ICJ Australia

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Post-sentence Detention for Terrorists

The *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (the Bill) is a piece of legislation introduced by the Turnbull government that would allow courts to keep "high risk" convicted terrorists to remain in detention after they have served their sentence, if satisfied to a high degree of probability that a convicted terrorist poses an unacceptable risk of committing a serious terrorism offence if released.

The proposed legislation erodes many of the traditional safeguards embedded in the criminal justice system to commit a convicted terrorist to indefinite detention, thus raising questions about constitutional legitimacy, principles of bureaucratic justice, human rights, and conclusiveness in sentencing.

The Turnbull government has pushed forward tougher anti-terror laws in an attempt to vigorously combat the national terrorism threat faced by Australia. At the time of writing, the National Terrorism Threat to Australia is "Probable", indicating credible intelligence that individuals or groups have developed both the intent and capability to conduct a terrorist attack in Australia.

What is Preventative Detention?

"Post-sentence preventative detention involves the court ordering certain offenders who are reaching the end of their prison sentence to be detained in custody for a further period after their sentence has expired."[1]

If passed, the Bill will empower a State or Territory Supreme Court to grant a continuing detention order, which will enable a convicted terrorist to be detained in prison for

[1] Bernadette Mcsherry, Patrick Keyzer, and Arie Freiberg, "Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development," *Report to the Criminology Research Council*

a period of up to three years. There is no limit to the number of renewal applications that may be made against a person. Thus, a continuing detention order has the capacity to commit a person to indefinite detention, despite the absence of re-offending behaviour.

A History of Preventative Detention in Australia

In the lead up to the drafting of the Bill, Commonwealth Attorney General George Brandis based the legitimacy and necessity of the proposed post sentence detention regime as "an unusual measure that was not unknown in other areas of the law"[2], as there are already post-sentence detention schemes in place which are focused on protecting the community. The Bill has been modelled closely to existing State and Territory laws that allow post-sentence detention for "high risk" sex offenders and violent offenders. Consequently, a post sentence detention regime for convicted terrorists would be developed in consultation with the States and Territories, and be based on similar principles, ensuring the protection of the community is the paramount consideration."[3]

Post-sentence preventative detention has a long history in Australia: first conceived in the 1990s by state governments seeking to preventively detain *one named offender* at the expiration of his sentence of imprisonment.[4] The first state in Australia to introduce post-sentence detention was Queensland. Their actions were soon followed by Western Australia, New South Wales, Victoria and, in 2013, the Northern Territory.[5]

More recently, several states and territories have introduced bills allowing for indefinite detention for high risk sex offenders or violent criminals. New South Wales has one of the most notable laws on the subject. Its introduction of the *Crimes (High Risk*

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[2] "COAG to Strengthen National Security Legislation," Attorney General for Australia, April 1, 2016, accessed October 26, 2016.

[3] Ibid.

[4] Tamara Tulich and Thematic: Post-Sentence Preventive Detention And Extended Supervision, *POST-SENTENCE PREVENTIVE DETENTION AND EXTENDED SUPERVISION OF HIGH RISK OFFENDERS IN NEW SOUTH WALES*, 2015, pg. #823, accessed October 27, 2016,

[5] Tamara Tulich and Thematic: Post-Sentence Preventive Detention And Extended Supervision, *POST-SENTENCE PREVENTIVE DETENTION AND EXTENDED SUPERVISION OF HIGH RISK OFFENDERS IN NEW SOUTH WALES*, 2015, pg. #823-824

Offenders) Act 2006 (NSW) sparked much controversy and even a High Court case to test its constitutional validity. Despite the challenge, the High Court ultimately upheld the validity of the Act.

The preamble of the *Crimes (High Risk Offenders) Act 2006* (NSW) states that its primary object is to "Provide for the extended supervision and continuing detention of high risk sex offenders and high risk violent offenders so as to ensure the safety and protection of the community. Another object of this Act is to encourage high risk sex offenders and high risk violent offenders to undertake rehabilitation."[6] Although originally envisaged to protect the community from high risk sex offenders, in 2013, the NSW bill was extended to include detention regimes for high risk violent offenders.

The unprecedented expansion of post-sentence preventative detention schemes for firstly high-risk sex offenders, then high-risk violent offenders, and now high-risk convicted terrorists signals a growing concern for security and precaution by the Australian government.

Criticisms of the Proposed Legislation

The United Nations Human Rights Committee has criticised Australia's post-sentence detention of a convicted sex offender in Queensland as "arbitrary and punitive"[7], contrary to the International Covenant on Civil and Political Rights (ICCPR). It criticised post-sentence detention as 'imprisonment without trial', which was not based on evidence of re-offending, but on retrospectively applying a harsher penalty - an act prohibited by the ICCPR. United Nations human rights bodies make clear that additional detention is only a last resort, and should be exercised for rehabilitation purposes only in relation to grave crimes.

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[6] "Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016," Commonwealth Parliament, May 09, 2016, Bill Text, accessed November 07, 2016

[7] United Nations General Assembly. 1966. "International Covenant on Civil and Political Rights." *Treaty Series* 999 (December): 171.

Human Rights Watch has also criticised the Bill in a strong statement issued to the Australian Parliamentary Committee on Intelligence and Security. Human Rights Watch strongly rejected the proposed post-sentence detention regime, arguing that Australia's existing powers to counter terrorism are adequate to protect society from genuine threats.

Post-sentence detention laws are often set up without proper use of due process and consultation with legal professional bodies, law reform agencies or civil liberties organisations[8]. The draftsmanship often includes vague terms and utilises the civil standard of proof, thus allowing the prosecution to discharge the burden relatively easily in comparison to a criminal trial. It is noted that the civil burden of proof invariably diminishes the power of the courts to adequately safeguard the offender from a risk of continuing detention, and further tips the wealth of power to exercise control over proceedings in favour of the State.

The traditional tenets of the criminal justice system recognise that a higher threshold of proof ("beyond reasonable doubt") is needed to adequately safeguard an individual against the grave loss of liberties that may be suffered if sentenced to a term of imprisonment.

The criminal justice system, as it operates, does not support extended and arbitrary punishment once the sentencing judge's orders are made. The only exception is by way of appeal to a higher court, which may result in a revised sentence for a finite period of time.

The Briginshaw standard

Although there is no third standard of proof, the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*[9], emphasised that the *Briginshaw*[10] standard can sometimes

[8] New South Wales Bar Association, Submission to the Crossbench members of the Legislative Council, *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005,* 29 November 2005.
[9] (1992) 67 ALRJ 170, 170-171 (Mason CJ, Brennan, Deane and Gaudron JJ).
[10] *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-362 (Dixon J).

direct attention to the strength of the evidence required to satisfy the civil standard of proof, especially in cases involving serious misconduct[11].

The Briginshaw principle recognises that, although the civil standard of proof remains one on the balance of probabilities, "the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove"[12].

While the Bill does not explicitly make reference to the *Briginshaw* standard in its legislative design, the civil onus for the making of a detention order may be elevated to import considerations of this kind, given the grave implications that a continuing detention order will have on its subjects.

Recidivism

In fact, sexual offenders are actually much less likely to re-offend than violent offenders or persons convicted of theft. "Recidivism rates for sexual offenders are far lower than is popularly assumed. A meta-analysis of recidivism studies, acknowledging their generally limited periods of follow-up and reliance on reconviction rates (which underrepresent reoffending), suggests that the overall rate of sexual reoffending is 13.4%, which is much lower than for most other types of offending, such as theft and violent crimes."[13]

The Victorian Example

Extended supervision order Victoria—"Post-sentence supervision in the community such as extended supervision orders and other schemes for monitoring offenders in the

[11] De Plevitz, L., (2003), '*The Briginshaw 'Standard of Proof in Anti-Discrimination law: Pointing with a wavering finger'* Melbourne University Law Review 13.
[12] *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449–50.

[13] "Legislation in Victoria on Sexual Offenders: Issues for Health Professionals," Medical Journal of Australia, accessed October 26, 2016

community, including the registration of sex offenders. Extended supervision orders involve the court ordering certain offenders who are reaching the end of their prison sentence to be subject to ongoing supervision in the community after their sentence has expired. Schemes for the registration of sex offenders require offenders to register their details with police and prohibit registered offenders from applying for, or engaging in, child-related employment or voluntary activities."[14] The Victorian act seems to be the most similar to the international high risk sex offender laws.

Existing Counterterrorism Legislation

The existing Commonwealth counter terrorism framework provides a necessary and proportionate means to counter terrorism activity. Under Division 105 of the *Criminal Code Act 1995*[15] (Cth), police can detain a person under a preventative detention order, for a maximum of 48 hours, either where there is a threat of an imminent terrorist attack, or immediately after a terrorist act has occurred.

States and Territories have followed suit with their own preventative detention regimes. In New South Wales, Part 2A of *Terrorism (Police Powers)Act 2002* (NSW)[16] permits the police to detain a person for up to 14 days. The Australian government has adequate laws to respond to terror threats.

The Commonwealth has sought to insulate the post-sentence detention regime for convicted terrorists from challenges on constitutional grounds by asking the States to refer their power on counter terrorism amendments under Part 5.3 of the Criminal Code to the Commonwealth.

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[14] Bernadette Mcsherry, Patrick Keyzer, and Arie Freiberg, "Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development," *Report to the Criminology Research Council*

[15] "Federal Register of Legislation - Australian Government," Federal Register of Legislation - Australian Government, accessed November 07, 2016

[16] "NSW Legislation," NSW Legislation, accessed November 07, 2016

Recommendations

It is recommended that the Australian government withdraw the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (the Bill), as the proposed law is fundamentally opposed to the administration of criminal justice by a process of trial and sentencing and there is no evidence cited by the government as to the ineffectiveness of the current Commonwealth counter terrorism framework.