Review of Australian Federal Police powers:

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

Parliamentary Joint Committee on Intelligence and Security

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

Table of Contents

About the Law Council of Australia **5**

Acknowledgement **6**

Executive Summary **7**

Summary of Law Council position **8**

Control orders and preventative detention orders 8

Control orders (COs) 8

Preventative Detention Orders (PDOs) 10

Police powers of stop, search and seizure 10

Continuing detention orders 12

Improvements to oversight and transparency of all powers 16

Background **18**

Legislative history 18

Extraordinary nature of powers under review 18

Previous reviews and extension of sunset dates 19

The value of regular parliamentary and independent review 19

Proposed 'extended supervision orders' regime 20

Control orders **21**

Necessity of the regime 23

Alternative recommendations 24

Period of effect and statutory pre-sunsetting reviews 24

Issuing threshold 24

Rules for drawing inferences from a person's past conduct 24

Outstanding recommendations of the first INSLM 25

Outstanding review recommendations – issuing court, available 'controls' and issuing threshold 26

Issuing court 26

Express prohibition on relocation orders 28

Issuing threshold – cumulative impact assessment 28

Interaction between control orders and continuing detention orders 29

Monitoring powers 30

Financial assistance in relation to control orders 31

Preventative detention orders **33**

Necessity of the regime 33

Alternative recommendations 34

Period of effect and statutory 'pre-sunsetting' reviews 34

Issuing threshold 35

Prohibition on investigative questioning of persons in preventative detention 36

Minimum age of persons who may be subject to a preventative detention order 37

Maximum duration of preventative detention orders 37

Information that must be given to persons in preventative detention 38
Monitoring confidential lawyer-client communications 38
Issuing authorities 39
Maximum penalty for the offence of contravening safeguards..................................40
Stop, search and seizure powers under Division 3A of Part 1AA of the Crimes Act 1914 ('Division 3A powers') 42
Powers in Commonwealth places and 'prescribed security zones' (Crimes Act, sections 3UB-3UE) 42
Emergency power to enter and search premises (Crimes Act, section 3UEA).............43
Non-use of Division 3A powers 43
Previous reviews and implementation 44
Law Council views and recommendations 45
Extension for a further three years, with statutory 'pre-sunsetting' reviews 45
Prescribed security zones 45
Criteria for declaring an area as a 'prescribed security zone' 45
Requirements for the revocation of a 'prescribed security zone' 50
Interaction of Division 3A powers with warrant-based search powers 51
Pre-conditions to the exercise of Division 3A search and seizure powers 51
Review of interactions between urgent warrants and Division 3A powers 52
Oversight of Division 3A powers 54
Notification of declarations of 'prescribed security zones' 54
Notification of rights to make complaints to oversight bodies 55
Continuing detention orders 55
Necessity of the regime 56
Prohibitions or limitations on post-sentence detention 58
Issuing thresholds and process 59
Definition of 'relevant expert' 59
The need for statutory precision in prescribing the categories of persons who may be appointed as 'relevant experts' 59
The Committee's conclusions in 2016 60
Seriousness of the relevant offence 61
Standard of proof in relation to unacceptable risk 62
Rules for drawing inferences about future risk 63
Mandatory considerations 63
Interim detention orders 64
Mandatory considerations 64
Technical correction to issuing criteria 65
Children who are convicted of serious terrorism offences 66
Rehabilitation 66
Post-sentencing assessments and referrals 66
Resourcing for rehabilitation programs 67

Annual reporting on rehabilitation measures 68
Arrangements with States and Territories 68
Conditions of continued detention 69
Public reporting and transparency 70
Public reporting on implementation of regime 70
Public disclosure of arrangements with States and Territories 70
Ministerial power of delegation—information-sharing functions 71
Interaction with ASIO's compulsory questioning powers 72
Potential use of ASIO's questioning material in CDO applications 73
Statement of procedures—compulsory questioning of terrorist offenders 76
Legal representation and financial assistance 77
The court's jurisdiction to order the Commonwealth to provide funding.....................77
Establishment of a dedicated Commonwealth legal assistance funding stream 78
Improper executive interference with judicial discretion via delegated legislation......78
Period of effect and further review of the regime 79
Oversight functions of the INSLM regarding all powers under review 80
An explicit statutory power to report separately on own-motion inquiries 80
Mechanisms to improve responsiveness to INSLM reports 81
Statutory timeframe for Government responses to all INSLM reports 81
Conferral of a statutory monitoring function on the INSLM 81
Improving timeliness in the Parliamentary tabling of unclassified INSLM reports...81
Mechanisms to improve Parliamentary oversight of the powers under review 82
Committee review of functions and powers under Part 5.3 of the Criminal Code 82
Committee review of police stop, search and seizure powers......................................83
Public transparency in relation to the powers under review 84

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

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

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

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
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Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

Acknowledgement

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Executive Summary

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

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

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

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

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

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

Summary of Law Council position

Control orders and preventative detention orders

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

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

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

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

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

Control orders (COs)

Issuing threshold

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

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

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

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

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

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

Conditions, limitations and restrictions able to be imposed under COs

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

Interaction of COs with CDOs

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

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

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

Financial assistance for respondents to CO applications

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

Preventative Detention Orders (PDOs)

Issuing criteria and procedural requirements

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

Sunsetting and review of Control Orders and Preventative Detention Orders

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

Police powers of stop, search and seizure

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

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

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

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

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

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

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

Designation of 'prescribed security zones'

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

Conditions on the exercise of powers

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

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

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

Oversight of stop, search and seizure powers

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

Continuing detention orders

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

Prohibition or limitations on indefinite post-sentence detention

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

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

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

Issuing thresholds and process

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

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

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

Rehabilitation

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

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

Treatment of persons being detained under CDOs

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

Public reporting and transparency

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

Ministerial power to delegate functions and powers under Division 105A

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

Interaction with compulsory questioning powers of ASIO

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

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

Legal assistance funding

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

Period of effect and further review

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

Improvements to oversight and transparency of all powers

Oversight by the Independent National Security Legislation Monitor (INSLM)

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

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

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

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

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

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

Oversight by the Committee

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

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

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

Public transparency

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

20. The objective of the register should be to ensure that all members of the Parliament and public have access to accurate, official statistical information on cumulative totals of orders issued.

Background

Legislative history

21. Other than CDOs, the extraordinary powers under review were enacted in 2005 as part of the second major tranche of Commonwealth counter-terrorism legislation.[12]

22. The CDO regime was enacted in 2016 and commenced on 7 June 2017. It was established pursuant to an agreement of the Council of Australian Governments (**COAG**) made in April 2016, in view of the impending release of persons convicted of terrorism offences following the completion of their sentences.[13]

Extraordinary nature of powers under review

23. The regimes of COs, PDOs and CDOs are extraordinary because they impose restraints on individual rights and liberties for preventive and protective purposes, rather than for punitive or investigative purposes connected with the commission of a criminal offence. Key instances of punitive purposes are sentences imposed by courts upon persons who have been convicted of terrorism or security offences; and the exercise by police of powers of arrest, as part of their investigations of suspected terrorism or other security offences. In contrast, the powers to limit rights and liberties under COs, PDOs and CDOs are based on predictions about future risk, which are, in turn, predicated on assessments of individuals' past conduct.

24. The warrantless police powers of stop, search and seizure in Division 3A of Part IAA of the Crimes Act are also extraordinary because they depart from the ordinary requirement that police must obtain a warrant, issued by a judge or a magistrate, to exercise such intrusive powers.

25. The issuance of a warrant by an independent judicial officer is a critical safeguard in the exercise of intrusive powers by the State, which would otherwise constitute trespass. The warrant system ensures that police search and seizure powers are

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

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

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

Previous reviews and extension of sunset dates

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

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

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

The value of regular parliamentary and independent review

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

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

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

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

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

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

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

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

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

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

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

Proposed 'extended supervision orders' regime

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

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

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

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

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

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

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

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

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

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

Control orders

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

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

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

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

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

[26] Criminal Code, section 104.3 (application) and 104.4 (issuing).
[27] Ibid, paragraphs 104.5(1)(f) and 104.16(1)(d).
[28] Ibid, section 104.27.
[29] Ibid, section 104.27A. The offence applies to the subject of the CO (the 'controlee') and any other person.

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

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

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

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

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

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

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

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

Necessity of the regime

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

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

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

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

Recommendation 1 – non-renewal of the control order regime

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

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

Alternative recommendations

Period of effect and statutory pre-sunsetting reviews

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

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

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

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

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

Issuing threshold

Rules for drawing inferences from a person's past conduct

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

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

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

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

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

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

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

Recommendation 3 – rules for drawing inferences about future risk

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

Outstanding recommendations of the first INSLM

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

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

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

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

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

Recommendation 4 – outstanding recommendations of the first INSLM

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

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

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

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

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

Issuing court

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

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

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

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

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

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

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

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

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

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

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

Additional conferral of jurisdiction on State and Territory Supreme Courts

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

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

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[41] COAG Review, *Final report of the COAG review of counter-terrorism legislation* (March 2013), 58 at [231].

[42] The Hon Roger Gyles AO QC, INSLM, *Control order safeguards: Part 2*, (April 2016), 8 at [6.6] and [6.7].

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

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

Express prohibition on relocation orders

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

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

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

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

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

Issuing threshold – cumulative impact assessment

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

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

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

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

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

Recommendation 5 – implementation of outstanding review recommendations

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

Interaction between control orders and continuing detention orders

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

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

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

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

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

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

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

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

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

Monitoring powers

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

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

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

[48] Ibid, 13-14 at [36].
[49] Section 3ZZKA Crimes Act, read in conjunction with s 3ZZNA Crimes Act.

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

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

Recommendation 7 – repeal of control order monitoring powers

Preferred option

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

Alternative option

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

Financial assistance in relation to control orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Preventative detention orders

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

Necessity of the regime

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

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

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

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

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

Recommendation 9 – non-renewal of preventative detention orders

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

Alternative recommendations

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

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

Period of effect and statutory 'pre-sunsetting' reviews

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

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

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

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

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

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

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

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

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

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

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

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

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

Issuing threshold

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

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

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

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

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

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

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

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

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

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

Recommendation 11 – likelihood of terrorist act being carried out

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

Prohibition on investigative questioning of persons in preventative detention

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

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

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

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

[74] Criminal Code, section 105.26.

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

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

Recommendation 12 – retention of prohibition on investigative questioning

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

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

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

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

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

Recommendation 13 – no reduction in minimum age

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

Maximum duration of preventative detention orders

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

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

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

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

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

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

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

Recommendation 14 – no increase to maximum duration of detention

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

Information that must be given to persons in preventative detention

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

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

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

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

Recommendation 15 – 'sufficient information' requirement

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

Monitoring confidential lawyer-client communications

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

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

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

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

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

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

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

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

Recommendation 16 – prohibition on monitoring lawyer-client communications

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

Issuing authorities

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

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

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

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

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

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

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

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

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

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

Maximum penalty for the offence of contravening safeguards

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

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

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

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

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

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

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

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

Recommendation 18 – alignment of maximum penalties for PDO offences

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

[89] Bret Walker SC, INSLM, *Declassified annual report 2012* (December 2012), 80-81,recommendation IV/4.
[90] Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Australian Security Intelligence Organisation Amendment Bill 2020*, (July 2020), 83-84.

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

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

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

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

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

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

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

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

[93] Ibid, section 3UC.

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

[95] Ibid, section 3UD.

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

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

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

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

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

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

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

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

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

Non-use of Division 3A powers

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

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[98] Ibid, subsection 3UJ(3).
[99] Ibid, subsection 3UJ(4).
[100] Ibid, subsection 3UJ(7).
[101] Ibid, subsections 3UJ(5) and (6).
[102] Ibid, subsection 3UEA(1).
[103] Ibid, subsection 3UEA(2).
[104] Ibid, subsection 3UEA(5).
[105] Ibid, subsections 3UEA(3) and (4).
[106] James Renwick CSC SC, INSLM, *Review of Division 3A of Part1AA of the Crimes Act 1914: stop search and seize powers* (September 2017) 25 at [6.1]; and Parliamentary Joint Committee on Intelligence and Security, *Report on the review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (February 2018) 4 at [1.17].

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

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

Previous reviews and implementation

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

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

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

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

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

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

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

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

[111] Ibid.

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

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

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

Law Council views and recommendations

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

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

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

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

Recommendation 19 – limited extension of Division 3A powers

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

Prescribed security zones

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

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

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

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

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

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

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

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

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

Issuing threshold directed to 'necessity' of the declaration

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

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

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

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

Proportionality, including an assessment of human rights impacts

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

[117] Ibid, subsection 3UJ(3).
[118] Ibid, subsection 3UJ(1).
[119] PJCIS, *2018 review report,* 21 at [2.46]. See also: INSLM, *Police powers report*, 37-38 at [8.51].

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

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

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

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

Strengthening the mandatory revocation requirement

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

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

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

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

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

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

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

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

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

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

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

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

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

The need for stronger statutory parameters on the Ministerial discretion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Requirements for the revocation of a 'prescribed security zone'

Minister's mandatory revocation obligation

178. Subsection 3UJ(4) provides that the Minister for Home Affairs must revoke a declaration in certain circumstances. These are:
    - if the declaration is made to prevent a terrorist act from being committed—there is no longer a terrorism threat that justifies the declaration being continued;[124] and
    - if the declaration is made to manage the aftermath of a terrorist act—the declaration is no longer required.[125]
179. While the Law Council supports the existence of a mandatory revocation obligation if the relevant issuing criteria are no longer met, the vice in subsection 3UJ(4) arises from the exceptionally low issuing threshold in subsection 3UJ(1).
180. This makes it unlikely that the revocation obligation in subsection 3UJ(4) would be enlivened in those cases in which the police would derive any kind of assistance in the exercise of the Division 3A powers. It would not be material that those powers may disproportionately limit individual rights, because they may only yield a very limited form of assistance. It would also not be material that it would be open to police to obtain the same level of assistance by obtaining a search warrant rather than relying on extraordinary warrantless powers.
181. The Law Council therefore considers it essential that the statutory revocation obligation is amended, so that it linked to the statutory issuing criteria for declarations set out in the Law Council's recommendation 20 above.
182. Consistent with the Law Council's comments on the issuing criteria, placing sole reliance on an expectation about the non-statutory factors a security or law enforcement agency or a policy department may take into consideration when advising the Minister on a potential revocation is not a legal safeguard. The Minister is under no legal obligation to accept that advice, and in any event, the public will not have the assurance of clear, certain and transparent legal standards that govern the making and mandatory revocation of declarations.

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

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

AFP obligations in relation to revocation

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

[124] Crimes Act, paragraph 3UJ(4)(a).
[125] Ibid, paragraph 3UJ(4)(b).
[126] Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, (February 2018), 20 at [2.44] and 23-24 at [2.53]-[2.54].
[127] Ibid, 20 at [2.44].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Review of interactions between urgent warrants and Division 3A powers

Potential reforms to emergency warrant provisions

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

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

[131] Crimes Act, section 3R.

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

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

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

Consideration of independent authorisation for certain Division 3A powers

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

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

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

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

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

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

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

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

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

Oversight of Division 3A powers

Notification of declarations of 'prescribed security zones'

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

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

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

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

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

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

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

[135] Crimes Act, section 3UJB.

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

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

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

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

Notification of rights to make complaints to oversight bodies

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

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

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

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

Continuing detention orders

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

[138] Criminal Code, subparagraphs 104.12(1)(b)(iv) and (vii); paragraphs 104.17(1)(b); and subparagraph 104.26(1)(c)(iii).
[139] Ibid, paragraphs 105. 28(2)(e)-(h).

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

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

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

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

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

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

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

Necessity of the regime

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Prohibitions or limitations on post-sentence detention

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

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

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

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

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

Recommendation 28 – maximum duration of post-sentence detention

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

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

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

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

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

Issuing thresholds and process

Definition of 'relevant expert'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Committee's conclusions in 2016

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

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

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

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

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

Seriousness of the relevant offence

238. Section 105A.3 prescribes the persons who may be the subject of a CDO. It lists the offences of which a person must have been convicted. These are:
   - offences against Subdivision A of Division 72 of the Criminal Code (international terrorist activities using explosive or lethal devices);
   - offences against Part 5.3 of the Criminal Code (terrorism) that are punishable by a maximum penalty of seven or more years' imprisonment); and
   - offences against Part 5.5 of the Criminal Code (foreign incursions) excluding offences for publishing recruitment advertisements, and offences against the predecessor to Part 5.5, the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).

239. The Law Council remains concerned the approach of prescribing broad categories of offences that carry high maximum penalties (which are generally between seven years and life imprisonment) is overly broad. The maximum penalty for an offence is intended to cover the most serious case. Accordingly, the requirements of section 105A.3 do not restrict the application of the CDO regime to those offenders who have been sentenced to a term of imprisonment of a particular period (for example, seven years' imprisonment).

240. This means that the CDO regime could be available in respect of persons whose offending was at the lower end of the range of objective seriousness. For example, the Supreme Court of New South Wales recently sentenced a person to three years and eight months imprisonment for the offence in subsection 119.1(2) of the Criminal Code for engaging in a hostile activity in a foreign country, notwithstanding that this offence is punishable by a maximum penalty of life imprisonment. The Court held that the offending was at the 'very lowest end of objective seriousness for offences of this kind'.[155]

241. The offender in this case could be the subject of a CDO, if the risk threshold in section 105A.7 of the Criminal Code is met within 12 months of his release (with the head sentence ending on 18 February 2022). In contrast, if a person who

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

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

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

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

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

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

Recommendation 30 – seriousness of underlying offence

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

Standard of proof in relation to unacceptable risk

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

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

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

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

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

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

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

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

Rules for drawing inferences about future risk

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

Recommendation 31 – rules for drawing inferences about future risk

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

Mandatory considerations

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

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

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

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

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

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

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

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

Interim detention orders

Mandatory considerations

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

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

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

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

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

Recommendation 33 – issuing criteria for interim detention orders

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

Technical correction to issuing criteria

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

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

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

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

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

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

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

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

Children who are convicted of serious terrorism offences

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

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

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

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

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

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

Rehabilitation

Post-sentencing assessments and referrals

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

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

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

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

[166] Ibid, 31 at [113].

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

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

Resourcing for rehabilitation programs

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

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

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

Recommendation 37 – resourcing for custodial and community rehabilitation

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

[167] Ibid.

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

Annual reporting on rehabilitation measures

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

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

Recommendation 38 – reporting requirements: rehabilitation

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

Arrangements with States and Territories

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

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

272. The Law Council considers that the power of the Minister to make arrangements under section 105A.21 should be subject to explicit, human rights-based preconditions. In particular, the Minister should be required to make all reasonable inquiries and take all reasonable steps to ensure that the prison accommodation provided for the CDO subject:
    - complies with the requirement in section 105A.4 for such persons to be treated in a way that is appropriate to their status as persons who are not serving a sentence of imprisonment; and
    - complies with Australia's international human rights obligations.

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

Recommendation 39 – human rights preconditions to making arrangements

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

Conditions of continued detention

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

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

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

Recommendation 40 – treatment of people subject to CDOs in prison

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

Public reporting and transparency

Public reporting on implementation of regime

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

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

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

Recommendation 41 – public reports on implementation plans

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

Public disclosure of arrangements with States and Territories

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

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

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

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

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

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

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

Recommendation 42 – publication of arrangements with States and Territories

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

Ministerial power of delegation—information-sharing functions

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

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

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

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

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

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

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

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

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

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

Recommendation 43 – addressing overbreadth in classes of delegates

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

Interaction with ASIO's compulsory questioning powers

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

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

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

Potential use of ASIO's questioning material in CDO applications

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

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

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

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

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

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

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

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

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

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

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[173] Criminal Code, sections 105A.8(3) and 105A.13.
[174] ASIO Act, subsection 34L(8).

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

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

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

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

The need for amendments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<u>**Preferred option**</u>

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

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

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

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

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

Alternative option

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

Statement of procedures—compulsory questioning of terrorist offenders

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

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

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

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

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

Legal representation and financial assistance

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

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

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

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

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

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

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

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

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

Recommendation 46 – power of court to order legal assistance funding

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

Establishment of a dedicated Commonwealth legal assistance funding stream

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

Recommendation 47 – legal assistance funding program for CDOs

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

Improper executive interference with judicial discretion via delegated legislation

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

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

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

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

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

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

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

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

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

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

Period of effect and further review of the regime

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

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

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

Recommendation 49 – sunsetting and parliamentary scrutiny of the CDO regime

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

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

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

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

Oversight functions of the INSLM regarding all powers under review

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

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

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

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

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

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

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

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

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

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

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

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

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

> **Recommendation 50—an express statutory power for the INSLM to prepare separate reports on their own-motion inquiries**
>
> - **The *Independent National Security Legislation Monitor Act 2010* (Cth) should be amended to confer an express power on the INSLM to report on a matter or matter within their statutory functions, but more urgently and more particularly than by the annual report.**

Mechanisms to improve responsiveness to INSLM reports

Statutory timeframe for Government responses to all INSLM reports

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

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

Conferral of a statutory monitoring function on the INSLM

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

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

Improving timeliness in the Parliamentary tabling of unclassified INSLM reports

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

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

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

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

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

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

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

Recommendation 51—mechanisms to improve responsiveness to INSLM reports

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

Mechanisms to improve Parliamentary oversight of the powers under review

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

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

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

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

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

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

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

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

Committee review of police stop, search and seizure powers

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

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

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

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

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

> **functions or duties, or the exercise of powers, under Division 3A of Part IC of the *Crimes Act 1914* (Cth), not limited to the AFP.**
>
> - **This would cover the role of departmental officials in administering and advising on the regime, including in the making and cancellation, extension or variation of declarations of prescribed security zones.**

Public transparency in relation to the powers under review

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

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

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

> **Recommendation 54—public register of extraordinary counter-terrorism powers**
>
> - **The Australian Government should establish a publicly accessible online register for extraordinary counter-terrorism orders. It should provide consolidated information about the cumulative total numbers of control orders, preventative detention orders, and declarations of prescribed security zones made to date. This should be maintained in addition to annual reporting requirements on individual powers.**
> - **The register should be updated in real time, or as close as possible, and should provide details of relevant cases involving control order and continuing detention order applications, and details of prescribed security zone declarations.**

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