3. Making an application for a continuing detention order

3.1 The chapter considers matters integral to the process of making an application for a continuing detention order (CDO), namely

- the timing of CDO and interim detention order applications,
- the standard of proof required,
- matters that must be considered by the Court,
- the use of relevant experts and risk assessment tools,
- the offender's access to information and legal representation,
- review and appeal rights, and
- alternatives to CDOs.

Timing of CDO applications

3.2 The Bill enables an application for a CDO to be made in the last six months of the terrorist offender's sentence.[1] This provision is intended to ensure that the offender is given time to demonstrate they are no longer a risk to the community prior to being assessed by an independent expert and eventually, the Court.[2]

[1] Proposed section 105A.5(2).

[2] Attorney-General's Department, *Submission 9,* p. 6.

3.3 The Attorney-General's Department's submission noted that the timing has been modelled on the NSW, Western Australian and Queensland sex offender schemes.[3] However, these jurisdictions have expressed concerns about this timeframe to the Attorney-General's Department, indicating that it may not allow enough time for:

- the relevant expert or experts to complete an assessment and prepare the necessary report, and
- to allow offenders adequate time to prepare for their hearings, to instruct counsel, analyse evidence and to make arrangements for witnesses to give evidence.[4]

3.4 In its submission to the Committee, the Department outlined the process that must be completed in the six months prior to the completion of the terrorist offender's sentence:

- an application for a CDO is made to the Court,[5]
- the applicant must, subject to proposed subsection 105A.5(5), give a copy of the application to the offender personally within two business days after the application is made,[6]
- a preliminary hearing must be held within 28 days after a copy of the application is given to the offender for the Court to consider appointing one or more relevant experts,[7]
- the relevant expert who is appointed must conduct an assessment of the risk of the offender committing a serious Part 5.3 offence if the offender is released into the community,[8]
- the offender is required to attend the assessment,[9]

[3] Attorney-General's Department, *Submission 9,* p. 6.

[4] Attorney-General's Department, *Submission 9,* p. 6.

[5] Proposed subsection 105A.6(1).

[6] Proposed subsection 105A.5(4).

[7] Proposed subsection 105A.6(2).

[8] Proposed paragraph 105A.6(4)(a).

[9] Proposed subsection 105A.6(5).

- the relevant expert must provide a report of their assessment to the Court, the Attorney-General and the offender,[10] and
- the Court may hold a hearing to determine whether to make a CDO.[11]

3.5 The Law Council of Australia recommended that the Bill be amended to ensure that an application for a CDO is finalised well in advance of the expiry of the person's sentence or CDO.[12] The Law Council expressed concerns about the time available to prepare for a CDO proceeding, noting that

> [t]he experience of criminal legal practitioners in relation to sex offenders preventive detention regimes suggests a difficulty with late applications which means that a person is required to remain in custody through all the adjournments. Adequate safeguards are required to ensure that the Crown makes applications with enough time for the person who might be subject to the order to respond and for disputed court processes to be properly prepared, heard and decided.[13]

3.6 During the public hearings, the Law Council indicated that it would be preferable to be able to commence proceedings 12 months prior to the conclusion of the sentence or CDO:

> There are vast volumes of material that have to be gone through. It really is imperative that at least six months before the release date the authority—the Attorney—notifies his or her intentions in relation to such an order … Twelve months before the expiry of the sentence in relation to such a person really should not be too much to ask. You ought to know by the time they have been in jail for that long what you think about whether an order such as this may be on the cards.[14]

3.7 The Australian Federal Police also supported the Law Council's view that it will likely be resource intensive and take some time to prepare for a CDO proceeding:

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[10] Proposed paragraph 105A.6(4)(b).

[11] Proposed subsection 105A.7(1).

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

[13] Law Council of Australia, *Submission 4,* p. 11.

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

> The actual application would be much shorter, but we have to make sure that we get it right—dot the i's and cross the t's. We would be looking at months, again, to get it right, particularly the first time we put it forward, because we would want to make sure that we had it right.[15]

Interim Detention Orders

3.8 Courts may make an interim detention order when the terrorist offender's sentence, or existing CDO, will come to an end before the Court has been able to make a decision on whether to make the CDO.[16] To make such an order, the Court must believe that the matter alleged in the CDO application would, if proved, justify making such an order.[17] The interim detention order may last for up to 28 days. While further interim detention orders may be made against the offender, they cannot last longer than three months in total.[18]

3.9 Ms Jacinta Carroll from the Australian Strategic Policy Institute stated that the interim detention orders

> sensibly provides for situations where there is a gap between the sentence and a determination by the court on continuing detention.[19]

3.10 The Law Council of Australia submitted that the current drafting of the Bill makes it very difficult to challenge interim detention orders.[20] The Law Council noted that in effect, the Court would consider the matters relied upon in support of the application, assume that they are proved, and then make an assessment as to whether or not those matters would justify a CDO:

> There's no way to challenge the matters relied upon in the first place because the court has to work on the assumption that those matters are proven. It

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[15] Mr Neil Gaughan, Assistant Commissioner and National Manager Counter-Terrorism, Australian Federal Police, *Committee Hansard,* 14 October 2016, p. 47.

[16] Attorney-General's Department, *Submission 9,* p. 7.

[17] Proposed subsection 105A.9(2).

[18] Proposed subsection 105A.9(5).

[19] Ms Jacinta Carroll, *Submission 7,* p. 4.

[20] Proposed section 105A.9.

> would only be open to Court to determine that the evidence, such as it is, is not sufficient.[21]

3.11 The Law Council of Australia recommended requiring courts to take the public interest into account when considering an application for an interim detention order:

> [I]n lieu of challenging the evidence the Attorney-General puts forward, the respondent could make a public interest argument against the IDO and, in considering the point, the Court can have regard to a wide range of matters it considers appropriate.[22]

3.12 The Australian National University (ANU) Law Students Counter-Terrorism Research Group recommended that offenders subject to an interim detention order be provided with a copy of the Court's reasons for deciding to make the order:

> It is important that an offender is provided with the reasons for any period they continue to remain in detention after the expiry of their conviction or previous order. The Human Rights Committee recently stressed the importance of reasons being provided to the detainee for their detention to be compatible with article 9(1) of the ICCPR, and found failure to provide reasons may be relevant towards violations of other obligations under the Convention.[23]

3.13 The New South Wales Government submitted that, based on its operational experience with its post-sentence detention scheme, the maximum three month period for interim detention orders may be insufficient:

> The present NSW post-sentence detention scheme has an equivalent three month timeframe for interim detention orders, however operational experience indicates this timeframe is difficult to meet. For example, often the information and documents required to inform an application including treatment completion reports, etc. are only available towards the end of an offender's time in custody.

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

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

[23] Australian National University (ANU) Law Students Counter-Terrorism Research Group, *Submission 5*, p.10.

> It is anticipated the information gathering and application process for the Commonwealth scheme will be far more complex than that which currently applies under the NSW scheme. Under the NSW scheme the operation of a 'High Risk Offenders Assessment Committee' facilitates review of risk assessments, co-operation between and co-ordination of relevant agencies, information sharing between relevant agencies, and makes recommendations about the taking of action under the NSW Act. The absence of equivalent facilitative structures under the proposed scheme causes further concern the three month interim period may be insufficient.[24]

3.14 The New South Wales Government further suggested that, 'to enable suitable post-order support arrangements to be made for the individual', consideration be given to including a mechanism to extend an interim detention order for a short period in the event that a continuing detention order is not granted.[25]

Committee comment

3.15 The Committee accepts the need for interim detention orders when an offender's sentence is to end prior to a court reaching a decision on whether to grant a CDO. The Committee is satisfied that 28 days is an appropriate maximum period for an interim detention order, given both the gravity of the threat to be assessed and consequence of detaining a person beyond their sentence.

3.16 The Committee received evidence from the New South Wales Government that a three month cap on the length of time for which interim detention orders can be granted may be insufficient. Interim detention order proceedings are not contested and do not require the Court to have regard to the factors in proposed sections 105A.7 (making a continuing detention order) and 105A.8 (matters a Court must have regard to in making a continuing detention order). As such, the Committee does not consider it would be appropriate to extend the maximum time for which interim orders can be issued.

[24] New South Wales Government, *Submission 17*, p. 3.

[25] New South Wales Government, *Submission 17*, p. 3.

3.17 The Committee notes that the provision in the Bill requiring an application for a CDO to be made in the last six months of a terrorist offender's sentence (or prior CDO) is modelled on State-based legislation and is intended to ensure that the offender is given time to demonstrate they are not a terrorist risk to the community, prior to being assessed under the scheme. The Committee received evidence, however, that the six month period may not provide enough time for the offender to prepare for their hearing and for all the relevant proceedings, including the expert assessment, to take place.

3.18 In light of these concerns, the Committee considers that extending the time in which an application can be made for a CDO to up to 12 months before the end of the offender's sentence would strike the right balance between giving the offender sufficient time to demonstrate their rehabilitation, and allowing enough time for all parties to prepare and for the proceedings to take place. This extension of time will also reduce the likelihood that a Court's decision on whether to make a CDO would still be pending at the end of the three-month maximum period for successive interim detention orders.

Recommendation 5

3.19 The Committee recommends that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to provide that an application for a continuing detention order may be commenced up to 12 months (rather than six months) prior to the completion of an offender's sentence, in order to provide all parties additional time to prepare and for the offender to seek legal representation.

Standard of proof

3.20 Before making a continuing detention order, proposed paragraph 105A.7(1)(b) in the Bill requires that the Supreme Court of a State or Territory be

> 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 released into the community.

3.21 Some participants in the inquiry questioned whether this was the most appropriate test for the CDO regime.[26] Of these, some argued that the criminal standard of proof 'beyond reasonable doubt' should replace the term 'high degree of probability', despite the proceedings being characterised in the Bill as civil rather than criminal.

3.22 For example, the Muslim Legal Network (NSW) submitted that even though the Explanatory Memorandum describes the detention of offenders under a CDO as preventative rather than punitive, 'in practical terms for the offender, the effect will be punitive'.[27] It went on to argue that

> it is inappropriate to apply the civil rules of evidence and procedure, in circumstances where the offender has originally been convicted of a criminal offence and may now be subject to this Bill's regime to prevent them from committing further criminal offences.
>
> Instead, criminal evidence and procedural rules should apply to continuing detention orders. By applying the civil evidence and procedure rules, the offender is denied of the important safeguards afforded to accused persons under our criminal legal system including at its core, a differing standard of proof. By not applying the criminal standard of proof, the regime avoids the need to apply procedural fairness and rights afforded in the ICCPR.[28]

3.23 The joint councils for civil liberties similarly argued that the regime could not be considered exclusively preventative.[29] The councils noted that there had been a 'divergence of views as to the precise meaning of "satisfied to a high degree of probability "and "unacceptable risk"' in similar legislation in other jurisdictions. The councils' submission recommended that

> [g]iven that the imposition of a CDO will lead to the detention of a person for up to three years with no restriction on the number of sequential CDOs the standards of proof and level of risk should be amended to 'beyond reasonable

[26] Law Council of Australia, *Submission 4*, p. 1820; Muslim Legal Network, *Submission 11*, p. 2021; Joint councils for civil liberties, *Submission 14*, p. 11; Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 9.

[27] Muslim Legal Network, *Submission 11*, p. 5.

[28] Muslim Legal Network, *Submission 11*, p. 20.

[29] Joint councils for civil liberties, *Submission 14*, p. 11.

doubt' and the 'unacceptable risk' should be clarified as meaning 'beyond more probably than not'.[30]

3.24 Again noting the gravity of the consequences of a CDO, the Law Council of Australia submitted that the 'unacceptable risk' test is not appropriate because:

- the lack of any established body of specialised knowledge on which to base predictions (discussed earlier in this chapter),
- the concept of risk is too fluid and may be very subjective, and
- it is inconsistent with the existing test for preventative detention orders, which requires a 'more certain' standard of reasonable grounds to suspect that the person will engage in a terrorist act.[31]

3.25 The Law Council consequently argued that the test for the CDO regime should be that the Court is 'satisfied beyond reasonable doubt that there are reasonable grounds to believe that the person will engage in a Part 5.3 offence'.[32]

3.26 At the public hearing, representatives of the Law Council added that not only would a 'beyond reasonable doubt' standard be consistent with the preventative detention order regime, it would also be consistent with 'the basis for sentencing the person in the first place'.[33]

3.27 Other participants in the inquiry were more accepting of the existing test in the Bill. The Australian Human Rights Commission identified the 'relatively high threshold' for the making of a CDO as an aspect of the regime that has been 'designed to achieve a post-sentence preventative detention scheme that is not arbitrary, and that is reasonable and proportionate to the purpose of ensuring community safety'.[34]

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[30] Joint councils for civil liberties, *Submission 14*, pp. 8–9.

[31] Law Council of Australia, *Submission 4*, pp. 19–20.

[32] Law Council of Australia, *Submission 4*, p. 20.

[33] Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 11.

[34] Australian Human Rights Commission, *Submission 8*, p. 14.

3.28 Similarly, the submission from Ananian-Welsh et al pointed out that part of the grounds for the High Court's upholding of legislation in the *Fardon* case was the 'high degree of probability' standard of proof (as opposed to 'balance of probabilities') and that the Court's discretion was subject to precise standards, including 'unacceptable risk'.[35]

3.29 Although firmly opposing the continuing detention regime, the Australian Lawyers Alliance noted that, in relation to future activities, the usual 'beyond reasonable doubt' standard of proof that is required to imprison persons in criminal cases 'clearly … cannot be met'.[36]

3.30 In response to questions from the Committee, the Attorney-General's Department stated that a CDO was considered civil rather than criminal in nature because there 'is no question of criminal guilt of an offence'. It argued that the Bill 'contains sufficient procedural safeguards to ensure that the terrorist offender may contest the evidence and the court may properly test that evidence'.[37]

3.31 The Department also submitted that requiring the Court to be satisfied to a 'high degree of probability' would be higher than the ordinary civil standard of 'more probable than not'. It claimed that the higher standard 'strikes the right balance between protection of the community and safeguarding the rights of the individual'. It further noted that the 'unacceptable risk' test, modelled on existing State regimes, would, unlike a 'reasonable grounds' test, require the Court to 'undertaking a balancing exercise'.[38]

Committee comment

3.32 The Committee carefully considered arguments received during the inquiry for the standard of proof and threshold test contained in the Bill to be amended. The Committee recognises the issue raised by applying civil standards of proof but considers that the standard of a high degree of

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

[36] Australian Lawyers Alliance, *Submission 3*, p. 18.

[37] Attorney-General's Department, *Submission 9.3*, p. 15.

[38] Attorney-General's Department, *Submission 9.3*, p. 16.

probability is appropriate in these circumstances. The Committee came to this conclusion for a number of reasons:

- The test in the Bill is modelled off similar regimes for high risk sex offenders and violent offenders States and Territories, with an existing body of jurisprudence. Aspects of the test have been important in the decision of the High Court to uphold the legislation in the *Fardon* decision.
- It is appropriate that a CDO proceeding be considered civil rather than criminal in nature. A CDO is not intended to re-punish past behaviour, but rather to protect the community from an unacceptable risk of future harm that may be caused by an unreformed convicted terrorist being released at the end of their prison sentence.
- Although it is a civil proceeding, the requirement of 'high degree of probability' proposed for the CDO regime raises the level of proof that will be required. This recognises the seriousness of the consequences of a CDO for the offender.
- The onus of satisfying the Court that the test has been met is borne by the Attorney-General (as the applicant for the order).
- It is appropriate that the CDO regime has a different threshold to the existing preventative detention order regime. Unlike the preventative detention order regime, the proposed CDO regime is a contested process in the Supreme Court of a State or Territory. It involves persons who have been previously proven to a criminal standard to have committed serious terrorism or terrorism-related offences. Rather than responding to a specific, imminent threat, it is intended to manage the medium-term, non-specific threat of the person reoffending.
- The 'unacceptable risk' test enables the Court to conduct a balancing exercise, taking the individual circumstances of the case into account. The Court could, for example, weigh up the level of probability that the terrorist offender may re-offend with the likely level of seriousness and impact of such a further offence.

Matters that must be considered by the Court

3.33 As outlined in Chapter 1, proposed section 105A.8 lists certain matters that the Court must have regard to in making its decision as to whether it is satisfied that the offender poses an unacceptable risk of committing a serious part 5.3 (terrorism) offence if released into the community.[39]

3.34 The Australian Human Rights Commission submitted that, while it is appropriate that the Court take the matters listed in the Bill into account, missing from the list is 'any factor relating to the impact of the order on the particular circumstances of the offender'. The Commission contrasted this omission with the control order regime, which requires an issuing court to 'take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances)'.[40]

3.35 Although noting that the list of matters in proposed section 105A.8 is non-exhaustive – and therefore does not prevent the impact of the order on the offender from being taken into account – the Commission argued:

> The corollary is that the Court is not prompted to give due weight to this matter, and the Court's failure to consider it altogether would not be considered an error. It should be noted, for example, that there have been differences in the interpretation of the phrase 'unacceptable risk' in the New South Wales legislation. By contrast, if the Bill were amended to require the Court to consider the impact of the order on the particular circumstances of the offender, it would better reflect the balancing process that international human rights law mandates, as well as providing greater practical assistance to the Court in the weighing-up process.[41]

3.36 The Commission recommended that proposed section 105A.8 be amended to require the Court to 'have regard to the impact of the order on the particular

[39] Proposed section 105A.8. The specific factors that must be considered are listed in Chapter 1 of this report.

[40] Australian Human Rights Commission, *Submission 8*, pp. 21–22.

[41] Australian Human Rights Commission, *Submission 8*, p. 22.

circumstances of the offender' when making its decision about the level of risk.[42]

3.37 As also referred to in Chapter 1, a joint submission from Ananian-Welsh et al highlighted that, during its upholding of the legislation in the *Fardon* decision, the High Court had emphasised that 'the separation of powers requires that a court not be capable of avoiding the rules of evidence'. The submission recommended that an ambiguity in the Bill concerning the application of the rules of evidence should be addressed in order to reduce the risk of constitutional challenge.[43]

3.38 Specifically, Ananian et al noted the broad nature of the list of matters in proposed section 105A.8, including 'any report' of a relevant expert, 'the results of any other assessment …', 'any other information the Court considers relevant' and other similarly worded matters. Ananian-Welsh et al argued that 'ambiguity arises as to whether the obligation on the Court to consider these matters' is subject to the requirements in sections 105A.13 and 105A.7 for the rules of evidence and procedure for civil matters to be applied, and for the Court to ground its decision in admissible evidence:

> This ambiguity creates a potential for a loophole by which information not subject to the rules of evidence may be adduced in these proceedings. It follows that the provisions risk constitutional challenge.[44]

3.39 Following questioning on this issue at the public hearing, Dr Ananian-Welsh indicated that the ambiguity could be resolved 'quite simply' by inserting

> [a] subsection at the end of section 105A.8 that clarified that when the court is taking those matters listed in that section into account the rules of evidence apply.[45]

3.40 In a supplementary submission, the Attorney-General's Department expressed its view that, under the unamended Bill, the matters set out in

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[42] Australian Human Rights Commission, *Submission 8*, p. 22.

[43] Ananian-Welsh et al, *Submission 6*, p. 7.

[44] Ananian-Welsh et al, *Submission 6*, p. 7.

[45] Dr Ananian-Welsh, *Committee Hansard*, 14 October 2016, p. 28.

proposed section 105A.8 would already be subject to the requirements of sections 105A.13 and 105A.7.[46]

Committee comment

3.41 The Committee notes the concern of the Australian Human Rights Commission that the Bill does not require the Court, when deciding on whether to make a CDO, to consider the impact of an order on the particular circumstances of the offender. However, the Committee does not agree that the Bill needs to be amended in this regard. The Committee notes that, while the particular impact of the order on the offender is not listed as a mandatory item for the Court to consider, proposed section 105A.8 does require the Court to have regard to 'any other matter the Court considers relevant'. Given that the making of a CDO is a contested proceeding with strong procedural safeguards, there would be adequate opportunity for the offender (or their legal representative) to attempt to convince the Court as to why the particular circumstances of the offender should be considered a relevant matter.

3.42 The Committee notes that a potential ambiguity – highlighted in the submission from Ananian-Welsh et al – arises in proposed section 105A.8 as to whether the rules of evidence are intended to apply to the matters that the Court must have regard to in its decision on whether to issue a control order. The Committee understands that it is intended that the rules of evidence apply to these matters, but considers that, for clarity and to reduce the risk of constitutional challenge, this ambiguity should be rectified by amendment to the Bill.

Recommendation 6

3.43 The Committee recommends that, to avoid a potential ambiguity, proposed section 105A.8 of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to make clear that the rules of evidence apply to the matters the Court is required to have regard to in its decision as to whether the terrorist offender poses an unacceptable risk of committing a serious terrorism offence if released into the community.

[46] Attorney-General's Department, *Submission 9.3*, p. 17.

Relevant experts and risk assessment tools

3.44 The Bill requires the Court to be satisfied to a high degree of probability, on the basis of admissible evidence, that an offender presents an unacceptable risk to the community of committing a Part 5.3 (terrorism-related) offence if they are released into the community.[47]

3.45 In its submission, the Attorney-General's Department noted that various forms of evidence may be admitted during CDO proceedings, including observations of the offender during his or her period of imprisonment.[48] In addition, the Court may appoint a relevant expert to conduct an assessment of the risk posed by the offender.[49] The Attorney-General Department's submission draws comparisons between the proposed regime and State and Territory preventative detention regimes for high risk sex offenders where experts may use risk assessment tools to support their assessment.[50]

3.46 The Attorney-General's Department has formed an Implementation Working Group which is comprised of legal, corrections and law enforcement representatives from each jurisdiction to progress outstanding implementation issues.[51] One of its functions include

> considering the development of risk assessment tools that could be of assistance to an expert who is undertaking an assessment of an offender under the proposed Commonwealth regime. The existing tools for violent offenders, together with tools that are in use or in development in relation to countering violent extremism, provide a useful starting point.[52]

3.47 The Department emphasised the critical importance of expert's skill and judgement when applying any risk assessment tool:

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[47] Proposed section 105A.7.

[48] Attorney-General's Department, *Submission 9*, p. 10.

[49] Proposed section 105A.6.

[50] Attorney-General's Department, *Submission 9*, p. 10.

[51] Attorney-General's Department, *Submission 9*, p. 4.

[52] Attorney-General's Department, *Submission 9*, p. 10.

> [N]o risk assessment tool is determinative, and the skills and expertise of the expert will be critical. The expert will be able to use their structured professional judgement, based on a range of factors, including the efforts made by the offender to address the causes of his or her behaviour.[53]

3.48 The next section considers the role, availability and appointment of experts. Following this the report discusses the validity of and the time it may take to develop risk assessment tools.

The use of relevant experts

3.49 Concerns regarding the use of relevant experts centred on two key issues:

- the appointment process of relevant experts, and
- the availability and basis of expertise of relevant experts.

Appointment of a relevant expert

3.50 When determining whether to issue a CDO, the Court must have regard to any report received from a relevant expert under section 105A.6 in relation to the offender, or any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence.[54]

3.51 A 'relevant expert' is defined as any of the following persons who is competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence if they are released into the community:

- a person who is registered as a medical practitioner under a law of a State or Territory and is a fellow of the Royal Australian and New Zealand College of Psychiatrists, or
- any other person registered as a medical practitioner under a law of a State or Territory, or
- a person registered as a psychologist under a law of a State or Territory, or
- any other expert.

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[53] Attorney-General's Department, *Submission 9,* p. 11.

[54] Proposed section 105A.8.

3.52 If an application for a CDO is made, the Court must hold a preliminary hearing to determine whether or not to appoint one or more relevant experts.[55] The decision to appoint a relevant expert is at the Court's discretion. The Court may appoint one or more relevant experts if it believes that the matters alleged would, if proved, justify making a CDO in relation to that offender.[56]

3.53 The Explanatory Memorandum notes that this provision is designed to ensure that the Court considers where there is a minimum basis to the application prior to requiring the offender to attend an assessment by an expert. Importantly, the Explanatory Memorandum states:

> The proceedings can continue, even if the Court decides not to appoint an expert because it does not consider this threshold to be met. Furthermore, the court may decide not to appoint an expert even if it considers the threshold to be met. The decision to appoint an expert is at the Court's discretion.[57]

3.54 It is unclear to what extent courts may appoint experts after the preliminary hearing has concluded. In instances where the Court did not consider the threshold to be met and did not appoint an expert, but found during the substantive hearings that the Attorney-General may meet the test for a CDO, it is uncertain whether a relevant expert can be appointed at that stage of the proceedings.

3.55 In addition, the Court may appoint a relevant expert to conduct an assessment of the risk posed by the offender.[58] The Court must have regard to the expert's report when making its decision.[59] If appointed by the Court, a relevant expert must conduct an assessment of the risk that the offender will commit a serious Part 5.3 offence if they are released into the

[55] Proposed section 105A.6(1).

[56] Proposed section 105A.6(3).

[57] Explanatory Memorandum, p. 20.

[58] Proposed section 105A.6.

[59] Proposed subsection 105A.8(b).

community and provide a report of their assessment to the Court, Attorney-General and the offender.[60] Such a report must include:

- the expert's assessment of the risk that the offender will commit a serious Part 5.3 offence,
- reasons for that assessment,
- the pattern or progression to date of behaviour on the part of the offender in relation to serious Part 5.3 offences, and an indication of likely future behaviour,
- efforts made by the offender to address the causes of his or her behaviour in relation to serious Part 5.3 offences,
- if the offender has participated in rehabilitation or treatment programs, whether or not this has had a positive impact upon him or her,
- any relevant background of the offender, including developmental and social factors,
- factors that may increase or decrease any risks that have been identified by the offender committing a serious Part 5.3 offence if the offender is released into the community, and
- any other matters the expert considers relevant.[61]

3.56 In its submission, the Attorney-General's Department indicated that a possible

> type of expert that will be appointed by a court will have expertise in forensic psychology or psychiatry (and in particular, recidivism) coupled with specific expertise on terrorism, radicalisation to violent extremism and countering violent extremism.[62]

3.57 Nevertheless, the Department emphasises that the expert report is only one of the matters courts must consider when determining whether to make a CDO. Other factors include:

[60] Proposed subsection 105A.6(4).

[61] Proposed subsection 105A.6(7).

[62] Attorney-General's Department, *Submission 9*, p. 10.

- any report related to the extent to which the offender can reasonably and practicably be managed in the community, that has been prepared by the relevant State or Territory Corrective Services, or any other person or body who is competent to assess that extent,
- any treatment or rehabilitation programs in which the offender has had an opportunity to participate in, and the level of the offender's participation in such programs,
- the offender's level of compliance with obligations whilst he or she was subject to parole for any offence, a CDO or an interim detention order,
- the offender's criminal history and the views of the sentencing court at the time the relevant sentence was imposed, and
- any other information as to the risk of the offender and any other matter the Court considers relevant.[63]

3.58 The Attorney-General's Department has stated that it has convened an Implementation Working Group which is comprised of legal, corrections and law enforcement representatives from each jurisdiction to progress outstanding implementation issues.[64] One of its functions include compiling a body of experts who may be called upon by a court during a CDO proceeding.[65] In its supplementary submission, the Attorney-General's Department indicated that it believed appropriately qualified experts currently reside within Australia.[66]

3.59 A number of submitters raised concerns about the Bill requiring the Court to appoint experts and then make judgements as to the veracity of the experts' evidence. The Australian Human Rights Commission recommended that an independent risk management body be established to appoint experts, to avoid undermining court independence.[67]

3.60 The Law Council of Australia stated that

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[63] Proposed section 105A.8.

[64] Attorney-General's Department, *Submission 9,* p. 4.

[65] Attorney-General's Department, *Submission 9,* p. 10.

[66] Attorney-General's Department, *Submission 9,* p. 9.

[67] Australian Human Rights Commission, *Submission 8,* p. 20.

> given the likely challenges to the existence of a specialised body of knowledge in relation to the prediction of terrorist offences, and the qualification of people who may be called to provide such expert opinions, courts would be put in the inappropriate position of ruling on objections to the expertise of an expert whom the Court itself had appointed.[68]

3.61 During the public hearing, Dr David Neal SC from the Law Council emphasised that requiring the Court to call a witness may compromise the independence of the judge and make it harder for the defence to run its case effectively:

> [I]f the judge were to call an expert witness, it would be a seal of approval by the court. If I, for example, had to get up and challenge the expertise of the witness that the court had appointed and get a ruling on whether or not it met section 79 of the Evidence Act, that would be an unusual and embarrassing position for both the judge and me as counsel.
>
> It would compromise the independence of the judge in what would be an extraordinarily sensitive type of hearing. So I would be surprised if there were not many judges who would feel very uncomfortable about being put in that position, to say nothing of the process by which they would judge who is in fact an expert and so on.[69]

3.62 Similarly, Dr Lesley Lynch from the NSW Council for Civil Liberties expressed concerns about the lack of detail in the Bill about the appointment of relevant experts:

> We are concerned that nowhere does the bill specify that the experts should be independent, and however this is done there should be such a specification in the bill. There is no provision that says that the offender must have any input into the selection of the expert or be able to call their own expert. We think both of these should be considered as special provisions.[70]

3.63 The Attorney-General's Department clarified how the appointment of experts was intended to occur in a supplementary submission. It is expected

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

[69] Dr Neal, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 10.

[70] Dr Lesley Lynch, Vice President, NSW Council for Civil Liberties, *Committee Hansard*, 14 October 2016, p. 40.

that a list of suitable experts would be provided to the Court enabling either party to nominate a suitable expert subject to court approval.[71] The Department stated that:

> It is not suggested that the court would appoint experts independently of the parties, only that the court should ultimately appoint the expert for the purposes of the proceeding. Both parties will be able to challenge the status of the relevant expert in the normal fashion.[72]

Basis of expertise of a relevant expert

3.64 A number of submitters have indicated that the definition of 'relevant expert' is too broad and may include individuals who are not properly qualified to assess whether a terrorist offender demonstrates an unacceptable risk to the community.[73] During the public hearings, Dr Lynch from the NSW Council for Civil Liberties expressed concern that relevant expert definition was so broad that it would undermine safeguards:

> Like others, we found the definition of relevant experts to be extraordinarily open-ended, and we argue that such an open-ended definition of competent expert could exacerbate the inherent imprecision of the risk assessment process. This definition needs to be significantly clarified and probably tightened.[74]

3.65 In its submission, the Law Council of Australia stated that the assessment of unacceptable risk is best undertaken by a psychologist or psychiatrist and that there is no need to include medical practitioners within this definition.[75] At the public hearing, the Law Council even queried the expertise of psychologists and psychiatrists to conduct this assessment.[76]

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[71] Attorney-General's Department, *Submission 9.3,* p. 9.

[72] Attorney-General's Department, *Submission 9.3,* p. 9

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

[74] Dr Lynch, NSW Council for Civil Liberties, *Committee Hansard,* 14 October 2016, p. 40.

[75] Law Council of Australia, *Submission 4,* p. 16.

[76] Dr Neal, Law Council of Australia, *Committee Hansard,* 14 October 2016, p. 6.

3.66 Ananian-Welsh et al also raised concerns about the inclusion of medical practitioners in the definition.[77] The Law Council recommended that the Explanatory Memorandum be amended to clearly outline what type of qualifications should be held by a relevant expert.[78] Similarly, Ananian-Welsh et al recommended removing the reference to an 'other relevant expert' as it was unclear what type of individuals would fall within the scope of this definition.[79]

3.67 In its supplementary submission, the Attorney-General's Department stated that

> [w]hile it is anticipated that the preparation of an expert report will most likely involve a psychiatrist or psychologist, it is possible that a medical practitioner with alternative specialist expertise may be able to assist the court.[80]

3.68 In their submission, Ananian-Welsh et al noted that the NSW post-sentence detention regimes require the assessments of at least two relevant experts, whether they be psychiatrists or psychologists.[81] During the public hearings, Mr Graeme Edgerton of the Australian Human Rights Commission also noted that comparable regimes rely on risk assessments from at least two experts.[82]Ananian-Welsh et al recommended that courts should be required to seek advice from at least two experts during CDO proceedings.

3.69 In response, the Attorney-General's Department indicated that the Bill does not limit the number of experts that may be appointed by the Court, stating that 'if the court considers it is appropriate to appoint two or more experts, it is able to do so'.[83]

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

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

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

[80] Attorney-General's Department, *Submission 9.3*, p. 9.

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

[82] Mr Graeme Edgerton, Senior Lawyer, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 16.

[83] Attorney-General's Department, *Submission 9.3*, p. 10.

The use of risk assessment tools

3.70 Concerns regarding the use of risk assessment tools centred on two key issues:

- the validity of such tools to predict terrorist behaviour, and
- the time it may take to develop and verify such tools.

Validity of risk assessment tools

3.71 A number of submitters, including the Australian Human Rights Commission strongly supported the development of a risk assessment tool during the public hearings:

> We support the calls in other submissions for the development of a reliable, validated risk assessment tool that can accurately measure this risk of individual committing terrorism offences in the future.[84]

3.72 Associate Professor Mark Nolan's submission emphasised the importance of engaging with an offender with a detailed deradicalisation plan and psychological profile *throughout* their term of imprisonment rather than immediately prior to their release. Otherwise:

> If such a detailed longitudinal understand is not even attempted during incarceration, with the most valid actuarial or structured professional judgment style risk assessment tools, then the legitimacy of some of the risk assessments made under the proposed CDO regime should be doubted.[85]

3.73 During the public hearing, the Australian Human Rights Commission indicated that the best risk assessment tools combine statistical information with clinical judgement:

> That is usually referred to as a structured decision. So it is a combination of an actuarial tool plus a clinical assessment from a psychologist or psychiatrist. There are a couple of tools that are being developed in relation to terrorist

[84] Mr Santow, Australian Human Rights Commission, *Committee Hansard,* 14 October 2016, p. 13

[85] Associate Professor Nolan, *Submission 13,* p. 9.

> offenders, but they have not yet been validated over a population to show that they are reliable and can accurately predict.[86]

3.74 However, numerous submitters also queried whether it was indeed possible to accurately predict the risk of that a terrorist offender will reoffend in the future.[87] In its submission, the Australian Lawyers Alliance stated that the

> truth is that no one can predict the future with any degree of accuracy. Therefore any system of indefinite detention would court serious injustice.[88]

3.75 A number of submitters cited a study by Professor Kate Warner which indicated that predictions of dangerousness only appear to be one-third to 50 percent accurate.[89] The Law Council of Australia also submitted that:

> The criticisms made of the use of predictive tools are magnified in the case of predicting the future behaviour of terrorism offenders. Numbers of terrorist offenders come from backgrounds which are very different from the profile usually associated with repeat offenders. The differences include lack or prior offending, stable family background, secure employment, non-use of alcohol or drugs, and significant religious belief.[90]

3.76 The Attorney-General's Department acknowledged that some offenders may attempt to obfuscate the assessment process:

> Assessments will be carried out with knowledge that some offenders may feign compliance. Relevant experts will have access to other information sources that can help them to assess the validity of their assessments.[91]

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

[87] Civil Liberties Australia, *Submission 2,* pp. 1–2; ANU Law Students Counter-Terrorism Research Group, *Submission 6,* p. 1; Associate Professor Nolan, *Submission 13*, p. *5;* Ms Jacinta Carroll, *Submission 7,* p. 5.

[88] Australian Lawyers Alliance, *Submission 3*, p. 19.

[89] Law Council of Australia, *Submission 4*, p. 14; Australian Lawyers Alliance, *Submission 3*, p. 18; Members of the Victorian Bar Human Rights Committee, *Submission 16*, p. 5; Australian Human Rights Commission, *Submission 8*, p. 18.

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

[91] Attorney-General's Department, *Submission 9.3,* p. 7.

3.77 The Australian Human Rights Commission acknowledged that ultimately, courts must determine how much weight to give the evidence before them, including in relation to an expert's risk assessment. However,

> the judge can only take note of the evidence that is before her or him. In other words, if there is no means to have a truly robust and reliable evidentiary material that can be adduced in court, that is going to pose all kinds of problems, probably at both ends of the spectrum. It could mean that some people who should not be subjected to one of these orders are, and it could mean the opposite of that, as well.[92]

3.78 Similarly, Dr Ananian-Welsh emphasised that it is important not to overestimate courts' abilities to exercise independent review within the context of a CDO proceeding because

> courts are not used to making future assessments of risk. It is absolutely what the government does but not what the court is necessarily comfortable or expert at doing. So in conducting these kinds of assessments the court is highly reliant on the information that is presented to it.[93]

3.79 In its submission, the Australian Human Rights Commission stated that the Bill puts too much emphasis on courts' ability to discern who is qualified to make a valid risk assessment, indicating that there are:

> Real risks that the incidence of both 'false positives' and 'false negatives' will be significant without some additional structure to provide confidence to the Court that experts are in fact competent to asses risk.[94]

3.80 During the public hearing, the Attorney-General's Department was asked about courts' experience in determining future risks. The Department stated that

> the majority of states and territories have schemes of a similar type. In those contexts, it is state and territory supreme courts that are responsible for making orders under those regimes … each regime is slightly different, but the

[92] Mr. Santow, Australian Human Rights Commission, *Committee Hansard*, 14 October 2016, p. 15.

[93] Dr Ananian-Welsh, *Committee Hansard*, 14 October 2016, p. 26.

[94] Australian Human Rights Commission, *Submission 8*, p. 19.

> nub of it is that that process and that need to make a predictive decision is the same.[95]

3.81 The Attorney-General's Department stated that an expert body of knowledge would

> include forensic psychological or psychiatric expertise, along with experience working with individuals who have radicalised to violent extremism.[96]

3.82 The Law Council of Australia was highly critical of the lack of an established body of knowledge upon which experts, and ultimately courts, can assess the risk that a terrorist offender poses to the community. During the public hearings, Dr Neal from the Law Council stated that

> we do not know of any—and we have asked—psychologists or psychiatrists who would claim at the moment that there is a specialised body of knowledge about the future behaviour of terrorists. So, there is a first question. Then, secondly, we have also asked, in relation to either international or Australian work, whether there is any instrument that is used by psychologists and psychiatrists to do this task, and we are told that there is not—not internationally or nationally.[97]

3.83 Dr Neal also indicated that courts cannot be confident that the risk of a terrorist offender can be properly assessed without a validated body of knowledge and risk assessment tool. He argued that medical professionals and psychologists are not immediately qualified to assess terrorist risk,[98] and questioned whether diagnostic tools can be used to assess terrorist behaviour in the same way that they are used to assess high risk sex offenders, stating that

> in terms of the comparison between sex offenders and these people, the sex offenders fall in a whole range of diagnostic categories that the psychiatrists and psychologists use. We do not have those here.[99]

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[95] Mr Coles, Attorney-General's Department, *Committee Hansard,* 14 October 2016, p. 52.

[96] Attorney-General's Department, *Submission 9.3,* p. 8.

[97] Dr Neal, Law Council of Australia, *Committee Hansard,* 14 October 2016, p. 6.

[98] Dr Neal, Law Council of Australia, *Committee Hansard,* 14 October 2016, p. 6.

[99] Dr Neal, Law Council of Australia, *Committee Hansard,* 14 October 2016, p. 6.

Time to develop risk assessment tools

3.84 The Law Council of Australia recommended that any risk prediction tool be developed in an accountable manner with input from psychologists, psychiatrists, counter-terrorism experts, the courts, legal practitioners, the Attorney-General's Department and law enforcement and corrective services.[100]

3.85 Likewise, the joint councils for civil liberties recommended that the Committee

> seek comprehensive advice on current expert views and database research on the reliability of risk assessments and procedures and assures itself before it recommends implementation of this bill that there will be possible access to a reliable process.[101]

3.86 The Australian Human Rights Commission endorsed the views of the NSW Sentencing Council on how best to appoint experts in the high risk offenders scheme. In that report, the Council recommended establishing an independent risk management authority modelled on Scotland's Risk Management Authority. The Australian Human Rights Commission recommended establishing a similar authority for the CDO regime. The Commission stated that such an authority would facilitate best practice in relation to risk prediction by:

- accrediting people in the assessment of risk for the purpose of becoming 'relevant experts',
- developing best-practice risk-assessment and risk-management processes, guidelines and standards,
- validating new risk assessment tools and processes,
- undertaking and commission research on risk assessment methods, and
- providing education and training for risk assessors.[102]

[100] Law Council of Australia, *Submission 4,* 14 October 2016, p. 16.

[101] Dr Lynch, NSW Council for Civil Liberties, *Committee Hansard*, p. 39.

[102] Australian Human Rights Commission, *Submission 8,* p. 20.

3.87 The Commission acknowledged that establishing a new risk management body would require significant resources and that the number of people likely to be subject to the CDO regime is low. However it argued that the costs are justifiable given the

> importance of the objective of protecting community safety underlying the Bill, the extraordinary impingement on the human rights of any person who is the subject of a continuing detention order, and the need for assessments of risk to be as accurate as possible.[103]

3.88 The Law Council indicated that it may take significant time to develop a specialised body of knowledge and risk assessment tools specifically related to terrorist offenders.[104] Similarly, the Human Rights Commissioner, Mr Edward Santow, indicated that it may take at least two years to develop and validate an appropriate risk assessment tool:

> The more effective assessment tools tend to rely on audits. In other words, they tend to rely on looking at large numbers of people in a particular situation and drawing conclusions from that; but clearly you need to apply that to the individual circumstances. What we also know is that there is no off-the-shelf tool, as it were, that can simply be applied that would be highly reliable. That is why I guess there is some advantage in the government having at least two years, or more than two years, ahead of it to commission that research.[105]

3.89 Likewise, Ananian-Welsh et al recommended delaying the introduction of the CDO regime until an appropriate risk assessment tool has been developed and validated.[106] Their submission cited research by Smith and Nolan which stated:

> The deprivation of liberty a CDO regime imposes is only defensible if there are accurate and reliable risk assessment tools that can determine which offenders are at a high risk of reoffending and which offenders are not. Adopting tools that have not yet been shown to accurately do this would "undermine the

[103] Australian Human Rights Commission, *Submission 8,* p. 20.

[104] Dr Neal, Law Council of Australia, *Committee Hansard,* 14 October 2016, p. 6.

[105] Mr Santow, Australian Human Rights Commission, *Committee Hansard,* 14 October 2016, p. 15.

[106] Ananian-Welsh et al, *Submission 6*, p. 1.

> objectives of the regime" and may unjustifiably deprive individuals who are not at risk of reoffending of their liberty.[107]

3.90 In its supplementary submission, the Attorney-General's Department indicated that the Implementation Working Group has not yet determined whether an existing tool can be adapted or whether new research is required.[108] As such, the Department could not provide an exact timeframe on the development of a risk assessment tool:

> Radicalisation to violent extremism is complex and to date, all research (domestic and international) agrees that there is no single pathway. Recent research papers have suggested that structured professional judgment tools may be more feasible and suitable for this application since they allow context to be taken into consideration and we do not yet have the volume of cases over a sufficiently long time to allow for any consideration as to whether violent extremism has a consistent underlying pathology that can be identified.[109]

3.91 At the public hearing, the Attorney-General's Department was asked to comment on the time it would take to develop an effective risk assessment tool. Ms Jamie Lowe, Acting Deputy Secretary, stated

> that will take some time … certainly months and possibly years.[110]

3.92 During the public hearing, the Attorney-General's Department was asked whether the CDO regime could be meaningfully implemented without a specific risk assessment tool being available. The Department stated that

> the bill, as drafted, anticipates a range of experts, including psychologists and psychiatrists, but the expectation is that in order to advise the court in the exercise of its discretion those experts would need to have the use of [risk assessment] types of tools.[111]

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[107] Ananian-Welsh et al, *Submission 6*, p. 5.

[108] Attorney-General's Department, *Submission 9.3,* p. 7.

[109] Attorney-General's Department, *Submission 9.3*, p. 7.

[110] Ms Jamie Lowe, Acting Deputy Secretary, Attorney-General's Department, *Committee Hansard*, 14 October 2016, p. 50.

[111] Mr Coles, Attorney-General's Department, *Committee Hansard,* 14 October 2016, p.54.

3.93 The Attorney-General's Department also confirmed that while the development of the risk assessment tools can be developed alongside this Bill, it is preferable to be able to refer to legislation during the development process:

> [W]e are not waiting for the bill to be passed for us to commence the work, but we do need the clarity to make sure that we do not go too far down a particular path that is not consistent with the legislation.[112]

Committee comment

3.94 The Committee notes that the integrity of the CDO regime depends on the court decision-making process, and this process will be informed by the Court's capacity to draw on relevant experts providing assessments of predictive terrorist behaviour.

3.95 Evidence received regarding the availability and skills of relevant experts, as well as the validity and time to develop risk assessment tools have raised serious concerns. At this point in time it is apparent that no such risk assessment tools exist and the Committee has been unable to verify the numbers, skill base or expertise of the relevant experts who the Department claims exist in Australia.

3.96 On the one hand, the Committee acknowledges that this is a newly emerged threat and that significant work is still required to develop specialised risk assessment tools. The Committee also appreciates the sensitivities which may exist around naming suitable relevant experts. However, the integrity of the regime is predicated on courts being able to be informed by robust assessments by experts, and this Committee is tasked with ensuring the fair and proper operation of the regime. While the Committee appreciates that there is to be an extended development and implementation phase before operation of the regime, at this point in time it is difficult for the Committee to assure itself of the robust operation of a critical aspect of the regime that is yet to be developed.

3.97 Further, no clear development plan or implementation timeframe has been provided, which raises further concerns for the Committee. At the very least,

[112] Ms Lowe, Attorney-General's Department, *Committee Hansard,* 14 October 2016, p.54.

the Committee considers that a detailed development and implementation plan of many key operational elements of the Bill should have preceded introduction of the Bill to Parliament. It is not clear that such a plan currently exists.

3.98 Nonetheless, the Committee supports the process outlined in the Bill. In particular, the Committee is reassured that the onus of proof to establish 'unacceptable risk' rests with the Attorney-General and it is for courts to appoint those whom it considers to be 'relevant experts', and to determine the validity of and weight given to predictive risk assessments. The regime's effective operation will be a matter for the courts.

3.99 The Committee acknowledges the concerns raised by submitters about the definition of relevant expert. Despite the lack of clarity on this point, the Committee can envisage situations where a relevant expert may be a person who is not a psychiatrist, psychologist or other medical practitioner. The Committee notes that in the Criminal Code a terrorist act is defined as an act committed with the intention of advancing a political, religious or ideological cause. It will be a matter for the Court to determine whether a relevant expert is 'competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence if the offender is released into the community'. The Committee therefore supports the inclusion of the item 'any other expert', but considers that greater clarity should be provided about persons who might meet this definition in the Explanatory Memorandum.

Recommendation 7

3.100 The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to provide greater clarity to the definition of 'relevant expert' in proposed section 105A.2. This should include examples of persons who may potentially fall within the category 'any other expert' at item (d) of the definition.

3.101 Proposed subsection 105A.6(7) lists a range of matters that *must* be included in the expert's report. The Committee considers that a relevant expert may not be in a position to provide an expert opinion on all matters listed in proposed paragraphs 105A.6(7)(c) to (g). Accordingly the Committee

recommends that subsection 105A.6(7) be amended to state that the expert's report *may* include the matters listed in the subsequent paragraphs.

Recommendation 8

3.102 The Committee recommends that proposed sub section 105A.6(7) of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to replace the word 'must' with 'may' so that the expert's report may include the matters listed in paragraphs (a) to (h).

3.103 The Committee notes that the Attorney-General's Department has clarified that the Court would not appoint experts independently of the parties. Rather, a list of suitable experts would be provided to the Court enabling either party to nominate a suitable expert subject to Court determination of the admissibility of each expert's evidence. Both parties would be able to challenge the status of the relevant expert in the normal fashion. The Committee considers that it is not clear from the drafting of the Bill that an offender can bring forward their own expert.

3.104 Accordingly, the Committee considers that the Bill and Explanatory Memorandum require amendment to more clearly reflect the intention of the Bill, namely that the onus is upon the Attorney-General to bring forward experts that meet the evidentiary burden, and that an offender may also bring forward their own expert or experts to refute this evidence.

3.105 The Committee supports the requirement outlined in proposed subsection 105A.6(5) that the offender must attend the assessment by a relevant expert.

Recommendation 9

3.106 The Committee recommends that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 and Explanatory Memorandum be amended to make explicit that each party is able to bring forward their preferred relevant expert, or experts, and that the Court will then determine the admissibility of each expert's evidence.

Recommendation 10

3.107 The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be

amended to make explicit that a Court may appoint a relevant expert at any point during continuing detention order proceedings.

3.108 The Committee also recommends that, given the important role of relevant experts and risk assessment tools, the Parliament should be informed of a clear development and implementation plan prior to its detailed consideration of the Bill and then be provided with annual implementation reports.

3.109 The Committee notes that there are a number of other operational elements of the regime still to be determined. In Chapter 4, the Committee makes recommendations around required reporting on the timeframes, development and implementation of relevant experts, risk assessment tools and other operational elements. The Committee considers this will strengthen the integrity of the regime's future operation.

Offender's access to information and legal representation

3.110 A strong procedural safeguard in the proposed regime is that the onus of proof rests with the Attorney-General and it is for the courts to determine if the threshold of 'a high probability of unacceptable risk' has been met. Placing the decision in the discretion of the Court provides the offender with the opportunity to contest proceedings.

3.111 The following sections consider the information in the CDO application that is provided to an offender and an offender's access to adequate legal representation.

Provision of the CDO application to the offender

3.112 The Bill requires the applicant (that is, the Attorney-General) to provide a copy of the CDO application to the offender within 2 business days after the application is made.[113] However, the copy of the application provided to the offender at this point is not required to include information for which the Attorney-General is likely to:

[113] Proposed section 105A.5(4).

- give a certificate under Subdivision C of Division 2 of Part 3A of the *National Security Information (Criminal and Civil Proceedings) Act 2004*,
- seek an arrangement under section 38B of that Act,
- make a claim of public interest immunity, or
- seek an order of the Court preventing or limiting disclosure of the information.[114]

3.113 The Explanatory Memorandum states that this provision allows the Attorney-General not to include in the copy of the application provided to the offender any material over which the Attorney-General is likely to seek protective orders preventing or limiting the disclosure of that information. For instance, the Attorney-General may seek protective orders to ensure that the information in the application can be protected from release to the public.[115]

3.114 In practice this means that the Attorney-General may give the offender

> a redacted copy of the application to the offender until the court has dealt with the suppression order application. It will not prevent the material that the Attorney-General seeks to rely on in the application from ultimately being disclosed to the offender.[116]

3.115 A number of submitters have interpreted proposed section 105A.5(5) to mean that crucial evidence that will be relied upon during the CDO proceedings may be withheld from the offender.[117] During the public hearings, the Law Council of Australia indicated that secret evidence provisions undermines an offender's ability to obtain a fair trial, stating:

> We cannot have a situation, in our view, where an application is made, and then the authorities say, 'There is all this evidence; but, by the way, we cannot

[114] Proposed section 105A.5(5).

[115] Explanatory Memorandum, p. 20.

[116] Explanatory Memorandum, p. 20.

[117] Australian Lawyers Alliance, *Submission 3,* p.13; Human Rights Watch, *Submission 12,* p. 6; Professor Ben Saul, *Submission 1,* p. 2.

> show you, we cannot tell you, we cannot let you challenge it, because it is all too secret'—particularly on the balance of probabilities issue.[118]

3.116 Human Rights Watch noted that in the United Kingdom, preventative detention cannot be based predominantly on secret evidence due to the importance of upholding procedural fairness and the right to a fair hearing.[119] It argued that the ability to withhold evidence from the offender is far too broad, stating that

> [t]he Attorney-General is not required to exercise any of the measures [listed in s105A.5(5)], but simply indicate an intention to. This furthers the already existing imbalance in the discretion of the court with regard to the NSI Act, which requires courts to give more weight to national security concerns rather than procedural fairness… ability of the subject of the order to defend against accusations and test the credibility of evidence is further, and significantly, limited.[120]

3.117 The Australian Lawyers Alliance expressed concern that secret evidence provisions would amount to breaching Article 14 of the ICCPR, which relates to freedom from arbitrary detention.[121]Similarly, Associate Professor Nolan indicated that secret evidence provisions may be in breach of Australia's international human rights obligations stating that

> Australia may need to be prepared for future human rights challenge to the UNHRC on this basis if secret evidence use in CDO hearings becomes problematic or provocative for prisoners otherwise due to be released upon the expiration of their sentences, especially those who served their sentences entirely under Supermax conditions.[122]

3.118 The joint councils for civil liberties recommended amending proposed section 105A.5

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[118] Mr Stuart Clark, President, Law Council of Australia, *Committee Hansard,* 14 October 2016, p. 5.

[119] Human Rights Watch, *Submission 12,* p. 6.

[120] Hunan Rights Watch, *Submission 12,* pp. 6-7.

[121] Australian Lawyers Alliance, *Submission 3,* p. 13.

[122] Associate Professor Nolan, *Submission 13*, p. 5.

> so that the terrorist offender has access to all information necessary to challenge the case against them, in the interest of procedural fairness[123]

3.119 Similarly, the ANU Law Students Counter-Terrorism Research Group and others suggested appointing special advocates who were able to view redacted documents and represent the interests of the defendant, in order to balance national security concerns with the need to ensure that the offender had access to a fair trial.[124]

3.120 The Attorney-General's Department's supplementary submission clarified this issue and emphasised that proposed subsection 105A.5(5) does not permit secret evidence. Rather, it is designed to balance the importance of providing the offender ample opportunity to prepare for a CDO with providing the Court adequate opportunity to consider any suppression orders connected to the application:

> Given the offender must be provided the application within a very short period of time, there may be insufficient time for the court to have considered the suppression order application before the continuing detention order application is provided to the offender…Accordingly, the offender is expected to be provided, in a timely manner, information to be relied on in an application for a continuing detention order. Subsection 105A.5(4) will not permit 'secret evidence'.[125]

Access to legal representation

3.121 A number of submitters raised concerns about terrorist offenders' access to adequate legal representation if they were the subject of CDO proceedings.[126] In its submission, the Law Council of Australia indicated that CDO proceedings are likely to attract extensive legal costs. It provided information about the cost of a control order proceeding, noting that in that

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[123] Joint Councils for Civil Liberties, *Submission 14*, p. 10

[124] ANU Law Students Counter-Terrorism Research Group, *Submission 5*, p. 13. See also Mr Clark, Law Council of Australia, *Committee Hansard*, 14 October 2016, p. 9; Dr Lynch, NSW Council for Civil Liberties, *Committee Hansard*, 14 October 2016, p. 39.

[125] Attorney-General's Department, *Submission 9.3*, p. 13.

[126] Dr Lynch, NSW Council for Civil Liberties, *Committee Hansard*, 14 October 2016, p. 43.

scenario Victoria Legal Aid only granted aid on a limited basis and the majority of work was undertaken pro bono:

> A recent contested control order case involved a 10-day hearing, thousands of pages of documents and surveillance records and expert evidence. The estimated cost of preparing and prosecuting that application with senior counsel, a junior and one to two instructors is $300,000 – $400,000.[127]

3.122 During the public hearing, the Law Council of Australia stated that it was important that

> the safeguards are realistic in terms of the hearing itself … if you are not prepared to make the safeguards for this sort of legislation practically operate, really you should not be doing it. Much of the evidence—in fact, virtually all of the factual evidence—that was led in that hearing was rejected by the judge … that was only because he was lucky enough to get pro bono assistance … I cannot stress enough how important the practical operation of these safeguards is.[128]

3.123 In addition, the Law Council indicated that Legal Aid Commissions do not necessarily have adequate procedures for assessing and funding civil matters such as a CDO proceeding:

> [T]hey do not really have categories for these things and they do not really do much in civil, and so on. So, our argument is this: if you are going to take these extraordinary steps and you are going to justify that on the basis of safeguards then there must be a reality behind that and funding behind it.[129]

3.124 As a result, the Law Council recommended that the Bill be amended to include provisions allowing the Court to order funding for reasonable legal expenses, should the respondent not be in a position to fund their own legal representation.[130]

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

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

[129] Dr Neal, Law Council of Australia, *Committee Hansard,* 14 October 2016, p. 11.

[130] Law Council of Australia, *Submission 4,* p. 18.

3.125 The Australian Human Rights Commission also emphasised the importance of the offender being able to access legal representation.[131] In its submission it referenced *Dietrich v The Queen*, noting that

> Australian law has not recognised a right to legal representation in criminal proceedings, but it has recognised the inherent power of the Court to stay criminal proceedings where an accused person does not have legal representation and where legal representation is essential to a fair trial.[132]

3.126 During the public hearings, the Commission indicated that in its view, the *Dietrich* case

> has made very clear the importance of legal representation in the context of serious criminal offences, and that is simply in order to arrive at a just outcome.[133]

3.127 The Commission considered it unclear whether this legal principle applied to CDO proceedings because they are characterised as civil rather than criminal in nature.[134] The Commission recommended that

- the Committee seek advice from the Attorney-General's Department about whether legal aid will be available for offenders against whom applications for CDOs are made,[135] and
- the Bill be amended to clarify that the Court has the power to stay proceedings for a CDO if an offender, through no fault of his or her own, is unable to obtain legal representation and where legal representation is essential for the proceeding to be fair.[136]

3.128 The Muslim Legal Network (NSW) indicated during the public hearings that the Muslim community are particularly concerned that individuals subject to the CDO regime be provided with meaningful legal representation:

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

[132] Australian Human Rights Commission, *Submission 8,* p.25; *Dietrich v The Queen* (1992) 177 CLR 292.

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

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

[135] Australian Human Rights Commission, *Submission 8,* p. 26.

[136] Australian Human Rights Commission, *Submission 8,* p. 26.

> We have heard about people, should these orders come into play, having access to real, good legal representation as part of this particular regime.[137]

3.129 The Attorney-General's Department commented on legal representation in its supplementary submission. Firstly, it noted that the offender would be provided with adequate notice to obtain legal representation as the offender must be informed of a CDO application within two business days of it being made.[138] As a result, it considered that the offender had adequate notice to obtain legal representation and that it was not necessary to require courts to stay proceedings for the offender to obtain legal representation.[139]

3.130 Secondly, the Department stated that the Australian Government provides significant of funding to Legal Aid Commissions under the National Partnership Agreement on Legal Assistance Services (2015–2020) to provide legal assistance to disadvantaged and vulnerable people, in accordance with the Commonwealth's service priorities. These priorities include assisting prisoners and other people in custody.[140] The submission stated that Legal Aid Commissions will receive $1.07 billion over five years, which will be available for Commonwealth family, civil and criminal law proceedings.[141]

3.131 The Department stated that while eligibility for legal aid is determined on a case-by-case basis by each legal aid commission,

> providing legal representation for an individual to oppose an application for a continuing detention application would likely be a high priority for commissions, given the potential for an offender's period in detention to be continued for up to three years.[142]

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[137] Mr Zaahir Edries, President, Muslim Legal Network (NSW), *Submission 11,* p. 35.

[138] Attorney-General's Department, *Submission 9.2,* p. 6.

[139] Attorney-General's Department, *Submission 9.2,* p. 6.

[140] Attorney-General's Department, *Submission 9.2,* p. 6.

[141] Attorney-General's Department, *Submission 9.2,* p. 6.

[142] Attorney-General's Department, *Submission 9.2,* p. 6.

Giving terrorist offenders documents

3.132 Proposed section 105A.15 provides the following requirements for the giving of CDO-related documents to an offender:

> (1) A document that is required to be given under this Division to a terrorist offender who is detained in a prison is taken to have been given to the offender at the time referred to in paragraph (3)(b) if the document is given to the chief executive officer (however described) of the prison or centre.
>
> (2) The chief executive officer must, as soon as reasonably practicable, give the document to the offender personally.
>
> (3) Once the chief executive officer has done so, he or she must notify the Court and the person who gave the officer the document, in writing:
>
> (a) that the document has been given to the offender; and
>
> (b) of the day that document was so given.

3.133 The Law Council of Australia recommended that this section be amended to require documents to also be provided to the person's legal representative.[143]

Committee comment

3.134 The Committee notes the concerns raised by many submitters regarding the use of 'secret' evidence and the clarification, provided by the Attorney-General's Department, that all evidence relied on in the application is ultimately disclosed to the offender.

3.135 Concerns arose due to some information being able to be withheld from the initial copy of information provided to the offender. However, the Department has confirmed that this is to provide time for the Court to consider any suppression order, and that some information may be protected from public release but all information will be provided to the offender.

3.136 It is vital that there is clarity on this issue as it is an important protection of an offender's rights. Consequently the Committee recommends that the

[143] Law Council of Australia, *Submission 4*, p. 21.

Explanatory Memorandum be amended to make abundantly clear that, notwithstanding subsection 105A.5(4) which may enable some information not to be disclosed in the copy of the CDO application first provided to the offender, an offender is to be provided in a timely manner with information to be relied on in an application for a CDO.

3.137 Alongside access to information, an offender's access to adequate legal representation during CDO proceedings is considered a fundamental right and safeguard. The Committee acknowledges the complexity of such cases and that substantial costs may be associated with legal representation. The Committee also notes that some offenders may be entitled to access to legal aid.

3.138 However, given both the gravity and the complexity of proceedings for CDOs, the Committee considers that ensuring access to legal representation is a vital protection of an offender's rights. Therefore the Committee recommends that the Bill be amended to explicitly provide courts with the power to stay proceedings for a CDO if an offender is unable to obtain legal representation, through no fault of their own. The Committee also recommends that, in such circumstances, the Court be empowered to make an order for reasonable costs to be funded to enable the offender to obtain legal representation.

3.139 Further, the Committee considers that access to adequate legal representation should form part of the review of the regime once it is considered operational. The Committee discusses and makes recommendations regarding the review of the CDO regime in Chapter 4.

3.140 The Committee notes that the Bill, as currently drafted, enables documents that are required under the CDO regime to be given to the offender to instead be given to the chief executive officer of the offender's prison. While the Committee understands the practical reasons why it may not be possible to deliver the documents to the offender directly, the Committee considers that it would be preferable that the documents be provided to the person's legal representative (if they have one) rather than to the chief executive of the prison.

Recommendation 11

3.141 The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to make explicit that an offender is to be provided in a timely manner with information to be relied on in an application for a continuing detention order.

Recommendation 12

3.142 The Committee recommends that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended so that if an offender, through no fault of his or her own, is unable to obtain legal representation:

- **the Court has the explicit power to stay proceedings for a continuing detention order, and**
- **the Court is empowered to make an order for reasonable costs to be funded to enable the offender to obtain legal representation.**

Recommendation 13

3.143 The Committee recommends that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to require documents related to a continuing detention order to be given to the offender's legal representative. If the offender does not have a legal representative, the documents may be delivered to the chief executive officer of the offender's prison as currently provided for in the Bill.

Review and appeal rights

Right of appeal

3.144 The offender may appeal the CDO decision to the Court of Appeal in the relevant state or territory. The appeal is to be by way of rehearing, which means that the Court of Appeal

- has all the powers, functions and duties of the Supreme Court in relation to making the relevant CDO proceedings,

- may draw inferences of fact which are not inconsistent with the findings of the Supreme Court, and
- may receive further evidence as to questions of fact if the Court is satisfied that there are special grounds to do so.[144]

3.145 The Explanatory Memorandum does not define 'rehearing' or provide information on what special grounds additional evidence may be adduced.

3.146 Dr Ananian-Welsh et al commended the manner in which the Bill aims to preserve an offender's ability to appeal CDOs as it is

> acknowledging the fundamental importance of basic procedural fairness to human rights and the rule of law.[145]

3.147 Likewise, in its submission to the Committee, the Australian Human Rights Commission recognised that the appeal provisions were one of the safeguards designed to limit the period of detention to what was reasonable, necessary and proportionate to the risk faced by the community, ensuring that detention was not arbitrary.[146]

3.148 The Law Council of Australia noted that it is unclear to what extent the appeal can be considered a rehearing of the initial proceedings where there is a limited scope to introduce new evidence. Its submission suggested that the Court of Appeal could only consider questions of fact where the appellant could successfully demonstrate that the primary judge had made a *'House v the King'* error.[147] The Law Council quoted a Queensland decision *AG (QLD) v Lawrence* which stated that an appellate court is not empowered to set aside such orders merely because they were not the

> ones the appellate court would have made had it been exercising the discretion. Before an appellate court can interfere it must be shown that the primary judge acted on a wrong principle, failed to take a material

[144] Proposed section 105A.17.

[145] Ananian-Welsh et al, *Submission 6*, p. 7.

[146] Australian Human Rights Commission, *Submission 8,* pp. 14-15.

[147] Law Council of Australia, *Submission 4,* p. 21.

> consideration into account, took into account an immaterial consideration or that the result "is unreasonable or plainly unjust".[148]

3.149 The Law Council stated that there may be merit in amending the appeal provisions in the Bill so that the appeal would be by way of rehearing, where the Court of Appeal can

> re-exercise the discretion and also have discretion to receive further evidence. The argument may be that a person's liberty should not be withdrawn in this way on the say so of one person.[149]

Periodic review

3.150 Proposed section 105A.10 of the Bill states that the Supreme Court of a State or Territory must begin a review of a CDO that is in force within 12 months after:

- the order began to be in force, or
- if the order has previously been reviewed by the Court—the most recent review ended.

3.151 In its submission to the Committee, the Attorney-General's Department stated that this provision was modelled on Victoria's review provisions for CDOs issued for sex offenders. Other State-based schemes allow for a longer regular review period of two years, or allow ad hoc review upon application to the Court.[150] A review is not required if an application for a new CDO has been made in relation to that offender.

3.152 The Department noted that some States have indicated that an annual review may

- not allow offenders sufficient time to demonstrate changes in behaviour which are indicative of a reduced risk to society, and

[148] AG (QLD) v Lawrence [2011] QCA 347 at [27].

[149] Law Council of Australia, *Submission 4,* p. 21.

[150] Attorney-General's Department, *Submission 9,* p. 7.

- create difficulties for corrective services and others in terms of their ability to obtain and provide to the Attorney-General current evidence for the purposes of these reviews.[151]

3.153 The Australian Human Rights Commission emphasised the importance of establishing meaningful, effective periodic review to avoid preventative detention being considered arbitrary in nature. The Commission endorsed the majority view in *Rameka v New Zealand*:

> The requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public.[152]

3.154 The Law Council of Australia considered that, in light of the significant impact that the Bill has upon the rule of law and human rights issues, the Bill should be amended to insert the following protective measures for review proceedings:

- a Court may adjourn the hearing of an application to give the offender an opportunity to obtain legal representation or an independent report or both,
- a Court making a CDO may specify a review date earlier than the 12 month deadline imposed by proposed section 105A.10, and
- the Attorney-General may make an application for review (under the Bill the review must be initiated by the relevant Supreme Court).[153]

Committee comment

3.155 The Committee considers the ability of offenders to access effective, robust appeal mechanisms to be an important feature of the continuing detention regime. The Committee agrees with the Australian Human Rights Commission's view that effective appeal mechanisms protect against arbitrary detention and ensure that the CDO regime is a reasonable,

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[151] Attorney-General's Department, *Submission 9,* p. 7.

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

[153] Law Council of Australia, *Submission 4,* p. 22.

necessary and proportionate response to the risk of terrorism faced by the community.

3.156 The Committee notes the Law Council of Australia's concern that the extent to which an offender may appeal the initial CDO decision is unclear. There is some ambiguity as to the extent to which a Court of Appeal may reconsider matters of fact during an appeal, despite the Bill characterising it as a 'rehearing.' The Committee notes that while the Bill allows new evidence to be introduced if the Court is satisfied there are 'special grounds' to do so, the Explanatory Memorandum does not indicate what types of factors may be considered special grounds.

Recommendation 14

3.157 The Committee recommends that the Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 be amended to clarify what is proposed by a 'rehearing' as set out in proposed section 105A.17, namely

- **what matters may be considered within a rehearing, and**
- **the types of circumstances that would constitute 'special grounds' to allow new evidence to be introduced during a rehearing.**

3.158 The Committee notes the Australian Human Rights Commission's statement that periodic review is an important safeguard against arbitrary detention. The Committee also recognises the need to balance regular reviews with allowing the offender, corrective services and other experts a reasonable amount of time to prepare for the review. The Committee considers that the initiation of a review within 12 months of an order being made or the last review being completed, as currently provided for in the Bill, is an appropriate balance.

3.159 The Committee notes that the Bill does not explicitly allow the Attorney-General to make an application to the Court to conduct a review of the CDO. Rather, the periodic review is to be initiated by the Court. Equivalent provisions in the existing post-sentence detention schemes in the Northern Territory, Queensland, Victoria and Western Australia all require an application to be made to the Court by the Attorney-General or Director of

Public Prosecutions, within a 12 month period, to cause the review to be initiated. It is unclear to the Committee how the Court-initiated periodic review provided for in the Bill will operate in practice. The Committee suggests that the operation of this provision should be clarified in the Explanatory Memorandum, and, if necessary, in the Bill.

Recommendation 15

3.160 The Committee recommends that the Government clarify the process for the initiation of a periodic review of a continuing detention order in the Explanatory Memorandum, and, if necessary, in the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.

Alternatives to continuing detention orders

3.161 Proposed paragraph 105A.7(1)(c) provides that a Supreme Court may only make a CDO if it is 'satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk'. A note to the section states that a control order is an example of a less restrictive measure.

3.162 Control orders are legislated for under Division 104 of the Criminal Code. Interim control orders are made on application of a senior member of the AFP (with the consent of the Attorney-General) to an issuing court, which may be either the Federal Court of Australia, the Federal Circuit Court of Australia, or the Family Court of Australia. While interim control orders are generally made through *ex parte* proceedings, they are subject to confirmation through contested proceedings in the issuing court.[154]

3.163 Control orders may be sought for persons who have been convicted of terrorism offences (in Australia or abroad), have trained with a listed terrorist organisation or who have 'engaged in a hostile activity' in a foreign country (or supported or facilitated such engagement); or for the purposes of

[154] The Counter-Terrorism Legislation Amendment Bill (No. 1) 2016, which is currently before the Parliament, proposes to remove the Family Court of Australia as an issuing court for control orders.

preventing a terrorist act or preventing support for or facilitation of a terrorist act.[155]

3.164 The terms of a control order may include prohibiting a person from being in a specified place, leaving Australia, or communicating with specified individuals; or requiring the person to remain at specified places at certain times, wear a tracking device or report to authorities at specified times and places. The issuing court must be satisfied 'on the balance of probabilities' that each of the obligations, prohibitions and restrictions imposed by the control order is 'reasonably necessary, and reasonably appropriate and adapted' for the purposes of protecting the public from a terrorist act; preventing the provision of support for or the facilitation of a terrorist act; or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.[156]

3.165 State and Territory continuing detention regimes for sex offenders and violent offenders also allow the Supreme Court to consider an 'extended supervision order' as an alternative to a CDO. Extended supervision orders generally allow for a range of supervision, monitoring and management conditions to be imposed on risk offenders after they are released into the community upon the expiry of their sentence. Conditions may include reporting regularly to a corrective services officer, residing at a specified address, wearing electronic monitoring equipment, and restrictions around who to associate with.[157]

3.166 Some participants in the inquiry were supportive of the safeguard in paragraph 105A.7(c) of the Bill requiring the Court to consider alternatives to a CDO. For example, the joint councils for civil liberties indicated that, if the Bill becomes law, the provision 'will be a critical safeguard against excessive imposition of CDOs'.[158] The ANU Law Students Counter-Terrorism Research Group commended the drafters for including the

[155] Paragraph 104.4(1)(c) of the Criminal Code.

[156] Attorney-General's Department, *Submission 9*, p. 5.

[157] Attorney-General's Department, *Submission 9*, p. 5.

[158] Joint councils for civil liberties, *Submission 14*, p. 6.

provision. However, the Group argued that the Bill should also include criteria to guide the Court in its assessment against the provision.[159]

3.167 Other participants, however, raised concerns that, unlike in the State and Territory frameworks for high risk sex offenders and violent offenders—including the Queensland legislation upheld by the High Court in *Fardon*—there is no capacity in the Bill for the Court to make (as opposed to just consider) a control order or an extended supervision order.[160]

Interoperability between CDO and control order regimes

3.168 In his letter referring the Bill to the Committee on 15 September 2016, the Attorney-General noted that the Court would not be able to make a control order as an alternative to a CDO because

> the two regimes are distinct with different procedural and threshold requirements (for example, different courts issue control orders, there are different applicants, and different threshold requirements).

3.169 The Attorney-General made the following suggestion as to how the Committee should approach this issue:

> The Independent National Security Legislation Monitor and the Committee will conduct reviews into the control order regime by 7 September 2017 and 7 March 2018 respectively, which are likely to be relevant to this issue. In light of these proposed reviews, it may be better to defer a detailed consideration of how the control order regime and the regime under the HRTO Bill might better interact with each other until those reviews occur.

3.170 The Attorney-General's Department expanded on this issue in its initial submission to the inquiry. It noted that, given that the Supreme Court would not be able to make a control order as an alternative to a CDO, the AFP would need to 'separately request an issuing court to make an interim control order'. This would 'potentially lead to an undesirable situation in which the offender is subject to two court processes and there is a duplication of effort'. While repeating the Attorney-General's suggestion

[159] ANU Law Students Counter-Terrorism Research Group, *Submission 5*, pp. 12–13.

[160] Associate Professor Nolan, *Submission 13*, p. 7; Australian Human Rights Commission, *Submission 8*, p. 23; Queensland Government, *Submission* 15, pp. 1–2.

that a detailed consideration of these matters be deferred until the reviews by the INSLM and the Committee in 2017 and 2018 respectively, the Department offered two possible options for consideration:

> One option is to create extended supervision orders under the proposed regime in the Bill that can be made in the alternative to a continuing detention order. Despite the apparent overlap between control orders and continued detention order regimes, there are nuanced differences in focus of the regimes in terms of the persons and behaviour to be managed. An alternative option is to amend the control order regime so that a control order could be obtained as an alternative to a continuing detention order. Both approaches would give the Court greater flexibility to make appropriate orders for managing the risk to the community posed by terrorist offenders.[161]

3.171 At the public hearing, AFP Deputy Commissioner National Security, Mr Michael Phelan, expanded on his concerns about the lack of interoperability between the two regimes:

> What I am concerned about is that a judge making a decision not to grant an order based on the possibility of a control order being in place, and using that as the reason for not granting such an application, puts a burden on the Australian Federal Police to apply for a control order in that space. I would have thought it was reasonable, in the court of public opinion, that if a judge says, 'I'm not granting one of these orders because the AFP should turn their mind to a control order,' we should have our act together and start doing a control order. The issue for me, then, is that I am running two duplicate processes in two separate jurisdictions … basically on the same set of facts, running parallel at the same time …
>
> My submission is: if a judge may be of a mind to dismiss something, because a control order may be granted or applied for, then why not make it part of a holistic process similar to how the state and territories operate with having the equivalent of an ESO, or extended supervision order?[162]

3.172 A similar point was raised in the submission from the Australian Human Rights Commission, which noted that the Court hearing the application for a

[161] Attorney-General's Department, *Submission 9*, p. 6.

[162] *Committee Hansard*, 14 October 2016, p. 56.

CDO does not have the discretion to impose a control order if it considers that it would be more appropriate:

> In this respect, the regime proposed in the Bill is different to that in every other Australian jurisdiction in which post-sentence preventative detention orders are available. In each of those other jurisdictions, the Court has the option of making a supervision order as an alternative to a continuing detention order.
>
> If the Court hearing an application for a continuing detention order forms the view that a control order would be more appropriate, the safety of the community would be better served by the Court having the power to make that order, rather than making no order at all and relying on a subsequent application for a control order to be made by the AFP.[163]

3.173 In its submission, the Queensland Government noted that its Attorney-General had raised the issue of interoperability between the regimes at the 5 August 2016 meeting of Attorneys-General, noting the practical challenges that would need to be addressed. The submission highlighted the interoperability of applications for continued detention and supervision orders under the *Dangerous Prisoners (Sexual Offenders) Act 2003*(Qld), and the 'important role this plays in the effective operation of this regime'.[164]

Control orders for persons serving a prison sentence

3.174 In a letter, dated 13 October 2016, the day before the public hearing, the Attorney-General supplemented his earlier advice with the following:

> There is, however, a pressing matter which you may wish to consider as part of the current inquiry. As you are aware, under the HRTO Bill, the Court will not be able to make a control order as an alternative to a continuing detention order. This is because the two regimes are distinct with different procedural and threshold requirements. If a Court does not make a continued detention order, the Australian Federal Police (AFP) will need to consider whether to seek a control order. A fundamental practical issue will be the timing of seeking a control order.

[163] Australian Human Rights Commission, *Submission 8*, p. 23.

[164] Queensland Government, *Submission* 15, pp. 1–2.

> The control order regime is premised on an assumption that the persons who may pose a terrorist risk are already in the community. Currently, Division 104 requires the AFP to apply first for an interim control order (so that conditions can be applied to mitigate the risk) before a full hearing to confirm the order (so that the conditions can apply for the full duration of the order). It is unclear whether the legislation would support the AFP applying for a control order while a person is serving a sentence of imprisonment, with the conditions of the control order to apply on release.[165]

3.175 The Attorney-General encouraged the Committee to explore these issues with the AFP at the hearing on 14 October 2016, and to consider whether appropriate amendments might be pursued to address this issue. The Committee subsequently discussed the matter with witnesses at both the private and the public hearings, and invited supplementary submissions on the issue from some of those in attendance.

3.176 A supplementary submission from the AFP and the Attorney-General's Department expanded on the Attorney-General's concern. It noted that, until the 'broader issue of integration is addressed', the AFP would need to run CDO proceedings in a Supreme Court of a State or Territory and the alternative control order proceedings, if required, in the Federal Court or Federal Circuit Court. The AFP would need to ensure that a control order would be available (if necessary) to coincide with the person's release.

> The existing control order regime in Division 104 of the Criminal Code arguably allows for control orders to be sought and obtained over persons serving sentences of imprisonment. However, there may be logistical and practical challenges associated with obtaining such orders in cases where a continuing detention order is also being considered.
>
> Division 104 of the Criminal Code does not explicitly allow an application for an interim control order to be made while someone is serving a sentence of imprisonment. In the interests of certainty, and for the avoidance of doubt, it may be prudent to clarify in Division 104 that an interim control can be made while an individual is in prison and that the controls imposed by that order will not apply until the person is released from prison.

[165] The full text of the Attorney-General's letter is at Appendix C.

> From the AFP and Attorney-General's Department perspective, clarity on this issue is critical. In practice, if a court does not make a continuing detention order on the basis that a control order would be the least restrictive option available to protect the community, the community would expect that the AFP can apply for a control order and that the process to do so is clear.[166]

3.177 In its supplementary submission, the Australian Human Rights Commission supported a Court being permitted to make a control order in respect of a person still in detention as an alternative to a CDO, to apply from the date that the person is released from detention.[167]

3.178 The Law Council of Australia supported a single court process, with the Court being open to make a control order or extended supervision order as an alternative to a CDO. To ensure consistency within Australia's counter-terrorism framework, its preliminary view was that the control order option, rather than an extended supervision order option, would be preferable. However, in order to avoid an increase in applications for continued detention orders in the first instance rather than sole applications for control orders, the Law Council recommended that the Attorney-General should be required to be satisfied in an application for a continued detention order that there is no other less restrictive measure that would be effective.[168]

3.179 The Law Council also considered that the scheduled reviews of the control order regime 'should be brought forward, prior to the enactment of the Bill, so that the control orders, preventative detention orders and [CDOs] can be harmonised and form a consistent counter-terrorism framework'.[169]

Committee comment

3.180 The Committee notes the complexity of the two regimes operating through separate court processes and the limitations in the capacity of either process to consider the entire gradation in the levels of control that could be applied to a terrorist offender. These complexities need to be considered in a more

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[166] Attorney-General's Department and Australian Federal Police, *Submission 9.1*.

[167] Australian Human Rights Commission, *Submission 8.1*, pp. 8–9.

[168] Law Council of Australia, *Submission 4.1*, p. 4.

[169] Law Council of Australia, *Submission 4.1*, p. 3.

comprehensive and integrated manner. Amendments aimed at better integrating the two regimes could reduce the duplication of effort inherent in the currently proposed arrangements while also enhancing the proportionality of the CDO regime. The Committee also notes the support of the Law Council of Australia and the Australian Human Rights Commission for a single court process for the making of CDOs (or extended supervision orders) and control orders, as was suggested by the Attorney-General's Department.

3.181 The Committee notes that control orders may be issued for a variety of purposes, including for preventative purposes, which enable early intervention to, for example, encourage deradicalisation and stop a person from associating with members of a violent group; as well as post-sentence purposes, where the person involved has been convicted of a terrorism offence. It is understood that all control orders issued in recent years have fallen into the former category, and a number of legislative reforms to the control order regime introduced since 2014 have been directed toward these purposes.

3.182 Given these differing purposes, an appropriate solution to the interoperability issue could be that, in the first instance, the application processes for the existing control order regime be retained for preventative cases. In addition, a separate application process could be introduced for post-sentence control orders that aligns more closely to the CDO regime. The Committee suggests that consideration is given to these options.

3.183 Significantly, the INSLM is required to review the control order regime (in addition to other legislation) by 7 September 2017, and the Committee is required to review the same legislation by 7 March 2018, ahead of current sunset clauses in the legislation coming into effect on 7 September 2018. The Committee accepts the Attorney-General's suggestion that these reviews provide an opportunity to more broadly consider the interoperability between the two regimes and the complexities that may arise. Between now and when those reviews commence, the Committee recommends that the Attorney-General's Department give further consideration to the interoperability issues raised in this inquiry with a view to developing a preferred solution.

3.184 The Committee notes that, of the 16 persons currently serving a sentence of imprisonment for an offence within the scope of the regime, the earliest head sentences expire in 2019 – well after the reviews are completed. While the non-parole periods for some of these offenders may expire earlier than 2019, 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. As such, the Committee is not convinced that there is a need to urgently bring forward its review of the control order regime.

3.185 In regard to the discrete issue of clarifying in the legislation whether a control order may be sought for a person who is currently serving a sentence of imprisonment, the Committee acknowledges the need for clarity and supports this matter being explicitly addressed in the control order legislation.

Recommendation 16

3.186 The Committee recommends that, for the avoidance of doubt, the Government should amend Division 104 of the Criminal Code to make explicit that a control order can be applied for and obtained while an individual is in prison, but that the controls imposed by that order would not apply until the person is released.

3.187 The Committee further recommends that the Government consider whether the existing control order regime could be further improved to most effectively operate alongside the proposed continuing detention order regime. Any potential changes should be developed in time to be considered as part of the reviews of the control order legislation to be completed by the Independent National Security Legislation Monitor (INSLM) by 7 September 2017 and the Parliamentary Joint Committee on Intelligence and Security (PJCIS) by 7 March 2018.