2. Scope of the continuing detention order regime

Range of offences

2.1 This chapter discusses provisions of the Bill relating to the scope of the offences included in the proposed continuing detention order (CDO) regime and their application to persons. The Bill provides that a CDO may be made in relation to a person if they have been convicted of international terrorist activities using explosive or lethal devices,[1] treason,[2] serious terrorism offences which carry a maximum penalty of seven or more years,[3] or foreign incursions and recruitment offences.[4] A list of the offences which fall within the scope of proposed section 105A.3 and maximum penalties for these offences is included below.

2.2 A CDO may only be granted against a person who is serving a sentence of imprisonment for one of these offences or has a continuing detention order, or interim detention order, in force against them.[5] A CDO may only be

[1] Criminal Code, Subdivision A of Division 72.

[2] Criminal Code, Subdivision B of Division 80.

[3] Criminal Code, Part 5.3.

[4] Criminal Code, Part 5.5.

[5] Proposed paragraph 105A.3(1)(b).

granted against a person who is at least 18 years old when their sentence ends.[6]

Table 2.1 Offences included within proposed section 105A.3

Offence	Penalty threshold
International terrorist activities – Subdivision A of Division 72	
International terrorist activities using explosive or lethal devices (s72.3)	Imprisonment for life
Treason – Subdivision B of Division 80	
Causing the death of, harm to or imprisoning the Sovereign, the heir apparent of the Sovereign, the consort of the Sovereign, the Governor-General or the Prime Minister (s80.1(1)(a)–(c))	Imprisonment for life
Levying war, or any act preparatory to levying war on the Commonwealth (s80.1(1)(d))	Imprisonment for life
Instigating a person who is not an Australian to make an armed invasion of the Commonwealth or a Territory of the Commonwealth (s80.1(1)(g))	Imprisonment for life
Materially assisting enemies at war with the Commonwealth (s80.1AA(1))	Imprisonment for life
Assisting countries engaged in armed hostilities against the Australian Defence Force (s80.1AA(4))	Imprisonment for life
Terrorism offences - Part 5.3	
Committing a terrorist act (s101.1)	Imprisonment for life
Providing or receiving training connected with terrorist acts (s101.2)	25 years imprisonment
Possessing things connected with terrorist acts (s101.4)	15 years imprisonment

[6] Proposed paragraph 105A.3(1)(c).

Collecting or making documents likely to facilitate terrorist acts (s101.5)	15 years imprisonment
Other acts done in preparation for, or planning, terrorist acts (s101.6)	Imprisonment for life
Directing the activities of a terrorist organisation (s102.2)	25 years imprisonment
Membership of a terrorist organisation (s102.3)	10 years imprisonment
Recruiting for a terrorist organisation (s102.4)	25 years imprisonment
Training involving a terrorist organisation (s102.5)	25 years imprisonment
Getting funds to, from or for a terrorist organisation (s102.6)	25 years imprisonment
Providing support to a terrorist organisation (s102.7)	25 years imprisonment
Financing terrorism (s103.1)	Imprisonment for life
Financing a terrorist (s103.2)	Imprisonment for life
Foreign incursions and recruitment - Part 5.5	
Incursions into foreign countries with the intention of engaging in hostile activities (s119.1)	Imprisonment for life
Engaging in a hostile activity in a foreign country (s119.1(2))	Imprisonment for life
Entering in, or remaining in, declared areas (s119.2)	10 years imprisonment
Preparations for incursions into foreign countries for purpose of engaging in hostile activities (s119.4)	Imprisonment for life
Allowing use of buildings, vessels and aircraft to commit offences under s119.4 (s119.5)	Imprisonment for life
Recruiting persons to join organisations engaged in hostile activities against foreign governments	25 years imprisonment

(s119.6)	
Recruiting persons to serve in or with an armed force in a foreign country (s119.7)	10 years imprisonment

Source: Criminal Code

Preparatory offences

2.3 The proposed scope of the CDO regime was the subject of several submissions. Key concerns centred on the inclusion of preparatory and treason offences in the range of offences for which a CDO could be made and the threshold for the length of imprisonment.

2.4 'Preparatory offences' relate to activities that do not amount to conducting a terrorist attack but instead facilitate the planning and conduct of terrorist attacks or enable the existence and growth of terrorist organisations. These offences include providing or receiving training connected with terrorist acts,[7] possessing things connected with terrorist acts,[8] recruiting for a terrorist organisation,[9] financing a terrorist organisation,[10] and providing support to a terrorist organisation.[11]

2.5 Several submitters argued that preparatory offences should not be included within the scope of the CDO regime because they do not represent the most serious form of terrorist offences. At the public hearing, Dr Tamara Tulich stated that preparatory offences

> are already subject to significant penalties. To then enable someone [to be subject to a CDO] who has only taken actions that are at the very beginning of criminality before there is clear criminal intent to engage in a terrorist act is not supportable.[12]

[7] Criminal Code, section 101.2.

[8] Criminal Code, section 101.4.

[9] Criminal Code, section 102.4.

[10] Criminal Code, section 102.6.

[11] Criminal Code, section 102.7.

[12] Dr Tamara Tulich, *Committee Hansard*, 14 October 2016, p. 26.

2.6 Human Rights Watch also indicated that the inclusion of preparatory acts within the definition of 'terrorist offences' under Part 5.3 was at odds with the UN special rapporteur on human rights and counterterrorism, who stated that

> the concept of terrorism includes only those acts or attempted acts 'intended to cause death or serious bodily injury' or 'lethal or serious physical violence'…to otherwise risks human life.[13]

2.7 Similarly, the Australian Human Rights Commission stated that an individual convicted of entering or remaining in a declared area of a foreign country where a listed terrorist organisation is engaging in hostile activity should not be eligible for a CDO.[14] It noted that this offence does not require any intention to engage in terrorist activity and that it may be difficult for that individual to demonstrate that they were in that area for a legitimate purpose. A 'legitimate purpose' is narrowly defined and does not include visiting friends, transacting business or attending to personal or financial matters.[15]

2.8 During the public hearing, the Commission recommended removing the declared area offence from the scope of the CDO regime as it was not sufficiently serious to justify the infringement on individual liberty. It stated that

> merely by being in a declared area somewhere overseas, you are taken to have committed an offence. It seems like that is very different from the purpose of this regime, which is to try and prevent the public from being harmed by people who do intend to harm them.[16]

2.9 The Law Council of Australia asserted that the preparatory nature of these offences made it difficult to accurately predict whether the relevant offender posed an unacceptable risk to the community.[17]

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[13] Human Rights Watch, *Submission 13*, p. 5.

[14] Australian Human Rights Commission, *Submission 8*, p. 16; see Criminal Code, section 119.2.

[15] Australian Human Rights Commission, *Submission 8*, p. 16.

[16] Mr. Edgerton, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 22.

[17] Law Council of Australia, *Submission 4*, p.15.

2.10 In their submission to the Committee, Dr Rebecca Ananian-Welsh, Dr Nicola McGarrity, Dr Tamara Tulich and Professor George Williams recommended that the definition of a 'serious Part 5.3 offence' be narrowed to the offence of engaging or attempting to engage in a terrorist act contrary to section 101.1 of the Criminal Code. Human Rights Watch also recommended limiting the use of CDOs to terrorist offences amounting to acts of violence.[18]

2.11 Alternately, Dr Ananian-Welsh et al recommended that the inclusion of preparatory offences within the scope of the CDO regime be limited to offences under Part 5.3 that caused, or were intended to cause, the death of another person or grievous bodily harm to another person.[19]

2.12 The Attorney-General's Department submitted that it was appropriate to include preparatory offences within the scope of the CDO regime, noting the majority of terrorism prosecutions have been connected to preparatory offences

> intended to cause serious damage to property and infrastructure and serious harm, or death, to people.[20]

2.13 The Department indicated the gravity of these offences is also reflected in the maximum penalties that are available.[21] For instance, an individual convicted for financing a terrorist may be subject to life imprisonment,[22] or be sentenced for a maximum of 25 years for recruiting on behalf of,[23] or otherwise providing support to,[24] a terrorist organisation.

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[18] Human Rights Watch, *Submission 12*, p. 7.

[19] Ananian-Welsh et al, *Submission 6*, p. 4.

[20] Attorney-General's Department, *Submission 9.2*, p. 3.

[21] Attorney-General's Department, *Submission 9.2*, p. 3.

[22] Criminal Code, section 103.2.

[23] Criminal Code, section 102.4.

[24] Criminal Code, section 102.7.

Length of imprisonment

2.14 To ensure that the scheme is appropriately targeted, it is intended that the regime only applies to terrorist offences under Part 5.3 which carry a maximum penalty of 7 or more years of imprisonment. The Attorney-General's Department stated that it considered the maximum penalty of an offence to be an appropriate threshold as it was

> the best, most objective measure of the seriousness of the offence as compared to the sentence actually imposed by the sentencing court, which can take into account other factors not relevant to the seriousness of the offending.[25]

2.15 A number of submitters indicated concerns about the scope of the CDO regime. The Law Council of Australia recognised that the CDO scheme is intended to be applied to particularly serious terrorism-related offences and that the seven year threshold is consistent with the NSW High Risk Offender legislation.[26] However, the Council noted that

> the maximum sentence of an offence is intended for the most serious behaviour and does not necessarily reflect the gravity of the particular terrorist offender's conduct.[27]

2.16 During the public hearing, the Australian Human Rights Commission stated:

> Our recommendation is that [the scope of the CDO regime] should be limited to the most serious offences, given the very serious infringement on liberty.

2.17 During the public hearing, Dr Tulich endorsed restricting the scope to include offenders with head sentences of at least seven years, stating that this was an important safeguard.[28] The Law Council of Australia made a similar recommendation in its submission.[29]

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[25] Attorney-General's Department, *Submission 9.2*, p. 4.

[26] *Crimes (High Risk Offenders) Act 2006* (NSW), section 5A.

[27] Law Council of Australia, *Submission 4*, p. 10.

[28] Dr Tulich, *Committee Hansard*, 14 October 2016, pp. 28–29.

[29] Law Council of Australia, *Submission 4*, p. 10.

Inclusion of treason offences

2.18 Treason may include causing the death of or harm to the Sovereign, the Governor General or the Prime Minister; levying war (or doing acts preparatory to levying war) against the Commonwealth; instigating a person who is not an Australian citizen to make an armed invasion of the Commonwealth or one of its territories; materially assisting enemies at war with the Commonwealth; or assisting countries engaged in armed hostilities against the Australian Defence Force.[30]

2.19 During the public hearing, the Law Council argued that treason threatens particular individuals such as the Prime Minister and Governor-General whereas terrorism can relate to a mass incident harming a large number of people. The Law Council argued that treason can be distinguished from the other offences listed in proposed paragraph 105A.3(1)(a) which involve international terrorist activities using explosive or lethal devices, serious Part 5.3 terrorism offences and foreign incursions and recruitment offences.[31] During the public hearing the Law Council stated

> the key part of the definition of a terrorist offence is that it is politically motivated. Most crime is not. That is the big distinction. A query: would you say that the killing of a Prime Minister is politically motivated? It may or may not be. It may be that someone has a personal grudge against the Prime Minister.[32]

2.20 The Law Council recommended that treason offences be removed from the scope of the CDO regime as the rationale for their inclusion had not been provided, stating:

> Our initial approach to the use of extraordinary powers is that they need to be very directly targeted at the focus. The inclusion of some of the terrorist offences, indeed, but certainly the treason offences, seem to be broader than [it] needs to be. That is the problem, and when we looked for some justification of the inclusion of that category in the papers, we did not find it.

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[30] Criminal Code, Division 80.

[31] Dr David Neal SC, Member, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 7.

[32] Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 8.

> We think that if that measure is going to be taken, that needs to be justified and, as I say, we have not seen what the justification is that has been offered.[33]

2.21 While noting that treason is not always terror-related, the Attorney-General's Department submitted that

> the offences listed in section 105A.3 are a group of offences for which a person is incarcerated that may suggest they are a type of person likely to pose a risk down the track of committing a serious terrorism offence.[34]

Committee comment

2.22 The Committee notes the views of some submitters that preparatory offences should be differentiated from the offences of engaging in or attempting to engage in a terrorist act, and should not fall under the scope of the Bill as they represent a lesser degree of harm. However the Committee notes that the inclusion of an offence only renders a person able to be *considered* for a CDO should it be determined that they pose an unacceptable risk at the time of their release. It is appropriate then that conviction for a preparatory offence, especially where this is of a significant and serious nature, should fall under the scope of the Bill.

2.23 In regard to the inclusion of treason offences, the Law Council of Australia raised concerns that these offences are not necessarily comparable to the other terrorism-related offences proposed for inclusion in the Bill. The Committee accepts this proposition and also understands that no person in Australia has been prosecuted for treason since the end of the Second World War. The Committee is concerned to ensure that the scope of offences is rightly limited to terrorism-related activities, and it does not consider that the inclusion of treason is necessary or appropriate. It is recommended that treason offences are removed from the scope of the Bill.

2.24 Similarly the Committee considered the scope of the foreign incursions and recruitment offences in Part 5.5 of the Criminal Code, with a view to assessing the necessity and appropriateness of their inclusion in the Bill. The

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[33] Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 7.

[34] Mr Anthony Coles, Assistant Secretary, Counter-Terrorism and Intelligence Unit, Attorney-General's Department, *Committee Hansard*, 14 October 2016, p. 49.

Committee was satisfied that the majority of these offences were likely indicative of serious terrorist affiliations or allegiances, and were appropriate for inclusion. However, the Committee was concerned about the breadth of section 119.7 of the Criminal Code which refers to recruiting persons to serve in or with an armed force in a foreign country, and includes:

- subsection 119.7(1) – Recruiting others to serve with foreign armed forces,
- subsections 119.7(2) and (3) – Publishing recruitment advertisements, and
- subsection 119.7(4) – Facilitating recruitment.[35]

2.25 Subsections (2) and (3) were differentiated as broader in scope than the recruiting others and facilitating recruitment offences, and not necessary and appropriate for the object of the Bill. Accordingly, it is recommended that proposed section 105A.3 of the Bill be amended to remove the offences of publishing recruitment advertisements from the scope of the CDO regime.

Recommendation 2

2.26 The Committee recommends that proposed section 105A.3 in the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to remove from the scope of offences section 80(B) of the Criminal Code, which refers to treason.

Recommendation 3

2.27 The Committee recommends that proposed section 105A.3 in the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to remove from the scope of offences subsections 119.7(2) and (3) of the Criminal Code, which refer to publishing recruitment advertisements.

[35] Criminal Code Part 5.5 s 119.7

Treatment of minors

2.28 A CDO may only be made in relation to offenders aged 18 years or over at the end of their sentence.[36] This means that a CDO can be granted against an individual who was a minor when they committed the relevant offence but will be 18 years or over when their sentence ends.[37]

2.29 A number of submitters expressed concerns about the inclusion of individuals in the scheme who were minors at the time the relevant offence occurred.[38] Members of the Victorian Bar Human Rights Committee considered this outcome 'particularly harsh and inconsistent with the United Nations Convention on the Rights of the Child.'[39] The members noted that while the Court can consider any factor it considers relevant when making a CDO, it is

> unclear whether and to what extent the Bill requires the Court to take into account the offender's previous status as a child when considering whether to impose a CDO on the offender who has reached adulthood while imprisoned.[40]

2.30 In its submission, the Law Council of Australia endorsed General Comment No. 10 of the United Nations Committee on the Rights of the Child, which states:

> Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law … the traditional objectives of criminal justice, such as repression/retribution, must

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[36] Proposed paragraph 105A.3(1)(c).

[37] Law Council of Australia, *Submission 4*, p. 23.

[38] Law Council of Australia, *Submission 4*, p. 26; Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 14; Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 11.

[39] Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 11.

[40] Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 11.

give way to rehabilitation and restorative justice objectives in dealing with child offenders.[41]

2.31 The Law Council stated that this emphasis on rehabilitation meant that making a CDO against individuals who were minors at the time of conviction should be an act of last resort.[42] If a CDO was to be made, a number of submitters recommended specifically requiring the Court to take into account the age of the child at the time of offending.[43] A number of submitters indicated that it was unclear the extent to which courts could take the age of the offender into account when determining whether to impose a CDO.[44]

Committee comment

2.32 Currently, the Bill proposes that the Attorney-General may make an application for a CDO for a person who is over the age of 18 years, has been convicted of a relevant offence and is considered to be an unacceptable risk to the community. Concerns were raised that this may potentially result in the application of a CDO to a person who is over 18 years at the time of their release, but who may have been a minor at the time of the offence.

2.33 The Committee acknowledges these concerns, the important safeguards that are appropriate for minors, and the challenging nature of responding to the radicalisation of young people.

2.34 The Committee considers it an important distinction that a person must be over the age of 18 at the time of the release in order for the Attorney-General to apply to the Court to consider a CDO. Further, the assessment of the terrorism risk posed must relate to the assessed terrorism risk at the time of

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[41] Law Council of Australia, *Submission 4*, p. 24.

[42] Law Council of Australia, *Submission 4*, p. 24.

[43] Law Council of Australia, *Submission 4*, p. 26; Mr Santow, Australian Human Rights Commission, *Committee Hansard,*14 October 2016, p. 14; Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 11.

[44] Law Council of Australia, *Submission 4*, p. 26; Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 11.

the person's release (as an adult) and is not based on the acts or assessed risk at the time of the relevant offence.

Interaction of the CDO regime with bail and parole

2.35 Generally, CDOs are designed to apply to individuals who are already in custody, whether it be to serve a sentence for the offences outlined above, or due to a CDO or interim detention order.[45]

2.36 In a supplementary submission, the Attorney-General's Department stated that where a terrorist offender is granted parole prior to the expiry of their sentence, they could not be considered for a CDO. However in instances where parole is revoked and the offender is returned to prison, then a CDO may be considered at the end of the offender's sentence.[46]

2.37 In its submission, the Law Council of Australia indicated that the interaction between the Bill and relevant parole laws is unclear.[47] On a practical level, it is unlikely that any offender who is liable to meet the threshold for a CDO would be successful in obtaining early release on parole. To avoid any confusion, the Law Council recommended amending the Explanatory Memorandum to clarify the manner in which parole is intended to interact with the CDO regime.[48]

2.38 The Law Council of Australia also recommended clarifying the interaction between the Bill and relevant bail provisions.[49] The Law Council stated that proposed subsection 105A.18 allows a police officer to take an offender into custody and detain them for the purposes of giving effect to a CDO. However, it also provides that the police officer has the same powers as if

[45] Proposed paragraph 105A.3(1)(b); Explanatory Memorandum, p. 19.

[46] Attorney-General's Department, *Submission 9.2*, p. 4.

[47] Law Council of Australia, *Submission 4*, p. 28.

[48] Law Council of Australia, *Submission 4*, p. 29.

[49] Law Council of Australia, *Submission 4*, p. 28.

they were arresting the offender, which would include granting them bail.[50] The Law Council concluded that

> this power of arrest and detention hinges on there being a detention order in force in respect of the offender, an argument could easily be made that, in those circumstances, the offender would not be entitled to conditional liberty in any event.[51]

Committee comment

2.39 Given the threshold of 'unacceptable risk to the community' that is required for a Court to grant a CDO, on a practical level the Committee considers it is unlikely that any offender who is liable to meet the threshold for a CDO would be successful in obtaining early release on parole. Nonetheless, to address the issue raised by the Law Council of Australia, the Committee considers it appropriate that the Bill and Explanatory Memorandum provide clarity on the manner in which both parole and bail provisions are intended to interact with the CDO regime.

2.40 If a person has met the conditions for and been granted parole, then these are not circumstances in which a CDO would expect to be considered. It is the view of the Committee and the Committee considers it the intention of the Bill that a CDO cannot be granted where a person has been released on parole prior to the end of their custodial sentence. However, there may be circumstances where a person with a conviction for a relevant offence has parole revoked and a CDO is then granted at the end of their sentence if they are considered to pose an unacceptable risk of carrying out a terrorism-related activity.

2.41 The Committee also notes the Law Council's suggestion that the regime's interaction with relevant bail laws be clarified – namely to make explicit that a person subject to a CDO is not eligible for parole, a person detained for the purposes of giving effect to a CDO may not apply for bail, but a person subject to a CDO and charged with a subsequent offence is entitled to seek bail for that offence.

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[50] Proposed section 105A.18.

[51] Law Council of Australia, *Submission 4*, pp. 27–28.

Recommendation 4

2.42 The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to clarify the interaction between parole and bail provisions, and make explicit that:

- **a person is not eligible for parole if that person is subject to a continuing detention order,**
- **a person detained for the purposes of giving effect to a continuing detention order is not entitled to seek bail, and**
- **a person subject to a continuing detention order and charged with a further offence is entitled to make an application for bail for that offence.**

Successive use of CDOs

2.43 According to the Bill, the period of a CDO must represent a period of time that the Court is satisfied is reasonably necessary to prevent the unacceptable risk to the community and cannot exceed three years.[52] This does not prevent the Attorney-General from making application and the Court granting successive CDOs that commence immediately after the previous CDO ceases to be in force.[53]

2.44 There is no limit to the number of CDOs that may be made against a terrorist offender.[54] In responses to questions on notice, the Attorney-General's Department noted that

> at the expiry of that [CDO] period, a further application can be made and the court will need to consider whether it is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is

52 Proposed subsection 105A.7(5).

53 Proposed subsection 105A.7(6).

54 Explanatory Memorandum, p. 22.

> released into the community and that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.[55]

2.45 The Attorney-General's Department considered it appropriate for courts to have the discretion to make successive CDOs because the regime was designed to protect the community:

> If a court is satisfied that this test is met, it is appropriate for the offender to continue to be detained in order ensure the safety and protection of the community, regardless of how many previous continuing detention orders have been made in relation to that offender.[56]

2.46 A number of submitters indicated concern that the ability to make successive CDOs will in effect enable indefinite detention of terrorist offenders. The Muslim Legal Network (NSW) stated that it was

> extremely concerned as this effectively leads to indefinite detention. Whilst we are opposed to continuing detention orders as a principle, if they are to be legislated, we submit that the period of orders should be reduced and successive applications should be limited.[57]

2.47 In its submission to the Committee, the Law Council of Australia cited the experience of the United Kingdom when it established an indefinite detention regime for high risk offenders:

> [I]t was ultimately abolished in 2012 following significant criticism in relation to the low threshold for establishing risk, and the high requirements for release.[58]

2.48 The Law Council's submission discussed the United Kingdom's extended determinate sentence framework, which replaced the indefinite detention regime for high risk offenders. The current regime allows the Court to detain high risk offenders where they present a significant risk to the public of committing certain offences. This framework limits the extended

[55] Attorney-General's Department, *Submission 9.3*, p. 2.

[56] Attorney-General's Department, *Submission 9.3*, p. 2.

[57] Muslim Legal Network, *Submission 11*, p. 6.

[58] Law Council of Australia, *Submission 4*, p. 12.

imprisonment period to five years and the combined total of the prison term and extension period cannot exceed the maximum sentence of the offence committed.[59]

2.49 Having regard to the United Kingdom's experiences, the Law Council recommended that a maximum prescribed term of ongoing detention should be set out in the Bill or alternatively, that there should be a limit on the number of successive CDOs that can be made.[60]

2.50 Likewise, the joint councils for civil liberties recommended that the provision relating to successive CDOs be amended to include a limit on the number that can be made against an individual.[61] In its submission, the joint councils stated that:

> There is an explicit provision clarifying that the Court may make successive continuing orders. This means that the period of detention that can result within the CDO regime is potentially indefinite. The CCLs consider this to be unreasonable and excessive.[62]

2.51 Similarly, the Australian Lawyers Alliance criticised the ability for courts to make an unlimited number of CDOs.[63]

2.52 During the public hearing, Dr Tulich stated that it was crucial for terrorist offenders to be provided with adequate rehabilitation and deradicalisation opportunities in the first instance, so that the application for CDOs would be a last resort. She stated that

> without having those programs in place and available to individuals who are convicted of terrorism related offences that might come under the post-sentence detention regime, then we are setting those individuals up to be subject to potentially indefinite detention.[64]

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[59] Law Council of Australia, *Submission 4*, p. 13.

[60] Law Council of Australia, *Submission 4*, p. 13.

[61] Joint councils for civil liberties, *Submission 14*, p. 12.

[62] Joint councils for civil liberties, *Submission 14*, p. 12.

[63] Australian Lawyers Alliance, *Submission 3*, p. 4.

[64] Dr Tulich, *Committee Hansard*, 14 October 2016, p. 25.

Committee comment

2.53 The Committee acknowledges concerns regarding the application of successive CDOs and suggestions that this could amount to indefinite detention.

2.54 The Committee notes that indefinite definition is not the intent of the Bill, although the Committee recognises that it is possible for a person to be held for prolonged periods beyond their sentence if successive CDOs are applied for and granted by the Court.

2.55 The issue of the application of successive CDOs and the resulting detention over a prolonged and indeterminate period was considered carefully by the Committee. Critical to the Committee's consideration is that the Attorney-General must initiate a new application for each new CDO and that application is considered by the Court—that is, an existing CDO cannot be extended and any application for a successive CDO must be considered by the Court as if it were the first application for a CDO. The Court will have the same capacity to consider expert evidence and the same requirement that an assessment be undertaken that the offender meets the threshold of a high probability of posing an unacceptable risk to the community. Each new application for a CDO must establish this threshold with the burden of proof on the Attorney-General, and the final determination resting with the Court. Further, each CDO attracts anew the same review rights.

2.56 The Committee considers that setting the maximum term of a CDO at three years, and requiring a new application, consideration and assessment of present risk at the time of granting each CDO, provide important safeguards in the regime against claims of arbitrary or indefinite detention.

2.57 However, the Committee recognises that procedural fairness in the successive assessment of risk when a CDO is applied for relies on an offender’s access to rehabilitation programs and opportunities.

2.58 During the inquiry there was some focus on the provision of rehabilitation programs prior to the conclusion of an offender’s sentence. The Committee is concerned to ensure that appropriate rehabilitation programs and opportunities should continue to be made available to all offenders who are

subject to a CDO. The development of and access to rehabilitation programs is discussed in Chapter 4.