Media Release

Law Council
OF AUSTRALIA

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Improvements required if CDO regime continues

Appearing before the Independent National Security Legislation Monitor (INSLM) today, the Law Council of Australia warned that if Australia retains its continuing detention orders (CDO) regime, further amendments are required to ensure that the CDO regime achieves its purposes of protecting the Australian community from the threat of terrorism and rehabilitating offenders.

“Boiled down to its most basic level, the CDO regime allows for the detention of an individual based on a prediction they may commit a future offence,” Law Council of Australia President, Mr Tass Liveris said.

“To date we have not seen any convincing evidence that continuing detention orders are a necessary or proportionate response to the threat of terrorism here in Australia,” Mr Liveris explained. Based on the experience of other countries with shared values facing a similar threat, the Law Council has recommended consideration be given to the UK model of extended determinate sentencing as a less restrictive alternative to CDOs.

The Law Council has made extensive submissions on the post-sentence regime for high-risk terrorist offenders since its introduction. In these submissions, the Law Council has made detailed recommendations, if the CDO regime is to be retained, on the issuing thresholds, applicable rules of evidence, and statutory limitations on indefinite detention as a result of multiple, consecutive CDOs being issued in relation to an individual.

A focus of the Law Council’s appearance before the second public hearing of the INSLM’s Review of Division 105A of the *Criminal Code Act 1995* (Cth) was to highlight the incompatibility of CDOs with human rights law.

“The Law Council considers that the CDO scheme fails to meet the requirement that post-sentence detention only be used as a last resort. Further amendments are required to ensure that when a Court is considering whether an extended supervision order (ESO) will be an alternative to imposing a CDO, the conditions of ESOs and control orders can be tailored to meet the specific risks posed by an offender. An issuing Court should be able to take into consideration measures that it identifies as being less restrictive to a CDO.”

The Law Council also called for the power of the Minister to make arrangements for the accommodation of offenders subject to a CDO to be subject to explicit, human rights-based preconditions.

“In addition, we believe the definitions of offences which allow a convicted person to be the subject of a CDO should be framed by reference to the actual sentence imposed on the person, not merely by a broad category of offence and their applicable maximum penalties,” Mr Liveris said.

The Law Council supports the Australian Government establishing a dedicated legal assistance funding program for continuing detention orders and notes that the Attorney General’s Department is still considering implementation of the PJCIS’ October 2021 recommendations in this regard.

Finally, the Law Council welcomes the INSLM’s consideration of the inter-operation of the CDO regime with Control Orders under Division 104 of the Criminal Code and other state orders. The Law Council has previously highlighted the risk that Control Orders could be sought as a form of ‘repêchage’ for a failed ESO application.

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