Law Council
OF AUSTRALIA

Office of the President

11 February 2022

Mr Grant Donaldson SC
Independent National Security Legislation Monitor
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

By email: INSLM@inslm.gov.au

Dear Mr Donaldson

REVIEW OF DIVISION 105A OF THE *CRIMINAL CODE ACT 1995* (CTH)

1. Thank you for your letter dated 6 July 2021 inviting the Law Council of Australia to make a submission to your own-motion review of the post-sentence regime for high-risk terrorist offenders in Division 105A of the *Criminal Code Act 1995* (Cth) (**Criminal Code**), and for the subsequent updates from your office regarding the timing of this inquiry, further to recent amendments to its statutory deadline.

Law Council submission

2. The Law Council's policy position on Division 105A is set out in its recent submissions to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**), as part of the following inquiries of that Committee, which were completed in 2021:

   - a statutory review of police powers in relation to terrorism, including the continuing detention order (**CDO**) regime in Division 105A of the Criminal Code, pursuant to paragraph 29(1)(cb) of the *Intelligence Services Act 2001* (Cth) (**AFP powers review**);[1] and

   - a concurrent review of the Counter-Terrorism Legislation Amendment (High-Risk Terrorist Offenders) Bill 2021 (**HRTO Bill**), which was passed and commenced in December 2021. The HRTO Bill sought to establish a regime of 'extended supervision orders' (**ESOs**) under Division 105A as less restrictive alternatives to CDOs (**HRTO Bill review**).[2] The resulting *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth) (**HRTO Act**) implemented a Government response to recommendations made by your predecessor, Dr James Renwick SC, in 2017 for the establishment of an ESO regime.[3] The HRTO Act also includes some of the amendments recommended by the PJCIS in the HRTO Bill review.

[1] PJCIS, *Advisory report on the AFP powers review*, (October 2021).

[2] PJCIS, *Advisory report on the HRTO Bill*, (September 2021).

[3] J Renwick SC, Third INSLM, *Report on the Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, (7 September 2017), Chapter 9, especially pp. 76-77 at [9.40]-[9.47].

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639 • *Email* mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

3. Copies of the relevant Law Council submissions to the PJCIS are provided as **Attachments 1, 2, 2A and 2B** to this correspondence. Additionally, **Attachment 3** to this correspondence provides the Law Council's responses to the 12 questions appended to your letter of 6 July 2021.

4. Collectively, these documents and this covering letter comprise the Law Council's submission to your inquiry. I confirm that the Law Council is agreeable to these materials being treated as public and uploaded to your inquiry website with the personal contact details at paragraph [21] redacted.

Summary of Law Council position on Division 105A

Continuing detention orders

5. The Law Council's primary position remains that the CDO regime is not a necessary or proportionate response to the threat of terrorism, and should not be renewed beyond its current sunset date of 7 December 2026.

6. Consideration could instead be given to an extended determinate sentencing regime, in the nature of the model in sections 254-257 of the *Sentencing Act 2020* (UK). That is, a person is given a criminal sentence with a fixed end date, which includes a discrete and additional protective component known as the 'extension period'. The duration of the extension period is assessed at the time of sentencing, and not later, as a stand-alone application for a post-sentence order when the person is close to completing their sentence of imprisonment.[4]

7. However, the Law Council acknowledges that the PJCIS review of AFP powers did not recommend the cessation of the CDO regime upon sunsetting, but rather recommended that the PJCIS be given a statutory function to conduct a further review, prior to the sunset date, to inform Parliamentary decision-making about whether it should be extended for a further period.[5]

8. The Law Council also notes the further recommendation of the PJCIS in the HRTO Bill review that the PJCIS should be conferred with a statutory function to undertake a 'mid-point' review of the operation of Division 105A. This parliamentary review would commence within 12 months of the completion of the present INSLM review.[6]

9. Therefore, if the CDO regime is to remain in force, at least until the PJCIS completes the further reviews it has recommended, the Law Council alternatively supports several amendments to the CDO regime. These amendments focus on the issuing thresholds and process; and statutory limitations on indefinite detention as a result of multiple, consecutive CDOs being issued in relation to an individual.

10. The Law Council's key recommended amendments to the CDO regime are set out in the commentary in **Attachment 1** (pp. 12-16 and pp. 54-76). Of these matters, the priority reforms for the Law Council are as follows:

    - **standard of proof**—the imposition of a criminal standard of proof for CDOs (and, ideally, ESOs) in relation to the finding that the person would present an unacceptable risk of committing a serious terrorism offence if released, rather

[4] See especially, *Sentencing Act 2020* (UK), section 256, which provides that an extension period for a person convicted of a serious terrorism offence must be at least one year, but must not exceed eight years.

[5] PJCIS, *Advisory report on the AFP powers review*, (October 2021), recommendation 17.

[6] PJCIS, *Advisory report on the HRTO Bill*, (September 2021), recommendation 10. (The Government moved amendments to the HRTO Bill in late 2021, which implemented the latter recommendation via the insertion of paragraph 29(1)(bbaaa) of the *Intelligence Services Act 2001* (Cth). However, no statutory provision is currently made for the PJCIS to undertake the further, pre-sunsetting review it recommended in its AFP powers review.)

than the current standard of 'satisfaction to a high degree of probability'. This reflects the close connection of post-sentence orders with the criminal process, the grave consequences of the imposition of a post sentence order, and the fraught nature of making predictions about a person's future risk of offending (especially in the absence of a settled and empirically verified risk-assessment methodology specific to terrorism);

- **rules for drawing inferences about future risk**—even if the criminal standard of proof is not adopted, the imposition of a rule providing that, if the issuing court is to draw an inference from a person's past conduct that they are an unacceptable risk of committing a serious terrorism offence in the future if released, this must be the only rational inference capable of being drawn from the evidence; and

- **legal assistance funding**—the practical issue of sufficient and dedicated legal assistance funding in connection with CDOs also requires urgent attention. (The Law Council has similarly recommended the review and reform of legal assistance funding arrangements for persons who are respondents to control order applications, and ESO applications.)

11. Additionally, the Law Council supports prompt implementation of the outstanding recommendations of the PJCIS in its report of October 2021 on AFP powers, as relevant to the CDO regime. In particular, the PJCIS called for:

    - the conferral of a statutory review function on the PJCIS, enabling it to undertake a pre-sunsetting review of the CDO regime, in order to provide advisory recommendations to the Parliament about whether it should be extended for a further period of time (recommendation 17);

    - the government to prioritise work with States and Territories towards securing appropriate accommodation for persons who are subject to CDOs, consistent with the requirements in section 105A.4 to ensure that they are treated in a manner consistent with their status as persons who are not serving sentences of imprisonment for criminal offences (recommendation 18); and

    - enhanced public reporting on the operation of the CDO regime, providing details of matters including the accommodation and rehabilitation programs provided to detainees, and associated costs (recommendation 19).

Extended Supervision Orders

12. The Law Council is cognisant that the terms of your review of Division 105A do not refer explicitly to the ESO regime enacted by the HRTO Act, and that your review was commenced on the basis that the CDO regime was, at that time, the sole post-sentence regime contained in Division 105A. However, the relevant statutory function supporting the present review, in subsection 6(1C) of the *Independent National Security Legislation Monitor Act 2010* (Cth), covers the entirety of Division 105A, which now includes the ESO regime. Consequently, if you are minded to include the ESO regime in your review, the Law Council wishes to place on record its concerns about several aspects of that regime, as set out in its submissions to the PJCIS review of the HRTO Bill. (See **Attachments 2, 2A and 2B**.)

13. In summary, while the Law Council is supportive, in principle, of an ESO regime as a less restrictive alternative to CDOs, it does not support several matters of detail in the HRTO Act that depart from the recommendations of your predecessor, Dr Renwick, about the design of the regime.

14. This includes the standard of proof for ESOs (which Dr Renwick recommended should be consistent with the standard for CDOs) and the range of conditions able to be imposed under those orders (which Dr Renwick recommended should be consistent with the existing conditions available for control orders). In contrast, the ESO regime in Division 105A applies the civil standard of proof,[7] which is a lower standard of proof than for CDOs (namely, a 'bespoke' standard of proof, which requires the court to be satisfied to a high degree of probability, on the basis of admissible evidence, that the person poses an unacceptable risk of committing a serious terrorism offence).[8]

15. In further contrast to Dr Renwick's recommendations, Division 105A enables ESOs to impose a significantly broader range of conditions on their subjects than those which were available for control orders,[9] at least until the enactment of the HRTO Act in December 2021, which contained amendments to further broaden the conditions available in respect of control orders, to align them with some of the wider conditions available under ESOs. (This includes, for example: obligations to carry and answer or promptly return all calls to a specified mobile phone; obligations to comply with certain requirements which are determined by specified law enforcement officers, rather than being included directly in the order; and obligations in relation to electronic monitoring devices, including to allow specified officers to enter the person's residence at any reasonable time, for any purpose relating to the monitoring device.)[10]

16. The Law Council is further concerned that the ESO regime in Division 105A contains no statutory safeguards against the risk that applications could be made for control orders in the Federal Court or Federal Circuit Court, as an effective 'repechage' for a failed ESO application that was previously made on the same basis, and was refused by the relevant State or Territory Supreme Court.

17. The Law Council is pleased that, in late 2021, the government moved parliamentary amendments to the HRTO Bill, which implemented some of the amendments recommended by the PJCIS in its HRTO Bill review, which were suggested in the Law Council's submissions to that review. This includes:

    - an issuing criterion requiring the court to take into consideration the combined effect of all ESO conditions on the person, when assessing whether the issuance of the order would be proportionate to the terrorism risk they pose to the community (recommendation 5);

    - a prohibition on an ESO containing curfew conditions which exceed a total of 12 hours in a 24-hour period (recommendation 6); and

    - the conferral of a power on the court considering an ESO application to make an order requiring the Commonwealth to meet the reasonable costs of a person's legal representation in the matter (recommendation 4).

18. However, the Law Council continues to call for the implementation of the outstanding PJCIS recommendations on the HRTO Bill, which were not addressed in parliamentary amendments, and largely endorsed suggestions made by the Law Council in its submissions to the HRTO Bill review. These include the following:

    - an issuing criterion which explicitly requires the court to ascertain whether the person is subject to a post-sentence order under a State or Territory law, and if so, to consider the combined impact of conditions under the State or Territory

[7] Criminal Code, paragraph 105A.7A(1)(b).
[8] Ibid, paragraph 105A.7(1)(b).
[9] Ibid, section 105A.7B. See also: sections 105A.7C-105A.7E.
[10] Ibid, subsection 104.5(3) and section 104.5A (control order conditions) which replicate several, but not all, of the ESO conditions in sections 105A.7B and 105A.7E. The relevant control order conditions were amended by the HRTO Act, Schedule 1, items 16-20.

and proposed Commonwealth order, as part of assessing whether a proposed ESO would be proportionate to the terrorism risk presented by the person (recommendation 1);

- a governmental review of alternative risk assessment methodologies to the current preferred methodology, the VERA-2R (recommendation 2); and
- the amendment of section 9A of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), so that decisions about making applications for post-sentence orders under Division 105A of the Criminal Code are treated in a consistent manner to decisions about applications for warrants, and other decisions which are closely related to the criminal justice process (recommendation 3).

19. To avoid doubt, the Law Council supports the implementation of the above PJCIS recommendations in addition to the further amendments recommended by the Law Council in its submission to the PJCIS in the HRTO Bill review (**Attachments 2, 2A and 2B**). This reflects that several of the Law Council's recommendations were not the subject of detailed examination or recommendation in the PJCIS's advisory report on the HRTO Bill review. Rather the PJCIS appeared to envisage that these issues would be considered in future reviews of Division 105A.[11]

Further information

20. Thank you again for the opportunity to participate in this inquiry. Members of the Law Council would be pleased to appear at your public hearings, and provide any supplementary information as required.

21. If the Law Council can provide any further assistance, please contact, in the first instance, Christina Raymond, Senior Policy Lawyer, National Security and Criminal Law, on (02) 6426 3732 or christina.raymond@lawcouncil.asn.au.

Yours sincerely



Mr Tass Liveris
President

[11] See, for example, PJCIS, *Advisory Report on the HRTO Bill*, (September 2021) at [3.156].

Law Council
OF AUSTRALIA

Review of Australian Federal Police powers:

- control orders;
- preventative detention orders;
- stop, search and seizure powers; and
- continuing detention orders

Parliamentary Joint Committee on Intelligence and Security
17 September 2020

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council gratefully acknowledges the assistance of the Law Society of New South Wales, the Victorian Bar and its National Criminal Law and National Human Rights Committees in preparing this submission.

Executive Summary

1. The Law Council welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security (**Committee**) review of the following counter-terrorism powers of the Australian Federal Police (**AFP**):

   - **Divisions 104 and 105 of the *Criminal Code Act 1995* (Cth) (Criminal Code)** which establish the regimes of control orders (**COs**) and preventative detention orders (**PDOs**);
   - **Division 3A of Part IAA of the *Crimes Act 1914* (Cth) (Crimes Act)** which provides for police stop, search and seizure powers in relation to:
     - persons present at Commonwealth places, if the police officer suspects on reasonable grounds that the person might have just committed, might be committing, or might be about to commit a terrorist act; and
     - persons present in a Commonwealth place that has been determined by the Minister for Home Affairs to be a 'prescribed security zone' (on the basis that this would assist to prevent a terrorist act from being committed, or would assist in responding to a completed terrorist act). In these cases, the police officer is not required to form any suspicion about the person's engagement in a terrorist act as a legal pre-condition to exercising the stop, search and seizure powers;[1]
   - **Division 105A of the Criminal Code**, which establishes the regime of continuing detention orders (**CDOs**) to authorise the continued imprisonment of people who have been convicted of certain terrorism or security offences, have served their sentences of imprisonment, but are determined to present an unacceptable risk of committing a serious terrorism offence if released; and
   - **provisions related to the above powers,** for example:
     - the exercise of extensive surveillance powers against the subject of a CO, for the purpose of monitoring their compliance with the conditions of the order (including telecommunications interception, metadata access, surveillance devices, remote computer access and search powers);[2] and
     - the regime for the appointment of special advocates in certain CO proceedings, pursuant to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**).

2. For the reasons set out in this submission, the Law Council's primary position is that, with the exception of certain powers under Division 3A of Part IAA of the Crimes Act, the powers under review are not necessary or proportionate responses to the threat of terrorism and should not be renewed beyond their sunset dates.

3. Alternatively, if some or all of these powers are to remain in force, the Law Council recommends several amendments to strengthen applicable safeguards, particularly in issuing thresholds and procedural requirements governing their execution. In addition, the Law Council's recommendations (particularly with respect to CDOs) are intended to promote community safety by ensuring that offenders are rehabilitated.

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[1] Crimes Act, section 3UB (application provisions).

[2] These powers were inserted in the Crimes Act, *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIA Act**) and *Surveillance Devices Act 2004* (Cth) (**SDA**) by the *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth), Schedules 8 and 9. They were extended further by the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) (**TOLA Act**), Schedule 2 (computer access warrants). Further, at the time of writing this submission, the Committee is reviewing a Bill that would confer additional powers on the AFP to obtain 'international production orders' that would enable it to access communications content stored or transmitted in foreign countries with which Australia has an agreement, for the purpose of monitoring a person's compliance with a control order: Telecommunications Legislation Amendment (International Production Orders) Bill 2020 (Cth).

Summary of Law Council position

Control orders and preventative detention orders

4. The Law Council's primary position remains that COs and PDOs should not be renewed beyond the current sunset period because they are neither necessary nor proportionate responses to the threat of terrorism.[3]

5. The Law Council continues to support the conclusions and reasoning of the first INSLM, Mr Bret Walker SC, that reliance should instead be placed upon agencies' extensive surveillance and investigatory powers, to enable the enforcement of the wide range of terrorism and security offences under Commonwealth laws.[4]

6. This includes offences that specifically target preparatory and ancillary activities to terrorist acts and foreign incursions.[5] These preparatory and ancillary offences can also operate in conjunction with the extensions of criminal liability in Part 2.4 of the Criminal Code, such as attempt, conspiracy and aiding and abetting. For instance, people have been charged with, and convicted of, the offence of conspiring to commit an act in preparation or planning for a terrorist act, contrary to sections 11.5 and 101.6 of the Criminal Code.[6]

7. If the Committee supports the continuation of the CO and PDO regimes, the Law Council makes several alternative recommendations to address some particularly problematic aspects, several of which the Law Council has raised in its previous submissions.[7]

8. These alternative recommendations would help to ameliorate, but could not remedy, the fundamental problems in these regimes. They cover the following matters:

Control orders (COs)

Issuing threshold

- amendments to provide that, in applying the issuing criteria, it is only possible for a court to draw an inference about a person's future risk of engaging in a terrorism or foreign incursions offence, if the court is satisfied it is the **only rational inference** capable of being drawn from the evidence before it;
- amendments to implement outstanding recommendations of the first INSLM, Mr Bret Walker SC, in his 2012 annual report in relation to clarification of the onus of proof, and amendments to the requirements for *ex parte* applications;

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[3] See further: Law Council of Australia, *Submission to the INSLM review of stop, search and seizure powers, declared areas, control orders, preventative detention orders and continuing detention orders* (May 2017); and Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (November 2017).

[4] Bret Walker SC, *Declassified annual report 2012* (December 2012), Chapters 2 and 3, especially recommendations II/4 and III/4.

[5] For example, Criminal Code, sections 101.2-101.6 (acts that are preparatory or ancillary to a terrorist act), sections 102.2-102.8 (acts in relation to a terrorist organisation), sections 103.1-103.2 (terrorist financing), and sections 119.1(1), 119.2, and 119.4-119.7 (acts that are preparatory and ancillary to foreign incursions).

[6] By way of illustration, individuals who were the subject of investigation in Operation Neath, concerning a plot to commit a terrorist act at the Holsworthy Army Barracks in outer South-Western Sydney in 2009, were charged with, and convicted of, this offence. See *R v Fattal & Ors* [2011] VSC 681; and *DPP v Fattal & Ors* [2013] VSCA 276.

[7] Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, (November 2017), 11-14 and 16-18.

Conditions, limitations and restrictions able to be imposed under COs

- amendments to implement outstanding recommendations of the second INSLM, the Hon Roger Gyles AO QC, in his 2016 reports on control order safeguards, to:
  - clarify the nature and extent of certain conditions of COs (for example, an express prohibition on mandatory relocation); and
  - invest exclusive jurisdiction for issuing control orders in the Federal Court of Australia, with the power to remit matters to the Federal Circuit Court. Additionally, the Law Council continues to support the conferral of jurisdiction on State and Territory Supreme Courts, given the close connection of many COs to the criminal process (especially the use of COs in the post-sentence context), the degree of scrutiny required of evidence in support of a CO application, and the gravity of the consequences of a CO for the subject.

Interaction of COs with CDOs

- the detailed review of the proposed ESO regime in a separate inquiry by the Committee into the HRTO Bill, to ensure that it faithfully implements the recommendations of the third INSLM, Dr James Renwick SC, in his 2017 review; and does not go further than is necessary and proportionate to respond to the risk presented by terrorist offenders who remain a risk to the community, following the completion of their sentences;
- the establishment of an independent statutory office to manage the appointment of special advocates (who may presently be appointed in closed CO proceedings, and are proposed under the HRTO Bill to be appointed in certain ESO proceedings) and the administration of the extended special advocates regime. Alternatively, consideration could be given to conferring this function on legal aid commissions, but only if it is accompanied by adequate additional resourcing;

Warrant-based surveillance for the purpose of monitoring compliance with COs

- repealing the warrant-based surveillance powers (including telecommunications interception, metadata access and surveillance devices) for the purpose of monitoring a person's compliance with a CO, as distinct to obtaining these warrants to investigate a suspected offence for breaching a condition of a CO;
- alternatively, strengthening the issuing thresholds for monitoring warrants, including a reasonable suspicion that the CO is not being complied with, or that the individual is engaged in a terrorism-related activity;

Financial assistance for respondents to CO applications

- legal assistance funding should be available to **all persons** who are the subject of a CO application, not only children in accordance with section 104.28 of the Criminal Code and the Criminal Code Regulations 2019. In particular, consideration should be given to delivering this financial assistance through State and Territory legal aid commissions, akin to existing arrangements for complex criminal cases;

Preventative Detention Orders (PDOs)

Issuing criteria and procedural requirements

- amending the issuing threshold for PDOs that are issued for the purpose of preventing an imminent terrorist act, so that the issuing authority must be reasonably satisfied that a terrorist act is **likely to occur** in the next 14 days (and not merely that a terrorist act **could occur** in the next 14 days);
- retaining the absolute prohibition on any investigative questioning of a person who is being detained under a PDO;
- no reduction in the minimum age of persons who may be subject to a PDO (being 16 years) and no extension of the maximum duration of preventative detention under a PDO (being 48 hours);
- no expansion in the classes of persons eligible to be appointed as issuing authorities for PDOs, however, consideration should be given to removing the power of the AFP to issue an 'initial PDO' so that a retired judicial officer, or a serving judicial officer (appointed in their personal capacity), is solely responsible for the issuance of all PDOs;
- removing the powers to monitor confidential lawyer-client communications between a person being detained under a PDO and their legal representative;
- including a requirement for a person subject to a PDO to be given sufficient information about the basis for issuing a PDO to enable them to give effective instructions to their lawyer, for the purpose of:
  - obtaining advice about the legality of the PDO;
  - obtaining advice about the legality of acts done under, or in relation to, the PDO; or
  - commencing legal proceedings in relation to the PDO;[8] and
- aligning the maximum penalty for the offence in section 105.45 for officials who contravene safeguard provisions (including humane treatment obligations) with the maximum penalties for the disclosure offences applying to PDO subjects and others in section 105.41, so that both offences are subject to a maximum penalty of five years' imprisonment. This will reflect that both offences involve an equal degree of moral culpability;

Sunsetting and review of Control Orders and Preventative Detention Orders

- making the renewed CO and PDO regimes subject to a further sunset period of no more than three years, consistent with the previous period of renewal in 2018 (as recommended by the Committee); and
- making the renewed CO and PDO regimes subject to further statutory 'pre-sunsetting' reviews by both the INSLM and the Committee to assess whether they should be renewed again (consistent with established practice in the establishment and conduct of such reviews).

Police powers of stop, search and seizure

9. The Law Council acknowledges that, in circumstances of emergency, the extraordinary powers in Division 3A of Part IAA of the Crimes Act have the potential to be necessary and proportionate to the prevention of an imminent terrorist act, and

[8] This would provide for equivalence for the effective requirement in relation to control orders, which is given effect by paragraph 38J(1)(c) of the NSI Act.

to managing the immediate aftermath of such an act (including conducting investigations, preserving evidence and securing the area).

10. Accordingly, the Law Council does not object to the extension of these powers for a maximum of three years (consistent with the previous period of renewal). However, this qualified support is subject to the enactment of amendments to the current provisions, as recommended in this submission and summarised below.

11. These recommended reforms will ensure that the powers are not open to being exercised in a manner that disproportionately limits human rights, especially the rights to freedom of movement, privacy and liberty and security of the person.[9] They will make important adjustments to the regime, which are necessary given its substantial departure from the established system of warrant-based powers.

12. As noted above, the warrant system is an important check and balance on intrusive investigatory powers. Allowing police to enter and search premises without a warrant and under their own authority increases the risk that such powers will be misused or mistakenly used. Moreover, it increases the risk that an individual's privacy will be breached in circumstances not justified by the necessary pursuit of a legitimate law enforcement objective.

13. The Law Council's recommended amendments are directed to the following matters:

Designation of 'prescribed security zones'

- statutory criteria to guide Ministerial decision-making about the declaration of a Commonwealth place as a 'prescribed security zone'. (As noted previously, the making of such a declaration enables most of the powers under Division 3A of Part IAA to be exercised at the relevant place **without** a statutory suspicion-based threshold that the particular person who is being stopped or searched has engaged, or is likely to engage, in a terrorist act);
- supplementing the Ministerial obligation to revoke a declaration of a 'prescribed security zone' if the issuing criteria are no longer met, with further statutory obligations on the AFP Commissioner to ensure that:
  - all relevant information suggesting that the issuing criteria are no longer met is brought to the Minister's attention as soon as possible, so that the Minister must consider whether to revoke the declaration; and
  - all reasonable steps are taken to discontinue the exercise of Division 3A powers on the basis of a declaration of a 'prescribed security zone' if the AFP Commissioner reasonably believes that the issuing criteria are no longer met, but the Minister has not yet formally revoked the declaration;
- considering whether the power to make a declaration of a 'prescribed security zone' could be conferred on an independent body, such as a new Investigatory Powers Division of the Administrative Appeals Tribunal (**AAT**), whose establishment was recently recommended by the third INSLM in his review of the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) (**TOLA Act**);

Conditions on the exercise of powers

- explicit statutory requirements for police officers exercising all Division 3A powers to consider whether it would be reasonably practicable to obtain a search warrant, including by making an urgent application via telephone or other electronic means, to perform a search or effect a seizure, as a

[9] *International Covenant on Civil and Political Rights* (ICCPR), [1980] ATS 23 (done at New York, 12 December 1966), Article 12 (freedom of movement) and Article 9(1) (liberty and security of the person).

pre-condition to the exercise of the warrantless powers in Division 3A. (This could alternatively be given effect via a 'least intrusive' threshold, requiring the police officer to be reasonably satisfied that there is no less intrusive means than exercising the Division 3A powers.)

Oversight of stop, search and seizure powers

- supporting timely and effective oversight of the exercise of the Division 3A powers by requiring:
  - the AFP to notify the Commonwealth Ombudsman, the INSLM and the Committee of a declaration of a 'prescribed security zone' within 24 hours of the Minister making the declaration;
  - the Minister for Home Affairs to ensure that the Committee is given a written statement of reasons for the making of the declaration of a prescribed security zone, for the purpose of the Committee performing its function under subparagraph 29(1)(bba)(ii) of the Intelligence Services Act to monitor and review the basis of the Minister's declaration of prescribed security zones; and
  - police officers exercising Division 3A powers to inform a person being stopped and detained for the purpose of a search of their right to make a complaint to the Commonwealth Ombudsman or applicable State or Territory police oversight body or bodies, unless this is not reasonably practicable because of circumstances of urgency;
- statutory pre-sunsetting reviews by the INSLM and the Committee, to assess the operation of the scheme as a whole and inform Parliamentary decision-making about whether it should continue. These reviews should specifically be required to consider whether existing procedures to obtain emergency search warrants could be made more efficient, in preference to retaining the extraordinary warrantless powers in Division 3A of Part IAA of the Crimes Act.

Continuing detention orders

14. In 2016, several of the Law Council's recommended amendments to the CDO regime were endorsed by the Committee and implemented via Parliamentary amendments to the originating Bill, the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (enacted as Act No 95 of 2016).[10]

15. The Law Council welcomed those amendments. However, the Law Council continues to support amendments to implement the following outstanding matters.

Prohibition or limitations on indefinite post-sentence detention

- a limitation on the total length of time a person may be subject to continuing detention under a CDO, preferably via a limit on the total number of consecutive CDOs that may be issued in relation to a person;
- in the alternative to a maximum duration on continued detention, an explicit requirement in sections 105A.5 and 105A.8 for the court to be provided with, and to take into consideration, information about the total duration of detention under all previous CDOs and the further duration of detention sought;
- a requirement for the court to also consider interoperability issues arising from the application of State dangerous offenders' legislation that allows for post-

[10] Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, (November 2016).

sentence detention. (For example, if a terrorist offender is also convicted and sentenced to imprisonment for serious offences against the person in addition to Commonwealth terrorism or other security offences; and the application of the terrorism-specific post-sentence detention regime in New South Wales, under the *Terrorism (High Risk Offenders) Act 2017* (NSW).)

Issuing thresholds and process

- an amendment of the definition of a 'relevant expert' in section 105A.2, to remove the reference in paragraph (d) to 'any other expert' so that the persons in paragraphs (a)-(c) (namely, Australian-registered psychiatrists, psychologists and medical practitioners) are exhaustive of the persons who may be appointed as relevant experts, provided that they are competent to assess the risk to the community if the offender were released into the community. Any expansion of those categories should be subject to explicit Parliamentary approval, via legislative amendments to Division 105A;
- amendments to the offences specified in paragraph 105A.3(1)(a) that make a convicted person liable to be the subject of a CDO (the 'anterior conviction'). These offences should be defined by reference to the actual sentence imposed on the person, not merely by the broad categories of offence, and their applicable maximum penalties;
- the threshold for issuing a CDO in section 105A.7 should be satisfaction 'beyond reasonable doubt' that the person would pose an unacceptable risk to the community, rather than the current standard of satisfaction 'to a high degree of probability;
- consistent with the Law Council's submissions on COs, if the court is to draw an inference from a detainee's past conduct that they are an unacceptable risk of committing a serious terrorism offence if released, this must be the only rational inference capable of being drawn from the evidence;
- the court should be required to consider additional matters under section 105A.7 in determining whether to issue a CDO, which are relevant to an assessment of the proportionality of post-sentence detention, namely:
    - matters with respect to the nature of the anterior conviction for a terrorism or security offence, in particular: the nature of the offending, and the fault elements of the offence;
    - the views of any parole authority on granting parole (this is presently, the Commonwealth Attorney-General for Commonwealth offenders, in the absence of a federal parole commission);
    - any practical limitations in the ability of the offender to test or challenge the information relied on in an application for a CDO; and
    - the conditions under which the offender will likely be detained under a CDO, including the availability of suitable rehabilitation programs;
- amendments to the criteria in section 105A.9 for issuing an 'interim detention order' (**IDO**) to temporarily detain a person for up to 28 days, pending determination of a substantive CDO application. These amendments should:
    - require the court to explicitly consider the public interest in deciding whether to make an IDO; and
    - address a technical issue in the drafting of the provision, to ensure that the court has the power to issue an IDO if the person's sentence of imprisonment **has ended** before the substantive CDO application is

determined. This is presently excluded by the drafting of the conditions in paragraph 105A.9(2)(a) in the future tense, which may be unintended;

- if a person was convicted of a serious terrorism offence as a child, and is aged 18 years or over on the completion of their sentence of imprisonment, any CDO application made in respect of that person should be subject to an additional issuing criterion. This should require the court to be satisfied that a CDO is the last resort to protect the community from the risk presented by that person if they were released upon completion of their sentence;

Rehabilitation

- either section 105A.23 of the Criminal Code (warning to persons sentenced for serious terrorism offences) or Part 1B of the Crimes Act (sentencing of federal offenders) should be amended to:
  - require a preliminary risk assessment to be undertaken in relation to a person who is convicted of, and sentenced to imprisonment for, a serious terrorism offence (and who is therefore liable to a CDO) for the purpose of a referral to a custodial rehabilitation program; and
  - impose a duty on the Minister for Home Affairs to take all reasonable steps, as soon as reasonably practicable after the person is sentenced, to ensure that an appropriate custodial rehabilitation program is identified based on the person's risk assessment, and the person is referred to it;
- the Commonwealth, States and Territories should properly fund rehabilitation programs for detainees (both as part of their curial sentences, and in post-sentence detention under CDOs); and for persons who are released into the community (both those who are released after completing their curial sentences without being made subject to a CDO, and those who are released after being detained for a further period under a CDO or multiple CDOs);
- the requirements under section 105A.22 for annual reports on the CDO regime should be amended to require the Minister for Home Affairs to include information about custodial rehabilitation programs for people who are serving sentences of imprisonment for serious terrorism offences, and people who are being detained under CDOs. This should include:
  - the number of programs;
  - a description of the types of programs; the total amount of Commonwealth, State and Territory funding provided for those programs, details of funding mechanisms, and evaluation and audit arrangements; and
  - breakdowns of the above matters for each State and Territory;
- the power of the Minister for Home Affairs to make agreements with States and Territories under section 105A.21 for the detention of people who are subject to a CDO in State and Territory facilities should be subject to a requirement that the Minister must be satisfied, on reasonable grounds, that the person's conditions of detention will be compatible with Australia's human rights obligations. This should include requirements to be satisfied about:
  - the establishment, adequacy and accessibility of custodial rehabilitative programs;
  - the adequacy of arrangements to ensure that people who are subject to a CDO will be treated in a manner appropriate to their status as persons who are not serving criminal sentences of imprisonment; and

- the adequacy of independent oversight (including consideration and redress of complaints);

Treatment of persons being detained under CDOs

- section 105A.4 should be amended to remove one of the exceptions to the obligation to treat people who are subject to a CDO in a way that is appropriate to their status as a person who is not serving a criminal sentence. This is the exception in paragraph 105A.4(1)(a) for the 'management' or 'good order' of the prison;

Public reporting and transparency

- Division 105A should be subject to further public reporting requirements in relation to the implementation of the CDO regime, including: risk assessment tools, housing of people who are subject to a CDO, requirements for the identification and accreditation of experts, rehabilitation programs (pre and post-release), oversight arrangements and resourcing;
- section 105A.21 should be amended to require the Minister for Home Affairs to make a notifiable instrument (within the meaning of the *Legislation Act 2003* (Cth)) in relation to the making of any arrangements with State and Territory government for the detention of persons subject to CDOs. The instrument should provide, as an annexure, details of the arrangements;

Ministerial power to delegate functions and powers under Division 105A

- there should be a narrowing of the power of the Minister for Home Affairs in paragraph 105A.20(b) to delegate certain of their functions with respect to information-sharing to any Australian Public Service (**APS**) employee in the Department of Home Affairs. This is necessary because of the potential for information obtained during risk assessments to be highly prejudicial to a CDO subject, and the ability for law enforcement agencies to use it derivatively. The class of delegates should be limited to departmental staff who hold a position that is classified as Senior Executive Service (**SES**) Band 1 or higher, and who the Minister considers have appropriate expertise and experience to perform the particular functions and particular powers to be delegated;

Interaction with compulsory questioning powers of ASIO

- the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) and the Australian Security Intelligence Organisation Amendment Bill 2020 (**ASIO Amendment Bill**) should be amended to provide that, if ASIO obtains a warrant to compulsorily question a prisoner who is the subject of an extant or imminent CDO application, then any information obtained under compulsory questioning cannot be used against the person in proceedings for a CDO. Equivalent amendments should also be made to the examination provisions of the *Australian Crime Commission Act 2002* (Cth);
- existing section 34C of the ASIO Act (and proposed section 34AF of the ASIO Act in the ASIO Amendment Bill) should be amended to require the Statement of Procedures for Compulsory Questioning (which is a legislative instrument) to include requirements for the execution of questioning warrants against

persons who are the subject of a CDO; or an extant, imminent or potential application for a CDO;[11]

Legal assistance funding

- the power of the court in section 105A.15A to make an order staying a CDO proceeding to enable an unrepresented respondent to obtain legal representation, and to order the Commonwealth to bear reasonable costs and expenses, should be amended to:
  - remove delegations of legislative power that inappropriately fetter judicial discretion, by permitting the executive government to dictate, via regulation, matters that a court **must not** take into account in considering an application for a financial assistance order (even if the factors prohibited by regulation were, in fact, relevant to a judicial decision); and
  - clarify that the court may make an order requiring the Commonwealth to pay for the reasonable costs and expenses of the respondent's legal representation, in circumstances where the respondent has been able to engage a legal representative, but that person is acting pro bono because legal assistance funding has been denied, or a decision on a request for such assistance has not been made in time (as has occurred in previous CO proceedings);
- the Australian Government should establish a dedicated legal assistance funding stream for CDOs (in addition to COs, as recommended above). Consideration should be given to delivering that funding through State and Territory legal aid commissions, in a manner akin to existing arrangements for complex criminal cases;

Period of effect and further review

- the CDO regime should only remain in force if it is subject to a statutory sunset period, with express provisions mandating 'pre-sunsetting' reviews by the Committee and the INSLM, in order to inform Parliamentary decision-making about any further renewal (including with any necessary amendments); and
- if any amendments to the CDO regime are proposed in future (for example, expansions of the offences for which a convicted person may be subject to a CDO, or amendments to the issuing thresholds or process) they should be referred to the Committee for inquiry and report, immediately upon the introduction of the relevant amending legislation to the Parliament.

Improvements to oversight and transparency of all powers

Oversight by the Independent National Security Legislation Monitor (INSLM)

16. The Law Council recommends the following amendments to the *Independent National Security Legislation Monitor Act 2010* (Cth) (**INSLM Act**), to aid oversight of the extraordinary powers under review, and other counter-terrorism legislation:

[11] See further: Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Australian Security Intelligence Organisation Amendment Bill 2020*, (July 2020), 88-90. (The Law Council recommended that the ASIO Amendment Bill should be further amended to require the statement of procedures for questioning, which is a legislative instrument made under proposed section 34AF of the ASIO Act, to address essential several matters, so that their inclusion or otherwise is not left solely to executive discretion about the contents of the statement of procedures.)

- explicitly conferring power on the INSLM to submit reports on any own-motion inquiries separately to their annual reports;
- requiring timely Government responses to all INSLM reports (for example, requirements to release a written response or provide a statement to the Parliament within a prescribed period, such as six months), to address the repeated and prolonged lack of responsiveness to most previous reports;
- empowering the INSLM to monitor and report on the adequacy of action taken in response to their reports, analogous to existing statutory powers of the Inspector-General of Intelligence and Security (**IGIS**); and
- amending the statutory Parliamentary tabling deadline for unclassified versions of the INSLM's reports, to ensure that these reports are made available to the public in a more timely way (especially given recent, prolonged adjournments of Parliamentary sittings due to the COVID-19 pandemic).

  In particular, the Law Council supports a statutory tabling deadline of **four Parliamentary sitting days (one sitting week)** after the INSLM gives their report to the Attorney-General, over the current 15-sitting-day deadline.

  A shorter tabling deadline, which provides no more delay than is strictly necessary to make the logistical arrangements for tabling, would avoid perpetuating the pattern of the extended delays—often in the range of months—between the INSLM providing their reports to the Government, and those reports becoming available publicly upon their Parliamentary tabling.

  The apparent practice of keeping secret unclassified INSLM reports until the statutory tabling deadline is inimical to transparency. It is no justification that the Government of the day requires an opportunity to consider its position on the recommendations. Such work can, and should, be conducted simultaneously with public review and analysis of the INSLM's reports.

Oversight by the Committee

17. The Law Council further supports amendments to paragraphs 29(1)(baa) and (bba) of the Intelligence Services Act, to confer an ongoing monitoring function on the Committee in respect of **all** Commonwealth officials who perform functions under Part 5.3 of the Criminal Code and Division 3A of Part IAA of the Crimes Act, not only the AFP (which is the only agency listed in the current provisions).
18. In particular, the Committee should have an explicit mandate to monitor the performance of functions or duties by the following officials, in relation to the counter-terrorism powers presently under review:
    - officials of the Department of Home Affairs to whom the Minister for Home Affairs has delegated their powers with respect to the CDO regime under section 105A.20 of the Criminal Code;
    - officials of the Department of Home Affairs and the Attorney-General's Department in administering Part 5.3 of the Criminal Code, and Division 3A of Part IAA of the Crimes Act, including their roles in:
        - the preparation of advice to Ministers on the performance of functions and exercise of powers;
        - facilitating compliance with reporting annual reporting obligations and other notification requirements on the extraordinary powers under review;

- supporting the appointment of issuing officers for PDOs, and maintaining registers of appointees, and providing training or administrative support; and

- the administration of the special advocates regime with respect to COs (and as proposed to be expanded to ESOs).

Public transparency

19. In addition to annual (financial year) reporting requirements, the Australian Government should maintain a public register of extraordinary police counter-terrorism and security powers (COs, PDOs, CDOs and stop, search and seizure powers) that provides:
    - cumulative statistical information about the total numbers of orders or declarations of prescribed security zones made to date; and
    - in the case of COs and CDOs, this should provide information about the decisions of the relevant issuing courts on all applications.
20. The objective of the register should be to ensure that all members of the Parliament and public have access to accurate, official statistical information on cumulative totals of orders issued.

Background

Legislative history

21. Other than CDOs, the extraordinary powers under review were enacted in 2005 as part of the second major tranche of Commonwealth counter-terrorism legislation.[12]
22. The CDO regime was enacted in 2016 and commenced on 7 June 2017. It was established pursuant to an agreement of the Council of Australian Governments (**COAG**) made in April 2016, in view of the impending release of persons convicted of terrorism offences following the completion of their sentences.[13]

Extraordinary nature of powers under review

23. The regimes of COs, PDOs and CDOs are extraordinary because they impose restraints on individual rights and liberties for preventive and protective purposes, rather than for punitive or investigative purposes connected with the commission of a criminal offence. Key instances of punitive purposes are sentences imposed by courts upon persons who have been convicted of terrorism or security offences; and the exercise by police of powers of arrest, as part of their investigations of suspected terrorism or other security offences. In contrast, the powers to limit rights and liberties under COs, PDOs and CDOs are based on predictions about future risk, which are, in turn, predicated on assessments of individuals' past conduct.
24. The warrantless police powers of stop, search and seizure in Division 3A of Part IAA of the Crimes Act are also extraordinary because they depart from the ordinary requirement that police must obtain a warrant, issued by a judge or a magistrate, to exercise such intrusive powers.
25. The issuance of a warrant by an independent judicial officer is a critical safeguard in the exercise of intrusive powers by the State, which would otherwise constitute trespass. The warrant system ensures that police search and seizure powers are

[12] *Anti-Terrorism Act (No. 2) 2005* (Cth), Schedules 4 and 5.

[13] *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth). See also: COAG, *Meeting Communique,* 1 April 2016, 3-4.

subject to external supervision and may only be exercised if the issuing authority is satisfied that the issuing criteria are met.

Previous reviews and extension of sunset dates

26. In recognition of the extraordinary nature of powers that place significant, preventive restraints on rights, and depart from established, independent authorisation mechanisms for warrants, the powers under inquiry were enacted subject to a sunset clause. For COs, PDOs and police stop, search and seizure powers, the originating legislation provided for an initial 10-year period of operation (until 2015.)

27. The sunset provisions have been extended twice, first in 2014 for a period of approximately four years, and subsequently in 2018 for a further three years.[14] The CO, PDO and stop, search and seizure powers will sunset on 7 September 2021 unless they are extended again.[15] Similarly, the CDO regime was enacted in 2016 subject to a 10-year sunset clause. It will cease on 7 December 2026.[16]

28. The CO, PDO and stop, search and seizure powers have been the subject of multiple parliamentary reviews[17] and executive reviews. The relevant executive reviews have been undertaken variously by a 'one-off' committee appointed by COAG in 2012-13 (COAG Review)[18] and successive INSLMs from 2012.[19] The Law Council has participated actively in all major reviews since the introduction of the originating Bills to Parliament in 2005.[20]

The value of regular parliamentary and independent review

29. The Committee's present review, conducted under paragraphs 29(1)(bb) and (cb) of the *Intelligence Services Act 2001* (Cth) (**Intelligence Services Act**), is a valuable opportunity to consider whether these powers should continue in force, and if so, whether any amendments are required. Such review is important, given that several persons who have been convicted of terrorism offences have recently completed their sentences of imprisonment, or are due to do so in the near future.[21]

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[14] *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act* 2014 (Cth), Schedule 1, items 43-45, 86-87 and 107-108 (extension to 2018); and *Counter-Terrorism Legislation Amendment Act (No. 1) 2018* (Cth). Schedule 1, items 7, 11 and 17 (extension to 2021).

[15] Criminal Code, sections 104.32 and 105.53; and Crimes Act, section 3UK.

[16] Criminal Code, section 105A.25.

[17] See, for example: Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (February 2018); Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (February 2016); Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014); and Senate Standing Committee on Legal and Constitutional Affairs, *Report on the provisions of the Anti-Terrorism Bill (No 2) 2005* (November 2005).

[18] Council of Australian Governments (**COAG**), *Final report of the COAG review of counter-terrorism legislation* (March 2013).

[19] Bret Walker SC, INSLM, *Declassified annual report 2012* (December 2012); the Hon Roger Gyles AO QC, INSLM, *Control order safeguards: Part 1* (January 2016); the Hon Roger Gyles AO QC, INSLM, *Control order safeguards: Part 2*, (April 2016); James Renwick CSC SC, INSLM, *Review of Divisions 104 and 105 of the Criminal Code*, (September 2017); and James Renwick CSC SC, INSLM, *Review of Division 3A of Part1AA of the Crimes Act 1914: stop search and seize powers* (September 2017).

[20] Anti-Terrorism Bill (No 2) 2005, Schedules 4 and 5.

[21] Parliamentary Joint Committee on Intelligence and Security, *Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, (November 2016), 2 at [1.5]. The Committee cited statistics provided by the Attorney-General's Department, as at October 2016, that there were 16 terrorist offenders serving sentences of imprisonment for relevant terrorism-related offences in NSW and Victoria, with a head sentence expiring from 2019 onwards. One such offender is Bilal Khazaal, who was convicted in 2008 of making a document connected with assistance in a terrorist act, contrary to subsection 101.5(1) of the Criminal Code and was sentenced to 12 years' imprisonment, expiring on 30 August 2020. Mr Khazaal was the subject of a control order, issued on 26 August 2020: *Booth v Khazaal* [2020] FCA 1241 (26 August 2020, Wigney J).

30. Further, although the sunset date for the CDO regime is still some time away, the Committee's present review provides a useful opportunity to consider how that regime is being implemented and utilised. This includes the following matters, several of which were identified as ongoing concerns in the Parliamentary scrutiny of the originating Bill for the CDO regime in 2016:[22]

- the application of a risk assessment framework to quantify a person's future risk if released into the community on the completion of their sentence. This includes the outcomes of work undertaken to strengthen the empirical basis for the risk assessment tool selected by the Government in 2017, the Violent Extremism Risk Assessment Version 2 (Revised) (**VERA-2R**);[23]
- the accreditation of persons in the use of the VERA-2R, who may be appointed by a court as 'relevant experts' to assess and give evidence about a person's future risk in CDO proceedings, pursuant to Division 105A;
- the availability of legal assistance for persons who are subject to CDO applications, including the adequacy of funding, to ensure equality of arms;
- the development, implementation and resourcing of rehabilitation programs, which are available to sentenced prisoners, persons being detained under CDOs, and persons who are released into the community on completion of their sentences or on the expiry of a CDO;
- details of inter-governmental agreements made to enable the detention of people who are subject to a CDO in State and Territory prisons;
- the development of suitable accommodation in State and Territory prisons for persons detained under CDOs, to ensure that they are treated in a manner appropriate to their status as persons who are not serving a sentence of imprisonment (as is required under section 105A.4);
- the development and implementation of oversight arrangements for persons who are subject to CDO applications (for example, their treatment in the conduct of mandatory risk assessments) and being detained under CDOs (for example, their conditions of detention);
- detailed costings for the operation of the CDO regime; and
- details of decision-making (both the general methodology utilised and outcomes in individual cases) by the AFP and Minister for Home Affairs about whether to apply for a CDO, in relation to persons who have completed their sentences of imprisonment for terrorism or other eligible security offences since the commencement of the CDO regime.

Proposed 'extended supervision orders' regime

31. The Committee's review of the CDO regime also overlaps with a Government Bill introduced on 3 September 2020, the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (**HRTO Bill**).

32. This Bill purports to implement recommendations of the third INSLM, Dr James Renwick SC, in 2017, to improve interoperability of CDOs with COs, by enacting a new regime of 'extended supervision orders' (**ESOs**).[24] These recommendations were accepted by the Government in 2018, but had not been acted upon.[25] The HRTO Bill also proposes to expand the special advocates regime for CO

[22] Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.

[23] Australian Government Attorney-General's Department, *Post-sentence preventative detention of high-risk terrorist offenders: report to the Parliamentary Joint Committee on Intelligence and Security*, (June 2017), 4.

[24] James Renwick CSC SC, INSLM, *Review of Divisions 104 and 105 of the Criminal Code*, (September 2017), Chapter 9 and summary of recommendations at 86, [11.13]-[11.17].

[25] Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018), 8.

proceedings to ESO proceedings. It further proposes to remove rights to statutory judicial review in relation to administrative decisions made with respect to CDOs, as well as excluding from such review administrative decisions made in relation to ESOs.

33. The Law Council supports, in principle, the implementation of the third INSLM's recommendations to establish an ESO regime, as a less restrictive alternative to a CDO, and the extension of the special advocates regime to ESOs. However, detailed scrutiny of the proposed regime is necessary to ensure that it meets the essential requirements of proportionality, and is compatible with Australia's international human rights obligations.

34. Such scrutiny will be particularly important for the statutory threshold for the issuance of an ESO, which the Law Council submits **should not** be lower than the standard for the issuance of a CDO (which the Law Council also submits should be increased to the criminal standard, rather than the existing threshold of 'a high degree of probability'). Detailed consideration is also required of any differences in the nature of the controls that can be applied under an ESO and a CO, and the proposed exclusion of statutory judicial review. It will further be important to carefully examine potential interactions between Commonwealth and State or Territory post-sentence regimes.

35. The Law Council intends to provide separate, detailed comments on the ESO regime. At the time of writing the present submission, there had been no public announcement of a referral of the HRTO Bill to the Committee. The Law Council strongly supports such a referral being made. If a referral does not occur, the Law Council would be pleased to provide a pro-active briefing to the Committee and other interested Parliamentarians.

Control orders

36. The CO regime is established under Division 104 of the Criminal Code. A CO is a civil order, issued by the Federal Court or Federal Circuit Court of Australia on the application of the AFP (with the consent of the Minister for Home Affairs).[26]

37. A CO places various obligations, prohibitions and restrictions on an individual's movements, activities and associations within the community for a maximum duration of 12 months per order (with no prohibition on seeking multiple consecutive orders, or any limitation on the number of consecutive orders that may be issued).[27]

38. Contravention of a condition of a CO is an offence, punishable by a maximum penalty of five years' imprisonment.[28] There is also a discrete offence, punishable by the same maximum penalty, for persons who interfere with the operation of a tracking device worn by a person under a control order.[29]

39. The obligations, prohibitions and restrictions that may be imposed by a CO are extensive, and comprise the following:

    - a prohibition or restriction on the person being at a specified place;
    - a requirement that the person remain at specified premises between specified times each day on specified days, but for no more than 12 hours within any 24 hours;
    - a requirement that the person wear a tracking device;

[26] Criminal Code, section 104.3 (application) and 104.4 (issuing).

[27] Ibid, paragraphs 104.5(1)(f) and 104.16(1)(d).

[28] Ibid, section 104.27.

[29] Ibid, section 104.27A. The offence applies to the subject of the CO (the 'controlee') and any other person.

- a prohibition or restriction on the person communicating or associating with specified individuals;
- a prohibition or restriction on the person accessing or using specified forms of telecommunication or technology (including the internet);
- a prohibition or restriction on the person possessing or using specified articles or substances;
- a prohibition or restriction on the person carrying out specified activities (including in respect of their work or occupation);
- a requirement that the person is to report to specified persons at specified times and places;
- a requirement that the person allow themselves be photographed, and allow impressions of their fingerprints to be taken; and
- a requirement that the person participate in specified counselling or education.[30]

40. For a CO to be issued, the AFP, as applicant, must obtain the consent of the Minister for Home Affairs to the making of the application.[31] Then, the issuing court may only make an order if it is satisfied that the following criteria have been met, to the civil standard of proof:

    - one of more of the following conditions are met:
        - the order would substantially assist in preventing a terrorist act; or
        - the person has provided training to, received training from, or participated in training with a listed terrorist organisation; or
        - the person has engaged in a hostile activity in a foreign country; or
        - the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation, or a terrorist act (as defined in the Criminal Code), or has been convicted of an equivalent offence in a foreign country; or
        - making the order would substantially assist in preventing the provision of support for, or the facilitation of, a terrorist act; or
        - the person has provided support for, or otherwise facilitated the engagement in a hostile activity in a foreign country; and [32]
    - the court is satisfied that each of the obligations, prohibitions or restrictions to be imposed under the CO is reasonably necessary, and reasonably adapted and appropriate, for the purpose of:
        - protecting the public from a terrorist act; or
        - preventing the provision of support for, or the facilitation of, a terrorist act; or
        - preventing the provision of support for, or the facilitation of, a hostile activity in a foreign country.[33]

41. In applying the tests of necessity and proportionality to the matters listed above, the Court is required to consider the following matters:

[30] Ibid, subsection 104.5(3).
[31] Ibid, section 104.2.
[32] Ibid, paragraph 104.4(1)(c).
[33] Ibid, paragraph 104.4(1)(d).

- the objects of Division 104 of the Criminal Code, as set out in section 104.1, to protect the public from terrorist acts or foreign incursions, and to prevent the provision of support for such acts. These objects are required to be treated as a paramount consideration;
- in the case of control orders for children aged 14 to 17 years, the best interests of the child, which must be treated as a primary consideration; and
- the impact of each obligation, prohibition and restriction on the person's circumstances (including their financial and personal circumstances).[34]

42. As at September 2020, the Law Council is aware of 16 COs having been made since the regime was enacted in 2005. Ten of these COs were issued in 2019 and 2020. Nine of those 10 COs were issued after the respondent was convicted of a terrorism or foreign incursions offence and had served their sentence, and one CO was issued in relation to a person whose conviction was overturned on appeal. This appears to indicate that COs are being used primarily as a tool to manage perceived risk at the post-sentence stage (in preference to CDOs) rather than as a tool to manage future risk by persons who have not been convicted of, and completed their sentence for, a security-related offence.

43. However, the Law Council cautions that there does not appear to be an official, publicly available register of the total number of all COs issued to date, or applications that were refused. Further, at the time of writing this submission, the Minister for Home Affairs had not tabled in Parliament the annual report on the use of control orders for 2019-20, which is required to be prepared under section 104.29 of the Criminal Code. These factors make it challenging for members of the public to obtain accurate information about the utilisation of the regime to date.

Necessity of the regime

44. The Law Council maintains its longstanding position, which was endorsed by the first INSLM, that the CO regime is not necessary to manage the security threat presented by terrorism.

45. Rather, the Law Council continues to support placing reliance on the investigation and enforcement of the wide range of criminal offences that are available in relation to terrorism-related activities, and offences in the nature of 'foreign incursions' to undertake violent and other hostile activities in other countries. This includes offences directed specifically to preparatory and ancillary conduct, which can also operate in combination with the extensions of criminal responsibility in Chapter 2 of the Criminal Code (such as attempt, conspiracy and aiding and abetting).

46. The enforcement of these offences is also supported by the exercise of the extensive and greatly expanded range of investigatory powers available to law enforcement and intelligence agencies.

47. However, if the CO regime is to be retained, the Law Council submits that it requires revising and updating to remove elements that are particularly problematic in terms of the proportionality of the regime to the threat of terrorism, and the wider range of foreign incursions offences it now covers. This is particularly the case in relation to outstanding recommendations of previous INSLMs. Any period of further effect should be limited, with statutory requirements for 'pre-sunsetting' reviews.

Recommendation 1 – non-renewal of the control order regime

- **The control order regime in Division 104 of the *Criminal Code Act 1995* (Cth) should not be renewed when it sunsets on 7 September 2021.**

[34] Ibid, subsection 104.5(2). See also subsection 104.5(2A) (factors relevant to the best interests of the child).

Alternative recommendations

Period of effect and statutory pre-sunsetting reviews

48. The Law Council is concerned to ensure that, if the CO regime is retained, any period of renewal should be limited to three years, which is consistent with the previous period of extension.[35] A three-year period of effect will create an opportunity for the Parliament to assess its continuing necessity after a limited period of further operation. The Law Council considers that this level of frequency of Parliamentary review is commensurate with the extraordinary nature of the regime.

49. In general, the Law Council considers that three years is an appropriate maximum period of operation for any renewal of extraordinary national security laws that are subject to sunset clauses, because it effectively mandates the review of those laws once every Parliamentary term.

50. In addition, the Law Council considers that specific statutory provision should be made for the Committee and the INSLM to each conduct a 'pre-sunsetting review' of the CO regime, consistent with established practice. The Law Council considers the practice of dual, statutorily mandated reviews by the Committee and the INSLM provides a participatory, thorough and transparent process for reviewing the continued necessity and appropriateness (or otherwise) of extraordinary laws. A statutory review requirement also assists in providing transparency and assurance to the public about the commencement and conduct of these reviews. It may also assist in the prioritisation of these reviews, and the allocation of resources to them.

Recommendation 2 – three-year extension, subject to statutory reviews

- **If the Committee supports the continuation of the control order regime, it should be subject to a sunset clause enabling it to operate for no more than three years.**
- **The *Intelligence Services Act 2001* (Cth) and the *Independent National Security Legislation Monitor Act 2010* (Cth) should be amended to require both the Committee and the Independent National Security Monitor to review the operation of the control order regime before it ceases to have effect.**

Issuing threshold

Rules for drawing inferences from a person's past conduct

51. The Law Council continues to hold concerns about the application of certain civil rules of evidence in CO proceedings. This pertains to the rules governing the drawing of inferences from a person's past conduct, for the purpose of assessing their future risk in applying the issuing test in section 104.4.

52. As a CO is a civil order, the relevant rule is that the inference must be more probable than not. The Law Council considers that COs are a highly unusual type of civil order which justifies a more conservative approach than is available under the ordinary rules of civil evidence. In particular, the Law Council considers it preferable

[35] *Counter-Terrorism Legislation Amendment Act (No 1) 2018* (Cth), Schedule 1, item 7. See further: Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (February 2018), recommendation 5.

for the criminal rules to apply, namely that the inference must be the only rational inference capable of being drawn from the evidence.[36]

53. This is in view of the following, extraordinary attributes of CO proceedings, which make them fundamentally different to most civil orders:

- the gravity of the consequences of the CO for the individual, in terms of the substantial restraints that can be imposed on their liberties for extended periods of time (which can also serve to stigmatise the person and may impede their rehabilitation)
- the severity of criminal sanctions for contravention (a maximum of five years' imprisonment, which is why COs are often given the informal description of 'quasi-criminal' orders); and
- the inferences drawn in CO proceedings are of a special and unusual kind, as they relate to predictions of future conduct, in often volatile scenarios.

54. The Law Council acknowledges that the third INSLM (in 2017) and the Committee (in 2018) did not support the Law Council's additional recommendation that the criminal standard of proof should apply to the issuing criteria for COs in section 104.4. However, rules governing the drawing of inferences are a separate matter, which was not specifically or substantively addressed in the reports of the third INSLM or Committee.[37]

Recommendation 3 – rules for drawing inferences about future risk

- **If the Committee supports the continuation of the control order regime, the issuing court for a control order, in applying the issuing criteria, should only be permitted to draw an inference about a person's future risk if that inference is the <u>only rational inference</u> able to be drawn from the admissible evidence before the court.**

Outstanding recommendations of the first INSLM

55. The Law Council continues to recommend implementation of outstanding recommendations of the first INSLM, Bret Walker SC, made in 2012. In particular:

- the onus of showing that grounds exist and, if challenged, that they existed when a control order was first made, should clearly be imposed on the authorities applying for confirmation of an interim control order (recommendation II/1); and
- the prerequisites for making an interim control order, including on an urgent basis, should include satisfaction that proceeding *ex parte* is reasonably necessary in order to avoid an unacceptable risk of a terrorist offence being committed were the respondent to be notified before a control is granted (recommendation II/2).[38]

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[36] In a criminal case, see: *Shepherd v R* (1990) 170 CLR 573, 578. In civil cases, see: *Richard Evans & Co Ltd v Astley* [1911] AC 674, 687.

[37] Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, (February 2018), 64-65 at [3.86]-[3.91]; and James Renwick CSC SC, Independent National Security Legislation Monitor, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, (September 2017), 59-62 at [8.42]-[8.61]. While the Committee's report stated, at [3.87], that the Committee 'accept[ed] the INSLM's conclusion that the civil standard of proof and civil rules concerning inferences should continue to apply' the Law Council notes that the third INSLM's conclusions on rules of evidence did not deal with inferences, and his analysis was directed to the separate issue of rules in relation to hearsay evidence in interim and confirmed proceedings.

[38] Bret Walker SC, Independent National Security Legislation Monitor, *Declassified Annual Report 2012*, (December 2012), 7-9.

Recommendation 4 – outstanding recommendations of the first INSLM

- **If the Committee supports the continuation of the control order regime, outstanding recommendations of the first Independent National Security Legislation Monitor should be implemented, with respect to the onus of proof in control order proceedings, and the threshold for conducting such proceedings ex parte.**

Outstanding review recommendations – issuing court, available 'controls' and issuing threshold

56. In May 2018, the Australian Government released a response to the recommendations of the COAG Review (2013) and the second INSLM (2016) with respect to COs. The Government rejected three recommendations of the COAG Review (recommendations 28, 33 and 37) which were endorsed, in full or with variation, by the second INSLM.[39]

57. The Law Council continues to support implementation of those recommendations, as varied by the second INSLM (with some further extension of a recommendation about the appropriate issuing courts for COs). These recommendations are as follows (references to numbers are those of the COAG Review):

    - **Recommendation 28 (issuing court)**: only the Federal Court of Australia should have jurisdiction to issue COs, however, that court should be empowered to remit applications for interim COs to the Federal Circuit Court of Australia;
    - **Recommendation 33 (prohibition on relocation orders)**: paragraph 104.5(3)(a) (the power to impose a control that prohibits or restricts a person from being at a specified area or place) should be amended to expressly exclude the possibility of a condition that amounts to a relocation order, by prohibiting a CO from applying to a person's ordinary residence; and
    - **Recommendation 37 ('least interference' issuing threshold, as varied by the second INSLM to be a 'combined effect' test)**: the issuing test in section 104.5 should be amended to require the court to consider whether the combined effect of all of the proposed 'controls' (that is, the proposed conditions and restrictions under subsection 104.5(3)) is proportionate to the risk being guarded against, in addition to the existing requirement to assess each proposed 'control' individually.

Issuing court

58. The Government stated in May 2018 that it did not support recommendation 28 (as varied by the INSLM) because it favoured 'an approach that provides clarity about whether or not the Federal Circuit Court is an issuing court' for the purpose of CO applications. It considered that the recommendation 'makes the jurisdiction of the Federal Circuit Court unclear and dependent on a decision of the Federal Court'.[40]

59. This reasoning is unpersuasive because it fails to engage with the reasoning of the COAG Review and the second INSLM.

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[39] Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018). See further: COAG Review, *Final report of the COAG review of counter-terrorism legislation* (March 2013); and the Hon Roger Gyles AO, QC, Independent National Security Legislation Monitor, *Control Order Safeguards—Part 2*, (April 2016).

[40] Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018), 14.

60. The COAG Review recommended that the Federal Court was designated as the sole court with jurisdiction to issue a CO, on the basis that 'the gravity of making a control order requires that this jurisdiction be reposed in the Federal Court itself … On balance, we think that judicial comity, fairness and consistency of outcome would be best served by the orders being made in the Federal Court'.[41]

61. The second INSLM also commented, in April 2016, on the 'serious effect that a control order has upon the liberty and life of the controlee' and that:

> *[t]he application of the control order legislation is important for controlees, the authorities and the public. The first contested cases will establish principles and set the pattern. It is best that this be done by one superior court. The Federal Court has a presence in all capitals. If there is no resident judge, an interstate judge can be provided at short notice and a video hearing can take place if necessary. Control order applications have not been a high-volume jurisdiction and that is not likely to change.* [42]

62. Contrary to the suggestion about creating a lack of jurisdictional clarity, the implementation of the recommendations of the COAG Review and the second INSLM would, in fact, create complete certainty about the jurisdiction of the Federal Circuit Court with respect to COs. Namely, there would be an explicit statutory rule that the Federal Circuit Court's jurisdiction was limited to those interim CO applications that were remitted by the Federal Court.

63. The basis for the apparent objection to making the jurisdiction of the Federal Circuit Court contingent upon a remittal decision of the Federal Court was not explained. It may be that the underlying objective was to give the AFP discretion to select the court in which it will make a particular CO application (that is, either the Federal Court or the Federal Circuit Court, as desired in the circumstances).

64. However, a desire by an applicant to retain discretion in the selection of an issuing court is not a legitimate basis for rejecting a recommendation that sought to invest jurisdiction in a superior court, precisely because of the extraordinary nature of COs; the gravity of intrusions into controlees' rights; and the imposition of significant criminal sanctions for contravention.

65. Further, the conferral of highly intrusive surveillance powers for the purpose of monitoring a controlee's compliance with the conditions of a CO, and the reduction in the minimum age of a controlee to 14 years, lends additional support to the need to vest exclusive jurisdiction for the issuance of COs in a superior court.

Additional conferral of jurisdiction on State and Territory Supreme Courts

66. In addition to the recommendations of the COAG Review and second INSLM, the Law Council considers that there remains a compelling case for State and Territory Supreme Courts to have jurisdiction in relation to COs. This would have the effect of confining jurisdiction for COs to superior courts (Federal, State and Territory).

67. The conferral of jurisdiction on State and Territory Supreme Courts is appropriate because it reflects the close connection of many COs to the criminal process (namely, their significant use in the post-sentence context). It is also compatible with the degree of scrutiny required of evidence in support of a CO application, and the gravity of the consequences of a CO for the respondent.

[41] COAG Review, *Final report of the COAG review of counter-terrorism legislation* (March 2013), 58 at [231].
[42] The Hon Roger Gyles AO QC, INSLM, *Control order safeguards: Part 2*, (April 2016), 8 at [6.6] and [6.7].

68. The Law Council would therefore prefer to see exclusive jurisdiction invested in superior courts (and ideally including State and Territory Supreme Courts as well as the Federal Court).

69. However, the Law Council would not object to the implementation of the recommendation of the second INSLM for the Federal Court to have a power of remittal to the Federal Circuit Court in appropriate cases. (For example, orders or variations in non-contested cases whose facts are relatively straightforward, in which the AFP does not seek to withhold information from the respondent.)

Express prohibition on relocation orders

70. With respect to recommendation 33, the Government stated in May 2018 that implementation of the recommendation was 'not necessary' on the basis that paragraph 104.5(3)(a) does not confer an 'express power that would allow for the relocation of a control order subject'.[43]

71. The Law Council is similarly concerned that this statement does not demonstrate an appreciation of the underlying concern raised by the COAG Review and second INSLM – namely, that the reference in paragraph 104.5(3)(a) to 'a specified place' (for the purpose of a prohibition or restriction on the person's presence at that place) could include a person's place of residence.

72. The Law Council acknowledges that a legal argument could be attempted that the meaning of the word 'place' in paragraph 104.5(3)(a) should be read as excluding a person's place of residence. Presumably, that argument would be based on the principle of legality in statutory interpretation.

73. However, the availability and prospects of any such argument is beside the point. The COAG Review and second INSLM expressly identified that their rationale was to make explicit, on the face of the statute, that relocation orders could not be issued, in order to place the matter beyond any doubt or argument, so that any need to appeal to contestable principles of statutory interpretation could be avoided entirely. This would remove any risk of confusion or misinterpretation in future, which may lead to the wastage of resources in making, contesting and rejecting an application for a CO containing a condition that amounts to *de facto* compulsory relocation.[44]

74. There is no discernible harm from the insertion of an 'avoidance of doubt' styled provision in relation to paragraph 104.5(3)(a), or simply the inclusion of a statutory note to this effect. Rather, the making of the extremely simple amendment recommended by the COAG Review nearly a decade ago would provide the strongest possible safeguard that the policy intent about the scope of the provision is given consistent effect in all CO applications. The balance of considerations tend overwhelmingly in favour of implementing the recommendation, and putting this outstanding matter to rest.

Issuing threshold – cumulative impact assessment

75. The Government stated in May 2018 that the second INSLM's recommendation for an additional issuing test, requiring consideration of the cumulative impact of all

[43] Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018), 17.

[44] See further: COAG Review, *Final report of the COAG review of counter-terrorism legislation* (March 2013), 62 at [241]: 'These recommendations will ensure that there can be no suggestion in any circumstance that a residential order will result in the relocation of a person'; and the Hon Roger Gyles AO QC, INSLM, *Control order safeguards: Part 2*, (April 2016), 15 at [10.4]: 'the wording of the section would literally permit de facto relocation by excluding the place of residence of the controlee. It is preferable to spell out the position as recommended in the COAG Review'.

controls on the person not merely an assessment of the proportionality of each individual control, 'would add complexity to the control order provisions'.[45]

76. This statement does not provide a coherent basis for declining to implement the recommendation. The resolution of legal and factual complexity is an inherent part of the judicial function and, accordingly, courts are well equipped to resolve such matters with expertise and efficiency. Moreover, as the second INSLM pointed out, the exposure of a controlee to intrusive compliance monitoring conditions makes it appropriate to adopt a higher degree of rigour in the issuing criteria for COs.[46]

Recommendation 5 – implementation of outstanding review recommendations

- **If the Committee supports the continuation of the control order regime, the following outstanding recommendations of the COAG Review of Counter-Terrorism Legislation (in 2013) and second Independent National Security Legislation Monitor (in 2016) should be implemented, via amendments to Division 104 of the *Criminal Code Act 1995* (Cth):**
  - **COAG Review recommendation 28, as varied by the second INSLM (definition of 'issuing court' as the Federal Court of Australia, with the discretion to remit applications for interim control orders to the Federal Circuit Court of Australia). Further consideration should be given to conferring jurisdiction on State and Territory Supreme Courts (with the result that CO jurisdiction is vested exclusively in superior courts, subject only to the limited power of the Federal Court to remit matters).**
  - **COAG Review recommendation 33, as endorsed by the second INSLM (an express prohibition on relocation orders, to place this matter beyond any doubt); and**
  - **COAG Review recommendation 37, as varied by the second INSLM (an issuing test requiring the issuing court to consider whether the combined effect of all of the proposed controls is proportionate to the risk being guarded against, in addition to assessing each control individually).**

Interaction between control orders and continuing detention orders

77. The Law Council welcomes the recent introduction of the HRTO Bill, to the extent it seeks to implement the recommendations of the third INSLM for an ESO regime. (However, the Law Council also notes that, if a State or Territory Supreme Court had jurisdiction to issue a CO, a separate ESO regime would likely be unnecessary.)

78. The Law Council will comment on the substantive provisions of the proposed ESO regime as part of its separate policy advocacy on the HRTO Bill. However, for the purpose of interaction issues arising in the present inquiry, the Law Council considers that the proposed extension of the special advocates regime in the NSI Act to ESO proceedings bolsters the case it has previously advanced for the establishment of an independent office to administer the special advocates regime.[47]

79. The Law Council also considers that there is force in an argument that the CO regime may no longer be required once an appropriate ESO regime is implemented.

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[45] Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018), 19.

[46] The Hon Roger Gyles AO QC, INSLM, *Control order safeguards: Part 2*, (April 2016), 18 at [13.7].

[47] See further: Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, (November 2017), 12-13 at [33].

As noted above, 10 of the 16 COs issued to date (as at September 2020) were made at the post-sentence stage. The Law Council considers that the future risks presented by persons without a prior conviction can be managed adequately via the investigation and enforcement of the preparatory and ancillary terrorism offences.

Recommendation 6 – establishment of an independent office to administer the special advocates regime

- **The Government should establish an independent office to administer the special advocates regime, including the appointment of special advocates and the provision of administrative support to special advocates.**
- **The office should be independent to all security agencies and government departments. The office-holder could be supported by staff employed by government departments under the *Public Service Act 1999* (Cth), provided that there are appropriate administrative arrangements to ensure their independence (as occurs with the administrative and professional staff supporting the Independent National Security Legislation Monitor).**
- **Consideration could be given to conferring this function on legal aid commissions, contingent on the provision of adequate additional resourcing.**
- **Resourcing for this function should not be drawn from existing legal assistance budgets, or the budgets of the federal courts, the administrative appeals tribunal, or oversight bodies.**

Monitoring powers

80. The Law Council has previously expressed concerns that the broad range of monitoring powers available to determine **whether** a breach of a CO has occurred, rather than a serious criminal offence has taken place, is likely to be a disproportionate response under human rights law.[48]

81. The Law Council's primary recommendation remains that these monitoring powers should be repealed. In the alternative, the Law Council continues to advocate for the amendments to issuing thresholds and scope of the powers it raised in its 2017 submission to the Committee, namely, that:

- sections 3ZZOA and 3ZZOB of the Crimes Act, which enable a constable to apply for a warrant in relation to a premises and a person respectively, should be amended to require that there must be at least a 'reasonable suspicion' that the CO is not being complied with or that the individual is engaged in terrorist-related activity;
- if entry into premises of a person subject to a CO is with an occupier's consent, a constable must leave the premises if the consent ceases to have effect.[49] In this regard, the Law Council's view is that subsection 3ZZNA(1) of the Crimes Act should be amended to include the words 'or express consent subject to limitations' to reflect the position that an occupier may refuse consent or express consent subject to limitations. This will help to ensure that an occupier is properly informed of his or her rights to refuse or express consent to having their premises searched by a police officer;
- the following provisions are unnecessary and should be repealed:

[48] Ibid, 13-14 at [36].

[49] Section 3ZZKA Crimes Act, read in conjunction with s 3ZZNA Crimes Act.

- paragraph 3ZZKF(2)(b) of the Crimes Act, which enables a constable who has entered premises, where the entry is authorised by a monitoring warrant, to conduct an ordinary search or a frisk search of a person; and

- subsection 3ZZLC(2), which enables a constable conducting a search authorised by a monitoring warrant to seize things found in the course of the search;

- subsection 3ZZNF(4) of the Crimes Act, which sets out the way in which compensation for damage to electronic equipment is determined, should be amended to insert 'were given the opportunity to provide any known appropriate warning or guidance on the operation of the equipment and if so' before the words 'provided any appropriate warning or guidance'; and
- the provisions of the *Surveillance Devices Act 2004* (Cth) that enable informers to use a surveillance device without a warrant for the purpose of monitoring CO compliance should be repealed.[50]

Recommendation 7 – repeal of control order monitoring powers

Preferred option

- **If the Committee supports the continuation of the control order regime, the monitoring powers under the *Crimes Act 1914* (Cth). *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2004* (Cth) and related legislation should be repealed. These investigatory powers should only be available to investigate suspected offences for the contravention of control order conditions, provided that the relevant legislative thresholds are met.**

Alternative option

- **If the CO monitoring powers are to remain in force, the legislative amendments listed at paragraph [81] of the Law Council's submission should be implemented. Equivalent amendments should be made to the proposed extension of monitoring powers to data that is stored offshore, under the Telecommunications Legislation Amendment (International Production Orders) Bill 2020.**

Financial assistance in relation to control orders

82. The Law Council welcomed the amendments made in 2018 to implement recommendations of third INSLM in relation to costs orders against controlees. Namely, a court must not award costs against a controlee in relation to CO proceedings, unless they have acted unreasonably in the conduct of those proceedings. In that event, costs may only be awarded against the controlee to the extent of their unreasonable conduct.[51]

83. The Law Council also supports the requirement in subsection 104.28(4) of the Criminal Code for children who are aged under 18 years and are the subject of a CO

[50] Law Council of Australia, *Stop, search and seizure powers, declared areas, preventative detention orders and continuing detention orders* (12 May 2017) pp. 20-21 and pp. 26-27.

[51] Criminal Code, section 104.28AA, inserted by the *Counter-Terrorism Legislation Amendment Act (No 1) 2018* (Cth). See also: James Renwick CSC SC, INSLM, *Review of Divisions 104 and 105 of the Criminal Code*, (September 2017), 63-64 at [8.64]-[8.71]; and Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (February 2018), 72-73 at [3.115]-[3.118].

application. The court is required to appoint a lawyer for any such children who are unrepresented.[52]

84. However, the third INSLM also recommended in 2017 that the Attorney-General give further consideration to the adequacy of legal aid for all controlees in CO proceedings. This recommendation responded to significant concerns raised by the Law Council about inadequacies in existing arrangements.

85. In evidence to the INSLM and Committee in 2017, the Law Council gave an example from one matter in 2016, *Gaughan v Causevic,*[53] in which legal aid was not available under the Expensive Criminal Cases Fund, and an application for Commonwealth legal assistance funding was refused on the basis of that the case did not involve any novel points of law. The Law Council expressed concern about the resultant risk of inequality of arms as between a controlee and the AFP (whose counsel are paid Commonwealth rates). The Law Council noted that this may ultimately reduce the level of scrutiny given to CO applications, if the respondent does not have a properly resourced and experienced lawyer to act as a contradictor. There is also a danger that the court will not receive the assistance it requires when considering whether a CO should be issued.[54]

86. In response to the INSLM's recommendation, the Government stated in May 2018 that the Attorney-General would 'further consider' the matter.[55] However, the outcomes of any such consideration do not appear to have been announced. The joint submission of the Department of Home Affairs, Attorney-General's Department and the AFP to the present inquiry also provides no information on this matter.

87. Further, the Law Council is not aware of any specific changes to legal aid or wider legal assistance funding in relation to CO proceedings. The *National Legal Assistance Partnership Agreement 2020-2025* does not identify CO proceedings among the priorities for legal assistance in relation to Commonwealth civil law matters.[56] It appears to remain the case that there is no dedicated Commonwealth legal financial assistance funding scheme for respondents to CO proceedings.[57]

88. Accordingly, the Law Council continues to recommend the allocation of specific Commonwealth funding to ensure that legal aid is available to all respondents in CO proceedings, akin to existing legal aid arrangements for complex criminal cases. As an alternative, consideration could be given to establishing a specific Commonwealth legal financial assistance scheme for COs, administered by the Attorney-General.

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[52] See also: Criminal Code Regulations 2019, regulations 5-7, which set out the procedural arrangements for issuing courts to request legal aid commissions to represent young persons, and obligations on the AFP to inform the legal aid commission, the young person and a parent or guardian of the court's request to the legal aid commission, and provide contact information to them.

[53] *Gaughan v Causevic* [2016] FCCA 397 (24 February 2016, Hartnett J); and *Gaughan v Causevic (No 2)* [2016] FCCA 1693 (8 July 2016, Hartnett J).

[54] Law Council of Australia, *Submission to the Independent National Security Legislation Monitor inquiry into stop, search and seizure powers, declared areas, control orders, preventative detention orders and continuing detention orders* (May 2017). 25-25 at [82]-[83] and 40-41 at [5]-[6] (Annexure A, Memorandum from Dr David Neal SC, Defence Counsel in *Gaughan v Causevic* [2016] FCCA 1693).

[55] Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018), 7.

[56] *National Legal Assistance Partnership Agreement 2020-2025*, Schedule A (Commonwealth priorities), especially at page A-3, paragraphs [A15]-[A17] (Commonwealth civil and criminal law priorities).

[57] Attorney-General's Department, *Commonwealth legal financial assistance*, website, <https://www.ag.gov.au/legal-system/legal-assistance/commonwealth-legal-financial-assistance>.

Recommendation 8 – a rights-based approach to legal assistance for COs

- **If the Committee supports the continuation of the control order regime, legal assistance funding should be available to <u>all persons</u> who are the subject of a control order application.**
- **In particular, consideration should be given to delivering this financial assistance through State and Territory legal aid commissions, akin to the arrangements for complex criminal cases.**

Preventative detention orders

89. The PDO regime is established under Division 105 of the Criminal Code. A PDO is an order authorising police to take a person into custody and detain them for up to 48 hours, for the purpose of:
    - preventing the commission of a terrorist act that is capable of being carried out, and could occur, within the next 14 days; or
    - preserving evidence of, or relating to, a terrorist act that occurred in the previous 28 days.[58]
90. There are two types of PDOs. 'Initial PDOs' are issued by a senior AFP member and authorise detention for up to 24 hours.[59] 'Continued PDOs' are issued by an 'issuing authority' (primarily a retired or serving judge in their personal capacity) and authorise detention for a further 24 hours (48 hours in total).[60]
91. Prohibited contact orders may also be made to prevent a person being detained under a PDO from contacting persons specified in the order.[61] A person is entitled to have contact with a lawyer, and may also make complaints to the Commonwealth Ombudsman.[62] There is a right to merits review of a decision to issue a PDO in the Administrative Appeals Tribunal.[63]
92. The issuance of a PDO is not based on the fact that a person is suspected, alleged or proven to have committed an offence, but rather on the basis that they have some involvement in an imminent or recently completed terrorist act. This means that the PDO regime can target people with merely peripheral involvement.
93. Based on the Law Council's review of publicly available information, no PDOs appear to have been issued under Division 105 of the Criminal Code from its enactment in 2005 to September 2020.

Necessity of the regime

94. The Law Council remains of the view that there is no persuasive case for retaining the PDO regime beyond the sunset date of 7 September 2021. Detaining a person other than as part of a criminal sentence following conviction of an offence, or as part of the process of arrest and investigative questioning in relation to the suspected commission of an offence, is a highly extraordinary measure. The Committee noted in 2018 that no comparable power existed in any other jurisdiction in the Five Eyes alliance (the United States, United Kingdom, Canada and New

[58] Criminal Code, section 105.4.
[59] Ibid, section 105.8.
[60] Ibid, section 105.12.
[61] Ibid, sections 105.15 and 105.16.
[62] Ibid, sections 105.36 and 105.37.
[63] Ibid, section 105.51.

Zealand).[64] Serious doubts remain about its constitutionality and human rights compatibility.

95. In addition, the Commonwealth PDO regime has never been used in approximately 15 years of operation. The inaugural INSLM commented in 2012 that his review of AFP files indicated that its use had never been seriously contemplated at that time,[65] and no subsequent evidence has emerged to suggest that serious consideration was given to issuing a Commonwealth PDO.[66]

96. Further, significant amendments have been made to the investigatory powers of law enforcement and intelligence agencies.[67] These powers increase the likelihood of the AFP meeting the threshold for arrest, and post-arrest detention for investigative questioning under Part 1C of the Crimes Act. This casts further doubt on the continued need for PDOs. It strengthens the force in the conclusion of the inaugural INSLM that PDOs would offer no benefit beyond the wide range of existing counter-terrorism powers available to security agencies.[68]

Recommendation 9 – non-renewal of preventative detention orders

- **The operation of the preventative detention order regime in Division 105 of the *Criminal Code Act 1995* (Cth) should not be renewed after the sunset date of 7 September 2021.**

Alternative recommendations

97. If the Committee supports the extension of PDOs, the Law Council makes several alternative recommendations (outlined below).

98. However, the Law Council emphasises that its preferred position is for the PDO regime to sunset in 2021 without any further renewal. The Law Council's alternative recommendations for amendments to specific provisions of Division 105 of the Criminal Code could only lessen, rather than cure, the problems inherent in the concept of executive detention for preventive purposes.

Period of effect and statutory 'pre-sunsetting' reviews

99. The Law Council notes the caution expressed by the third INSLM that the considerations tending against, and in support of, retaining the PDO regime are complex.[69]

100. The Law Council considers that the Committee's reasoning for a further, limited period of operation of three years remains applicable, if the regime is to continue in

[64] Parliamentary Joint Committee on Intelligence and Security, *2018 review report*, 95-96 at [4.52] and 102 at [4.72]

[65] Bret Walker SC, *Declassified annual report 2012* (December 2012), 45.

[66] In fact, the third INSLM reported that 'as the AFP acknowledged at the public hearing, the PDO regime in Div 105 is of significantly less utility than the complementary regimes which are in force pursuant to State and Territory legislation … [T]here is a real question as to whether the regime in Div 105 will ever be used in preference to a State or Territory PDO'. James Renwick CSC SC, INSLM, *Review of Divisions 104 and 105 of the Criminal Code*, (September 2017), 80 at [10.10].

[67] For example, the arrest threshold was lowered in 2014 by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*. The issuing criteria for control orders were expanded by the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014*. Significant expansions to agencies' investigatory powers were enacted by the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) including conferring warrant-based computer access powers on law enforcement agencies. Further proposed amendments are before the Parliament to make it easier for law enforcement agencies and ASIO to obtain data held offshore: Telecommunications Legislation Amendment (International Production Orders) Bill 2020.

[68] Bret Walker SC, *Declassified annual report 2012* (December 2012), 67.

[69] James Renwick CSC SC, *Report on CO and PDO reviews*, (September 2017), 80 at [10.13].

force (contrary to the Law Council's primary recommendation for it to sunset in 2021 without renewal). Consistent with the established practice arising from the previous review of the PDO regime by the Committee, any further period of operation should not exceed three years.[70]

101. The Committee and the INSLM should also be required to undertake statutory 'pre-sunsetting' reviews to assess whether the PDO regime remains necessary, effective and compatible with human rights requirements.

102. A statutory review requirement is preferable to discretionary review (such as under the INSLM's own motion power, or a referral to the Committee by a Minister or House of Parliament). A statutory review requirement will provide certainty to stakeholders that the extraordinary powers of detention in Division 105 will be reviewed and will not merely be left to discretion in the future, subject to any competing workload demands. Similarly, a statutory review requirement will assist in forecasting and managing the respective workloads of the Committee and INSLM and may also assist in determining their resourcing requirements.

Recommendation 10 – three-year extension, subject to statutory reviews

- **If the Committee supports the continuation of the preventative detention order regime, it should be subject to a sunset clause enabling it to operate for no more than three years.**
- **The *Intelligence Services Act 2001* (Cth) and the *Independent National Security Legislation Monitor Act 2010* (Cth) should be amended to require both the Committee and the Independent National Security Monitor to review the operation of the preventative detention order regime before it ceases to have effect.**

Issuing threshold

103. Presently, subsection 105.4(5) provides that, for a PDO to be issued for the purpose of protecting the public from a terrorist act, the issuing authority must be satisfied that there are reasonable grounds on which to suspect that the relevant terrorist act is capable of being carried out, and could occur, within the next 14 days.

104. The Law Council maintains its previous submissions to the Committee in 2017 that this issuing threshold is too low. The Law Council continues to support an issuing threshold that requires reasonable satisfaction that the terrorist act is **likely** to occur within the next 14 days.

105. Importantly, this should not be conflated with a requirement to suspect that the terrorist act **will occur**. Rather, the Law Council's recommendation is for a statutory requirement to show that there is at least a **fair or reasonable probability of it occurring**, to the exclusion of a possibility that is merely theoretical.[71]

106. The Law Council acknowledges that the Committee, in its previous review, supported the view of the third INSLM that the Law Council's recommendation may not be practicable, as it may be difficult for police to establish a threshold of likelihood (that is, a terrorist act 'is likely to occur') as opposed to a bare possibility (that is, a terrorist act 'could occur'). [72]

107. However, the Law Council considers that a higher threshold is needed to ensure the proportionality of a power of detention for preventive purposes. The Law Council

[70] PJCIS, *2018 review report*, 103 at [4.81].

[71] Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, (November 2017), 14-15 at [37]-[42].

[72] PJCIS, *2018 review report*, 100-102 at [4.66]-[4.71].

also emphasises that, consistent with the ordinary principles of statutory interpretation, the meaning of the word 'likely' in the issuing threshold would be interpreted by reference to the context and purpose of the PDO regime. That is, the PDO regime is directed to the purpose of predicting, and attempting to mitigate, the future risk of a terrorist act, in circumstances of considerable urgency.[73]

108. Moreover, the assessment of a 'likelihood' must be read in combination with the requirement for the issuing authority to be satisfied that there are **reasonable grounds on which to hold a suspicion** that a terrorist act is likely to be carried out at some point within the next 14 days. This is a lower threshold than a requirement to prove that such an event **is likely** to occur in the next 14 days.

Recommendation 11 – likelihood of terrorist act being carried out

- **If the Committee supports the continuation of the preventative detention order regime, the issuing threshold in subsection 105.4(5) of the *Criminal Code Act 1995* (Cth) should be amended in relation to preventative detention orders that are issued for the purpose of preventing an imminent terrorist act.**
- **The threshold should be that the issuing authority is reasonably satisfied that a terrorist act is <u>likely to occur</u> in the next 14 days, and not merely that a terrorist act could occur in the next 14 days.**

Prohibition on investigative questioning of persons in preventative detention

109. Section 105.42 of the Criminal Code expressly prohibits police from conducting investigative questioning of a person who is being detained under a PDO (for example, questioning about an apprehended or completed terrorist act, or other terrorism or security related offences). Rather, for any questioning to occur, the person would need to be released from detention under the PDO, and immediately arrested on suspicion of an offence and questioned under the separate authority of Part 1C of the Crimes Act.[74] This is an important safeguard to ensure that the PDO regime can only be used for preventive rather than punitive purposes (such as in connection with the investigation of an offence).

110. The Law Council notes that the Committee's previous review canvassed the possibility of conferring power on police to conduct investigative questioning of persons being detained under a PDO, but ultimately made no recommendations on this matter.[75] There is likely to be significant doubt about the constitutionality of an investigatory questioning power under the Commonwealth PDO regime, in addition to doubt about the human rights compatibility of such a measure.

111. While New South Wales has enacted legislation enabling the investigative questioning of persons who are detained for preventive purposes,[76] the Law Council continues to strongly oppose the conferral of an equivalent power under Commonwealth laws. The constitutional separation of judicial and non-judicial powers is more rigid at Commonwealth level than at State level. In addition, it is preferable that a person who is under investigative questioning is dealt with under the established processes and attendant safeguards applicable to post-arrest questioning under Part 1C of the Crimes Act.

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[73] The Law Council also notes that the concept of 'likelihood' is readily amenable to judicial interpretation. For example, there is ample precedent in the context of the elements of the offence of murder at common law, constituted by an act that is carried out recklessly (that is, knowing that someone will probably die or suffer really serious injury). It has been held that word 'probable' means 'likely to happen', which can be contrasted with something that is merely 'possible': *R v Crabbe* (1985)156 CLR 464.

[74] Criminal Code, section 105.26.

[75] PJCIS, 2018 review report, 95-96 at [4.49]-[4.54].

[76] *Terrorism (Police Powers) Act 2002* (NSW), Part 2AA ('investigative detention').

Recommendation 12 – retention of prohibition on investigative questioning

- **If the Committee supports the continuation of the preventative detention order regime, the prohibition on questioning a person for investigative purposes in section 105.42 of the *Criminal Code Act 1995* (Cth) should be retained.**

Minimum age of persons who may be subject to a preventative detention order

112. PDOs may only be issued in relation to a person who is at least 16 years of age. The Law Council submits that this threshold should not be lowered, as has occurred with COs[77] and is proposed for ASIO's compulsory questioning warrants.[78]

113. While the Law Council acknowledges that young persons aged below 16 years may legitimately be the targets of security investigations by law enforcement and intelligence agencies, it does not follow automatically that a power of preventive detention is necessary, reasonable or proportionate. Detention is even more intrusive than a CO, in that the subject's rights to freedom of movement are abrogated in entirety while they are detained under the PDO. The conditions of a person's detention under a PDO may be particularly harsh and confronting for a young child (for example, at a State or Territory remand centre or prison, as provided for in section 105.27).

114. To use the words of the second INSLM, in support of his recommendation for the repeal of ASIO's questioning-and-detention warrants, the detention of 14 or 15 year-old children who may not necessarily be suspected of having committed a terrorism offence for up to 48 hours is 'a step too far'.[79]

Recommendation 13 – no reduction in minimum age

- **If the Committee supports the continuation of the preventative detention order regime, there should be no reduction in the minimum age of persons who may be subject to preventative detention orders (being 16 years).**

Maximum duration of preventative detention orders

115. A person may be detained under a PDO for a maximum of 48 hours.[80] However, PDOs issued under corresponding State or Territory legislation authorise the detention of a person for up to 14 days.[81] In 2005, the differences in maximum durations were attributed to constitutional limitations for the Commonwealth, arising from the separation of judicial and non-judicial powers under Chapter III of the Constitution.[82] If the Commonwealth PDO regime is retained, the Law Council considers there should be no increase to the maximum period of detention.

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[77] Criminal Code, subsection 104.28(1).

[78] Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, item 10, inserting proposed section 34BB of the *Australian Security Intelligence Organisation Act 1979* (Cth) (minor questioning warrants).

[79] The Hon Roger Gyles AO QC, *Report on Certain Questioning and Detention Powers in Relation to Terrorism*, (February 2017), 41 at [9.10].

[80] Criminal Code, subsection 105.12(5).

[81] *Terrorism (Police Powers) Act 2002* (NSW); *Terrorism (Community Protection) Act 2003* (Vic); *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2006* (WA); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Emergency Powers) Act 2006* (NT); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT).

[82] Council of Australian Governments, *Meeting Communique*, 27 September 2005, 4. ('State and Territory leaders agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days.')

Recommendation 14 – no increase to maximum duration of detention

- **If the Committee supports the continuation of the preventative detention order regime, there should be no reduction in the maximum duration of a preventative detention order (being 48 hours).**

Information that must be given to persons in preventative detention

116. In 2013, the COAG Review recommended that the CO regime should be amended to require police to give a person who is subject to a CO application 'sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations'.[83]

117. This was ultimately implemented via the enactment of paragraph 38J(1)(c) of the NSI Act in 2016. The effect of this provision is that, in proceedings concerning the issuing, confirmation or variation of a CO, a court may only make an order withholding national security related information from the respondent (the controlee), if the court is satisfied that the respondent has been given sufficient information about the allegations on which the application was based to enable them to give effective instructions to in relation to those allegations.

118. The Law Council considers that the same need arises for a PDO subject to be given an adequate amount of information about not only the terms of the PDO,[84] but also the basis for its issuance, to enable them to give effective instructions to their lawyer, in order to obtain advice or commence proceedings in relation to the decision to issue the PDO, or actions taken in purported reliance on the authority of the PDO. A person's ability to access effective legal advice and assistance necessarily requires them to have sufficient information to provide instructions.

119. Access to effective legal advice is particularly important because initial PDOs are issued internally by senior AFP members. Such access is also important in view of the extensive secrecy offences in relation to PDOs in section 105.41, which make it unlikely that the public or Parliament would otherwise find out about errors, illegality or impropriety in the issuing or execution of PDOs.

Recommendation 15 – 'sufficient information' requirement

- **If the Committee supports the continuation of the preventative detention order regime, Division 105 of the *Criminal Code Act 1995* (Cth) should be amended to insert an equivalent requirement to that in paragraph 38J(1)(c) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) in relation to the disclosure of information to the subject of an order.**
- **That is, the police officer executing a preventative detention order should be required to give the subject of that order sufficient information to enable them to issue instructions to a lawyer to obtain advice or commence proceedings in relation to the order, or both.**

Monitoring confidential lawyer-client communications

120. Section 105.38 of the Criminal Code provides that police may monitor the communications between a person being detained under a PDO and their lawyer (together with communications between the PDO subject and a family member who they are permitted to contact). There is a use immunity in relation to the PDO

[83] COAG Review, *Final report of the COAG review of counter-terrorism legislation* (March 2013), recommendation 31.

[84] Criminal Code, section 105.32 (a person must be given a copy of the PDO).

subject, which means that information obtained from monitoring confidential communications cannot be admitted in evidence in criminal or civil proceedings against that person.

121. The Law Council considers that section 105.38 should not apply to confidential lawyer-client communications. The provision abrogates lawyer-client confidentiality. It does not provide any protection against the derivative use of information obtained from confidential lawyer-client communications against the PDO subject. Further, it does not prevent such information from being used directly against other persons.

122. It is particularly concerning that it would be open to the Commonwealth to make derivative use of information obtained from monitoring confidential lawyer-client communications in order to defend a challenge brought by the PDO subject to the issuing of the PDO, or action taken under the PDO.

123. The Law Council notes that the compulsory questioning provisions of the ASIO Act presently contain a power to monitor confidential lawyer-client communications of persons who are being compulsorily questioned under that regime.[85] However, that provision has been removed from the proposed re-designed compulsory questioning regime. The relevant amending legislation was being considered by the Parliament at the time of writing this submission.[86]

124. The Law Council submits that there is no compelling reason for the PDO regime to take a different approach to that in the proposed amendments to the ASIO Act noted above. This is especially important given the possibility that a person could be transferred from detention under a PDO, into compulsory questioning under an ASIO warrant, or the reverse.

Recommendation 16 – prohibition on monitoring lawyer-client communications

- **If the Committee supports the continuation of the preventative detention order regime, section 105.38 of the *Criminal Code Act 1995* (Cth) should be repealed to the extent of its application to lawyer-client communications, so that there is no power to monitor confidential communications between a person who is being detained under a preventative detention order and their lawyer.**

Issuing authorities

125. A senior AFP member is authorised to issue an 'initial PDO' that authorises the immediate detention of a person for up to 24 hours. Any further detention, up to a further 24 hours (or 48 hours in total), must be authorised by an 'issuing officer' who has been appointed by the Attorney-General. Issuing officers must be a retired or serving judge of the Federal Court, Federal Circuit Court or a State or Territory superior court; or a serving Presidential or Deputy Presidential member of the Administrative Appeals Tribunal.[87]

126. The Law Council notes that, since the enactment of the PDO regime in 2005, there has been strong recognition of the importance of independent issuing authorities for the intrusive and coercive powers conferred on security agencies. For example, the third INSLM considered that the independent issuing of the extraordinary powers conferred on, or for the benefit of, security agencies to compel private

[85] *Australian Security Intelligence Organisation Act 1979* (Cth), subsection 34ZQ(2).

[86] Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1. See also: Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of the Australian Security Intelligence Organisation Amendment Bill 2020* (July 2020), 20 at [50].

[87] Criminal Code, sections 100.1 (definition of issuing authority), 105.2 (appointment of issuing authorities), 105.8 (issuing initial PDOs) and 105.12 (issuing continued PDOs).

communications providers to render certain assistance to was essential to the proportionality of that regime [88]

127. The Law Council has long supported the independent issuing of all intrusive or coercive powers conferred on security and law enforcement agencies. If PDOs are to be retained, the power to issue an initial PDO (as well as a continuing PDO) should be conferred exclusively on 'issuing authorities' as presently defined in section 100.1 of the Criminal Code (being retired or serving judicial officers and Presidential and Deputy Presidential AAT members, who are appointed by the Attorney-General). This would ensure an appropriate degree of independence in the exercise of the extraordinary powers of detention under Division 105.

128. There is no reason that an application cannot be made and issued on an urgent basis, with appropriate administrative arrangements in place to ensure the availability of issuing authorities and facilities.

Recommendation 17 – independent issuing authorities for 'initial preventative detention orders'

- **If the Committee supports the continuation of the preventative detention order regime, consideration should be given to amending the definition of an 'issuing authority' for a preventative detention order in section 100.1 of the *Criminal Code Act 1995* (Cth) to remove the power of senior AFP members to issue initial preventative detention orders to detain people for up to 24 hours.**
- **There should be no expansion of the classes of persons who are eligible to be appointed as issuing authorities for preventative detention orders.**

Maximum penalty for the offence of contravening safeguards

129. Section 105.45 of the Criminal Code contains an offence for police and other persons exercising authority under a PDO, if they intentionally engage in conduct, and are reckless as to the circumstance that they are contravening one of the following statutory obligations in relation to the treatment of a person being detained under a PDO:

- the duty to inform the person of certain matters, including:
  - the effect of the order and their rights and obligations: subsections 105.28(1) and 105.29(1); and
  - the extension of a PDO (permitted up to the statutory maximum duration): section 105.30;
- the obligation on all persons enforcing or implementing a PDO to treat the subject with humanity and respect for human dignity, and not to subject them to cruel, inhuman or degrading treatment: section 105.33
- a special obligation in relation to persons aged 16 or 17 years, to segregate them from adults while in detention under a PDO: section 105.33A;
- breaching the prohibition on investigative questioning of a person being detained under a PDO: section 105.42; and
- contravening prohibitions on taking sensitive identification material from vulnerable persons, such as children, without judicial authorisation (for example, fingerprints, recordings, samples of handwriting or photographs),

[88] James Renwick SC, *Trust but verify: a report concerning the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and related matters*, (June 2020), 188-203 and recommendations 3-6.

or using that identification material for any purpose other than confirming the identity of the PDO subject: sections 105.43 and 105.44.

130. The offence in section 105.45 is punishable by a maximum penalty of two years' imprisonment. In contrast, section 105.41 contains a secrecy offence that applies to PDO subjects (and others, such as lawyers, to whom information is lawfully disclosed) who make an unauthorised disclosure of the existence of the PDO or information about the PDO (such as the fact the person is being detained, or the period of detention). This offence is punishable by a maximum penalty of five years' imprisonment.

131. The Law Council considers that there is no rational basis for this disparity in maximum penalties. The present disparity sends a signal to sentencing courts and the wider community that the actions of an official who **knowingly or recklessly** contravenes significant statutory safeguards—including obligations to treat a detained person humanely; to refrain from conducting investigative questioning; and to segregate children from adults in places of detention—are **less culpable** than the actions of a person who discloses information about the existence of a PDO (even if no harm eventuates from the disclosure).

132. The Law Council considers that both types of offending can involve an equal degree of moral culpability, and this should be recognised by increasing the maximum penalty applicable to the offence in section 105.45 for contravention of safeguards, so that it is aligned with the disclosure offence in section 105.41 (five years' imprisonment).

133. The Law Council notes that the first INLSM, Bret Walker SC, made similar recommendations in relation to a disparity in the maximum penalties for corresponding offence provisions in the compulsory questioning scheme in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth). Mr Walker also recommended alignment of the maximum penalties for these offences.[89] The Law Council has separately called for the first INSLM's recommendation to be implemented in relation to proposed legislation to re-design ASIO's compulsory questioning regime.[90] The Law Council supports the implementation of an equivalent approach to the same type of offences applying to the PDO regime.

Recommendation 18 – alignment of maximum penalties for PDO offences

- **If the Committee supports the continuation of the preventative detention order regime, Division 105 of the *Criminal Code Act 1995* (Cth) should be amended to align the maximum penalties for the offences in section 105.45 (officials who contravene safeguards, including the humane treatment obligation) and the offences in section 105.41 (disclosure offences by preventative detention order subjects and others).**
- **Both offences should be subject to a maximum penalty of five years' imprisonment, to reflect that they involve an equal degree of culpability.**

[89] Bret Walker SC, INSLM, *Declassified annual report 2012* (December 2012), 80-81,recommendation IV/4.

[90] Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Australian Security Intelligence Organisation Amendment Bill 2020*, (July 2020), 83-84.

Stop, search and seizure powers under Division 3A of Part 1AA of the Crimes Act 1914 ('Division 3A powers')

Powers in Commonwealth places and 'prescribed security zones' (Crimes Act, sections 3UB-3UE)

134. Division 3A of Part IAA of the Crimes Act empowers the AFP and State and Territory police to exercise certain stop, search and seizure powers, provided that:

- a person is in a Commonwealth place[91] (other than a 'prescribed security zone') and the officer suspects, on reasonable grounds, that the person might have just committed, might be committing, or might be about to commit, a terrorist act; or
- a person is in a Commonwealth place in a 'prescribed security zone' (which has been declared by the Minister for Home Affairs, on the basis of the Minister's satisfaction that the declaration would assist in preventing a terrorist act, or in responding to a terrorist act that has occurred).[92]

135. In these circumstances, a police officer may exercise the following powers (which are referred to collectively in this submission as the 'Division 3A powers'):

- request a person in the relevant place to provide the police officer with the person's name, residential address, reason for being in that place and evidence of identity (with an offence for failure to comply with such a request, punishable by a fine of up to 20 penalty units or $4,440);[93] and
- stop and detain the person for the purpose of conducting a search of them for a 'terrorism-related item' (being a thing that the police officer conducting the search reasonably suspects: may be used in a terrorist act; or is connected with preparations for, or the engagement of a person in, a terrorist act; or is evidence of, or relating to, a terrorist act).[94] The power of search covers:
  - an ordinary frisk search of the person;
  - a search of any thing that is, or the officer suspects on reasonable grounds, to be under the person's immediate control;
  - a search of any vehicle (including a vessel or an aircraft) that is operated or occupied by the person; and
  - a search of any thing that the officer suspects on reasonable grounds the person has brought into the place.[95]
- seizing any 'terrorism-related items' found during the search, as well as any 'serious offence items'.[96] (The latter term means items that the officer conducting the search reasonably suspects: may be used in a serious offence; or is connected with the preparation for, or the engagement of a person in, a serious offence; or is evidence of, or relating to, a serious offence', being an offence punishable by a maximum of two or more years' imprisonment.)[97]

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[91] Crimes Act 1914, section 3UA (definition of Commonwealth place by reference to section 3 of the *Commonwealth Places (Application of Laws) Act 1970* (Cth), meaning 'a place with respect to which the Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth').

[92] Ibid, sections 3UB (application provision) and 3UI and 3UJ (prescribed security zones).

[93] Ibid, section 3UC.

[94] Ibid, sections 3UD (stopping and searching) and 3UA (definition of 'terrorism-related item).

[95] Ibid, section 3UD.

[96] Ibid, sections 3UE (seizure power) and 3UF (notices of seizure).

[97] Ibid, section 3UA (definition of 'serious offence item') and section 3C (definition of 'serious offence').

136. A declaration of a 'prescribed security zone' has a maximum duration of 28 days, with no statutory limit on the number of subsequent declarations that may be issued in relation to the same part of a Commonwealth place.[98]

137. The Minister must revoke a declaration if they become satisfied that there is no longer a terrorism threat justifying the declaration being continued; or in the case of declarations made to deal with the aftermath of a terrorist act, the declaration is no longer required.[99] Declarations are not legislative instruments.[100] They are required to be published but are not invalidated by a failure to do so (although failure of publication may make it impossible to enforce offences for non-compliance).[101]

Emergency power to enter and search premises (Crimes Act, section 3UEA)

138. Section 3UEA confers additional powers of search and seizure on the AFP and State and Territory police, which operate independently to the declaration of a prescribed security zone and are not otherwise limited to Commonwealth places. Section 3UEA authorises a police officer to enter any premises, without a warrant, if the police officer suspects, on reasonable grounds, that:

- it is necessary to search the premises, in order to prevent a thing that is on the premises from being used in connection with a terrorism offence; and
- it is necessary to proceed without a search warrant, because there is a serious and imminent threat to a person's life, health or safety.[102]

139. Police are empowered to seize things found during a search that are connected with a terrorism offence.[103] In addition, police are empowered under section 3UEA to seize any other thing, or do any thing to make the premises safe, if the police officer suspects on reasonable grounds that it is necessary to do so to protect a person's life, health or safety. However, the police officer must be satisfied it is necessary to do so without a search warrant because the circumstances are serious and urgent.[104]

140. Further, police are empowered under section 3UEA to secure the premises if they find other things which they suspect, on reasonable grounds, are relevant to another offence, pending their obtaining an ordinary search warrant under Part IAA.[105] They are not authorised under section 3UEA to seize such items.

Non-use of Division 3A powers

141. The INSLM and Committee reported in September 2017 and February 2018 respectively that the Division 3A powers of stop, search and seizure had not been used since their enactment in 2005.[106] The Law Council can find no evidence on the

[98] Ibid, subsection 3UJ(3).

[99] Ibid, subsection 3UJ(4).

[100] Ibid, subsection 3UJ(7).

[101] Ibid, subsections 3UJ(5) and (6).

[102] Ibid, subsection 3UEA(1).

[103] Ibid, subsection 3UEA(2).

[104] Ibid, subsection 3UEA(5).

[105] Ibid, subsections 3UEA(3) and (4).

[106] James Renwick CSC SC, INSLM, *Review of Division 3A of Part1AA of the Crimes Act 1914: stop search and seize powers* (September 2017) 25 at [6.1]; and Parliamentary Joint Committee on Intelligence and Security, *Report on the review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (February 2018) 4 at [1.17].

public record indicating that they have been used from February 2018 to August 2020.[107]

142. There also appears to be no information on the public record about whether police have given serious consideration to exercising a power under Division 3A, especially the section 3UEA powers, but ultimately decided to proceed under another power, such as ordinary search warrant (including by way of making an emergency application by telephone or other electronic means under section 3R). The release of such information about the consideration (or otherwise) of Division 3A powers would be relevant to an assessment of their continued necessity or otherwise.

Previous reviews and implementation

143. The Law Council notes that the INSLM and Committee, in their previous reviews in 2017 and 2018, concluded that the Division 3A powers remained necessary as emergency measures to prevent an imminent terrorist act, or to manage the immediate aftermath of such an act. They recommended an extension of the regime for a further period. The INSLM recommended five years,[108] and the Committee recommended three years, with a further pre-sunsetting reviews.[109]

144. The Law Council also notes that the Committee and INSLM supported the Law Council's recommendation for public annual reporting on the use of the scheme, which repeated a recommendation of the COAG Review in 2013 that had been rejected by the Government.[110] The Committee and the INSLM further recommended that the AFP be made subject to statutory requirements to provide the Committee, the INSLM, the Minister for Home Affairs and the Commonwealth Ombudsman with notifications of each instance in which a Division 3A power is exercised in a particular incident.[111]

145. The Committee further supported an extension of its statutory functions in relation to the AFP, to enable it to monitor the exercise of Division 3A powers, including the basis upon which the Minister for Home Affairs makes a declaration that a Commonwealth place is a 'prescribed security zone'. This is in addition to the existing functions of the Committee to monitor the operation of the terrorism provisions in Part 5.3 of the Criminal Code (covering terrorism-specific offences, COs, PDOs and CDOs).[112]

146. These recommendations were accepted by the Government in 2018.[113] The Law Council welcomed the subsequent enactment of amendments to implement them.[114]

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[107] Department of Home Affairs, *Control Orders, Preventative Detention Orders, Continuing Detention Orders, and Powers in Relation to Terrorist Acts and Terrorism Offences: Annual Report, 2018-19*, (February 2020), 7. (This annual report indicated that the Division 3A powers were not used in 2018-19. At the time of writing this submission, an annual report had not been released for 2019-20 and partial statistics for 2020-21 did not appear to have been released publicly.)

[108] James Renwick CSC SC, INSLM, *Review of Division 3A of Part1AA of the Crimes Act 1914: stop search and seize powers* (September 2017), 38 at [8.57] (**'INSLM police powers report'**)

[109] Parliamentary Joint Committee on Intelligence and Security, *Report on the review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (February 2018) ('**PJCIS 2018 review report'**), recommendation 4.

[110] PJCIS, *2018 review report*, recommendation 2; and INSLM, *Police powers report*, 36 at [8.44].

[111] Ibid.

[112] PJCIS, *2018 review report,* recommendation 3. See also, *Intelligence Services Act 2001* (Cth), paragraphs 29(1)(baa) and (bba) (Committee functions in relation to AFP powers).

[113] Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018), 1-4 and 11.

[114] *Counter-Terrorism Legislation Amendment Act (No. 1) 2018* (Cth).

Law Council views and recommendations

Extension for a further three years, with statutory 'pre-sunsetting' reviews

147. The Law Council does not oppose the continuation of the Division 3A powers for a further period of no more than three years, subject to further pre-sunsetting reviews by the INSLM and Committee. However, this is contingent on further amendments being made to address some outstanding issues with respect to:

- the designation and revocation of prescribed security zones;
- measures to clarify the interaction of Division 3A powers with ordinary warrant-based powers of search and seizure (including emergency oral warrants); and
- oversight of the Division 3A powers.

148. The extraordinary nature of the Division 3A powers, in departing from the usual warrant-based authorisation requirements, means that their continued necessity must be reviewed regularly. The Law Council notes that a three-year period of effect is preferable to any longer period of operation. The Committee's reasons for preferring a three-year sunset period in its 2018 review remain compelling in the present circumstances.[115] It is especially important to take a cautious approach to the continuation of the Division 3A powers, given that existing warrant regimes provide for the application and issue of warrants in emergency circumstances (including through oral means). The need for regular review of the Division 3A powers also militates against any proposal to remove the sunset provision entirely.

Recommendation 19 – limited extension of Division 3A powers

- **If the Committee considers that the police powers of stop, search and seizure in Division 3A of Part IAA of the *Crimes Act 1914* (Cth), remain necessary, then they should be extended for a further period of no more than three years. This extension should be subject to the following conditions being met:**
  - **the provisions should be subject to statutory 'pre-sunsetting reviews' by the Committee and the Independent National Security Legislation Monitor (with the *Intelligence Services Act 2001* (Cth) and the Independent *National Security Legislation Monitor Act 2010* (Cth) being amended accordingly); and**
  - **the amendments recommended by the Law Council should be implemented (see recommendations 20-27 in this submission).**

Prescribed security zones

Criteria for declaring an area as a 'prescribed security zone'

149. A decision by the Minister for Home Affairs to make a declaration under subsection 3UJ(1) to designate a Commonwealth place as a 'prescribed security zone' has profound legal consequences. It authorises police officers to exercise the powers of stop, search and seizure under sections 3UC, 3UD and 3UE without **any requirement** to hold a reasonable suspicion that the person being stopped and searched is, or has been, or may in future be, involved in a terrorist act.[116] The powers under sections 3UC, 3UD and 3UE are exercisable without a statutory

[115] PJCIS, *2018 review report,* 25 at [2.93] and recommendation 4.

[116] Crimes Act, paragraph 3UB(1)(b).

suspicion based-threshold for as long as the declaration is in effect, up to a maximum period of 28 days.[117]

150. As noted above, the Minister need only be satisfied that the declaration would assist in preventing a terrorist act occurring, or responding to a terrorist act that has already occurred.[118] The Law Council is concerned that this is a disproportionately low threshold, given the highly intrusive nature of the warrantless powers of stop, search and seizure in a prescribed security zone, which are not subject to any suspicion-based threshold.

151. The Committee's report on its 2018 review referred to evidence from Commonwealth officials that a range of administrative considerations may be taken into account by the AFP in making applications to the Minister, and by security agencies including ASIO in making recommendations about the designation of a 'prescribed security zone'.[119] However, mere administrative or policy-based considerations are not a statutory safeguard against the arbitrary exercise of a broad Ministerial discretion. The Minister is under no statutory obligation to accept the administrative or policy-based factors advanced by security agencies. Those factors are also susceptible to unilateral amendment or removal. Unlike a list of statutory considerations, a list of administrative or policy-based factors may not be available, or readily accessible, to the public.

152. The essential character of a safeguard is that it imposes a legal limitation on a power, so that there is no lawful discretion for it to be exercised more broadly than is necessary and proportionate to achieve a legitimate objective, or in a manner that is otherwise arbitrary or oppressive. It is a fundamental tenet of the rule of law that laws are clear, certain and accessible. Placing reliance on a mere expectation about the way in which the Minister may choose to exercise a discretionary power, and the matters that security agencies may take into account in advising the Minister on the exercise of that power, does not satisfy these fundamental requirements.

153. Key omissions from the statutory criteria for making a declaration under section 3UJ are outlined below. They focus on requirements of necessity and proportionality.

Issuing threshold directed to 'necessity' of the declaration

154. There is no threshold requirement for the Minister to be satisfied that making the declaration is **necessary** to assist in preventing or responding to a terrorist act (or as a minimum, the declaration would **substantially assist** in such endeavours).

155. There is also no requirement for the Minister to be reasonably satisfied that a potential terrorist act is imminent, or at least has some **realistic possibility** of being carried out while the proposed declaration would be in force.

156. This means that it would be legally open to the Minister to make a declaration on the basis that exercising the extraordinary powers under sections 3UC, 3UD and 3UE, **without** a statutory suspicion-based threshold, would provide **any degree** of assistance in preventing a potential terrorist act (the likelihood of which need not be specifically assessed) or in responding to a completed terrorist act.

157. As discussed below, even if there is no subjective intention to exercise the powers in this manner, the Law Council's concern is that section 3UJ creates this possibility.

Proportionality, including an assessment of human rights impacts

158. Further, there is no requirement for the Minister to have regard to the likely impact of making the declaration on persons present in the area who may be subject to the

[117] Ibid, subsection 3UJ(3).

[118] Ibid, subsection 3UJ(1).

[119] PJCIS, *2018 review report,* 21 at [2.46]. See also: INSLM, *Police powers report*, 37-38 at [8.51].

powers (including impacts on their human rights to freedom of movement, privacy and liberty and security of the person). The Minister is not required to be satisfied that the identified impacts on third party rights would be reasonable and proportionate to the purpose of preventing, or responding to, a terrorist act.

159. The Minister is also not required to have regard to the availability of alternative powers and consider whether they are likely to be as effective in preventing or responding to a terrorist act. (This would include the suspicion-based thresholds for exercising the powers in sections 3UC, 3UD and 3UE in a Commonwealth place; the exercise of the power in section 3UEA to enter and search premises; and the exercise of ordinary search warrant-based powers in Division 2 of Part IAA.)

160. In addition, the Minister is not required to specifically consider an appropriate duration for the declaration within the statutory maximum period of 28 days. By extension, there is no requirement for the Minister to consider the requirements of necessity and proportionality referred to above in the context of the length of time for which the powers in sections 3UC, 3UD and 3EU will be available to police, **without** being subject to a statutory suspicion-based threshold.

161. The absence of a proportionality requirement also means that the Minister is under no legal obligation to consider the cumulative impact of successive declarations of a Commonwealth place as a 'prescribed security zone'.

Strengthening the mandatory revocation requirement

162. The Law Council supports the mandatory revocation obligation on the Minister for Home Affairs in subsection 3UJ(4), if the Minister becomes satisfied that the declaration is no longer required. However, the low threshold for making a declaration in subsection 3UJ(1) also affects the threshold for mandatory revocation, and may make it unlikely that the revocation obligation will be enlivened.

163. In particular, the mandatory revocation obligation would not arise if the Minister was satisfied that the availability of the stop, search and seizure powers in sections 3UC, 3UD and 3EU, **without** a statutory suspicion-based threshold, would provide **some degree** of assistance to police in preventing or responding to a terrorist act.

164. The absence of requirements in the issuing criteria for an assessment of necessity and proportionality means that even a minimal degree of anticipated assistance would be sufficient to avoid the mandatory revocation requirement.

Absence of Parliamentary control over the exercise of the declaration-making power

165. There is no effective Parliamentary control over the broad discretionary Ministerial power to declare a 'prescribed security zone' under section 3UJ.

166. As declarations of 'prescribed security zones' are not legislative instruments,[120] the Parliament has no power of disallowance under the *Legislation Act 2003* (Cth) that could otherwise have been exercised to protect individuals against arbitrary or oppressive exposure to extraordinary powers under sections 3UC, 3UD and 3EU, including in the absence of any statutory suspicion-based threshold.

167. While the Committee has the power to monitor the operation of Division 3A powers (including the Minister's basis for making a declaration under section 3UJ),[121] its conclusions and recommendations are of an advisory nature. The Committee's reviews are also likely be made on a retrospective basis (that is, after a declaration

[120] Crimes Act, subsection 3UJ(7).

[121] *Intelligence Services Act 2001* (Cth), paragraph 29(1)(bba).

of a 'prescribed security zone' is made and after the attendant powers in sections 3UC, 3UD and 3UE are exercised in an incident).[122]

168. Further, the Committee would be largely reliant on the executive government to cooperate with its inquiries, as the Committee is subject to a statutory prohibition on compelling the provision of 'operationally sensitive information'.[123] This may cover information about the exercise of Division 3A powers, including information about the declaration of a 'prescribed security zone'. The Committee may therefore be unable to proceed with an inquiry if the Government of the day did not cooperate.

169. Accordingly, while *ex post facto* oversight is valuable, it is not a substitute for the imposition of clear and precise statutory conditions on the discretionary Ministerial in subsection 3UJ(1) power to declare a Commonwealth place as a 'prescribed security zone', so that this power is only available where it is objectively necessary and proportionate.

170. Further, the Law Council considers that the Committee's oversight and review function could be enhanced if the Minister for Home Affairs were subject to a statutory requirement to provide the Committee, as soon as reasonably practicable, with a written statement of reasons for the making of the declaration. This would assist the Committee in performing its monitoring and review-based functions with respect to the basis upon which a declaration is made under section 3UJ of the Crimes Act. (See recommendation 26 below, in relation to oversight arrangements for the stop, search and seizure regime.)

The need for stronger statutory parameters on the Ministerial discretion

171. If the Division 3A powers are to be made proportionate to the legitimate objective of protecting the public against an imminent terrorist act, or dealing with the immediate aftermath of a terrorist act, stronger parameters are needed on the discretionary power of the Minister for Home Affairs to declare a 'prescribed security zone'.

172. Presently, the power is subject to broad executive discretion without statutory limitations to protect the public against misuse, and to promote transparency and consistency in decision-making. It is no response that an individual who is subject to the exercise of stop, search and seizure powers in a 'prescribed security zone' could potentially seek judicial review of the Minister's decision to issue the declaration, or challenge the admissibility of evidence obtained through the exercise of Division 3A powers, on the basis that the Minister's declaration was unlawful.

173. This would make it solely incumbent on the people who are subjected to the exercise of stop, search and seizure powers to challenge the making of the declaration to raise an individual grievance after their rights have been limited and the harm sustained. This does not proactively facilitate the reasonable and proportionate exercise of the discretionary Ministerial power in the first place.

174. Further, judicial remedies may not always be accessible to an aggrieved person. In addition to the issue of access to legal representation, there are foreseeable limitations in an individual's ability to obtain the necessary evidence to support an application for review. It is conceivable that the Commonwealth may make a claim for a public interest immunity claim over that evidence, on the basis that its disclosure would prejudice national security or law enforcement interests.

175. Additionally, the low statutory threshold under subsection 3UJ(1) for the making of a Ministerial declaration makes it unlikely that an individual challenge would succeed.

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[122] Consistent with the retrospective, incident-based reporting requirements: Crimes Act 1914, section 3UJA.

[123] *Intelligence Services Act 2001* (Cth), Schedule 1, Clause 1 (prohibition on compelling 'operationally sensitive information'). See also the definition of 'operationally sensitive information' in Clause 1A (covering sources of information; information about operational assistance or methods; information about particular operations or proposed operations; and confidential information provided by a foreign government).

(That is, the Minister need only be satisfied that the declaration would, in some way, assist in preventing or responding to a terrorist act.)

176. Placing stronger and clearer statutory parameters on the Ministerial power of declaration under subsection 3UJ(1) would have the further benefit of providing greater clarity and certainty to police officers exercising powers under sections 3UC, 3UD and 3UE. It could assist law enforcement investigations, and ultimately prosecutions or applications for preventive powers such as COs, by reducing the likelihood of successful challenges to the admissibility of evidence obtained under these powers.

177. In addition, the existence of clear and certain statutory parameters on the declaration-making power in section 3UJ may help to facilitate public trust and confidence in the legitimacy of the powers in sections 3UC, 3UD and 3UE.

Recommendation 20 – criteria for the declaration of 'prescribed security zones'

- **If the powers in Division 3A of Part 1AA of the *Crimes Act 1914* (Cth) are to be retained, section 3UJ should be amended to place further statutory parameters on the discretionary power of the Minister for Home Affairs to declare a Commonwealth place as a 'prescribed security zone'. The Minister should only be permitted to make a declaration if they are satisfied, on reasonable grounds, of the following matters:**

(1) making a declaration is necessary to achieve the following objectives (or, as a minimum, making the declaration would substantially assist in achieving these objectives):

(a) preventing a terrorist act that has a realistic possibility of being carried out while the declaration would be in force; or

(b) responding to a terrorist act that has been carried out;

(2) the impacts of making the declaration would be reasonable and proportionate in the circumstances. This should expressly include an assessment of the following matters:

(a) the likely impacts on the human rights of people who may be subject to the exercise of powers under sections 3UC, 3UD and 3UE, in the absence of a statutory requirement for a police officer to hold any suspicion about that person's involvement, or future involvement, in a terrorist act;

(b) whether it would be reasonably practicable for police to rely on other powers (including the suspicion-based grounds of exercising the powers in sections 3UC, 3UD and 3UE; the powers of search in section 3UEA; and ordinary search warrants under Division 2 of Part 1AA);

(c) the impacts of the maximum duration of the declaration, and whether it may be appropriate to prescribe a lesser period of effect than the 28-day statutory maximum; and

(d) if the Commonwealth place has previously been subject to a declaration or declarations that have expired, the cumulative impacts of all such declarations.

Requirements for the revocation of a 'prescribed security zone'

Minister's mandatory revocation obligation

178. Subsection 3UJ(4) provides that the Minister for Home Affairs must revoke a declaration in certain circumstances. These are:
    - if the declaration is made to prevent a terrorist act from being committed—there is no longer a terrorism threat that justifies the declaration being continued;[124] and
    - if the declaration is made to manage the aftermath of a terrorist act—the declaration is no longer required.[125]

179. While the Law Council supports the existence of a mandatory revocation obligation if the relevant issuing criteria are no longer met, the vice in subsection 3UJ(4) arises from the exceptionally low issuing threshold in subsection 3UJ(1).

180. This makes it unlikely that the revocation obligation in subsection 3UJ(4) would be enlivened in those cases in which the police would derive any kind of assistance in the exercise of the Division 3A powers. It would not be material that those powers may disproportionately limit individual rights, because they may only yield a very limited form of assistance. It would also not be material that it would be open to police to obtain the same level of assistance by obtaining a search warrant rather than relying on extraordinary warrantless powers.

181. The Law Council therefore considers it essential that the statutory revocation obligation is amended, so that it linked to the statutory issuing criteria for declarations set out in the Law Council's recommendation 20 above.

182. Consistent with the Law Council's comments on the issuing criteria, placing sole reliance on an expectation about the non-statutory factors a security or law enforcement agency or a policy department may take into consideration when advising the Minister on a potential revocation is not a legal safeguard. The Minister is under no legal obligation to accept that advice, and in any event, the public will not have the assurance of clear, certain and transparent legal standards that govern the making and mandatory revocation of declarations.

Recommendation 21 – conditions for the mandatory revocation of a prescribed security zone declaration

- **Subsection 3UJ(4) of the *Crimes Act 1914* (Cth) should be amended to require the Minister for Home Affairs to revoke a declaration of a prescribed security zone, if the Minister is reasonably satisfied that the issuing criteria in subsection 3UJ(1), as amended in line with the Law Council's recommendation 20, are no longer met**

AFP obligations in relation to revocation

183. In its 2018 review report, the Committee noted evidence from government agencies that they would inform the Minister for Home Affairs as soon as possible if they considered the declaration was no longer required.[126] The AFP noted that this could integrated into its internal governance procedures.[127] The Law Council welcomes

[124] Crimes Act, paragraph 3UJ(4)(a).

[125] Ibid, paragraph 3UJ(4)(b).

[126] Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, (February 2018), 20 at [2.44] and 23-24 at [2.53]-[2.54].

[127] Ibid, 20 at [2.44].

that practice, but considers it should be given effect as a statutory obligation, in the interests of facilitating transparency, certainty, consistency and public trust.

184. Further, the Law Council considers that the protective intention of the mandatory revocation obligation would be enhanced by a complementary requirement, to manage the period of time between the AFP Commissioner becoming satisfied that the issuing criteria for the declaration are no longer met and the Minister revoking the declaration. There should be a further statutory safeguard in these circumstances. The AFP Commissioner should be required to take all reasonable steps to discontinue the exercise of the powers under sections 3UC, 3UD and 3EU in reliance on the declaration of the prescribed security zone.

185. The AFP is subject to similar discontinuance requirements in relation to various warrant-based powers.[128] Further, in the case of ministerial-level authorisations, it is notable that the Director-General of the Australian Security Intelligence Organisation is also subject to requirements to notify the Attorney-General if the Director-General believes that the issuing grounds for a warrant are no longer met, and to take all reasonable steps to discontinue action under that warrant pending its revocation by the Attorney-General.[129] This framework should be replicated in section 3UJ of the Crimes Act with respect to declarations of prescribed security zones.

Recommendation 22 – obligations on the AFP Commissioner in relation to the mandatory revocation of a prescribed security zone declaration

- **Division 3A of Part IAA of the Crimes Act 1914 (Cth) should be amended to require the AFP Commissioner to:**
  - **cause the Minister to be notified, as soon as practicable, if the Commissioner reasonably believes that the requirements of subsection 3UJ(1) (as amended in line with the Law Council's recommendation 20 above) are no longer met in relation to a particular declaration of a prescribed security zone; and**
  - **take all reasonable steps to discontinue, as soon as possible (and potentially within a set time period), the exercise of the powers in sections 3UC, 3UD and 3EU in reliance on the Minister's declaration of the prescribed security zone pursuant to paragraph 3UB(1)(b).**

Interaction of Division 3A powers with warrant-based search powers

Pre-conditions to the exercise of Division 3A search and seizure powers

186. Only one of the Division 3A powers requires police officers to individually consider whether it is necessary, because of circumstances of urgency, to rely on a warrantless power of entry and search rather than obtaining a search warrant.

187. This is section 3UEA, the application of which is not limited to prescribed security zones or Commonwealth places more generally. Rather, it applies if a police officer suspects, on reasonable grounds that entering the premises is necessary to prevent a thing on the premises from being used in connection with a terrorism offence. The police officer must also be satisfied that it is necessary to exercise the power without the authority of a search warrant, because of a serious and imminent threat to a person's life, health or safety.[130]

[128] See, for example, *Telecommunications (Interception and Access) Act 1979* (Cth), section 58; *Surveillance Devices Act 2004* (Cth), sections 21 and 27H.

[129] *Australian Security Intelligence Organisation Act 1979* (Cth), section 30 (special powers warrant).

[130] Crimes Act, subsection 3UEA(1).

188. While the Law Council supports the threshold of necessity for the exercise of powers under section 3UEA, there would be value in amending the provision to insert an explicit requirement for the police officer to consider the possibility of obtaining an urgent oral or electronic application for a search warrant under section 3R of the Crimes Act. Such a clear direction would ensure that this factor is consistently taken into consideration in decision-making under section 3UEA.

189. In contrast to section 3UEA, the warrantless powers of search and seizure in sections 3UD and 3UE do not require police officers to consider whether it is necessary to proceed without a search warrant, as a pre-condition to exercising those warrantless powers. The Law Council considers that all of the Division 3A powers should be subject to a necessity threshold, as a precondition to their exercise in individual cases. That is, the police officer must be satisfied it is necessary to exercise a Division 3A power rather than obtaining a warrant because of a serious and imminent threat to life, health or safety.

190. This would better reflect the extraordinary nature of the Division 3A powers, with respect to their departure from the usual system of warrant-based authorisation for intrusive police powers of search and seizure. As noted above, the independent issuance of warrants, subject to prescribed statutory criteria, is an important safeguard to powers that would otherwise constitute trespass.

191. A necessity threshold of the kind recommended by the Law Council would provide clear, consistent and targeted parameters for when it is permissible to bypass normal warrant-based authorisation requirements.

Recommendation 23 – pre-condition to the exercise by police of search and seizure powers under sections 3UD, 3UE and 3UEA

- **Before a police officer exercises a power of search or seizure under section 3UD and 3UE of the *Crimes Act 1914* (Cth), the police officer must consider whether it would be reasonably practicable to obtain a search warrant under Division 2 of Part 1AA of the Crimes Act rather than relying on extraordinary warrantless powers.**
- **This requirement should include consideration of whether it would be reasonably practicable to make an urgent application for a search warrant via telephone or other electronic means under section 3R.**
- **Section 3UEA should also be amended to require specific consideration of an urgent application for a search warrant under section 3R.**

Review of interactions between urgent warrants and Division 3A powers

Potential reforms to emergency warrant provisions

192. The Law Council remains of the views it expressed to the third INSLM and Committee in 2017 that further consideration should be given to possible refinements to the process for requesting and issuing emergency search warrants,[131] in the event that there are logistical or other barriers that could result in police utilising the Division 3A powers in preference to their usual warrant-based powers.

193. If any such barriers are identified in relation to emergency search warrants, addressing them could help to reduce the need for police have recourse to the Division 3A warrantless powers, and therefore dispense with the important safeguards that warrant-based authorisation provide. The availability of an optimally

[131] Crimes Act, section 3R.

efficient (but also rigorous and independent) process for obtaining warrants in emergencies may also require reconsideration of the continued necessity of the extraordinary warrantless powers in Division 3A.

Recommendation 24 – further review of interactions between emergency warrants and Division 3A warrantless powers (particularly section 3UEA powers)

- **The 'pre-sunsetting' statutory reviews in recommendation 19 above should specifically require the Independent National Security Legislation Monitor and Committee to examine issues of interaction between emergency investigatory warrants, such as search warrants under Division 2 of Part 1AA of the *Crimes Act 1914* (Cth), and the warrantless powers of search and seizure under Division 3A of Part IAA of that Act.**
- **These reviews should consider whether it would be desirable to make amendments to the provisions for the urgent issuing of warrants in terrorism-related cases, in preference to retaining the extraordinary warrantless powers under Division 3A.**

Consideration of independent authorisation for certain Division 3A powers

194. The third INSLM, Dr James Renwick CSC SC, recently recommended the establishment of an independent body to issue compulsory industry assistance notices to communications providers under Part 15 of the *Telecommunications Act 1997* (Cth).[132]

195. The Law Council considers that the INSLM's observations on the importance of independent issuing have much broader application than the industry assistance regime in the Telecommunications Act. Independent authorisation of an intrusive power by an appropriately senior and skilled person, such as a serving or retired judge, can improve the rigour of the issuing process. In turn, it can promote greater public confidence in the legality, propriety and legitimacy of agencies' activities.

196. In its recent submission to the Committee's current review of the TOLA Act, the Law Council encouraged the Committee to consider whether an independent issuing body for communications industry assistance notices could also be designed in a way that would make it feasible for its functions to be extended in future, to authorise the exercise of other intrusive security-related powers.[133]

197. The Law Council considers that the issuing of declarations of prescribed security zones under section 3UJ of the Crimes Act, on the application of the AFP, would appropriately be conferred on such an independent issuing body.

Recommendation 25 – further review of interactions between emergency warrants and Division 3A warrantless powers (particularly section 3UEA powers)

- **The Committee may wish to consider (as part of its present review or a future pre-sunsetting review in line with the Law Council's recommendation 19 above) whether an independent body, such as a new Investigatory Powers Division of the Administrative Appeals Tribunal, could also perform authorisation functions in relation to the**

[132] James Renwick CSC SC, INSLM, *Trust but verify: a report concerning the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and related matters*, (June 2020), recs 3-6.

[133] Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of amendments made by the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (Cth)*, August 2020, 9.

Division 3A powers, such as the declaration of 'prescribed security zones' under section 3UJ.

Oversight of Division 3A powers

Notification of declarations of 'prescribed security zones'

198. The Law Council welcomes the implementation of the previous recommendations of the Committee and third INSLM for the AFP to report to the Minister for Home Affairs, the Committee, the INSLM and the Commonwealth Ombudsman on the exercise of Division 3A powers in a particular incident.[134] This is additional to the public annual reporting requirement,[135] which also implements recommendations of the Committee and third INSLM. [136] A 'per incident' reporting requirement is an important means of focusing oversight on extraordinary powers. It removes the need for independent or Parliamentary oversight bodies to continuously make inquiries simply to ascertain whether a power was exercised.

199. However, the Law Council considers that a further, modest amendment could enhance the capacity for independent and Parliamentary oversight over the exercise of Division 3A powers. This is a requirement for the AFP Commissioner to notify the Committee, INSLM and Commonwealth Ombudsman when the Minister makes a declaration of a prescribed security zone under section 3UJ.

200. While these declarations must be notified in the *Commonwealth Government Gazette* and published (for example, on an agency's website)[137] it is conceivable that an individual declaration may not come to the attention of oversight bodies, who are consumed with their other functions. A requirement for the AFP to specifically notify the Committee, Commonwealth Ombudsman and INSLM of a declaration will make certain that these oversight agencies are alerted to the imminent exercise of the extraordinary Division 3A powers. This will enable them to allocate oversight resources and make other necessary preparations accordingly.

201. Such advance notice may be particularly important for the Commonwealth Ombudsman, as this office may receive complaints from people who have been subjected to the exercise of the warrantless powers. There may be a need for immediate or urgent investigation, to determine whether remedial action is required while the declaration of the prescribed security zone remains in force.

Recommendation 26 – Ombudsman and Committee notification of declarations of prescribed security zones, in addition to the exercise of Division 3A powers

- **Division 3A of Part IAA of the *Crimes Act 1914* (Cth) should be amended to:**
  - **require the Australian Federal Police Commissioner to notify the Parliamentary Joint Committee on Intelligence and Security, the Commonwealth Ombudsman and the Independent National Security Legislation Monitor as soon as reasonably practicable after the Minister for Home Affairs has made a declaration of a prescribed security zone; and**
  - **require the Minister for Home Affairs to cause a written statement of reasons to be provided to the Committee, explaining the factual basis for making the declaration under section 3UJ, for**

[134] Crimes Act, section 3UJA. See also, INSLM, *Police powers report*, 36 at [8.44]; and PJCIS, 2018 review report, recommendation 2.

[135] Crimes Act, section 3UJB.

[136] INSLM, *Police powers report,* 26 at [8.44]; and PJCIS, 2018 review report, recommendation 2.

[137] Crimes Act, subsection 3UJ(5).

the purpose of the Committee performing its functions under subparagraph 29(1)(bba)(ii) of the *Intelligence Services Act 2001* (Cth) to monitor and review the basis for the Minister's declarations of prescribed security zones under section 3UJ of the *Crimes Act 1914* (Cth).

- **To ensure that oversight resources can be targeted appropriately, the notification requirement should be additional to the existing requirements in section 3UJA for retrospective reporting on the exercise of Division 3A powers in relation to an incident.**

Notification of rights to make complaints to oversight bodies

202. The legislation governing other extraordinary powers, including COs and PCOs, requires the AFP to inform the subject of certain rights. For example, the AFP is required to inform a person who is subject to a CO of any rights of appeal and review they may have [138] In the case of PDOs, the AFP is required to inform the subject of their right to make a complaint to the Commonwealth Ombudsman or other applicable authorities.[139] No comparable notification requirements apply in relation to the stop, search and seizure powers under Division 3A.

203. The Law Council considers that the procedural requirements under Division 3A should be aligned with those governing COs and PDOs in this respect. It would ensure that people who are the subject of any of these extraordinary and intrusive counter-terrorism powers are apprised of their rights to make complaints, and that there is a clear pathway for them to bring any concerns to the attention of relevant oversight agencies.

Recommendation 27 – Duty of police exercising Division 3A stop, search and seizure powers to inform people of rights to make complaints to oversight bodies

- **Sections 3UC, 3UD, 3UE and 3UEA of the *Crimes Act 1914* (Cth) should be amended to impose a general obligation on a police officer exercising the relevant stop, search and seizure powers to notify the person of their right to make a complaint to the Commonwealth Ombudsman, Australian Law Enforcement Integrity Commission, or the relevant oversight body for a State or Territory police force.**
- **This should be subject to a limited exception, which is available only if the police officer believes on reasonable grounds that the time taken to provide the notification would prevent the police officer from:**
  - **responding to an imminent risk to life, health or safety or serious damage to property; or**
  - **preventing the imminent destruction of evidence of a terrorist act that has occurred.**

Continuing detention orders

204. The CDO regime is established by Division 105A of the Criminal Code. It enables a Supreme Court of a State or Territory to make an order for the detention of a person after they have completed their sentence. The Minister for Home Affairs or the AFP (or legal representative) may make an application for an order in the final 12 months

[138] Criminal Code, subparagraphs 104.12(1)(b)(iv) and (vii); paragraphs 104.17(1)(b); and subparagraph 104.26(1)(c)(iii).

[139] Ibid, paragraphs 105. 28(2)(e)-(h).

of a detainee's sentence.[140] A CDO may be sought in relation to a person who has been convicted of, and sentenced to imprisonment for, one of the following offences:

- offences against Subdivision A of Division 72 of the Criminal Code (international terrorist activities using explosive or lethal devices);
- offences against Part 5.3 of the Criminal Code (terrorism) that are punishable by a maximum penalty of seven or more years' imprisonment); and
- offences against Part 5.5 of the Criminal Code (foreign incursions) excluding offences for publishing recruitment advertisements, and offences against the predecessor to Part 5.5, the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).[141]

205. A court may issue a CDO if satisfied, to a high degree of probability, that the person would present an unacceptably high risk of committing a 'serious Part 5.3 offence' (a terrorism offence punishable by a maximum penalty of seven years' imprisonment) if released into the community. The court must be satisfied that there is no less restrictive alternative available to a CDO.[142]

206. The court may appoint a 'relevant expert' (being an Australian-registered psychiatrist, psychologist or medical practitioner, or 'any other expert') to assess and report on the person's future risk. The person must attend that assessment. The court must consider that report in making a finding of fact about the person's future risk for the purpose of determining the CDO application [143]

207. The court may also make an IDO for up to 28 days (and a total duration of three months for consecutive IDOs) to deal with circumstances in which a CDO application has not been determined by the time the person has completed their sentence of imprisonment.[144]

208. A CDO remains in force for up to three years, and there is no limit on the number of successive orders that may be sought and issued.[145]

209. Appeal and review rights exist in relation to CDOs.[146] Presently, administrative decisions made under Division 105A are also subject to statutory judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in the absence of being listed in Schedule 1 to that Act as a decision to which the Act does not apply, pursuant to section 3.

Necessity of the regime

210. The CDO regime does not appear to have been utilised to date, notwithstanding the release of terrorist offenders who would have been eligible for such orders, upon completion of their custodial sentences for relevant offences that would have enlivened the CDO regime, if the risk-related thresholds were met.

211. This raises questions about the reasons for the apparent decisions of the AFP and Home Affairs Minister not to utilise the CDO regime. The basis for making those decisions is relevant to an assessment of the necessity of the CDO regime. The Law Council has not identified official information on the public record which explains such decision-making.

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[140] Ibid, section 105A.5.
[141] Ibid, section 105A.3.
[142] Ibid, section 105A.7.
[143] Ibid, sections 105A.6 and 105A.8.
[144] Ibid, section 105A.9.
[145] Ibid, subsections 105A.7(5) and (6).
[146] Ibid, Division 105A, Subdivision D.

212. For example, the Law Council is aware that Bilal Khazaal was released from prison on 30 August 2020, after serving a sentence of 12 years' imprisonment for the offence in subsection 101.5(1) of the Criminal Code of making a document connected with assistance in a terrorist act, knowing of that connection. The Federal Court of Australia issued an interim CO on 26 August 2020.[147]

213. The Court held that Mr Khazaal presented an ongoing risk of committing, supporting or facilitating a terrorist act in Australia or overseas. It noted evidence that his views were unchanged in custody, that he self-identified as a Sheik who had sought to exert influence over others in that capacity, and had been previously assessed by a corrective services psychologist as having a high risk of engaging in further terrorism-related activity. The Court was satisfied that a set of 17 highly restrictive controls (including wearing an ankle monitoring bracelet, travel bans, extensive limitations or prohibitions on the use of mobile phones, computers, the internet and instant messaging services, and prohibitions on associating with certain persons) were reasonably necessary, appropriate and adapted to managing that risk.[148]

214. The imposition of a CO on Mr Khazaal, in the apparent absence of a CDO application being made by the AFP or the Minister for Home Affairs, suggests that the AFP and its Minister determined that the CO regime, and not the CDO regime, was the appropriate means of managing the risk to the community presented by an unrepentant terrorist offender, who was assessed as presenting a high risk of recidivism.

215. The Law Council acknowledges that a single case is not dispositive of the question of necessity of the CDO regime. However, the facts of the Khazaal CO case seem to indicate a deliberate decision not to utilise the CDO regime respect of an offender who appeared to possess the risk factors that the CDO regime was designed to target when it was enacted in 2016.

216. At the very least, this significant instance of non-use raises questions about the necessity of the CDO regime, which merit interrogation in the Committee's inquiry. It also casts doubt on the propriety of retaining in Australia's counter-terrorism legislation an unutilised post-sentence-detention regime, which is of a kind that has been found by the United Nations Human Rights Committee to be incompatible with the prohibition on arbitrary detention under international human rights law.[149]

217. Given the extraordinary nature of post-sentence detention and the gravity of its consequences for detainees, the Law Council submits that the fact of non-use, or extremely limited use of the regime, should be given considerable weight in assessing its continued necessity. It is important that the continued necessity of the CDO regime is kept under close scrutiny, and that the regime contains statutory mechanisms to facilitate such scrutiny. This includes the retention of sunset clauses at all times while the regime is in force, and statutory requirements for independent pre-sunsetting reviews by the Committee and the INSLM, in addition to ongoing review and monitoring.

218. The Law Council urges the Committee to pay close attention to the future release of further terrorist offenders who have served their sentences, and to scrutinise relevant officials' decision-making about whether to apply for CDOs or COs in the circumstances of each case (and ESOs, if the HRTO Bill is passed).

219. If there is an identifiable trend in the decision-making of authorities to seek COs or ESOs (when available) in preference to CDOs, this will tend strongly toward a conclusion that CDOs are unnecessary.

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[147] *Booth v Khazaal* [2020] FCA 1241 (26 August 2020, Wigney J).

[148] Ibid, [23]-[31] and [35]-[39].

[149] *Tillman v Australia*, UN Doc CCPR/C/98/D/1635/2007 (12 April 2010); and *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007 (12 April 2010).

Prohibitions or limitations on post-sentence detention

220. The Law Council has previously submitted to the Committee that there should be a limitation on the total maximum duration of post-sentence detention under consecutive CDOs, in preference to the ability to obtain an unlimited number of consecutive CDOs of up to three years each.[150]

221. The Committee did not support that recommendation in 2016, on the basis that the issuing court would assess each consecutive CDO application anew, and would need to be satisfied that the person presented an unacceptable risk of committing a serious terrorism offence, if released into the community on the expiry of the previous CDO.[151]

222. The Law Council remains concerned that a person could be indefinitely detained, in three-year increments, after serving their sentences. This could potentially be far in excess of their sentence of imprisonment for the relevant offence, and in excess of the maximum sentence of imprisonment for some serious terrorism offences. This risk is particularly significant in the case of persons whose offending was assessed by the sentencing court as being at the lower end of the range of objective seriousness, but have become further radicalised in prison because they were exposed to the influence of other offenders, and did not have adequate access to rehabilitative programs.

223. Accordingly, the Law Council continues to support extended determinate sentencing framework, in the nature of the UK model under section 226A of the *Criminal Justice Act 2003* (UK), in preference to an indeterminate sentencing regime or a post-sentence detention regime.[152]

224. However, if the Committee supports the retention of a post-sentence detention regime in Division 105A of the Criminal Code, the Law Council recommends that applications for consecutive CDOs should be subject to additional issuing criteria. In particular, there should be a duty on the applicant to disclose to the court all previous applications for CDOs, and for the court to take into consideration the total duration of post-sentence detention, including relative to the person's custodial sentence for the relevant offence, and the maximum penalty for that offence.

Recommendation 28 – maximum duration of post-sentence detention

- **Division 105A of the *Criminal Code Act 1995* (Cth) should be amended to provide for one of the following measures:**
  - **a limitation on the total length of time a person may be subject to continuing detention under a CDO, preferably via a limit on the total number of consecutive CDOs that may be issued in relation to a person; or**
  - **in the alternative to a maximum duration on continued detention, an explicit requirement in sections 105A.5 and 105A.8 for the court to be provided with, and to take into consideration, information**

[150] Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, (October 2016), 12-13 at [38]-[43].

[151] Parliamentary Joint Committee on Intelligence and Security, Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, (November 2016), 44 at [2.55]-[2.56].

[152] An ***'extended determinate sentencing regime'*** means that a sentence has a fixed end date that is handed down at the point of a person being sentenced, but this sentence also includes a protective component. It contrasts with an '***indeterminate sentencing regime'*** whereby the sentence imposed on the offender has no end date but is subject to periodic review (the UK had such a scheme until 2012 when it was abolished due to human rights concerns). It further contrasts with the model adopted in the CDO regime, which is ***'post-sentence detention regime'***, involving the making of an order that is separate to the person's sentence, to authorise their detention after the expiry of their sentence.

about the total duration of detention under all previous CDOs and the further duration of detention sought.

Issuing thresholds and process

Definition of 'relevant expert'

225. The Law Council remains of the view that there is overbreadth in the present definition of a 'relevant expert' who performs the mandatory risk assessment of a terrorist offender under the CDO regime, and whose report the court is obliged to consider in assessing the offender's future risk, if released.

226. The definition of a 'relevant expert' in section 105A.2 of the Criminal Code covers Australian-registered psychiatrists, medical practitioners and psychologists, as well as 'any other expert'. Section 105A.2 also provides that, for any person who is covered by these categories to be appointed by a court as a relevant expert, they must be 'competent to assess the risk' of the offender committing a serious terrorism offence if released into the community.

227. The Law Council has previously identified that the inclusion in section 105A.2 of 'any other expert', in addition to Australian-registered psychiatrists and psychologists, is overly broad, having regard to the matters that the relevant expert may address (at their discretion) in their report under subsection 105A.6(7); and the obligation on the court under paragraphs105A.8(1)(b) and (c) to consider the relevant expert's report, and the results of 'any other assessment' conducted by the relevant expert, in deciding whether to issue a CDO.

The need for statutory precision in prescribing the categories of persons who may be appointed as 'relevant experts'

228. The Law Council notes that a 'relevant expert' may not be able to comment, in their capacity as an expert, on some of the matters enumerated in subsection 105A.6(7). While a relevant expert is not required to comment on all of the matters listed under that provision,[153] there is no statutory directive that the relevant expert **may only** comment on the matters that are, in fact, within their individual expertise as it pertains to the assessment of the offender's future risk.

229. In other words, if a particular 'relevant expert' chose to exceed the limits of their particular field of expertise for the purpose of assessing and reporting on an offender's future risk, paragraphs 105A.8(1)(b) and (c) would nonetheless **require** the findings made in their report, and the outcomes of any other assessment they have conducted, to be given legal status as the evidence of a 'relevant expert' for the purpose of the court's decision the CDO application. While a court is free to determine the appropriate degree of weight to be given to the evidence of a 'relevant expert' the practical reality is that a court is likely to be heavily reliant on that evidence. Paragraphs 105A.8(1)(b) and (c) may have the practical effect of facilitating such reliance.

230. For this reason, there must be a greater degree of precision in the statutory definition of a 'relevant expert'. This will provide the strongest possible practical assurance that the person's evidence, in fact, merits the legal status as that of a 'relevant expert'. That status will be conferred automatically under paragraphs 105A.8(1)(b) and (c) once the person is appointed as a 'relevant expert'.

[153] Such a requirement was proposed in the originating Bill as introduced, but was removed on a recommendation of the Committee. See: Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, (November 2016), recommendation 8, and 77-78 at [3.101]-[3.102].

231. The Law Council notes that its recommended limitation on the definition of 'relevant expert' would not prohibit the court from admitting and considering the evidence of other persons. For example, the court could consider the evidence of such persons in assessing other matters specified in section 105A.8, including:

- **paragraph 105A.8(1)(d)**—any report, relating to the extent to which the offender an reasonably and practicably be managed in the community, that has been prepared by a State or Territory corrective services agency, or any other person who is competent to make that assessment;
- **paragraph 105A.8(1)(i)**—any other information as to the risk of the offender committing a serious terrorism offence; and
- **subsection 105A.8(2)—**any other matter the court considers relevant.

232. Importantly, it would be open to the court to admit the opinions of a person other than someone appointed as a 'relevant expert' under the rules governing expert evidence (for example, under section 79 of the Uniform Evidence Law, which has been adopted in New South Wales, Victoria, Tasmania, the Australian Capital Territory and the Northern Territory). The only difference would be that this evidence is not **also** given statutory status under Division 105A as the evidence of a 'relevant expert'. The offender could not be required to attend a mandatory risk assessment conducted by that person, pursuant to subsections 105A.6(4) and (5).

233. Given the special status accorded to the evidence of a 'relevant expert' under sections 105A.7 and 105A.8, the Law Council considers that the Parliament should have a stronger role in individually approving the categories of persons who are eligible to be appointed by the courts as 'relevant experts'. This is also appropriate given that law enforcement agencies can subsequently make derivative use of an offender's answers to questions asked of them, or information otherwise provided by the offender, at a mandatory risk assessment conducted by a relevant expert under subsections 105A.6(4) and (5).

234. In particular, the Law Council submits that the Parliament should be responsible for prescribing exhaustively, in primary legislation, the categories of persons who may be appointed as relevant experts, by reference to their qualifications, skills, experience, and applicable professional conduct obligations and regulation. There should no longer be a 'catch all' provision covering 'any other expert' in addition to a registered psychologist, psychiatrist or medical practitioner.

235. This is particularly important given that risk assessment frameworks for the purpose of Division 105A are still in development and are relatively new (as discussed below in relation to implementation matters). Once those frameworks are more advanced and established, the Parliament would be in a better position to assess whether there is a need to add further categories of persons to those who may be appointed as 'relevant experts'. (For example, because the substance of the risk assessment frameworks will identify, or will help to identify, the types of persons who are suitable to become accredited to administer them.)

The Committee's conclusions in 2016

236. The Law Council acknowledges that the Committee, in its 2016 report on the originating Bill, supported the retention of 'any other expert' in the definition of a 'relevant expert'. The Committee acknowledged the lack of clarity in this aspect of the definition, but indicated that it could 'envisage situations where a relevant expert may be a person who is not a psychiatrist, psychologist or other medical practitioner'.[154]

[154] Parliamentary Joint Committee on Intelligence and Security, Advisory report on the Criminal Code Amendment (High-Risk Terrorist Offenders) Bill 2016, (November 2016), 77 at [3.99].

237. The Law Council does not dispute that, in some cases, the evidence of such persons may be relevant and may assist the court in making decisions about an offender's future risk. Rather, the Law Council's concerns are directed to a separate matter, which is the **status** that Division 105A gives to that evidence (as that of a 'relevant expert'). A more cautious legislative approach is preferable in identifying the categories of persons who are eligible to be appointed as relevant experts.

Recommendation 29 – persons who may be appointed as 'relevant experts'

- **The definition of 'relevant expert' in section 105A.2 of the *Criminal Code Act 1995* (Cth) should be amended to omit paragraph (d) (covering 'any other expert') so that the Australian-registered psychiatrists, psychologists and medical practitioners specified in paragraphs (a), (b) and (c) are exhaustive of the persons who may be appointed as relevant experts in continuing detention order applications. (This is provided that they are determined by the court to be competent to assess the risk to the community, if the offender were released into the community.)**
- **Any expansion of the categories of people who are eligible to be appointed as 'relevant experts' (subject to the court being satisfied of their competence) should be subject to explicit Parliamentary approval, via legislative amendments to section 105A.2 to add further categories.**

Seriousness of the relevant offence

238. Section 105A.3 prescribes the persons who may be the subject of a CDO. It lists the offences of which a person must have been convicted. These are:
    - offences against Subdivision A of Division 72 of the Criminal Code (international terrorist activities using explosive or lethal devices);
    - offences against Part 5.3 of the Criminal Code (terrorism) that are punishable by a maximum penalty of seven or more years' imprisonment); and
    - offences against Part 5.5 of the Criminal Code (foreign incursions) excluding offences for publishing recruitment advertisements, and offences against the predecessor to Part 5.5, the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).
239. The Law Council remains concerned the approach of prescribing broad categories of offences that carry high maximum penalties (which are generally between seven years and life imprisonment) is overly broad. The maximum penalty for an offence is intended to cover the most serious case. Accordingly, the requirements of section 105A.3 do not restrict the application of the CDO regime to those offenders who have been sentenced to a term of imprisonment of a particular period (for example, seven years' imprisonment).
240. This means that the CDO regime could be available in respect of persons whose offending was at the lower end of the range of objective seriousness. For example, the Supreme Court of New South Wales recently sentenced a person to three years and eight months imprisonment for the offence in subsection 119.1(2) of the Criminal Code for engaging in a hostile activity in a foreign country, notwithstanding that this offence is punishable by a maximum penalty of life imprisonment. The Court held that the offending was at the 'very lowest end of objective seriousness for offences of this kind'.[155]
241. The offender in this case could be the subject of a CDO, if the risk threshold in section 105A.7 of the Criminal Code is met within 12 months of his release (with the head sentence ending on 18 February 2022). In contrast, if a person who

[155] *R v Betka* [2020] NSWSC 77 (20 February 2020, Harrison J) at [36].

committed violent acts in pursuit of a political, religious or ideological motive was ultimately charged with, and convicted of, offences against the person (such as murder, grievous bodily harm or serious assault) rather than a specific terrorism or security offence, that person will not be capable of being made subject to a CDO under Division 105A.

242. This risk of a disparity between the persons who are liable to a CDO and those who are not is particularly significant for those terrorism and foreign incursions offences that apply very broadly. This includes the offence of entering, or remaining in, a declared area contrary to section 119.2 of the Criminal Code. It also includes the preparatory and ancillary terrorism offences in Divisions 101, 102 and 103 of the Criminal Code. These offences criminalise a wide range of conduct, with extensive variation in its degree of gravity.

243. The Law Council acknowledges that the Committee considered this issue in its 2016 report on the originating Bill. It placed weight on the fact that the court must apply the 'unacceptable risk' threshold in section 105A.7 in deciding whether to issue a CDO, and is not required to consider the anterior conviction for a relevant offence.

244. However, the Law Council remains concerned that the lack of precision in the relevant offences specified in section 105A.3 is liable to create arbitrary distinctions between the persons who may be subject to CDOs and those who are not, before any question arise about the person's risk upon the completion of their sentences of imprisonment. The overly broad coverage of the offences which can render a person liable to a CDO also creates a risk that there will be no rational connection between an offender's anterior conviction for an offence, and their future risk if released into the community on completion of their sentence.

245. Consequently the Law Council continues to recommend greater precision in the statutory criteria covering the persons who may be subject to a CDO, on the basis of their actual sentences, and not merely the maximum sentence for the relevant offence.

Recommendation 30 – seriousness of underlying offence

- **Section 105A.3 of the *Criminal Code Act 1995* (Cth) should be amended to provide that a person may be the subject of a continuing detention order if they have been:**
  - **convicted of an offence against the provisions specified in paragraph 105A.3(a); and**
  - **sentenced to a term of imprisonment of seven years or more.**

Standard of proof in relation to unacceptable risk

246. The Law Council remains of the view that, given the gravity of the consequences of a CDO, the 'high degree of probability' standard for the 'unacceptable risk' test in section 105A.7 of the Criminal Code is not appropriate and should be replaced with the criminal standard of proof (beyond reasonable doubt).

247. The Law Council made the following observations in its submission to the Committee inquiry into the originating Bill:

- there is a lack of an established body of specialised knowledge on which to base predictions about a person's future risk of committing a terrorism offence. While it appears that the Commonwealth, State and Territory Governments

have now selected a preferred risk assessment tool (the VERA-2R)[156] it must be acknowledged that this tool is still formative; and

- the concept of 'risk' is, itself, fluid and subjective. The qualifier 'unacceptable' does little or nothing to change this high level of subjectivity.[157]

248. The Law Council acknowledges that the Committee supported the retention of the 'high degree of probability' standard on the basis: of its broad consistency with State and Territory dangerous prisoners' legislation; the protective rather than punitive objective of the CDO regime; and the non-specific threat of re-offending to which the CDO regime is directed (rather than a specific, imminent threat).[158]

249. However, the Law Council remains concerned about the vagueness and subjectivity inherent in the substantive issuing threshold of an 'unacceptable risk' of a person committing a terrorism offence.

250. The Law Council considers that this factor merits a higher and more certain standard of proof, which is akin to the criminal standard applied to sentencing. This is further supported by the gravity of the consequences of a CDO, the extraordinary and potentially indefinite nature of post-sentence detention under the CDO regime, its close connection with criminal offences, and the inherently fraught nature of making predictions about a person's future risk (including in the absence of an established and reliable risk assessment framework).[159]

Rules for drawing inferences about future risk

251. The Law Council considers that its position in relation the rules about drawing inferences about a person's future risk should apply to both COs and CDOs, since both types of orders involve placing preventive restraints on a person's liberty based on predictions from their future risk, on the basis of inferences from their past conduct. The Law Council's reasoning above in support of its recommendation on COs applies similarly to CDOs (See recommendation 3 above).

Recommendation 31 – rules for drawing inferences about future risk

- **Section 105A.7 of the *Criminal Code Act 1995* (Cth) should be amended to provide that, if an inference is to be drawn that a person is an unacceptable risk of committing a serious terrorism offence based on their past conduct, that inference must be the only rational inference capable of being drawn from the evidence.**

Mandatory considerations

252. The Law Council welcomes the statutory guidance provided in section 105A.8 about the matters that a court must consider in performing the assessment required under section 105A.7 as to whether the person presents an unacceptable risk of committing a serious terrorism offence if released into the community.

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[156] Attorney-General's Department, *Post-sentence preventative detention of high-risk terrorist offenders: report to the Parliamentary Joint Committee on Intelligence and Security*, June 2017, 8.

[157] Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, (October 2016), 19 at [67].

[158] Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, (November 2016), 56-57 at [3.32].

[159] The Law Council notes that the Government has selected the VERA-2R as its preferred risk assessment tool. However, proponents of the VERA-2R themselves acknowledge the limitations in this tool. In particular, stating that 'predictive validity is problematic due to the low base rate of terrorists and violent extremists ... risks are time and context sensitive and are not able to be predicted with certainty. For each evaluation, limitations in the assessment must be clearly identified'. Custodial Institutions Agency, Ministry of Justice and Security, Government of the Netherlands, VERA-2R: strengths and limitations, <https://www.vera-2r.nl/vera-2r-instrument/strengths-and-limitations/index.aspx>.

253. However, the Law Council continues to recommend that section 105A.7 should require the court to take into account further matters, variously part of the assessment of the offender's future risk, and as additional considerations directed to establishing the proportionality of continued detention.

Recommendation 32 – additional matters to which the court must have regard

- **Section 105A.7 of the *Criminal Code Act 1995* (Cth) should be amended to provide that the court must also take into account the following factors, in addition to those relevant to the assessment of risk as specified in paragraphs 105A.8(1)(a)-(i):**
  - **matters with respect the nature of the anterior convention for a serious terrorism offence, in particular: the nature of the offending, the fault elements of the offence**
  - **the views of any parole authority concerning the release of the offender on parole;**
  - **any limitations (practical and legal) in the ability of the offender to test or challenge the information relied on in an application for a CDO; and**
  - **the conditions under which the offender will likely be detained, including the availability of suitable rehabilitation programs.**

Interim detention orders

Mandatory considerations

254. The Law Council remains of the view that IDOs made pending the determination of a CDO application should be subject to a public interest assessment.[160] Presently, paragraph 105A.9(2)(b) enables the court to issue an order if it is 'satisfied there are reasonable grounds for considering that a continuing detention order will be made in relation to the offender'. The Law Council notes that there is no meaningful way for a respondent to challenge an application for the IDO. In effect, the court looks at the matters relied upon in support of the application, assumes that they are proved, and then makes an assessment as to whether those matters would justify a CDO (or whether they would be insufficient to establish, to a high degree of probability, that the offender would present an unacceptable risk if released).

255. In view of this practical limitation on the respondent, the Law Council considers that the section 105A.9 should adopt an analogous provision to paragraph 76(1)(c) of the *Serious Offenders Act 2018* (Vic) under which a court must not make an interim detention order unless satisfied that it would be in the public interest. This would at least enable a respondent to make a public interest argument against the IDO, in lieu of a meaningful ability to challenge evidence put forward by the Minister for Home Affairs or their representative.

256. The Law Council's concerns (as summarised above) were noted in the Committee's 2016 advisory report on the originating Bill, but were not the subject of substantive comment.[161] The Law Council therefore continues to recommend this amendment, in order to ameliorate the present inability of the respondent to meaningfully challenge an IDO application.

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[160] Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, (October 2016), 22 at [79]-[81].

[161] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, (November 2016), 50-51 at [3.10]-[3.11] and 52-53 at [3.15]-[3.18].

Recommendation 33 – issuing criteria for interim detention orders

- **Section 105A.9 of the *Criminal Code Act 1995* (Cth) should be amended to provide that the court must be satisfied that it is in the public interest to make the interim detention order.**

Technical correction to issuing criteria

257. The Law Council continues to recommend amendments to paragraph 105A.9(2)(a) to rectify a technical drafting issue, which was explained as follows in the Law Council's 2016 submission on the originating Bill:

> *Paragraph 105A.9(2)(a) is framed in the future tense ('the Court is satisfied that either of the following period will end before the application for the continuing detention order has been determined'). However, a situation may arise where the Attorney-General, for whatever reason, lodges an application for a CDO two weeks before an offender's sentence expires. Assume then that the CDO application will not be determined in that two-week period. The Attorney-General then makes an application for an IDO to cover the difference. Paragraph 105A.9(2)(a) is engaged because the sentence of imprisonment will end before the CDO application has been determined. However, imagine further that 28 days down the track, the CDO application has not yet been determined and the Attorney-General makes another IDO application. Now, the term of imprisonment has ended and it necessarily will not end before the application has been determined because it already has ended. The Bill should be amended to read 'will end or has ended'.*[162]

258. As this matter was not addressed in the Committee's 2016 advisory report on the originating Bill, the Law Council supports its remediation as part of the present review.[163]

259. The Law Council notes that paragraph 76(5)(a) of the *Serious Offenders Act 2018* (Vic) expressly addresses this risk in the context of the Victorian post-sentence detention and supervision regime. It provides that the Supreme Court of Victoria may determine an application for an interim detention order, even if the offender has ceased to be an 'eligible offender' because the custodial sentence has been served or has expired, pending resolution of the interim and substantive detention order applications.

Recommendation 34 – technical correction to s 105A.9(2)(a)

- **Paragraph 105A.9(2)(a) of the *Criminal Code Act 1995* (Cth) should be amended to provide that a court may make an interim detention order if the person's sentence of imprisonment <u>has ended</u> or will end, before the substantive continuing detention order application is determined.**

[162] Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, (October 2016), 23 at [83].

[163] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, (November 2016), 50-53, [3.8]-[3.18].

Children who are convicted of serious terrorism offences

260. The Law Council has previously submitted that post-sentence preventative detention should only be available as a last resort in relation to persons who were children when they committed the relevant offence.[164]

261. The Law Council remains concerned that the application of the CDO regime to such persons may be incompatible with Australia's obligations under the *Convention of the Rights of the Child*, and continues to support additional issuing criteria that unambiguously require the court to consider the fact that the person was a child when they committed the relevant offence, and apply a 'last resort' threshold to such CDOs.

262. The Law Council notes that the Committee, in its 2016 report on the originating Bill, placed weight on the fact that the person's future risk for the purpose of a CDO application is assessed after they turn 18.[165] However, it is the anterior conviction for a relevant offence, which occurred when the person was a child, that first determines whether a person can be subject to a CDO if they meet the 'unacceptable risk' threshold when they have completed their sentence.

263. The Law Council remains of the view that such offenders should be subject to specific issuing criteria for subsequent CDOs, which reflect the circumstance that they were under a special vulnerability when they committed the relevant offence; as distinct to an offender who was an adult when they committed the relevant offence.

Recommendation 35 – post-sentence detention of persons who were convicted and sentenced as children

- **Section 105A.7 of the *Criminal Code Act 1995* (Cth) should be amended to make explicit provision for the issuing of CDOs in relation to persons who were convicted and sentenced as children, and are aged 18 years or over at the sentence has been completed.**
- **Any CDO application made in respect of such persons should be subject to an additional issuing criterion, which requires the court to be satisfied that a CDO is the last resort to protect the community from the likely risk presented by that person if they were released.**

Rehabilitation

Post-sentencing assessments and referrals

264. The Law Council has previously commented on the importance of a terrorist offender having access to rehabilitation programs as soon as possible after their sentence commences, and for them to be held in detention facilities that encourage an environment of rehabilitation. A delay in the provision of rehabilitation programs until shortly before an offender becomes eligible for parole is not sufficient.[166]

265. Accordingly, an early assessment of an offender should be required as soon as possible after sentencing, so that an appropriate rehabilitation program can be put in place promptly. This may assist in reducing the need for CDOs to be sought and issued, and may assist in ensuring that any remaining level of risk that the person may present is capable of being managed within the community.

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[164] Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, (October 2016), 23-26 at [84]-[93].

[165] Parliamentary Joint Committee on Intelligence and Security, Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, (November 2016), 38-39 at [2.34].

[166] Ibid, 31 at [113].

Recommendation 36 – post-sentencing assessments and referrals to rehabilitation programs

- **Either section 105A.23 of the *Criminal Code Act 1995* (Cth) (warning to persons sentenced for serious terrorism offences) or Part IB of the *Crimes Act 1914* (Cth) (sentencing of federal offenders) should be amended to:**
  - **require a preliminary risk assessment to be undertaken in relation to a person who is convicted of, and sentenced to imprisonment for, a serious terrorism offence (and who is therefore liable to a CDO) for the purpose of a referral to a custodial rehabilitation program; and**
  - **impose a duty on the Minister for Home Affairs to take all reasonable steps, as soon as reasonably practicable after the person is sentenced, to ensure that an appropriate custodial rehabilitation program is identified based on the person's risk assessment, and the person is referred to it.**

Resourcing for rehabilitation programs

266. The Law Council has previously observed that persons who are, or could be, subject to a CDO should be given repeated opportunities to participate in rehabilitation programs as soon as their sentence commences, and should have access to suitable services if released into the community.[167]

267. The Law Council is concerned that very little information has been provided to the public about funding for rehabilitation programs. The last implementation report on the regime, provided to the Committee in June 2017, simply stated that 'expenses' would 'be likely to focus on the extension or adaptation of existing programs, and their continued evaluation'. It stated that 'detailed costings' on implementation would be provided to the (then) Law, Crime and Community Safety Council by December 2018.[168] This information did not identify the types of relevant rehabilitation programs (if any) in existence at that time, and no further information has been released publicly, to the Law Council's knowledge.

268. Accordingly, the Law Council suggests that the Committee considers the existence and adequacy of rehabilitation programs (including resourcing) as part of its present inquiry into Division 105A.

Recommendation 37 – resourcing for custodial and community rehabilitation

- **The Commonwealth, States and Territories should properly fund rehabilitation programs for detainees, both:**
  - **in custody, as part of their curial sentences and in post-sentence detention under continuing detention orders; and**
  - **in the community, for persons who are released after completing their curial sentences without being made subject to a continuing detention order, and those who are released after being detained for a further period under a continuing detention order (or consecutive orders).**

[167] Ibid.

[168] Attorney-General's Department, *Post-sentence preventative detention of high-risk terrorist offenders: report to the Parliamentary Joint Committee on Intelligence and Security*, June 2017, 9.

Annual reporting on rehabilitation measures

269. The Law Council welcomes the statistical annual reporting requirements under section 105A.22 in relation to the CDOs sought and issued for each financial year. However, the provision of aggregated statistical information about the number of orders sought and issued does not provide sufficient information for the public and Parliament to scrutinise the operation of the CDO regime.

270. The Law Council considers that further information is needed about rehabilitation programs, including numbers, details of the types of programs offered, and resourcing. This will enable meaningful scrutiny of the adequacy of rehabilitation programs, which are integral to the effective operation of the CDO regime and the protection of public safety more generally. (The Law Council also makes further recommendations about the periodic publication of implementation progress reports: see recommendation 42.)

Recommendation 38 – reporting requirements: rehabilitation

- **Section 105A.22 of the *Criminal Code Act 1995* (Cth) should be amended to require annual reports on the CDO regime should be amended to require the Minister for Home Affairs to include information about custodial rehabilitation programs for people who are serving sentences of imprisonment for serious terrorism offences, and people who are being detained under CDOs. This should include:**
  - **the number of programs;**
  - **a description of the types of programs;**
  - **the total amount of Commonwealth, State and Territory funding provided for those programs; and**
  - **breakdowns of the above matters for each State and Territory.**

Arrangements with States and Territories

271. Subsection 105A.21(1) of the Criminal Code empowers the Minister for Home Affairs to make arrangements with State and Territory governments for the detention of persons subject to CDOs in State and Territory prisons. Under subsection 105A.21(2), CDOs are taken to authorise the chief executive officer of the relevant State or Territory prison to detain the person under the CDO while it is force.

Human rights-based preconditions to making arrangements with States and Territories

272. The Law Council considers that the power of the Minister to make arrangements under section 105A.21 should be subject to explicit, human rights-based preconditions. In particular, the Minister should be required to make all reasonable inquiries and take all reasonable steps to ensure that the prison accommodation provided for the CDO subject:

- complies with the requirement in section 105A.4 for such persons to be treated in a way that is appropriate to their status as persons who are not serving a sentence of imprisonment; and
- complies with Australia's international human rights obligations.

273. This condition will provide a stronger incentive for the Commonwealth to ensure the compliance of the accommodation provided by States and Territories, before a person can be detained in State and Territory prisons under a CDO.

Recommendation 39 – human rights preconditions to making arrangements

- **Section 105A.21 of the *Criminal Code Act 1995* (Cth) should be amended to provide that the power of the Minister for Home Affairs to make agreements with States and Territories for detention of persons subject to continuing detention orders in State and Territory prisons should be subject to a requirement that the Minister must be satisfied, on reasonable grounds, that the person's conditions of detention will be compatible with Australia's human rights obligations, including adequate access to custodial rehabilitative programs.**

Conditions of continued detention

274. Subsection 105A.4(1) provides that a person detained under a CDO must be 'treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment'. However, this is subject to a series of exceptions, one of which is in paragraph 105A.4(1)(a), concerning 'the management, security or good order of the prison' in which the CDO subject is being detained under the order.

275. The Law Council considers that the 'management' or 'good order' of a prison is not a legitimate basis on which to deny a CDO subject the right to be treated in a manner that is commensurate with their status as a person who is not serving a sentence of imprisonment. Rather, if a prison facility cannot accommodate a CDO subject in a way that is compatible with their status, it should not be permitted to detain the person under the CDO. Further, as recommended above, the Commonwealth should not be permitted to enter into an arrangement with a State or Territory to detain a CDO subject, unless satisfied on reasonable grounds that the State or Territory prison can meet the 'appropriate treatment' obligation in subsection 105A.4(1).

276. Concerningly, paragraph 105A.4(1)(a) is not limited to temporary, emergency circumstances or a fixed maximum period of time. Rather, it could extend to the **entirety** of a person's detention under one or more CDOs, which could be an extremely prolonged or indefinite period of time (potentially the remainder of a person's natural life). Consequently, the provision fails to satisfy the basic requirements of proportionality and should be repealed.

Recommendation 40 – treatment of people subject to CDOs in prison

- **Paragraph 105A.4(1)(a) of the *Criminal Code Act 1995* (Cth) should be repealed, so that the management or good order of a prison is <u>not</u> lawful justification to treat a CDO subject in a manner that is not commensurate with their status as a person who is not serving a sentence of imprisonment**.
- **Alternatively, paragraph 105A.4(1)(a) should be amended to provide that the exception from the obligation to treat a CDO subject inconsistently with their status as a person who is not serving a criminal sentence can only be departed from where necessary to maintain the security of the prison, in temporary circumstances of emergency. This should be subject to a maximum time limit, and clear lines of oversight, and rights of complaint by the CDO subject.**

Public reporting and transparency

Public reporting on implementation of regime

277. The Law Council notes that the last detailed, official public report on the implementation of the CDO regime appears to have been provided to the Committee in June 2017, prepared by the Attorney-General's Department.[169] This was pursuant to a recommendation of the Committee in its 2016 review of the originating Bill for the CDO regime.[170] The Law Council is not aware of any further implementation plans and progress report being released publicly since 2017.

278. In the interests of transparency in the implementation of this relatively new and highly intrusive regime, the Law Council considers that there should be statutory periodic reporting requirements on the implementation of the regime, which go beyond the statistical annual reporting requirements in section 105A.22 on the numbers of CDOs and applications.

279. Implementation reports should address the development of risk assessment tools and the processes for identifying and accrediting relevant experts, together with matters relevant to rehabilitation (including resourcing) and oversight.

Recommendation 41 – public reports on implementation plans

- **Division 105A of the *Criminal Code Act 1995* (Cth) should be subject to further public reporting requirements in relation to the implementation of the CDO regime, including:**
  - **risk assessment tools;**
  - **housing of people who are subject to a CDO;**
  - **requirements for the identification and accreditation of experts;**
  - **rehabilitation programs (pre and post-release);**
  - **oversight arrangements; and**
  - **resourcing (including for rehabilitation, legal assistance, and assistance to people who are subject to CDO applications in calling their own experts).**

Public disclosure of arrangements with States and Territories

280. As noted above, section 105A.21 of the Criminal Code empowers the Minister for Home Affairs to make arrangements with State and Territory governments for the detention of persons subject to CDOs in State and Territory prisons.

281. The Law Council considers that there should be greater transparency in relation to arrangements that are made under section 105A.21. In particular, there should be public disclosure about the fact that such arrangements have been made, and the release of the terms of the arrangement, unless disclosure of certain parts would be likely to cause serious harm to security interests, including the security of prisons and the safety of prisoners.

282. Greater transparency about the existence and terms of arrangements with States and Territories under section 105A.21 would provide an opportunity for public and Parliamentary scrutiny of the steps taken by the Commonwealth to ensure that the

[169] Attorney-General's Department, *Post-sentence preventative detention of high-risk terrorist offenders: report to the Parliamentary Joint Committee on Intelligence and Security*, June 2017.

[170] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, November 2016, recommendations 22 and 23.

conditions of detention for people who are subject to a CDO are reasonable and appropriate.

283. This should include an opportunity for public and Parliamentary scrutiny of the adequacy of the steps taken by the Minister for Home Affairs to ensure that any State and Territory prison accommodation will be compatible with the requirements in section 105A.4 for the CDO subject to be treated in a manner that is appropriate to their status as a person who is not serving a sentence of imprisonment.

Recommendation 42 – publication of arrangements with States and Territories

- **Section 105A.21 of the *Criminal Code Act 1995* (Cth) should be amended to require the Minister for Home Affairs to make a notifiable instrument, within the meaning of the *Legislation Act 2003* (Cth), in relation to the making of any arrangements with State and Territory government for the detention of persons subject to CDOs.**
- **The notifiable instrument should provide, as an annexure, details of the relevant arrangement (ideally a copy of a written agreement).**

Ministerial power of delegation—information-sharing functions

284. Subsection 105A.19(1) of the Criminal Code confers power on the Minister for Home Affairs to request certain persons (who are prescribed by regulations)[171] to provide information that the Minister reasonably believes is relevant to the administration or execution of the CDO regime. These requests may be oral or written.

285. Subsection 105A.19(2) of the Criminal Code confers further power on the Minister for Home Affairs to disclose information obtained under the CDO regime to any other person, who is listed in the regulations,[172] for the purpose of the recipient performing a function, or duty.

286. Section 105A.20 provides that the Minister for Home Affairs may delegate any or all of their information gathering and disclosure powers under section 105A.19 to the Secretary of the Department of Home Affairs, or any departmental employee. There are no limitations on the classes of departmental employees to whom the functions may be delegated (such as by reference to their level of seniority or expertise).

287. The Law Council notes that the information collection and disclosure functions under section 105A.19 are highly significant. The information able to be obtained under subsection 105A.19(1) could potentially be used against a person in CDO proceedings. The information that is obtained under subsection 105A.19(1) could also include information obtained as part of, or in connection with, CDO applications. The 'on-disclosure' of such information under subsection 105A.19(2) may be highly prejudicial to the interests of the CDO subject, or other persons. There is only a use immunity under section 105A.6(5A) in respect of information an offender provides during a mandatory risk assessment by a 'relevant expert' for the purpose of a CDO application. There are no prohibitions or limitations on the derivative use of that information in proceedings against the person; and there is not even a use immunity in respect of any other information that may be obtained from the offender for the purpose of the AFP or Minister preparing a CDO application. In addition, subsection 105A.19(4) provides that the power to disclose information obtained in the operation

[171] Criminal Code Regulations 2019, regulation 10. The prescribed persons are: senior executive AFP employees, State and Territory police, State and Territory corrective services staff; directors of public prosecutions and their staff; the Director-General of Security and all ASIO officers; all employees of the Department of Home Affairs; and authorised officers who perform functions under Part IB of the Crimes Act with respect to the management of federal offenders.

[172] Ibid. The Regulations prescribe the same classes of persons for the purpose of the Minister's information collection and disclosure functions under section 105A.19.

of the CDO regime overrides all other laws that would otherwise apply to prohibit disclosure. This means that privacy and secrecy laws are overridden.

288. If such a broad information-collection and disclosure provision is to be retained in respect of highly sensitive and potentially prejudicial information, there must be stronger limits on the classes of persons to whom it may be delegated. The Law Council considers that the Minister's power to delegate any or all of their information-collection and disclosure functions under section 105A.19 to **any or all** departmental staff is not proportionate to the impacts this may have on personal privacy and other interests of the CDO subject; and potentially security or law enforcement interests in making subsequent disclosures of classified information (given the overriding of otherwise applicable secrecy offences).

289. The power of delegation should be limited to a class of senior officers, to ensure that there is an appropriate level of oversight and accountability for information collection and disclosure in connection with the CDO regime. The Law Council recommends that this is limited to Departmental officers who hold a position that is classified at the level of Senior Executive Service (**SES**) Band 1 or higher.

290. More junior officers should instead act as administrative assistants to the SES-level delegate, by providing advice to the delegate on decisions to make requests or disclosures, and implementing the decisions of the delegate. As a minimum, there should be limitations in respect of disclosures to police and prosecutorial agencies.

Recommendation 43 – addressing overbreadth in classes of delegates

- **Paragraph 105A.20(b) of the *Criminal Code Act 1995* (Cth) should be amended to place greater limits on the power of the Minister for Home Affairs to delegate their information collection and sharing functions to any Australian Public Service employee in the Department of Home Affairs.**
- **The amendments should limit the class of delegates to officers who hold position that is classified Senior Executive Service Band 1 or higher, and who the Minister considers have appropriate expertise and experience to perform the particular functions and particular powers to be delegated.**

Interaction with ASIO's compulsory questioning powers

291. The Law Council notes that ASIO's compulsory questioning powers under Division 3 of Part III of the ASIO Act may overlap with the CDO regime. This may occur if ASIO were able to obtain a warrant to compulsorily question a convicted terrorist offender who is:

- subject to a CDO, or an application for a CDO that has been made but not yet been determined, or an imminent application for a CDO (in that the AFP or Home Affairs Minister have decided to make an application to the court, but have not yet completed or filed that application); or
- may be subject to an application for a CDO, because they have been convicted of a serious terrorism offence, are presently serving a sentence of imprisonment, and have 12 months or less remaining on that sentence.

292. The Law Council is concerned that neither Division 105A of the Criminal Code nor Division 3 of Part III of the ASIO Act contains clear safeguards to prevent the risk that ASIO's exercise of compulsory questioning powers may lead to oppression or prejudice in relation to a person's defence to a CDO application. (This includes in the revised questioning warrant regime that is presently under consideration by the Committee as part of its inquiry into the ASIO Amendment Bill.)

Potential use of ASIO's questioning material in CDO applications

293. There appears to be a risk that ASIO could compulsorily question a person who is subject to a CDO application, or an imminent CDO application, about the subject matter of the CDO application—namely, the person's future risk of committing a serious terrorism offence if released into the community. (For example, compulsory questioning about the person's ideological beliefs; their post-release intentions and plans; and their activities, associations and communications in prison.) The use immunity for information obtained from compulsory questioning is limited to criminal proceedings, whereas CDOs are civil orders.[173]

294. The proposed amendments to ASIO's compulsory questioning regime, in the ASIO Amendment Bill, do not address this matter. For the reasons explained below, the Law Council considers that the ASIO Act should not permit compulsory questioning of persons who are subject to a CDO application or an imminent CDO application about the subject matter of that CDO application. Alternatively, as a bare minimum, the limitations in the ASIO Amendment Bill on the secondary disclosure and use of questioning material in 'post-charge' cases should be extended to CDO proceedings.

The position in relation to criminal proceedings (including post-charge questioning)

295. Presently, the compulsory questioning regime in Division 3 of Part III of the ASIO Act purports to abrogate the privilege against self-incrimination,[174] but is silent as to whether a person can be compulsorily questioned by ASIO about the substance of any pending or imminent charges, before they have been resolved by a court.

296. Based on the reasoning of the High Court in applying the principle of legality to the interpretation of other statutory compulsory questioning powers, it is unlikely that the ASIO Act could presently authorise compulsory questioning of charged persons, in the absence of clear words to effect a radical alteration of the accusatorial nature of the criminal justice system. (This includes a requirement that the Crown must prove its case beyond reasonable doubt, and the right of the accused person to silence.)

297. For this reason, the proposed amendments to the compulsory questioning regime in the ASIO Act include an explicit power to compulsorily question charged persons about the subject-matter of their charges. These proposed amendments emulate previous amendments to other statutes conferring compulsory questioning powers for criminal intelligence and anti-corruption investigations.

The position in relation to non-criminal proceedings, which involve the imposition of a penalty or other restraints on liberty

298. Further, the ASIO Act is presently silent as to whether a person can be compulsorily questioned by ASIO in relation to the subject matter of any other pending proceedings that may result in the imposition of:

- a civil penalty against the person that is unconnected with unresolved or imminent criminal charges; or
- other significant restraints on a person's liberty which are also unconnected with unresolved criminal charges, but which may not necessarily amount to a penalty, such as a pending CO or CDO application.

299. It is unclear whether the principle of legality would necessarily apply in these circumstances, so that the questioning warrant provisions of the ASIO Act would be taken not to authorise ASIO to question a person about the subject-matter of a

[173] Criminal Code, sections 105A.8(3) and 105A.13.

[174] ASIO Act, subsection 34L(8).

pending application for a civil penalty or other restrictive order, in the absence of clear words to the contrary.[175]

300. The proposed amendments to the ASIO Act which are presently before the Parliament do not attempt to clarify whether compulsory questioning powers can be exercised in this context. Further, the proposed amendments to the ASIO Act only extend use immunity in relation to questioning material to criminal proceedings against the person. 'Criminal proceedings' are defined as prosecutions for offences against Australian laws, or confiscation proceedings under proceeds of crime legislation.[176]

301. The use immunity in the ASIO Amendment Bill does not extend to 'a proceeding for the imposition of a penalty'. This is in contrast to the use immunity conferred by paragraph 30(5)(b) of the *Australian Crime Commission Act 2002* (Cth) (**ACC Act**) in relation to the compulsory questioning ('examination') powers of the ACIC.

302. However, even under the more expansive use immunity in paragraph 30(5)(b) of ACC Act, there would still be a question of law as to whether an application for an order to impose preventive restraints on a person's liberty (such as a CDO) would amount to a 'penalty' for the purpose of the statutory use immunity in relation to examination material.[177]

The need for amendments

303. Neither the present compulsory questioning regime nor the proposed amendments in the ASIO Amendment Bill provide clarity as to whether a person who is the subject of a CDO application, or an imminent CDO application could be questioned by ASIO about the matters that would be the subject of the CDO application. (That is, questioning about matters relevant to the risk that the person may commit a serious terrorism offence if released into the community when their sentence ends.)

304. However, if ASIO were able to exercise its compulsory questioning powers in this manner, there would be nothing in either the ASIO Act or Division 105A of the Code to prevent the Minister for Home Affairs or the AFP making **direct use** of that questioning material as evidence against the person in CDO proceedings.

305. In such circumstances, a detainee's compulsion to answer ASIO's questions under a questioning warrant would be additional to the obligation imposed on them under subsection 105A.6(5) of the Criminal Code to attend a compulsory risk assessment

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[175] In C*hief Executive, Queensland Health v Jattan* [2010] QCA 359 (17 December 2010, Holmes and White JJA, Boddice J) the Queensland Court of Appeal acknowledged the existence of a common law privilege against exposure to civil penalties, which is analogous to the criminal law privilege against self-incrimination. The Court held at [28'] that 'the privilege against self-incrimination is deeply entrenched in our common law. Similarly, the privilege against exposure to [civil law] penalties, although having its origin in the rules of equity relating to discovery, has long been recognised by the common law'. The court recognised that a civil penalty need not be pecuniary, and could cover the forfeiture of property interests, exposure to loss of office, or disqualification from the management of a corporation. However, the Law Council notes that there may be legal argument as to whether any such privilege is of a sufficiently 'fundamental' character to attract the principle of legality in statutory interpretation (as is required by the common law formulation of that principle).

[176] Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, item 10: proposed section 34 (definition of criminal proceeding) and proposed subsections 34GD(5) and (6) of the ASIO Act.

[177] See, for example, C*hief Executive, Queensland Health v Jattan* [2010] QCA 359 at [29]-[33] and [40]. The Queensland Court of Appeal held unanimously that the issuance of a statutory notice by Queensland Health to cancel a person's professional endorsement as a pharmacist was a 'proceeding for the imposition of a penalty' within the meaning of subsection 30(5) of the ACC Act. This meant that information obtained in a compulsory examination carried out by the ACIC could not be used by Queensland Health as the basis for issuing the cancellation notice. The Court acknowledged that, while the cancellation of a person's professional accreditation has a public interest dimension (in the sense of protecting the public from exposure to persons who are found unfit to practise the relevant profession), the removal of a person's ability to practise their profession was nonetheless properly characterised as penal.

by a 'relevant expert' for the purpose of a CDO application (although they are not compelled to answer questions or give information at that assessment).

306. Accordingly, there is a risk that ASIO could obtain a questioning warrant to effectively 'bolster' an extant or imminent application for a CDO. A similar risk may also arise in relation to the examination powers of the ACIC under the ACC Act, if a CDO application were held not to be 'a proceeding for the imposition of a penalty' and therefore did not attract the use immunity in paragraph 30(5)(b) of the ACC Act.

307. In contrast, subsection 105A.6(5A) of the Criminal Code confers a use immunity on the detainee's answers to questions, or other information the detainee provides, during the compulsory risk assessment conducted for the purpose of a CDO application. This use immunity extends to any criminal or civil proceedings (other than the relevant CDO application for which the risk assessment is conducted). This means, for example, information given as part of a CDO risk assessment cannot later be admitted in evidence in a CO application in relation to that person.

308. To ensure that the protection in subsection 105A.6(5A) of the Criminal Code is not effectively 'hollowed out' by the exercise of compulsory questioning powers for intelligence gathering purposes by ASIO or the ACIC, those agencies' compulsory questioning powers should not be capable of being exercised against the subjects of CDO applications, or imminent CDO applications, where the intended questioning by ASIO or the ACIC relates to the subject matter of the proposed CDO.

309. An express statutory prohibition to this effect would provide the strongest possible safeguard against the risk that information obtained from compulsory questioning conducted by ASIO or the ACIC could cause prejudice to the interests of a detainee who is responding to a CDO application.

310. At the very least, there should be an explicit use immunity in relation to ASIO questioning material and ACIC examination material, which prevents it from being admitted in evidence against the person in CDO proceedings. Further, the statutory limitations in the ACC Act and the proposed limitations in the ASIO Act on the disclosure of ACIC examination material or ASIO questioning material to prosecutors should be extended to disclosures of such material to the AFP or Minister for Home Affairs, where there is an extant or imminent CDO application in relation to the questioning subject.[178]

311. In addition, in the case of applications and issuing decisions for ASIO's questioning warrants, there should be similar protections to those in the ASIO Amendment Bill for post-charge questioning.[179]

312. In particular, the Director-General of Security should be required to disclose the existence of an extant or imminent CDO application in their requests for questioning warrants. The relevant issuing authority should only be able to issue the questioning warrant if satisfied on reasonable grounds that it would be **necessary** to obtain intelligence that is important in relation to a questioning matter (such as a terrorism offence that may be committed by the person).

Recommendation 44 – prohibition on using ASIO questioning material in continuing detention order applications

Preferred option

- **Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (and the proposed amendments in the Australian Security Intelligence Organisation Amendment Bill 2020)**

[178] ACC Act, sections 25B-25E; ASIO Amendment Bill 2020, Schedule 1, item 10, inserting proposed section 34DF and Subdivision E of Division 3 of Part III of the ASIO Act.

[179] ASIO Amendment Bill, Schedule 1, item 10, inserting proposed paragraph 34BA(1)(d) of the ASIO Act.

should be amended to provide that ASIO cannot compulsorily question a person who is the subject of an extant or imminent CDO, in order to question the person about the subject-matter of the CDO application.

- **An equivalent prohibition should be inserted in the *Australian Crime Commission Act 2002* (Cth) in relation to compulsory examinations conducted by the ACIC.**

Alternative option

- **The ASIO Act and ACC Act should be amended to:**
  - **expressly confer use immunity in relation to CDO proceedings brought against the questioning subject / examinee, so that ASIO questioning materials and ACIC examination materials cannot be admitted in evidence against that person in the CDO application;**
  - **apply limitations on the secondary disclosure of ASIO questioning materials and ACIC examination materials to the AFP or Minister for Home Affairs (as CDO applicants), where the questioning warrant subject / examinee is the subject of an extant or imminent application for a CDO. These limitations should be equivalent to those which apply under the ACC Act, and are proposed to apply under the ASIO Act, for the disclosure of post-charge questioning or examination materials; and**
  - **in the case of ASIO's applications for questioning warrants under the ASIO Act:**
    - **the Director-General of Security should be required to inform the issuing authority whether the person is the subject of a CDO, or an extant or imminent CDO application; and**
    - **the issuing authority must only issue a questioning warrant if the higher threshold of 'necessity' is met (consistent with the proposed threshold for post-charge questioning).**

Statement of procedures—compulsory questioning of terrorist offenders

313. If the Committee considers that ASIO should have the power to compulsorily question detainees about the substance of an extant or imminent CDO application, the Law Council considers that binding procedural safeguards are necessary for the conduct of that questioning. (This is additional to the statutory safeguards recommended above.)

314. In particular, the Law Council submits that ASIO's statement of procedures for the conduct of compulsory questioning should make provision for the conduct of questioning in these circumstances. (The statement of procedures is a non-disallowable legislative instrument, which must be made under section 34C of the ASIO Act in order for the compulsory questioning power to be exercised. The ASIO Amendment Bill retains this requirement in the re-designed regime, in proposed section 34AF of the ASIO Act).

315. To ensure that such procedural guidance is included in all versions of the statement of procedures, as in force from time-to-time, the ASIO Act should specify that the statement of procedures **must** make provision for this matter.

Recommendation 45 – statement of procedures for questioning terrorist offenders who are, or may be, the subject of a continuing detention order

- **Section 34C of the *Australian Security Intelligence Organisation Act 1979* (Cth) and proposed section 34AF of the ASIO Act (in the Australian Security Intelligence Organisation Amendment Bill 2020) should be amended to provide that the Statement of Procedures for compulsory questioning by ASIO must include specific guidance on seeking and executing a questioning warrant against a person:**
  - **who is the subject of a continuing detention order, or an application for such an order, or**
  - **who may be the subject of such an order, because they are serving a sentence of imprisonment for a serious terrorism offence.**

Legal representation and financial assistance

The court's jurisdiction to order the Commonwealth to provide funding

316. The Law Council supports, in principle, the availability of a provision in Division 105A to enable the court to make orders staying CDO proceedings, and to require the Commonwealth to bear all or part the reasonable costs and expenses of the offender's legal representation.

317. However, the Law Council is concerned by aspects of the drafting of the relevant provisions in section 105A.15A. Subsection 105A.15A(1) limits the power of the court to make either or both orders to circumstances in which the offender, due to 'circumstances beyond their control', is '**unable to engage** a legal representative in relation to the proceeding' (emphasis added).

318. Problematically, the limitation of the power to circumstances in which the offender has been unable to engage a lawyer excludes circumstances in which the offender has engaged a lawyer, but is unable to self-fund that lawyer's fees; and a grant of legal aid or Commonwealth legal financial assistance has been declined, or has not been determined when the matter comes before the court.

319. In these circumstances, it is conceivable that a lawyer may take on the case pro bono, or in the hope that a pending request for legal aid or Commonwealth legal financial assistance is subsequently granted. Such a decision may be influenced by a concern on the part of the lawyer to ensure that the offender is not detained unnecessarily under an IDO (for up to a total of three months) because the determination of the CDO application is delayed due to unresolved funding issues concerning the offender's legal representation in the CDO proceedings.

320. In such cases, there should be an ability for the respondent to make a direct application to the court for an order under paragraph 105A.15A(2)(b) which requires the Commonwealth to bear all or part of the reasonable costs and expenses of the person's legal representation. To deny the court jurisdiction to make an order in these circumstances amounts to cost-shifting by the Commonwealth.

321. The Law Council also notes that the Committee, in its 2016 advisory report on the originating Bill, emphasised that 'access to adequate legal representation should form part of the review of the regime once it is considered operational'.[180] The Law

[180] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, (November 2016), 87 at [3.139].

Council urges the Committee to recommend that the above limitation in the court's jurisdiction under subsection 105A.15A(1) is rectified.

Recommendation 46 – power of court to order legal assistance funding

- **Section 105A.15A of the *Criminal Code Act 1995* (Cth) should be amended to enable the court to make an order requiring the Commonwealth to pay for the reasonable costs of the respondent's legal representation, if:**
  - **the respondent has been able to engage a legal representative, but**
  - **that person is acting *pro bono* because of an absence of public legal assistance funding. (For instance, a grant of legal aid, or a grant under the Commonwealth legal financial assistance scheme has been refused, or a decision has not been made.)**

Establishment of a dedicated Commonwealth legal assistance funding stream

322. The Law Council's comments at [82] to [88] in relation to legal assistance in CO proceedings apply equally to CDOs.

Recommendation 47 – legal assistance funding program for CDOs

- **The Australian Government should establish a dedicated legal assistance funding program for continuing detention orders (in addition to control orders, as per the Law Council's recommendation 8). Consideration should be given to delivering that assistance through State and Territory legal aid commissions, akin to existing arrangements for complex criminal cases.**

Improper executive interference with judicial discretion via delegated legislation

323. The Law Council is concerned that section 105A.15A inappropriately delegates legislative power to the executive government to interfere with the exercise of judicial discretion in applications for the Commonwealth to cover some or all of the detainee's reasonable costs or expenses for legal representation in the CDO matter.

324. In particular, subsection 105A.15A(3) provides that regulations may prescribe matters that the court may, must or must not take into account in determining whether circumstances are beyond the offender's control (with respect to their inability to engage a legal representative); and what are reasonable costs and expenses for legal representation.

325. Regulation 9 of the Criminal Code Regulations 2019 currently only prescribes the matters that the court **may** take into account, and does not purport to exercise the delegated legislative power to **prohibit** the court from taking account of specified matters (even if they are, in fact, relevant to a decision). The relevant discretionary considerations listed in regulation 9 cover the offender's financial circumstances, the reasonableness of their conduct, any attempts to obtain legal aid or legal assistance, and any other relevant matters.

326. Subsection 105A.15A(3) was inserted by Government amendments to the originating Bill in 2016, which purported to implement the Committee's recommendation for the court to be conferred with a power to 'make an order for reasonable costs to be funded to enable the offender to obtain legal representation'

where they were unable to independently obtain such representation 'through no fault of their own'. [181]

327. Nowhere in its 2016 report did the Committee recommend, or even mention, a delegation of legislative power to the executive to dictate to the judiciary the matters it must, or must not, consider in an application for a financial assistance order.

328. Further, no explanation was given for subsection 105A.15A(3) in the Supplementary Explanatory Memorandum which accompanied the parliamentary amendments to the 2016 Bill. That document offered only a cursory re-statement of the provision.[182]

329. Subsection 105A.15A(3) is repugnant to judicial independence and the principle of equality of arms, and should be repealed. As a minimum, the provision should be amended to delegate legislative power only to prescribe matters that the court **may** consider, if it regards them to be relevant and appropriate in the instant case.

Recommendation 48 – remedying inappropriate interference with judicial discretion in relation to legal assistance funding applications

- **Subsection 105A.15A(3) of the *Criminal Code Act 1995* (Cth) should be repealed, so that the executive government cannot fetter judicial discretion about the making and terms of orders for legal assistance to persons against whom a CDO application is made.**
- **In particular, the executive government should not be empowered to unilaterally dictate to a court the matters it must not consider in deciding an application for a financial assistance order.**

Period of effect and further review of the regime

330. Given the extraordinary nature of post-sentence detention, and the absence of publicly available evidence of its use (or contemplated use), the Law Council submits that the CDO regime should remain subject to a sunset clause, so that its necessity and proportionality can be continually reassessed by the Parliament in the context of considering whether it should be extended. The CDO regime should not be established as a permanent feature of Australia's counter-terrorism legislation.

331. The Law Council also emphasises the importance of dedicated, statutory pre-sunsetting reviews by both the INSLM and the Committee. The Law Council's previous remarks on the pre-sunsetting reviews of the other powers under examination in this inquiry apply with equal force to the CDO regime.

332. Further, the Law Council considers it essential that the Committee continues its oversight of any developments to the CDO regime, including the proposed ESO regime in the HRTO Bill, and any future amendments. It would be desirable for the Government to commit publicly to referring such legislation to the Committee for review, or to advise the public if such a referral has already been made.

Recommendation 49 – sunsetting and parliamentary scrutiny of the CDO regime

- **The CDO regime in Division 105A of the *Criminal Code Act 1995* (Cth) should only remain in force subject to a statutory sunset period, with express provision for pre-sunsetting reviews by the Committee and the INSLM, to inform Parliamentary decision-making about any renewal (with or without amendment).**

[181] Ibid, 88 at [3.142], recommendation 12.

[182] Supplementary Explanatory Memorandum, Criminal Code Amendment (High-Risk Terrorist Offenders) Bill 2016, 23 at [122].

- **If any amendments to the CDO regime are proposed in future, the amending Bills should routinely be referred to the Parliamentary Joint Committee on Intelligence and Security for inquiry and report.**

Oversight functions of the INSLM regarding all powers under review

333. If the powers under review are renewed, in full or in part, the oversight functions of the INSLM will remain critical in monitoring their effectiveness, necessity, proportionality and human rights compliance.

334. Accordingly, the Law Council continues to recommend amendments to the INSLM Act to address some limitations in the INSLM's reporting functions; and to remedy the regrettable and persistent practice of delayed, absent or incomplete Government responses to multiple INSLM reports.

335. These issues have the potential to limit the effectiveness of the INSLM's functions in conducting independent oversight of the police powers presently under review, as well as the other counter-terrorism legislation within their remit.

An explicit statutory power to report separately on own-motion inquiries

336. The first, second and third INSLMs have all recommended amendments to the INSLM Act to ensure that there is an express statutory basis for the INSLM to report on their own-motion inquiries outside of their annual report prepared under section 29 of that Act. This appears to be an oversight in the design of the Act.

337. The inaugural INSLM recommended a straightforward amendment to address this issue.[183] In the absence of a government response, it was repeated by the second INSLM in 2015,[184] and by the third INSLM in 2020.[185] The Law Council has also repeatedly endorsed these recommendation, including in its submission to the Committee's previous review of AFP powers in 2017.[186]

338. The absence of a clear statutory basis on which the INSLM may prepare a stand-alone report on an own motion inquiry risks undermining the effectiveness of the INSLM in bringing urgent matters to the attention of the Government, Parliament and public.

339. The present lack of clarity on the face of the INSLM Act also risks undermining the independence of the INSLM in having full discretion about when and how to report on their own-motion inquiries. A further potential risk to the independence of the INSLM is that the annual budgets of the office may be calculated on the assumption that own-motion inquiries will be consolidated with annual reports, as this would be consistent with a literal reading of the present reporting provisions in the Act.

340. The Law Council considers that implementation of this recommendation is overdue. The necessary amendments to the INSLM Act are straightforward and should be made without further delay.

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[183] Bret Walker SC, INSLM, *Annual Report: 2013-14* (March 2014), 2.

[184] The Hon Roger Gyles AO QC, INSLM, *Annual Report: 2014-15* (December 2015), 6-7.

[185] James Renwick CSC SC, INSLM, *Annual Report, 2018-19* (December 2019), x-xi.

[186] Law Council, *Submission to the PJCIS review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, (November 2017), 7.

Recommendation 50—an express statutory power for the INSLM to prepare separate reports on their own-motion inquiries

- **The *Independent National Security Legislation Monitor Act 2010 (*Cth) should be amended to confer an express power on the INSLM to report on a matter or matter within their statutory functions, but more urgently and more particularly than by the annual report.**

Mechanisms to improve responsiveness to INSLM reports

Statutory timeframe for Government responses to all INSLM reports

341. The Law Council also remains concerned that there has not been a consistent practice of timely and complete Government responses to all INSLM reports. This regrettable practice appears to have persisted from the first recommendations of the inaugural INSLM in his 2011-12 annual report to the present time.[187]

342. The Law Council considers that the issue has become sufficiently serious as to warrant a statutory requirement for the government to respond to all INSLM reports, within a prescribed time of receiving them.[188] This will also improve parliamentary and public accountability, if the statutory deadlines recommended by the Law Council are not complied with.

Conferral of a statutory monitoring function on the INSLM

343. Sections 24 and 24A of the *Inspector-General of Intelligence and Security Act 1986* (Cth) (**IGIS Act**) enable the IGIS to monitor responses to the recommendations in their inquiry reports. This includes a function to issue further reports, if the IGIS considers that the relevant agency head or Minister has not taken, within a reasonable period, action that the IGIS considers to be adequate and appropriate in the circumstances.

344. Given the prolonged lack of responsiveness to multiple INSLM reports, the Law Council considers that there is a need for a similar provision in the INSLM Act, to enable the INSLM to consider and report publicly on the adequacy of Government responsiveness to their reports. To ensure appropriate accountability and responsibility, the Government should be required to table in Parliament all of the INSLM's reports on inadequacies or lack of responsiveness to their inquiry recommendations, within four sitting days (that is, one sitting week) of the INSLM providing the report to the Government.

Improving timeliness in the Parliamentary tabling of unclassified INSLM reports

345. The Law Council also considers that timeliness in the tabling of unclassified INSLM reports could be improved, particularly if a report was provided to the Attorney-General during an extended adjournment of Parliament. (Examples of extended adjournments include the recent adjournments due to the COVID-19 pandemic; and the breaks at the end of Spring and Winter sittings.)

346. Presently, the INSLM Act requires annual reports and reports on a matter referred by the Prime Minister or Attorney-General to be tabled in both Houses of Parliament within 15 Parliamentary sitting days of receipt.[189] This can result in considerable delay if the INSLM delivers a report is out of sitting, and it is not tabled until the 15th

[187] See further: Bret Walker SC, INSLM, *Annual Report, 2012-13* (December 2013),6; and Bret Walker SC, INSLM, Annual Report, 2013-14 (March 2014), 2-3.

[188] See further: James Renwick CSC SC, INSLM, *Annual Report, 2018-19* (December 2019), x-xi.

[189] INSLM Act, subsections 29(5) (annual reports) and 30(6) (reports on references from the Prime Minister or Attorney-General).

sitting day after the report is given to the Attorney-General. For example, if a report is provided in December after the Parliament has adjourned for the year, on a usual sitting calendar, tabling would not be required to occur until March the following year.

347. In addition to the above recommendation for a statutory reporting and tabling requirement for the INSLM's own-motion inquiries, the Law Council further supports a refinement to the existing statutory tabling requirements, which would oblige the Attorney-General to cause the tabling of the report as soon as practicable after receiving it from the INSLM, and no later than four sitting days (that is, one sitting week) after the report is given to the Attorney-General.

Recommendation 51—mechanisms to improve responsiveness to INSLM reports

- **The *Independent National Security Legislation Monitor Act 2010* (Cth) (INSLM Act) should be amended to:**
  - **require the Attorney-General to cause the tabling of all INSLM reports in Parliament as soon as practicable, and in any event, no later than four sitting days (that is, one sitting week) of the report being given to the Attorney-General;**
  - **require the Government to provide a response to each INSLM report within a prescribed timeframe (for example, six or 12 months after the report is provided to the Attorney-General);**
  - **confer an express function on the INSLM to monitor and report on the implementation of their recommendations, and the adequacy of those actions, analogous to existing sections 24 and 24A of the *Inspector-General of Intelligence and Security Act 1986* (Cth); and**
  - **require the Attorney-General to cause a report prepared by the INSLM on the action taken by the Government of the day to implement recommendations in a previous INSLM report or reports to be tabled within Parliament as soon as practicable, and no later than four sitting days (that is, one sitting week) of the Attorney-General being given the report.**

Mechanisms to improve Parliamentary oversight of the powers under review

Committee review of functions and powers under Part 5.3 of the Criminal Code

348. The Law Council is pleased that the Committee's statutory functions under subsection 29(1) of the Intelligence Services Act have been progressively expanded, on its recommendations, to monitor and review the extraordinary powers under inquiry in Part 5.3 of the Criminal Code.

349. However, the Law Council notes that the drafting of the relevant provisions in paragraphs 29(1)(baa) and (bab) may be unintentionally narrow. They are limited to the performance by the AFP of functions under Part 5.3 of the Criminal Code. There is a risk that may be taken to impliedly exclude, or create uncertainty about the coverage of, other Commonwealth officials who perform various administrative and advisory functions under, or in relation to, these extraordinary powers.

350. For example, as noted above, the Minister for Home Affairs has a power under section 105A.20 of the Criminal Code to delegate information-sharing functions relating to CDOs to any departmental employee.

351. Further, a range of Commonwealth officials from the Department of Home Affairs and Attorney-General's Department perform administrative and advisory responsibilities, such as the appointment of issuing authorities for PDOs, and providing advice to Ministers and others on the potential exercise of powers or performance of functions.

352. The Law Council supports the express inclusion of these matters in the Committee's statutory review and monitoring functions, to ensure that its oversight is comprehensive, and that this is communicated expressly to all officials, on the face of the provisions.

Recommendation 52—Committee's monitoring and review functions over Part 5.3 of the *Criminal Code Act 1995* (Cth)

- **Paragraphs 29(1)(baa) and (bab) of the *Intelligence Services Act 2001* (Cth) should be amended to enable the Parliamentary Joint Committee on Intelligence and Security to monitor, review and report on the performance of functions under Part 5.3 of the *Criminal Code Act 1995* (Cth) by <u>any</u> Commonwealth official, not only the Australian Federal Police. This would include, for example:**
  - **the role of officials of the Department of Home Affairs to whom the Minister has delegated functions or powers under Division 105A of the *Criminal Code Act 1995* (Cth); and**
  - **the role of officials of the Department of Home Affairs and the Attorney-General's Department in administering the relevant legislation, and advising on the statutory performance of functions or exercise of powers.**

Committee review of police stop, search and seizure powers

353. Similarly, the Committee's statutory function in relation to the operation of Division 3A of Part IAA of the Crimes Act, in subparagraph 29(1)(bba)(i) of the Intelligence Services Act, is limited to the performance of functions by the AFP.

354. It does not explicitly cover the actions of other Commonwealth officials in the administration and execution of the regime. The Law Council supports amendments to extend the Committee's oversight to all such officials.

355. This expanded review and monitoring power will complement the Committee's function in subparagraph 29(1)(bba)(ii) to review the basis for the making of Ministerial declarations of prescribed security zones. (The Law Council has separately suggested, at recommendation 26 above, that this function should be supported by an additional statutory obligation on the Minister for Home Affairs to provide the Committee with a statement of reasons for the declaration).

Recommendation 53—Committee's monitoring and review functions over stop, search and seizure powers in Division 3A of Part IAA of the *Crimes Act 1914* (Cth)

- **Paragraph 29(1)(bba) of the *Intelligence Services Act 2001* (Cth) should be amended to provide that the functions of the Parliamentary Joint Committee on Intelligence and Security are to monitor and review the performance by the AFP and <u>any other Commonwealth official</u> of**

functions or duties, or the exercise of powers, under Division 3A of Part IC of the *Crimes Act 1914* (Cth), not limited to the AFP.

- **This would cover the role of departmental officials in administering and advising on the regime, including in the making and cancellation, extension or variation of declarations of prescribed security zones.**

Public transparency in relation to the powers under review

356. This inquiry has highlighted the lack of readily available, official statistical information about the exercise to-date of the extraordinary powers under review. While annual reports are required to be issued on these powers, delays in the availability of those reports makes it difficult to obtain current, definitive official information, at a given point in time, about all orders or declarations made to date. This contrasts with the publication of prosecution statistics by the Commonwealth Director of Public Prosecutions, including for terrorism and security offences.[190]

357. The Law Council understands that government agencies regularly provide statistical information to the INSLM for the purposes of annual reports and other inquiries. The Law Council submits that consolidated information should also be provided publicly. This would be a relatively straightforward exercise in establishing and maintaining a web page, potentially hosted on the Australian Government national security information portal, www.nationalsecurity.gov.au.

358. Given that none of the powers under review constitute a 'high volume' jurisdiction, the maintenance of a webpage would not appear to require a significant diversion of resources, or otherwise amount to an unreasonable impost on relevant agencies.

Recommendation 54—public register of extraordinary counter-terrorism powers

- **The Australian Government should establish a publicly accessible online register for extraordinary counter-terrorism orders. It should provide consolidated information about the cumulative total numbers of control orders, preventative detention orders, and declarations of prescribed security zones made to date. This should be maintained in addition to annual reporting requirements on individual powers.**
- **The register should be updated in real time, or as close as possible, and should provide details of relevant cases involving control order and continuing detention order applications, and details of prescribed security zone declarations.**

[190] See: Commonwealth Director of Public Prosecutions (CDPP), *Prosecutions statistics*, CDPP website, <https://www.cdpp.gov.au/statistics>. The Law Council understands that these statistics are updated per financial year, and are reproduced from the CDPP's internal databases. As the CDPP is not involved in applications for COs, PDOs and CDOs, it does not maintain equivalent statistics. To the Law Council's knowledge, the AFP and Department of Home Affairs have not undertaken a similar pro-active public disclosure program to the CDPP, in respect of COs, PDOs and CDOs (for which they respectively have operational and policy responsibility).

ATTACHMENT 2

Law Council
OF AUSTRALIA

Review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020

Parliamentary Joint Committee on Intelligence and Security

6 November 2020

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council gratefully acknowledges the contributions of the Law Institute of Victoria, the Queensland Law Society, the New South Wales Bar Association, the Law Society of New South Wales and its National Criminal Law Committee to this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security (**Committee**) review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (**Bill**).

2. The Bill proposes to establish a new type of 'post-sentence order' in Division 105A of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) to manage the future risk presented by a person who has completed a sentence of imprisonment for a terrorism or security offence. The new form of order is an 'extended supervision order' (**ESO**), which will enable a person to be released into the community, subject to prohibitions and other conditions on their activities, associations, and movements.

3. The Law Council does not oppose, in principle, the establishment of an ESO regime, as a less-restrictive alternative to 'continuing detention orders' (**CDOs**). However, the Law Council makes 21 recommendations for amendments to the Bill, to ensure that the ESO regime:

   - is consistent with the recommendations of the third Independent National Security Legislation Monitor (**INSLM**), Dr James Renwick CSC SC about the core elements of the regime, especially the applicable standard of proof and conditions able to be imposed under an ESO;[1] and
   - applies a fair, reasonable and proportionate process for the determination of ESO applications, including adequate access to legal assistance; and
   - effectively manages interactions between ESOs, the control order (**CO**) regime in Division 104 of the Criminal Code, and applicable State or Territory post-sentence regimes. In particular, the Law Council supports safeguards to ensure that a person is not exposed to oppression by being subjected to:
     - multiple orders under different regimes, on the same or substantially similar grounds;
     - proceedings seeking a particular type of order (for example, a CO) as an effective 'repechage' to a previous, failed application for a different type of order (for example, an ESO), irrespective of outcome; or
     - conflicting conditions or obligations, or conditions or obligations whose combined effect is oppressive.

4. In particular, the Law Council considers that the ESO regime should only proceed if it implements the third INSLM's recommendations, as a minimum standard for the legislative framework governing ESOs. In the alternative, State and Territory Supreme Courts should be invested with jurisdiction to issue COs.

5. The Bill also contains measures that are unrelated to ESOs, or which apply far more broadly than to ESOs alone. This includes a proposal to significantly expand CO conditions. The Law Council has significant concerns about these proposals, and recommends that they are withdrawn from the Bill and examined separately as part of the Committee's current statutory review of the CO regime.

[1] Dr James Renwick CSC SC, INSLM, *Report on the Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, (September 2017), 67-75, especially 76 at [9.41]-[9.45].

Overview of the proposed ESO regime

A component of a broader 'post-sentence' preventive regime

6. The proposed ESO regime forms part of a broader suite of measures under Commonwealth law to manage 'post-sentence' terrorism risks. That is, the risks presented by people:

   - who have finished serving sentences of imprisonment for terrorism and other security offences in Chapter 5 of the Criminal Code; and
   - are assessed as presenting an unacceptable terrorism risk if released (either at all, or without restraints on their movements and other activities).

7. Since 2016, there have been two primary mechanisms in Part 5.3 of the Criminal Code to manage this risk, other than by prosecuting further offences arising from a person's conduct post-release:

   - CDOs issued under Division 105A, which enable the post-sentence detention of a person, in unlimited three-year increments. The first CDO application is presently before the Supreme Court of Victoria;[2] and
   - COs issued under Division 104, to impose prohibitions, conditions and other obligations on offenders within the community, following their release. Nine of the 16 COs issued to date have applied to convicted terrorist offenders, and immediately after their release from prison.[3]

Issuing court and applicant for ESOs

8. State or Territory Supreme Courts would be responsible for issuing ESOs, on the application of the Minister for Home Affairs (**Minister**) or representative.[4]

9. An ESO could be issued as an outcome of a CDO application, if the issuing court is not satisfied that it is necessary to detain a person under a CDO beyond their sentence. The Minister could also make an application seeking only an ESO.[5]

Duration and conditions of ESOs

10. An ESO would last for up to three years, with no limitations on subsequent orders.[6] The proposed threshold for issuing an ESO is that the court is satisfied, on the balance or probabilities, that the person presents an unacceptable risk of committing a serious terrorism offence, and that each condition of the ESO is necessary and proportionate to managing that risk.[7]

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[2] *Minister for Home Affairs v Abdul Nacer Benbrika* (Case Number: S ECI 2020 03527).

[3] See further: Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security Review of AFP Powers*, (October 2020), 23 at [42] (**PJCIS Review of AFP Powers Submission**).

[4] Bill, Schedule 1, item 62 (inserting new subsection 105A.5(1) of the Criminal Code).

[5] Ibid, items 59, 62, 82, 85 and 87 (inserting proposed sections 105A.3, 105A.5(1), 105A.6A, 105A.7(2) and 105A.7A of the Criminal Code).

[6] Ibid, item 87 (inserting proposed paragraph 105A.7A(4)(d) of the Criminal Code).

[7] Ibid, item 87 (inserting proposed subsection 105A.7A(1) of the Criminal Code).

11. In significant contrast to COs, there are no statutory limitations on the types of conditions which a court may impose under an ESO.[8] The non-exhaustive conditions specified in the Bill far exceed those presently available for COs.[9]

Consequences of breaching ESO conditions

12. Breach of an ESO condition would be an offence, punishable by a maximum penalty of five years' imprisonment, equivalent to the offence for breaching a CO condition.[10]

13. In addition, a person who is sentenced to imprisonment for the offence for breaching an ESO condition could be eligible for a further post-sentence order (an ESO or a CDO) upon completing that sentence.[11]

Retrospective application of ESO regime to certain CO subjects

14. In addition, the Bill proposes to give the ESO regime retrospective application. It would permit an ESO to be sought and issued in relation to a terrorist offender who finished their sentence of imprisonment before the ESO regime commenced, and was the subject of a CO at the time the ESO regime commenced.[12]

Powers and procedures relating to ESOs

15. The Bill also proposes to make the following consequential amendments to related powers and procedures, to accommodate the ESO regime:

- an expansion of the search and surveillance powers of the Australian Federal Police (**AFP**) to cover monitoring a person's compliance with an ESO, as well as powers to share information obtained in the exercise of those powers;[13]
- an expansion of the proposed access regime for offshore communications data in the Telecommunications Legislation Amendment (International Production Orders) Bill 2020 (**IPO Bill**), which is currently being considered by the Committee, to cover monitoring powers with respect to ESOs;[14]
- an expansion of the special advocates regime in the *National Security (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**) to cover proceedings for ESO applications in addition to CO applications;[15]
- an exclusion of Ministerial decisions about applications for ESOs from statutory judicial review, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**);[16] and

[8] Ibid, item 87 (inserting proposed section 105A.7B of the Criminal Code).

[9] Cf Criminal Code, subsections 104.5(3)-(6).

[10] Bill, Schedule 1, item 133 (inserting new Subdivision EA of Division 105A of the Criminal Code).

[11] Ibid, item 59 (inserting proposed subsections 105A.3(4) and (5) of the Criminal Code).

[12] Ibid, item 59, (inserting proposed subsection 105A.3A(8) of the Criminal Code).

[13] Ibid, items 155-188 (amendments to Part IAAB of the *Crimes Act 1914* (Cth) (**Crimes Act**) regarding powers of search), items 211-312 (amendments to the *Surveillance Devices Act 2004* (Cth) (**SDA**) regarding surveillance device warrants and remote computer access warrants), and items 313-392 (amendments to the *Telecommunications Interception and Access) Act 1979* (Cth) (**TIA Act**) regarding telecommunications interception warrants and telecommunications data access authorisations).

[14] Ibid, Schedule 2, items 1-105 (amendments to the IPO Bill, inserting proposed Schedule 1 in the TIA Act).

[15] Ibid, Schedule 1, items 189-210 (amendments to the NSI Act).

[16] Ibid, item 153 (inserting new paragraph (dad) of Schedule 1 to the ADJR Act).

- the removal of any obligation on the Australian Security Intelligence Organisation (**ASIO**), when giving security advice to the Minister for Home Affairs about a prospective application for an ESO or a variation of such an order, to do so via a formal security assessment issued under Part IV of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**).[17]

Separate proposed amendments to CDOs and COs

16. The Bill contains additional measures that are separate to the proposed ESO regime, or which cover CDOs as well as ESOs, namely:

Expanded eligibility for post-sentence orders (CDOs and ESOs)

- people who have been convicted of offences for breaching a CO or an ESO condition would be eligible for an ESO or a CDO, if they are prosecuted while the ESO or CO is in force, or no later than six months after the conduct constituting the alleged breach offence (whichever is later); [18]

Expanded grounds for withholding information from ESO or CDO respondents

- certain material can be withheld from a person who is subject to an application for an ESO or CDO (in addition to the existing power to withhold material from CDO applications on national security and public interest immunity grounds). The new ground will cover 'terrorism material' which advocates for 'terrorist acts or violent extremism' or preparatory acts, or association with a terrorist organisation;[19]

Expanded CO conditions

- the Bill proposes the following expansions of the conditions able to be imposed by COs (with breach constituting a criminal offence, which may result in a person also becoming eligible for an ESO or CDO if convicted and sentenced to imprisonment for any length of time):
  - a requirement that the person carries, at all times, a specified mobile phone, and is available to answer calls from a 'specified authority' or return such calls promptly;[20]
  - additional, mandatory obligations on a person who is required to wear an electronic monitoring device, which a court has no discretion to dispense with or modify, including:
    - the above requirement to carry at all times, a specified mobile phone, and answer or return promptly calls from a 'specified authority';
    - a requirement to allow a 'specified authority' (being any person specified in the CO, not limited to police) to enter the controlee's house at any time, for any purpose 'relating to the electronic monitoring of the person'; and
    - detailed obligations in relation to the maintenance of the monitoring device, as specified in the individual CO (with no statutory parameters on the conditions that may be specified);[21]

[17] Ibid, item 154 (inserting new subsection 35(2) of the ASIO Act).
[18] Ibid, item 59 (inserting new subsection 105A.3(1) and new section 105.3A of the Criminal Code).
[19] Ibid, item 120 (inserting new section 105A14D).
[20] Ibid, item 16 (inserting new paragraph 104.5(da) of the Criminal Code).
[21] Ibid, items 16 and 20 (inserting new paragraph 104.5(d) and section 104.5A of the Criminal Code).

Issuing and enforcement of ESOs

Standard of proof for ESOs

17. Proposed paragraph 105A.7A(1)(b) provides that an ESO may be issued if the issuing court is satisfied, on the balance of probabilities, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious terrorism offence. Proposed subsection 105A.7A(4) provides that the Minister bears the onus of satisfying the Court of the abovementioned risk.

18. Paragraph 105A.7A(1)(b) requires the court to consider the factors in proposed section 105A.6B in assessing the offender's level of risk. These factors include:

- the protective objects of Division 105A;[22]
- the report of a 'relevant expert'[23] and the results of any other assessment conducted by such a person;
- reports of the relevant State or Territory corrective service authority and 'any other person' who the court considers is competent the extent to which the offender can be reasonably and practicably managed in the community;
- evidence of the offender's participation in treatment or rehabilitation;
- whether the offender was released on parole;
- the offender's criminal history; and
- the views of the sentencing court, in sentencing the person for the terrorism or security offence which made them eligible for a post-sentence order.

Rejection of former INSLM recommendation

19. The proposed standard of proof for an ESO (the balance of probabilities) is lower than the standard for a CDO (a 'high degree of probability').[24] This contradicts the recommendation of the third INSLM in his 2017 report, that the ESO regime should adopt the same standard of proof as the CDO regime.[25]

20. The third INSLM's recommendation was accepted by the Government in May 2018, with its response to the former INSLM's report stating that 'the Government supports the features of the ESO scheme recommended by the INSLM'.[26]

21. The Explanatory Memorandum to the Bill does not acknowledge that the Bill proposes to reject the third INSLM's recommendation, or retreat from the Government's acceptance of that recommendation two years ago. It offers minimal justification for the proposal, stating that the civil standard of proof is considered appropriate because applying conditions on a person's activities within the

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[22] Bill, Schedule 1, item 50 (inserting an objects clause, in new section 105A.1 of the Criminal Code).

[23] Criminal Code, section 105A.2 (an Australian-registered psychiatrist, psychologist or medical practitioner, or 'any other expert' who is 'competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence if released into the community').

[24] Criminal Code, s 105A.7(1)(b).

[25] Dr James Renwick CSC SC, *Review of Divisions 104 and 105 of the Criminal Code*, 76 at [9.41]. The Senate Scrutiny of Bills Committee also identified this issue and sought further explanation of the proposed departure: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2020*, (October 2020), 15 at [1.50]-[1.51].

[26] Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018), 8.

community under an ESO is 'less restrictive' than detaining a person under a CDO.[27] The effect of the proposal in the Bill is to align the standards of proof for ESOs with the standard for COs, which is presently the civil standard.[28]

Law Council position

22. The Law Council urges the Parliament to reject the proposal to retreat from the previous acceptance of the third INSLM's recommendation. As a bare minimum, ESOs should be subject to the same (higher) standard of proof as for CDOs (namely, 'a high degree of probability' and not 'the balance of probabilities').

23. Adopting the higher standard of proof of 'a high degree of probability' would also be consistent with the standard of proof applied to post-sentence orders (covering both detention and supervision) in New South Wales for dangerous offenders and terrorist offenders.[29] The standard of 'a high degree of probability' is also applied to both detention and supervision orders in the post-sentence regimes in Queensland and Victoria, under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) and the *Serious Offenders Act 2018* (Vic).[30]

24. However, as the Law Council commented in its submission to the Committee's current review of the AFP's counter-terrorism powers, it would be preferable for CDOs to apply the criminal standard of proof (beyond reasonable doubt) and the criminal rules for drawing adverse inferences (the matter must be the only rational inference).[31] The Law Council similarly recommends that ESOs should be subject to the criminal standard of proof and criminal rules for drawing adverse inferences.

Adoption of the criminal standard of proof and criminal rules for drawing inferences

25. Subjecting ESOs to the criminal standard of proof and criminal rules for drawing inferences of future risk is appropriate for the following reasons:

- the close connection of post-sentence orders with the criminal process (a consideration which applies equally to ESOs and CDOs);
- the gravity of the consequences of an ESO for the individual, including:
  - the extremely onerous (and unlimited) conditions, restrictions, prohibitions and other obligations that can be imposed on a person who is subject to an ESO, under pain of criminal penalty for breach;
  - the imposition of significant criminal penalties (up to five years' imprisonment) for the offence of contravening the conditions of an ESO;
  - the potential exposure of a person to a further post-sentence order if they are convicted of breaching an ESO and are sentenced to imprisonment;

[27] Explanatory Memorandum, 67 at [182].

[28] Criminal Code, paragraph 104.4(1)(c).

[29] *Crimes (High Risk Offenders) Act 2006* (NSW), paragraphs 5B(d) and 5C(d); and *Terrorism (High Risk Offenders) Act 2017* (NSW), paragraphs 20(d) and 34(1)(d).

[30] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), paragraph 13(3)(b); and *Serious Offenders Act 2018* (Vic), subsections 14(3) and 62(2).

[31] Law Council of Australia, *PJCIS Review of AFP Powers Submission,* 62-63 at [252]-[253].

- the exposure of a person who is subject to an ESO to highly intrusive search and surveillance powers, which do not require a suspicion of non-compliance with the conditions of an ESO; and

- the ability for an unlimited number of ESOs to be sought and issued in relation to a person (notwithstanding the three-year maximum duration of individual orders);

- the highly extraordinary and unusual nature of ESOs, in that they involve making predictions about a person's future risk, based on evidence of their past conduct. This raises difficult and complex issues, including:

  - the inherently difficult task of predicting a person's future conduct, for which there is no settled and empirically validated risk assessment framework. As the Law Council has observed previously, the risk assessment framework favoured by the Government, the VERA-2R, appears to be in a formative stage of development;[32] and

  - in the absence of direct evidence of a person's preparation or planning to engage in a terrorist act, the task of predicting a person's future risk will generally rely upon the drawing of inferences based on their past conduct. Such inferences may need to be drawn in volatile and rapidly changing circumstances. This supports adopting the criminal rules for the drawing of adverse inferences. That is, the matter must be the only reasonable inference that is capable of being drawn;[33] and

- the threshold of 'unacceptable risk' is vague, fluid and subjective, especially when applied in the context of assessing a non-specific threat of re-offending at an unspecified point in the future, rather than a specific and imminent threat. If this threshold is to be used for any kind of post-sentence order, then the criminal standard of proof should be adopted to counterbalance the risks of arbitrariness and error that arise from its vagueness and subjectivity.

Recommendation 1—criminal standard of proof and rules for drawing inferences

Preferred option

- **Proposed paragraphs 105A.7(1)(b) and 105A.7A(1)(b) and (c) (items 82 and 87 of Schedule 1 to the Bill) should be amended to provide that:**
  - **the criminal standard of proof applies to decisions to issue ESOs and CDOs; and**
  - **the criminal rules for drawing inferences apply to any findings of a person's future risk for the purpose of issuing an ESO or CDO.**

Alternative (non-preferred) option

- **As a minimum, paragraphs 105A.7A(1)(b) and (c) (item 87 of Schedule 1 to the Bill) should be amended to provide that the standard of proof for an ESO is 'a high degree of probability' (the standard for CDOs).**

[32] See further: Law Council of Australia, *PJCIS Review of AFP Powers Submission,* 63 at [250] (including footnote 159). See also: Law Council of Australia, *PJCIS Review of AFP Powers Supplementary Submission* (September 2020), 12-13 at [47]-[50].

[33] *Shepherd v R* (1990) 170 CLR 573, 57.

Recommendation 2—withdrawal of ESO regime if standard of proof not increased

- **If there is no appetite to increase the standard of proof for ESOs, to at least the standard recommended by the third INSLM ('a high degree of probability') then:**
  - **the ESO regime should not proceed; and**
  - **Division 104 of the Criminal Code should be amended to confer jurisdiction on State and Territory Supreme Courts to issue COs.**

Necessity and proportionality of proposed ESO conditions

26. Proposed paragraph 105A.7A(1)(c) would require the issuing court to apply the tests of necessity and proportionality to each condition that is proposed to be included in an ESO. That is, the court must be satisfied, to the civil standard, that each of the proposed conditions is reasonably necessary for, and reasonably appropriate and adapted to, the purpose of protecting the community from an unacceptable risk that the person will commit a serious terrorism offence. This corresponds with the current issuing test for control orders in section 104.5 of the Criminal Code.

27. While the Law Council supports an explicit threshold of necessity and proportionality, it continues to support the implementation of outstanding recommendations of the second INSLM, the Hon Roger Gyles AO QC, in relation to the application of that issuing test for COs. The second INSLM's recommendations should be replicated in the proposed ESO regime. In particular, the second INSLM recommended that the issuing test should require an assessment of the necessity and proportionality of each individual condition, as well as the **combined effect** of all proposed conditions.[34]

28. As the Law Council observed in its submission to the Committee's current review of the AFP's counter-terrorism powers, there is no cogent reason for rejecting the second INSLM's recommendation.[35] The recommendation was developed specifically to address concerns about limitations in the proportionality assessment (and therefore the compatibility of the CO regime with Australia's human rights obligations). The second INSLM placed weight on the exposure of a controlee to highly intrusive surveillance powers to monitor their compliance, which are subject to low thresholds for their exercise. These considerations also apply to ESOs.[36]

29. As the Law Council has noted previously, the Government's explanation for rejecting this recommendation in May 2018 that this would 'add complexity' to the issuing is not persuasive in relation to either COs or ESOs.[37] The resolution of legal and factual complexity is an inherent part of the judicial function. Courts are well equipped to resolve such issues with expertise and efficiency.

30. This observation has particular force in the context of the functions of State and Territory Supreme Courts in determining applications for post-sentence orders. Their extensive criminal jurisdiction, and consequent expertise, makes them

[34] The Hon Roger Gyles AO QC, INSLM, Control order safeguards: Part 2, (April 2016), 18 at [13.7].

[35] Law Council of Australia, *PJCIS Review of AFP Powers Submission*, 28-29 at [75]-[76].

[36] The Hon Roger Gyles AO QC, INSLM, Control order safeguards: Part 2, (April 2016), 18 at [13.7].

[37] Ibid and Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018), 19.

well-placed to make findings on complex issues of fact and law, in matters that are very closely related to the criminal process.

Recommendation 3—cumulative assessment of all ESO conditions

- **Proposed paragraph 105A.7A(1)(c) (item 87 of Schedule 1 to the Bill) should be amended to require the issuing court to assess, and be satisfied of, the necessity and proportionality of:**
  - **each individual condition proposed to be included in an ESO; and**
  - **the combined effect of all of the proposed conditions of the ESO.**

Conditions able to be imposed under ESOs

Rejection of third INSLM's recommendation

31. The third INSLM, Dr James Renwick CSC SC, specifically recommended that ESOs should apply the **same conditions** as those applicable to COs.[38] The proposed ESO regime contradicts this in two respects, which are not acknowledged in the Explanatory Memorandum as departures from the Government's previous acceptance of the former INSLM's recommendation in May 2018.[39]

32. **First,** the Bill proposes to enable the Minister or representative to seek, and the court to issue, an unlimited range of conditions. It also provides inclusive lists of potential conditions that may be included in an ESO, which far exceed those currently available for COs. For the reasons set out below, the Law Council does not support the unlimited nature of conditions available for ESOs.

33. **Secondly,** the Bill proposes to allow a 'specified authority' (being any person or class of persons specified in an order) to unilaterally grant temporary 'exemptions' from certain ESO conditions.

34. The Law Council does not oppose, in principle, a limited ability to temporarily vary the terms of an ESO to accommodate urgent circumstances without requiring an ESO subject to initiate legal proceedings (especially given the significant inadequacies in Commonwealth legal assistance funding, as identified in the Law Council's previous submissions).[40] However, this must be accompanied by rigorous safeguards, as outlined in the Law Council's recent submission to the Committee on a similar proposal advanced by the AFP in relation to COs.[41]

Breadth and unlimited nature of ESO conditions

35. The Bill proposes to empower an issuing court to make an ESO with **any** conditions it considers are reasonably necessary for, and reasonably appropriate and adapted to, the purpose of protecting the community from the 'unacceptable risk' that the

[38] James Renwick CSC SC, INSLM, *Review of Divisions 104 and 105 of the Criminal Code*, (September 2017), 76 at [9.42] paragraph (c).

[39] Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018), 8.

[40] Law Council of Australia, *PJCIS Review of AFP Powers Submission,* (September 2020), 31-33 and 77-79.

[41] Law Council of Australia, *PJCIS Review of AFP Powers Supplementary Submission* (September 2020), 6-7 at [11]-14].

offender poses.[42] Subsections 105A.7B(3) and (5) set out non-exhaustive conditions that may be imposed under an ESO.

36. Subsection 105A.7B(3) contains 'general conditions', which have some similarities to CO conditions in existing subsection 104.5(3) of the Criminal Code but are far more extensive. They include:

- prohibitions on the person's presence at specified places;
- residency requirements (with no prohibition on mandatory relocation);
- requirements to stay at a particular place for up to 12 hours per day;
- limitations on overseas travel and possession of travel documents;
- prohibitions on communicating or associating with specified persons;
- prohibitions on carrying out certain work and undertaking certain education or training;
- prohibitions on using specified forms of technology including the internet;
- requirements to participate in treatment, rehabilitation or counselling (which, in contrast to existing CO conditions, does not require a person to consent to the condition being imposed under an ESO);
- requirements to participate in psychological or psychiatric assessment (not specifically for rehabilitative purposes) and requirements to permit the disclosure of results (and any other specified information) to a specified authority (again, without a requirement that the person must consent to the condition being imposed under an ESO); and
- a requirement to 'comply with any reasonable direction given to the offender by a specified authority'.

37. An ESO could potentially place some limitations on the ability of a person to contact and instruct a lawyer, in that a particular lawyer may be specified in the classes of persons with whom contact is prohibited.[43] However, such a condition would be subject to the issuing test of necessity and proportionality. In apparent contrast to the provisions governing CO conditions, there is no specific prohibition on ESO conditions preventing a person from associating with close family members, with respect to matters of family or domestic concern.[44]

38. Subsection 105A.7B(5) prescribes further conditions pertaining to monitoring of the person, which exceed the range of conditions able to be included in COs in existing subsection 104.5(3). They include requirements that the person:

- submits to testing for specified substances or articles;
- allows their fingerprints and photographs to be taken;
- wears an electronic monitoring device;
- carries, at all times, a specified mobile phone, and answers calls to that phone from a 'specified authority' or returns such calls within a reasonable period;
- reports to specified persons at specified times;

[42] Bill, Schedule 1, Item 87, proposed subsection 105A.7B(1).

[43] Ibid, item 87, proposed paragraph 105A.7B(3)(h) and proposed subsection 105.7B(7).

[44] Cf Criminal Code, subsection 104.5(3)(4).

- provides an advance schedule of their proposed movements for a specified period, and complies with that schedule;
- allows any police officer to enter and search their residence or other premises at any reasonable time, for any purpose relating to the electronic monitoring of the person (not merely the installation or maintenance of a monitoring device);
- facilitates access to data held on their computers or other technology, including by providing passwords.

Law Council views

39. The Law Council holds concerns about the breadth and non-exhaustive nature of the conditions listed in subsections 105A.7B(3) and (5), which enliven offences for non-compliance that can further expose persons to additional post-sentence orders.

40. As the Parliamentary Joint Committee on Human Rights observed in its initial comments on the Bill, a power to impose an unlimited range of conditions has the potential to place significant limitations on human rights, including rights to liberty and security of the person, privacy, freedom of expression and movement, peaceful assembly and association.[45]

41. Consequently, it is problematic that the Explanatory Memorandum to the Bill fails to acknowledge that the proposed ESO conditions are far more expansive than those which apply to COs, and explain why each condition (particularly the proposed expansions from CO conditions) is considered necessary and proportionate. In the absence of cogent justification, the Law Council considers that the conditions available under an ESO should be identical to those presently available for COs in section 104.5(5) of the Criminal Code, as recommended by the third INSLM.

42. In particular, there should be statutory limitations on the range of conditions that a Court may impose, in view of the gravity of consequences of an ESO for the individual. A fixed, statutory range of potential conditions would provide an important safeguard against the miscarriage of an unlimited discretion to fashion a condition of any kind. Such a miscarriage could, as the Supreme Court of New South Wales cautioned in 2017, result in the imposition of conditions that are 'unjustifiably onerous or simply punitive' or reflect what is most 'convenient or resource efficient' for the relevant authorities administering the order.[46]

43. Further, a fixed range of statutory conditions would enhance Parliamentary control over the post-sentence regime, as legislative amendments would be required to expand the range of conditions able to be imposed (as presently occurs for COs). The Parliament would have an opportunity to scrutinise, and specifically approve, each proposal for a new type of condition. This would include detailed consideration of the justification provided, and an examination of its human rights implications.

Recommendation 4—limitations on the range of ESO conditions

- **Proposed section 105A.7B (item 87 of Schedule 1) should be amended so that:**

[45] Parliamentary Joint Committee on Human Rights, *Report 11 of 2020* [2020] 11 AUPJCHR 131 at [1.14]. The Law Council's members have also reported on their experience that, in the context of the Victorian post-sentence regime, offenders have been prohibited from contacting family members under those orders.

[46] *State of New South Wales v Bugmy* [2017] NSWSC 855, [89] (per Fullerton J).

- **the conditions prescribed in subsections 105A.7B(3) and (5) are exhaustive of the conditions that may be imposed under ESOs; and**
- **the conditions available for an ESO should be limited to those available for a CO under subsection 104.5(5). In particular:**
  - **there should be no power to impose an ESO condition requiring a person to participate in counselling, education, psychiatric or psychological assessment unless the person has consented to the inclusion of that condition (equivalent to existing subsection 104.5(6) in relation to COs); and**
  - **the power to impose conditions prohibiting a person's association with others should be subject to a limitation on associations with close family members for matters of family or domestic concern (equivalent to the existing subsection 104.5(4) in relation to COs).**

Temporary exemptions from ESO conditions

Proposed temporary exemption regime

44. Proposed section 105.7C provides that an issuing court for an ESO may specify conditions of the ESO as 'exemption conditions'. This means that a 'specified authority' may administratively grant temporary exemptions from those conditions, once the ESO is in force.

45. The offender may make a written application to the specified authority, who may grant or refuse the application. An application may be granted subject to 'any reasonable directions' that the specified authority decides to impose.

46. There is no requirement for the court to apply any statutory criteria in deciding whether to designate an ESO condition as an 'exemption condition'. Nor is the 'specified authority' subject to any statutory criteria in deciding whether to approve an application for a temporary exemption.

47. There is also no obligation on the specified authority to make a decision on an exemption application, including within a specified timeframe. Nor are there any statutory limits on the maximum duration of a temporary exemption, with an obligation on the Minister to consider whether the substantive ESO condition remains necessary or proportionate (and, if satisfied that it is not, further obligations to notify the person, and apply the court for a permanent variation of the ESO).

Law Council position on a temporary exemption regime

48. The Law Council acknowledges that there is value in creating a mechanism for fast and flexible temporary variations of ESO conditions, which are sought by the person who is subject to an ESO, to deal with unforeseen personal circumstances.

49. This will ensure that such persons are not exposed to criminal liability and made reliant on prosecutorial discretion not to enforce a breach offence, if they were unable to make a variation application to a court and have the matter heard in time.

50. However, the Law Council is concerned that there are inadequate safeguards to prevent the arbitrary exercise of discretion by 'specified authorities' and to protect the person against exposure to criminal liability (and further post-sentence orders).

Recommended safeguards for the temporary exemption regime

51. The Law Council considers that the following additional safeguards are needed, which are based on its recent submission to the Committee's review of AFP counter-terrorism powers, commenting on an equivalent proposal in relation to COs:[47]

- the specified authority should be required to make a decision on an application within 48 hours (with failure to decide within this time constituting a deemed refusal, which would enliven the additional obligations below);
- the specified authority should be subject to statutory decision-making criteria, which require an assessment of:
  - the impact of a refusal on the person, particularly their employment, education, contact with family, and physical and mental health; and
  - an assessment of whether the temporary exemption sought may raise an unacceptable risk to public safety, and if so, whether that risk can be managed by approving the exemption subject to directions;
- the power of the specified authority to grant an exemption subject to directions should be limited, given that this is effectively a power to prescribe the substance of the offence for contravention of a direction under proposed subsection 105A.18A(2). In particular, the direction-making power should be subject to express requirements to:
  - assess the necessity, proportionality of the proposed directions, and the practical feasibility of the person's compliance with them; and
  - give the person a reasonable opportunity to comment on the feasibility of the proposed direction or directions;
- the specified authority must make a written record of the exemption decision, which sets out the following matters:
  - if the exemption application is approved, the activities in which the person is permitted to engage, including details of any directions to which they are subject, and the date and time at which the exemption will commence and cease; or
  - if the exemption is refused, the reasons for refusing the application (consideration should also be given to the availability of review rights for a refusal decision, comprising at least a prescribed avenue of internal review within a fixed timeframe);
- the specified authority must:
  - give a copy of the written record of the decision to the ESO subject as soon as possible after the decision is made; and
  - take all reasonable steps to ensure that the person understands the decision, particularly the duration and terms of the exemption (including any directions) and the effect of the offence in proposed subsection

[47] Law Council of Australia, *PJCIS Review of AFP Powers Supplementary Submission* (September 2020), 12-13 at [47]-[50].

105A.18A(2) for contravening a direction that has been given in relation to a temporary exemption;

- the specified authority must ensure that the Minister for Home Affairs is notified of a decision to grant an exemption, and the Minister for Home Affairs must consider whether the relevant condition of the ESO remains necessary and proportionate. If the Minister considers that it is no longer necessary or proportionate, they must:
  - notify the person, in writing, of this view as soon as possible; and
  - apply to the court for a variation of the ESO to remove or modify the condition;
- the Minister for Home Affairs must include in their annual reports on Division 105A the number of temporary exemptions granted each year; and
- the offences in proposed sections 105A.18A and 105A.18B for contravening an ESO condition should be subject to an express exception for people who act in act in accordance with a temporary exemption. This would make explicit that the contravention of a substantive ESO condition, by complying with a temporary exemption, is not an offence.

Implications for legal assistance funding

52. Further, the Law Council emphasises that any mechanism for the temporary variation of ESO conditions should be seen as a 'last resort' for unforeseen circumstances that arise urgently—for example, if an ESO subject is asked to work a night shift the day before, and their ESO contains a curfew condition.

53. A temporary variation mechanism is no substitute for properly funding legal assistance for ESO respondents so that they can make submissions in proceedings for ESO applications, to ensure that any conditions are appropriately tailored.

54. It is also important to ensure that the proposed temporary exemption regime does not become a 'de facto variation mechanism'. This risk may arise if an ESO applicant cannot afford legal representation to make an application to the court for a permanent variation or revocation of an ESO condition, or to seek the review of an ESO in entirety. In these circumstances they may become dependent on temporary variations to avoid exposure to criminal liability for breaching conditions, as a result of changes in their personal circumstances that do not present any security risk.

Recommendation 5—safeguards for the temporary variation power

- **Proposed section 105.7C (item 87 of Schedule 1 to the Bill) should be amended to include the safeguards at paragraph [51] of this submission.**

Ministerial appointment of 'relevant experts'

55. Proposed section 105A.18D empowers the Minister to direct a prisoner, or a person in relation to whom a post-sentence order is in force, to attend a mandatory risk assessment, which will be conducted by a person who the Minister has unilaterally appointed as a 'relevant expert'.

56. The purpose of such an assessment would be to inform the Minister's decision-making about whether to seek a post-sentence order (or a further order), or the variation of such an order. If the Minister subsequently makes an application for a post-sentence order, or the variation of an existing order, the court is required to consider the report of the 'relevant expert' appointed by the Minister.[48]

57. A person's mandatory participation in a risk assessment under proposed section 105A.18D would be additional to their mandatory participation in any court-ordered risk assessment by a 'relevant expert' who may be appointed by the court under section 105A.6, for the purpose of the court's consideration of the application for the post-sentence order, if ultimately sought by the Minister.

Limitation of the power to appoint 'relevant experts' to courts

58. The Law Council does not support the proposal to empower the Minister to unilaterally determine a person to be a 'relevant expert' (within the meaning of existing section 105A.2 of the Criminal Code) and to require an offender to attend a risk assessment carried out by that person.

59. The Law Council considers that the court, and not a Minister, should be solely responsible for the appointment of 'relevant experts' and ordering a person to participate in a mandatory risk assessment. As explained below, this reflects the significant discretion in making a finding of fact that a person is a 'relevant expert', the status that is given to that person's reports in subsequent proceedings for a post-sentence order, and the gravity of the consequences of a post-sentence order for the offender.

Findings of fact about a person's expertise and independence

60. The definition of a 'relevant expert' in existing section 105A.2 of the Criminal Code requires an objective assessment of a person's competence to assess an offender's future risk.

61. A 'relevant expert' is not limited to an Australian-registered psychiatrist, psychologist or medical practitioner, and can be any person who is determined to be competent to make a prediction of future risk. There is no requirement in the present definition for the 'relevant expert' to be independent of law enforcement, corrections and security agencies, or the Executive Government more broadly. Further, as the Law Council has previously noted, there is presently no empirically verified risk assessment framework for terrorist offenders.

62. These factors make it particularly important that the power to appoint a person as a 'relevant expert' and direct an offender to participate in a mandatory risk assessment are conferred only on a court.

Judicial decision-making

63. Importantly, any decisions of a court about the appointment of a person as a 'relevant expert' would be subject to the constitutional requirements governing the manner in which a judicial power must be exercised. These requirements would not apply to a unilateral decision by the Minister.

64. Such requirements include standards of independence, impartiality and equality before the law. They require parties to be given an opportunity to present their case

[48] Bill, Schedule 1, item 1, item 18, inserting proposed paragraph 105A.6B(1)(b)(ii).

and respond to the opposing case. Decisions must be made on the basis of an application of the law to the facts as found, and must apply the rules of evidence.[49]

65. In further contrast to the process for exercising a Ministerial decision-making power, judicial proceedings concerning the appointment of a 'relevant expert' would generally be conducted in open court, and decisions would be subject to appeal.

Status of reports of 'relevant experts' appointed by the Minister

66. Further, as noted above, if the Minister subsequently makes an application for a post-sentence order, the court is obliged under proposed subparagraph 105A.6B(1)(b)(ii) to consider the report of a 'relevant expert' who was appointed by the Minister under proposed section 105A.18D.

67. While the court has discretion about the degree of weight to be given to such a report in proceedings for a post-sentence order, an express statutory direction to take that report into consideration gives it a privileged status over other evidence. As a matter of practicality, that statutory direction may have some influence on the degree of weight the person's report is given. It may also have some bearing on a court's decision on whether to separately appoint another 'relevant expert' and require the offender to participate in a further mandatory risk assessment.

Evidentiary complexities in CDO and ESO hearings

68. The Law Council also notes that proposed subsection 105A.6B(3) provides that the court must apply the rules of evidence to its assessment of the report of the Ministerially appointed 'relevant expert' under proposed subparagraph 105A.6B(1)(b)(ii).

69. The Law Council takes this to mean that the court **will not** be able to consider that person's report if it does not satisfy the applicable rules of evidence in the particular State or Territory in relation to the admission of expert opinion, or another exception to the general rule against opinion evidence.[50]

70. Therefore, if the court is not satisfied that the person appointed by the Minister possesses the requisite specialised knowledge to predict future risk, or that such a specialised body of knowledge exists, it cannot admit the report on the basis of expert evidence. Unless it is possible to admit the report on another basis (for example, as 'lay opinion' based on the person's observations of the offender during a risk assessment interview)[51] then the court could not consider it under subparagraph 105A.6B(1)(b)(ii) when assessing the offender's future risk.

71. However, this approach is likely to add significant complexity to the determination of CDO or ESO applications. It will increase the risk that there will be complex arguments (and potential appeals against decisions) about whether the person appointed by the Minister as a 'relevant expert' under proposed section 105A.18D, in fact, possessed the requisite degree of expertise for their reports to be admissible as expert opinion evidence in subsequent CDO or ESO proceedings.

72. Argument about this matter would be additional to arguments about the potential exercise by the court of its separate power under existing section 105A.6 to appoint

[49] See, for example, *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209 (per Gaudron J).

[50] See, for example, sections 76 and 79 of the Uniform Evidence Law (which is applied in NSW, Vic, Tas, ACT, NT in addition to the Commonwealth).

[51] See, for example, section 78 of the Uniform Evidence Law.

a relevant expert (or experts) in CDO or ESO proceedings, and the admissibility of the reports of that person or those persons.

73. Such complexity has the potential to prolong a person's detention or supervision (for example, it may result in the issuing of interim orders). It would be preferable to avoid these problems by removing the Minister's power to appoint 'relevant experts' (and consequently removing the obligation on the court to consider those reports).

Circumstances in which 'pre-application risk assessments' should be permitted

74. Given the significant consequences of a post-sentence order for the individual offender, the Law Council recommends that the Minister should only be able to obtain risk assessments in relation to an offender, for the purpose of deciding whether to apply for a post-sentence order, if:

- the offender has consented to participating in such an assessment; or
- the offender is subject to an existing post-sentence order, which includes a condition requiring the person to participate in a risk assessment, which has been imposed **with the consent of the offender** to that condition. Such a condition could only be imposed if the issuing court is satisfied of its necessity and proportionality to the person's future terrorism-related risk.

Recommendation 6—removal of Ministerial power to appoint 'relevant experts'

- **Proposed section 105A.18D (item 134 of Schedule 1) should be omitted from the Bill.**
- **If an offender voluntarily participates in a 'pre-application' risk assessment conducted by a person nominated by the Minister:**
  - **the court which hears a subsequent application for a CDO or ESO against that person should not be subject to an express statutory obligation to consider a report of that person, as part of its assessment of the offender's future risk; and**
  - **instead, the admission and treatment of such a report in CDO or ESO proceedings should be left to the general discretion of the court to admit relevant evidence and determine its weight.**

Legal assistance for ESO applications

75. Presently, section 105A.15A of the Criminal Code empowers a court to make an order requiring the Commonwealth to meet the reasonable costs of legal representation for a person who is subject to an application for a CDO, if that person has been unable to engage a lawyer due to circumstances beyond their control.

76. The Bill proposes to amend section 105A.15A to restrict its application to those cases in which the Minister (or representative) seeks a CDO.[52] As a result, a court will be empowered to make an order for legal assistance funding in cases in which it is considering making an ESO as an alternative to a CDO. However, a court will have no power to make an order for legal assistance funding if the Minister (or representative) only applies for an ESO, or a review of an ESO. The

[52] Bill, Schedule 1, item 122, inserting new paragraph 105A.15A(1)(a) of the Criminal Code.

Explanatory Memorandum does not explain the reasons for the exclusion of 'ESO-only' proceedings from the legal assistance mechanism in section 105A.15A.

77. This means that all of the serious deficiencies identified previously by the Law Council about legal assistance funding arrangements for COs would apply equally to applications for ESOs.[53] This is so notwithstanding the significantly more onerous conditions that can be imposed under an ESO as compared to a CO; the longer duration of ESOs as compared to COs (three years as opposed to 12 months); and the potential that a conviction for the offence of breaching an ESO condition can make the person liable to a new post-sentence order (a CDO or an ESO).

78. The Law Council recommends that section 105A.15A is amended to cover all post-sentence orders under Division 105A. This section (or similar provisions inserted in Divisions 104 and 105A) should also cover legal assistance funding for persons who are charged with an offence of breaching an ESO or CO condition, if those offences are to be the basis for a CDO or ESO application, pursuant to proposed subsections 105A.3A(4) and (5).

79. These recommendations are additional to the amendments to section 105A.15A and the establishment of a dedicated Commonwealth legal assistance funding stream, which the Law Council has recommended in its submission to the Committee's inquiry into the AFP's counter-terrorism powers.[54]

Recommendation 7—legal assistance funding for all post-sentence orders

- **Item 122 of Schedule 1 to the Bill should be omitted and substituted with amendments to section 105A.15A of the Criminal Code, which empower the court to make orders for legal assistance in proceedings for all post-sentence orders (that is, both CDOs and ESOs).**
- **The Bill should further amend one or both of Divisions 105A and 104 of the Criminal Code to include a similar power to that in section 105A.15A, enabling a court to make orders for legal assistance in prosecutions for the offence of breaching an ESO or CO condition, if those offences are to be the basis for making a person eligible for an ESO or CDO, under proposed subsections 105A.3A(4) and (5).**
- **There should be a dedicated Commonwealth legal assistance funding stream for all post-sentence orders, in addition to COs.**

Offences for breaching ESO conditions

80. Proposed section 105A.18A contain new offences for engaging in conduct which contravenes an ESO condition. Proposed section 105.18B contains further offences for interfering with an electronic monitoring device that the person is required to wear under an ESO. These offences are punishable by a maximum penalty of five years' imprisonment.

81. The Law Council is concerned that the proposed offence regime may effectively create a 'revolving door' that exposes offenders to prolonged imprisonment on the basis of relatively minor infractions of ESO conditions. Prolonged imprisonment also raises a further risk that the person may be exposed to radicalisation and new forms of criminal activity while a serving a sentence of imprisonment for breaching an

[53] Law Council of Australia, *PJCIS Review of AFP Powers Submission,* 31-32 at [82]-[88].
[54] Ibid, 77-78 at [316]-[322].

ESO. This may impede their prospects of rehabilitation and, in turn, enlarge the risk that they present to the safety and security of the wider community.

82. For example, Law Council members have identified that, in their experience under the *Crimes (High Risk Offenders) Act 2006* (NSW) and *Terrorism (High Risk Offenders) Act 2017* (NSW), offenders have received lengthy sentences for breaches of ESO conditions that are often unrelated to their risk of committing a further serious offence.

83. In one instance, an offender had a five-year extended supervision order imposed on him at after he committed three serious sexual offences at the age of 16. This order remained in force for over 11 years due to repeated minor breaches, such as cannabis consumption and curfew breaches. The offender was ultimately incarcerated for around 11 of the 16 years that had passed since he completed his sentence for the sexual offences. In revoking the supervision order earlier this year, the Supreme Court of New South Wales observed that the offender's prospects of rehabilitation had been adversely affected by his repeated incarceration for relatively minor infractions of the order and his consequent 'institutionalisation'.[55]

84. To help prevent this problem in the context of Commonwealth post-sentence orders, the Law Council recommends that consideration should be given to amending sections 105A.18A and 105A.18B to create a 'two-tiered' offence regime, as follows:

- a 'lower tier' breach offence would apply if the conduct constituting the breach did not, and was not likely to, cause serious harm to another person, and was not otherwise connected with a terrorism or security offence. It would be punishable by a maximum penalty of two years' imprisonment; and

- a 'higher tier' breach offence would apply if the conduct constituting the breach caused, or was likely to cause, serious harm to another person, or was otherwise connected with a terrorism or security offence. It would be punishable by a maximum penalty of five years' imprisonment.

Recommendation 8—offences for breaching ESO conditions

- **Proposed sections 105A.18A and 105.18B (item 133 of Schedule 1 to the Bill) should be amended to establish the 'two-tiered' breach offence regime outlined at paragraph [84] of this submission.**

Interaction with State and Territory post-sentence orders

Absence of a statutory regime to manage interaction

85. The Bill contains no provisions to manage the interaction of Commonwealth post-sentence orders with post-sentence orders issued under State or Territory laws, as in force from time-to-time.

86. For example, there are no prohibitions on:

- the power of the Minister to apply for a Commonwealth post-sentence order while an application for an equivalent State or Territory order is on foot, or while a State or Territory order is already in force in relation to the person; or

[55] *State of New South Wales v Carr* [2020] NSWSC 643; *State of New South Wales v Hill* [2016] NSWSC 913.

- the power of the court to issue a Commonwealth ESO while a person is also the subject of a supervision order, or an application for such an order, under State or Territory legislation.

87. Further, the Bill does not contain any measures to guide judicial decision-making, such as issuing criteria which require the court to routinely consider the following matters (and supported by disclosure obligations on the Minister to inform the court of any concurrent or imminent orders under State or Territory post-sentence laws):

- whether the person is subject to a post-sentence supervision order under State or Territory legislation, and if so, the conditions of that order; and
- the cumulative impact on the person of multiple post-sentence orders under Commonwealth and State or Territory laws, including the risk of oppression.

The need for express statutory guidance

88. While it is conceivable that an issuing court would consider matters of interaction and potential conflict in individual cases, it would be desirable for the Bill to provide express statutory guidance in relation to the consideration of these matters. This would ensure that potential issues of interaction and conflict are identified and managed consistently across all ESO applications.

89. In addition, a prohibition on concurrent post-sentence orders would create a degree of consistency with the prohibition on double jeopardy and the prohibition on double punishment in sentencing. Such consistency is appropriate having regard to the close connection of post-sentence orders with criminal offences.

90. A statutory framework to avoid conflict and manage interaction would also help to prevent constitutional challenges under sections 109 and 122 of the Constitution, if there is conflict between conditions of individual Commonwealth and State or Territory post-sentence orders.

Examples of potential interaction of post-sentence regimes

91. The risk of duplication or conflict between Commonwealth and State or Territory ESOs is not merely theoretical. Experience under the post-sentence regime in the *Terrorism (High Risk Offenders) Act 2017* (NSW) (**THROA**) is instructive.

92. For example, in 2019, the Supreme Court of New South Wales held that a person who was serving a sentence of imprisonment for assaulting prison guards, and had previously been convicted of a foreign incursions offence under section 119.1 of the Commonwealth Criminal Code, was eligible for an order under the THROA.[56]

93. If the Bill is passed, proposed subsection 105A.3A(3) would provide that the person would also be eligible for a Commonwealth post-sentence order, if they had been continuously imprisoned since being convicted of the foreign incursion offence.

Recommendation 9—express provisions dealing with interaction of regimes

- **The Bill should be amended to include a statutory scheme to manage interactions between post-sentence orders issued under Commonwealth, State and Territory laws (as in force from time-to-time). This should include:**

[56] *State of New South Wales v Elmir (Final)* [2019] NSWSC 1867.

- **a prohibition on a person being subject to concurrent post-sentence orders under Commonwealth and State or Territory legislation; and**
- **issuing criteria that specifically require a court to consider the cumulative impacts on the person of being subject to multiple, consecutive post-sentence orders under Commonwealth and State or Territory legislation.**

Interaction of ESOs with 'post-sentence' COs

94. The Bill would not restrain the ability of the Minister to seek a CO from the Federal Court or Federal Circuit Court, where a State or Territory Supreme Court had refused an ESO application brought on the same, or substantially similar, grounds.

95. This creates a risk that COs could be sought as a form of 'repechage' for a failed ESO application. This raises the types of concerns the Law Council has previously identified about the use of COs after charges against a person have been withdrawn, or a brief from the AFP is refused by the Commonwealth Director of Public Prosecutions, due to lack of evidence. This occurred in the CO proceedings in *Gaughan v Causevic* in 2016.[57]

96. The Law Council considers that all 'post-sentence' preventive orders should be dealt with under a single regime in Division 105A of the Criminal Code. It should not be possible to effectively 'revive' a failed ESO application before a different court, by essentially 're-branding' it as a CO, despite the proposed CO:

- being based on the same or substantially similar grounds as the unsuccessful ESO application; and
- seeking the same or substantially similar conditions as those in the unsuccessful ESO application.

97. The availability of COs in these circumstances has the potential to cause significant oppression to the affected individual, and divert significant public resources into making and responding to duplicative applications (namely, the costs of the Commonwealth as applicant, legal assistance costs for respondents, and the operating costs of the issuing courts). This would aggravate the Law Council's existing concerns about serious inadequacies in Commonwealth legal assistance funding for respondents to CO applications.[58]

98. The Law Council recommends that there should be a prohibition on seeking a CO in the Federal Court or Federal Circuit Court, if a previous ESO application made on the same or substantially similar grounds, has failed before a State or Territory Supreme Court.

99. Rather, the person should be monitored in the community. (For example, via ASIO's intelligence collection powers, if the applicable thresholds are met.) If the person's conduct after their release from prison indicates that they remain a security threat, the evidence of their conduct should form the basis of a separate CO application, or their arrest and charge, as applicable.

[57] *Gaughan v Causevic (No.2)* [2016] FCCA 1693 (8 July 2016, Hartnett J).

[58] Law Council of Australia, *PJCIS Review of AFP Powers Submission,* 31-33 at [82]-[88].

100. However, if there is an appetite to allow COs to be available as a 'repechage' for failed ESO applications, then express statutory safeguards are needed.

101. For example, a court should only be able to hear a CO application that is based on the same or substantially similar grounds as a failed ESO application if the court is satisfied that there are exceptional circumstances which justify hearing the CO application (such as the identification of significant, new evidence).

Recommendation 10—limitations & safeguards in relation to 'post-sentence' COs

Preferred option

- **Division 104 of the Criminal Code should be amended to remove the ability to obtain a CO, if a State or Territory Supreme Court has refused an ESO application made on the same, or substantially similar, grounds.**

Alternative (non-preferred) option

- **Alternatively, there should be a condition which prevents a CO application from being made in such cases, unless the issuing court for the CO is satisfied that there are exceptional circumstances.**

Law Council recommendations on CDOs that also apply to ESOs

102. As part of its recent submissions to the Committee's current statutory review of AFP counter-terrorism powers, the Law Council recommended several amendments to the CDO regime.[59] The Law Council considers that equivalent amendments should be made to the proposed ESO regime, in particular:

- a statutory limitation on the total number of ESOs that can be issued in relation to a person;
- a requirement that the court must take additional matters into consideration when assessing a person's future risk, including:
  - the nature of the person's conviction for the underlying terrorism or security offence, and the fault elements of the offence (in addition to their sentence and the views of the sentencing court);
  - the views of any parole authority on granting parole (the Commonwealth Attorney-General in the absence of a federal parole commission); and
  - any practical limitations in the ability of the offender to test or challenge the information relied on in an application for an ESO;
- limiting the persons who are eligible to be appointed as 'relevant experts' under section 105A.2 to Australian-registered psychiatrists, psychologists and medical professionals, who are assessed by the court as being competent to assess an offender's future risk (not 'any other person'); and
- prohibiting the issuing of ASIO's questioning warrants in relation to people who are the subject of current or imminent proceedings for a post-sentence order, or alternatively prohibiting the use of such questioning material in proceedings for post-sentence orders.

[59] Law Council, *PJCIS Review of AFP Powers Submission*, 55-79.

Recommendation 11—amendments to the ESO regime to align with Law Council recommendations on the CDO regime

- **The Bill should be amended to incorporate the measures at paragraph [102] of this submission. These measures would implement, in relation to ESOs, the Law Council's recommended amendments to CDOs (made as part of the Committee's current review of the CDO regime).**

Proposed retrospective application of the ESO regime

103. Proposed subsection 105A.3A(8) would give the ESO regime retrospective application. It would enable an ESO to be sought and issued in relation to a person who had served their sentence of imprisonment for a terrorism or security offence before the ESO regime commenced, and was the subject of a 'post-sentence' CO upon their release (which remained in force when the ESO regime commenced).

Inadequacy of policy justification

104. The Explanatory Memorandum to the Bill suggests that this retrospective application is appropriate because this cohort of persons could have been eligible for a CDO, and an ESO is merely 'a less restrictive measure than the CDO for which they were already eligible'.[60] It further argues that this cohort of persons 'is already subject to some obligations, prohibitions and restrictions in the community under a [CO]'.[61]

105. However, this reasoning does not engage with the fact that, once a person is released after serving their sentence, they are no longer eligible for a CDO. It is therefore irrelevant that, prior to the person's release from prison, they could have been eligible for an ESO or a CDO, if the ESO scheme had then existed.

106. Further, in all of the cases involving 'post-sentence' COs since 2016, the Minister had an opportunity to seek a post-sentence order (namely, a CDO) prior to the person's release date and elected not to do so. There is no compelling reason to provide a subsequent opportunity to the Minister to revisit that decision. This would remove the safeguards imposed by the Parliament in passing the legislation enacting Division 105A in 2016, which deliberately limited the 'window' within which a post-sentence order could be sought against a person (namely, within the final 12 months of their sentence of imprisonment).

107. In addition, the mere fact that a person is subject to conditions under a 'post sentence' CO is not an adequate justification for making them liable to an application for an ESO, which would effectively replace the current CO. The ability to seek an ESO against a person who is currently subject to a 'post-sentence' CO is not a benign, technical legal exercise in changing the particular type of order to which the person is subject. Rather, an ESO will place significantly greater limitations on a person's rights than their present CO for the following reasons:

    - as explained above, the conditions that may be imposed under an ESO far exceed those presently available for COs;

    - there is a risk that a person could be subject to an application for an ESO which seeks to impose conditions that were refused by the issuing court for

[60] Explanatory Memorandum, 60 at [135].

[61] Ibid.

the 'post-sentence' CO (effectively making the ESO a 'repechage' for a prior, unsuccessful application for a particular CO condition); and

- subjecting a person to an ESO in substitution of their current 'post-sentence' CO could make that person eligible for a further post-sentence order (namely, a further ESO, or a CDO) if they were convicted of an offence for breaching an ESO condition and were sentenced to imprisonment.

International human rights implications

108. The Explanatory Memorandum to the Bill asserts that the proposed ESO regime, in its entirety, 'does not engage the prohibition on the retrospective operation of criminal laws' in Article 15(1) of the *International Covenant on Civil and Political Rights* (**ICCPR**).[62] The basis for this assertion is a view that 'the imposition of an ESO is not a penalty for criminal offending' because its purpose is 'protective rather than punitive or retributive' and these orders are 'based on an assessment of future risk rather than punishment for past conduct'.[63]

109. However, this assertion does not advert to the fact that the United Nations Human Rights Committee (**UNHRC**) has taken a contrary view. It has determined that the absolute prohibition on retrospective criminal laws under Article 15(1) of the ICCPR applies with equal force to post-sentence orders, given their close connection with criminal offences.[64] The absence in the Explanatory Memorandum of any reference to the views of the UNHCR is surprising, given that this finding was made in response to a complaint about certain Australian post-sentence legislation.

110. In particular, the UNHRC held in 2010 that the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) breached the prohibition in Article 15(1), because it exposed an offender to post-sentence detention on the basis of laws that were enacted after his conviction for the relevant sexual offences. In 2010, the UNHRC held that the exposure of the offender to post-sentence detention under laws which were made after he had committed the offence, and was convicted, amounted to 'a heavier penalty … than the one that was applicable at the time when the criminal offence was committed'.[65]

111. The Law Council considers that this reasoning is also capable of application to a law that makes a person liable to a new form of post-sentence order (such as an ESO) to which they were not liable when they committed the relevant offence, or when they were convicted, or when they completed their sentence of imprisonment. This is because, for the reasons explained above, the conditions and liabilities imposed under ESOs exceed those presently available for COs.

Commonwealth criminal law policy implications

112. For the same reasons as those identified by the UNHRC, the Law Council also considers that the requirements of Commonwealth criminal law policy in relation to the creation of retrospective criminal offences should apply equally to proposals for a regime of post-sentence orders to be applied retrospectively.

113. In particular, the Australian Government *Guide to Framing Offences, Infringement Notices and Enforcement Powers* states that retrospectivity should be limited to the

[62] Ibid, 36 at [172].
[63] Ibid, 35 at [172].
[64] *Fardon v Australia*, UNHRC Communication No. 1629/2007, CCPR/C/98/D/1629/2007, 9.
[65] Ibid.

most exceptional cases where there is strong justification.[66] The limited justification provided in the Explanatory Memorandum does not meet this high threshold.

Recommendation 12—ESO regime must only apply prospectively

- **The Bill should be amended to omit proposed subsection 105A.3A(8) of the Criminal Code (inserted by item 59 of Schedule 1 to the Bill).**

Monitoring powers in relation to ESOs

Domestic search and surveillance powers

114. The Bill proposes to amend Part IAAB of the Crimes Act to extend the monitoring powers presently available for COs to ESOs, as well as surveillance powers under the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2004* (Cth).

115. These monitoring powers enable law enforcement agencies to search persons subject to a supervisory order, or a premises the person occupies, either with consent or pursuant to a search warrant. They also allow the interception of telecommunications (under warrant), access to telecommunications data (under internal authorisation), the use of surveillance devices (under warrant), and remote access to computers (under warrant).

116. The Law Council has previously expressed concern that the broad range of monitoring powers available to determine whether a breach of a CO has occurred, rather than investigating a suspected criminal offence (including a breach offence), is likely to be a disproportionate response under human rights law.[67]

117. The Law Council also holds this concern in relation to the proposed expansion of monitoring powers to ESOs. It recommends the repeal of existing monitoring powers, and the removal of the proposed expansions of those powers from the Bill.

Recommendation 13—removal of monitoring powers for ESOs

- **The Bill should be amended to omit the proposed expansions of monitoring powers in Parts 2 and 3 of Schedule 1.**

International Production Orders

118. The Bill proposes to expand the IPO regime, which is separately under review by the Committee, to enable IPOs to be issued for the purpose of monitoring compliance with an ESO. This would enable law enforcement agencies to access communications data that is stored offshore, in a country with which Australia has a bilateral agreement for the cross-border sharing of such data.

119. Consistent with the Law Council's submissions to the Committee on the IPO Bill, the Law Council does not support the application of the IPO regime to monitoring

[66] Australian Government, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, (September 2011), 15-17 at [2.1.3]. See also: Attorney-General's Department, *Prohibition on Retrospective Criminal Offences*, Public Sector Guidance Sheet, <www.ag.gov.au>.

[67] Law Council of Australia, *PJCIS Review of AFP Powers Submission,* 30-31 at [80]-[81].

powers for either COs or ESOs, and considers that IPOs should be reserved for the investigation of serious offences.[68]

120. However, if the Committee is minded to support the expansion of the IPO regime to these powers, the Law Council submits that this expansion will make it even more crucial for the IPO Bill to be amended to implement the additional safeguards recommended by the Law Council in its submissions on the IPO Bill. In particular, the Law Council recommended:

- stronger conditions for the recognition of international agreements under the IPO regime, which requires the Attorney-General to certify their compliance with a range of human rights obligations, consistent with a corresponding condition in the US *Clarifying Lawful Overseas Use of Data Act* (**CLOUD Act**);
- stronger thresholds for the issuing of IPOs, including specific protections for types of particularly sensitive information (such as information subject to legal professional privilege and health information);
- independent issuing by judicial officers not tribunal members;
- the establishment of an independent statutory office to review IPOs before being served on communications providers, and to resolve complaints from communications providers; and
- enhancements to reporting requirements and oversight arrangements.[69]

121. In addition, Australia and the US are presently negotiating a bilateral agreement that would be supported by the IPO regime in Australia, and the CLOUD Act in the US. The CLOUD Act contains a condition that the US Attorney-General must certify that an international agreement meets certain minimum human rights compatibility standards. Congress may have regard to such a certification and the underlying reasons in deciding whether to exercise its power to disallow the agreement for the purpose of US laws (namely, the framework under the CLOUD Act).[70]

122. The proposed expansion of the IPO regime to cover ESO-related monitoring would likely be material to such an assessment by the US Government, and subsequent scrutiny of an agreement by Congress. The Law Council is aware that the US Government is presently considering the compliance of the proposed IPO regime with the human rights compatibility requirements in the CLOUD Act. Accordingly, the Committee may wish to seek an assurance from the Government that it has informed the US of the proposed expansion of the IPO regime in the present Bill, so that this may be taken into account as part of the US's human rights assessment of Australia's laws (particularly the proposed IPO legislation) under the CLOUD Act.

Recommendation 14—expansion of IPO regime to ESO monitoring powers

- **If there is an intention to retain monitoring powers for ESOs, and to expand the IPO regime to cover these powers:**
  - **the IPO Bill should be further amended to implement the Law Council's recommended amendments to strengthen safeguards**

[68] Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020* (May 2020); and Law Council of Australia, *Supplementary Submissions to the Parliamentary Joint Committee on Intelligence and Security Review of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020* (May and June 2020).

[69] Ibid.

[70] 18 USC 121 §2523(b)(1).

for that regime (as set out in its separate submissions to the Committee's inquiry into the IPO Bill); and

- **the Government should provide advice as to whether it has informed the US Government of the proposed expansion of the IPO regime, for the purpose of the US determining whether a potential bilateral agreement with Australia would satisfy the human rights conditions of the US CLOUD Act (18 USC 121 §2523(b)(1)).**

Expansion of special advocates regime to ESO proceedings

123. The Bill proposes to amend the NSI Act to expand the special advocates regime to ESOs, as well as COs, where the court makes an order preventing the disclosure of documents or information or the calling of witnesses.[71]

124. The Law Council continues to support this measure. However, the Law Council reiterates its recent recommendation to the Committee's statutory review of the AFP's counter-terrorism powers that the proposed expansion of the special advocates regime warrants the establishment of an independent office (preferably established under statute) to administer it.[72]

Recommendation 15—administration of the special advocates regime

- **The Government should establish an independent office to administer the special advocates regime, including the appointment of special advocates and the provision of administrative support to special advocates.**
- **The office should be independent to all law enforcement and security agencies and government departments.**
- **Consideration could be given to conferring this function on legal aid commissions, contingent on adequate additional resourcing.**
- **Resourcing for this function should not be drawn from existing legal assistance budgets, or the budgets of the federal courts, the Administrative Appeals Tribunal, or oversight bodies.**

Administrative review rights in relation to ESOs

Exclusion of statutory judicial review rights regarding ESOs

125. Item 153 of Schedule 1 to the Bill proposes to amend the ADJR Act to exempt from statutory judicial review decisions of the Minister made under Division 105A of the Criminal Code. These include decisions of the Minister to:

- apply for CDOs or ESOs under section 105A.5; and
- exercise the power under proposed section 105A.18D to:

[71] Bill, Schedule 1, items 189-210.

[72] Law Council of Australia, *PJCIS Review of AFP Powers Submission,* 29-30 at [77]-[79].

- appoint a person as a 'relevant expert' and direct them to perform a risk assessment of a detainee, for the purpose of the Minister's decision-making about whether to seek a post-sentence order; and
- direct a detainee to attend such a risk assessment, which may be conducted in a single session or over an unlimited number of sessions.

126. The Law Council does not support the proposed exclusion of these decisions from statutory judicial review under the ADJR Act. The removal of statutory judicial review rights reduces the practical ability of an aggrieved individual to seek review of decisions they believe to be unlawful. It also reduces transparency in decision-making about applications for post-sentence orders.

Inadequacy of judicial review rights under original / constitutional jurisdiction

127. The Explanatory Memorandum notes that a person will retain the ability to seek judicial review under the original jurisdiction of the High Court or the Federal Court under section 39B of the *Judiciary Act 1903* (Cth) (which reflects constitutional limitations on Commonwealth legislative power to exclude such review).[73]

128. However, judicial review in original jurisdiction (or section 39B jurisdiction) is no substitute for a right to ADJR Act review. In the absence of a statutory right to reasons for an administrative decision, as exists under section 13 of the ADJR Act, it may be extremely difficult for an individual to obtain the necessary evidence to make an application for judicial review under original or section 39B jurisdiction. This will be particularly difficult should the Commonwealth respond to a review application with extensive claims for public interest immunity over relevant evidence.

Deficiencies in the reasons given in the Explanatory Memorandum

129. The Explanatory Memorandum suggests that:

- the complete extinguishment (rather than deferment) of statutory judicial review rights is necessary to avoid 'fragmenting' or 'frustrating' a parallel legal process—that is, an application for a post-sentence order;[74] and
- judicial determination of the substantive application for a post-sentence order will, in all instances, provide an adequate opportunity for a person to 'seek judicial consideration of the Minister's decision'.

130. The Law Council does not support these suggestions, as their underlying reasoning is problematic for the three reasons explained below.

131. **First,** Ministerial decisions in relation to CDOs have been subject to statutory judicial review under the ADJR Act since 2016. No evidence has been advanced of the asserted risk of 'fragmentation' or 'frustration' eventuating in practice.

132. **Secondly,** while the Administrative Review Council has previously identified that an exclusion from ADJR Act review **may be** justified where such review has the potential to frustrate or fragment another legal process, that observation was not intended as a rigid rule of universal application.[75] Rather, this factor must be

[73] Explanatory Memorandum, 103 at [386].

[74] Ibid, 103 at [387]-[391].

[75] Administrative Review Council, *Federal Judicial Review in Australia*, Report No 52, (2012), 105. See also: Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2003), 38.

balanced against other salient policy considerations, which arise in the circumstances of particular types of administrative decisions.

133. In the case of decision-making about post-sentence orders under Division 105A of the Criminal Code, important countervailing considerations include the gravity of the consequences of a post-sentence order on the person; and the fact that the court is required to consider the report of a 'relevant expert' appointed by the Minister (even if the court would not have appointed the particular person as a 'relevant expert').

134. **Thirdly,** the role of the issuing court, in considering the substantive application for a post-sentence order, does not necessarily or invariably provide an adequate opportunity for an individual to contest the Minister's decision-making under Division 105A. The contrary suggestion in the Explanatory Memorandum overlooks the fact that the Bill contains a regime for 'court-only' evidence in ESO applications, which would exclude the respondent and their lawyer from those proceedings.

135. Under this regime, a special advocate who is appointed by the court to act as a contradictor in closed proceedings would be prevented from communicating that evidence to the respondent and their lawyer. This means that a respondent to an ESO application may not have access to the necessary particulars about the Minister's decision-making, even if it were possible to make a collateral challenge to the substantive application as part of those proceedings.

Alternative solution—amendments to section 9A of the ADJR Act

136. If the Committee considers that there is a case for limiting statutory judicial review rights in relation to the Minister's decision-making under Division 105A of the Criminal Code, the preferable option would be to amend section 9A of the ADJR Act, so that post-sentence orders are included as a form of 'related criminal justice process decision'. This would have the following effects:

- rather than extinguishing statutory judicial review rights, subsection 9A(1) of the ADJR Act would apply to defer their exercise until the completion of the hearing and the expiry of any appeal period for the post-sentence order; and
- if the person had applied for ADJR Act review **before** the Minister commenced proceedings for a post-sentence order, then the Minister could apply for a permanent stay of those review proceedings under subsection 9A(3) of the ADJR Act. The court could only make an order for a permanent stay if satisfied, in the circumstances of the particular case, that:
  - the matter that is the subject of the ADJR Act review application is better dealt with in the substantive proceedings concerning the application for the post-sentence order; and
  - a permanent stay would not cause prejudice to the applicant who is seeking ADJR Act review (that is, the prisoner who is potentially the subject of a post-sentence order, if the Minister made an application).

137. The circumstances identified in the second bullet point above may arise if a prisoner was subjected to a mandatory risk assessment, by a 'relevant expert' appointed by the Minister under proposed section 105A.18D, for the purpose of the Minister deciding whether to make an application for a post-sentence order.

138. In such a case, the prisoner may wish to contest the decision of the Minister to appoint a person as a 'relevant expert' under proposed subsection 105A.18D(2).

For example, the person might submit that the decision was an improper exercise of the power, because it was unreasonable or an abuse of power;[76] or the appointment decision was not based on evidence of the person's expertise.[77]

139. The alternative approach of amending section 9A of the ADJR Act to include decisions about post-sentence orders as 'related criminal justice process decisions' would have three key benefits, which are outlined below.

Benefit 1—enabling an assessment of the circumstances of individual cases

140. First, it would enable the court to make an assessment, in the individual circumstances of each case, as to whether a matter that is the subject of an ADJR Act review application is better dealt with in the substantive proceedings concerning an application for a post-sentence order.

141. In contrast, the proposal in the Bill to categorically exclude ADJR Act review assumes that the subject matter of a statutory judicial review application will **invariably** be better dealt with in the proceedings concerning the substantive post-sentence order. For the reasons given above, the Law Council cautions against making such a generalised assumption.

Benefit 2—clear and consistent treatment of warrants under the ADJR Act

142. Secondly, the Law Council's suggested alternative approach would close a 'loophole' that presently exists in relation to decisions of the AFP about monitoring warrants for ESOs. The proposed exclusion in item 153 of Schedule 1 to the Bill is limited expressly to decisions of the Minister under Division 105A of the Criminal Code, and therefore does not extend to decisions of AFP officials about monitoring warrants.

143. While section 9A of the ADJR Act limits statutory judicial review rights in relation to decisions about warrants, that provision applies only to administrative decisions that are made 'in connection with an offence'.[78] This would appear to exclude monitoring warrants, as they do not require any suspicion that a person has contravened, or may be contravening, a condition of an ESO (which is, itself, an offence).

144. Consequently, if administrative decisions about post-sentence orders were included in section 9A of the ADJR Act, then courts would have greater ability to assess the risks of 'fragmentation' as a result of a separate statutory judicial review application, and to balance any such risks against the potential for prejudice to the rights and interests of aggrieved persons.

145. Amending section 9A of the ADJR Act as suggested would make this balancing exercise possible in relation to administrative decisions about applications for post-sentence orders, as well as decision-making by the AFP about monitoring warrants.

Benefit 3—accurate reflection of the character of post-sentence orders

146. Thirdly, the Law Council's suggested alternative approach would accurately reflect the close connection of post-sentence orders with the criminal justice process, in

[76] ADJR Act, paragraph 5(1)(e) and subsection 5(2).

[77] Ibid, paragraph 5(1)(h).

[78] ADJR Act, subsection 9A(4). See subparagraph (a)(iii) of the definition of 'related criminal justice process decision', which covers 'a decision in connection with the issue of a warrant, including a search warrant or a seizure warrant'. However, this is qualified by the chapeau (opening sentence) to the definitional provision, which provides that the administrative decision must be 'in relation to an offence'.

that the post-sentence regime is only enlivened if a person has been convicted of, and sentenced to a period of imprisonment for, a terrorism or security offence.

Recommendation 16—statutory judicial review rights regarding Division 105A

Preferred option

- **The Bill should be amended to omit item 153 of Schedule 1 so that Ministerial decision-making under Division 105A is subject to ADJR Act review. In particular, this should include Ministerial decisions to:**
  - **apply for an order under proposed section 105A.5; and**
  - **appoint a person as a 'relevant expert' and to direct that person to conduct a mandatory risk assessment of a prisoner under proposed section 105A.18D.**

Alternative option

- **The Bill should be amended to:**
  - **omit item 153 of Schedule 1; and**
  - **substitute it with amendments to section 9A of the ADJR Act, to bring administrative decisions under Division 105A of the Criminal Code within the definition of a 'related criminal justice process decision' in subsection 9A(4) of the ADJR Act.**

Requirements for ASIO security advice about ESOs

Proposed exclusion of the security assessment regime

147. Item 154 of Schedule 1 to the Bill proposes to amend section 35 of the ASIO Act to relieve ASIO of any requirement to furnish security assessments in respect of its advice about ESO conditions or the electronic monitoring of ESO subjects.

148. It does so by excluding ASIO's advice on these matters from the definition of 'prescribed administrative action' (**PAA**) in section 35 of the ASIO Act, which is a component of the definition of 'security assessment' that section.

149. Effectively, section 35 of the ASIO Act defines a 'security assessment' as a form of advice by ASIO which expresses a recommendation, opinion, advice or other reference to one or both of the following questions:

- 'whether it would be consistent with the requirements of security' for PAA to be taken in relation to a person; or
- 'whether the requirements of security make it necessary or desirable for [PAA] to be taken in respect of a person'.

150. 'PAA' is defined in section 35 of the ASIO Act as covering a range of administrative decisions. Relevantly, paragraph (a) of the definition of PAA applies to administrative decisions about a person's access to information or a place, or their ability to undertake an activity, where such access or activity is controlled on security grounds. A decision to seek a particular ESO condition, or to monitor compliance with an existing ESO condition, could fall within this ground of PAA.

151. Importantly, security assessments are subject to certain rights of notification and review under Part IV of the ASIO Act. This includes obligations to notify the person of an 'adverse security assessment' (essentially, a form of security assessment that is prejudicial to the person's interests) and rights to seek merits review of such an assessment in the Security Division of the Administrative Appeals Tribunal.[79] These rights do not apply to ASIO's security advice that is not covered by the definition of a 'security assessment' in section 35 of the ASIO Act.

152. The proposed amendments in the Bill provide that ASIO **would not** be required to furnish a security assessment in respect of any of its advice that:

- makes a recommendation or suggestion about the desirability of the Minister applying for an ESO which includes particular conditions (or applying for a variation of the conditions of an existing ESO); or
- makes a recommendation or suggestion about the desirability of the AFP excising monitoring powers in relation to a person who is subject to an ESO.

153. Consequently, the notification and review requirements under Part IV of the ASIO Act would not apply to such security advice given in relation to the ESO regime.

Absence of justification

154. The Explanatory Memorandum comments that the proposed measure would 'put beyond doubt' that the security assessment provisions of Part IV of the ASIO Act do not apply to ASIO's advice in relation to ESOs.[80] However, it does not explain why it is considered necessary to exclude the application of the Part IV requirements.

155. It is conceivable that significant weight could be placed on ASIO's security advice in ESO proceedings. It is also conceivable that such advice may be withheld from the person under the 'court only evidence' provisions of the NSI Act. This makes the rights to seek merits review of ASIO's ESO-related security advice under Part IV of the ASIO Act particularly important.

156. Accordingly, the Law Council recommends that the proposed amendments to the ASIO Act should be omitted from the Bill, in the absence of a cogent explanation.

Recommendation 17—ASIO's ESO-related advice should be subject to Part IV

- **In the absence of a cogent justification, the Bill should be amended to omit the proposed amendments to section 35 of the ASIO Act in item 154 of Schedule 1.**
- **That is, ASIO should be required to furnish a security assessment if:**
  - **it gives security advice about ESO conditions or the exercise of monitoring powers in relation to a person subject to an ESO; and**
  - **that advice meets the current definition of a 'security assessment' in existing section 35 of the ASIO Act, including the current definition of the component term 'prescribed administrative action'.**

[79] ASIO Act, section 38 (notification) and Division 4 of Part VI (review rights).

[80] Explanatory Memorandum, 104 at [393].

Proposed amendments to CDOs and COs

157. The Bill also contains several measures that go beyond what is strictly necessary to establish an ESO regime, namely proposed amendments to:

- aspects of the CDO regime (concerning eligible offences and access to information) in addition to applying these measures to the ESO regime and
- the conditions able to be imposed under COs.

158. For the reasons outlined below, the Law Council does not support these measures. In particular, the Law Council consider that:

- the proposals in relation to 'eligible offences' and access to information for CDOs and ESOs should be omitted entirely (that is, they should not apply to either type of post-sentence order); and
- the proposals in relation to COs should be withdrawn from the present Bill and scrutinised as part of the Committee's statutory review of COs.

'Eligible offences' for CDOs (in addition to ESOs)

159. The Bill proposes to expand the range of Commonwealth offences which enliven the post-sentence regime, to cover offences for breaching ESO or CO conditions where:

- the person previously served a sentence of imprisonment for a terrorism or security offence; and
- the person was charged with an offence for contravening the condition of an ESO or a CO before the later of:
  - the ESO or CO ceasing to be in force; or
  - six months after the conduct constituting the breach offence;
- the person is serving a sentence of imprisonment for the breach offence; and
- the court making the post-sentence order is satisfied that, as a result of the offence of breaching the ESO or CO condition, the person poses an unacceptable risk of committing a serious terrorism offence.[81]

160. For the reasons outlined at paragraphs [80]-[84] above in relation to the breach offences for ESOs, the Law Council does not support the expansion of the post-sentence regime to breach offences in relation to ESOs or COs.

161. The proposed expansion of the eligible offences risks creating a 'revolving door' in which offenders are subject to prolonged detention, variously under sentences of imprisonment for breaching ESO or CO conditions, and post-sentence orders.

162. The Law Council acknowledges that the requirement in the final dot point at paragraph [159] above may go some way towards mitigating this risk. (That is, the requirement for the court to be satisfied that the ESO or CO breach offence indicates that the person poses an unacceptable risk of committing a serious terrorism offence.)

163. However, this compounds the difficulties the Law Council has previously identified in making predictions about a person's future risk. The court is not merely required to

[81] Bill, Schedule 1, item 59 (inserting new subsections 105A.3A(4) and (5) of the Criminal Code).

make a generalised prediction of a person's future risk (as it must in applying the issuing test in proposed section 105A.7) which is an inherently fraught exercise. Rather, the effect of proposed subsections 105A.3A(4) and (5) is that the court must also attempt to make that prediction on the basis of a single instance of conduct—namely, the breach offence in relation to the ESO or CO.

164. The Law Council submits that, if the conduct constituting a breach offence in relation to an ESO or CO raises a risk that the person is likely to commit a serious terrorism offence, then that conduct is, itself, likely to constitute an offence that attracts the post-sentence regime.

165. This reflects that the eligible terrorism and foreign incursions offences specifically target preparatory and ancillary conduct, such as preparations and planning for, or supporting, terrorist acts or foreign incursions. The extensions of criminal liability in Chapter 2 of the Criminal Code also apply to these preparatory and ancillary offences. For example, it is an offence to attempt or conspire to prepare to commit a terrorist act. These offences enliven the application of the post-sentence regime.

166. Consequently, if a person is to be exposed to a post-sentence order for conduct that constitutes a breach of an ESO or CO condition, it should be on the basis of a separate prosecution for a terrorism or foreign incursions offence.

Recommendation 18—exclusion of offences for breach of CO or ESO conditions

- **Proposed subsections 105A.3A(4) and (5) (item 59 of Schedule 1) should be omitted from the Bill.**

Access to information forming part of CDO and ESO applications

167. The Bill proposes to expand the grounds for limiting an offender's access to information that is part of an application for a post-sentence order. Currently, paragraph 105A.5(3)(aa) and subsection 105A.5(5) permits the Minister to withhold information that is likely to be protected by a claim of public interest immunity, or the subject of an Attorney-General's certificate or protective orders under the NSI Act.

168. Proposed section 105A.14D contains a further ground for withholding or limiting access to information in an application for an ESO or a CDO. This is if the application contains 'terrorism material', being material that:

- advocates support for 'any terrorist acts' or 'violent extremism' (the latter term is undefined in the Bill);
- relates to planning or preparations for any such acts; or
- advocates joining or associating with a terrorist organisation.

169. In these circumstances, the Minister may apply to a State or Territory Supreme Court seeking 'an order in relation to the manner in which the material is to be dealt with'. The court may make an order which requires the information to be given to the person's lawyer only, or to be available for inspection at specified premises.

170. There are no statutory criteria for the making of orders, such as a requirement that the court may only make an order limiting or prohibiting access if satisfied that this is necessary and proportionate to any security risks. There are also no provisions would ensure that there will always be an effective 'contradictor' in such applications (for example, the offender or their lawyer, or a special advocate).

171. The Explanatory Memorandum states that the ability to withhold or limit access to 'terrorism material' is necessary because 'having access to extremist material within a prison setting may increase the risk of other inmates being exposed to the material and may potentially inhibit efforts to de-radicalise, rehabilitate or disengage from violent extremist ideologies [by] the offender or other offenders'.[82]

172. The Law Council remains of the view expressed in its recent submission to the Committee's review of AFP powers (set out below) which commented on a similar proposal to withhold or limit access to materials forming part of a CO application:

> *The Law Council considers that limitations on the subsequent dissemination of materials* [given to a prisoner who is the subject of an application for a post-sentence CO, as part of the service obligations in relation to that application] *should be managed in practice within correctional facilities, by removing the opportunity for a CO respondent to make such disclosures, and to remove the ability for recipients to retain any materials that may have been inappropriately disclosed by the CO respondent. Further, there is already an ability in paragraph 104.12A(3)(d) of the Criminal Code for the AFP to withhold information from a CO respondent, if it would put at risk the safety of the community or law enforcement officers.*
>
> *In the absence of any evidence that such practical steps have been exhausted, or that it has not been possible to rely on the existing ability to withhold information on community safety grounds, the service requirements should not be reduced, given the risk of reducing or removing the ability of the respondent to know the case against them, and instruct their lawyers.*[83]

Recommendation 19—power to withhold or limit access to 'terrorism material'

- **The Bill should be amended to omit proposed section 105A.14D (item 120 of Schedule 1 to the Bill).**

Proposed expansions of CO conditions

173. The Bill also proposes two major expansions to the conditions able to be imposed under a CO. They cover obligations in relation to electronic monitoring devices;[84] and obligations to carry at all times a specified mobile phone, and to answer or promptly return calls to that phone from a 'specified authority'.[85]

174. For the reasons explained below, the Law Council does not support these proposed expansions. If there is a desire to pursue them, they should be examined separately as part of the Committee's statutory review of the CO regime.

[82] Explanatory Memorandum, 90 at [303].

[83] Law Council of Australia, *PJCIS Review of AFP Powers Supplementary Submission* (September 2020), 10 at [33]-[34].

[84] Bill, Schedule 1, item 16 (inserting new paragraph 104.5(3)(d) of the Criminal Code). See also, item 20 (inserting new section 104.5A of the Criminal Code).

[85] Ibid, item 16 (inserting new paragraph 104.5(3)(da) of the Criminal Code).

Electronic monitoring devices

175. The Bill proposes to expand the existing condition in section 104.5(3)(d) that a person must wear a tracking device by:

- replacing the requirement to 'wear a tracking device' with a requirement that the person 'be subject to electronic monitoring' which may include a requirement to wear a monitoring device and to comply with specified directions about the maintenance of that device;[86]
- imposing extensive, additional conditions to those in existing section 104.5(3A) that require persons to keep the device in good working order, to attend for inspections of the device, and inform the AFP if the person becomes aware the device is not in good working order.

  In particular, if the court imposes an ESO condition that the person wears a monitoring device, then it would be **required** to impose additional conditions, including requirements that the person must:

  - carry, at all times, a specified mobile phone and answer or promptly return calls to that phone from a specified authority;
  - allow a specified authority to enter the person's residence at any reasonable time for 'any purpose relating to the electronic monitoring of the person'; and
  - take the steps specified in the CO 'and other reasonable steps' to ensure that the monitoring device and any related equipment are in good working order.[87]

176. If a person does not consent to a specified authority entering their premises for the above purposes, then a police officer is permitted to use reasonable force to gain entry and perform the relevant activities specified in the ESO.[88]

Law Council views

177. The Law Council is concerned that a court has no discretion about whether to impose these additional conditions (either at all, or subject to further limitations that the court considers appropriate in the circumstances). The Explanatory Memorandum does not explain why the Bill proposes to remove all judicial discretion, in the context of potentially onerous and highly intrusive CO conditions, which attract significant criminal sanctions for breach.

178. The combined effect of proposed paragraph 104.5(3)(d) and proposed section 104.5A also adds force to the Law Council's previous submissions in support of implementing the recommendations of the second INSLM, to require the court to assess the necessity and proportionality of the combined effect of all CO conditions.

179. Further, the requirement in proposed subparagraph 104.5A(1)(c)(i) that the controlee must allow a 'specified authority' to enter their residence at any reasonable time, for 'any purpose relating to the electronic monitoring of the person', far exceeds the stated policy intent in the Explanatory Memorandum to enable law enforcement officers to ensure that the device and related equipment are installed

[86] Ibid, item 16 (inserting new paragraph 104.5(3)(d) of the Criminal Code).
[87] Ibid, item 16 (inserting proposed paragraph 104.5A(1)(c) and subsection 104.5A(2) of the Criminal Code).
[88] Ibid, item 16 (inserting proposed subsection 104.5A(5) of the Criminal Code).

correctly and are in good working order.[89] The obligation should be limited to the purposes identified in the Explanatory Memorandum as the basis for the proposal.

180. To the extent that entry to a person's residence may be sought for broader purposes, such as determining whether a person is complying with their obligations in relation to electronic monitoring, these matters are already covered by the CO-related monitoring powers in the *Crimes Act 1914* (Cth).

Recommendation 20—additional conditions for monitoring devices

Preferred option

- **The Bill should be amended to omit item 16 of Schedule 1. Any proposed expansion of CO conditions should be examined separately in the Committee's current statutory review of the CO regime.**

Alternative (non-preferred) option

- **Proposed subsection 104.5A(1) (item 16 of Schedule 1 to the Bill) should be amended so that the court has discretion about whether to impose the requirements in paragraphs (b) and (c).**
- **The obligation in proposed subparagraph 104.5A(1)(c)(i) to allow a specified authority to enter the controlee's residence should be limited to entry for the purpose of maintaining a monitoring device (not 'any purpose relating to the electronic monitoring of the person').**

Obligations to carry and answer a specified mobile phone

Lack of demonstrated necessity

181. The Law Council considers that there is an inadequate case for the condition in proposed paragraph 104.5(3)(da), requiring a person to carry a specified mobile phone, and answer or promptly return calls from a specified authority. For the reasons outlined below, the Law Council supports its removal.

182. While this requirement may provide a degree of convenience for law enforcement agencies in monitoring the movements and activities of a person subject to a CO, it has not been demonstrated that it is necessary to expose a person to a criminal offence, punishable by a maximum of five years' imprisonment, for failing to carry a mobile phone or answer or promptly return calls.[90]

183. This is particularly significant in view of the availability of extensive monitoring powers, which authorise intrusive powers of search and electronic surveillance to assess whether a person is complying with a condition of a CO.

184. These are critical distinctions to the imposition of similar sorts of requirements in parole conditions, which require parolees to be contactable by the relevant authority.

Overbreadth of proposed condition

185. Further, the condition in proposed paragraph 104.5(3)(da) is not limited to circumstances in which a court also imposes a condition that the person wears a

[89] Explanatory Memorandum, 44 at [49].

[90] Criminal Code, section 104.27 (offence of breaching a CO condition).

monitoring device. While a court is obliged to impose the condition in proposed paragraph 104.5(3)(da) if it imposes a condition under paragraph 104.5(3)(d) requiring a person to wear a monitoring device,[91] it may also impose the condition in paragraph 104.5(3)(da) any other circumstances.

186. The availability of the condition in broader circumstances than the use of monitoring devices exceeds the justification given for proposed paragraph 104.5(3)(da) in the Explanatory Memorandum. That justification is directed to ensuring compliance with the requirement to wear a monitoring device, stating that the requirement:

> *would ensure that the controlee can be contacted as needed, for example to advise them to charge an electronic monitoring device if the battery is running low, or to confirm their whereabouts if the electronic monitoring device indicates a controlee is not complying with other obligations, prohibitions or restrictions in the order.*[92]

187. Given that contravention of this condition is an offence,[93] which may potentially also expose a person to a post-sentence order,[94] it should only be available to serve the specific purpose to which it is directed—that is, in connection with electronic monitoring. It should not be possible to seek or obtain a CO containing this condition for any other purpose.

188. In view of the gravity of the consequences of a CO for the individual, the Law Council emphasises that a general appeal to a desire for operational flexibility would not be a sufficient justification for enabling the power in proposed paragraph 104.5(3)(da) to be available more broadly.

Recommendation 21—omission of obligations to carry & answer specified phone

Preferred option

- **The Bill should be amended to omit proposed paragraph 104.5(3)(da) (item 16 of Schedule 1 to the Bill).**

Alternative (non-preferred) option

- **If the condition in proposed paragraph 104.5(3)(da) is to be retained, the Bill should be amended as follows:**
  - **the condition in proposed paragraph 104.5(3)(da) should only be available if the court also imposes a condition under new paragraph 104.5(3)(d), which requires the person to be subject to electronic monitoring; and**
  - **proposed paragraph 104.5(3A)(b) should be omitted from the Bill, so that the power to give directions under proposed paragraphs 104.5(3)(da)(iii) is limited to the purpose of giving effect to the obligations in subparagraphs 104.5(3)(da)(i) and (ii) to carry a specified mobile phone, and to answer or return calls promptly.**

[91] Bill, Schedule 1, item 20 (inserting proposed paragraph 104.5A(1)(b) of the Criminal Code).

[92] Explanatory Memorandum, 42-43 at [43].

[93] Criminal Code, section 104.27.

[94] Bill, Schedule 1, item 59 (inserting proposed subsection 105A.3A(5) of the Criminal Code).

ATTACHMENT 2A

Law Council
OF AUSTRALIA

Supplementary submission:

Review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020

Parliamentary Joint Committee on Intelligence and Security

27 November 2020

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council gratefully acknowledges the contribution of its National Criminal Law Committee to this supplementary submission.

Introduction

1. The Law Council thanks the Parliamentary Joint Committee on Intelligence and Security (**Committee**) for the opportunity to appear at its public hearing on 13 November 2020, as part of its inquiry into the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (**Bill**).

2. To assist the Committee in its deliberations, the Law Council wishes to provide supplementary information about the following matters:

   (1) questions from Senator Fawcett about the proposed adoption of the civil standard of proof for extended supervision orders (**ESOs**), as distinct to:

      (a) the higher standard of a 'high degree of probability' currently applicable to continuing detention orders (**CDOs**); or

      (b) the criminal standard of proof for both CDOs and ESOs, as recommended by the Law Council;

   (2) questions from the Hon Mark Dreyfus QC MP, regarding differences between the proposed conditions for ESOs and the current conditions available for control orders (**COs**) under existing subsections 104.5(3)-(6) of the *Criminal Code Act 1995* (Cth) (**Criminal Code**); and

   (3) evidence from governmental witnesses at the public hearing, which suggested that the broader range of ESO conditions, as compared to the presently available CO conditions, is considered appropriate because:

      (a) it would be compatible with the unlimited range of conditions able to be imposed under most State and Territory post-sentence supervision orders for dangerous offenders, including sexual offenders; and

      (b) the imposition of each ESO condition is a matter for judicial discretion, in individual ESO applications. To impose a condition, the issuing court must be satisfied that the person presents an unacceptable risk of committing a serious terrorism offence, and that the condition is necessary for, and proportionate to, the management of that risk.

Standard of proof for ESOs

3. Senator Fawcett asked Law Council witnesses whether the Law Council's recommendation to increase the standard of proof for ESOs may have unintended consequences.

4. In particular, it was suggested that there may be a gap in community protection if:

   - the higher threshold of a 'high degree of probability' (or 'beyond reasonable doubt' as recommended by the Law Council) **could not be met** for a post-sentence order (either a CDO or an ESO) in relation to an offender; but
   - the civil standard of proof **could be met** for an ESO in relation to that offender.

5. It was noted that, if an ESO was **not available** on the civil standard of proof, there may be no scope to impose preventive restraints on that person's liberty to protect the community from any risk that the person may commit a serious terrorism offence, once they were released into the community on the expiry of their sentence.

6. It was noted, by way of illustration, that some perpetrators of terrorist acts overseas, including the London Bridge attack in 2019, had previously served sentences of imprisonment for terrorism-related offences.

7. The Law Council provides the additional information set out below to supplement its responses given at the public hearing of 13 November 2020.

Distinction between standard of proof and unacceptability of risk

8. As a preliminary comment, it is important to bear in mind that the standard of proof is distinct from the unacceptability of risk. The relevant test is whether there is an unacceptable risk of the commission of a serious terrorism offence. This test necessarily involves consideration of both the level of risk and the likely consequences were the risk to be realised. The bar of unacceptability is not likely to be high in terrorism cases. A slim risk of a catastrophic outcome may be unacceptable. (See, for example, *State of NSW v Naaman (No.2)* [2018] NSWCA 328; (2018) 365 ALR 179 at [29] at point (5)).[1]

9. The standard of proof is the level of satisfaction by the court that the risk is unacceptable. The competing standards are satisfaction: (a) beyond reasonable doubt; (b) to a high degree of probability; or (c) on the balance of probabilities.

10. The standard of proof is concerned with the quality of the evidence establishing the alleged risk, including the level of risk. The Law Council's position is that a much higher level of satisfaction than a bare balance of probabilities is required before serious restrictions are placed upon an offender who has been punished and served their sentence.

Present availability of intervention mechanisms

11. If the threshold in a particular case cannot be met for a post-sentence order, there are nonetheless extensive powers available to intelligence and law enforcement agencies to identify, prevent and disrupt activities of security concern. This includes powers to:

    - extensively monitor the person's movements, contacts and activities in the community; and
    - intervene, at a very early stage, if surveillance of that person produces evidence indicating that they are, or may be:
        - committing a preparatory terrorism offence, or assisting another person to do so; or
        - engaging in other activities that identify an unacceptable risk of the person engaging in terrorism related activity.

12. In particular, the following tools are presently available, which demonstrate that there is unlikely to be a material gap in the availability of preventive and disruptive powers if the standard of proof for issuing ESOs is aligned with the standard for CDOs, which the Law Council recommends should be the criminal standard:

[1] Basten, McFarlan and Leeming JJA stated, in relation to the reference to 'unacceptable risk' in section 20 of the *Terrorism (High Risk Offenders) Act 2017* (NSW): 'the Court is … to determine whether that risk is or is not "unacceptable". It is entirely possible that the Court might be very comfortably satisfied (ie to the requisite high degree of probability) that there is a slim probability of an unsupervised offender committing a terrorist act, and that that risk is unacceptable having regard to the consequences of the act, even if the probability of the risk eventuating is less than 50%'.

COs, based on proof of a person's post-release activities in the community

- it would be possible to obtain a CO in relation to that person, on the basis of an assessment **that their current conduct in the community post-release** (cf conduct which may be many years in the past) raised a risk of their engaging in terrorism-related activity, and there is an identified need to protect the community by placing prohibitions, restrictions or other limitations or conditions on the person's movements and activities;

- the conditions applicable to COs contain extensive surveillance powers;

Investigation and enforcement of security and other offences

- Chapter 5 of the Criminal Code contains an extremely wide range of preparatory and ancillary terrorism and other security offences (including offences in the nature of foreign incursions). This includes offences that specifically criminalise preparations and planning, and ancillary actions such as providing support for a terrorist act or to a terrorist organisation, or advocating violence;

- the preparatory and ancillary offences in Chapter 5 of the Criminal Code also operate in combination with the extensions of criminal liability in Chapter 2 of the Criminal Code, covering inchoate and ancillary offences such as attempting and conspiring to commit offences against Commonwealth laws, or aiding and abetting the commission of such an offence. For example, a person could be charged with, and convicted of, an offence for **attempting or conspiring** to prepare to commit a terrorist act; and

- the Australian Federal Police (**AFP**) has extensive investigatory powers in relation to the above offences, and to monitor a person's compliance with a CO. The arrest threshold for terrorism offences is also lower than other Commonwealth offences (being **suspicion** on reasonable grounds, rather than the standard of **belief** on reasonable grounds, which applies to the power of arrest in relation to all other Commonwealth offences);[2]

Intelligence collection powers (surveillance and compulsory questioning)

- in addition to law enforcement investigatory powers, the Australian Security Intelligence Organisation (**ASIO**) has extensive surveillance powers for the purpose of collecting intelligence that is important in relation to security. This includes including politically motivated violence, from which there is a need to protect Australia and Australians. Importantly, the Law Council notes that:

    - ASIO's surveillance powers are **not limited** to the investigation of terrorism offences. The High Court has held that intelligence will be relevant to security (and therefore able to form the basis of a security intelligence warrant) if it has a 'real connection' to security, which is judged by reference to what is known to ASIO at the time.[3] It can therefore include the collection of intelligence to determine whether a person is, or is not, a security risk, on the basis of fairly limited initial intelligence that suggests a person might be a security risk.
      (For example, such initial intelligence would likely include evidence about a person's future risk, which did not meet the higher thresholds recommended by the Law Council for the issuing of an ESO);

[2] *Crimes Act 1914* (Cth), section 3WA cf section 3W.

[3] *Church of Scientology v Woodward* (1982) 154 CLR 25 at 61 (per Mason J) and 73-74 (per Brennan J).

- it would be open to ASIO to apply for, and execute, special powers warrants to conduct surveillance of a person who is released from prison as part of its participation in Joint Counter-Terrorism Teams, which comprise relevant Commonwealth, State and Territory agencies;

- intelligence obtained by ASIO can be shared with law enforcement agencies, and used directly or derivatively by those law enforcement agencies in CO proceedings, and in the investigation and prosecution of a terrorism or security offence. Extensive protections for sensitive evidence (which may include ASIO's intelligence) are available under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) including court-only evidence mechanisms in CO proceedings; and

- ASIO also has compulsory, warrant-based questioning powers, which are presently exercisable to collect intelligence that is important in relation to a terrorism offence. A person need not be suspected of having committed a terrorism offence to be the subject of an ASIO questioning warrant. ASIO's compulsory questioning powers are proposed to be expanded significantly by a separate Bill presently under review by the Committee, and would cover all forms of politically motivated violence (as well as other heads of security);[4] and

Powers to stop a person from leaving Australia

- preventative powers are also available to prevent a person from leaving Australia, including powers to suspend and cancel travel documents on security grounds.

Risks in predicting a person's future dangerousness, prior to their release from imprisonment, for the purpose of an ESO

13. Applying a lower (civil) standard of proof to ESOs, as compared to CDOs or the criminal standard of proof, raises substantial risks in relation to the accuracy of predicting a person's future dangerousness within the community.

14. The Law Council's proposals to elevate the standard of proof for ESOs would mitigate this risk—while also enabling reliance on the wide range of significant preventive and disruptive powers outlined above, if the standard of proof for an ESO was not met.

15. Significantly, as members of the High Court[5] and United Nations Human Rights Committee[6] have noted, predicting future risk is an extremely fraught exercise, with often unreliable results. The fraught nature of that task is aggravated in relation to predicting a person's future risk of engaging in terrorism-related offending, due to the absence of an empirically validated and accepted risk assessment tool that is adapted specifically to the prediction of a person's future risk of re-offending.

[4] Australian Security Intelligence Organisation Amendment Bill 2020.

[5] *Fardon v Attorney-General (Qld)* (2003) 223 CLR 575, especially at [125] (per Kirby J), in which predictions of future dangerousness were identified as 'at best, an educated or informed guess' and were described as 'notoriously difficult' and 'unreliable'.

[6] *Tilman v Australia* Communication No. 1635/2007, U.N. Doc. CCPR/C/98/D/1635/2007 (2010): 'The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is **inherently problematic**. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science' (emphasis added).

16. The risk of error or miscarriage in predicting future risk is increased significantly in the context of the proposed ESO regime as drafted in the Bill, because of the combination of the following circumstances:

- ***Applying a low standard of proof to an already fraught predictive exercise:*** applying the lower, civil, standard of proof to an already fraught predictive exercise increases the risk of error in the application of the test of future dangerousness, and the assessment of individual ESO conditions;

- ***Limited reliability of evidence of past conduct:*** unreliable evidence may be used to predict a person's future risk, including evidence of:

  - the person's conduct in the community a long time ago. (That is, the person's actions before their conviction and lengthy sentence of imprisonment, noting that the high maximum penalties and limitations on parole eligibility generally result in long sentences of imprisonment); and

  - the person's conduct in the artificial environment of prison, while serving their sentence of imprisonment. (For example, the reliability of admissions, confessions or statements of future intent may be limited, because they can plausibly be motivated by a person's interactions with other prisoners, for example, a desire to fit in or to avoid being targeted);

- ***Lengthy duration of ESOs, and restrictive nature of conditions*****:** the predictions of a person's future dangerousness made for the purpose of issuing an ESO will result in the person being subjected to an unlimited range of conditions, for up to three years (that is, triple the length of time than for a CO);

- ***Exposure to a 'revolving door' of imprisonment, which may limit a person's prospects of rehabilitation:*** contravention of an ESO condition, even a technical breach, can expose a person to a further offence, punishable by up to five years' imprisonment. Further imprisonment for breach can harm a person's rehabilitation, and may increase their risk of future dangerousness, by:

  - removing them from the community, and therefore removing or severely curtailing their access to family and community support systems, including employment and engagement with counsellors, mentors and other positive influences in the community; and

  - potentially exposing them to a learning environment for further crime or radicalisation in a prison environment, which may neutralise the effect of any rehabilitative services that may be available in prison (which may, in any event, be inadequate for the person's needs); and

- ***Limitations in legal assistance:*** as the Law Council has previously noted, there are severe deficiencies in existing arrangements for legal assistance for respondents, both in responding to ESO applications, and in seeking variations of ESO conditions or cancellation of orders. This creates a risk that there will not be an effective contradictor to the case advanced by the applicant in ESO proceedings, about whether an ESO should be issued and, if so, the conditions of that order. In turn, this raises a risk of miscarriage in the exercise of judicial discretion in the making of orders.

17. The extensive range of measures listed above provide a secure basis for dealing with risk **on the basis of proof of their current conduct within the community,** which strikes a proportionate balance between community safety and Australia' human rights obligations.

Limitations in the effectiveness of protective conditions: example of the 2019 London Bridge attack

18. Finally on the issue of the standard of proof for ESOs, the Law Council notes that a prohibition or limitation on a person's conduct, such as that imposed under an ESO or a CO, is unlikely to prevent a person from engaging in terrorism or other acts of violence if they are determined to do so, and are determined to undertake counter-surveillance and counter-intelligence measures conceal that intention from authorities and other persons known to them. This would be so irrespective of the standard of proof that applies to ESOs (or COs). In these circumstances, security will depend on existing intelligence and law enforcement powers to arrest a person who is, for example, encouraging, planning or taking preparatory steps in relation to an attack.

19. As to the effectiveness of supervisory orders, the Law Council notes that the person responsible for the 2019 London Bridge attacks, Mr Usman Khan, was under release on temporary licence (the UK equivalent of parole) at the time of his offending, having been previously convicted and sentenced to imprisonment for terrorism-related offences in 2012.

20. At the time of the 2019 attack, Mr Khan was reportedly subject to 22 licence conditions, including that he wore an electronic monitoring device to track his location.[7] As the UK Independent Reviewer of Terrorism Legislation has observed, 'increasingly, licence conditions given to released terrorist prisoners resemble the conditions that may be attached under Terrorism Prevention and Investigation Orders' (the latter type of order being the UK's broad equivalent to Australia's COs).[8]

21. The Law Council also notes that post-incident reviews of various 'lone wolf' terrorism incidents in the UK have identified limitations in the prioritisation of surveillance of individuals who are known to intelligence and law enforcement agencies, and further limitations in information-sharing and decision-making about the taking of early disruptive actions or other interventions.[9]

22. It may be that making enhancements to these operational matters ultimately proves more effective than the enactment of further legislation to impose additional, and unlimited, conditions on a person's post-release activities within the community.

23. In considering the evidence of post-sentence crimes committed by convicted terrorist offenders, in the context of assessing the legislative design of the proposed Commonwealth ESO regime, it is important to acknowledge that similar sorts of conditions had already been imposed on the perpetrator of the 2019 London Bridge incident, and nonetheless failed to prevent that attack.

Differences between ESO conditions and CO conditions

24. Secondly, Mr Dreyfus asked Law Council witnesses about areas in which the proposed, non-exhaustive ESO conditions listed in new subsections 105A.7B(3) and (5) of the Criminal Code are more expansive than the CO conditions in existing subsections 104.5(3)-(6) of the Criminal Code.

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[7] See, for example, BBC News, 'London Bridge: What we know about the attack', 3 December 2019, www.bbc.com/news/uk-uk-50594810.

[8] Jonathan Hall QC, Independent Reviewer of Terrorism Legislation (UK), *The Terrorism Acts in 2018: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts of 2000 and 2006*, (March 2020), 148 at [7.52].

[9] David Anderson QC, *Attacks in London and Manchester, March June 2017: Independent Assessment of MI5 and Police Internal Reviews*, (December 2017), Chapter 3 generally.

Detailed comparison (see Attachment 1)

25. At the public hearing, the Law Council's witnesses identified that the proposed ESO regime contains significantly broader monitoring powers (including entry to premises and use of force) than the CO regime, as well as conditions to compel a person's participation in education, counselling and psychological assessment.

26. As the Law Council's witnesses also noted at that hearing, these matters are not exhaustive of the significant expansions proposed in the ESO regime. The comparative table at **Attachment 1** provides a detailed analysis of individual conditions and itemises the expansions in proposed subsections 105A.7B(3) and (5).

Highlights of key proposed expansions of ESO conditions

27. To aid review of the detailed comparative analysis of ESO conditions at **Attachment 1**, the Law Council draws particular attention to the following proposed expansions:

- ***Prohibitions in relation to 'classes' of places and persons:*** the proposed ESO regime includes conditions which prohibit or limit a person's presence at classes of places, and their association with classes of persons, in addition to prohibitions or limitations on presence at specified places, and association with specified individuals (as is presently the case under COs). Further:

  - there are no limitations on what may constitute a 'class' of places or persons for this purpose. For example, could entire States, Territories, regions or countries be classified as a 'class' of places? Could large segments of the public be classified as a 'class' of persons? and

  - it is no answer to state that the risk of potential overbreadth is capable of management by the exercise of judicial discretion in individual ESO applications, given:

    - the low standard of proof proposed for ESOs, coupled with the extremely fraught nature of predicting future risk (noted above);

    - the gravity of consequences of such ESO conditions for an individual (namely, the criminalisation of otherwise lawful conduct), combined with the absence of a judicial requirement to have regard both the individual and cumulative impact of such conditions on the person; and

    - the high risk of a serious inequality of arms as between the Commonwealth as applicant for an ESO, and the offender as respondent, given the deficiencies identified by the Law Council in both the legislative framework and funding arrangements for the provision of legal assistance to ESO respondents;

- ***Compulsory participation in counselling and education:*** the ESO regime would include powers to impose conditions which compel a person to attend counselling and education, without the consent requirement presently applicable to the inclusion of such conditions in COs.

  Again, the Law Council submits that it is no answer to suggest that the imposition of a condition compelling a person to attend counselling, under penalty of liability to criminal prosecution, is simply a matter for the exercise of judicial discretion in individual ESO applications. The Law Council's concerns in the above point about the circumstances in which a court is required to make

a decision in an ESO application (regarding the lower the standard of proof, gravity of consequences and risks of inequality of arms as between applicant and respondent) also apply equally to this point;

- ***Absence of safeguards in relation to rights to have contact with family:*** under the proposed ESO regime, there is no prohibition on a non-association condition that would prevent a person from having contact with close family members in relation to genuine matters of domestic concern (as there is presently for COs);

- ***Absence of safeguards in relation to forced relocation, and forced disqualification from employment:*** the proposed conditions in the ESO regime to prohibit a person from being present at a place, or class of places, do not contain any safeguards against forced relocation orders, or orders that would disqualify a person from their current employment, education or training, if their workplace(s) or educational institution(s) fell within a class of places.

  - ***Forced relocation:*** the proposed power to prohibit a person from being present at a 'place' could, on the ordinary meaning of the word 'place', include the person's residence. This risk is particularly significant in view of the proposed power to prohibit a person's presence at a **class of places**, with no statutory limitation on the breadth of a 'class' of place able to be prescribed. This could effectively force a person to relocate to a new residence, which is a considerable distance away from their usual residence. Consequently, they may be isolated from their family, friends and usual social support systems. This may also expose a person to significant, unintended hardship in commuting to and from their place of employment, education or training. It may also expose the person to significant financial and other hardship in finding new housing (including financial hardship because they may have continuing obligations to service a mortgage or lease on their former place of residence); and

  - ***Forced disqualification from employment:*** a condition prohibiting a person's presence at a particular place or class of places could operate as a *de facto* exclusion from their present employment, education or training, if their place or places of employment or education fall with the specified place or classes of places. The proposed ESO conditions contain no limitations, qualifications or other guidance in relation to this matter. There is also no specific statutory safeguard against the risk of oppression as a result of the separate proposed ESO condition to place prohibitions or limitations on a person's engagement in particular employment or educational activities

- ***Effective delegation of powers to members of the executive government:*** numerous ESO conditions will require a person subject to an ESO to comply with directions given, or other requirements imposed, by a 'specified authority'. In some cases, an ESO condition can permit a 'specified authority' to prescribe further or different matters at their complete discretion, which may be in addition to, or in substitution of, the obligations stipulated in the ESO itself. A 'specified authority' can be any individual person, or class of persons, specified in ESO. This creates significant uncertainty, and amounts to an extremely broad delegation of power to the executive; and

- ***Extremely broad monitoring powers:*** the monitoring powers for ESOs are far broader than those available under COs, and overlap with the warrant or authorisation-based powers that are also proposed to be available for ESOs. They include requirements for the person to:

- submit to testing for specified substances;

- allow 'specified authorities' to enter the person's premises at any time to monitor the person's compliance with curfew conditions;

- allow 'specified authorities' to enter the person's premises at any reasonable time for purposes 'relating to' the electronic monitoring of a person; and

- carry, at all times, a specified mobile phone, and answer or promptly return all calls made to that phone by a 'specified authority'.

Response to arguments of Government witnesses in favour of an unlimited range of ESO conditions

28. The Law Council notes that representatives of the Attorney-General's Department gave evidence at the Committee's public hearing on 13 November 2020, which provide further, limited justification for the proposal to expand the range of ESO conditions as compared to the present CO conditions.

29. This evidence was to the effect that an unlimited range of ESO conditions was considered appropriate because:

- some State and Territory post-sentence regimes enable courts to impose **any condition** that they consider is necessary or appropriate, it is also appropriate for a Commonwealth ESO regime to emulate that approach, and enable an unlimited range of conditions to be imposed under an ESO; and
- in any event, the imposition of individual conditions in an ESO is a matter for judicial discretion, in accordance with the statutory issuing tests in the Bill.

30. For the reasons explained below, the Law Council urges the Committee not to endorse this position, because it:

- overlooks crucial differences between the proposed Commonwealth regime and those of States and Territories, as well as evidence of the Crown's approach to conditions sought under State regimes; and
- appears to assume, incorrectly, that judicial discretion is an effective 'cure' for the significant risks arising from an unlimited range of ESO conditions (as noted above).

Suggested alignment with State and Territory ESO regimes

31. The Law Council cautions strongly against the wholesale adoption of a measure purely because it presently exists in some jurisdictions' post-sentence regimes.

32. This is particularly so in the absence of evidence that these regimes are effective. There is a significant risk, which seems to have materialised in New South Wales, that the applicant for an ESO will routinely apply for a suite of 'standard' conditions devised by the applicant. (See, for example, *State of New South Wales v Sturgeon (No.2)* [2019] NSWSC 883 at [100]-[103].)[10] This may result in injustice to individual

[10] Note, in particular, the comments of Garling J at [101]-[102] about the approach taken by the State of New South Wales to the imposition of conditions on a supervision order under the *Crimes (High Risk Offenders) Act 2006* (NSW). Garling J observed that, during the hearing, counsel for the Crown sought certain conditions 'to prohibit some conduct in respect of which there was no risk that the defendant would engage in it'. His Honour stated that 'this approach does not accord with the duty of any party in civil proceedings. Rather,

respondents, unnecessary engagement of monitoring resources, and very significant court resources being taken up with arguments about conditions.

33. Further, while it is the case that some State and Territory regimes permit an unlimited range of conditions to their supervisory orders, it is also the case that the several distinguishing factors apply to State and Territory regimes. These factors, which are outlined under the two subheadings below, are not present in relation to the proposed Commonwealth terrorism specific ESO regime.

Wider coverage of offences under State and Territory regimes

34. State and Territory post-sentence regimes cover a far wider variety of offences, which are not consistent across all State and Territory regimes. There is considerable variation in the coverage of various types of violent offending, and in some cases, violent and sexual offending are combined into a single post-sentence scheme.

35. This wide coverage of extremely variable types of offending necessarily makes it less feasible for those State and Territory regimes to prescribe an exhaustive range of statutory conditions for their post-sentence orders, given the multiplicity (and significant diversity) of future risks being regulated under a single statutory supervisory regime. For example, the risk profile and specific risk factors applying to a convicted child sex offender will conceivably differ entirely from those applicable to a violent offender, who has demonstrated a pattern of behaviour in committing serious offences against the person, such as murder and grievous bodily harm.

36. This consideration **does not** apply to the proposed Commonwealth ESO regime, which is limited to an assessment of a very specific type of risk of future offending—namely, the person's risk of committing a **serious terrorism offence**.

Higher standard of proof for State and Territory regimes

37. All States and Territories, except South Australia, operate according to a higher standard of proof in relation to future risk, and the necessity and proportionality of individual conditions, in relation to their post-sentence supervisory regimes. This is the standard of 'a high degree of risk'.

38. In sharp contrast, the Commonwealth would be an 'outlier' with the majority of jurisdictions, by adopting the civil standard of proof for terrorism related ESOs.

Overreliance on judicial discretion as a safeguard

39. The Law Council also notes that the determinative weight that governmental witnesses appear to have given to the role of judicial discretion, as a safeguard against the risks arising from an unlimited range ESO conditions, does not take adequate account of the very significant limitations arising from the circumstances in which that discretion is exercised.

40. As members of the High Court have observed repeatedly, not only is the prediction of a person's future risk of offending 'notoriously unreliable at the best of times'[11] but that exercise is also of a kind that 'do[es] not in any way partake of the nature of legal

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it suggests that the State is seeking to avoid its obligation to seek conditions which relate to the risk posed by the particular defendant, and instead to proceed by asking for all standard conditions as a matter of course regardless of the evidence and their relevance to a defendant'. The Law Council considers that the risk of such practices, and their major adverse impacts on respondents and court resources, is greatest where there is an unlimited suite of conditions available under a supervisory order. This risk should be eliminated from the proposed Commonwealth ESO regime, via the statutory prescription of a finite range of potential conditions.

[11] *Fardon v Attorney-General (Qld)* (2003) 223 CLR 575 at [169] (per Kirby J).

proceedings'.[12] That is, proceedings for a post-sentence preventive order 'do not involve the resolution of a dispute between contesting parties as to their respective legal rights and obligations' which is the core of judicial power and, consequently, the focus of courts' adjudicative expertise.[13] Rather, ESO proceedings are 'directed to making a guess'[14] about the person's future conduct, and applying significant restraints on liberty on the basis of that 'guess'.

41. As such, the significant departure of the proposed ESO regime from 'past and present notions of the judicial function in Australia'[15] significantly reduces the degree of weight that can reasonably be given to judicial discretion as a safeguard against the risks of error, oppression, arbitrariness and significant diversion of court and other public resources that arise from the existence of an unlimited range of ESO conditions.

42. It should also be acknowledged that the State post-sentence regimes that were the subject of the strong judicial criticisms quoted above were directed principally to sexual offenders, and utilised risk assessment frameworks that were based on psychiatry, with a focus on risks arising from a diagnosable mental illness.

43. In contrast, the Commonwealth post-sentence regime for terrorism offenders does not operate on the basis of a body of medical expertise and diagnosable illness, and lacks an empirically verified foundation for predicting future risk of committing specific terrorism offences. Consequently, the judicial criticisms quoted above about the unreliability of predictions of future risk, and their inconsistency with the core focus of judicial power (and consequently, judicial expertise), have even stronger force in relation to the post-sentence regime in Division 105A of the Criminal Code.

44. Moreover, the inherently fraught and unreliable nature of the task of predicting future risk is aggravated in the context of the proposed Commonwealth ESO regime for two reasons. First, the proposed ESO regime requires these inherently fraught predictions to be made, and highly restrictive conditions imposed, on the basis of a low standard of proof (being the civil standard).

45. Secondly, given the critical limitations that the Law Council has previously identified in the availability of legal assistance funding for respondents in proceedings for post-sentence orders, there is a serious risk that the court will be required to undertake this fraught predictive exercise, on the basis of a low standard of proof, in the absence of an effective contradictor. This risk is further compounded by the absence of dedicated financial assistance arrangements for respondents to engage their own 'relevant experts' who are independent of any person or persons appointed by the Minister at the pre-application stage, or by the court during proceedings.

46. These factors, together with the gravity of the consequences of ESO conditions on the individual (and their families and associates),[16] make it essential that sole or primary reliance is not placed on judicial discretion as the effective 'cure' for the significant and real risks arising from an unlimited suite of potential ESO conditions.

[12] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at [22] (per Gaudron J).

[13] Ibid.

[14] Ibid.

[15] *Fardon v Attorney-General (Qld)* (2003) 223 CLR 575 at [125] (per Kirby J).

[16] It should be noted that the grave consequences for an individual do not merely arise from the restrictive nature of the ESO conditions to which they are subjected for a prolonged period (up to three years, subject to unlimited renewal). They also expose a person to a significant criminal penalty for contravention (up to five years' imprisonment), further post-sentence orders, and highly intrusive surveillance and monitoring for the duration of the order, without suspicion that the person is contravening an ESO condition.

Law Council's recommended approach to ESO conditions

47. For the reasons given above, the Law Council cautions against the selective adoption of arguments in favour of national consistency; and an assumption that judicial discretion will necessarily cure the significant risks presented by the absence of statutory prescription of the range of conditions available under an ESO.

48. Rather, the legislative features of a Commonwealth post-sentence supervisory regime for terrorist offenders should be determined solely by reference to the specific circumstances surrounding that regime. This principle led the third Independent National Security Legislation Monitor to recommend that the range of conditions available for ESOs should be identical to those presently available for COs.

Stronger facilitation of accuracy in tailoring conditions to manage future risk

49. As the Law Council has noted its previous evidence, and in the above comments, the drawing of inferences about a person's future risk of engaging in terrorism-related offending is a fraught and highly uncertain exercise. In ESO proceedings, the court must assess whether each ESO condition sought by the Minister for Home Affairs is necessary and proportionate to the risk that has been identified.

50. The wider the range of conditions able to be imposed under an ESO—especially under the lower, civil standard of proof—the greater the risk of error in predictions about future risk of terrorism-related offending in this highly volatile and uncertain context. The Law Council therefore recommends that there should be a fixed range of conditions, from which a court may select in considering an ESO application. (See further **recommendation 4** of the Law Council's main submission.)

Stronger oversight and approval role for the Parliament

51. Importantly, under the Law Council's recommended approach, the Australian Parliament would play a critical and strong role in specifically approving each type of condition able to be included in an individual terrorism related ESO, by passing legislation prescribing those conditions (or declining to do so, as appropriate).

52. The upshot of this approach is that a detailed case will need to be made to the Parliament, in the future, about the specific inadequacies identified in the existing range of ESO conditions, and the need to address them via additional proposed conditions that will be open the Minister to seek, and courts to impose, in individual ESOs. The requirements of particularity in establishing this case would far exceed the general appeal that governmental witnesses have made to operational flexibility.

53. Rather, under the Law Council's recommended approach, it would be incumbent on the Parliament to scrutinise and be satisfied of the merits of proposals for **each additional type of condition sought from time-to-time**. This would include a detailed assessment of the stated, specific operational case of the particular conditions sought to be included in the regime (including evidence of the security risks that are sought to be addressed). It would also require detailed assessment of the human rights and other implications of each proposed expansion of the range of conditions available, to ensure their proportionality.

54. The Law Council considers that legislative endorsement of an open-ended and unlimited range of ESO conditions would represent a sub-optimal use of legislative power, which would miss an opportunity to enshrine adequate protection against overbreadth and error, while also facilitating a workable protectie regime with a broad but fixed range of potential conditions. Judges are not legislators with complete discretion, but rather must assess the proposed conditions put before them in applications (subject to all of the significant constraints identified above).

Attachment 1:
Comparison of current CO and proposed ESO conditions

CO conditions: **existing ss 104.5(3)-(6)**	**ESO conditions:** **proposed ss 105A.7B(1), (3) and (5)** **(Bill, Schedule 1, item 87: pp. 34-37)**
Limited range of conditions **104.5(3):** the conditions that the court may impose are as specified in paragraphs (a)-(l), as qualified or supplemented by subsections (4)-(6)).	**Unlimited range of conditions *(broader than COs)*** **105A.7B(1):** court may impose any condition, it satisfied, on the balance of probabilities, the condition is necessary and proportionate to the purpose of protecting the public from an unacceptable risk of the offender committing a serious terrorism offence. Subsections (3) and (5) set out non-exhaustive conditions that the issuing court may impose.
104.5(3)(a)-(l): exhaustive conditions for COs ***Places*** **(a)** prohibition or restriction on the person being at specified areas or places. <u>Note on relocation orders under s 104.5(3)(a):</u> In May 2018, the Government declined to implement a recommendation of the second INSLM, the Hon Roger Gyles AO QC (2016) and the COAG Review of Counter-Terrorism Laws (2013) that there should be an express prohibition on relocation orders, to ensure that the prohibitions and restrictions in this condition were not applied to a person's primary place of residence. However, this was on the basis that the recommendation was considered unnecessary because there is no explicit CO condition permitting a relocation order. The Law Council disagrees with that reasoning, because a 'place' in s 104.5(3)(a) could, the ordinary meaning of that term, include a person's residence. This was the very concern which the second INSLM sought to address, by removing any possibility that such an interpretation could be adopted by the AFP in an individual CO application. In any event, the non-exhaustive nature of the proposed ESO conditions means that the Government's reasons for rejecting the second INSLM's recommendations in the CO context **do not apply** to the proposed ESOs regime.	**105A.7B(3)(a)-(r): 'General conditions' for ESOs which correspond with those in the CO regime** ***Places (broader than COs)*** **(a)** in addition to prohibiting or restricting presence at specified areas or places, can also prohibit or restrict presence at: • classes of areas or places, and • any other area or place determined by a 'specified authority' (any person specified in the order). **(b)** residency requirements (requirement to reside at specified premises, unless permission is granted in writing by a 'specified authority' with no statutory conditions or process for the granting of permission). <u>Note on relocation orders under s 105A.7B(3)(a):</u> Proposed paragraph 105A.7B(b) could amount to a relocation order ***(see comments at left).***
Travel **(b)** prohibition or restriction on the person leaving Australia.	***Travel (broader than COs)*** **(d)** equivalent prohibition on the person leaving Australia, but also includes a <u>prohibition on leaving State or Territory or usual residence</u>. **(e)** requirement to surrender passport(s) **(g)(i) and (ii)** prohibition on applying for travel documents (Australian and foreign travel documents).

CO conditions: existing ss 104.5(3)-(6)	**ESO conditions: proposed ss 105A.7B(1), (3) and (5) (Bill, Schedule 1, item 87: pp. 34-37)**
Curfews **(c)** curfew requirement (up to 12 hours per day).	***Curfews*** ***(broader than COs due to related monitoring power)*** **(c)** equivalent to COs, but see additional condition: **105A.7B(5)(g):** obligation to allow a specified authority to visit the premises that are the subject of a curfew order, at any time, for the purpose of monitoring compliance with the curfew.
Tracking devices **(d)** person must wear a tracking device. **The court must also impose the obligations in s 104.5(3A)** to: • take the steps (if any) specified in the CO to keep the device and any equipment necessary for its operation in good working order • report, as specified in the CO, for the purpose of having the device inspected; • notify the AFP, no later than four hours after becoming aware that the device is not in good working order.	***'Electronic monitoring devices' (s 105A.7B(5))*** ***(broader than COs)*** **105A.7B(5)(d):** obligation to allow themselves to be subject to electronic monitoring, including wearing an electronic monitoring device and complying with directions given by a specified authority in relation to electronic monitoring. Court must also impose conditions in **s 105A.7E,** including obligations to keep the device in good working order, and allow a specified authority to enter the person's residence at any reasonable time, for any purpose relating to the electronic monitoring of the offender. Other monitoring conditions that may be imposed in **s 105A.7B(5)** include**: (c)** an obligation to carry, at all times, a specified mobile phone, and answer or return promptly all calls from a specified authority. (This condition is not limited to circumstances in which a court imposes monitoring conditions, but must be imposed if monitoring conditions are imposed. The court has no discretion in the matter.)
Non-contact and non-association **(e)** prohibition on communicating or associating with specified individuals. This is subject to s 104.5(4), which provides that a non-association condition cannot prevent a person from associating with a close family member for genuine matter of domestic concern. Also subject to s 104.5(5) which prevents a non-association or contact condition from prohibiting a person to communicate or associate with their lawyer. If a particular lawyer is specified in a non-contact or association condition, the person is permitted to contact any other lawyer who is not so specified.	***Non-contact and non-association*** ***(broader than COs)*** **(h)** prohibition on contacting or associating with classes of persons, and individuals determined by a specified authority (in addition to specified individuals). Contact with family: No exemption for contact or association with close family members for matters of domestic concern. Contact with lawyers: However, there is an equivalent safeguard to COs regarding contact with lawyers: **s 105A.7B(7).**
ICT access **(f)** prohibition or restriction on accessing or using specified forms of telecommunication (including the internet).	***ICT access*** ***(same as COs)*** **(i)** same as corresponding CO condition.
Possession and use of articles / substances **(g)** prohibition on possessing or using specified articles or substances.	***Possession and use of articles / substances*** ***(broader than COs due to related monitoring power concerning testing requirements)*** **(j)** same as corresponding CO condition, but additional monitoring requirements apply, as follows: A person is subject to testing condition in **s 105A.7B(5)(a):** requirement to submit to testing by a

CO conditions: existing ss 104.5(3)-(6)	ESO conditions: proposed ss 105A.7B(1), (3) and (5) (Bill, Schedule 1, item 87: pp. 34-37)
	specified authority in relation to the possession or use of specified articles or substances, which can include but is not limited to testing for the purpose of monitoring compliance with a condition imposed under s 105A.7B(3)(j)).
Activities (including work) **(h)** prohibition or restriction on carrying out specified activities (including work or occupation).	***Activities (including work) (broader than COs)*** **(k)** prohibition on carrying out specified activities. **(l)** prohibition on specific work or classes of work, or specified activities relating to specified work or classes of work (including voluntary work). **(m)** prohibition on undertaking any education or training without prior permission of a specified authority (with no process or criteria for granting permission).See also, conditions in **(g)(iii):** prohibition on applying for any licence to operate equipment, machinery or a heavy vehicle, or a weapons licence.
Reporting **(i)** requirement to report to specified persons at specified times.	***Reporting (broader than COs)*** **105A.7B(5)(f):** requirement to report to persons specified in order, at times specified in order or as directed by a specified authority.
Photographing and fingerprinting **(j)** requirement to allow themselves to be photographed; and **(k)** requirement to allow themselves to be fingerprinted.	***Photographing and fingerprinting (same as COs)*** **105A.7B(5)(b) and (c):** same as corresponding CO conditions.
Counselling / education **(l)** requirement to participate in specified counselling or education. **Subject to s 104.5(6)** which provides that a counselling or education condition may only be imposed if the controlee consents.	***Counselling / education / assessment (broader than COs)*** **(n)(i)** requirement to attend and participate in treatment, rehabilitation or intervention programs or activities, as specified in the order or as directed by a 'specified authority' (with no criteria, conditions or limitations on power of direction). **(n)(ii)** requirement to undertake psychological or psychiatric assessment or counselling, as specified in the order or as directed by a 'specified authority' (with no criteria, conditions or limitations on power of direction). **(o)** requirement to attend and participate in interviews and assessments (including those in para (n) but not so limited) as specified in the order **or** as directed by a specified authority (with no criteria, conditions or limitations on power of direction). **(p)** requirement to permit disclosure of results of interviews and assessments and any other specified information to a 'specified authority'. (***Continued)*** ***Absence of corresponding safeguards in COs*** No consent requirement equivalent to COs. No limitation of conditions other than (n)(i) to the purpose of offender's rehabilitation.

CO conditions: existing ss 104.5(3)-(6)	ESO conditions: proposed ss 105A.7B(1), (3) and (5) (Bill, Schedule 1, item 87: pp. 34-37)
No other conditions ***(ie, no equivalent to corresponding ESO conditions noted at right).*** CO conditions are limited expressly to those in s 104.5(3) as outlined above.	**105A.7B(3)(a)-(r): 'General conditions' for ESOs which have no equivalent in the CO regime** ***(broader than COs)*** **(f)** prohibition on changing the person's name, or using any name that is not specified in the ESO. **(r)** requirement to comply with 'any reasonable direction' given by a 'specified authority'. Subject to requirement in **s 105A.7B(4)** that the specified authority must be satisfied the direction is 'reasonable in all of the circumstances' to give effect to an ESO condition, or the objects of Division 105A.
Monitoring conditions ***No equivalent to corresponding ESO conditions*** No specific monitoring conditions beyond reporting, and inspection of tracking devices. Monitoring is otherwise done via the CO monitoring powers under the *Crimes Act 1914* (Cth), *Telecommunications (Interception and Access Act 1979* (Cth) and *Surveillance Devices Act 2004* (Cth). These include warrant-based powers to intercept telecommunications, use surveillance devices, and gain remote access to computers. They also include internally authorised access to telecommunications metadata. The Telecommunications Legislation Amendment (International Production Orders) Bill 2020 also proposes to expand International Production Orders (authorising access to offshore communications content and data) to CO monitoring.	**105A.7B(5): 'monitoring conditions' which have no equivalent in CO regime *{broader than COs)*** **(h)** obligation to provide schedule of intended movements to a specified authority, and comply with that schedule **(i)** obligation to allow any police officer to enter premises specified in the ESO regime and conduct a search of the offender and the premises, and seize any item **(j)** obligation for the offender to facilitate access to electronic equipment or technology, or any data held or, or accessible from, such equipment or technology (eg, giving passwords) **Subject to the requirement in s 105A.7B(6):** these powers must be exercised only if the person exercising the power is satisfied it is reasonably necessary to give effect to the ESO, or facilitate or monitor compliance with a condition of the ESO. **Additional monitoring powers** The powers under s 105A.7B(5) conditions are additional to further proposals to extend the warrant and authorisation-based monitoring powers, comparable to those presently available for COs. The monitoring conditions in proposed s 105A.7B(5) are also additional to the proposal to amend the Telecommunications Legislation Amendment (International Production Orders) Bill 2020 to expand International Production Orders (authorising access to offshore communications content and data) to ESO monitoring (as well as CO monitoring).

ATTACHMENT 2B

Law Council
OF AUSTRALIA

Supplementary Submission:

Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020

Parliamentary Joint Committee on Intelligence and Security

22 June 2021

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council gratefully acknowledges the assistance of members of its National Criminal Law Committee in the preparation of this supplementary submission.

Executive Summary

1. The Law Council of Australia thanks the Parliamentary Joint Committee on Intelligence and Security (**Committee**) for the invitation to comment on Supplementary Submission 5.3, in which the Attorney-General's Department and Department of Home Affairs identified the Government's intention to move certain amendments to the Bill under inquiry (**HRTO Bill**).

2. The proposals outlined in Supplementary Submission 5.3 appear to derive from an assessment of parts of the judgment on the first application for a continuing detention order (**CDO**), in *Minister for Home Affairs v Benbrika* [2020] VSC 888 (24 December 2020) (***Benbrika***) as well as an assessment of the attributes and circumstances of the present cohort of offenders who are eligible for CDOs upon their release.

3. There has not yet been an opportunity to comment on the text of any proposed amendments, which would be essential to the Law Council's ability to form a definitive policy position on the proposals described in Supplementary Submission 5.3. However, Supplementary Submission 5.3 provides the following general description of two proposals under consideration, at [4]:

   *(a) in all circumstances, extended supervision orders (**ESOs**) and control orders [**COs**] can commence where a person is in immigration detention, and ensure that the conditions of the orders remain enforceable against an offender who is in immigration detention.*

   *(b) ESOs and [COs] are the only measures to be considered by a state or territory Supreme Court when deciding whether there is a 'less restrictive measure' to a continuing detention order (**CDO**) that would be effective in preventing the unacceptable risk posed by an offender.*

4. The Law Council's initial policy position, based on the short description of the proposed amendments in Supplementary Submission 5.3, is listed on the following page, and explained in the balance of this supplementary submission. In brief, the Law Council's views are:

   - proposal (a) should not proceed unless and until further evidence of its necessity can be established, and further statutory safeguards in the issuing criteria for post-sentence orders are included; and
   - proposal (b) should not proceed at all, either in the HRTO Bill or in any future legislative vehicle.

5. The Law Council provides these initial views with the caveat that it is likely to have further comments on the text of any proposed amendments, should the Government decide to proceed with the proposals. The Law Council would therefore welcome an opportunity to review and comment on the legislative text in due course.

Overview of Law Council policy position on the proposals

Summary of position on proposal (a)

6. In relation to proposal (a), concerning the commencement of ESOs and COs while a person is held in immigration detention, the Law Council's position is as follows:

(1) **Necessity:** this measure should not proceed unless evidence of its necessity is provided, over and above the extensive restrictions and limitations that can already be applied under the *Migration Act 1958* (Cth) (**Migration Act**) to persons who are in immigration detention, including persons whose visas are cancelled on character grounds; and

(2) **Proportionality:** if the Committee is persuaded that the measure is necessary, further safeguards are required, including the following:

(a) there should be no power 'at large' for a CO to commence, or continue in force, while the subject of that order is in immigration detention. This would ensure that the only circumstances in which a preventive order under Part 5.3 of the Criminal Code could commence or continue in force while a person is in immigration detention would be if that person has been determined by a court to be a 'high-risk terrorist offender' under Division 105A of the Criminal Code and is the subject of an ESO issued under that Division (if the HRTO Bill is passed).

Importantly, this narrower application would ensure that the onerous obligations under post-sentence orders under Part 5.3 of the Criminal Code (and the ensuing exposure of the subject to criminal liability for breaching the conditions of an order) could only apply to persons who are in immigration detention, if those persons are high-risk terrorist offenders who are subject to ESOs that are issued (but not commenced) prior to their release, and are immediately transferred to immigration detention upon completion of their criminal sentences of imprisonment, because their visas have been cancelled or their dual Australian citizenship has ceased on terrorism-related grounds.

This approach would remove the possibility that a CO and immigration detention could be relied upon, in combination, to provide a form of 'repechage' for a failed ESO (or CDO) application in relation to a high-risk terrorist offender (or to remediate an administrative failure to make an application for a Division 105A order in the requisite timeframe before the offender is released from prison, and immediately thereafter taken to immigration detention).

This approach would also prevent the unexplained and potentially intended consequence that proposal (a) would enable the significant obligations, prohibitions and liabilities available under COs to apply much larger cohort of persons who are in immigration detention than merely high-risk terrorist offenders. (For example, without the Law Council's suggested limitation, COs could be issued and take effect in respect of asylum seekers who arrive in Australia without a valid visa and are taken into immigration detention. Supplementary Submission 5.3 does not acknowledge, and consequently does not provide justification for, this possibility); and

(b) in any event, the statutory issuing criteria, conditions, associated breach offences, and periodic review requirements for ESOs, as proposed in the HRTO Bill, should be amended to take explicit account of the subject's

circumstances, as a person being held in immigration detention, in line with this submission (see especially paragraphs [32]-[58]). Equivalent amendments should also be made to the CO regime, should the Committee take a different view to the Law Council in relation to the matter at item (1)(a) above.

Summary of position on proposal (b)

7. Proposal (b) seeks to confine judicial discretion in the factual identification and assessment of less restrictive measures to a CDO under paragraph 105A.7(1)(c) of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).

8. The Law Council's position is that proposal (b) should not proceed. It would be an inappropriate fetter on judicial discretion in the making of findings of fact which are essential to an assessment of the necessity and proportionality of continuing detention. Questions of proportionality are also material to the human rights compatibility and constitutionality of the CDO regime.

Summary of position on common issues to both proposals

9. If the Government proceeds with either or both of the measures described in Supplementary Submission 5.3, the Law Council suggests that text of any proposed amendments should be referred to the Committee for review and report.

10. Such a review should provide an adequate opportunity for non-government stakeholders, including the Law Council, to review and make submissions on the proposed legislation. Any programming of Parliamentary debate should also await the completion of final reports by the Senate Scrutiny of Bills Committee and Parliamentary Joint Committee on Human Rights on the proposed amendments, and ensure that all Parliamentarians will have had an adequate opportunity to consider all committee reports prior to debate.

11. The timing for the debate and passage of any proposed amendments should be compatible with effective Parliamentary and public scrutiny. If the Government proceeds with either or both of the proposals described in Supplementary Submission 5.3, the Law Council emphasises that any urgency for the desired passage of the HRTO Bill, due to the need to establish an ESO regime, should not be used as a basis for bypassing or truncating opportunities for thorough Parliamentary and public scrutiny of the additional proposals.

12. Rather, it would be preferable for the proposals described in Supplementary Submission 5.3 to be progressed in a separate Bill, to ensure that reasonable time and focus is devoted to their scrutiny, which is commensurate with the gravity of their legal consequences.

Proposal (a): ability for ESOs and COs to commence when the subject is in immigration detention

13. In principle, the Law Council does not categorically oppose a power for ESOs to commence, or continue in force, while the subject is being held in immigration detention, following their release from prison after completing a sentence of imprisonment for a 'serious terrorism offence' within the meaning of Division 105A of the Criminal Code. (However, for the reasons explained below, the Law Council is categorically opposed to COs being capable of commencing, or continuing in force, while the subject is in immigration detention.)

14. As the Australian Human Rights Commission (**AHRC**) has noted in its supplementary submission on the proposals in Supplementary Submission 5.3,[1] a judicially issued order such as an ESO, which imposes conditions that are directed specifically to an individual's level of risk as determined by a court, may be more likely to result in the imposition of proportionate limitations on that individual's rights and liberties, as compared to the exercise of executive power under the Migration Act to control the conditions of a person's immigration detention.

15. For example, under proposed section 251A of the Migration Act,[2] which remains before the Parliament, the responsible Minister would be invested with discretion to make a determination prescribing an entire class of things as 'prohibited items' for all persons in immigration detention. This could include items which are capable of lawful and innocuous use, such as smartphones, computers and other personal communications devices.[3] In the result, all persons in immigration detention would be prohibited from possessing an item that is prescribed as a 'prohibited item', irrespective of their individual circumstances and personal motivation for possessing the relevant item.

16. However, the Law Council has two principal concerns with proposal (a), which are directed to questions of necessity and proportionality.

Necessity

17. The Law Council considers that the necessity of proposal (a) has not been clearly established for two reasons, as outlined under the subheadings below.

Concurrent operation of post-sentence orders with immigration detention

18. If ESOs and COs could commence and remain in force while a person is being held in immigration detention, they would operate concurrently with the extensive suite of powers under the Migration Act, which empower the executive government to establish or designate places of immigration detention and control the conditions of detention. This includes a power to designate State and Territory prisons as immigration detention centres, and any other place as determined in writing by the responsible Minister.[4] Substantial restrictions can be imposed on the entry of persons to detention centres.[5] Immigration detainees are subject to significant powers of search and seizure,[6] which are additional to general powers of criminal investigation,

[1] AHRC, *Supplementary Submission*, (11 June 2021), 7 at [21] (**'AHRC Supplementary Submission'**).

[2] Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (Cth).

[3] Ibid, Schedule 1, item 2 (inserting proposed subsection 251A(2) of the Migration Act). The note to this provision specifically refers to mobile phones, sim cards an electronic devices capable of being connected to the internet, as examples of the categories of things that may be prescribed as 'prohibited items'.

[4] Migration Act, subsection 5(1). See subparagraphs (b) of the definition of 'immigration detention'.

[5] Ibid, section 273. See also, section 252.

[6] Ibid, Part 2, Division 13.

and powers to conduct surveillance or compulsory questioning for security or criminal intelligence purposes.

19. Paragraph [9] of Supplementary Submission 5.3 appears to proceed on an assumption that immigration detention facilities are necessarily less restrictive than prisons, and as such, 'will … afford a person access to individuals or technology, which could be inconsistent with the conditions of a particular ESO or [CO]' that has been issued in relation to that person. As such, it does not specifically countenance the need for, and implications of, the concurrent operation of two sets of obligations, restrictions and liabilities. Nor does it specifically identify a need for provisions dealing with interoperability of the two regimes, or provide an indication of the intended approach to the design of such provisions.

20. While it may be the case that some forms of immigration detention could be less restrictive than the conditions of a person's imprisonment as part of their criminal sentence, this is not legally guaranteed to be the universal or invariable position. Further, it should be acknowledged the restrictions imposed upon persons in immigration detention can objectively be very onerous in their own right, irrespective of any comparisons which may be drawn with other types of detention.

21. The Law Council therefore cautions against legislating (or formulating the underlying policy settings) on the basis of a generalisation or assumption that the conditions of immigration detention are, and will invariably be, inadequate to manage the security risk presented by a high-risk terrorist offender who is placed in immigration detention—with the result that the person the must be made subject to two concurrent sets of controls. (That is, one set under the Migration Act, and the other set under a post-sentence order which has been made pursuant to Part 5.3 of the Criminal Code.)

22. In particular, it is readily conceivable that, in practical terms, the existing powers available under the Migration Act in relation to the designation and control of immigration detention facilities may limit the opportunities for persons in immigration detention to engage in terrorism-related activities (many of which may, themselves, constitute a preparatory or ancillary terrorism offence under Division 101 of the Criminal Code, which can be investigated and enforced accordingly, irrespective of whether a person is in immigration detention or resides in the community).

23. However, a critical practical difference would be that, if a post-sentence order under Part 5.3 of the Criminal Code commenced while the person is in the highly controlled environment of immigration detention, they would additionally be liable to criminal offences for breaching the conditions of that order. This could then form the basis for the Minister for Home Affairs seeking a further post-sentence order under Part 5.3 of the Criminal Code. The commission of a breach offence in relation to a post-sentence order could also provide a fresh basis for a Ministerial decision to cancel or refuse the issuance of a visa. (This may be material if the person is challenging the original visa cancellation or refusal decision, as it could effectively neutralise any utility in the person pursuing those challenges.)

Potential for COs to be issued in considerably broader circumstances than in relation to the HRTO cohort

24. Further, Supplementary Submission 5.3 indicates that proposal (a) is intended to apply to both ESOs and COs, such that both types of order could commence while the subject is being held in immigration detention. Although paragraph [8] states that the proposal is intended to enable ESOs and COs to 'commence and be enforced in ***all circumstances*** while a person is in immigration detention' (emphasis added), the policy justification offered for this proposal is confined to a specific factual scenario. Namely, it is restricted to the context of high-risk terrorist offenders who are visa-holders, and are immediately transferred to immigration detention after their release from prison upon completion of their sentences, because their visas are cancelled (presumably by reason of their conviction and sentence of imprisonment for terrorism offences).

25. The limited purview of the policy justification is evident in paragraph [11] of Supplementary Submission 5.3, which describes the perceived problem in the following terms:

> *Under current paragraph 104.5(1)(d) of the Criminal Code, an interim control order does not commence until the individual subject to the control order is 'released from custody'. In a circumstance where an offender is transported directly to immigration detention at the conclusion of their sentence, the current drafting of the legislation does not make clear that a control order can commence.*

26. However, COs are available in far broader circumstances than those described in paragraph [11] of Supplementary Submission 5.3 (as extracted above) which are confined to high-risk terrorist offenders who complete their criminal sentences of imprisonment.[7] The supplementary submission does not acknowledge the legal possibility for broader application beyond this discrete factual scenario, and consequently does not provide a justification for this outcome.

27. By way of example, unless explicit statutory limitations are adopted, proposal (a) could potentially operate to enable COs to commence in the following circumstances, which are not directly addressed in Supplementary Submission 5.3:

- ***in the case of a HRTO-eligible offender***—a court may refuse an application for a post-sentence order in relation to the person (whether a CDO, ESO or CO) or the AFP Minister or AFP Commissioner (as applicable) might decline to apply for an order, or may otherwise fail to make an application for a CDO or ESO within the statutory timeframe. However, an application for a CO may subsequently be made, including on the basis of the person's conduct in the community after their release.[8] If the person is subsequently taken into immigration detention as a result of the cancellation of their visa, proposal (a) would appear to enable a CO to be sought, issued and commence while the person is in immigration detention;

- ***in the case of a non-HRTO eligible offender who is transferred to immigration detention after completing a custodial sentence for a non-terrorism offence***—proposal (a) would appear to enable that person to be made subject to obligations under a CO while they are in immigration

[7] Criminal Code, paragraphs 104.2(2)(a)-(d).

[8] Note that the Law Council has recommended that the HRTO Bill should be amended to include an express provision in Division 104 of the Criminal Code, which prevents a court from issuing a CO (and the AFP from making an application for a CO) if the facts and grounds are identical to, or substantially the same as, a previous application by the Minister for Home Affairs for an ESO in relation to the person, and that ESO application was refused by the relevant State or Territory issuing court. See: Law Council, *Primary Submission*, (6 November 2020), 26-27 at [94]-[101] and recommendation 10.

detention, in addition to the restraints imposed on them by reason of being in an immigration detention facility (which could potentially be a State or Territory prison, or any other place prescribed in a Ministerial determination). For example, if there is a concern that a non-HRTO prisoner has been radicalised while serving a sentence of imprisonment for their non-terrorism offence or offences, proposal (a) would make it legally possible for that person to be made subject to obligations under a CO, concurrently with being placed in immigration detention;

- ***in the case of a person who has not served any sentence of imprisonment that is imposed following their conviction for a criminal offence, but whose visa is cancelled while they are in the community and is transferred to immigration detention***—proposal (a) would appear to enable that person to be made subject to a CO which would commence while they are in immigration detention. The CO could potentially be made on the basis of a future risk arising from either their conduct in the community, or in immigration detention; and

- ***in the case of a person who is already in immigration detention (for example, because their visa has been cancelled, or because a visa was never issued as may be the case for certain asylum seekers)***—proposal (a) would appear to make it possible for COs to be sought, issued and commence while those persons are in immigration detention.

28. The potential for proposal (a) to apply much more broadly than the specific factual scenario described in Supplementary Submission 5.3 is significant, as it would 'open up' the CO regime to a much broader cohort of people than those contemplated in the official policy justification. As breach of a CO condition is a criminal offence punishable by a maximum penalty of five years' imprisonment,[9] the contravention of such a condition may trigger significant legal consequences for the subject. Not only would this create a new legal pathway for the transfer of persons from immigration detention into imprisonment, conviction for a breach offence could also enable the issuance of further post-sentence orders against the person.[10]

29. Additionally, in the case of immigration detainees who are awaiting a decision on a visa application, or who are exercising legal rights to challenge a visa cancellation or refusal decision, exposure to a CO and subsequent contravention of its conditions may create a legal basis for a separate decision to refuse or cancel their visa.

30. Accordingly, the Law Council encourages the Committee to seek clarification of the policy intent concerning the circumstances in which it is envisaged that a CO would be capable of commencing (or continuing in force) when the subject is in immigration detention.

31. It may be that there is a deliberate policy intent for COs to be capable of commencing (or continuing in force) in relation to immigration detainees beyond those who are part of the cohort of HRTO-eligible offenders who are transferred to immigration detention immediately after the completion of their sentences of imprisonment. However, if this is the case, it is important that this intent is specifically acknowledged and justified. Accordingly, the Law Council submits that proposal (a) should not proceed unless and until this specific information is provided about the policy intent, and its underlying justification, and there is an adequate opportunity for its scrutiny.

[9] Criminal Code, section 104.27.

[10] HRTO Bill, Schedule 1, item 59 (inserting new subsection 105A.3(1) and new section 105.3A of the Criminal Code).

Recommendation 1: the need for further evidence of necessity of proposal (a)

- **Proposal (a) should not proceed unless and until a clear and compelling justification is provided in relation to its necessity, which addresses the two issues raised at paragraphs [18]-[31] of the Law Council's supplementary submission, concerning:**
  - **the concurrent operation of CO conditions with the conditions of immigration detention (as are able to be set by the executive government under the Migration Act); and**
  - **the possibility that immigration detainees could be subject to CO conditions (and criminal liability for breach) in considerably broader circumstances than the 'post-sentence HRTO context' identified in Supplementary Submission 5.3 as the basis for the proposal.**

Proportionality

32. The Law Council is concerned that the brief outline of proposal (a) in Supplementary Submission 5.3 does not identify adequate safeguards to ensure the potential amendments dealing with the commencement of post-sentence orders would operate in a manner that is proportionate to the security risk sought to be addressed.[11]

33. The Law Council has identified three principal issues which go to matters of proportionality, which are set out below. If the Committee is persuaded that proposal (a) is necessary, the Law Council encourages it to consider recommending the inclusion of statutory safeguards in the nature of those outlined below, which are variously consistent with, and complementary to, those recommended by the AHRC.

Intended meaning of 'immigration detention' for the purpose of proposal (a)

34. Proposal (a) is directed to the commencement of ESOs and COs that are issued in respect of persons who are in 'immigration detention', and the continuation in force of such orders if the subject is placed in immigration detention after the issuance and commencement of the ESO or CO. However, Supplementary Submission 5.3 does not explain the intended interpretation of the term 'immigration detention' for the purpose of proposal (a).

35. Significantly, subsection 5(1) of the Migration Act defines 'immigration detention' for the purpose of that Act, in a way that extends considerably beyond the placement of a person in a designated immigration detention centre established under the Migration Act, or a State or Territory prison or remand centre, or another place specified by the responsible Minister via a written determination. In particular, subsection 5(1) of the Migration Act also provides that a person is taken to be in immigration detention in circumstances which include the following:

- being in the company of, and restrained by, an officer who is authorised to do so under the Migration Act (or another person directed by the Secretary of the Department of Home Affairs or Australian Border Force Commissioner);
- being held by, or on behalf of, such an officer in a police station or watch house, or on a vessel in certain circumstances; and
- being subject to a Ministerial residence determination made under section 197AB of the Migration Act (the effect of which is that the person is still taken to

[11] AHRC, *Supplementary Submission*, 7-9 at [19]-[28].

be in immigration detention but is able to live in the community, at a specified address and in accordance with specified conditions).[12]

36. It is unclear whether there is a policy intent for proposal (a) to apply to all components of the definition of 'immigration detention' under subsection 5(1) of the Migration Act, or only a subset (and if so, which individual components of the definition). The limited policy justification provided in Supplementary Submission 5.3 appears to contemplate circumstances in which a high-risk terrorist offender whose visa is cancelled is being held at a dedicated facility of some kind after their release from prison (although it does not refer specifically to a dedicated 'immigration detention centre' established under the Migration Act).

37. However, Supplementary Submission 5.3 does not indicate whether the reference to this circumstance was intended to be an illustrative and non-exhaustive example only, or whether it was intended to exclude persons who may be in other forms of immigration detention which are possible under the Migration Act (such as being detained in a State or Territory prison, or being under the restraint of a competent official, or being in the community under a residence determination).

38. The concept of 'immigration detention' is the key determinant of the scope of application of proposal (a) and therefore its proportionality. As such, it is important that there is precision in relation to its intended meaning. The Law Council encourages the Committee to seek clarity about this matter from the proponents of the potential amendments.

39. If there is an intention for proposal (a) to apply the definition of 'immigration detention' in subsection 5(1) of the Migration Act in full, then it would also be important for the proponents to explain how issues of interoperability and potential conflict between the two discrete sets of obligations would be managed. (For example, the potential for conflict between the conditions of an ESO or CO issued under Part 5.3 of the Criminal Code, and the conditions specified in a residence determination made under section 197AB of the Migration Act.)

Need for specific statutory preconditions to the commencement or continuation in force of a post-sentence order in respect of an immigration detainee

40. Paragraph [15] of Supplementary Submission 5.3 appears to indicate that there would be no additional statutory safeguards under Part 5.3 of the Criminal Code, which would apply specifically when an ESO or CO is proposed to commence, or continue in force, while the subject of that order is being held in immigration detention.

41. In particular, paragraph [15] of Supplementary Submission 5.3 appears to evince a policy intention to place sole reliance on the generally applicable issuing criteria for ESOs and COs; together with generally applicable periodic review requirements and discretionary revocation powers for ESOs, the ability for a CO subject to apply to the court for the variation of the CO, and the obligation of the AFP Commissioner to apply to the court for variations of COs in certain circumstances.

42. The Law Council considers that additional protections are needed, to ensure that the cumulative effect of the conditions of the CO and the conditions of immigration detention are taken into account in the assessment of the need for the ESO or CO, as well as the specific conditions of the order. In particular, the Law Council supports the following measures:

- **Obligation to inform court of certain matters:** the Minister for Home Affairs (in the case of ESOs) and the AFP Commissioner (in the case of COs) should

[12] See especially note 2 to the definition of 'immigration detention' which provides expressly that the definition applies to persons who are subject to residence determinations (as is provided for by section 197AC).

be subject to an explicit statutory obligation to inform the issuing court in an ESO or CO application as to:

- the visa and citizenship status of the subject of the proposed order; and

- whether it is intended that the ESO or CO will commence when the person is in immigration detention. (For example, if a decision has been made to cancel the person's visa, including by reason of the mandatory cancellation requirements under the Migration Act due to the person's conviction and sentence, or potentially if the person's Australian citizenship has ceased by reason of their conduct constituting the offence for which they have been convicted and sentenced. This would likely result in the immediate transfer of the person to immigration detention after completing their sentence of imprisonment);

- **Consideration of implications of immigration detention:** if the Minister for Home Affairs or the AFP Commissioner (as applicable) informs the court that there is an intention for the ESO or CO to commence while the subject is in immigration detention, then the court must take this matter into consideration in applying the issuing criteria for the ESO and CO, and in fashioning each of the individual conditions of the order (if issued). This should include a requirement to consider whether any of the proposed conditions in an ESO or CO would:

  - conflict, or be reasonably likely to conflict, with any legal rights and obligations that would otherwise apply in relation to a detainee under the Migration Act (particularly in relation to residence, curfew, reporting and counselling obligations under the CO or ESO as applicable, as well as ESO conditions requiring a person to keep in their possession and answer or promptly return calls to a specified mobile phone); and

  - be feasible to administer and comply with in the immigration detention environment; and

- **Obligation on Minister or AFP Commissioner to seek review of orders**: if the subject of an application for an ESO or CO is a visa holder or a dual citizen of Australia and another country, and the Minister for Home Affairs or the AFP Commissioner (as applicable) informs the court that there is no intention, at the time the ESO or CO application is made, for that order to commence while the subject is in immigration detention, then there should be a statutory requirement for the Minister or AFP Commissioner to make an immediate application to the court for the review of the order and its conditions, if the person is taken into immigration detention after the order is issued. Compliance with this requirement should be a statutory pre-condition to the ESO or CO continuing in force when the subject is taken into immigration detention.

43. In proposing these safeguards, the Law Council concurs with the views of the AHRC that the issuing court for an ESO or CO should be specifically informed of any intention for an order to apply to a person in immigration detention, as these matters are relevant to an assessment of the necessity and proportionality of the order and each of its proposed conditions.[13]

44. In particular, the Law Council submits that the provision of this information to the court in every case is central to the notion of judicial oversight for the issuance and terms of orders. The Law Council is concerned that the silence of Supplementary Submission 5.3 on this matter may reflect an intent that proposal (a) would create a legislative mechanism for the automatic commencement or continuation of COs or ESOs in respect of persons in immigration detention, by reason of a statutory rule,

[13] AHRC, *Supplementary Submission*, 7 at [19] and recommendation1.

rather than judicial approval in each case. This approach presents risks to the integrity of judicial decision-making about the issuance and conditions of COs and ESOs, because there would be no statutory assurance that all relevant information would be placed before the court about the environment in which the proposed order would or could foreseeably operate.

45. Further, in proposing the mandatory judicial review of extant ESOs or COs, if the subject of the order is taken into immigration detention after that order has commenced, the Law Council emphasises that it would not be satisfactory to rely solely on the operation of general application-based variation or periodic review mechanisms for ESOs or COs. The Law Council concurs with the submission of the AHRC that these mechanisms fail to establish a process which will ensure that inappropriate conditions are not in force for any period of time.[14]

46. Significantly, there may be many reasons that an ESO or CO subject does not, or cannot, exercise their discretion to apply for a variation of an order. For example, lack of awareness of their legal rights, lack of ability to access legal representation or to review relevant information from immigration detention, or a lack of inclination which may arise from their prolonged detention and anticipated deportation. Reliance on the discretion of the Minister for Home Affairs or AFP Commissioner (as applicable) to seek variation also falls short of a legal safeguard in this respect. Even in circumstances in which there is an obligation to seek variation, there is scope for subjectivity and delay in executive decision-making about whether the obligation is enlivened in particular circumstances.

47. Moreover, reliance on general mechanisms for the judicial review of orders—such as annual judicial review requirements for ESOs, or confirmation proceedings for interim COs, or applications for a new ESO or CO after the expiry of the previous order—would not ensure the timely remediation of conditions which are no longer necessary or proportionate to the subject's risk, or are otherwise impossible to comply with, if the subject is in immigration detention.

48. As discussed further below, the risk that proposal (a) could lead to the imposition or continuation of ESO or CO conditions that are not necessary, proportionate or feasible to comply with, where the subject is in immigration detention, also has implications for a person's exposure to criminal liability for breach of those conditions. This makes it even more important that the management of this risk is not left to general discretion under the existing issuing criteria and periodic review requirements for ESOs (as proposed in in the HRTO Bill) and COs (as per Division 104 of the Criminal Code). Rather, this factor heightens the need for Divisions 104 and 105A of the Criminal Code to make specific provision for the circumstances of persons who are in administrative detention, especially immigration detention.

Safeguards directed to access to legal assistance, access to relevant information, and professional risk assessment and counselling services

49. The Law Council also highlights the need for regard to be had to practical matters to facilitate the person's access to necessary assistance and information relevant to the post-sentence order. This includes the following matters:

- access to legal assistance (including the person's lawyer of choice);
- access to independent risk assessment services (for example, by a psychologist of the person's choice) should they wish to obtain such an assessment as part of a review or variation request; and

[14] Ibid, 8 at [25]-[26].

- access to all relevant information concerning applications for the renewal or variation of the ESO or CO (or its making, if the proposal proceeds with COs contrary to the Law Council's above recommendation).[15]

50. The Law Council notes that the legal and practical management of these matters in the confined setting of immigration detention is likely to raise additional human rights risks and other complexities. As Supplementary Submission 5.3 makes no mention of these matters, the Law Council considers that the proposal should not proceed unless and until adequate information has been provided, from which the Parliament and the public could reasonably take assurance.

Safeguards in relation to offences for breaching a post-sentence order

51. The Law Council is of the view that where compliance with a condition of a CO or ESO would be impossible by reason of the subject being in immigration detention, then there should be an express exception to this effect in relation to the offences for contravening these orders. (This might include, for example, residence and curfew requirements, prohibitions on associating with particular persons, obligations to keep on the person's possession and answer a specified mobile phone, and obligations to participate in specified counselling or education).

52. It is preferable that this matter is dealt with clearly on the face of the legislation, rather than a person's potential exposure to significant criminal liability being left to the discretion of law enforcement agencies at the point of investigating potential breaches of orders.

53. This reflects the gravity of the criminal consequences of breach and the exposure of the person to the ordeal of investigation and potential prosecution. It also reflects the significant flow-on effects, including the enlivening fresh and additional grounds for visa cancellation (for example, if the original cancellation decision is overturned on review or appeal), and the exposure to further post-sentence orders under Part 5.3 of the Criminal Code as a result of committing a breach offence.

Impacts of overbreadth in the potential ESO conditions proposed in the HRTO Bill

54. Proposal (a) in Supplementary Submission 5.3 may also compound the problems identified in the Law Council's primary submission and first supplementary submission, about the proposal to enable ESOs to impose an unlimited range of conditions on the subject, including several non-exhaustive statutory conditions that are broader than those presently available for COs.[16]

55. The breadth of the power to set an unlimited range of ESO conditions makes it possible that an issuing court may assess the proposed conditions of an order to be reasonable and proportionate either before the person is required to be taken to immigration detention, or even possibly on the basis of extant or anticipated conditions of immigration detention. However, the balance of considerations may change significantly if the facts underlying those assumptions were to change. In the result, a person may be subject to a post-sentence order that could require, in effect, a complete overhaul almost immediately after it is made. (Or such an order may no longer be needed if the conditions of immigration detention are sufficient to manage the person's risk without a specific post-sentence order—as could potentially be the case if a person's place of immigration detention was a State or Territory prison, as is permitted under the Migration Act).

[15] In this regard, the interaction of the proposed restriction in proposed section 105A.14D of the Criminal Code on access to certain material ('terrorism material') which is relied upon by the Minister for Home Affairs in support of an ESO application (HRTO Bill, Schedule 1, item 120) should be considered carefully.

[16] Law Council, *Primary Submission*, 14-17 at [35]-[43] and recommendation 4; and Law Council, *Supplementary Submission 1*, (27 November 2020), 13-17 at [28]-[54] and Attachment 1.

56. The broader the conditions available under an ESO, the greater the risk described above. For example, the HRTO Bill proposes that ESOs should be able to impose conditions requiring person to participate in specified counselling even if they do not consent,[17] and conditions requiring a person to keep a specified mobile phone in their possession and to answer or promptly return calls to that phone.[18] It also confers significant power on members of the AFP and others to determine the requirements in individual circumstances, and the court would approve such conditions on the basis of an assessment of the person's circumstances at a given time.[19]

57. The proposal to extend the application of ESOs to persons who are in immigration detention (so that an ESO would operate concurrently with the limitations and restrictions arising from the person's conditions of immigration detention) exacerbates the risks identified previously by the Law Council about overbreadth in the unlimited range of ESO conditions. The Law Council considers that proposal (b) further strengthens the case for limiting the range of available ESO conditions to those presently available for COs, as the Law Council recommended in its primary submission.

Recommendation 2: further statutory safeguards are required for proposal (a)

- **Proposal (a) in Supplementary Submission 5.3 should not proceed, unless and until the matters raised at paragraphs [32]-[56] of this submission are addressed.**

Proposal (b): limitation of judicial discretion to assess less restrictive alternatives to CDOs

58. The Law Council does not support proposal (b) and encourages the Committee to recommend that it should not proceed, either as part of the HRTO Bill or in any other future legislative vehicle.

59. The present ability of the court to consider the existence and relative effectiveness of all less restrictive alternatives to a CDO, which are available in the circumstances of a particular case, is an important safeguard to the proportionality of post-sentence detention, and consequently both its human rights compatibility and compatibility with Chapter III of the *Constitution*.

60. Proposal (b) seeks to fetter the ability of the court to identify and assess less restrictive measures to a proposed CDO, so that it may only consider an ESO and a CO. This increases the risk that the regime may not be proportionate to the legitimate objective of protecting the community from the unacceptable risk presented by a high-risk terrorist offender who has completed their sentence of imprisonment.

61. Supplementary Submission 5.3 appears to lack substantive justification for weakening this fundamental safeguard. The supplementary submission refers to the possibility, as occurred in *Benbrika,* that the issuing court may consider any measure or action (or combination thereof) that it deems less restrictive, irrespective of whether those measures are designed specifically to manage the risk posed by a high-risk terrorist offender. That is, the court is concerned in functional or substantive terms with the likely effect of an alternative measure on managing the unacceptable risk presented by the person. It is not concerned with the subjective categorisation or 'label' ascribed

[17] HRTO Bill, Schedule 1, item 87 (inserting new paragraph 105A.7B(3)(n) of the Criminal Code).

[18] Ibid, Schedule 1, item 87 (inserting new paragraph 105A.7B(5)(e) of the Criminal Code).

[19] See, for example: ibid, Schedule 1, item 87 (inserting new subparagraph105A.7B(3)(h)(iii), new paragraphs 105A.7B(3)(m)-(r) and new subsection 105A.7B(4) of the Criminal Code).

to a particular measure (that is, as a 'HRTO-specific measure') under legislation or administratively by security or law enforcement agencies.

62. However, there is no reason that this approach is inherently problematic, such that the ability of the court to make a factual assessment on the basis of all relevant evidence should be displaced or fettered in any way. It is open to the Minister for Home Affairs to make submissions to the court about the existence and likely effectiveness of alternatives. The supplementary submission does not identify reasoning underlying any concerns arising from this state of affairs.

63. Indeed, the result in *Benbrika* tends in strong support of this mechanism. The court considered, in detail, alternatives identified in that case, including 24-hour surveillance and the cancellation of the defendant's visa leading to his deportation from Australia (in addition to a CO) and found that these measures would not be effective in the circumstances.[20] There is no apparent reason that the factual circumstance or necessarily fact-specific outcome in *Benbrika* should be the basis for a statutory restriction on the ability of the court to consider all relevant facts about the ability to manage a person's risk if they were not detained under a CDO.

64. The Law Council further concurs with the submissions of the AHRC that it is no answer to suggest that the issuing court has a residual discretion to decline to issue a CDO, even if it is satisfied that the issuing criteria are met.[21] Supplementary Submission 5.3 appears to assume that a court may be inclined to exercise this residual discretion if it considers that there are effective alternatives to a CDO, apart from those which are proposed to be prescribed expressly in the statutory issuing test (being ESOs and COs alone).[22] It appears to be illogical and arbitrary to separate the relevant factual considerations in this way. The Law Council further agrees that that the remarks of Tinney J in *Benbrika* about the absence of judicial authority on the exercise of residual discretion, and the reluctance of the court to countenance its exercise in *Benbrika*, appear to make it less likely that court would exercise its residual discretion in this way.[23]

65. Moreover, there is a legal risk that the proposal to place an express restriction on the meaning of the expression 'other less restrictive measure' in paragraph 105A.7(1)(c) so that it covers only ESOs and COs may be taken to evince an intention, by necessary implication, to remove any residual discretion that might otherwise exist to consider measures other than ESOs and COs, which the court considers to be less restrictive than a CDO and effective in managing the offender's risk. In other words, the implementation of proposal (b) might, itself, unintentionally limit the scope of any residual discretion to decline to grant an order on the basis of other, non-terrorism specific risk management options.

Recommendation 3: proposal (b) should not proceed

- **The Law Council urges the Committee to recommend that proposal (b) in Supplementary Submission 5.3 should not proceed.**
- **Rather, the identification and assessment of less restrictive measures to a CDO should remain a question of fact to be determined exclusively by the court on the basis of all relevant, admissible evidence. Division 105A of the Criminal Code should not purport to create a statutory rule which prescribes two specific measures (namely, COs and ESOs) as the only less restrictive alternatives to a**

[20] *Benbrika* [2020] VSC 888, at [466]-[469]. See also [337]-[349] (submissions on behalf of the Minister for Home Affairs on the issue of less restrictive alternatives, which were accepted by the Court).

[21] AHRC, *Supplementary Submission*, 12 at [38].

[22] Attorney-General's Department and Department of Home Affairs, *Supplementary Submission 5.3*, (May 2021), 5 at [19] (third dot point).

[23] *Benbrika* [2020] VSC 888 at [472]-[473].

CDO that the court may take into consideration in applying the issuing criteria.

Opportunities to scrutinise the text of amendments implementing both proposals

66. The Law Council appreciates the intent of Supplementary Submission 5.3 to provide the Committee and interested stakeholders with some advance notice of intended amendments to the HRTO Bill. However, an announcement of a general policy intention does not dispense with the need for the Parliament and wider public to have adequate opportunities to scrutinise and comment on the legislative text of those proposed amendments.

67. The post-sentence regime in Division 105A of the Criminal Code is technical and complex. It operates in particularly 'high-stakes' circumstances, in that it enables the imprisonment of an individual on the basis of a prediction about their future risk, which is made according to a lower standard of proof than the criminal standard. Much will therefore turn upon a detailed and technical examination of the legislative design and drafting of the provisions giving effect to the proposals.

68. Accordingly, it is important that any policy intent to enact a Commonwealth ESO regime as soon as possible, via the passage of the HRTO Bill on a time-critical basis, is not also used as a basis to seek the urgent passage of the two proposals described in Supplementary Submission 5.3. These two proposals are significant in their own right. They should not be subjected to a truncated scrutiny process because of time constraints pertinent to the separate policy objective to establish the ESO regime, so as to provide an alternative preventive order to CDOs which is available in relation to prisoners whose release dates are imminent.

69. Rather, if the Government intends to proceed with the proposals described in Supplementary Submission 5.3, the relevant amendments will require detailed examination, which should be conducted via the usual, well-established, and participatory mechanisms of Parliamentary scrutiny. That includes the review of the proposed legislation by the Committee, as well as the usual reviews by the Senate Scrutiny of Bills Committee and Parliamentary Joint Committee on Human Rights (covering both their interim and final reports, with the latter reports taking account of matters raised in correspondence with the relevant responsible Minister).

70. It will also be necessary for the Parliament as a whole to be afforded reasonable and adequate time to consider the final reports of all of three committees, together with Government responses to their conclusions and recommendations, and (if desired) consideration of evidence given by relevant submitters to those committee inquiries.

Recommendation 3: scrutiny of the text of the proposal amendments

- **The Law Council encourages the Committee to recommend that, if the Government proceeds with amendments of the kind described in Supplementary Submission 5.3, the relevant amending legislation should be referred to the Committee for public inquiry and report.**
- **The Committee may also wish to consider recommending mechanisms to ensure that adequate time is available for the thorough scrutiny of those amendments, for example, via their inclusion in a stand-alone Bill with a longer timeframe for intended passage than the HRTO Bill (in recognition of the urgency to enact an ESO regime in Division 105A of the Criminal Code).**

ATTACHMENT 3

Law Council
OF AUSTRALIA

Review of Division 105A of the *Criminal Code Act 1995* (Cth):

Responses to questions of 6 July 2021

Independent National Security Legislation Monitor

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Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000[1] lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Acting Chief Executive Officer of the Law Council is Mr Ms Margery Nicoll. The Secretariat serves the Law Council nationally and is based in Canberra.

1 Law Council of Australia, *The Lawyer Project Report*, (September 2021), pp. 9-10.

Acknowledgement

The Law Council gratefully acknowledges the input of the Law Society of South Australia, and members of its National Security Law Working Group, National Criminal Law Committee and National Human Rights Committee to the below responses to the 12 questions asked of the Law Council by correspondence dated 6 July 2021.

The Law Council also acknowledges the contributions of all its constituent bodies and expert advisory bodies to Law Council's longstanding body of policy advocacy in relation to Division 105A and Part 5.3 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) more broadly.

Background

1. This document comprises part of the Law Council's submission to the Independent National Security Legislation Monitor (**INSLM**) review of the regime of post-sentence orders for high-risk terrorist offenders (**HRTO**) in Division 105A of the Criminal Code. It provides the Law Council's responses to 12 specific questions posed by the INSLM by letter dated 6 July 2021, prior to the suspension of that inquiry in 2021.

2. The balance of the Law Council's submission to this inquiry is provided by way of covering letter, and the attachments to that correspondence numbered 1, 2, 2A and 2B. Those attachments comprise the Law Council's submissions to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) in relation to reviews of matters concerning Division 105A in 2021. Collectively, these documents articulate the Law Council's position on Division 105A.

Question 1: preparatory terrorism offences as 'serious terrorism offences'

Question 1. Noting the relative limits of the impact of preparatory offending in comparison to other serious Part 5.3 offences, do you consider that the rationale and policy for the inclusion of preparatory offences as "serious Part 5.3 offences" has changed, and if so to what extent, since 2016?

3. The Law Council acknowledges that preparatory offending, such as the offence of preparing or planning to commit a terrorist act in section 101.6 of the Criminal Code, can be objectively serious. In particular, the Law Council acknowledges the sustained advice from security agencies about the nature and magnitude of the terrorist threat facing Australia (which remains at the level of 'probable').[2] This includes advice that 'lone wolf' style attacks can involve a rapid and potentially unpredictable progression from a person's adherence to violent ideologically motivated extremism, to the acquisition and deployment of relatively unsophisticated but highly lethal capabilities, such as firearms, knives, vehicles or improvised explosive devices (and precursor chemicals or other equipment).[3]

4. Equally, however, the Law Council notes that the specific criminalisation of some 'ancillary' activities, such as the offences in relation to terrorist organisations in Division 102, may criminalise involvement of a more passive nature which does not give rise to the same level of risk to public safety, in relation to the offender themselves carrying out or directly facilitating the commission of a terrorist act. This distinction might be especially significant where the various 'ancillary' offences in Part 5.3 of the Criminal Code are prosecuted in connection with the extensions of criminal liability in Chapter 2 (such as attempt, incitement or conspiracy).

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[2] Australian Government, 'National terrorism threat advisory system', Australian national security website, <www.nationalsecurity.gov.au>.

[3] See, for example, ibid: 'While the most likely form of terrorism in Australia remains an attack by a single person or a small group using simple attack methodologies, more sophisticated attacks also remain possible. Any attacks planned in Australia for at least the next 12 months are likely to use weapons and tactics that are low-cost and relatively simple. These include basic weapons, explosives and firearms. Basic weapons are everyday objects that do not need special skills to use as weapons, such as knives and vehicles. Explosives remain a favoured terrorist weapon; but firearms can be acquired by terrorists through both legal and illicit channels, and have previously been used in Australian terrorist attacks'.

5. These observations have relevance to the enlivenment of the continuing detention order (**CDO**) regime in Division 105A in two principal respects. First, they are relevant to the concept of an 'eligible offence' in paragraph 105A.3(1)(a) of the Criminal Code, which determines whether a prisoner is liable to be subject to a CDO. (The offences specified in the latter provision are not limited to offences against Part 5.3 of the Criminal Code, and include foreign incursions offences in Part 5.5 and offences in Division 72 implementing Australia's obligations under sectoral terrorism conventions to criminalise international terrorist activities using explosive or lethal devices.)

6. Secondly, as noted in question (1), the above observations are also relevant to the statutory concept of a 'serious Part 5.3 offence' as defined in section 105A.2 of the Criminal Code, which is the basis for assessing a person's future risk in paragraph 105A.7(1)(b) as a pre-requisite to the issuance of a CDO.[4]

Eligible offences

7. In relation to the first issue of a conviction for a preparatory or ancillary offence making a person liable to a CDO under paragraph105A.3(1)(a), the Law Council considers that the preferable approach to determining eligibility for a CDO would be to consider the actual sentence imposed on the person, not the maximum penalty for the offence, or its status as preparatory or ancillary to a principal offence (or some other categorisation of offences).

8. The Law Council discussed this matter in detail in its submission to the PJCIS statutory review of Division 105A (**Attachment 1**) at pp. 61-64, paragraphs [238]-[253]. In that submission, the Law Council supported consideration of the actual sentence imposed on the offender, together with a range of other factors under section 105A.7 that would be relevant to an assessment of the proportionality of a CDO. This includes consideration of the nature of the person's conviction for the eligible offence, including the applicable fault elements of that offence (among other matters).

Prediction of future risk of offending

9. In relation to the question of defining a 'serious terrorism offence' in section 105A.2 for the purpose of making a prediction about a person's future risk of offending under paragraph 105A.7(1)(b), the Law Council acknowledges that a measure of the kind contemplated by question (1) is directed to the important objective of proportionality. However, the Law Council is concerned that this particular measure may have significant unintended consequences. If the CDO regime is to remain in force, the Law Council would support alternative statutory safeguards directed to ensuring that any decision to authorise post-sentence detention is proportionate to the risk presented by the individual.

10. In particular, the Law Council notes that a statutory requirement for a court considering a CDO application to effectively distinguish between a person's future risk of engaging in merely preparatory or ancillary conduct, as distinct to committing or directly facilitating a terrorist act, may introduce significant complexity by making the predictive exercise more granular. This could aggravate the already fraught task of

[4] A 'serious Part 5.3 offence' is defined in section 105A.2 as an offence in Part 5.3 that is punishable by a maximum penalty of seven or more years' imprisonment. The seven-year penalty threshold has the effect of excluding the offence of associating with a terrorist organisation in section 102.8; offences for contravening control order conditions in sections 104.27 or 104.27A; and offences for breaching secrecy provisions and other procedural requirements applying to preventative detention orders in sections 105.41 and 105.45.

predicting a person's future risk on the basis of a relatively low standard of proof, and in the absence of an empirically validated risk assessment methodology.

11. In any event, there may be reasonable grounds for doubting that any risk assessment methodology could reliably draw such granular distinctions between a person's risk of engaging in 'merely preparatory' or otherwise 'ancillary conduct', and their risk of direct engagement in or facilitation of a terrorist act. For example, would it be meaningful, or even possible, to individually assess and quantify a person's risk of engaging in the preparatory or ancillary activity of collecting or making documents likely to facilitate terrorist acts (per section 101.5) as distinct to that person's risk of actually engaging in a terrorist act (per section 101.1) or attempting to do so (per section 11.1)?

12. Rather, the Law Council submits that the applicable standard of proof is the single most effective safeguard that could be introduced into the predictive exercise in section 105A.7(1)(b) with respect to a person's future risk. As noted in the Law Council's submission to the PJCIS statutory review of Division 105A (**Attachment 1**) at pp. 62-63, paragraphs [246]-[250] (footnotes omitted):

> *The Law Council remains of the view that, given the gravity of consequences of a CDO, the 'high degree of probability' standard for the 'unacceptable risk' test in section 105A.7 of the Criminal Code is not appropriate and should be replaced with the criminal standard of proof (beyond reasonable doubt).*
>
> *The Law Council made the following observations in its submission to the Committee inquiry into the originating Bill [in 2016]:*
>
> - *there is a lack of an established body of specialised knowledge on which to base predictions about a person's future risk of committing a terrorism offence. While it appears that the Commonwealth, State and Territory Governments have now selected a preferred risk assessment tool (the VERA-2R) it must be acknowledged that this tool is still formative;*
>
> - *the concept of 'risk' is, itself, fluid and subjective. The qualifier 'unacceptable' does little or nothing to change this high level of subjectivity.*
>
> *…*
>
> *[T]he Law Council remains concerned about the vagueness and subjectivity inherent in the substantive issuing threshold of an 'unacceptable risk' of a person committing a terrorism offence.*
>
> *The Law Council considers that this factor merits a higher and more certain standard of proof, which is akin to the criminal standard applied to sentencing. This is further supported by the gravity of the consequences of a CDO, the extraordinary and potentially indefinite nature of post-sentence detention under the CDO regime, its close connection with criminal offences, and the inherently fraught nature of making predictions about a person's future risk (including in the absence of an established and reliable risk assessment framework).*

Question 2: assessment of 'unacceptable risk'

Question 2. Should a temporal requirement be added to the "unacceptable risk" test under s 105A.7? If so, should the temporal requirement be 'imminent' or 'probable', or have another test?

13. The Law Council would support the inclusion of a further requirement in section 105A.7 for there to be a temporal connection between the person's risk of engaging in a serious terrorism offence, and its apprehended crystallisation if the person was released into the community upon completion of their sentence of imprisonment for a HRTO-eligible offence.

14. By way of illustration, the issuing threshold for post-sentence detention orders for serious sexual and violent offenders in New Zealand applies to persons who are assessed as presenting 'a very high risk of imminent serious sexual or violent offending'.[5] An equivalent temporal connection of 'imminence' would provide a further safeguard to ensure the proportionality of the CDO regime, by ensuring that it targets only those offenders who are at immediate risk of engaging in a serious terrorism offence if released into the community. Alternative protective mechanisms, principally extended supervision orders (**ESO**) and surveillance, should be utilised in respect of those persons who are not assessed as presenting a risk of imminent re-offending. Proof of the imminent nature of a person's predicted re-offending would be a matter for the court considering a CDO application, on the basis of admissible evidence.

15. However, the Law Council considers that the insertion of a temporal requirement alone, including one in the nature of 'imminence', would not address the fundamental concerns it has previously raised about the fraught nature of the predictive exercise itself, as the basis for detaining a person under a post-sentence order.[6] For these reasons, the Law Council emphasises its position that the most significant and effective improvement that could be made to the terrorism-specific post-sentence regime in Division 105A is the adoption of the criminal standard of proof in relation to the prediction of future risk required by paragraph 105A.7(1)(b).

16. If the criminal standard of proof is not recommended in relation to CDOs, the Law Council alternatively submits that the retention of the existing standard of proof would heighten the importance of adopting a temporal requirement in the issuing criteria.

Questions 3 and 4: international obligations

Question 3. Are the provisions under Div 105A consistent with Australia's international obligations to combat terrorism? In what way could the provisions be amended to contribute to these efforts more explicitly?

Question 4. In what way could the provisions under Div 105A be perceived as inconsistent with Australia's international obligations to combat terrorism?

[5] *Public Safety (Public Protection Orders) Act 2014* (NZ), section 13.

[6] Law Council of Australia, *Submission to the PJCIS Review of AFP Powers*, (17 September 2020), 62-63 at [246]-[251] (copy provided as **Attachment 1** to this submission to the fourth INSLM).

17. Australia's international obligations to combat terrorism require it to do so in a manner that is compatible with its human rights obligations.[7] In particular, limitations that are imposed on those rights which may be permissibly limited must be applied in accordance with law, and must be necessary for and proportionate to the achievement of a legitimate objective. The Law Council is concerned that the CDO regime does not meet the requirements of proportionality.

18. In particular, the Law Council concurs with the views of the United Nations Human Rights Committee (**UNHRC**) in its 2010 views on the communications in *Tillman v Australia* (UN Doc CCPR/C/98/D/1635/2007) and *Fardon v Australia* (UN Doc CCPR/C/98/D/1629/2007). The UNHRC held that post-sentence detention orders issued under the *Crimes (Serious Sex Offenders) Act 2006* (NSW) and Dangerous *Prisoners (Sexual Offenders) Act 2003* (Qld) were incompatible with the prohibition on arbitrary detention under Article 9(1) of the International Covenant on Civil and Political Rights (**ICCPR**). This included on the basis that:

    - the persons, Tillman and Fardon, had already served their terms of imprisonment for sexual offences, and their continued detention 'amounted, in substance, to a fresh term of imprisonment which…is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law';
    - imprisonment is a punitive measure which 'can only be imposed pursuant to a conviction for an offence in the same proceedings in which the offence is tried' not at a later point in time under a separate process (which was commenced 10 and 14 years after Tillman and Fardon were convicted and sentenced). That separate detention was made 'in respect of predicted future criminal conduct which had its basis in the very offence for which [they] had already served [their] sentences';
    - the enactment of the post-sentence detention in legislation after Tillman and Fardon were convicted and sentenced meant that the post-sentence orders comprised 'a heavier penalty than was applicable at the time when the criminal offence was committed'. They considered this to be contrary to the prohibition on retrospective punishment under Article 15(1) of the ICCPR, which relevantly provides that a 'heavier penalty' shall not be imposed on a person 'than the one that was applicable at the time when the criminal offence was committed'. The UNHRC held that detention pursuant to proceedings which, themselves, contravene Article 15(1) is 'necessarily arbitrary' for the purpose of Article 9(1); and
    - the issuing process for the post-sentence detention orders under the State legislation was 'civil in character' and, as such, 'did not meet the due process guarantees required under Article 14 … for a fair trial in which a penal sentence is imposed'. The UNHRC considered that an order for detention that is made during proceedings which, themselves, contravene Article 14 constitutes arbitrary detention under Article 9(1).

[7] See, for example: United Nations Global Counter-Terrorism Strategy (A/RES/60/288, 8 September 2006) at 9. ('IV—Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism'. See especially [2] which reaffirmed the commitment of UN member states to 'ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law'.)

Questions 5 and 6: process for issuing and administration

Question 5. Should there be a 'Public Interest Monitor' (PIM) to monitor the conditions and application of Div 105A orders?

19. The Law Council understands this question to be directed to the establishment of a regime for the appointment of an independent person or persons to supervise the execution of CDOs (as distinct to the appointment of a person or persons to act as a contradictor in relation to CDO applications). This might include, for example:

    - monitoring the conditions of detention and their administration in practice, to ensure compliance with the obligations in section 105A.4 that the person must be treated in a manner that is appropriate to their status as someone who is not serving a criminal sentence of imprisonment;
    - reviewing the arrangements made between the Commonwealth and States and Territories under section 105A.21 for the detention of persons subject to CDOs (including accommodation and the delivery of rehabilitative programs); and
    - independently monitoring compliance with obligations on the Commonwealth to seek periodic reviews of CDOs under section 105A.10, to ensure that all necessary arrangements and efforts are made to provide information to the person under section 105A.15, and to facilitate access to legal representation.

20. Some of these functions would be within the existing remit of the Commonwealth Ombudsman, and State or Territory Ombudsmen in relation to actions taken by the corrective services authorities in their respective jurisdictions. The Law Council is supportive of independent oversight of the administration of the CDO regime, not merely in response to complaints, but also pro-active inspections or audits to determine the nature and extent of compliance, and to facilitate the early identification and remediation of issues, and continuous improvement.

21. The Law Council has no strong preference as to whether that function should be performed by relevant Ombudsmen, or persons appointed to the discrete office of a 'public interest monitor' or similar. If there is a preference to appoint dedicated 'public interest monitors' to perform this function, then it will be important to ensure that there are statutory safeguards in place to ensure their independence from government (both substantive and perceived); conditions of appointment directed to their qualifications and expertise; and access to all necessary information, persons and premises. Adequate provision will also need to be made for information-sharing, the release of reports, and government reporting on responsiveness to advisory recommendations.

22. It will also be important that any independent oversight function, including a function to conduct periodic inspections, is not overly prescriptive in relation to the matters which must be assessed, and gives appropriate flexibility to the relevant oversight body to determine its priority areas of focus. For example, an oversight function should not be limited to considering the issue of strict legal compliance with applicable obligations, but rather should be sufficiently broad and flexible to enable the oversight body to identify opportunities for better practice, such as in relation to risk management.

Question 6. In light of the transfer of the *Benbrika* matter from the civil to the criminal jurisdiction in Victoria, in which jurisdiction (civil/criminal) should future CDO/IDO applications be heard and why?

23. The Law Council understands this question to be referring to the practice of allocating a CDO application to a particular division of the relevant State or Territory Supreme Court, rather than amending Division 105A to effectively 'transform' the nature of CDOs from civil to criminal orders (that is, via the adoption of the criminal standard of proof and rules of evidence, including with respect to the drawing of inferences of a person's unacceptable risk from circumstantial evidence—that is, evidence of their past conduct).

24. There was evidently a view in *Minister for Home Affairs v Benbrika* [2020] VSC 888 (24 December 2020, Tinney J) (***Benbrika***) that the Criminal Division of the Supreme Court of Victoria was the appropriate division to hear that CDO application. The Law Council would be supportive of a rule that all CDO applications must be heard in the criminal division a State or Territory Supreme Court. In part, this would reflect the practical and logistical considerations which will, almost invariably, attend all CDO applications. This includes physical and information security considerations, particularly the closure of the court in the presence of classified evidence—including via the enlivenment of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). It could also more readily facilitate the presence of the respondent, who would be in custody, at hearings. In addition, it would underscore the very close connection of post-sentence detention with criminal offences (both the anterior conviction and the prediction of a person's future risk of offending).

25. As noted above, however, the Law Council considers that the most pressing issue is changing the substantive nature of CDOs to criminal orders, not merely the particular division of the court to which a CDO application must be allocated. The circumstance noted above, in relation to the close connection of post-sentence detention with criminal offences tends in favour of not only allocating CDO applications to the criminal division of the issuing court, but also the adoption of the criminal standard of proof, and criminal rules of evidence and procedure in relation to CDOs.

Questions 7 and 8: matters concerning children

Question 7. The AFP Minister can apply for a CDO against an offender who was under the age of 18 at the time he/she committed a relevant Part 5.3 offence (and has subsequently reached the age of majority in prison). Should there be a limitation to this power (considering an offender under a specific age at the time of offending would not necessarily have had the capacity to understand the implications of their offending in relation to Div 105A eligibility)?

Question 8. Do you consider that a CDO application made against an offender who committed the offence as a child is in contravention of the CRC?

26. The Law Council addressed these matters in its submission to the PJCIS review of Division 105A in September 2020, in which it made the following observations at p. 66 at [260]-[263] (footnotes omitted):

> *The Law Council has previously submitted that post-sentence preventative detention should only be available as a last resort in*

relation to persons who were children when the committed the relevant offence.

The Law Council remains concerned that the application of the CDO regime to such persons may be incompatible with Australia's obligations under the Convention of the Rights of the Child, and continues to support additional issuing criteria that unambiguously require the court to consider that the person was a child when the committed the relevant offence, and apply a 'last resort' threshold to such CDOs.

The Law Council notes that the Committee, in its 2016 report on the originating Bill, placed weight on the fact that a person's future risk for the purpose of a CDO application is assessed after they turn 18. However, it is the anterior conviction for a relevant offence, which occurred when the person was a child, that first determines whether a person can be subject to a CDO if they meet the 'unacceptable risk' threshold when they have completed their sentence.

The Law Council remains of the view that such offenders should be subject to specific issuing criteria for subsequent CDOs, which reflect the circumstance that they were under a special vulnerability when they committed the relevant offence; as distinct to an offender who was an adult when the committed the relevant offence.

Questions 9 and 10: State post-sentence regimes

Question 9. Are there safeguards or other aspects of similar State schemes which should be incorporated into Div 105A or procedures for which agencies operationalise Div 105A?

27. As a general observation, the Law Council considers that harmonisation with elements of State post-sentence detention regimes would not be the most effective strategy to improve safeguards in Division 105A. The Law Council notes that, apart from New South Wales,[8] State post-sentence detention regimes are not specific to terrorism. These regimes cover a far wider variety of offences, which are not uniform across all jurisdictions. There is considerable variation in the various types of violent offending covered and, in some cases, violent and sexual offending are combined into a single post-sentence scheme. This may limit the utility of those regimes as a precedent for a terrorism-specific post-sentence regime in Division 105A of the Criminal Code.

28. Moreover, as noted above, the UNHRC has found two (non-terrorism specific) post-sentence detention regimes in Queensland and New South Wales to be incompatible with the prohibition on arbitrary detention in Article 9 of the ICCPR. This further tends against placing reliance on such regimes as a basis for any Commonwealth post-sentence detention scheme.

29. Rather, if the CDO regime is to remain in force, contrary to the Law Council's preferred option that it sunset without renewal, the Law Council considers that the major improvements that should be made are those set out in its submission to the PJCIS review of AFP powers in September 2020. (See **Attachment 1** to this submission, pp. 55-79 at [204]-[332].)

[8] *Terrorism (High Risk Offenders) Act 2017* (NSW).

30. However, one such recommendation (number 33, at p. 65) supports the adoption of an additional issuing criterion for interim detention orders under Division 105A, which is modelled on paragraph 76(1)(c) of the *Serious Offenders Act 2018* (Vic). The latter provision prevents a court from making an interim detention order unless satisfied that the order is the public interest. As the Law Council noted, 'this would at least enable a respondent to make a public interest argument against the IDO [interim detention order] in lieu of a meaningful ability to challenge evidence put forward by the Minister for Home Affairs or their representative' (p. 64 at [255]).

Question 10. Has there been a case(s) where, under the State schemes, a judge has been found to have erred in his/her decision to issue or not issue a post-sentence detention order?

31. The Law Council has not identified any such matters from consultations with its membership as at February 2022. It may be that relevant State Governments could be in a position to provide more definitive information about the outcomes of their applications and any appeals they have lodged in their respective jurisdictions.

Questions 11 and 12: 'less restrictive measures'

Question 11. Assuming detention is inherently a more restrictive measure than controlled presence in the community, could there be a situation where, as a result of extremely strict conditions imposed by a control order (or an ESO), detention under a CDO would in practice be less restrictive to a high-risk terrorist offender? Should a control order be properly considered a less restrictive measure?

Question 12. Should there be any additional 'less restrictive measures' enacted in Div 105A? If so, what are they?

32. If the CDO regime is to remain in force, the Law Council considers that there should not be any statutory fetter on the ability of the issuing court to take into consideration any measures that it identifies as being less restrictive to a CDO, in the circumstances of the particular case. This reflects that the assessment of the relative degree of restriction imposed by various measures is likely to be a highly fact-specific exercise. It is important that the courts retain flexibility in these circumstances, with the assistance of submissions from the parties.

33. The Law Council made the following submissions to the PJCIS, in response to a request from that Committee to comment on a proposal by Government agencies[9] to use the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (**HRTO Bill**) as a vehicle to amend the CDO regime, to provide that a control order (**CO**) or an ESO are the only less restrictive alternatives that the court may consider in relation to a CDO application:

> ***Proposal (b): limitation of judicial discretion to assess less restrictive alternatives to CDOs***

[9] Attorney-General's Department and Department of Home Affairs, Supplementary Submission 5.3 to the PJCIS Review of the HRTO Bill, (May 2021), 2 at [4], paragraph (b): 'the proposed amendments would provide that ... ESOs and control orders are the only measures to be considered by a state or territory Supreme Court when deciding whether there is a 'less restrictive measure' to a continuing detention order (CDO) that would be effective in preventing the unacceptable risk posed by an offender'.

The Law Council does not support proposal (b) and encourages the Committee to recommend that it should not proceed, either as part of the HRTO Bill or in any other future legislative vehicle.

The present ability of the court to consider the existence and relative effectiveness of all less restrictive alternatives to a CDO, which are available in the circumstances of a particular case, is an important safeguard to the proportionality of post-sentence detention, and consequently both its human rights compatibility and compatibility with Chapter III of the Constitution.

Proposal (b) seeks to fetter the ability of the court to identify and assess less restrictive measures to a proposed CDO, so that it may only consider an ESO and a CO. This increases the risk that the regime may not be proportionate to the legitimate objective of protecting the community from the unacceptable risk presented by a high-risk terrorist offender who has completed their sentence of imprisonment.

The Law Council concurs with the submission of the AHRC [Australian Human Rights Commission] *that Supplementary Submission 5.3* [from the Attorney-General's Department and Department of Home Affairs, providing details of the proposal] *fails to provide substantive justification for weakening this fundamental safeguard. The supplementary submission refers to the possibility, as occurred in Benbrika, that the issuing court may consider any measure or action (or combination thereof) that it deems less restrictive, irrespective of whether those measures are designed specifically to manage the risk posed by a high-risk terrorist offender. That is, the court is concerned in functional or substantive terms with the likely effect of an alternative measure on managing the unacceptable risk presented by the person. It is not concerned with the subjective categorisation or 'label' ascribed to a particular measure (that is, as a 'HRTO-specific measure') under legislation or administratively by security or law enforcement agencies.*

However, there is no reason that this approach is inherently problematic, such that the ability of the court to make a factual assessment on the basis of all relevant evidence should be displaced or fettered in any way. It is open to the Minister for Home Affairs to make submissions to the court about the existence and likely effectiveness of alternatives. The supplementary submission does not identify reasoning underlying any concerns arising from this state of affairs.

Indeed, the result in Benbrika tends in strong support of this mechanism. The court considered, in detail, alternatives identified in that case, including 24-hour surveillance and the cancellation of the defendant's visa leading to his deportation from Australia (in addition to a CO) and found that these measures would not be effective in the circumstances. There is no apparent reason that the factual circumstances or necessarily fact-specific outcome in Benbrika should be the basis for a statutory restriction on the ability of the court to consider all relevant facts about the ability to manage a person's risk if they were not detained under a CDO.

The Law Council further concurs with the submissions of the AHRC that it is no answer to suggest that the issuing court has a residual discretion to decline to issue a CDO, even if it is satisfied that the issuing criteria

are met. Supplementary Submission 5.3 appears to assume that a court may be inclined to exercise this residual discretion if it considers that there are effective alternatives to a CDO, apart from those which are proposed to be prescribed expressly in the statutory issuing test (being ESOs and COs alone). The Law Council agrees with the AHRC that it is illogical and arbitrary to separate the relevant factual considerations in this way. The Law Council further agrees that that the remarks of Tinney J in Benbrika about the absence of judicial authority on the exercise of residual discretion, and the reluctance of the court to countenance its exercise in Benbrika, appear to make it less likely that court would exercise its residual discretion in this way.

Moreover, there is a legal risk that the proposal to place an express restriction on the meaning of the expression 'other less restrictive measure' in paragraph 105A.7(1)(c) so that it covers only ESOs and COs may be taken to evince an intention, by necessary implication, to remove any residual discretion that might otherwise exist to consider measures other than ESOs and COs, which the court considers to be less restrictive than a CDO and effective in managing the offender's risk. In other words, the implementation of proposal (b) might, itself, unintentionally limit the scope of any residual discretion to decline to grant an order on the basis of other, non-terrorism specific risk management options.[10]

34. Rather, the Law Council considers that the main change that should be made to Division 105A, in relation to facilitating judicial consideration of less restrictive alternatives to continued detention, is the enactment of a regime of ESOs which faithfully implements the recommendations of the third INSLM (especially as regards equivalence of the standard of proof and conditions with those applying to control orders, prior to the changes made by the HRTO Act in December 2021). This would ensure that it is open to the issuing court to automatically consider making an ESO in the event it is not satisfied that a CDO application has met the requisite statutory thresholds. It would obviate the need for a separate application to be made to a different court.

35. While the HRTO Act has now established an ESO regime, the Law Council refers to its submissions to the PJCIS on the HRTO Bill in relation to the terms of the proposed ESO regime, which identify significant areas of departure from the recommendations of the former INSLM. (Copies of the Law Council's submissions on the HRTO Bill are provided as **Attachments 2, 2A and 2B** to this submission). The Law Council further notes that the HRTO Bill was ultimately amended in Parliament in late 2021 to insert amendments moved by the government to restrict the discretion of the court to consider less restrictive alternatives to a CDO. In particular, paragraph 105A.7(1)(c) of the Criminal Code now provides that when the issuing court is considering less restrictive alternatives to a CDO (as required by the issuing criteria for those orders) it is only permitted to consider orders able to be made under Part 5.3 of the Criminal Code (that is, a control order under Division 104 or an ESO under Division 105A).

36. For the reasons summarised above, and as detailed further in **Attachment 2B** (at pp. 17-18), the Law Council recommends the repeal of this provision, so that the issuing court is not prevented from considering evidence of all measures which are, as a matter of fact, capable of constituting a less restrictive alternative to a CDO.

[10] Law Council of Australia, Supplementary Submission to the PJCIS Review of the HRTO Bill, (22 June 2021), 17-18 at [58]-[65].