Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

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 3
Acknowledgement 4
Executive Summary 5
General principles regarding post-sentence preventive detention 7
Primary object – safety and protection of community 7
Continuing Detention Order 8
Constitutional validity 8
Eligibility 8
Conduct and offence type 8
Connection between eligibility and risk 8
Treason 9
Seriousness of the offence 10
Procedure and proof 10
Applications to the Supreme Court 10
Successive orders and possibility of indefinite detention 12
Accurate risk predictability 13
Relevant experts 16
Legal Representation 17
Standard of proof 18
High degree of probability 18
Unacceptable risk 19
Matters a Court must have regard to in making a CDO 20
Giving terrorist offenders documents 21
Right of appeal 21
Periodic review 21
Interim orders 22
Applicability to children 23
Administration of the scheme 27
Terrorism offenders should be warned that they may be subject to orders 27
Entitlement to bail 27
Parole 28
Conditions of detention 29
Suitable post-release programs 31
Human rights and fundamental freedoms 32
Independent Review 34

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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
- Law Firms Australia
- The Victorian Bar Inc.
- Western Australian Bar Association

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

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

Acknowledgement

The Law Council acknowledges the assistance of its National Criminal Law Committee, National Human Rights Committee, the Law Society of New South Wales and the New South Wales Bar Association in the preparation of this submission. The Law Council is also grateful for the opportunity to consult with the Attorney-General's Department during the preparation of this submission.

Executive Summary

1. The Law Council of Australia is grateful for the opportunity to provide the following submission to the Parliamentary Joint Committee on Intelligence and Security's (**the Committee's**) inquiry into the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (**the Bill**).

2. The Bill was introduced into the Senate on 15 September 2016. Relevantly, it amends Part 5.3 of the *Criminal Code Act 1995* (Cth) (***Criminal Code***) to establish a scheme for the continuing detention of high risk terrorist offenders (**detainees**) who 'pose an unacceptable risk to the community at the conclusion of their custodial sentence'.[1]

3. The Supreme Court is authorised to make a continuing detention order (**CDO**) for no more than three years. However, a successive order, commencing immediately after a previous order ceases to be in force, can then be made by the Court.[2]

4. The practical effect of these provisions is that an offender whose sentence had been served in full could be held in detention indefinitely after their sentence expires. The legislation does not stipulate a maximum number of CDOs that can be made in relation to each detainee, or the maximum total number of years for such detention.

5. The Law Council acknowledges that the Bill is aimed at the legitimate objective of protecting the community from harm that may be caused by individuals convicted of terrorism offences who continue to be radicalised or engaged in terrorism.

6. However, the Law Council notes the suite of existing powers in the *Criminal Code* to impose control orders and preventative detention orders and offences carrying life sentences in the case of those who threaten to carry out further terrorist acts. These are in addition to general parole conditions.

7. Post-sentence preventive detention also sits outside the normal criminal justice framework. It confronts, if not contravenes, a range of common law principles and human rights protections by virtue of:

   - the application of the rules of evidence and procedure for civil matters to detention, without ordinary means of testing contested evidence;
   - detention being based on preventing expected future behaviour, rather than as a punishment for past offending proven in a Court;
   - ongoing detention contrary to the principle of finality;
   - the reality that detainees will serve their continued detention in high risk security conditions;
   - the reality of what can be seen as double punishment for the same conduct;
   - retrospectivity of criminal laws applicable to offenders sentenced before the regime proposed by the Bill was in place; and

[1] Explanatory Memorandum, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) 1.
[2] Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) sch 1 item 1. Proposed section 105A.7(5) and (6).

- the question of whether the regime may be considered to be inconsistent with freedom from arbitrary detention and the right to liberty of the person in Article 9, and the right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the person in Article 10, of the *International Covenant on Civil and Political Rights.*

8. Aspects of the Bill which may breach these protections are considered in this submission.

9. The Bill also gives rise to practical difficulties:

   - Who are the psychiatrists/psychologists or 'other experts' with the demonstrated expertise to predict future terrorist actions?
   - How will they make meaningful predictions based on one or more interviews of people who have already served lengthy sentences?
   - How will the prison system provide appropriate conditions which facilitate the de-radicalisation and rehabilitation prospects for detainees?

10. For these reasons, the regime proposed by the Bill should only be adopted if:

   - It is a necessary and proportionate response to the risk sought to be addressed;
   - The risk cannot be met by less restrictive alternatives either generally or in response to a specific case; and
   - The procedure for the making of a CDO incorporates appropriate safeguards.

11. In the event that the Bill proceeds, the Law Council recommends that the Bill be amended to improve consistency with rule of law principles[3] and the integrity of the judicial process as proposed in this submission.

[3] Law Council of Australia, *Policy Statement: Rule of Law Principles,* March 2011.

General principles regarding post-sentence preventive detention

12. Fundamental sentencing principles require observance of the principle of proportionality; that is, in effect that the punishment should not exceed the seriousness of the crime.[4] The original sentence imposed reflects the synthesis of all of the purposes of sentencing, including punishment, deterrence, denunciation and protection of the community from the offender.[5]

13. Continuing detention also undermines the fundamental principle of finality in sentencing (subject to appeals), and may have the effect of sidelining altogether the original sentencing judgment. Unless very carefully constrained to exceptional circumstances, continuing detention in effect amounts to a new punishment beyond that already imposed in accordance with law.

14. Predicting an offender's future conduct is a notoriously difficult task.[6] In *Fardon v Attorney General for the State of Queensland* (***Fardon***), Justice Kirby observed that predictions of dangerousness are 'based largely on the opinions of psychiatrists which can only be, at best, an educated or informed "guess"'.[7] The UN Human Rights Committee also noted this problem in the *Tillman v Australia* and *Fardon* cases.[8]

15. The Law Council submits that, before the Committee recommends the Bill proceed, it should satisfy itself as to the existence of reliable evidence about which it can have confidence to support the proposed preventive detention regime.

Primary object – safety and protection of community

16. Proposed section 105A.1 of the Bill provides that the object of proposed Division 105A of the *Criminal Code* is to ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders who pose an unacceptable risk of committing serious Part 5.3 offences if released into the community.

17. Proposed paragraph 105A.8(a) provides that, when determining an application for a CDO, the Supreme Court must have regard to the safety and protection of the community.

18. In *Lynn v State of New South Wales*,[9] the New South Wales Court of Appeal confirmed at [55], in the context of the New South Wales high risk offender detention regime, that the evaluation of whether an offender poses an 'unacceptable risk' requires the Court to consider the primary object of the Act, being to ensure the safety and protection of the community.

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[4] *Veen v The Queen [No 2]* (1988) 164 CLR 465, 470.
[5] *Crimes (Sentencing Procedure) Act 1999* (NSW), s3A.
[6] *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 275 [124]-[125].
[7] Ibid [125].
[8] Human Rights Committee, *Views: Communication No 1635/2007,* 98th sess, UN Doc CCPR/C/98/D/1635/2007 (10 May 2010, adopted 18 March 2010) [7.4] ('*Tillman v Australia'*); Human Rights Committee, *Views: Communication No* 1629/2007, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010, adopted 18 March 2010) [7.4] ('*Fardon v Australia').*
[9] *Lynn v State of New South Wales* [2016] NSWCA 57.

Continuing Detention Order

19. The Attorney-General can apply to the Supreme Court of a State or Territory for a CDO or an interim detention order (**IDO**).[10] The effect of a CDO is to commit a 'terrorist offender' to detention in a prison for the period the order is in force, which can be up to three years.[11] Proposed subsection 105A.7(6) provides that there is no limit on the number of CDOs that can made.

20. The proposed scheme does not authorise the continuing detention of minors. However, a minor who is convicted of a relevant offence can be subjected to the scheme provided they are 18 when the sentence ends.[12]

Constitutional validity

21. In *Fardon,*[13] the High Court held that the Queensland sex offender detention regime was constitutionally valid. The High Court held that the powers conferred on the Supreme Court of Queensland were not incompatible with that Court's exercise of federal jurisdiction under Chapter III of the Constitution. Imprisonment was not considered to be 'punishment' if authorised for a non-punitive reason such as community protection.

22. It is important to recall that *Fardon* was concerned with the application of *Kable v Director of Public Prosecutions (NSW)* (1996)[14] to a State Court vested with federal jurisdiction. The present Bill, on the other hand, involves the direct application of Chapter III of the Constitution to federal legislation.[15] The constitutional validity of the scheme is critical and it is imperative that appropriate consideration be given to this issue prior to enactment.

Eligibility

Conduct and offence type

Connection between eligibility and risk

23. The *Criminal Code* offences that trigger eligibility for a CDO are identified in proposed paragraph 105A.3(1)(a) as follows:

    - an offence against Subdivision A of Division 72 (international terrorist activities using explosive or lethal devices);
    - an offence against Subdivision B of Division 80 (treason);
    - a serious Part 5.3 offence (defined in section 105A.2 as an offence the maximum penalty for which is 7 or more years imprisonment); and
    - an offence against Part 5.5 (foreign incursions and recruitment).

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[10] Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) sch 1 item 1. Proposed section 105A.7 and 105A.9.
[11] Ibid, proposed subsection 105A.7(5).
[12] Ibid, proposed paragraph 105A.3(1)(c).
[13] *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575.
[14] *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.
[15] Cf *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575 [68] (Gummow J).

24. The Law Council has previously raised concerns in relation to a range of the eligibility offences. For example, Part 5.3 terrorism offences include a range of preparatory offences which can impose substantial terms of imprisonment where an offender has not inflicted harm on the community. There may also be people convicted for offences against the *Criminal Code* as a result of amendments made by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (***Foreign Fighters Act***). For example, people may receive a conviction for supporting Australian foreign policy by fighting against ISIS or for falling outside the restricted list of exceptions.[16] These offences extend to penalising conduct for the very purpose of deterring it; for example, being in a foreign place. The Bill contemplates that that conviction will be the trigger for a very different regime, namely, ongoing preventive detention.

Treason

25. Proposed subparagraph 105A.3(1)(a)(ii) provides that a CDO may be made in relation to a person who has been convicted of 'an offence against Subdivision B of Division 80 [of the *Criminal Code*] (treason)'.

26. This subparagraph is in marked contrast to the other provisions of paragraph 105A.3(1)(a), which respectively concern international terrorist activities using explosive or lethal devices, a serious Part 5.3 terrorism offence and foreign incursions and recruitment offences.

27. The Subdivision B of Division 80 treason offences include causing the death of or harm to the Sovereign, the Governor General or the Prime Minister, levying war (or doing acts preparatory to levying war) against the Commonwealth, or instigating a person who is not an Australian citizen to make an armed invasion of the Commonwealth or one of its territories. These acts, while undoubtedly very serious, are of a different nature to the terrorism offences with which paragraph 105A.3(1)(a) is otherwise concerned.

28. Treason offences in Subdivision B of Division 80 of the *Criminal Code* were included in the definition of a 'terrorism offence' under the *Crimes Act 1914* (Cth) (***Crimes Act***) following the enactment of the *Foreign Fighters Act*.

29. Due to the very limited timeframes involved for non-government organisations to consider that substantial piece of legislation, the Committee did not receive substantive submissions opposing the inclusion of treason in the *Crimes Act* definition. Similarly, from publicly available submissions and the Committee's report on the Foreign Fighters Bill,[17] it does not appear that the Committee received evidence to justify its inclusion.

30. Neither the Second Reading Speech nor the Explanatory Memorandum to the Bill set out any underlying policy rationale for the extension of the proposed regime of CDOs to treason offences, many of which are not 'terrorism-related offences'. The regime ought not to be so extended, absent any underlying rationale for the extension.

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[16] Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act* 2014 (Cth), 3 October 2014.
[17] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014).

Recommendation:

- **The Bill should not apply to persons convicted of Subdivision B of Division 80 of the *Criminal Code* treason offences, absent any underlying rationale for the extension.**

Seriousness of the offence

31. A deliberate attempt appears to have been made to ensure that conviction for a terrorism-related offence carrying a certain level of serious penalty is required for a person to be considered eligible under the scheme. The seven year maximum penalty is consistent with the New South Wales High Risk Offender legislation.[18] However, the maximum sentence for an offence is intended to cover the most serious case and does not reflect the seriousness of a particular offence. The scheme should be restricted to those who have been sentenced to a minimum term greater than seven years to reflect the seriousness of the particular offending.

Recommendation:

- **The scheme should be restricted to those who have been sentenced to a minimum term greater than seven years to reflect the seriousness of the particular offending.**

Procedure and proof

Applications to the Supreme Court

32. An issue of particular concern relates to applications for CDOs. The Bill permits the rules of procedural fairness to be abrogated in certain circumstances. Where the consequence of a successful application will be continuing detention after a detainee has served their entire sentence, procedural fairness is of particular significance.

33. By the combined effect of subsections 105A.5(3) and 105A.5(5), the Attorney-General or their representative is not required to give to the respondent 'any report or other document' to be relied on in relation to the application in certain circumstances. All that is required to trigger this denial of procedural fairness is that the Attorney-General 'is likely' to take one of the steps set out in subsection 105A.5(5).[19]

34. The Law Council of Australia, NSW Bar Association and Law Society of NSW are concerned that the offender is not in a position to defend themselves if not provided

[18] *Crimes (High Risk Offenders) Act 2006* (NSW), sub-s 5(1), s 5A.
[19] Section 105A.5 provides that the Attorney-General, or a legal representative of the Attorney-General, may apply to a Supreme Court of a State or Territory for a CDO in relation to a terrorist offender, and that such application must include any report or other document that the applicant intends to rely on. Subsection 5 provides that the applicant is not required to give the offender any information included in the application if the Attorney-General 'is likely' to give a certificate under Subdivision C of Division 2 of Part 3A of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth); seek an arrangement under section 38B of that Act; make a claim of public interest immunity; or seek an order of the Court preventing or limiting disclosure of the information.

with the information, or a *précis* of the information, relied upon against them to obtain a CDO.

35. The subject of the CDO proceedings should be provided sufficient information about the allegations against them to enable effective instructions to be given in relation to those allegations. In addition, there should, as a minimum be a provision, requiring service of all the evidence if, for example, one of the steps is not taken by the Attorney-General within a specific period of time.

36. Paragraph 105A.5(5)(c) specifies a claim of public interest immunity as one of the steps, the likelihood of which permits the Attorney-General to refuse to serve material on the respondent. However, a claim of public interest immunity is in a different category to the other steps set out in paragraph 105A.5(5)(c). The usual consequence of a valid claim of public interest immunity is that the information over which the claim is made is not available for admission into evidence. That is, the information the subject of a claim cannot be deployed to assist the party asserting the claim. The inclusion of public interest immunity in subsection 105A.5(5) is inconsistent with paragraph 105A.5(3)(a) and the chapeaux to subsection 105A.5(5). That is, if a claim of public interest immunity is to be asserted, then the material the subject of the claim ought not to be a part of the application. The real vice of paragraph 105A.5(5)(c) is that it permits a circumstance in which the respondent remains unaware of (and unable to challenge) the material deployed against them in an application.

37. Further, subsection 105A.5(2) provides that an application may not be made more than 6 months before the end of the relevant sentence of imprisonment or the period for which a CDO is in force. The experience of criminal legal practitioners in relation to sex offenders preventive detention regimes suggests a difficulty with late applications which means that a person is required to remain in custody through all the adjournments. Adequate safeguards are required to ensure that the Crown makes applications with enough time for the person who might be subject to the order to respond and for disputed court processes to be properly prepared, heard and decided. The Law Council considers on this basis that an application should be required to be heard and determined well in advance of the expiry of the person's sentence or CDO. Likewise, the Law Council is concerned that the Bill does not provide for the circumstance of making an application and release on parole. This matter should be explicitly addressed by legislation (as set out below under 'Parole').

Recommendations:

- **The subject of proceedings for a CDO should be provided with sufficient detail of information included in the application for the CDO involving adverse assertions to enable them to properly defend themselves;**
- **There should be a time limit imposed for the Attorney-General to take one of steps listed in section 105A.5(5) to limit access to information filed with the application (e.g. within 30 days of filing the application). Otherwise, the whole of the material must be served on the respondent;**
- **If a claim of public interest immunity is to be asserted, then the material the subject of the claim ought not to be a part of the application; and**
- **An application for a CDO should be required to be heard and determined well in advance of the expiry of the person's sentence or CDO.**

Successive orders and possibility of indefinite detention

38. An order made by the Supreme Court must be for a period of no more than three years.[20]

39. Subsection 105A.7(5) does not prevent the Supreme Court from making a successive CDO.[21] Any successive CDO must also be for a period of no more than three years, by the operation of subsections 105A.7(4) and (5). However, the Bill does not provide for a maximum total term of any combined original CDO and any successive order or orders. As the Attorney-General stated in the Second Reading Speech, 'there is no limit to the number of such applications'.[22]

40. Absent amendment, this means that a detainee could be held in detention for an indefinite number of three year terms after their sentence has been served in full.

41. An indefinite detention scheme for high risk offenders was established in the United Kingdom under the *Criminal Justice Act 2003* (UK) (***Criminal Justice Act***), however, it was ultimately abolished in 2012[23] following significant criticism[24] in relation to the low threshold for establishing risk, and the high requirements for release.[25]

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[20] Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) sch 1 item 1. Proposed subsections 105A.7(4) and (5).
[21] Ibid proposed subsection 105A.7(6).
[22] Commonwealth, *Parliamentary Debates*, Senate, 15 September 2016 , 41 (George Brandis).
[23] The *Legal Aid Sentencing and Punishment of Offenders Act 2012* (UK) abolished the sentence of imprisonment for public protection and established a new sentencing framework for dangerous offenders.
[24] Zoe Conway, 'David Blunkett 'regrets injustices' of indeterminate sentences', *BBC News* (online), 13 March 2014 <http://www.bbc.com/news/uk-26561380>.
[25] Tamara Tulich, 'Will post-sentence detention of convicted terrorists make Australia any safer?', *The Conversation* (online), 26 July 2016 <http://theconversation.com/will-post-sentence-detention-of-convicted-terrorists-make-australia-any-safer-62980>.

42. Currently in the UK an extended determinate sentence framework is in place under the *Criminal Justice Act.* The Sentencing Council for England and Wales notes that this framework allows a Court to give an extended sentence to an offender[26] in circumstances where:

- the offender is guilty of a specified violent or sexual offence;[27]
- the Court assesses the offender as a significant risk to the public of committing further specified offences;
- a sentence of imprisonment for life is not available or justified; and
- the offender has a previous conviction for an offence listed in schedule 15B to the *Criminal Justice Act* or the current offence justifies an appropriate custodial term of at least four years.[28]

43. While providing extra protection to the public in cases where the Court has found that the offender is dangerous and an extended imprisonment period is required to protect the public from risk of harm, the scheme has limitations which make it more palatable than the prior indefinite detention scheme, including the following:

- The extended imprisonment period must not exceed five years;[29] and
- The combined total of the prison term and extension period cannot be more than the maximum sentence for the offence committed.[30]

Recommendation:

- **A maximum prescribed term of ongoing detention should be set out in the Bill; alternatively, there should be a limit on the number of successive orders that can be made.**

Accurate risk predictability

44. The Law Council is particularly concerned as to whether it is possible to accurately predict whether a person will engage in future serious terrorism-related conduct on the basis of past offending. The Law Council is not aware of an accurate Australian or international risk method to predict such behaviour. From its inquiries, the Law Council understands that it may take some years to develop such a method in Australia. The Law Council is concerned about the ability of the Committee to properly assess and scrutinise the proposed scheme in the absence of a reliable risk predictive tool as this is a critical element of the relevant expert's report. The tool should also be developed in an accountable manner which receives considerable input from psychologists, psychiatrists, counter-terrorism experts, the courts, legal practitioners, the Attorney-General's Department and law enforcement

[26] Over the age of 18.
[27] Which includes a number of terrorism offences. See part 1 of schedule 15 of the *Criminal Justice Act 2003* (UK) for the offences included in 'specified offences'.
[28] Sentencing Council, *Extended Sentences* <https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/extended-sentences/>.
[29] In the case of a violent offence, pursuant to paragraph 226A (8)(a) of the *Criminal Justice Act 2003* (UK).
[30] *Criminal Justice Act 2003* (UK) sub-s 226A(9).

and corrective services. It is vital that, should the scheme proceed, the Court has a sound evidentiary basis on which to make a determination for a CDO.

45. The NSW Sentencing Council noted in its 2012 report into High Risk Violent offenders that predicting violent reoffending is even more difficult than predicting sex reoffending because high risk violent offenders 'are not generally specialists – they engage in violent behaviour as part of a broader criminal career'.[31] The NSW Department of Justice in its 2010 review of the legislation came to a similar conclusion.[32]

46. The limitations of risk assessment methodology have been long recognised by Australian courts. In *DPP (WA) v Comeagain*,[33] McKechnie J observed as follows:

> *There remains an issue with all the predictive tools in that they have not yet been validated. They were developed, in part, to overcome the perceived and actual weaknesses of an unguided clinical assessment and have been embraced by professionals, psychiatrists and psychologists, as an improvement on an unguided assessment. Nevertheless, it would be an error to attribute a degree of scientific certainty to the tools simply because they deliver an arithmetical outcome. They remain unvalidated. Years will have to pass before a retrospective survey can determine whether and, to what extent, the predictive tools are reliable.*

47. In *TSL v Secretary to the Department of Justice*[34] Callaway JA cited an issues paper prepared by Professor Bernadette McSherry concerning the dangers of evidence provided by mental health professionals, especially in light of the '…potential for judges and juries to misunderstand and misuse risk assessments, assigning greater accuracy and inevitability to predicted behaviours than is warranted'. Callaway JA also referred to Justice Kirby's judgment in *Fardon* where his Honour held that:

> *[e]xperts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness. In a recent comment, Professor Kate Warner remarked '[A]n obstacle to preventive detention is the difficulty of prediction. Psychiatrists notoriously over predict. Predictions of dangerousness have been shown to have only a one-third to 50% success rate'. [citations omitted].*[35]

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[31] NSW Sentencing Council, *High Risk Violent Offenders* (May 2012) 2.93.
[32] NSW Department of Justice, *Review of the Crimes (Serious Sex Offenders) Act 2006* (November 2010). See for example, 96-7.
[33] *DPP (WA) v Comeagain* [2008] WASC 235, [20].
[34] *TSL v Secretary to the Department of Justice* (2006) 14 VR 109, 122.
[35] *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575 [124]. See further *DPP (WA) v Mangolamara* (2007) 169 A Crim R 379, [165]-[166]; *Attorney-General (NSW) v Tillman* [2007] NSWSC 605, [72]-[76] (Bell J). See further B McSherry and P Keyzer, *Sex Offenders and Preventative Detention: Politics, Policy and Practice*, 2009, 19-49. See also Ian R. Coyle, 'The Cogency of Risk Assessments', *Psychiatry, Psychology and the Law* (4 March 2011). The Law Council also notes that there are real divisions of opinion regarding risk assessment tools. For example, in Victoria the experts use the STATIC-99, which is 'static' because it is a list of factors that are unchanging. The STATIC-99 is a checklist – see: http://www.static99.org/pdfdocs/static-99rcodingform.pdf. A person cannot change their risk level according to those factors (the expert then applies 'dynamic' assessment tools, which can change, to make an overall assessment). However, there is now the STATIC-99R, which gives greater weight to age in the assessment (because it is said the STATIC-99 failed to give proper weight to the fact that older persons are less likely to commit offences). However, in some cases experts in Victoria may still be told to use the (arguably flawed) STATIC-99. Also, the risk assessment tools challenge foundational principles of law – for example the coding

48. The criticisms made of the use of predictive tools are magnified in the case of predicting the future behaviour of terrorism offenders. Numbers of terrorist offenders come from backgrounds which are very different from the profile usually associated with repeat offenders. The differences include lack or prior offending, stable family background, secure employment, non-use of alcohol or drugs, and significant religious belief. While the Law Council understands that work is being done on the development of indicative tests for radicalisation, the fact that such instruments have yet to be developed, let alone validated, does not provide a proper basis for a CDO regime based on predictions of future terrorist acts. This is especially so when the tests will be administered to people who have already served long sentences and will be aware of the purpose of the testing.

49. Cases involving terrorists such as Man Haron Monis indicate a criminal history of violent behaviour. It is unclear whether there are any special warning signs from a psychological perspective which would clearly indicate whether an individual continues to be radicalised or has genuinely become de-radicalised.

50. Further, in contrast to violent and sexual offending, terrorist offenders in Australia are typically imprisoned for preparatory offences or for conspiring to do an act in preparation for a terrorist act. Preparatory offences criminalise conduct which is intended to facilitate the future commission of a substantive offence such as engaging in a terrorist act. In the terrorism context, a preparatory offence may include (for example) collecting materials for possible use in a terrorist act.

51. Preparatory terrorist acts attract criminal responsibility regardless of whether a plan to execute a specific terror attack has been developed and regardless of whether harm has been caused. The offences are also committed even if a terrorist act does not occur or the preparatory act is connected to more than one terrorist act. The preparatory nature of such offences makes the question of accurate risk predictability more acute.

52. As the severe consequence of continuing to be detained despite not being convicted of a further offence may result from a risk assessment, it is critical that the accuracy of risk assessments be sufficiently demonstrated. The legitimacy and effectiveness of the post-sentence detention regime is dependent on the accuracy of the risk assessment methodology employed.

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rules to the STATIC-99 specify that acquittals (including overturned convictions) can be counted as prior convictions and the index offence for the purpose of the assessment (because they are statically significant). See pp.18 and 37 here: http://www.static99.org/pdfdocs/static-99-coding-rules_e.pdf

Recommendations:

- **The Committee should inquire into the proposed risk assessment methodology to be employed and be satisfied that it has been sufficiently validated in the case of terrorist offenders. The findings of the Committee's inquiries into this issue should be included in the Committee's report regarding the Bill; and**
- **The risk prediction tool to be used by relevant experts should be developed in an accountable manner which receives considerable input from psychologists, psychiatrists, counter-terrorism experts, the courts, legal practitioners, the Attorney-General's Department and law enforcement and corrective services.**

Relevant experts

53. The proposed scheme depends heavily on expert opinion evidence about future terrorist acts. The admissibility of expert evidence depends on: specialised knowledge; and a person who possesses that knowledge. While the disciplines of psychiatry and psychology can rightly point to an established body of knowledge in relation to sexual behaviour, for example, the same cannot be said in relation to terrorist behaviour. At best there is an incipient body of knowledge and only the most preliminary attempts to develop predictive instruments based on evidence given at the Inquest into the death of Numan Haider.[36] Further, there are few, if any, psychiatrists or psychologists who could claim this expertise. Even with that expertise, the feasibility of obtaining reliable predictive information in one or more interviews with terrorism offenders nearing end or their sentences is very low.

54. A further issue is the definition of 'relevant expert' to include 'any other person [that is, other than a psychiatrist or a psychologist] registered as a medical practitioner under a law of a State or Territory'. The factors to be addressed by the evidence of a 'relevant expert' are set out in subsection 105A.6(7). They include a risk assessment, the reasons for the assessment, the respondent's pattern or progression of behaviour in relation to serious Part 5.3 terrorism offences, efforts and success at treatment or rehabilitation and any relevant background of the respondent.

55. These are matters that could only properly be addressed by a psychiatrist or psychologist, and there is no apparent reason for including 'any other person registered as a medical practitioner' in the definition of 'relevant expert'.[37] The Law Council, NSW Bar Association and Law Society of NSW query which other relevant experts would be competent to assess such a risk, and, if so, how their competence would be determined.

56. The Law Council notes that the ability of the Court to appoint relevant experts is based on State based sex offender post-sentence preventive detention regimes. The Law Council also understands that it is not uncommon in civil litigation matters for the Court to appoint experts.

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[36] Numan Haider was shot by police in 2014 following the stabbing of police officers outside a Melbourne police station on 23 September 2014. The findings of the Inquest have not yet been made public.
[37] Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 to the Bill (Cth) sch 1 item 1. Proposed section 105A.2.

57. However, the Law Council is concerned about the proposal that the Court should appoint the expert.[38] It is unusual for courts to become involved in selecting witnesses although this does occur in some instances. In this instance, however, given the likely challenges to the existence of a specialised body of knowledge in relation to the prediction of terrorist offences, and the qualification of people who may be called to provide such expert opinions, courts would be put in the inappropriate position of ruling on objections to the expertise of an expert whom the Court itself had appointed. The Law Council is not aware as to whether the Supreme Courts of States and Territories have been consulted on this proposal.

Recommendations:

- **The inclusion of 'any other expert registered as a medical practitioner under a law of a State or Territory' in the definition of 'relevant expert' should be removed;**
- **The Supreme Courts of the States and Territories should be consulted on the proposed measures regarding the appointment of and assessment by relevant expert provisions to ensure the accuracy and efficacy of the proposed risk assessment methodology; and**
- **The Bill or Explanatory Memorandum should be amended to clearly outline the relevant qualifications a relevant expert should hold.**

Legal Representation

58. No mention is made of representation for respondents to applications for these orders. A recent contested control order case involved a 10-day hearing, thousands of pages of documents and surveillance records and expert evidence. The estimated cost of preparing and prosecuting that application with senior counsel, a junior and one to two instructors is $300,000 – $400,000. The Commonwealth Attorney–General's Department refused aid for the respondent. Victoria Legal Aid has granted aid on a very limited basis. Most of the legal representation work for the respondent was undertaken on a *pro bono* basis.

59. The inclusion of appropriate and effective safeguards through the court system is, from the Law Council's perspective, a condition precedent for its introduction. However, the reality of those safeguards is lost without adequate legal representation. If these extraordinary powers are to proceed, the Bill must include provisions allowing the Court to order proper funding for the respondent's representation. This is particularly important given that legal aid is rarely available for civil matters.

[38] Proposed section 105A.6 of the Bill provides that the Supreme Court may, on an application for a CDO, appoint one or more relevant experts who must conduct an assessment of the risk of the offender committing a serious Part 5.3 offence if the offender is released. Section 105A.2 provides that 'relevant expert' includes any of the following persons 'who is competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence' if the offender is released: any registered medical practitioner (whether or not they are a fellow of the Royal Australian and New Zealand College of Psychiatrists), any registered psychologist, and 'any other expert'.

> **Recommendation:**
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> - **The Bill should be amended to include provisions allowing the Court to order funding for the respondent's reasonable legal expenses, should the respondent not be in a position to self-fund.**

Standard of proof

60. Proceedings on an application for a CDO are civil proceedings, not criminal proceedings.[39]

61. Rules of evidence that apply only in criminal proceedings to protect an accused person do not apply. While conviction and aggravating factors for sentencing require proof beyond reasonable doubt, three-year extensions of detention in prison can be ordered on the lower standard of 'high degree of probability'.[40] There are a number of consequences. They include the power of the Court to draw an adverse inference if the respondent fails to give evidence and to draw other inferences on the balance of probabilities, rather than on the criminal standard that the inference is the only reasonable inference open on the evidence and to hear evidence of prior criminal offences.

62. A three-limbed test is proposed to be addressed by the Court to grant a CDO. The Court 'may' only make a continuing detention order under section 105A.7 if it is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if they were released into the community. The three limbs are:

    (a) There is a 'high degree of probability', on the basis of admissible evidence, that there is a risk;

    (b) The risk must be unacceptable; and

    (c) There is no other less restrictive measure that would be effective in preventing the unacceptable risk.

High degree of probability

63. The WA and NSW legislation have similar provisions to section 105A.7, which set out that the Court must be satisfied to a high degree of probability that the offender poses an unacceptable risk.[41]

64. The standard of proof was discussed in *Cornwall v Attorney General (NSW)*, where the NSW Court of Appeal stated:

> *The expression 'a high degree of probability' indicates something 'beyond more probably than not'; so that the existence of the risk, that is the likelihood of the offender committing a further serious sex offence, does have to be proved to a*

[39] Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) sch 1 item 1. Proposed section 105A.13.
[40] Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) sch 1 item 1. Proposed subsection 105A.13(1).
[41] *Crimes (High Risk Offenders) Act 2006* (NSW) s 5B (high risk sex offender) and s 5E (high risk violent offender); *Dangerous Sexual Offenders Act 2006* (WA) s 7.

> *higher degree than the normal civil standard of proof, though not to the criminal standard of beyond reasonable doubt.*[42]

Unacceptable risk

65. The unacceptable risk test in the context of the NSW sex offender post-sentence preventive detention regime was considered by Justice Hulme in *New South Wales v Thomas*:

> *That provision, to my mind, is an indication by the legislature that the risk of the person committing a serious sex offence does not need to be more likely than not before it can be regarded as an unacceptable risk. Put another way, the risk may be less likely than not but still be an unacceptable risk.*[43]

66. In *RJE v Secretary to the Department of Justice & Ors*[44] it was held that the issue of what 'high degree of probability' means was akin to the criminal standard, but this was then addressed by statute where subsection 9(5) of the *Serious Sex Offenders (Detention And Supervision) Act 2009* (Vic) now provides:

> *For the* avoidance *of doubt the Court may determine under* subsection *(1) that an offender poses an unacceptable risk of committing a relevant offence even if the likelihood that the offender will commit a relevant offence is less than a likelihood of more likely than not.*

67. Given the gravity of the consequences of a CDO, the Law Council considers that the unacceptable risk test is not appropriate in the case of terrorist offences for a number of reasons:

    (a) The lack of any established body of specialised knowledge on which to base predictions stands in marked contrast to the extensive body of learning which underpins sexual offences, for example, and even then there are serious criticisms of the prediction methods used in those areas.

    (b) The concept of risk is too fluid and, as the cases cited above show, may be very subjective. The qualifier – 'unacceptable' – does little or nothing to change that high level of subjectivity.

    (c) It is inconsistent with the existing test for preventative detention for terrorism offenders in the *Criminal Code.* That test focuses on the probability that the person will commit a terrorist act. The relevant part of the test for preventative detention orders under subsection 105.12(2) of the *Criminal Code* requires reasonable grounds to suspect that the person will engage in a terrorist act. That is a more certain standard. Unlike the preventative detention order regime, there would be no temporal limit for the commission of the terrorist act. Given that the duration of a preventative detention order is limited to 48 hours, plus another extension of 48 hours,[45] a test for a CDO which may last for up to three years and will be renewable, the test for a CDO should be at

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[42] *Cornwall v Attorney General (NSW)* [2007] NSWCA 374, [21].
[43] *New South Wales v Thomas* [2011] NSWSC 118, [16].
[44] *RJE v Secretary to the Department of Justice & Ors* (2008) 21 VR 526.
[45] Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) sch 1 item 1. Proposed subsections 105.12(5) and 105.14(6). Amendments currently before the Parliament for subsection 105.4(5) would remove imminence and rely on a 48 hour window for the issue of a PDO – see Counter-Terrorism Legislation Amendment Bill (No. 1) 2016.

least as strict as that for a PDO but the test for the Court should be belief, not suspicion.

Recommendation:

- **The Bill should provide that the test for a CDO should be that the court be satisfied beyond reasonable doubt that there are reasonable grounds to believe that the person will engage in a Part 5.3 offence.**

Matters a Court must have regard to in making a CDO

68. Proposed paragraphs 105A.8(a) to (b) of the Bill identify the matters to which a Court must have regard in considering whether to make a CDO.

69. The Law Council suggests that the Court should also be required to consider the nature of the offending for which the offender was originally convicted, including its proximity to serious threats to public safety. In this context, it is to be recalled that the offences caught by the Bill extend to inchoate offences and those involving placing oneself in a declared area under section 119.2 of the *Criminal Code*.

70. Likewise, the Law Council considers that the Court should be required to have regard to the fault element of the crime (recognising that the lower fault element such as recklessness may be indicative of less culpable conduct), as well as to the views of any parole authority concerning the release of the offender on parole.

71. Finally, the Court ought be required to have regard to the inability of the offender to test or challenge the information relied on in an application for a CDO.

Recommendation:

- **The Bill should be amended so that a Court should be required to also have regard to the following matters when considering whether to make a CDO:**

  a) the nature of the offending for which the offender was originally convicted, including its proximity to serious threats to public safety;

  b) the fault element of the crime, as well as to the views of any parole authority concerning the release of the offender on parole;

  c) the inability of the offender to test or challenge the information relied on in an application for a CDO; and

  d) the conditions under which the offender will likely be detained, including the availability of de-radicalisation or other rehabilitation programs for terrorist offenders/detainees.

Giving terrorist offenders documents

72. Section 105A.15 provides for documents under proposed Division 105A on CDOs to be given to the terrorist offender. The documents should also be provided to the person's legal representative, and this should be prescribed in the legislation.

> **Recommendation:**
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> - **Proposed section 105A.15 of the Bill should be amended to require documents to be provided to the person's legal representative.**

Right of appeal

73. A right of appeal against a decision in relation to the making of a CDO is available to the Court of Appeal (however described) of a State or Territory. An appeal lies as of right and with leave on a question of law and on a question of fact.[46] The appellant would have to establish a 'House v the King' error on the part of the primary judge. The appeal regime in QLD for continuing detention orders is similarly framed. An instructive decision is *AG (QLD) v Lawrence:*

    > *This is an appeal from orders made in the exercise of a discretion by a judge based on findings of fact made by the judge. An appellate court is not empowered to set aside such orders merely because they were not ones the appellate court would have made had it been exercising the discretion. Before an appellate court can interfere it must be shown that the primary judge acted on a wrong principle, failed to take a material consideration into account, took into account an immaterial consideration or that the result "is unreasonable or plainly unjust.* [47]

74. The above was subsequently quoted with approval in *AG v Lawrence*[48]. Having to establish a *House v the King* error is the norm in sentence appeals.

75. It is possible that the appeal to the Court of Appeal should be by way of rehearing so that the Court of Appeal can re-exercise the discretion and also have discretion to receive further evidence. The argument may be that a person's liberty should not be withdrawn in this way on the say so of one person.

Periodic review

76. Proposed sections 105A.10 and 105A.11 of the Bill establish that a CDO must be reviewed by the Court annually, or sooner if the offender applies for a review and the Court is satisfied that new facts or circumstances, or the interests of justice, justify the review.[49]

77. The proposed procedures in Subdivision E that are applicable in proceedings determining an application for a CDO or an IDO, also apply to proceedings for

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[46] Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) sch 1 item 1. Proposed section 105A.17.
[47] *AG (QLD) v Lawrence* [2011] QCA 347 at [27].
[48] *AG v Lawrence* [2014] QCA 220.
[49] Explanatory memorandum, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, 4.

reviewing a CDO. The Court must apply the rules of evidence and procedure applicable to civil matters; the parties can adduce evidence and make submissions; reasons for decisions must be given; and decisions can be appealed.[50] As noted above, continued detention on the basis of a civil standard of proof deprives individuals of their liberty without the normal criminal evidentiary and procedural safeguards.

78. Given the significant rule of law and human rights issues raised by the Bill, the following protective measures should be inserted:

- A Court may adjourn the hearing of an application to give the offender the opportunity to obtain legal representation or an independent report of any kind or both.[51]
- A Court making a continuing detention order may specify a review date earlier than one year after the order is made.[52]
- The Attorney-General may make an application for review.[53] Under the Bill, a review can currently only be instigated by the relevant Supreme Court within 12 months of the order or a review,[54] or on the application of the offender or offenders legal representative.

Recommendations:

- **Insert a provision which allows the Court to adjourn the review hearing to give the offender the opportunity to obtain legal representation or an independent report of any kind or both;**
- **Insert a provision which allows the Court to specify a review date sooner than 1 year after the order/review; and**
- **Insert a provision which allows the Attorney-General to make an application to the Supreme Court for review.**

Interim orders

79. The IDO scheme applies where an application for a CDO is on foot and either the offender's term of imprisonment or the term of the offender's CDO or IDO will expire before the application is determined.

80. The Law Council notes that there is really no way to challenge the making of an IDO. The test is whether the matters alleged in the application for the CDO would, if proved, justify making a CDO in relation to the offender.[55] 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 or not those matters would

[50] Explanatory Memorandum, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, 5.
[51] See for example, section 82 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).
[52] See for example section 65 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), and section 31(2) of the *Serious Sex Offenders Act* (NT).
[53] See for example, s27(2) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).
[54] Proposed section 105A.10 (1).
[55] Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) sch 1 item 1. Proposed paragraph 105A.9(2)(b).

justify a CDO. There's no way to challenge the matters relied upon in the first place because the Court has to work on the assumption that those matters are proven. It would only be open to the Court to determine that the evidence, such as it is, is not sufficient. It should be noted, however, that this test is used in the State/Territory regimes and that the rules of evidence still apply to IDO proceedings.

81. The Law Council notes that paragraph 54(1)(c) *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) imposes a 'public interest' test in addition to the other matters a Court must be satisfied of before making an IDO. This broad public interest test would be a worthwhile inclusion in the Bill's IDO scheme. At least in lieu of challenging the evidence the Attorney-General puts forward, the respondent could make a public interest argument against the IDO and, in considering the point, the Court can have regard to a wide range of matters it considers appropriate.

82. As a related issue, it is unclear how a Court could not grant a second (or third and so on) IDO should such a circumstance arise. If a court is satisfied that the matters justify the making of a CDO in the first IDO application, there is no real reason to deviate from that position unless the Attorney-General subsequently puts forward some evidence that undercuts his/her own position. However, there should be a limit on the number of successive IDO's that can be applied for under the scheme.

83. 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'.

Recommendations:

- **A 'public interest' test should be included in addition to the other matters a Court must be satisfied of before making an IDO;**
- **There should be a limit on the number of successive IDO's that can be applied for under the Bill; and**
- **Subparagraph 105A.9(2)(a) of the Bill should be amended to read 'the Court is satisfied that either of the following period *will end or has ended* before the application for the continuing detention order has been determined'.**

Applicability to children

84. Paragraph 105A.3(1)(c) provides that a CDO may apply to a person who is at least 18 years old when the sentence ends. In effect, a CDO may apply to adults who were under the age of 18 when they committed the relevant offence.

85. The Law Society of NSW opposes the application of post-sentence preventive detention to persons who committed an offence when they were a child. It considers that this is inconsistent with the principles relating to children under the *Convention on the Rights of the Child* (**CRC**).[56]

86. The Law Council considers that a CDO should only be made in relation to persons under the age of 18 at the time they were convicted of the relevant offence as a measure of last resort.[57] The age of the child at the time of the conviction for the relevant offence should be required, as a minimum, to be a matter the Court is unambiguously required to take into account in making a CDO. The Law Council notes that the Court is required to have regard to any report received from a relevant expert[58] and that the content of the expert's report must include any relevant background of the offender, including developmental factors. While developmental factors may include issues concerned with the development of a person, they may not necessarily require a Court to consider the age of the offender at the time the offence.

87. The principle that every prison system should seek the reformation and rehabilitation of prisoners[59] applies with particular force to children in conflict with the law.[60]

88. The UN Committee on the Rights of the Child in its General Comment No. 10 stated the following:

> *Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.*[61]

89. These principles underline juvenile justice legislation across Australia, including the *Young Offenders Act 1997* (NSW), the object of which is to (amongst other things)

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[56] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[57] Paragraph 105A.7(1)(c) of the Bill states that to make a continuing detention order the Court must be satisfied that there is no less restrictive measure that would be effective in preventing the unacceptable risk. An example of a less restrictive measure is a control order under sections 104.4 or 104.14 of the *Criminal Code*.
[58] Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) sch 1 item 1. Proposed subparagraph 105A.8(1)(b).
[59] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 10(3); Human Rights Committee, *General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 44th sess, UN Doc HRI/GEN/1/Rev.1 (10 April 1992) [10].
[60] See for example: Human Rights Committee, *Views: Communication No 1968/2010,* 112th sess, UN Doc CCPR/C/112/D/1968/2010 (17 November 2014, adopted 22 October 2014) [7.8] ('*Blessington and Elliot v Australia*').
[61] Committee on the Rights of the Child, *General Comment No 10 (2007): Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) [10]; see also Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (2011) 409 *Trends and Issues in Crime and Criminal Justice,* 1.

establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences.[62]

90. Post-sentence preventive detention of children for security purposes fails to recognise that children, by virtue of their unique vulnerability, are entitled to special protections in international law requiring that detention of children be used only as a last resort and for the shortest appropriate period of time,[63] and be limited to exceptional cases.[64]

91. Specifically, post-sentence preventive detention of children may be inconsistent with the following provisions of international human rights treaties, which Australia has ratified:

(a) *CRC*:

- Article 3(1) – In all actions concerning children, the best interests of the child shall be a primary consideration;
- Article 37(a) – Right to freedom from torture or cruel, inhuman or degrading treatment or punishment;
- Article 37(b) – Right to freedom from arbitrary detention. The detention of a child 'shall be used only as a measure of last resort and for the shortest appropriate period of time';
- Article 37(c) – Right of a child deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of their age;
- Article 37(d) – Right of a child deprived of their liberty to prompt access to legal and other appropriate assistance, and the right to challenge the legality of their deprivation of liberty before a court and to a prompt decision on any such action;
- Article 40(1) – Right of a child in conflict with the law to treatment which promotes their sense of dignity and worth, takes their age into account, and aims at their reintegration into society;
- Article 40(2)(a) – Prohibition on retrospective laws;
- Article 40(2)(b) – Right of a child in conflict with the law to basic guarantees, including to be presumed innocent until proven guilty; to be informed of the reasons for detention; to have the matter determined without undue delay; and to have a decision and any measures imposed reviewed by a higher authority;

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[62] *Young Offenders Act 1997* (NSW) para 3(a).
[63] Article 37(b) of the *Convention on the Rights of a Child*; Children's Legal Centre and UNICEF, 'Administrative detention of children: A global report' (February 2011) 23. The UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules') (para 19), UN Rules for the Protection of Juveniles Deprived of their Liberty ('Havana Rules') (para 2) and UN Guidelines for the Prevention of Juvenile Delinquency ('Riyadh Guidelines') (para 46) state that institutionalisation of a child should be a measure of last resort and for the 'minimum necessary period'.
[64] *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, GA Res 45/113, 68th plen mtg, A/RES/45/113 (14 December 1990) [2].

- Article 40(3)(b) – States parties must seek to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

(b) *International Covenant on Civil and Political Rights* (**ICCPR**):[65]

- Article 10(3) – Child offenders must be accorded treatment appropriate to their age and legal status;

- Article 24(1) – Every child has the right to "such measures of protection as are required by his status as a minor, on the part of his family, society and the State"; and

(c) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**CAT**):[66]

- Article 16 – prohibition on cruel, inhuman or degrading treatment.

92. In relation to article 16 of the CAT, the UN Special Rapporteur on Torture has recognised that life imprisonment and lengthy sentences, such as consecutive sentencing, are 'grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child'. Such sentences 'have a disproportionate impact on children and cause physical and psychological harm that amounts to cruel, inhuman or degrading punishment'.[67]

93. Under international law, the ICCPR, CRC and CAT have been binding on both the Federal and State Parliaments of Australia since they were ratified in 1980, 1990, and 1989, respectively. Implementation of Australia's treaty obligations is the responsibility of each jurisdiction, having regard to their Constitutional powers. However, ratification of treaties 'is an adequate foundation for a legitimate expectation' that administrative decision-makers, and arguably judicial decision making, will accord with the relevant treaty.[68]

Recommendation:

- **A CDO should only be made in relation to persons under the age of 18 at the time they were convicted of the relevant offence as a measure of last resort. The age of the child at the time of the conviction for the relevant offence should be required, as a minimum, to be a matter the Court is unambiguously required to take into account in making a CDO.**

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[65] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Human Rights Committee, *Views: Communication No 1635/2007,* 98th sess, UN Doc CCPR/C/98/D/1635/2007 (10 May 2010, adopted 18 March 2010) ('*Tillman v Australia*') [7.4]; Human Rights Committee, *Views: Communication No* 1629/2007, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010, adopted 18 March 2010) ('*Fardon v Australia*') [7.4].

[66] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

[67] Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* UN Doc A/HRC/28/68 (5 March 2015) [74].

[68] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291.

Administration of the scheme

Terrorism offenders should be warned that they may be subject to orders

94. A Court that sentences a person for a relevant terrorism offence should be required to cause the person to be advised of the existence of the CDO scheme and of its application to the offence. It is important that a warning is given to encourage a positive attitude toward rehabilitation. Requiring a written notice to be issued by the Court registries when an offender receives a sentence could ensure judicial officers issue the warning.

95. Offenders should also be provided with further warning during the course of their sentences, possibly when eligible for parole and on the anniversary of parole refusals. Offenders likely to be the subject of applications should be notified of the State's intention to apply for the orders with sufficient time to complete relevant programs prior to the expiration of their sentences.

Recommendation:

- **A Court that sentences a person for a relevant terrorism offence should be required to cause the person to be advised of the existence of the CDO scheme and of its application to the offence.**

Entitlement to bail

96. The Bill itself does not make any amendments to the current situation in relation to bail and neither the Bill nor the Explanatory Memorandum state one way or the other whether the relevant Acts relating to bail apply. It should be noted that for CDOs in other contexts on a State level, the relevant bail legislation does not apply and this is explicitly spelled out.[69] Bail is generally a matter reserved for the States and Territories. Subsection 68(1) of the *Judiciary Act 1903* (Cth) provides that the State and Territory laws in relation to bail apply to federal offenders. However, that section deals with the jurisdiction of State and Territory courts in *criminal* cases.

97. Given the detention order proceedings are removed from the criminal process and that the law of bail is part of the criminal process, it is unlikely that the relevant laws in relation to bail would apply.

98. If the State and Territory bail laws do not apply, however, then an inconsistency arises vis-à-vis subsection 105A.18(4). Subsection (3) of that section provides, in substance, that where a detention order is in force in relation to a person at any time after the offender is released as mentioned in paragraph (1)(b),[70] any police officer may take the offender into custody and detain the offender for the purpose of giving effect to the detention order. However, subsection (4) provides that a police officer who acts pursuant to subsection (3) has the same powers and obligations as the police officer would have if the police officer were arresting the offender, or

[69] See for example *Crimes (High Risk Offenders) Act 2006* (NSW) s 28; *Bail Act 1985* (SA) sub-s 4(3); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 4; *Dangerous Sexual Offenders Act 2006* (WA) s 5.
[70] The circumstances of release in that paragraph are: (i) the sentence of imprisonment the offender was serving ends; (ii) the term of the detention order ends; (iii) the continuing detention order was revoked.

detaining the offender, for an offence. Such powers include the power (normally given to a police officer with the rank of sergeant or above) to grant a person bail, subject to any limitations in the relevant bail legislation.[71] However, noting that this power of arrest and detention hinges on there being a detention order in force in respect of the offender, an argument could easily be made that, in those circumstances, the offender would not be entitled to conditional liberty in any event.

99. It is suggested that the way in which bail will be addressed is a matter that could benefit from further clarification either in the Explanatory Memorandum or the Bill itself.

100. The Law Council also notes that offenders subject to a CDO should be entitled to make an application for bail if they are charged with a further offence. Relevant bail laws should be amended to make it clear that offenders may apply for bail.

Recommendations:

- **The way in which bail will be addressed is a matter that could benefit from further clarification either in the Explanatory Memorandum or the Bill itself.**
- **Relevant bail laws should be amended to make it clear that offenders may apply for bail if they are charged with a further offence.**

Parole

101. The Bill and Explanatory Memorandum do not explain how parole is to interact with a CDO. As with bail, the administration of parole is generally a matter for the States and Territories, although the *Crimes Act* deals with parole for federal offenders. Subsection 19AL(1) of the *Crimes Act* provides that the Attorney-General must, before the end of a non-parole period for federal offences, either make or refuse to make a parole order. As a matter of practice, in a situation where there is a possibility an offender may be subject to a CDO and is eligible for parole, the Attorney-General would most likely refuse to grant parole (it would not make sense for the Attorney-General to grant the offender parole and then make a CDO application). This could explain why paragraph 105A.5(2)(a) is drafted the way it is: the prospect of such an offender being released into the community would really only arise as a matter of practice at the expiry of his or her sentence. In any event, the *Crimes Act* could still be amended to provide that a person is not eligible for parole if that person is subject to a CDO (in line with similar legislation on a State level).[72]

102. The Law Council recommends that the Explanatory Memorandum to the Bill specifically address the way in which the scheme is intended to interact with parole.

[71] See for example *Bail Act 2013* (NSW) s 43; *Bail Act 1992* (ACT) s 14; *Bail Act 1977* (Vic) s 10;
[72] See for example, *Crimes (Administration of Sentences) Act 1999* (NSW) sub-s 126(4); *Corrective Services Act 2006* (Qld) para 179(2)(c);

Recommendation:

- **The Explanatory Memorandum to the Bill should specifically address the way in which parole is intended to interact with a CDO application under the scheme.**

Conditions of detention

103. In relation to terrorism offences, those on remand and those serving sentences are held in levels of high security which inevitably impose significant restraints and constraints. For the reasons that follow, it is highly likely (if not inevitable) that those conditions would be shared by those detainees held in custody on CDOs, which distinguishes this legislation from similar regimes for different types of offenders.

104. There is some attempt in the Bill to acknowledge that a detainee under a CDO is not serving a sentence of imprisonment. Subsection 105A.4(1) provides as follows:

> *A terrorist offender who is detained in a prison under a continuing detention order 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, subject to any reasonable requirements necessary to maintain:*
>
> *(a) the management, security or good order of the prison; and*
>
> *(b) the safe custody or welfare of the offender or any prisoners; and*
>
> *(c) the safety and protection of the community.*

105. Similarly, subsection 105A.4(2) stipulates that a detainee must not be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving sentences of imprisonment. However, like subsection 105A.4(1), the exceptions to subsection 105A.4(2) are significant. A detainee can relevantly be held with those serving sentences of imprisonment where:

> *(b) it is necessary for the security or good order of the prison or the safe custody or welfare of the offender or prisoners; or*
>
> *(c) it is necessary for the safety and protection of the community.*

106. These provisions are similar to section 115 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic). That provision has been considered in two cases: *DPP v JPH*[73] and *DPP v CGM*.[74] The first case appears more relevant than the second. In that case, the respondent challenged the regime for the detention of persons subject to CDO's on the basis of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**) (freedom from arbitrary detention and requirement for humane treatment). The argument was not accepted for a number of reasons (primarily because the detention was not considered to be 'arbitrary') and the judge made the point that section 115 of the *Serious Sex Offenders (Detention and*

[73] *DPP v JPH* (No 2) [2014] VSC 177.
[74] *DPP v CGM* [2014] VSC 485.

Supervision) Act 2009 (Vic) is entirely consistent with subsections 22(2) and (3) of the Charter, which deal with the detention of persons who are detained without charge.

107. Notwithstanding this, the Law Society of NSW has noted that a detainee would, in effect, continue to be subjected to imprisonment, although the Bill characterises 'detention in a prison' as distinct from serving a sentence of imprisonment. The offender's detention in a prison would amount, in substance, to a fresh term of imprisonment which is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law. This may amount to a violation of the prohibition on arbitrary detention under Article 9(1) of the ICCPR.[1]

108. The Law Council and NSW Bar Association note that, in NSW, detainees will be assessed and assigned a security classification by Corrective Services pursuant to the *Crimes (Administration of Sentences) Act 1999* (NSW) and the *Crimes (Administration of Sentences) Regulation 2014* (NSW) (**the Regulation**), as are prisoners on remand and those serving sentences. The exceptions to both subsections 105A.4(1) and (2) of the Bill include exceptions for the security and good order of a prison and the safety and protection of the community. These exceptions mean that detainees under a continuing detention order could be given a Category AA classification (in the case of male inmates) and a Category 5 classification (in the case of female inmates) under clauses 12 and 13 respectively of the Regulation. These clauses relevantly permit those classifications for an inmate if, in the opinion of the Commissioner of Corrective Services, they represent a special risk to national security (for example, because of a perceived risk that they may engage in terrorist activities) and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment.

109. Where a continuing detention order has been made by the Supreme Court, a Category AA or Category 5 classification by Corrective Services for a detainee would be almost inevitable given that the order would have been made on the basis of a finding that 'the offender poses an unacceptable risk of committing a serious Part 5.3 [terrorism] offence if the offender is released into the community'.[75] The conditions of custody for any Category AA or Category 5 prisoner in relation to terrorism offences, whatever the basis of their detention – that is, whether on remand, serving a sentence or under the proposed continuing detention order regime – are extremely harsh. In the case of *R v Naizmand*[76] Justice Harrison of the Supreme Court of New South Wales noted:

> *The applicant's security classification has resulted in him being housed in a maximum security facility. His association with other inmates is limited to four other prisoners. His exercise time is restricted. When he is outside his cell he is escorted by no less than four prison officers or corrective services personnel. In these situations, he is routinely handcuffed and his feet are always shackled. That procedure is universally adopted, even in circumstances as apparently benign as walking along the corridor to use the phone.*[77]

[75] Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) sch 1 item 1. Proposed section 105A.7(1)(b).
[76] *R v Naizmand* [2016] NSWSC 836.
[77] Ibid, [20].

110. His Honour in *Naizmand* also commented that the evidence on the release application:

> *… has reinforced the notorious fact that prisoners on remand awaiting terrorism related charges are treated differently. ... [A]ll such prisoners receive the same treatment. It is therefore to be expected that a person facing prosecution for alleged breaches of a control order will be subject to custodial conditions that include limited association, shackling and constant surveillance, and all of the other onerous and intrusive conditions and constraints of the type outlined by the present applicant.*[78]

111. To hold a detainee in prison in such conditions, in circumstances where their sentence has been served in full, highlights the importance of appropriate detention facilitates that encourage an environment of rehabilitation.

112. The Law Council agrees that persons subject to a CDO should be detained in a different area to other prisoners. The UN Human Rights Council has stated that the conditions during any non-punitive period of additional detention 'must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society'.[79] The need to maintain the management or good order of a prison is therefore not a valid reason to treat a subject of a CDO in the same way as a prisoner who is serving a sentence of imprisonment, or to detain them in the same area of the prison as prisoners serving sentences of imprisonment.

113. Further, relevant offenders should be given repeated opportunities to participate in rehabilitation programs as soon as possible after their sentence commences. A delay in the provision of rehabilitation programs until shortly before an offender is eligible for parole is not sufficient. An early assessment of an at risk offender should be required so that an appropriate rehabilitation program can be put in place as soon as possible after an offender has been sentenced.

Recommendations:

- **The Commonwealth, States and Territories should properly fund effective rehabilitation programs for detainees; and**
- **Legislation should require a preliminary assessment of high risk terrorist offenders to determine an appropriate rehabilitation program as soon as possible after an offender has been sentenced.**

Suitable post-release programs

114. Post-release support programs and transition programs are essential to deliver positive outcomes for offenders in terms of reducing reoffending and protection of the community. The availability of such programs is also vital to ensure that a Court issues a CDO or extends a CDO only as a measure of last resort. The Law Council notes that the Explanatory Memorandum to the Bill does not outline the types of post-release programs that will be available for terrorist offenders who may be

[78] Ibid [39].
[79] Human Rights Committee*, General Comment No 35, Article 9 (Liberty and security of person),* 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) [21].

subjected to the CDO regime or at risk. The nature and availability of such programs may vary across State jurisdictions and require appropriate funding.

Recommendation:

- **The Law Council encourages the Committee to inquire into the nature of suitable post-release programs for offenders that may be subject to the CDO scheme and to be satisfied that such programs specifically addressing terrorism issues are in place and are effective prior to enactment of the Bill.**

Human rights and fundamental freedoms

115. The Law Council considers that very real questions arise as to whether the powers conferred by the Bill are capable of being exercised in contravention of the following articles of the ICCPR:

- Article 9(1) – the prohibition on arbitrary detention;
- Article 14(1)-(3) – rights to a fair trial;
- Article 14(7) – the prohibition on double punishment for an offence; and
- Article 15 – the prohibition on retrospective criminal laws (on the basis that at the time of the sentencing of some offenders, the regime proposed under the Bill was not in force and there was then no prospect of post-sentence detention).

116. In addition, the Law Council is concerned that the power to make a CDO is capable of being exercised to interfere with the right to liberty, with privacy, with freedom of movement, expression and communication, assembly and association in contravention of Articles 9, 17, 12, 19 and 21 of the ICCPR.

117. Under international human rights law, most of these rights may be subject to limitations, but only if the limitations satisfy the conditions provided for under the Covenant. An authoritative formulation of the framework for analysing whether such limitations are permissible is provided by the Australian Parliamentary Joint Committee on Human Rights (**PJCHR**) established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). A limitation must be provided by law and the Government must also demonstrate that:

(a) The limitation is aimed at achieving a legitimate objective;

(b) There is a rational connection between the limitation and the achievement of the objective; and

(c) The limitation is a proportionate means of the achievement of that objective. This includes consideration of whether there are less restrictive alternatives, and whether a measure is overbroad.

118. In *Fardon v Australia*[80], and *Tillman v Australia*[81] (**Tillman**) the UN Human Rights Committee held that Australia's post-sentence preventive detention regimes for sex

[80] *Fardon v Australia* (UNHRC, Communication No 1629/2007, 18 March 2010).

offenders were incompatible with the prohibition on arbitrary detention in Article 9(1) of the ICCPR, and also opined, without deciding, that the post-sentence detention of the complainants may contravene the prohibition against double punishment in Article 14(7) and that against double punishment in Article 15(1). The Committee observed as follows:

> *The concept of feared or predicted dangerousness to the community applicable in the case of past offenders in inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. [The legislative regime] on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise. To avoid arbitrariness, in these circumstances, the State Party should have demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention…*[82]

119. In 2014, the Human Rights Committee adopted General Comment No 35 'Article 9: Liberty and security of person'. In paragraph [21] the Committee commented as follows in relation to continued detention regimes:

> *When a criminal sentence includes a punitive period followed by a non-punitive period intended to protect the safety of other individuals, then once the punitive term of imprisonment has been served, to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society. If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention.* (emphasis added)

120. The Law Council suggests that the Committee should await the report of the PJCHR in relation to the Bill and have regard to that Committee's findings to ensure

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[81] *Tillman v Australia* (UNHRC, Communication No 1635/2007, 18 March 2010).
[82] Human Rights Committee, *Views: Communication No 1635/2007,* 98th sess, UN Doc CCPR/C/98/D/1635/2007 (10 May 2010, adopted 18 March 2010) ('*Tillman v Australia*') [7.4(4)]; Human Rights Committee, *Views: Communication No* 1629/2007, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010, adopted 18 March 2010) ('*Fardon v Australia*') [7.4(4)].

the consistency of any preventive detention scheme for terrorist offenders with Australia's international human rights obligations.

Recommendation:

- **The Committee should await the report of the Parliamentary Joint Committee on Human Rights in relation to the Bill and have regard to that Committee's findings in its deliberations.**

Independent Review

121. The Law Council recommends that the Independent National Security Legislation Monitor (**INSLM**) should be tasked with undertaking his own review of the legislation, if enacted, 12 months after the first CDO application is made.

Recommendation:

- **The INSLM should be tasked with undertaking his own review of the legislation, if enacted. The INSLM's review should be completed no later than 12 months after the regimes implementation. The scheme should then be subject to periodic review by the INSLM.**