

BAIL AMENDMENT (PERSONS LINKED TO TERRORISM) BILL 2018 (WA)

EXPLANATORY MEMORANDUM

Overview of the Bill

The Bail Amendment (Persons Linked to Terrorism) Bill 2018 (WA) will amend the *Bail Act 1982* (WA) (the Bail Act).

The purpose of the Bill is to implement the 2017 Council of Australian Governments (COAG) agreement for a presumption against bail applying to persons with links to terrorism.

For the purposes of the Bill a person has links to terrorism if they are charged with, or have been convicted of, a terrorism offence, or are the subject of an interim control order or confirmed control order made under the Commonwealth *Criminal Code Act 1995* (Cth), or have been the subject of a confirmed control order within the last 10 years. It is not necessary for these links to terrorism to have any connection to the current charge for which bail is being considered.

In the case of persons linked to terrorism the power to grant bail can only be exercised by a court constituted by a judicial officer other than a justice of the peace. The Bill introduces a presumption against bail in such cases in that the judicial officer must refuse to grant bail (and remand the accused in custody) unless satisfied that there are exceptional reasons why the accused should not be kept in custody, and that bail may be granted having regard to the usual considerations.

The Bill introduces a new provision which will increase the grounds upon which the prosecution may arrest an accused to bring the person back to court to show cause why bail should not be varied or revoked. This procedure may be used when new facts have been discovered, new circumstances have arisen or the circumstances have changed since bail was granted. It may apply to any accused, including where the accused person is, or has become, a person linked to terrorism.

The Bill introduces provisions that require a judicial officer to take all reasonable steps to maintain the confidentiality of information that the judicial officer considers is 'terrorist intelligence information'. These steps include closed court hearing of the information in the absence of certain persons and parties to the bail proceedings, and other prohibitions on disclosure, including orders to redact the information from certain bail documents, and a requirement that the information must not be referred to in any reasons for the bail decision.

These new confidentiality protections are designed to facilitate the sharing of classified terrorist intelligence information by the Australian intelligence and law enforcement agencies. This information would not ordinarily be made available in open court bail proceedings due to the risks that exposing this information may compromise covert terrorism investigations and national security. It is necessary to establish appropriate procedures to share terrorist intelligence information with the court, which may be critical to an assessment as to whether an accused, if not kept in custody, may endanger the safety, welfare or property of any person.

Part 1: Preliminary

Clause 1 – Short title

Clause 1 provides that the Bill, once enacted, will be known as the *Bail Amendment (Persons Linked to Terrorism) Act 2018* (WA).

Clause 2 – Commencement

Clause 2 provides for the commencement of the Act.

Sections 1 and 2 come into operation on the day on which the Act receives Royal Assent.

The rest of the Act will come into operation on a day fixed by proclamation.

The delay in commencement is to ensure that any required administrative arrangements, including updating Western Australia Police Force systems to identify persons linked to terrorism, establishing new court procedures and training on the new processes are undertaken before the new regime commences.

Clause 3 – Act amended

Clause 3 provides that this Act will amend the *Bail Act 1982* (WA).

Clause 4 – Section 3 amended

Clause 4 inserts new definitions in section 3(1) of the Bail Act, which are required to support the new processes for a presumption against bail applying to persons linked to terrorism and new protections for the confidentiality of terrorist intelligence information that are introduced by this Bill.

‘Commonwealth Criminal Code’ means the Criminal Code set out in the Schedule to the Commonwealth *Criminal Code Act 1995* (Cth). This term is used throughout the Bill for the purpose of other new defined terms including, ‘confirmed control order’, ‘interim control order’, ‘person linked to terrorism’, ‘terrorism offence’ and ‘terrorist act’.

The terms **‘confirmed control order’** and **‘interim control order’** have the same meanings given in the Commonwealth *Criminal Code Act 1995* (Cth) section 100.1(1).

Under the Commonwealth *Criminal Code Act 1995* (Cth), these (control) orders are issued by a court at the request of the Australian Federal Police to impose obligations, prohibitions and restrictions on a person, for the purpose of:

- protecting the public from a terrorist act;
- preventing the provision of support for or facilitation of a terrorist act;
- preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

These orders have been identified for the purpose of the definition of ‘person linked to terrorism’.

A '**person linked to terrorism**' means a person who:

- is charged with, or has been convicted of, a terrorism offence; or
- is the subject of an interim control order or confirmed control order made under the Commonwealth *Criminal Code Act 1995* (Cth), or who has been the subject of a confirmed control order within the last 10 years.

The definition of 'person linked to terrorism' identifies the class of persons to whom the new presumption against bail is to apply. The criteria, which includes charges or convictions for terrorism offences, or being subject to Commonwealth interim and confirmed control orders (in certain circumstances), provide objective indicators of a person's links to terrorism.

Interim and confirmed control orders have been distinguished for the purpose of applying the new presumption against bail. The presumption will not apply in regard to interim control orders that have lapsed as they have not been subject to full legal scrutiny and for this reason it would not be appropriate to apply a presumption against bail in those circumstances. A time limit of ten years on expired confirmed control orders has been identified to ensure sufficient proximity to the control order event as an indicator of terrorism risk.

'**Terrorism offence**' is defined for the purpose of the definition of 'person linked to terrorism'.

The definition, which is detailed in paragraphs (a) to (i) below, identifies Commonwealth terrorism offences, a general provision to cover terrorism offences in a law of the Commonwealth, another State, a Territory, or another country, where the features of the offence substantially corresponds to the listed Commonwealth terrorism offences, and an offence of attempting, inciting or conspiring to commit a terrorism offence.

- (a) An offence against a provision of Subdivision A of Division 72 of the Commonwealth *Criminal Code Act 1995* (Cth), which relates to international terrorist activities using explosive or lethal devices.
- (b) An offence against a provision of Subdivision B of Division 80 of the Commonwealth *Criminal Code Act 1995* (Cth), which relates to treason.
- (c) An offence against a provision of Part 5.3 of the Commonwealth *Criminal Code Act 1995* (Cth), which relates to terrorism. The following offences have been expressly excluded.
 - Section 104.22, which relates to the procedures of law enforcement regarding the treatment of photographs and impressions of fingerprints. This offence is not regarded as a terrorist act and it would not be appropriate for it to be captured by the presumption against bail.
 - Sections 104.27 and 104.27A, which relate to contravening a Commonwealth control order and associated offence in relation to tracking devices. These offences are excluded because the Western Australia regime for a presumption against bail for persons with links to terrorism will already apply to persons subject to an interim or confirmed control order, including confirmed control

orders made in the last ten years. It is not necessary to capture the offences of contravening these orders, which may be objectively trivial.

- Sections 105.41 and section 105.45, which relate to disclosure offences and offences of contravening Preventative Detention Orders (PDO). These have been excluded as the Western Australia regime is not to apply to persons subject to those orders. This is because PDOs may be used for investigative purposes, such as interviewing witnesses and gathering evidence, and may apply to persons who are not directly involved with terrorism offending. It is not intended to extend the scheme to contraventions of those orders.
- (d) An offence against a provision of Part 5.5 of the Commonwealth *Criminal Code Act 1995* (Cth), which relates to foreign incursion and recruitment.
- (e) An offence against a provision of either of the following provisions of the Commonwealth *Charter of the United Nations Act 1945* (Cth):
- Part 4 of that Act, which relate to terrorism and dealings with assets; or
 - Part 5 that Act, which relate to offences of United Nations sanctions, to the extent that it relates to the Commonwealth *Charter of the United Nations (Sanctions—Al-Qaida) Regulations 2008* (Cth).
- (f) An offence against a provision of the former Commonwealth *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (repealed), which relates to similar offences to those now contained in Part 5.5 of the Commonwealth *Criminal Code Act 1995* (Cth).
- (g) An offence against section 8 of the Commonwealth *Crimes (Internationally Protected Persons) Act 1976* (Cth), which relates to violent offences (including threats) against prescribed representatives, officials and other persons.
- (h) An offence under a written law or a law of the Commonwealth, another State, a Territory or another country, that substantially corresponds to an offence in paragraphs (a) to (e) and (g). This is a general provision to cover all terrorism offences that are not expressly captured by the defined Commonwealth terrorism offences.
- (i) An offence of attempting, inciting or conspiring to commit an offence referred to in paragraphs (a) to (h).

The term '**terrorist act**' has the same meaning given in the *Terrorism (Commonwealth Powers) Act 2002* (WA) section 3, and is defined for the purpose of the definition of 'terrorist intelligence information'.

'Terrorist intelligence information' is defined to mean information related to an actual or suspected terrorist act (whether in Western Australia or elsewhere), the disclosure of which could reasonably be expected:

- to prejudice national security; or
- to endanger a person's life or physical safety; or
- to threaten significant damage to infrastructure or property; or
- to prejudice a criminal investigation; or

- to reveal intelligence-gathering methodologies, investigative techniques or technologies or covert practices; or
- to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement.

This definition is central to the operation of new section 66C introduced by clause 11 of the Bill, which provides for the protection of terrorist intelligence information.

Clause 5 – Section 6 amended

Section 6 of the Bail Act deals with an arresting officer's duty to consider bail. It applies when a police officer or other person (the arrester) charges a person who is under arrest (the accused) and does not release the accused unconditionally, or who arrests a person under warrant.

Clause 5 of the Bill amends section 6 so that, in the case of persons linked to terrorism, the arrester does not have power to grant the accused bail. The arrester is required to take the accused before a court constituted by a judicial officer other than a justice of the peace for the bail consideration. This new procedure in relation to arrested persons linked to terrorism is effected by the following amendments.

Clause 5(1) amends section 6(6) to delete the reference to subsections '(9) or (10)' and replace it with a reference to subsections '(9), (10) or (11)'. This amendment directs the arrester to the requirements in new section 6(11), and clarifies that authorised police officers, justices of the peace, and authorised officers are not empowered to grant bail for arrested persons linked to terrorism.

Clause 5(2) inserts new section 6(11). It provides that if new section 16B applies, which deals with who is empowered to grant bail for persons linked to terrorism, the arrester must bring the accused or cause the accused to be brought before a court constituted by a judicial officer other than a justice of the peace, who must consider the accused's case for bail as soon as is practicable.

Clause 6 – Section 7 amended

Section 7(1) of the Bail Act deals with the duty imposed on judicial officers to consider bail and the manner in which this duty is to be exercised. This duty is subject to certain provisions of the Bail Act, which are specified in section 7(5).

Clause 6 amends section 7(5) by deleting the reference to clauses '3A and 3D' and replacing it with references to clauses '3A, 3D and 3E' of Schedule 1 Part C to the Bail Act. This directs the decision maker to the considerations that must be taken into account in the case of bail for persons linked to terrorism, and confirms that, except under certain circumstances, once a bail decision has been made under clause 3E, it does not have to be revisited under section 7(1).

Clause 7 – Section 16 amended

If a person arrests someone pursuant to a warrant then section 16 of the Bail Act applies. It provides restrictions to an accused's right to have bail considered and directs who is empowered to consider bail.

Clause 7 amends section 16(1) by deleting the reference to sections '14 and 15' and replacing it with a reference to sections '14, 15 and 16B'. It clarifies that, in the case of a person linked to terrorism arrested for an offence pursuant to a warrant, the accused must be brought before a court constituted by a judicial officer (that is not a justice of the peace) as commanded by the warrant and in accordance with the terms of new section 16B.

Clause 8 – Section 16B inserted

Clause 8 inserts new section 16B into Part III of the Bail Act.

It provides that bail in the case of a person linked to terrorism who is in custody awaiting an appearance in court before conviction for an offence, or waiting to be sentenced or otherwise dealt with for an offence of which the person has been convicted, can be exercised only by a court constituted by a judicial officer other than a justice of the peace.

Section 16B sets out the jurisdiction for bail decision making in the case of persons linked to terrorism and is to be read together with other sections of the Bail Act that deal with the duties of bail decision makers and their power to grant bail. The effect of this provision is that whenever bail is to be considered, justices of the peace, authorised officers, and authorised police officers are not empowered to make bail decisions for persons linked to terrorism.

Proposed section 16B recognises the seriousness of terrorism matters and puts into effect the policy that bail of persons with links to terrorism be subject to the scrutiny and oversight of a higher decision-making authority. Judicial officers are familiar with the application of the exceptional reasons test, and are best placed to consider and manage new requirements for the protection of terrorist intelligence information that is likely to be raised during such bail hearings.

Clause 9 – Section 26 amended

Section 26 of the Bail Act requires a record of bail decision and reasons to be kept in relation to certain matters.

Clause 9(1) amends section 26(2)(aa) by deleting the reference to clauses '3A or 3D' and replacing it with a reference to clauses '3A, 3D or 3E' of Part C of Schedule 1 to the Bail Act. The effect of the amendment is to require that a record of bail decision and reasons is to be kept in relation to a grant of bail in cases of persons linked to terrorism to which new clause 3E applies.

Clause 9(2) inserts new section 26(5), which provides that a bail record form, or the record of a decision and reasons for it, must not include information that is 'terrorist intelligence information'.

Clause 10 – Section 54 amended

Section 54 of the Bail Act provides the process by which the relevant officer (being the prosecutor or a police officer as the case requires) may cause a bailed accused to be

taken before a judicial officer to show cause against the variation or revocation of bail. Currently, the use of this power is limited to certain conditions being met, for example, when the relevant officer has reasonable grounds to believe, or is notified, that an accused is not likely to comply with a requirement to appear at court, and other matters relating to compliance with conditions of bail, suitability of a surety and / or security amount, and the conduct of the accused relating to an appeal.

Clause 10 amends section 54 to provide the option for the relevant officer to bring an accused released on bail back before the court where new facts or circumstances have been discovered since bail was originally set. This provision could be applied to any accused, including where the accused person is, or has become, a person linked to terrorism. This will ensure that there is flexibility to effectively respond to any change in circumstances, including possible terrorism or other risks.

Clause 11 – Section 66C inserted

Section 66C introduced by the Bill establishes a regime for the protection of ‘terrorist intelligence information’ in bail proceedings.

Proposed section 66C(1) places an obligation on a judicial officer in a case for bail to take all reasonable steps to maintain the confidentiality of information that the judicial officer considers is ‘terrorist intelligence information’. These steps include:

- receiving evidence and hearing argument about the information in private, and in the absence of any person other than the prosecutor, and any other person to whose presence the prosecutor consents; and
- prohibit the publication of, or reference to, the information; and
- order that certain documents that are provided to the accused must be redacted (including the approved form given under section 8, and any report made in accordance with section 24 and 24A of the Bail Act).

A judicial officer has discretion to consider that the information is ‘terrorist intelligence information’ having regard to the definition inserted into section 3 of the Bail Act by clause 4 of the Bill.

Proposed section 66C(2) provides that if the judicial officer considers that information is not ‘terrorist intelligence information’, the judicial officer must give the prosecutor the opportunity to withdraw the information from consideration, and if the information is withdrawn the judicial officer must prohibit the publication of, or reference to, the information.

Proposed section 66C(3) permits the judicial officer to disclose the terrorist intelligence information, or information withdrawn from consideration, to:

- the Attorney General;
- a court;
- a person to whom the prosecutor authorises disclosure.

It is important that the prohibitions on the disclosure of terrorist intelligence information do not inhibit the ability of the Attorney General to be advised of matters relating to national security, or for a court to furnish relevant papers to the court where the accused is required to appear for the purpose of a bail decision or appeal. The ability

of the court to share information with a person to whom the prosecutor authorises disclosure is to facilitate the bail process.

Clause 12 – Schedule 1 Part C amended

Clause 12(1) amends clause 1 of Schedule 1 Part C of the Bail Act to cross-reference new clause 3E in that clause. To effect this, the references to clauses '3C and 3D' are deleted and replaced with references to clauses '3C, 3D and 3E'.

Clause 12(2) amends clause 2(3)(a) to Schedule 1 Part C of the Bail Act to cross-reference new clause 3E in that clause. To effect this, paragraph (a) is deleted and replaced with '(a) clauses 3A, 3C, 3D and 3E; and'.

Clause 12(3) inserts new clause 3E into Schedule 1 Part C of the Bail Act. It provides for the manner in which jurisdiction is to be exercised for bail in the case of a person linked to terrorism.

Proposed clause 3E(1) provides confirmation that clause 3E applies where an accused who is a person linked to terrorism is in custody awaiting an appearance in court before conviction for an offence, or waiting to be sentenced or otherwise dealt with for an offence of which the accused has been convicted.

Proposed clause 3E(2) provides for the presumption against bail. It obliges the judicial officer in whom jurisdiction is vested to refuse to grant bail to the person linked to terrorism unless satisfied that there are exceptional reasons why the accused should not be kept in custody; and satisfied that bail may be properly granted having regard to the usual bail provisions.

Proposed clause 3E(3) sets out those matters that the judicial officer must have regard to in making a decision on whether exceptional reasons exist. These are:

- (a) Have regard to the nature and seriousness of the offence or offences (including any other offence or offences for which the accused is awaiting trial) and the probable method of dealing with the accused for it or them, if the accused is convicted.
- (b) Have regard to the conduct of the accused since being charged with or convicted of a terrorism offence; or made the subject of a relevant interim control order or confirmed control order.
- (c) Consider whether it would be appropriate to refuse bail and make a hospital order under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) section 5.
- (d) In the case of a child, while the overriding consideration is the safety of the community, a judicial officer is to consider section 6(d) of the *Young Offenders Act 1994* (WA) as an objective of the Bail Act. This is the principle of juvenile justice recognising the role of the responsible adult and community in the punishment and rehabilitation of a young person, and minimising further incidents of crime.

Proposed clause 3E(4) provides that the judicial officer, in determining whether there are exceptional reasons and in considering the usual bail provisions, may take additional matters into account over and above those in clause 3E(3).

Proposed clause 3E(5), cross-referenced in the amendment to section 7(5) under clause 6 of the Bill, provides that once a bail decision has been made under clause 3E, it does not have to be revisited unless the accused satisfies the judicial officer who may order detention that:

- (a) new facts have been discovered, new circumstances have arisen or the circumstances have changed since bail was refused; or
- (b) the accused failed adequately to present their case for bail on the occasion of that refusal.

Proposed clause 3E(6) provides that where an accused is granted bail in accordance with clause 3E, on any subsequent appearance in the same case a judicial officer may order that bail is to continue on the same terms and conditions.

Proposed clause 3E(7) provides that a child accused who is refused bail under subclause (2) must be dealt with in accordance with section 19(2) of the *Young Offenders Act 1994* (WA), which relates to being taken to and placed in a detention centre.

The note at the foot of clause 3E draws attention to section 15AA of the Commonwealth *Crimes Act 1914* (Cth), which provides a presumption against bail for persons charged with or convicted of certain Commonwealth terrorism offences. It confirms that, in proceedings for a terrorism offence as defined in section 3(1) of that Act, a bail authority must not grant bail unless satisfied that exceptional circumstances exist to justify bail.

Clause 12(4) amends clause 4(1) of Schedule 1 Part C of the Bail Act to cross-reference new clause 3E in that clause. The reference to 'clauses '3C and 3D' is deleted and replaced with references to clauses '3C, 3D and 3E,'.