Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at **Appendix 3**.

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Purpose	Establishes a scheme to permit the continuing detention of 'high risk terrorist offenders' at the conclusion of their custodial sentence
Portfolio	Attorney-General
Introduced	Senate, 15 September 2016
Rights	Liberty; freedom from arbitrary detention; right to humane treatment in detention; prohibition on retrospective criminal laws (see **Appendix 2**)
Previous reports	7 of 2016; 8 of 2016
Status	Concluded

Background

2.3 The committee initially reported on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (the bill) in its *Report 7 of 2016,* and requested further information from the Attorney-General in relation to the human rights issues identified in that report.[1]

2.4 In order to conclude its assessment of the bill while it is still before the Parliament, the committee requested that the Attorney-General's response be provided by 27 October 2016. A response was not received by this date.

2.5 In the absence of this response, the committee again reported on the bill in its *Report 8 of 2016* and reiterated its previous request for further information as well as seeking an additional response from the Attorney-General as outlined below.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 12-20.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 16-26.

2.6 The committee requested that the Attorney-General's outstanding response as well as the additional response be provided by 18 November 2016. A response was still not received by this date.

2.7 However, the Attorney General's response to the committee's inquiries was received on 28 November 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

2.8 The bill then passed both Houses of Parliament on 1 December 2016 and received Royal Assent on 7 December 2016.

Continuing detention of persons currently imprisoned

2.9 The bill proposes to allow the Attorney-General (or a legal representative) to apply to the Supreme Court of a state or territory for an order providing for the continued detention of individuals who are imprisoned for particular offences under the *Criminal Code Act 1995* (Criminal Code).[3] The Attorney-General may also apply for an interim detention order pending the hearing of the application for a continuing detention order.[4] The effect of these orders is that a person may be detained in prison after the end of their custodial sentence.[5]

2.10 The particular offences in respect of which a person may be subject to continuing detention will include:

- international terrorist activities using explosive or lethal devices;[6]
- treason;[7] and
- a 'serious offence' under Part 5.3,[8] or an offence under Part 5.5,[9] of the Criminal Code.

2.11 Individuals who have committed crimes under these sections of the Criminal Code are referred to in the bill as 'terrorist offenders'.

2.12 The court is empowered to make a continuing detention order where:

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3 See proposed sections 105A.3 and 105A.5.

4 See proposed section 105A.9. An interim detention order can last up to 28 days.

5 See proposed section 105A.9(3).

6 Criminal Code, Schedule 1, Division 72, Subdivision A.

7 Criminal Code, Schedule 1, Division 80, Subdivision B.

8 Criminal Code, Schedule 1, Part 5.3. The offences in Part 5.3 include directing the activities of a terrorist organisation; membership of a terrorist organisation; recruiting for a terrorist organisation; training involving a terrorist organisation; getting funds to, from or for a terrorist organisation; providing support to a terrorist organisation; associating with terrorist organisations; financing terrorism; and financing a terrorist.

9 Criminal Code, Schedule 1, Part 5.5. Offences under this part include incursions into foreign countries with the intention of engaging in hostile activities; engaging in a hostile activity in a foreign country; entering, or remaining in, declared areas; preparatory acts; accumulating weapons etc; providing or participating in training; and giving or receiving goods and services to promote the commission of an offence.

(a) an application has been made by the Attorney-General or their legal representative for the continuing detention of a 'terrorist offender';

(b) after having regard to certain matters,[10] the court is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community; and

(c) the court is satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.[11]

2.13 The Attorney-General bears the onus of proof in relation to the above criteria.[12] The standard of proof to be applied is the civil standard of the balance of probabilities.[13]

2.14 While each detention order is limited to a period of up to three years, further applications may be made and there is no limit on the number of applications.[14] This means that a person's detention in prison could be continued for an extended period of time.

2.15 This bill provides that a person detained under a continuing detention order must not be held in the same area or unit of the prison as those prisoners who are serving criminal sentences, unless it is necessary for certain matters set out in proposed section 105A.4(2).[15]

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10 Under proposed section 105A.8 the court must have regard to the following matters in deciding whether it is satisfied: (a) the safety and protection of the community; (b) any report received from a relevant expert under section 105A.6 in relation to the offender, and the level of the offender's participation in the assessment by the expert; (c) the results of any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence, and the level of the offender's participation in any such assessment; (d) any report, relating to the extent to which the offender can reasonably and practicably be managed in the community, that has been prepared by: (i) the relevant state or territory corrective services; or (ii) any other person or body who is competent to assess that extent; (e) any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation in any such programs; (f) the level of the offender's compliance with any obligations to which he or she is or has been subject while: (i) on release on parole for any offence; or (ii) subject to a continuing detention order or interim detention order; (g) the offender's criminal history (including prior convictions and findings of guilt in respect of any other offences); (h) the views of the sentencing court at the time the relevant sentence of imprisonment was imposed on the offender; (i) any other information as to the risk of the offender committing a serious Part 5.3 offence; (j) any other matter the court considers relevant.

11 Proposed section 105A.7.

12 Explanatory memorandum (EM) 4.

13 See proposed section 105.A.13(1).

14 Proposed section 105A.7(5) and (6).

15 Proposed section 105A.4.

2.16 The measure allows ongoing preventative detention of individuals who will have completed their custodial sentence. The previous analysis observed that the use of preventative detention, that is, detention of individuals that does not arise from criminal conviction but is imposed on the basis of future risk of offending, is a serious measure for a state to take.

2.17 While noting that the measure engages and limits a range of human rights, the focus of the initial human rights assessment was on the right to liberty, which includes the right to be free from arbitrary detention. Forms of detention that do not arise from a criminal conviction are permissible under international law, for example, the institutionalised care of persons suffering from mental illness. However, the use of such detention must be carefully controlled: it must reasonable, necessary and proportionate in all the circumstances to avoid being arbitrary, and thereby unlawful under article 9 of the International Covenant on Civil and Political Rights (ICCPR).

2.18 The initial human rights analysis noted that post-sentence preventative detention of persons who have been convicted of a criminal offence may be permissible under international human rights law in carefully circumscribed circumstances.[16] The United Nations Human Rights Committee (UNHRC) has stated that:

> ...to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society.[17]

2.19 The initial analysis stated that the question therefore is whether the proposed preventative detention regime is necessary and proportionate, and not arbitrary within the meaning of article 9 of the ICCPR, bearing in mind the specific guidance in relation to post-sentence preventative detention.

2.20 For the purposes of this initial analysis, it was accepted that the proposed continuing detention order regime pursues the legitimate objective of 'protecting the community from the risk of terrorist attacks',[18] and the measure is rationally

16 See: United Nations (UN) Human Rights Committee, General Comment 35: Article 9, Right to Liberty and Security of Person (16 December 2014)[15], [21]. See also: UN Human Rights Committee, General Comment 8: Article 9, Right to Liberty and Security of Persons (30 June 1982).

17 See, for example, UN Human Rights Committee, General Comment 35: Article 9, Right to Liberty and Security of Person (16 December 2014) [21].

18 EM 3.

connected to this stated objective in the sense that the individual subject to an interim or continuing detention order will be incapacitated while imprisoned. However, questions arose as to whether the regime contains sufficient safeguards to ensure that preventative detention is necessary and proportionate to this objective.

2.21 The proposed continuing detention order regime shares significant features with the current continuing detention regimes that exist in New South Wales (NSW),[19] and Queensland.[20] These state regimes apply in respect of sex offenders and/or 'high risk violent offenders' and have the following elements:

- the Attorney-General or the state may apply to the Supreme Court for a continuing detention order for particular classes of offenders;[21]
- the application must be accompanied by relevant evidence;[22]
- the effect of the continuing detention order is that an offender is detained in prison after having served their custodial sentence in relation to the offence;[23]
- the court may make a continuing detention order if it is satisfied to a 'high degree of probability' that the offender poses an 'unacceptable risk' of committing particular offences;[24]
- in determining whether to make the continuing detention order, the court must have regard to a list of factors;[25]

19 The *Crimes (High Risk Offenders) Act 2006* (NSW) was first enacted in 2006 as the *Crimes (Serious Sex Offenders) Act 2006* to provide for continuing supervision and detention of people convicted of sex offences. The Act was amended in 2013 to extend the regime to people convicted of violent crimes.

20 The *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) was enacted in 2003 to provide for continuing supervision and detention of people convicted of sex offences.

21 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 5; Crimes (High Risk Offenders) Act 2006 (NSW) section 13A.

22 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 5; Crimes (High Risk Offenders) Act 2006 (NSW) section 14; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5D, 5G.

23 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 14; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5D, 5G.

24 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 13; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5B, 5E.

- the court must consider whether a non-custodial supervision order would be adequate to address the risk;[26]
- the term of continuing detention orders can be made for extended periods of time;[27] and
- the availability of periodic review mechanisms.[28]

2.22 As noted in the previous analysis, these continuing detention schemes were the subject of individual complaints to the UNHRC in *Fardon v Australia*,[29] and *Tillman v Australia.*[30] In *Fardon v Australia,* the author of the complaint had been convicted of sex offences in 1989 and sentenced to 14 years' imprisonment in Queensland. At the end of his sentence, the complainant was the subject of continuing detention from June 2003 to December 2006. In *Tillman v Australia* the complainant was convicted of sex offences in 1998 and sentenced to 10 years' imprisonment in NSW. At the end of his sentence, the complainant was the subject of a series of interim detention orders, and finally a continuing detention order of one year (effectively for a period from May 2007 until July 2008).

2.23 The UNHRC found that the continued detention in both cases was arbitrary in violation of article 9 of the ICCPR. In summary, the UNHRC identified the following as relevant to reaching these determinations:

- as the complainants remained incarcerated under the same prison regime the continued detention effectively amounted to a fresh term of imprisonment or new sentence. This was not permissible if a person has not been convicted of a new offence; and is contrary to the prohibition against retrospective criminal laws (article 15 of the ICCPR), particularly as in both instances the enabling legislation was enacted after the complainants were first convicted;

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25 In New South Wales (NSW) this includes community safety, medical assessments, any other information relating to the likelihood of reoffending, the offender's compliance with supervision orders and willingness to engage in assessments or rehabilitation programs, the offender's criminal history, and any other matters that the court considers relevant: see, *Crimes (High Risk Offenders) Act 2006* (NSW) section 17(4). In Queensland this includes medical reports or other information relating to the likelihood that the prisoner will reoffend, the prisoner's criminal history, the prisoner's engagement with rehabilitation programs, community safety, and any other relevant matter: see *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13.

26 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 13; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5D, 5G.

27 In Queensland continuing detention orders may be indefinite; in NSW a continuing detention order may be up to five years. The court may also order further continuing detention orders against the same offender: *Crimes (High Risk Offenders) Act 2006* (NSW) sections 17(4), 18(3).

28 Crimes (High Risk Offenders) Act 2006 (NSW) section 24AC.

29 UN Human Rights Committee (1629/2007) (18 March 2010).

30 UN Human Rights Committee (1635/2007) (18 March 2010).

- the procedures for subjecting the complainants to continuing detention were civil in character, despite an effective penal sentence being imposed. The procedures therefore fell short of the minimum guarantees in criminal proceedings prescribed in article 14 of the ICCPR;
- the continued detention of offenders on the basis of future feared or predicted dangerousness was 'inherently problematic'. The application process for continuing detention orders required the court to 'make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.' The complainants' predicted future offending was based on past conduct, for which they had already served their sentences; and
- the state should have demonstrated that the complainant could not have been rehabilitated by means other than detention which were less rights restrictive.

2.24 The UNHRC's findings and the Australian government's formal response were not referred to in the statement of compatibility.

2.25 The previous analysis stated that a number of the concerns about the NSW and Queensland schemes are relevant to an assessment of the current continuing detention proposal, including:

- individuals currently incarcerated may be subject to continuing detention contrary to the prohibition on retrospective criminal law;
- the civil standard of proof applies to proceedings (that is, the standard of the balance of probabilities rather than the criminal standard of beyond reasonable doubt);[31] and
- the difficulties arising from the court being asked to make a finding of fact in relation to the risk of future behaviour.

2.26 However, the analysis noted two points of difference to the NSW and Queensland schemes.

2.27 First, the bill provides that a person detained under a continuing detention order must not be held in the same area or unit of the prison as those prisoners who are serving criminal sentences, except in certain circumstances. This safeguard appears to respond to one of the bases upon which the state-level regimes were incompatible with article 9, namely, that the applicants were incarcerated within the same prison regime, and therefore their preventative detention in effect constituted a fresh term of imprisonment after they had served their sentence. However, the bill nonetheless does provide that persons subject to continuing detention orders are to

31 See proposed section 105.A.13(1). Some preventative detention regime proceedings are criminal in nature: *Dangerous Sexual Offenders Act* 2006 (WA) section 40.

be detained in prison and that there is a series of circumstances in which they may be detained in the same area or unit as those prisoners serving criminal sentences.

2.28 Second, the bill requires that a court may only make a continuing detention order if satisfied that there is 'no other less restrictive measure that would be effective in preventing the unacceptable risk'.[32] Accordingly, the bill appears to incorporate some aspects of the test of proportionality under international human rights law.[33]

2.29 The initial analysis noted that this aspect of the bill appears to be a safeguard against the use of a continuing detention order in circumstances where an alternative to detention is available. However, it is not apparent from the bill how this safeguard would operate in practice including whether and how the court would be able to assess or provide for less restrictive alternatives. Under the NSW and Queensland regimes, if satisfied that a prisoner is a serious danger to the community (in Queensland) or is a high risk sex offender or high risk violent offender (in NSW), it is open to a court to make either a continuing detention order or a supervision order.[34] By contrast, the bill does not empower the court to make an order other than a continuing detention order.[35]

2.30 Further, the previous analysis noted that the proposed legislative test requires consideration of whether the continuing detention order is the least rights restrictive only at the particular point of time at which it is being contemplated by the court, at or towards the end of the sentence. It is likely that interventions might be possible earlier in respect of a particular offender, such as effective de-radicalisation and rehabilitation programs. Including a requirement to consider this type of intervention, both prior to and after making any continuing detention order, would support an assessment of the proposed regime as proportionate, particularly that post-sentence detention is provided as a measure of last resort and is aimed at the detainee's rehabilitation and reintegration into society.

2.31 Finally, in the proposed scheme the assessment of 'unacceptable risk' is crucial in determining whether the court is empowered to make a continuing detention order. As the risk being assessed relates to future conduct there are inherent uncertainties in what the court is being asked to determine, akin to the concerns in *Fardon v Australia* and *Tillman v Australia*. The bill provides for the court

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32 Proposed section 105A.7.

33 State regimes currently contain a more limited version of this test; the court is required to consider whether a non-custodial supervision order would be adequate to address the risk in deciding whether to make a continuing detention order: see *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5D, 5G.

34 See Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 13; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5B, 5E.

35 The bill does contain an annotation that a control order is an example of a less restrictive measure. However, this does not form part of the operative legislation.

to obtain expert evidence in reaching a determination in relation to risk, though given the nature of the task inherent uncertainties with risk assessments remain.[36]

2.32 Other jurisdictions have sought to minimise these uncertainties by recommending that a 'Risk Management Monitor' be established to undertake a range of functions including developing best practices for risk assessments; developing guidelines and standards; validating new assessment tools; providing for procedures by which experts become accredited for assessing risk; providing education and training in the assessment of risk; and developing risk management plans.[37] Such a body is intended to act as a safeguard in relation to the quality of risk assessments.

Committee's requests for further information from the Attorney-General

2.33 The committee noted that the bill contains certain safeguards which may support an assessment that the regime of continuing detention orders is necessary, reasonable and proportionate; however, its analysis raised questions regarding the adequacy of these safeguards, particularly in light of the UNHRC's determinations in relation to the state-level regimes.

2.34 Accordingly, the committee sought the advice of the Attorney-General as to the extent to which the proposed scheme addresses the specific concerns raised by the UNHRC as set out at [2.23] in respect of existing post-sentencing preventative detention regimes.

2.35 The committee further sought the advice of the Attorney-General as to how the court's consideration of less restrictive measures pursuant to proposed section 105A.7 is intended to operate in practice, including:

- what types of less restrictive measures may be considered by the court;
- what options might be available to the court to assess or make orders in relation to the provision of less restrictive alternatives; and
- whether the Attorney-General will consider whether there are less restrictive alternatives in deciding whether to make an application for a continuing detention order.

2.36 The committee also sought the advice of the Attorney-General as to the feasibility of the following recommendations:

- to address concerns regarding the application of the civil standard of proof to proceedings, that the bill be amended to provide for a criminal standard of proof (as currently is the case under the *Dangerous Sexual Offenders Act 2006* (WA), section 40);

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36 See proposed section 105A.6.

37 Victorian Sentencing Advisory Council, High Risk Offenders: Post-sentence preventative detention: final report (2007) 115; NSW Sentencing Council, High-risk Violent Offenders: Sentencing and Post-Custody Management Options (2012).

- to assist in addressing concerns regarding assessments of future 'unacceptable risk', that a Risk Management Monitor be established including the functions outlined at [2.32];
- to assist in addressing concerns regarding the application of retrospective criminal laws (article 15 of the ICCPR), that the bill be amended to only apply to new offenders; and
- that the bill be amended to ensure the availability of rehabilitation programs to offenders that may be subject to the continuing detention order regime.

2.37 The committee did not receive a response from the Attorney-General within the requested timeframe regarding the human rights issues identified in the initial human rights assessment of the bill.

2.38 The committee therefore restated its request for advice from the Attorney-General in relation to the proposed scheme, including the specific matters set out in its previous request at [2.34], observing the concern that it was not possible to conclude that the proposed regime is compatible with the right to liberty.

2.39 The committee also sought the further advice of the Attorney-General in relation to the following possible amendments which may assist with the human rights compatibility of the scheme:

- to address concerns about whether the court would be empowered to make orders in relation to the provision of less restrictive alternatives, that the bill be amended to provide for alternative orders;
- to assist with concerns about whether continuing detention would be the least rights restrictive in an individual case, that the bill be amended to provide that, prior to making an application for a continuing detention order, the Attorney-General should be satisfied that there is no other less restrictive measure to address any risk;
- to address concerns regarding the application of the civil standard of proof to proceedings, that the bill be amended to provide for a criminal standard of proof (as currently is the case under the *Dangerous Sexual Offenders Act 2006* (WA), section 40);
- to assist in addressing concerns regarding assessments of future 'unacceptable risk', that a Risk Management Monitor be established including the functions outlined at [2.32];
- to assist in addressing concerns regarding the application of retrospective criminal laws (article 15 of the ICCPR), that the bill be amended to only apply to new offenders; and
- that the bill be amended to ensure the availability of rehabilitation programs to offenders that may be subject to the continuing detention order regime.

2.40 The previous legal analysis raised serious concerns in relation to the proposed continuing detention regime in the context of its assessment against international human rights law.

2.41 The requests by the committee were directed at being able to properly analyse the human rights compatibility of the proposed scheme. This included requests for advice in relation to particular recommendations which may have assisted with the human rights compatibility of the scheme. In the absence of the further advice of the Attorney-General it appeared that the continuing detention regime, in its current form, was likely to be incompatible with the right to liberty (including the right not to be subject to arbitrary detention).

Attorney-General's response

2.42 In his response dated 28 November 2016, the Attorney General states that he intends to move a number of amendments to the bill to implement certain recommendations from the Parliamentary Joint Committee on Intelligence and Security (PJCIS):

- an application for a continuing detention order may be commenced up to 12 months (rather than 6 months) prior to the expiry of a terrorist offender's sentence
- the scope of the offences to which the scheme applies be limited by removing offences against Subdivision B of Division 80 (treason) and offences against subsections 119.7(2) and (3) of the Criminal Code (publishing recruitment advertisements)
- the Attorney-General must apply to the Supreme Court for a review of a continuing detention order (at the end of the period of 12 months after the order began to be in force, or 12 months after the most recent review ended) and that failure to do so will mean that the continuing detention order will cease to be in force
- the Attorney-General must undertake reasonable inquiries to ascertain any facts known to a Commonwealth law enforcement or intelligence or security officer that would reasonably be regarded as supporting a finding that a continuing detention order should not be made (or is no longer required)
- the application for a continuing detention order, or review of a continuing detention order, must include a copy of any material in the possession of the Attorney-General or any statements of facts that the Attorney-General is aware of that would reasonably be regarded as supporting a finding that an order should not be made
- on receiving an application for an interim detention order the Court must hold a hearing where the Court must be satisfied that there are reasonable grounds for considering that a continuing detention order will be made in relation to the terrorist offender

- each party to the proceeding may bring forward their own preferred relevant expert, or experts, and the Court will then determine the admissibility of each expert's evidence
- any responses to questions or information given by the terrorist offender to an expert during an assessment will not be admissible in evidence against the offender in criminal and other civil proceedings
- the criminal history of the offender that the Court must have regard to in making a continuing detention order is confined to convictions for those offences referred to in paragraph 105A.3(1)(a) of the Bill
- if the offender, due to circumstances beyond their control, is unable to obtain legal representation, the Court may stay the proceeding and/or require the Commonwealth to bear all or part of the reasonable cost of the offender's legal representation in the proceeding
- when sentencing an offender convicted under any of the provisions of the Criminal Code to which the continuing detention scheme applies, the sentencing court must warn the offender that an application for continuing detention could be considered
- the continuing detention scheme be subject to a sunset period of 10 years after the day the Bill receives Royal Assent, and
- a control order can be applied for and obtained while an individual is in prison, but the controls imposed by that order would not apply until the person is released.

To enhance oversight of the continuing detention scheme, the amendments also provide that:

- the *Independent National Security Legislation Monitor Act 2010* be amended to require the Independent National Security Legislation Monitor (INSLM) to complete a review of the continuing detention scheme five years after the day the Bill receives Royal Assent, and
- the *Intelligence Services Act 2001* be amended to require that the Committee review the continuing detention scheme six years after the day the Bill receives Royal Assent.[38]

2.43 These amendments, which introduce certain additional safeguards, will improve the legislation. Some of these additional safeguards address aspects of whether a continuing detention order is necessary, reasonable and proportionate in an individual case. The introduction of additional oversight mechanisms and a ten year sunset clause may also assist to improve the proportionality of the regime. This means that the committee will examine any proposed extension to the regime in ten years' time.

38 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

2.44 However, many of the concerns identified in relation to the human rights compatibility of the original bill remain in relation to the amended bill. These are set out below.

2.45 The previous human rights analysis noted that the bill requires that a court may only make a continuing detention order if satisfied that there is 'no other less restrictive measure that would be effective in preventing the unacceptable risk'.[39] This aspect of the bill departs from the regimes in NSW and Queensland that have been found by the UNHRC to be incompatible with the right to liberty, and the bill appears to incorporate some aspects of the test of proportionality under international human rights law.[40] The Attorney-General's response refers to this requirement as assisting to ensure the regime is the least restrictive of human rights. However, the previous analysis identified concerns about how this requirement will work in practice and its adequacy as a safeguard. In response to the committee's request as to what types of less restrictive measures may be considered by the court, the Attorney-General points to control orders. However, as explained in the Attorney-General's response, the court will not be able to make a control order in the alternative:

> The Court that hears an application for a continuing detention order will not be able to make a control order in the alternative. This is due to the fact that currently control orders are issued by federal courts, while applications for a continuing detention order as proposed by the Bill are made to the Supreme Court of a State or Territory. There are also different applicants under each regime, and there are also different threshold requirements which must be met under the respective regimes.[41]

2.46 This gives rise to the concern that, even as amended, the proposed legislation does not enable the court to fully assess or make orders in relation to the provision of less restrictive alternatives. The Attorney-General's response appears to contemplate that this issue might be addressed in the future:

> [The] Independent National Security Legislation Monitor and PJCIS will conduct reviews into the control order regime by 7 September 2017 and 7 March 2018 respectively. Given the detailed and complex policy and practical issues that would need to be explored about the interaction between the proposed post-sentence preventative detention scheme and the control order regime, I suggested to the PJCIS during its inquiry into the Bill that it may be better to defer a detailed consideration of how the

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39 Proposed section 105A.7.

40 State regimes currently contain a more limited version of this test; the court is required to consider whether a non-custodial supervision order would be adequate to address the risk in deciding whether to make a continuing detention order: see *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5D, 5G.

41 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

> control order scheme and the proposed scheme under the Bill interact with each other until those reviews occur. The PJCIS agreed.[42]

2.47 As this issue has not been resolved, the bill currently does not appear to ensure that continuing detention is the least rights restrictive approach in each individual case.

2.48 The committee also requested a range of further information from the Attorney-General in relation to the proposed regime. In relation to the standard of proof to be applied in relation to proceedings, the Attorney-General explains the standard as follows:

> *Civil standard of proof*
>
> The 'high degree of probability' standard is a statutory standard which indicates something beyond the traditional civil standard of proof of more probable than not. The existence of the risk of the offender committing a further serious offence must be proved to a higher degree than the normal civil standard of proof, though not to the criminal standard of beyond reasonable doubt. This standard is modelled on the standard used by most States and Territories that have post-sentence preventative detention schemes.[43]

2.49 However, in the case of the NSW and Queensland schemes referred to above, the fact that those schemes contained a civil rather than criminal standard of proof was one of the reasons leading the UNHRC to finding the schemes to be incompatible with the right to be free from arbitrary detention. The Attorney-General's response does not explain, as requested, why the criminal standard of beyond a reasonable doubt as is provided under the *Dangerous Sexual Offenders Act 2006* (WA) section 40 would not be feasible.

2.50 One of the factors identified in the previous human rights analysis of the bill was the inherent difficulties arising from the court being asked to make a finding of 'unacceptable risk' in relation to future behaviour. In relation to the feasibility of establishing a Risk Management Monitor to assist in addressing such concerns, the Attorney-General advises that:

> *Risk Management Monitor*
>
> My Department has convened an Implementation Working Group with legal, corrections and law enforcement representatives from each jurisdiction to progress all outstanding issues relating to implementation of the proposed post sentence preventative detention scheme.
>
> The implementation Working Group has developed an implementation plan in response to PJCIS Recommendation 22. The plan sets the process

42 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

43 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

> and timeframes for the development of the risk assessment tool and ongoing validation. It notes that work will be undertaken in consultation with correctional services, law enforcement and intelligence agencies, and international partners, and ongoing validation will need to be undertaken.
>
> The Working Group may consider whether a Risk Management Monitor or similar will undertake the functions set out at paragraph 1.77 of the Committee's Report 7 of 2016.[44]

2.51 Consideration of these issues going forward is to be welcomed and may improve the scheme. It would, however, be preferable to incorporate any such safeguards from the outset. A significant factor upon which the UNHRC considered that the regimes in NSW and Queensland were incompatible with the right to be free from arbitrary detention was that the continued detention of offenders on the basis of future feared or predicted dangerousness was 'inherently problematic' and required the court to 'make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.' This was notwithstanding that courts under these regimes have access to expert evidence as will be the case under the proposed regime.

2.52 Further, the previous analysis noted that it is likely that interventions might be possible earlier in respect of a particular offender, such as effective de-radicalisation and rehabilitation programs. In relation to the availability of rehabilitation programs and consideration of interventions, the Attorney-General's response states:

> Access to rehabilitation programs is an important part of the scheme. When making a continuing detention order, paragraph 105A.8(e) requires the Court to have regard to any treatment or rehabilitation programs in which the offender has had an opportunity to participate and the level of the offender's participation in any such programs. At present, Corrections Victoria and Corrections New South Wales provide inmates with access to prison based programs which aim to disengage individuals from advocating or using violence to further their goals or beliefs. Jurisdictions other than Victoria and New South Wales have a range of general rehabilitation programs, which are not specifically tailored to violent extremist offenders.
>
> The Commonwealth will continue to consider the availability of such programs with states and territories through the Implementation Working Group.[45]

2.53 Section 105A.8(e) contemplates that the court is to have regard to any treatment or rehabilitation programs in which the offender has had an opportunity

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44 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

45 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

to participate and the level of the offender's participation in any such programs. However, what the proposed legislation does not require the court to consider is whether such interventions were made available and whether they were adequate. Including a requirement to consider the availability and adequacy of this type of intervention, both prior to and after making any continuing detention order, would support an assessment of the proposed regime as proportionate as it would better ensure post-sentence detention is provided as a measure of last resort and is aimed at the detainee's rehabilitation and reintegration into society. The Attorney-General's response provides some information in relation to current programs that are available in NSW and Victoria as well as noting that the government will continue to consider the availability of such programs. The sufficiency of such intervention programs going forward would be an important factor in ensuring the proposed regime is one of last resort in practice.

2.54 In relation to whether the Attorney-General will consider whether there are less restrictive alternatives in deciding whether to make an application for a continuing detention order, the Attorney-General's response provides that:

> Attorney-General's consideration of less restrictive measures
>
> Before the Attorney-General initiated an application for a continuing detention order in relation to a terrorist offender he or she would need to carefully consider all of the information before them. Consideration would also include whether there is a reasonable prospect of success, which would require the Attorney-General to consider whether the risk to the community could be appropriately managed through less restrictive means such as a control order.[46]

2.55 While the Attorney-General's response makes clear that in deciding whether to make an application for a continuing detention order the Attorney-General may consider whether the application has reasonable prospects of success and whether the risk to the community could be appropriately managed through less restrictive means such as a control order, this is not required under the proposed legislation. A requirement for the Attorney-General to consider whether there are less rights restrictive means of managing risk prior to making an application would assist to ensure that the proposed regime imposes a proportionate limit on the right to liberty.

2.56 In summary, the Attorney-General's response has pointed to some additional safeguards that will be incorporated into the bill for the proposed continuing detention scheme, which are to be welcomed. However, it appears that, notwithstanding these amendments, the continuing detention regime remains likely to be assessed as incompatible with the right to liberty (including the right not to be subject to arbitrary detention).

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46 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

Committee response

2.57 **The committee has concluded its examination of this issue.**

2.58 **The proposed continuing detention scheme engages and limits the right to liberty.**

2.59 **The UNHRC has previously found that substantially similar existing preventative detention schemes in Queensland and NSW were incompatible with the right to be free from arbitrary detention and lacked sufficient safeguards.**

2.60 **The Attorney-General's response has pointed to some additional safeguards that will be incorporated into the bill for the proposed continuing detention scheme.**

2.61 **These additional safeguards may address some aspects of whether a continuing detention order is necessary, reasonable and proportionate in an individual case.**

2.62 **However, the preceding legal analysis concludes that the continuing detention regime, as amended, is likely to be incompatible with the right to liberty under international human rights law.**

2.63 **The amendments to the proposed scheme introduce a 10 year sunset period. This means that the committee will have the opportunity to examine any proposed extension to the scheme when it comes before it against the principles articulated above.**

2.64 **Noting the human rights concerns raised by the preceding legal analysis, the committee draws the human rights implications of the bill to the attention of the Parliament.**