed, but later realised to have been unnecessary, the restriction will also apply. Therefore, a person, once charged, regardless of whether the charges proceed or whether the person has been found guilty or innocent will be considered a terror suspect forever. This regime imposes legal consequences upon individuals not because of anything they have been proved to have done, but because they fell under suspicion at some time.

In relation to proposed section 193D(e) (analogous to our comments on proposed section 193B(1)(d)(iii)), this would apply to prisoners who have family "associations". Essentially, the

Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018

proposal will have the effect of keeping people in prison because of the activities and actions of their relatives.

Clauses 14 to 16 – Amendment of s 205, 208A, 208B

Clause 14 seeks to amend section 205 of the *Corrective Services Act 2006* by amending proposed section 205(2) to allow the Parole Board to

- (d) suspend or cancel a parole order if the board reasonably believes the prisoner subject to the parole order poses a risk of carrying out a terrorist act.

In our view, the Parole Board already has the power to suspend or cancel a parole order by virtue of current section 205(2)(iii) of the *Corrective Services Act 2006* which states:

- (2) A parole board may, by written order—
 - (a) amend, suspend or cancel a parole order if the board reasonably believes the prisoner subject to the parole order—
 - (iii) poses an unacceptable risk of committing an offence;

Therefore, the Society considers that clause 14 is unnecessary.

Similarly, we consider that clauses 15 and 16 are also unnecessary as adequate powers are contained in sections 208A and 208B of the *Corrective Services Act 2006*, respectively.

3.2 Youth Justice Act 1992**Clause 30 – Amendment of s 227 (Release of child after service of period of detention)**

Clause 30 of the Bill seeks to amend section 227 of the *Youth Justice Act 1992*. Section 227 of the *Youth Justice Act 1992* states:

- 227 Release of child after service of period of detention
- (1) Unless a court makes an order under subsection (2), a child sentenced to serve a period of detention must be released from detention after serving 70% of the period of detention.
 - (2) A court may order a child to be released from detention after serving 50% or more, and less than 70%, of a period of detention if it considers that there are special circumstances, for example to ensure parity of sentence with that imposed on a person involved in the same or related offence.
 - (3) If the child is entitled under section 218 to have a period of custody pending the proceeding (the custody period) treated as detention on sentence, the period before the child is released under this section must be reduced by the custody period.

Example—

C is sentenced to 10 weeks detention. C spent 2 weeks on remand before sentence. The chief executive must make a supervised release order releasing the child 5 weeks after sentence, which is 70% of 10 weeks with a further reduction of 2 weeks.

Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018

Clause 30 states:

- (2A) However, a court may not make an order under subsection (2) if—
- (a) the child has, at any time, been found guilty of a terrorism offence; or
 - (b) the child is the subject of a Commonwealth control order; or
 - (c) the court is satisfied the child has promoted terrorism.

The explanatory notes in relation to clause 30 of the Bill states:

Section 227 is amended to insert new section (2A) which provides that a court may not make an order that a child be released from detention after serving between 50 percent and 70 percent of a period of detention, if the child has, at any time, been found guilty of a terrorism offence; or is the subject of a Commonwealth control order; or if the court is satisfied the child has promoted terrorism. This amendment creates a non-release period by limiting the operation of section 227. A court sentencing a child for an offence cannot reduce the period of detention to less than 70 percent of the period of detention in those circumstances.

Therefore, clause 30 removes the discretion of the court to release the child if the child has a conviction for a terrorism offence, is the subject of a control order, or has 'promoted terrorism'. This is an undue fetter on the court's power to impose a just sentence based on cogent evidence, and takes away the flexibility in the sentencing and detention of a young person.

The Society opposes the proposal of presumption against release of children from detention to supervised release orders after serving 70% of the period of detention, unless a sentencing court makes an order for earlier release after serving between 50% and 70% of the detention period.

The Society considers that the imposition of a mandatory non-parole period for children is an undue fetter on the Court's power to impose a just sentence.

The view of the Society in relation to mandatory sentencing is well established. In accordance with this view, the Society has been a long-standing advocate for judicial discretion. The reasons for our support for judicial discretion are based on cogent evidence and are clearly detailed in our mandatory sentencing paper.² In line with our opposition to mandatory sentencing, we called for a commitment to refrain from the creation of new mandatory sentencing regimes and to take steps to repeal current mandatory sentencing regimes in our 2015 and 2017 Call to Parties Statements.

It is in line with this position, the Society reemphasises the need to maintain flexibility in the sentencing process when considering sentencing and detention of a young person. It is essential that judicial discretion be maintained for sentencing in all youth criminal matters, including those arising from alleged terrorist activity. A mandatory sentence, by definition, prevents a court from fashioning a sentence appropriate to the facts of the case. A civilised society should put its trust in judicial officers to use their discretion based on individual circumstances.

As noted in our policy position, the public perception of the appropriateness of a sentence changes as additional information about a matter is provided. A study established by Her

² Accessible at:

http://www.qls.com.au/Knowledge_centre/Areas_of_law/Criminal_law/Mandatory_sentencing_policy_paper.

Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018

Excellency Professor the Honourable Kate Warner AC from the University of Tasmania asked jurors to assess the appropriateness of the judge's sentence for the case in which they were involved. The jurors, who were not informed of the sentence imposed by the judge in the case, were asked what sentence they would impose. More than half of the jurors surveyed indicated they would have imposed a more lenient sentence than the trial judge imposed. When subsequently informed of the actual sentence imposed, 90% said that the judge's sentence was (very or fairly) appropriate.

4. Concluding comments

The Society, as a long-standing advocate for fundamental legislative principles and judicial discretion, does not support the manner in which the Bill infringes upon these well-established legal doctrines. Legislation should not reverse the onus of proof in criminal proceedings and pose a potential danger to the administration of justice, without persuasive data or evidence to justify why the current bail and parole regimes are inadequate.

If you have any queries regarding the contents of this letter, please do not hesitate to contact QLS Legal Policy on [REDACTED] or by email to [REDACTED]

Yours faithfully



Ken Taylor
President