

BAIL AMENDMENT (PERSONS LINKED TO TERRORISM) BILL 2018

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Sue Ellery (Leader of the House)**, read a first time.

Second Reading

HON SUE ELLERY (South Metropolitan — Leader of the House) [6.50 pm]: I move —

That the bill be now read a second time.

The Bail Amendment (Persons Linked to Terrorism) Bill 2018 proposes to amend the Bail Act 1982 to implement the 2017 Council of Australian Governments—COAG—agreement in relation to a presumption against bail applying to persons with links to terrorism. On 9 June 2017, COAG agreed to ensure that there will be presumptions against the granting of bail and parole to persons who have demonstrated support for, or have links to, terrorist activity. At a 5 October 2017 special meeting on counterterrorism, COAG agreed that the 9 June 2017 decision should be underpinned by a nationally consistent approach. The Australia–New Zealand Counter-Terrorism Committee was tasked by COAG to consult with each Australian jurisdiction to develop principles to guide the implementation of these presumptions. The first principle is that the presumption against bail and parole should apply to categories of persons who have demonstrated support for, or links to, terrorist activity. The second principle is that a high legal threshold should be required to overcome the presumption against bail and parole. The third principle is that the implementation of the presumption against bail and parole should draw on and support the effectiveness of the joint counterterrorism team model. The fourth principle is that implementing a presumption against bail and parole should appropriately protect sensitive information. The principles acknowledge that all jurisdictions have well-established practices and procedures in relation to bail and parole. In Western Australia the COAG agreement is being implemented in two stages. This bill is the first stage. A second tranche of legislative proposals to implement the presumption against parole is being developed for introduction in 2019.

The bail of persons charged with certain commonwealth terrorism offences is dealt with in accordance with Western Australia's bail legislation and procedures, as read together with section 15AA of the commonwealth Crimes Act 1914. That act provides that bail must not be granted unless a person can demonstrate exceptional circumstances. The commonwealth legislation does not apply when a person is charged with an offence against a law of Western Australia.

The amendments to the Bail Act 1982 introduced by this bill will require that persons with links to terrorism are to be subject to a presumption against bail, regardless of whether these links to terrorism have any connection to the current charge for which bail is being considered. 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, or have been the subject of a confirmed control order within the last 10 years. These criteria provide objective indicators of a person's links to terrorism and are consistent with the minimum scope identified by the Australia–New Zealand Counter-Terrorism Committee.

The bill provides that in the case of persons linked to terrorism, the power to grant bail can be exercised only by a court constituted by a judicial officer other than a justice of the peace. This 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. The core of the presumption is in new clause 3E of part C in schedule 1 of the Bail Act 1982. It requires that a judicial officer must refuse to grant bail and remand the accused in custody, unless satisfied of two matters: firstly, that there are exceptional reasons why the accused should not be kept in custody; and, secondly, that bail may be granted having regard to the usual bail considerations. The exceptional reasons test is guided by special considerations. These will ensure that judicial officers retain discretion to consider the seriousness of the current charge and appropriately assess risk when deciding whether the accused has satisfied the exceptional reasons test. An example of special considerations may be whether the alleged offending is of a minor nature that does not ordinarily attract a penalty of imprisonment, or when the accused sufficiently demonstrates that they have disengaged from former terrorism links. The considerations provide an opportunity to divert young people in appropriate circumstances, with the overriding consideration being the safety of the community. Provision is also made to refuse bail and make a hospital order. The presumption against bail under new clause 3E must still be applied when a person linked to terrorism has already overcome a different exceptional reasons test in the same proceedings—for example, bail for murder, a second serious offence or breach of a dangerous sex offender order. The bill introduces greater flexibility for the prosecution to 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. The increased flexibility is of general application and may be applied to any accused, including when the accused person is, or has become, a person linked to terrorism.

The bill also introduces provisions that will 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 a 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 of whether an accused, if not kept in custody, may endanger the safety, welfare or property of any person.

The amendments ensure that Western Australia’s bail legislation, like other states, addresses terrorism risk at the stage of bail. These reforms are a preventive measure, adding to the national and Western Australian legislative framework to deal with terrorism risk.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

The COAG agreement has not sought to create consensus or impose rules for nationally uniform legislation for a presumption against bail applying to persons with links to terrorism. Instead, COAG agreed that legislation will be underpinned by nationally consistent principles to ensure that the presumption applies in agreed circumstances across Australia. The principles agreed by the states, territories and the commonwealth, include a minimum level of consistency, but afford wide discretion for how each jurisdiction chooses to give effect to the presumption. This has resulted in considerable variability with regard to how each jurisdiction has defined persons with links to terrorism for the purpose of applying the presumption against bail, the threshold test to satisfy a grant of bail and other procedural matters related to bail decision-making and receiving and considering terrorism intelligence information.

There is no new intergovernmental agreement for the bill. The existing 2017 “Intergovernmental Agreement on Australia’s National Counter-Terrorism Arrangements”, to which Western Australia is a signatory, provides the framework for Australia’s comprehensive and nationally consistent approach to countering terrorism, including through a comprehensive and complementary legal regime across all jurisdictions.

I commend the bill to the house and table the explanatory memorandum.

[See paper 2425.]

Debate adjourned, pursuant to standing orders.

House adjourned at 7.00 pm
