Law Council
OF AUSTRALIA

Counter-Terrorism and Other Legislation Amendment Bill 2023

Parliamentary Joint Committee on Intelligence and Security

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Acknowledgements

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Executive summary

1. The Law Council welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security (the **PJCIS**) regarding its inquiry into Counter-Terrorism and Other Legislation Amendment Bill 2023 (the **Bill**).

2. The Bill would extend the operation of Australian Federal Police (**AFP**) powers relating to terrorism under the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth) (the **Criminal Code**) for a further three years, to December 2026. These powers relate to:

   - the authority to stop, question and search persons and seize items in Commonwealth places, including in 'prescribed security zones', without a warrant and, in relation to prescribed security zones, without the need for reasonable suspicion (Crimes Act, Part 1AA, Division 3A);
   - the control order (**CO**) regime, which allows for obligations and restrictions to be imposed on a person for the purpose of protecting the public from a terrorist act or to prevent the provision of support for the facilitation of a terrorist act (Criminal Code, Division 104); and
   - the preventative detention order (**PDO**) regime, which allows a person to be taken into custody and detained for up to 48 hours if it is suspected, on reasonable grounds, that they are preparing to engage in a terrorist act (Criminal Code, Division 105).

   In this submission, these powers are collectively referred to as **AFP stop, search and seize powers**, and the **CO and PDO regime**.

3. The Bill would also extend, by 12 months, the operation of section 122.4 of the Criminal Code, which establishes an offence for a current or former Commonwealth officer to disclose information without authorisation.

4. The Law Council has extensively considered the AFP stop, search and seize powers, and the CO and PDO regime over several years. This includes, most notably, submissions to the:

   - Senate Legal and Constitutional Legislation Committee in relation to the 2005 Bill that introduced the stop, search and seize powers, CO and PDOs;[1]
   - 2013 Council of Australian Government (**COAG**) review of Counter-Terrorism Legislation;[2]
   - 2017 statutory reviews by the Independent National Security Legislation Monitor (the **INSLM**);[3]
   - 2018 PJCIS review of police powers, control orders and preventative detention orders;[4] and

[1] Law Council of Australia, Submission No. 140 to the Senate Legal and Constitutional Affairs Committee, Anti-Terrorism (No. 2) Bill 2005 (11 November 2005). ('***Law Council 2005 Submission***')
[2] Law Council of Australia, Submission to COAG Counter-Terrorism Review Committee, COAG Review of Counter-Terrorism Legislation (27 September 2012).
[3] Law Council of Australia, Submission to Independent National Security Legislation Monitor, Stop, search and seizure powers, declared areas, control orders, preventive detention orders and continuing detention orders (12 May 2017). ('***Law Council 2017 Submission***')
[4] Law Council of Australia, Submission to 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 (3 November 2017).

- 2021 PJCIS review of police powers, control orders and preventative detention orders.[5]

5. The Law Council maintains[6] its position 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 to managing the immediate aftermath of such an act (including conducting investigations, preserving evidence and securing the area). The Law Council supports the Bill's improvements to strengthen oversight of these powers, and to specify statutory criteria to guide the Minister's declaration of prescribed security zones. These improvements are in line with the Law Council's previous recommendations,[7] which have informed this Committee's recommendations.

6. However, the Law Council continues to oppose renewing the CO and PDO regime. Such extraordinary powers are neither necessary nor proportionate having regard to the reduced terrorism threat level in Australia, the presence of comprehensive state and territory counter-terrorism frameworks, and evidence that these powers have very rarely been used to date.

7. Further, the Law Council is concerned by the sequencing of this Bill because it pre-empts ongoing scrutiny by the PJCIS of related post-sentence orders under Division 105A. The Bill proposes to both extend the application of COs for a substantial period of time, and broaden the conditions (currently termed: 'prohibitions, restrictions and obligations') that may be imposed on a person under a CO to ensure greater 'alignment' with the extended supervision orders (**ESO**) regime under Division 105A.

8. If this Bill proceeds, these powers should only be renewed for another 12 months to allow time for completion of the PJCIS's review and consideration by the Government of its response. If these powers remain in force, the Law Council renews its support for targeted improvements to the CO and PDO regime directed to improving proportionality, as set out in this submission and in earlier submissions.

[5] Law Council of Australia, Submission no. 10 to Parliamentary Joint Committee on Intelligence and Security, Review of Australian Federal Police powers: control orders; preventative detention orders; stop, search and seizure powers; and continuing detention orders (17 September 2020). ('***Law Council 2020 Submission***') See more generally, Law Council of Australia, Submission no. 10.1 to the Parliamentary Joint Committee on Intelligence and Security, Supplementary submission to the review of Australian Federal Police Powers (9 October 2020). ('***Law Council 2020 Supp Sub***')
[6] Law Council 2020 Submission, 10-11 [9]-[10].
[7] Ibid, 11 [13].

Introduction

9. When the powers contained in the Bill were first introduced in 2005 pursuant to the *Anti-Terrorism Act (No. 2) 2005* (Cth)—in response to a specific deterioration in Australia's security situation following the terrorist bombings in London in July 2005—there was limited opportunity for careful scrutiny, parliamentary oversight and community consultation. It has been observed that the 'abbreviated process left little time for parliamentary scrutiny or deliberation, let alone close consideration by parliamentary committees'.[8] Because of this inadequate consultation, at the time, the Law Council said 'trust in parliamentary democracy has been undermined'.[9]

10. The sunset mechanism, applicable to the powers contained in the Bill, recognises their extraordinary character. In 2005, the Senate Legal and Constitutional Affairs Committee said:

> *Extraordinary laws may be justifiable but they must also be temporary in nature. Sunset provisions ensure that such laws expire on a certain date. This mechanism ensures that extraordinary executive powers legislated during times of emergency are not integrated as the norm and that the case for continued use of extraordinary executive powers is publicly made out by the Government of the day.*[10]

11. The measures that are extended by the Bill remain extraordinary in the sense that they override long-standing principles regulating the use of intrusive powers, and, therefore, require careful justification.

    - The warrantless police powers of stop, search and seizure depart from the ordinary requirement that police must obtain a warrant, issued by a judge or a magistrate, to exercise such intrusive powers. At common law, courts have long recognised[11] that the issuance of a warrant by an independent judicial officer is a principle of 'constitutional liberty and security'[12] regulating the exercise of intrusive powers by the State, which would otherwise constitute trespass.

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[8] Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' 38 (2014) *Melbourne University Law Review* 366-367. ('***Ananian-Welsh and Williams***').
[9] Law Council 2005 Submission, 6 [11].
[10] Senate Legal and Constitutional Affairs Legislation Committee, Anti-Terrorism Bill (No 2) 2005 (Report, November 2005), [2.27].
[11] See for example, *Smethurst v Commissioner of Police* [2020] HCA 14; 272 CLR 177 at [124]-[127] (Gageler J) citing *Entick v Carrington* (1765) 19 St Tr 1029 (Lord Camden).
[12] Ibid. More generally, *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 276 [141] ('***Vella***') Gageler J referred to the importance of the judiciary as a 'safeguard of individual liberty' in the context of separation of powers as understood '…in a tradition within which judicial protection of individual liberty against legislative or executive incursion has been a core value…' That is achieved 'by requiring a distinction to be maintained between powers described as legislative, executive and judicial, by reference not to fundamental functional differences between powers, but to distinctions … between classes of powers requiring different skills and professional habits in the authorities entrusted with their exercise'. (Citations omitted) *Davison* (1954) 90 CLR 353, 381 –382, quoted with approval in *Vella*, 276 [141], 292 [190] and *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166, 188 [67], 202 [139].

- The CO and PDO regimes 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.
  - The PDO regime is extraordinary because it is a departure from the ordinary principle that 'the involuntary detention of a citizen in custody by the state is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.[13]
  - While it is true to say the common law has historically[14] permitted judicial determination of new rights and obligations restricting personal liberty for a preventative[15] purpose, the CO regime presents unique challenges within that preventative framework. In *Thomas v Mowbray* [2007] HCA 33, the High Court upheld[16] the validity of the CO regime. However, the precise limits of the constitutional authorisation for liberty restricting preventative schemes have been a subject[17] of continuing debate.[18]

12. For the reasons outlined above, the Law Council encourages the PJCIS to carefully consider the necessity, reasonableness and proportionality of each of the measures the Bill seeks to renew.

[13] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27-28, 58 ('***Lim Principle***'). Importantly, exceptions were acknowledged. Examples of executive detention pursuant to statutory authority include quarantine, and detention under mental health legislation. Applying the principle in Lim, the High Court upheld the CDO regime in Division 105A on the basis that there is a distinction between detention of an individual for the punishment for a crime, and detention of an individual for the protection of the community from a proven unacceptable risk of serious harm: *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 181 [35]-[36], 183 [41]-[43]. For a recent restatement of the connection between the Lim Principle and the protection of individual liberty, see further, *Alexander v Minister for Home Affairs* [2022] HCA 19, [71]-[73] (Kiefel CJ, Keane and Gleeson JJ).

[14] *Garlett v Western Australia* [2022] HCA 30, [50]-[52] (Kiefel CJ, Keane and Steward JJ); [165] (Gordon J); [209]-[213] (Edelman J). ('***Garlett***')

[15] See for example, *Garlett* (Kiefel CJ, Keane and Steward JJ) [55].

[16] The High Court upheld the validity of the CO regime because the power to restrict a person's liberty on the basis of what that person might do in the future is a power that has been, and is, exercised by courts in a variety of circumstances, for example, bail and apprehended violence orders. *Thomas v Mowbray* (2007) 233 CLR 307, 327-329 [15]-[16] (Gleeson CJ); [71] – [79] (Gummow and Crennan JJ). The Law Council notes the contrary view expressed by Kirby J who considered the prediction of what is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act an indeterminate criteria unsuited to the exercise of judicial power in relation to a person's liberty. Relatedly, Kirby J asked: '[t]his invites the question: if the community of nations, with all of its powers and resources, cannot agree on what precisely "terrorism" is (and how it can be prevented), how can one expect a federal magistrate or court in Australia to decide with consistency and in a principled (judicial) way what is reasonably necessary to protect the public from a terrorist act?' (citations omitted) [354] (Kirby J).

[17] The Law Council notes the view expressed by Gordon J, in dissent, in *Garlett* that 'coercive preventive justice regimes (are) becoming an increasingly prominent feature of lawmaking in Australia' and that '[w]here *risk* comes to prevail as the main driver of policy, there is a danger of the logic of risk reduction ... permit[ting] ever more intrusive and liberty-eroding incursions' (citations omitted); [167] (Gordon J).

[18] In particular, the determination of what a person may do in the future is difficult in the context of the CO regime because, unlike the determination of the risk of re-offending in other criminal contexts, determination of a person's future risk of committing a terrorism offence is a fraught exercise without an empirically validated risk assessment methodology.

The need for further justification of necessity

The downgrading of Australia's threat level

13. Having regard to the recent reduction in Australia's threat level to '*possible*' from '*probable*', it is timely to revisit the necessity and proportionality of renewing the CO and PDO regime. There is an onus on Government and law enforcement bodies to provide the requisite justification of the necessity of these measures given their extraordinary character and the changing nature of threats to Australia's security.

The nature of the security risk

14. The Law Council notes that the evidence provided by the Attorney-General's Department[19] and the AFP[20] submissions to this inquiry does not refer to specific changes in the nature of the security risk, in particular, evidence of attack planning intent and capability. Instead, references to security risks are made in general terms such as:

> *[t]he potentially catastrophic consequences of a terrorist attack on places of national significance, or in places of mass gathering, do not change despite the recent downgrade in the National Terrorism Threat Level. The maintenance of counter-terrorism powers and frameworks is a key factor in managing the overall risk of terrorism, and provides a proper basis for the continued existence of these unique powers.*[21]

15. The AFP refers to the increased risk posed by Ideologically Motivated Violent Extremism (**IMVE**), including, the increased risk of recruitment and radicalisation.[22] However, no evidence is provided about the attack planning intent and capability of IMVE groups. The AFP also refers to the continuing but diminished risk posed by Religiously Motivated Violent Extremism (**RMVE**) in the following terms:

> *It is enduring and, while many of these extremists appear to have limited genuine intent to act, some continue to aspire to undertake attacks in Australia. RMVE-linked terrorist groups remain a threat, albeit a diminished one. To date, the majority of terrorism offenders released into the community following the completion of their imprisonment, have held RMVE ideologies.*[23]

16. The extraordinary powers contained in the Bill, in particular the CO and PDO regime, should not be justified by reference to the 'overall risk of terrorism'.[24] More specific evidence should be provided regarding the intention of current actors to carry out the sorts of violent attacks that characterised the threat posed by religiously motivated violent extremists between 2014 and 2022 when the threat perception was deemed 'probable'.

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[19] Attorney-General's Department, Submission no. 2 to the Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-Terrorism and Other Legislation Amendment Bill 2023 (September 2023). ('***Attorney-General's Department 2023***')
[20] Australian Federal Police, Submission no. 5 to the Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-Terrorism and Other Legislation Amendment Bill 2023 (6 October 2023). ('***Australian Federal Police 2023***')
[21] Attorney-General's Department 2023, 5 [8].
[22] Australian Federal Police 2023, 2 [5].
[23] Ibid, 2 [6].
[24] Attorney-General's Department 2023, above no. 22.

17. For example, in 2020, the AFP[25] justified the renewal of these powers referring specifically to the risk posed by the rise of the Islamic State noting the shift between 'large-scale operations to smaller-scale 'lone actor' style attacks'.[26] That 2020 submission also said: '[d]uring this period, the National Terrorism Threat Level was raised to PROBABLE, as credible intelligence indicated that individuals or groups possessed the intent and ability to conduct an attack onshore'.[27] In 2018, the PJCIS highlighted former INSLM, Dr Renwick's emphasis on 'the increase in the threat of smaller-scale opportunistic attacks by lone actors, with the concomitant risk of little to no lead time to prevent a spontaneous attack'.[28]

An appropriately tailored legislative scheme

18. The constitutionality of legislation imposing restrictions on personal liberty for a protective purpose, for example, post-sentence continuing detention, is conditioned on whether the legislation is an 'appropriately tailored scheme for the protection of the community from the harm that particular forms of criminal activity may pose'.[29] On one view, legislation imposing protective punishment may exceed constitutional limits where it is no longer appropriately tailored because 'the purposes of the protective punishment could easily be met to the same extent by reasonable alternatives which are less invasive upon liberty'.[30]

19. As the Australian Human Rights Commission has observed,[31] it is insufficient to justify the retention of specific powers on the basis that it is currently part of 'Australia's counter-terrorism framework'[32] or part of a 'suite'[33] of existing powers. It should not be assumed that it is better to have more counter-terrorism powers, '[o]n the contrary, it may be better to have fewer powers that are appropriately targeted to the risks faced, and to remove powers that merely duplicate existing capacity but have greater potential to impact adversely on human rights'.[34]

20. For the reasons outlined above, the Law Council endorses the views expressed by the Parliamentary Joint Committee on Human Rights (the **PJCHR**) that 'no specific information is provided to demonstrate the continuing need for these powers despite this reduction in the terrorism threat level in the intervening period'.[35]

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[25] Australian Federal Police, Submission no. 2 to the Parliamentary Joint Committee on Intelligence and Security, Inquiry into AFP Powers (Division 3A Part IAA of the Crimes Act 1914 and Divisions 104 and 105 of the Criminal Code) August 2020 (August 2020).
[26] Ibid, 3 [5].
[27] Ibid.
[28] 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 (Report, February 2018), 96 [4.53]. ('***2018 PJCIS Review***')
[29] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166, 180 [32].
[30] *Garlett*, [258] (Gageler J).
[31] Australian Human Rights Commission, Submission no. 7 to the Parliamentary Joint Committee on Intelligence and Security, Review of Australian Federal Police Powers (10 September 2020), 7 [21]. ('***Australian Human Rights Commission 2020***')
[32] Explanatory Memorandum, 4 [5].
[33] Australian Federal Police, Submission to the Parliamentary Joint Committee on Intelligence and Security, Inquiry into AFP Powers (Division 3A Part IAA of the Crimes Act 1914 and Divisions 104 and 105 of the Criminal Code) (August 2020), [6].
[34] Australian Human Rights Commission 2020, 7 [21].
[35] Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report—Report 9 of 2023 (Report, 6 September 2023), 17 [1.12]. ('***PJCHR 2023***')

Previous reviews on the extension of sunset dates and the changing security situation

21. While the Law Council acknowledges that, since the introduction of AFP powers, CO, and PDO regimes, views of specialist bodies charged with reviewing the necessity and proportionality of these measures have differed, these assessments should be viewed in the context of the changing security assessments of the threat of terrorism as set out above.

22. Most recently, these powers, which are currently due to sunset in December 2023, were extended on a 12-month basis in December 2022[36] to allow the Government further time to consider the recommendations of the PJCIS in its October 2021 review (the **2021 PJCIS Review**),[37] which is discussed further below.

23. The Explanatory Memorandum to the Bill refers to earlier assessments of the utility of the measures made against the backdrop of the 'probable' threat level.[38] For example, the INSLM's 2017 *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers* (the **2017 INSLM Review**)[39] by the third INSLM, Dr James Renwick SC, which concluded[40] that AFP stop, search and seize powers are consistent with Australia's human rights, counter-terrorism and international security obligations, necessary and proportionate. In that year, Dr Renwick also made similar conclusions in relation to the CO and PDO regimes.[41]

24. Accordingly, the Law Council agrees with the recommendation of the PJCHR that the Attorney-General's Department should provide further advice in relation to the ongoing necessity of these powers despite the recent downgrade in Australia's national terrorist threat level, and why it is proposed that these measures be extended for three years, and not a shorter period.[42]

Recommendation

The Law Council recommends, in line with the Parliamentary Joint Committee on Human Rights, that further advice be provided in relation to:

- **the ongoing necessity of these powers despite the recent downgrade in Australia's national terrorist threat level; and**
- **why it is proposed that these measures be extended for three years, and not for a shorter period of time.**

[36] *Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Act 2022* (Cth).
[37] Parliamentary Joint Committee on Intelligence and Security, Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime (Report, October 2021). ('***2021 PJCIS Review***') See in particular, in relation to stop, search and seizure powers—Recommendation 3; in relation to the CO Regime—Recommendation 7; in relation to the PDO regime—Recommendation 14.
[38] With respect to AFP stop, search and seize powers: Explanatory Memorandum, 5 [14] and 17 [16].
[39] Independent National Security Legislation Monitor, Dr James Renwick SC, Review of Division 3A of Part IAA of the Crimes Act 1914: Stop Search and Seize Powers (Report, September 2017). ('***2017 INSLM Review: AFP Powers***')
[40] 2017 INSLM Review: AFP Powers, ix. Cited by Explanatory Memorandum, 5 [14], 17 [16].
[41] Independent National Security Legislation Monitor, Dr James Renwick SC, Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders (Report, 7 September 2017).
[42] Parliamentary Joint Committee on Human Rights 2023, 19 [1.19].

Implementation of 2021 PJCIS Review

25. If, as it appears[43] from the explanatory materials, the primary justification for the Bill is contingent on it being a partial implementation of the recommendations contained in the 2021 PJCIS Review, then more detailed and complete information should be provided regarding the Government's approach to implementation of related recommendations.

26. Importantly, several outstanding matters arising from the PJCIS's recommendations pertaining to the proportionality of the warrantless powers of search contained in section 3UEA(1) of the Crimes Act and the CO regime have not been addressed.[44]

- **In relation to the warrantless powers of search: Recommendation 5**—the PJCIS recommended that the Attorney-General's Department consider the appropriateness of the implementation of a duty judge system where applications for search warrants could be received and considered on an expedited basis.
- **In relation to the CO regime: Recommendation 11**—the PJCIS recommended that the Australian Government undertake a review of the range of conditions that could be imposed as part of a CO, and report back to the PJCIS by July 2022. Without case studies illustrating specific shortcomings in the existing prohibitions, restrictions and obligations under a Control Order, it is difficult to assess the necessity of broadening these restrictions.
- **In relation to the CO regime: Recommendation 13**—the PJCIS recommended that the Attorney-General's Department:
  - investigate the cost of providing legal aid for those subject to proceedings under Division 104 of the Criminal Code, including continuing detention orders and COs; and
  - provide a report to the PJCIS within the 12 months of the tabling of this report. Provision of adequate legal assistance is crucial to equality of arms between parties to a control order proceeding.

27. The Law Council has been hampered in its assessment of the necessity and proportionality of the measures contained in the Bill due to the inability to scrutinise the Government's implementation of these outstanding matters, as further detailed below. Briefly stated, Recommendation 5 of the 2021 PJCIS Review is relevant to assessing the necessity of the PDO regime; Recommendations 11 and 13 are relevant to assessing the proportionality of the ESO regime and the changes made in the Bill to broaden the range of applicable conditions under a CO.

[43] See further, Explanatory Memorandum, 3 [1]; 5 [15]; 9 [32]; 14 [2]; 23 [47]; 46 [37].
[44] 2021 PJCIS Review, [2.71] Recommendation 5; [3.78] Recommendation 11; [3.84] Recommendation 13.

Recommendations

- **Any conclusions made by the Attorney-General's Department in relation to the appropriateness of the implementation of a duty judge system, where applications for search warrants could be received and considered on an expedited basis, should be published.**
- **The findings of the Australian Government review conducted into the range of conditions imposed under the existing CO regime should be published. Consideration should be given to establishing why the current range of conditions available under control orders are insufficient.**
- **The report into the cost of providing legal aid for those subject to proceedings under Division 104 of the Criminal Code should be published.**

The sequencing of the Bill

28. The Law Council considers that renewing the powers contained in the Bill for three years inadvisably pre-empts related ongoing legislative scrutiny. For the reasons outlined below, it would be more appropriate to renew these powers for a shorter period of 12 months.

29. While acknowledging that the existing powers are due to sunset in December 2023, the Law Council expresses concern that the Bill pre-empts ongoing scrutiny by the PJCIS of related post-sentence orders, including extended supervision orders contained in Division 105A. Part 5.3 creates four kinds of orders: COs (Division 104); PDOs (Division 105); and two post-sentence orders; continuing detention orders (**CDO**s) and ESOs (Division 105A).

30. On 15 May 2023, the PJCIS commenced its statutory review of post-sentence terrorism orders: Division 105A of the Criminal Code (the **2023 PJCIS Review of Division 105A**). The PJCIS review followed the completion, in March 2023, of the former INSLM, Grant Donaldson SC's review[45] (**the INSLM's Review of Division 105A**) of the same division.

31. The 2021 PJCIS Review also acknowledged the evidence that the introduction of the ESO scheme would have an impact on the use of COs and that the CO regime should then be repealed. In response, it stated that 'it is necessary to evaluate the extended supervision order scheme *prior* to making a determination that the control order scheme is no longer necessary to address the threat of terrorism (emphasis added)'.[46]

32. The Law Council has provided a submission[47] to the 2023 PJCIS Review of Division 105A, supporting the implementation of the former INSLM's review. This is on the basis that the review contains persuasive recommendations which were shaped in response to detailed and iterative consultations with relevant government

[45] Independent National Security Legislation Monitor, Grant Donaldson SC, Review into Division 105A (and related provisions) of the Criminal Code Act 1995 (Cth) (Report, March 2023). ('the **INSLM's Review of Division 105A**').
[46] 2021 PJCIS Review, 50 [3.65].
[47] Law Council of Australia, Submission no. 14 to the Parliamentary Joint Committee on Intelligence and Security, Review of post-sentence terrorism orders: Division 105A of the Criminal Code Act 1995 (Cth) (17 July 2023). ('***Law Council Division 105A 2023 Submission***')

agencies, including the Attorney-General's Department, as well as a variety of civil society groups, academics and members of the public.

The INSLM's review of Division 105A

33. The Law Council agrees with the observation of the former INSLM, Mr Grant Donaldson SC, that '[t]here are significant overlaps in the regime for COs, PDOs and post-sentence orders, both CDOs and ESOs'[48] and the COs and ESOs are both similar and can be 'extremely restrictive and intrusive'.[49] That overlap occurs because a person subject to a CO or an ESO can be made subject to a PDO and a person who leaves a prison having served a term for a terrorist offence can be the subject of an ESO or a CO.

34. Most obviously, Mr Donaldson's review raises[50] but does not decide[51] the question whether the operation of the ESO scheme, since 2021, as a less restrictive alternative, makes the CO regime unnecessary. However, several additional related matters arise from his review, which are addressed in the following section.

Mechanisms to improve responsiveness to INSLM reports

35. With the discussion above in mind, the Law Council remains of the view that further reform of the *Independent National Security Legislation Monitor Act 2010* (Cth) (the **INSLM Act**) is needed to ensure that the INSLM has specific statutory authorisation to monitor implementation of the INSLM's recommendations in light of changing security assessments over time. It is also desirable[52] that legislation specify the need to ensure timeliness between the completion of an INSLM's report, tabling, of the unclassified version, in Parliament and consideration of the Government's response in implementing the INSLM's recommendations. There may be some doubt as to whether current arrangements would permit an INSLM to report on the implementation of their previous recommendations.[53]

36. The Law Council reiterates[54] its recommendation that the INSLM Act should be amended to:

- 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); and
- 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).

[48] INSLM's Review of Division 105A, 22 [67].
[49] Ibid.
[50] After citing the Law Council's position, Mr Donaldson said: 'These contentions are, in truth, directed at repeal of the control order regime, based on Mr Walker's reasoning in his 2012 annual report.' INSLM's Review of Division 105A, 108 [356].
[51] Mr Donaldson said: 'I am not going to agitate this matter in this report. It's been considered not only by Mr Walker but also by the third INSLM, Dr James Renwick SC.' Ibid, 108 [357].
[52] See further, Law Council 2020 Submission, 81 [345].
[53] Currently, the INSLM may prepare a 'special report' pursuant to section 29A of the INSLM Act relating to the performance of the INSLM's functions under paragraphs 6(1)(a), (b) and (ca) which include, for example, the function to consider, on his or her own initiative, whether any legislation contains appropriate safeguards for protecting the rights of individuals and remains necessary and proportionate. Paragraph 6(1)(3) also permits the INSLM power to things 'necessary or convenient' to be done in connection with the performance of the INSLM's functions.
[54] Law Council 2020 Submission, 82 Recommendation 51.

Recommendation

- **The Law Council recommends that the INSLM Act be amended to ensure that the INSLM has appropriate statutory authorisation to monitor the implementation of their previous findings and recommendations.**

Control Order Regime

Use of control orders

37. As of 6 August 2023, there have been 28 COs made against 21 individuals since these powers were first introduced.[55] The Law Council refers to three important recent trends in the use of the CO regime:

    - Legal Aid NSW found,[56] based on a review of 15 CO proceedings between 2018 and 2023, '60% would have been eligible for an ESO order (9 of 15) had the ESO regime been in force at the relevant time'. That means that the majority of recent COs regulate **post-sentence risk** of persons convicted of a serious terrorism offence.
    - Based on the evidence of both the Attorney-General's Department and the AFP, it appears there are two situations where a CO is sought outside of the first circumstance highlighted above:
        - to regulate **post-sentence risk** presented by high-risk terrorism offenders who are not eligible for an ESO or CDO under Division 105A. 'An example would be individuals who are under the age of 18 years, or those convicted of non-HRTO offences (such as advocating terrorism)';[57] and
        - to regulate **pre-prosecution risk**, 'especially for those in respect of whom there is insufficient evidence or information to charge with terrorism offences, though there is otherwise evidence the person poses a terrorist threat to the community'.[58]
    - Appendix A[59] to the Legal Aid NSW submission illustrates that, based on a review of CO breach proceedings, there is limited evidence that CO subjects are likely to commit substantive terrorism breaches.

38. In the time available, based on the regular public reports issued by the Minister[60] and publicised on the Department of Home Affairs website,[61] it has not been

[55] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 August 2023, 1 (Mark Dreyfus KC MP, Attorney-General).
[56] Legal Aid NSW, Submission no. 4 to the Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-Terrorism and Other Legislation Amendment Bill 2023 (October 2023), 1 18. ('***Legal Aid NSW***').
[57] Australian Federal Police 2023, 3 [15].
[58] Ibid, 3 [14]. The Attorney-General's Department make a similar point noting the availability of control orders continue to be 'necessary and of high utility in both the pre-prosecution and post-sentence context in dealing with individuals who pose a significant terrorism risk to the community, and in instances where there is not evidence to reach the threshold for a criminal offence:' Attorney-General's Department, 11 [40].
[59] Legal Aid NSW, Appendix A, 26-27.
[60] Required by Criminal Code, s. 104.29.
[61] Department of Home Affairs, The Counter-Terrorism Powers Annual Report (webpage, 22 August 2023).

possible to verify what proportion of CO proceedings in the second category above were in relation to post-sentence risk compared to pre-prosecution risk.

39. The Law Council renews support for its previous recommendation[62] for a public register of extraordinary counter-terrorism powers consolidating information about the cumulative total numbers of COs, PDOs, and declarations of prescribed security zones made to date. The Law Council suggests that scrutiny of the CO regime would be enhanced by including a brief summary of the facts of each CO in operation, distinguishing between post-sentence risk and pre-prosecution risk.

Recommendation

- **In addition to existing annual reporting, the Law Council recommends maintaining a public register of extraordinary counter-terrorism powers consolidating information about the COs, PDOs, and declarations of prescribed security zones made to date alongside abstracts of relevant facts to allow for identification of the types of risks, pre-prosecution or post-sentence, that are currently being regulated under the CO regime.**

Necessity and proportionality of control orders

40. The Law Council does not support renewing the CO regime beyond its current sunset date in December 2023, because it is not necessary or proportionate. And it does not support any expansion of the range of conditions available under the CO regime. In support of its position, the Law Council refers to the following reasons:

- **Reduction in Australia's threat level**—there is insufficient justification to establish that the CO regime remains necessary to grapple with the specific nature of security threats to Australia. There is an absence of specific justification for the expansion of CO conditions in light of this reduction in the threat level. The reduction in Australia's threat level increases the force of the Law Council's long-standing position, which was accepted by the first INSLM Bret Walker SC, that the CO regime is not necessary.
- **There is no evidence to indicate the current range of obligations, prohibitions and restrictions available under the CO regime are ineffective**—based on the evidence[63] provided by Legal Aid NSW, any expansion in the range of conditions available under a CO would be unnecessary because 'there have been no instances in Australia of CO subjects committing substantive terrorism offences while an order (under the existing provisions) was in force)'.[64] The force of this point is strengthened by the INSLM's Review of Division 105A which argues[65] persuasively for establishing an independent post-sentence authority to administer the discretions vested in the 'specified authority'.

[62] See further, Law Council 2020 Submission, 84, Recommendation 54.
[63] Legal Aid NSW, Appendix A, 26-27.
[64] Legal Aid NSW, 8.
[65] INSLM's Review of Division 105A, 130 [451]:

> *I have two concerns with this model. First, the body exercising the delegated powers and discretions to which I have referred should be independent of the AFP Minister and not be a law enforcement body or officer. My second concern arises from the magic of federation. I am concerned that there may be differences between States and Territories as to how ESOs, even on the same conditions, will be administered. It is not acceptable that administration of ESOs, or the way in which ESOs practically operate, could vary from State to State.*

- **The proposed new conditions**[66] **under the CO regime risk eroding the right to silence**—the Law Council holds grave concerns in relation to the risk that discretion will be placed in a 'specified authority' to require a controlee to attend and participate in treatment and rehabilitation programs without safeguards on the use that can be put to information that is compulsorily disclosed.
- **Renewing the CO regime for longer than 12 months, as an interim measure, pre-empts ongoing legislative scrutiny of related post-sentence measures contained in Division 105A**—as stated above, the PJCIS has previously indicated[67] that it is necessary to evaluate the extended supervision order scheme *prior* to making a determination regarding the necessity of the CO regime.
- **The INSLM's Review of Division 105A**—raises several outstanding issues that pertain to the necessity and proportionality of the CO regime, as well as the proposal to expand the range of conditions available under a CO including:

    - whether continued operation of the ESO scheme makes the CO regime unnecessary—Mr Donaldson's review raises[68] but does not decide[69] the question whether the operation of the ESO scheme, since 2021, as a less restrictive alternative, makes the CO regime unnecessary;

    - the proposal to align conditions available under a CO with those available under an ESO undermines the fundamental contrast between the purpose of the CO regime and the purpose of Division 105A. Mr Donaldson's detailed recommendations[70] directed to strengthening the proportionality of the range of conditions available under an ESO are premised on the need to strengthen the contrast[71] between the purpose of the CO regime and the ESO regime. That contrast will be substantially impaired by the Bill. The basic difficulty with undermining this contrast is that 'the effect of the Bill, generally, is that a substantially lower bar applies to impose the same conditions pursuant to a control order.'[72]

    - The risk of *repechage* resulting from the overlap between the CO regime, ESOs and parallel state regimes. Mr Donaldson was highly critical[73] of the prospect of parallel state post-sentence orders being made as a fallback to ESOs.

[66] See in particular, The Bill, ss. 104.5A(1)(n) and (o).
[67] 2021 PJCIS Review, 50 [3.65].
[68] After citing the Law Council's position, Mr Donaldson said: 'These contentions are, in truth, directed at repeal of the control order regime, based on Mr Walker's reasoning in his 2012 annual report.' INSLM's Review of Division 105A, 108 [356].
[69] Mr Donaldson said: 'I am not going to agitate this matter in this report. It's been considered not only by Mr Walker but also by the third INSLM, Dr James Renwick SC.' Ibid, 108 [357].
[70] See for example, his recommendation that: s. 105A.7A(1)(c) be amended to provide that, when a court considers whether proposed conditions of an ESO are 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from that unacceptable risk', the court also consider whether they provide adequately for rehabilitation and reintegration of the defendant into the community: ibid, 13 [30].
[71] Ibid, 22 [67], 109 [358].
[72] Legal Aid NSW, 11.
[73] INSLM's Review of Division 105A, 24 [77].

- Non-disclosure[74] and other methodological[75] problems associated with the evidence base foundational to assessments of future risk, including the use of VERA-2R.

- In the absence of a post-sentence administration authority, that is independent of law enforcement—such as the extended supervision authority proposed by the INSLM and/or a Commonwealth Parole Authority as proposed by the Law Council—it is inadvisable to vest further discretion on law enforcement authorities to enforce participation in rehabilitative activities. If the Bill proceeds and conditions available under a CO are aligned with those available under an ESO and given the significant discretions[76] conferred on the 'specified authority', Mr Donaldson's concerns regarding the need for consistent administration will apply with equal force to the CO regime.

- **Use of CO regime in relation to pre-prosecution risk**—the Law Council considers that use of the CO regime in relation to pre-prosecution risk is more likely to be disproportionate. Given the extensive range of terrorism offences that capture preparatory and ancillary conduct, and existing investigatory powers, the use of the CO regime either as an alternative to prosecution or as a repechage for an unsuccessful prosecution risks undermining the presumption of innocence and other fair trial rights.
- **Human rights compatibility**—the CO regime permits significant restrictions on multiple human rights and the PJCHR has consistently[77] raised concerns regarding the proportionality of these restrictions. The Law Council shares those concerns and notes, in particular, the liberty restricting implications of the CO regime are particularly problematic in relation to pre-prosecution risk.
- **Risk of abuse of process**—the Law Council continues to hold significant concern regarding the absence of sufficient safeguard against the use of the CO regime as a fallback for ESO applications and unsuccessful prosecutions.

Necessity

41. The Law Council has consistently preferred[78] the conclusion[79] of the first INSLM, Mr Bret Walker SC, that the CO and PDO regimes are neither necessary nor proportionate, and that reliance should instead be placed upon agencies' extensive surveillance and investigatory powers to enable the enforcement of the wide range[80] of terrorism and security offences under Commonwealth law which target preparatory and precursor conduct. Courts, in interpreting terrorism offences,

[74] INSLM's Review of Division 105A, 81 [273]:
> *Dr Corner's report should have been provided to Mr Benbrika and produced to the Court in that application.* ***Indeed, it should have been provided in all applications where relevant experts make a risk assessment using the VERA-2R tool****. There is no excuse for not doing so. (emphasis added)*

[75] See in particular, INSLM's Review of Division 105A, 83-84 [279]-[281].
[76] See for example, new section 104.5A(1)(n) (that the person attend and participate in treatment, rehabilitation or intervention programs as directed by a specified authority).
[77] See for example, PJCHR 2023, [1.10].
[78] See for example, Law Council 2020 Submission, 8 [5].
[79] Bret Walker SC, Declassified annual report 2012 (December 2012), Chapters 2 and 3, especially recommendations II/4 and III/4.
[80] See for example, Criminal Code, s. 101.6 (preparing for or planning terrorist acts).

already recognise that the threat of terrorism requires expanding traditional notions of criminal responsibility.[81]

42. 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.[82]

43. The investigatory powers that can be applied in relation to the wide range of terrorism and security offences under Commonwealth law have been significantly expanded in recent years. For instance, the Australian Security Intelligence Organisation Amendment Bill 2020 expanded the intelligence collection powers of the ASIO. Most notably, those powers included renewing, on an expanded basis, ASIO's compulsory questioning powers including expanding the scope of questioning and lowering the minimum age of questioning to 14 years.

Whether continued operation of the ESO scheme makes the CO regime unnecessary

44. The Law Council notes that while Mr Donaldson did not make a finding on the matter, he generally agreed with the Law Council and Mr Walker's position that ordinary powers of criminal investigation and arrest in relation to the broad range of offences targeting preparatory conduct adequately respond to the threat of terrorism, observing:[83]

> *It is telling that a prior INSLM [Bret Walker SC] suggested that the existence of these offences rendered control orders unnecessary because the risk of terrorist acts occurring was ameliorated by the power to prosecute this precursor conduct.*

45. The Law Council stated in 2020[84] that there is force in an argument that the CO regime may no longer be required once an appropriate ESO regime is implemented.

46. The Law Council submits that there should be further, informed consultation on this question. That will be facilitated by the CO regime only being renewed for a shorter, 12-month period and government agencies providing further justification for the necessity of the CO regime alongside the ESO regime.

Recommendation

- **If the CO regime is to be extended, it should only be renewed for another 12 months to allow time for completion of the PJCIS review of post-sentence orders under Division 105A. This will support informed scrutiny of the ongoing necessity of the CO regime, taking into account**

[81] *Lodhi v R* [2007] NSWCCA 360, [79]:
> *By the extended range of conduct which is subject to criminal sanction, going well beyond conduct hitherto generally regarded as criminal, and by the maximum penalties provided, the Parliament has indicated that, in contemporary circumstances, the threat of terrorist activity, requires condign punishment.*

[82] 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 for example, *R v Fattal & Ors* [2011] VSC 681; and *DPP v Fattal & Ors* [2013] VSCA 276.

[83] INSLM's Review of Division 105A, 108 [340]. Citations omitted.

[84] Law Council 2020 Submission, 29 [79].

the interoperability of COs, ESOs and state and territory post-sentence orders.

Broadening the range of conditions available under the CO Regime

47. Proposed section 104.5A seeks to 'align' the range of conditions available under an interim CO, which may then be confirmed as a CO, with the range of conditions available under an ESO under Division 105A of the Criminal Code. The Explanatory Memorandum states that the intent of expanding conditions under a CO is to align them with the conditions that can be imposed under an ESO '[i]n line with recommendations made by the PJCIS in the AFP Powers Review'.[85]

48. In keeping with the ESO regime, the Bill would not limit[86] the conditions that the issuing court may impose on a person—it would provide that the court can impose any conditions it considers appropriate so the control order can be tailored to address the risk profile of the individual concerned. However, a non-exhaustive list of possible conditions is contained at new section 104.5A of the Bill.

49. The Attorney-General's Department provides two reasons for this alignment. First, referring to the 2021 PJCIS Review, the need to modernise the range of conditions listed under a control order, for instance, the need to provide for 'more modern and technologically appropriate conditions that can address risks posed by controlees'.[87] Second, in relation to 'exemption conditions' enabling the controlee to apply to a 'specified authority' for a temporary exemption, the Attorney-General's Department observe that this will 'provide more flexibility to support the day-to-day management of offenders subject to control orders …'[88]

50. The Law Council acknowledges the finding in the 2021 PJCIS Review that there would be a benefit in modernising the range of conditions available under a CO and aligning the conditions to those available under the proposed ESO scheme.[89] However, the Law Council agrees with the finding of the Parliamentary Joint Committee on Human Rights that the need to 'modernise' CO conditions is not 'an adequate justification under international human rights law for interferences with human rights',[90] and that 'no information is provided as to why the existing power is inadequate to achieve the stated objective of the CO regime'.[91]

Right to silence

51. The Law Council strongly **opposes** proposed conditions under the CO regime that would require a person to make potentially prejudicial disclosures in the course of mandatory rehabilitation activities without adequate safeguards regarding the direct use and derivative use of that information. In particular, it is concerned by the following proposed conditions:

- section 104.5A(1)(n)—that the person do any or all of the following:
  - attend and participate in treatment, rehabilitation or intervention programs or activities;
  - undertake psychological or psychiatric assessment or counselling;

[85] Explanatory Memorandum, 9 [34].
[86] The Bill, s. 104.5A(1).
[87] Attorney-General's Department, 9 [31].
[88] Ibid, 10 [33].
[89] 2021 PJCIS Review, 51 [3.74].
[90] Parliamentary Joint Committee on Human Rights 2023, 24 [1.32].
[91] Ibid, 24 [1.33].

as specified in the order or as directed by a 'specified authority;'

- section 104.5A(1)(o)—that the person attend and participate in interviews and assessments (including for the purposes of paragraph (n) as specified in the order or as directed by a 'specific authority;'
- section 104.5A(1)(p)— the person allow the results of the interviews and assessments referred to in paragraph (o), and any other specified information, to be disclosed to a 'specified authority;' and
- section 104.5A(1)(q) that the person provide specified information to a 'specified authority' within a specified period or before a specified event.

52. The accusatory principle and the companion principle are well-established[92] fundamental principles underpinning the criminal justice system:

- the **accusatory principle**—the prosecution bears the burden of proving its case beyond reasonable doubt; and
- the **companion principle**—absent a clear statutory power to the contrary, a person charged with a crime cannot be compelled to assist in the discharge of the prosecution's onus of proof.

53. The right to silence, which realises both principles outlined above, entails an immunity from being compelled to testify against oneself, and encompasses both incriminating and non-incriminating evidence.[93] These safeguards are necessary to preserve the proper balance between the powers of the state and the rights and interests of citizens, to preserve the presumption of innocence and to ensure that the burden of proof remains on the prosecution.[94]

54. In particular, the Law Council is concerned that information disclosed by a person in the course of complying with these obligations may be used in pre-charge intelligence gathering, or where a brief has been refused by the Commonwealth Director of Public Prosecutions or a charge has been withdrawn.[95] As stated above, the evidence of recent use of the CO regime indicates that COs may be used in relation to pre-prosecution as well as post-sentence risk of terrorism.

55. The Law Council shares the concern expressed by Legal Aid NSW that this 'creates an invidious circumstance where a person risks breach of a CO, punishable by imprisonment, if they seek to exercise their fundamental right to silence'.[96]

Contrast between rationale for CO regime as against ESO regime

56. The basic difficulty with the aspiration in the Bill to 'align' conditions available under the CO regime with those already available under the ESO regime is that such an alignment cannot occur on a principled basis without further scrutiny of the objects, applicable restrictions and thresholds in each scheme. Accordingly, the Law Council shares NSW Legal Aid's concern that the effect of the Bill is that 'a substantially lower bar applies to impose the same conditions pursuant to a control order'.[97]

[92] *X7 v Australian Crime Commission* (2013) 248 CLR 92, 153 [159] (Kiefel J); *Lee v The Queen* (2014) 253 CLR 455, 466-7 [32]-[33] (French CJ, Crennan, Kiefel, Bell and Keane JJ).
[93] ALRC, Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Report 129, December 2015), 312.
[94] Ibid, 310.
[95] Legal Aid NSW, 11.
[96] Legal Aid NSW, 11.
[97] Ibid.

57. As a general point, as noted above, liberty-restricting legislative schemes should be appropriately tailored to the restrictiveness of the obligations they impose and the objects of the scheme.

58. Recent reviews highlight that the ESO scheme should be primarily targeted at longer term risks of terrorist offending, and, therefore, should also be conditioned by the need for rehabilitation and reintegration, whereas the CO regime should be primarily targeted at controlling immediate risk. It is significant that COs operate for shorter periods than an ESO and can be made on an urgent basis.

59. Legal Aid NSW observes[98] that the CO regime establishes a less onerous 'report-based' prohibition scheme imposing a range of strict prohibitions and notification requirements where 'defendants are closely monitored by authorities and are required to notify authorities of relevant information as it changes'. On the other hand, ESOs operate under a more onerous 'active supervision' model that involves intense supervision and case-management, greater than the intensity for the management of parolees, requiring extensive pre-approval and permission from a specified authority.

60. The more onerous scheme of supervision envisaged under an ESO is reflected in the more stringent preconditions for post-sentence orders, including that the person must be detained in custody in a prison serving a sentence of imprisonment for an offence prescribed in section 105A.3(1), as well as the more stringent threshold specified in section 105A.7.

61. Mr Donaldson's recommendation for reform of Division 105A to preserve the ESO regime on an amended basis is premised on making the difference between the CO regime and the ESO regime more pronounced. In this regard, Mr Donaldson observed:[99]

> *If my recommendation on the change in the objects of Div 105A is accepted, what was likely intended to be the essential difference between the ESO and control order regimes will become more pronounced. Control orders were always intended to be shorter term and respond to factors of immediacy. ESOs deal with convicted terrorist offenders. If my recommendation on change of the objects of Div 105A is accepted, ESOs will respond to (at least perceived) longer term risks of terrorist offending but be conditioned by the need for rehabilitation and reintegration into the community of (generally) long-term prisoners and detainees.*

62. If, contrary to the Law Council's primary submission, the CO regime is preserved alongside the ESO regime, it would be better to ensure the CO regime, which imposes lower thresholds than the ESO regime and does not contain rehabilitation in its objects clause, remains appropriately tailored to respond to immediate terrorism risk. For that reason, it is appropriate that the CO regime take a less liberty restricting approach to day-to-day case management under the less onerous 'report-based' prohibition scheme.

Conferral of discretions on 'specified authority'

63. The Law Council **opposes** inserting into the CO regime given the significant risks and uncertainties associated with conferring extensive discretion on the 'specified

[98] Ibid, 3.3 16.
[99] INSLM's Review of Division 105A, 109 [358].

authority' which is defined in section 100.1 of the Criminal Code as a police officer, or any person deemed appropriate by the Court.

64. The Law Council recently endorsed[100] the INSLM's recommendation that, within the next three years, the Attorney-General's Department should publish a report responding to the INSLM's provisional recommendation in favour of establishing an independent statutory authority—the Extended Supervision Authority (the **ESO Authority**). Mr Donaldson proposes that the ESO Authority will oversee specified authorities to ensure that ESOs are administered uniformly and consistently throughout the Commonwealth.

65. The Law Council agrees[101] with the INSLM that there is a need to ensure the day-to-day management of offenders on an ESO and the exercise of the significant discretions under Division 105A are conducted independently and should not continue to be exercised by law enforcement agencies. In this respect, Mr Donaldson said persuasively:

> *'Extraordinarily complex conditions with a belligerent bureaucratic mindset make contravention inevitable and prosecution certain. If this occurs with ESOs, Div 105A will fail'.*[102]

66. The Law Council renews its recent observation[103] that, if an independent ESO Authority is established and responsible for the independent and expert administration of ESOs, its functions would be complemented by an independent federal parole authority able to make independent determinations of when parole should be granted or revoked.

67. The Law Council encourages the PJCIS to review its recent Position Paper—Principles underpinning a federal parole authority.[104]

The risk of repechage arising from the overlap between Cos, ESOs and state orders

68. The Law Council has consistently raised[105] concerns that the ESO regime in Division 105A contains no statutory safeguards against the risk that applications could be made for Cos in the Federal Court, as an effective *repechage* for a failed ESO application that was previously made on the same basis, and was refused by the relevant State or Territory Supreme Court. For example, it should not be possible to effectively 'revive' a failed ESO application before a different court, by essentially 'rebranding' it as a CO application, where the proposed CO is based on the same or substantially similar grounds as was the unsuccessful ESO application; and seeking the same or substantially similar conditions as those in the unsuccessful ESO application.

Multiple proceedings because of state and territory schemes

69. Mr Donaldson agreed with the submission of NSW Legal Aid that a number of people in prison in New South Wales could be subject to post-sentence proceedings under both the NSW Act and Division 105A of the Criminal Code because of the

[100] Law Council Division 105A 2023 Submission, 18 [57].
[101] Ibid, 19 [59].
[102] INSLM's Review of Division 105A, 130 [453].
[103] Law Council Division 105A 2023 Submission, 25 [80].
[104] Law Council of Australia, Principles underpinning a federal parole authority, Position Paper, November 2022, available here.
[105] See for example, Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (6 November 2020), 25. ('***Law Council 2020 HRTO Submission***')

operation of the *Crimes (High Risk Offenders) Act 2006* (NSW)). Mr Donaldson observed that:

> *'[i]t could never be accepted that an application for a post-sentence order could be made and fail under Div 105A but then, in effect, be brought again under the NSW Act'.*[106]

70. The Law Council was substantially assisted by consideration of the case studies[107] presented by Legal Aid NSW which illustrate these potential overlaps.

71. The Law Council reiterates its recommendation[108] that express safeguards are required dealing with the interaction of federal and state and territory regimes to prevent the risk that an individual will be subject to an ESO, CO and state order in respect of substantially similar offending behaviour.

Pre-prosecution risk

72. The Law Council expresses concern regarding the use of the CO regime as a fallback or alternative to:

- prosecution, either where there is a lack of probative evidence that would ground a 'reasonable suspicion' permitting arrest, or where the Commonwealth Director of Public Prosecutions (**CDPP**) has advised that there is no reasonable prospect of conviction; or
- as a *repechage* following an unsuccessful prosecution—for example, where a person has been tried and acquitted.

73. For example, the first INSLM, Mr Bret Walker SC, persuasively criticised the use of control orders in respect of Jack Thomas, after acquittal for terrorism offences, and David Hicks, after controversial conviction in the United States for a terrorism offence which was subsequently set aside. Mr Walker reasoned there was 'no evidence that Australia was made appreciably safer' by the existence of the two control orders that had been made, and that 'neither [control order] was reasonably necessary for the protection of the public from a terrorist act'.[109]

74. Similarly, the Law Council has expressed concern regarding the use of the CO regime in the case of *Causevic*[110] in circumstances where the Commonwealth Director of Public Prosecutions had discontinued prosecution on the basis there was 'insufficient evidence'.[111] It was only at the confirmation hearing, almost 10 months later, that there was an opportunity to test the evidence relied on by the AFP for the interim control order. The Court found that despite extensive physical, telephonic and listening device surveillance of Mr Causevic—there was no direct evidence that he had any intention or plan to carry out a terrorist act.[112] Additionally, there was no direct evidence that Mr Causevic intended to assist in, or knew of any plan to commit, a terrorist act.[113]

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[106] INSLM's Review of Division 105A, 24 [77]
[107] Legal Aid NSW, Case Study A and Case Study B, 23-24.
[108] Law Council 2020 HRTO Submission, Recommendation 9.
[109] Independent National Security Legislation Monitor, Bret Walker SC, Declassified Annual Report (Report, 20 December 2012), 14.
[110] *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).
[111] Commonwealth Director of Public Prosecutions, Discontinuance of Conspiracy Charge against Mr Harun Causevic (Media Statement, 25 August 2015).
[112] *Gaughan v Causevic* (No 2) [2016] FCCA 1693 at [63].
[113] Ibid, [64].

75. Furthermore, the Law Council reiterates[114] its view that the case of *Causevic* highlights that the broad range of monitoring measures to determine whether a breach of a CO condition has occurred rather than that a serious criminal offence has taken place is likely to be a disproportionate response under human rights law:[115]

> *In Causevic, the effects on the controlee were serious and police monitoring powers were already very extensive. While a CO is aimed at ensuring community safety, it is arguable that the community's best interests would appear to have been in ensuring that he received effective counselling, employment and a normal social life. The tracking device, according to the treating psychologist in the case, was inhibiting that process.*

76. Given *Causevic* and the evidence[116] submitted by Legal Aid NSW that demonstrates that there is limited evidence that CO contraventions relate to substantive terrorism behaviour, the Law Council submits that the extensive law enforcement resources expended on monitoring breach of COs would be better directed to investigating the existing extensive range of criminal offences.

77. This concern is only partly alleviated by policy level commitments[117] made by federal and state authorities regarding the application and precedence of particular forms of post-sentence orders in relation to particular offenders and requires statutory safeguarding.

Issuing court

78. New section 100.1(1) would amend the definition of 'issuing court' in relation to COs to include only the Federal Court of Australia with the effect that the Federal Circuit and Family Court of Australia will no longer be able to issue COs.

79. The Explanatory Memorandum states:

> *Limiting the power to issue control orders to the Federal Court of Australia reflects the serious and extraordinary nature of those orders, and the Federal Court of Australia's expertise in considering matters that involve a significant volume of evidence.*[118]

80. In general, given the serious effect that a control order has upon the liberty and life of the controlee, and the imposition of significant criminal sanctions for contravention, the Law Council agrees that these decisions are best made by superior courts.

81. The Law Council suggests[119] that consideration be given to conferring jurisdiction on State and Territory Supreme Courts reflecting the close connection of many COs to the criminal process (namely, their significant use in the post-sentence context).[120] It

[114] Law Council 2017 Submission, 19 [52].
[115] Ibid.
[116] Legal Aid NSW, Annexure A, 26.
[117] Australian Federal Police, Submission no. 12 to Parliamentary Joint Committee on Intelligence and Security, Review of Post-Sentence Terrorism Orders: Division 105A of the Criminal Code Act 1995 (July 2023).
[118] Explanatory Memorandum, 9 [33].
[119] Law Council 2020 Submission, 27-28.
[120] Ibid, 27-28.

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.

Recommendations

- **With respect to issuing courts for COs, given the effect that a control order has upon the liberty and life of the controlee, the Law Council supports amending the definition of 'issuing court' in relation to COs to mean only the Federal Court of Australia.**
- **However, the Law Council suggests that further consideration should be given to conferring jurisdiction on State and Territory Supreme Courts, reflecting the close connection of many COs to the criminal process.**

Legal assistance

82. The Law Council maintains that urgent amendment is required to ensure that legal assistance funding is 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.

83. For a full statement of the Law Council's position, we refer to our previous submission.[121] In particular, the Law Council reiterates its observations[122] in relation to the *Causevic* proceedings, which were an early example of proceedings, where legal aid was not available under the Expensive Commonwealth Criminal Cases Fund and the Attorney-General's Department refused aid on the basis that no novel point of law arose.

84. As stated above, the Law Council is concerned that insufficient evidence has been advanced publicly to establish the degree to which Recommendation 13 of the 2021 PJCIS Review has been implemented. Ensuring guaranteed legal assistance funding to all persons who are the subject of a CO application remains one of the most significant proportionality concerns of the Law Council with the CO regime.

85. The Law Council has long maintained[123] that provision of adequate legal assistance funding in relation to the defence of COs is critical to addressing the risk of inequality of arms as between the subject of a CO and the AFP (whose counsel are paid Commonwealth rates). This is also a significant restriction on the right to fair trial. 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.

86. In this regard, the 2021 PJCIS Review cited[124] extensively the evidence of the Law Council's representative, Dr David Neal SC who said:[125]

[121] Law Council 2020 Submission, 31-33.
[122] Law Council 2017 Submission, 25. See further, Annexure A—Memorandum from David Neal SC Defence Counsel in *Gaughan v Causevic* [2016] FCCA 1693: ibid, 39-47.
[123] Law Council 2020 Submission, 31-33 [82]-[88] and Recommendation 8.
[124] 2021 PJCIS Review, 48-49 [3.62].
[125] 2021 PJCIS Review, 49 citing Dr David Neal, SC Co-Chair, National Criminal Law Committee, Law Council of Australia, Committee Hansard, Canberra (25 September 2020), 5.

> *Fair trials and the protection of people's rights depend on them being able to present those rights to the court and not to be presenting them in circumstances where senior and junior counsel and three solicitors are able to prepare the case for one party while the other party is left to the charity of certain members of the legal profession plus the legal aid commissions to fund their defence at a much lower level. These are extraordinary powers. The Law Council concedes that they are necessary in some instances, but they are extraordinary and they are extraordinarily intrusive. Because of the volatility of the issues surrounding terrorism in particular, things are prone to getting irrational. That's why you need to have proper representation for the defendants or respondents in these cases—so that the evidence can be carefully assessed and, where it falls short of the mark, those powers can be rolled back from that person. If we claim to want to protect human rights then we have to have the mechanisms available to make that a reality.*

Outstanding proportionality concerns—CO regime

87. Should the Bill proceed, and the CO regime be extended, the Law Council reiterates its recommendation that the following urgent reforms be considered to address the most problematic aspects of the CO regime.

- **Issuing threshold**—in relation 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, there should be legislative amendment 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.[126]
- **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.[127] 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.[128]

88. The Law Council continues to support the more detailed list of changes recommended in its previous submission.[129]

[126] Ibid, 24-25 Recommendation 3.
[127] Ibid, 30-31 Recommendation 7.
[128] Ibid, 31-33 Recommendation 8.
[129] See further, the summarised list of recommendations in respect of the CO regime: ibid, 8-9.

Recommendations

- **If the Committee supports the continuation of the CO regime:**
  - **the issuing court for a CO, in applying the issuing criteria, should only be permitted to draw an inference about a person's future risk if that inference is the only rational inference able to be drawn from the admissible evidence before the court;**
  - **the monitoring powers under the *Crimes Act 1914 (*Cth). *Telecommunications (Interception and Access) Act 1979* (Cth) and *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 CO conditions, provided that the relevant legislative thresholds are met; and**
  - **legal assistance funding should be available to all persons who are the subject of a CO application.**

PDO Regime

Overall comment

89. The Law Council reiterates[130] its longstanding view that PDOs should not be renewed beyond the current sunset period because they are neither necessary nor proportionate responses to the threat of terrorism.

90. In particular, the Law Council continues to hold the view that existing preparatory terrorism offences in the Criminal Code are sufficient to capture the types of activities targeted by PDOs, and concerns remain as to the threshold for issuing a PDO, which may not ensure that only situations where there is a real risk of a terrorist act occurring are captured.

Outstanding proportionality concerns—PDO regime

91. Should the Bill proceed, and the PDO regime be extended, the Law Council maintains its view that the following urgent reforms are required:

- **Issuing threshold**—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).[131]
- **Lawyer-client communications**—removing the powers under section 105.38 to monitor confidential lawyer-client communications between a person being detained under a PDO and their legal representative.[132]
- **Sufficient information requirement**—the police officer executing a preventative detention order should be required to give the subject sufficient

[130] Law Council 2020 Submission, 8 [4]; 33-40.
[131] Law Council 2020 Submission, 35-36 Recommendation 11.
[132] Ibid, 39 Recommendation 16.

information about the basis for issuing a PDO to enable them to give effective instructions to their lawyer.[133]

- **Independent issuing authorities**—currently, the definition of 'issuing authority' in subsection 100.1(1) allows initial preventative detention orders to be authorised by a senior AFP member. We consider that 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 105.2 of the Criminal Code for the purpose of continued PDOs (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.[134]

92. The Law Council continues to support the more detailed list of changes recommended in its previous submission.[135]

Recommendation

- **If the Committee supports the continuation of the PDO regime:**
  - **the issuing threshold in subsection 105.4(5) of the Criminal Code should be amended to require 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 is capable of being carried out, and could occur, within the next 14 days;**
  - **section 105.38 of the Criminal Code 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; and**
  - **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 to remove the power of senior AFP members to issue initial preventative detention orders to detain people for up to 24 hours.**

[133] Ibid, 38 Recommendation 15.
[134] Ibid, 39-40 Recommendation 17.
[135] See further, the summarised list of recommendations in respect of preventative detention orders: ibid, 10.

Extraordinary AFP stop, search and seizure powers

93. The Law Council maintains[136] its view 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 to managing the immediate aftermath of such an act (including conducting investigations, preserving evidence and securing the area).

94. However, the Law Council has concerns with renewing the warrantless powers of search contained in section 3UEA(1) of the *Crimes Act* which enables emergency entry to premises without a warrant for the following reasons.

- The failure to publish the Government's response to **Recommendation 5** of the 2021 PJCIS Review, which recommended the Attorney-General's Department consider the appropriateness of the implementation of a duty judge system where applications for search warrants could be received and considered for expedited review, it is not possible to establish the necessity of section 3UEA(1). This matter should be clarified in further evidence of government agencies.
- Even if the proposed amendments contained in the Exposure Draft[137] (the **Exposure Draft**) attached to the Attorney-General's Department Supplementary Submission are implemented—there is insufficient safeguarding against derivative use of material that may be elicited under section 3UEA(1) of the Crimes Act. If a retrospective warrant is refused, there should be safeguards ensuring that material recovered by the AFP outside the scope of the power is returned to the person affected and not subject to derivative use.

95. The Law Council supports certain amendments made by the Bill to make these powers more proportionate including: requiring that a police officer exercising these powers inform a person of their right to make a complaint, specification of statutory criteria in relation to the Minister's discretion to declare prescribed security zones and related strengthened notification obligations.

Warrantless powers of entry

96. The Exposure Draft is intended to implement Recommendation 6 of the 2021 PJCIS Review which recommended that the powers permitting emergency entry to premises without warrant, in limited circumstances, be amended to require an ex post facto warrant to be obtained as soon as possible following the use of the warrantless entry powers.

97. The Law Council's primary position is warrantless entry powers are unnecessary and that greater consideration should be given to strengthening existing telephonic procedures for emergency search warrants.[138]

98. However, it welcomes in-principle this Exposure Draft as a positive step which provides for a measure of additional scrutiny. It underlines that further scrutiny of

[136] Law Council 2020 Submission, 10 [9].
[137] Attorney-General's Department, Submission no. 2.1 to the Parliamentary Joint Committee on Intelligence and Security, Supplementary Submission—Exposure Draft (October 2023).
[138] See for example, *Crimes Act 1914* (Cth), s. 3R (warrants by telephone or other electronic means in an urgent case).

the Exposure Draft is needed and that attaching an Exposure Draft to the Department's submission should not be considered a consultation.

99. At this stage, the Law Council's particular concern is that, because of the High Court's approach[139] in *Smethurst,* unless there is a statutory safeguard prohibiting the derivative use of unlawfully elicited material and an obligation to return any such material promptly to the affected person, the courts will not imply such a restriction. Furthermore, the widely expressed discretion in Section 138 of the *Evidence Act 1995* (Cth) is not a sufficient safeguard against the use of unlawfully obtained material in subsequent proceedings.

100. For the reasons outlined above, the Law Council is concerned that without a statutory safeguard, there is an undesirable incentive for law enforcement agencies to test the boundaries of these extraordinary powers.

101. As a minimum, given the extraordinary nature of these powers, there should be a prohibition on direct use in subsequent proceedings, as well as derivative use for further investigatory purposes, and an obligation on the AFP to return any unlawfully seized material as soon as practicable.

102. The Law Council would welcome the opportunity to consider in greater detail the appropriate drafting of such a safeguard.

Recommendations

- **The PJCIS should carefully consider the necessity of warrantless entry powers under section 3UEA(1) of the Crimes Act, having regard to the PJCIS's recommendations for duty judges, and the possibility of strengthening existing procedures for expedited warrants for telephonic warrants.**
- **Further consultation should be conducted on the Exposure Draft—in particular, further consideration should be given to safeguards prohibiting direct and derivative use of unlawfully obtained material, and introducing a requirement on law enforcement authorities to return unlawfully obtained material promptly.**

Existing procedures to obtain emergency search warrants

103. The Law Council reiterates[140] its recommendation that further consideration be given to whether existing procedures[141] 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.

[139] The High Court rejected any presumption 'that information unlawfully obtained may not be used in the investigation or prosecution of an offence:' *Smethurst v Commissioner of Police* (Cth) (2020) 272 CLR 177, [65] ('***Smethurst***') applying the rule in *Bunning v Cross* (1978) 141 CLR 54, 65.
[140] Ibid, 53 Recommendation 25.
[141] See for example, *Crimes Act 1914* (Cth), s. 3R (warrants by telephone or other electronic means in an urgent case).

104. The Law Council endorses the previous finding of the 2021 PJCIS Review that, while it is possible to conceive of *hypothetical* situations where it is not possible to seek a telephone application to enable disruption of an imminent terrorist activity. Concrete evidence is needed in relation to the constraints faced within existing mechanisms. The Law Council agrees with the PJCIS previous finding that:[142]

> *a duty judge system may provide necessary assurance any warrantless entry powers exercised will be in response to extraordinary circumstances. Therefore, the Committee recommends the Government consider the appropriateness of a duty judge system. Such a review should, among other matters, consider:*
>
> - *the potential cost of introducing such a system;*
> - *international comparisons;*
> - *how long it takes to apply for a warrant on an expedited basis presently.*

105. As noted above, the Law Council encourages the Attorney-General's Department to publish its advice in response to Recommendation 5 of the 2021 PJCIS Review concerning the feasibility 2021 PJCIS Review duty judge system where applications for search warrants could be received and considered on an expedited basis.

Recommendations

- **The Committee should seek further clarification about whether existing procedures to obtain emergency search warrants could be made more efficient.**
- **The Law Council supports implementation of a duty judge system, where applications for search warrants could be received and considered on an expedited basis.**

Informing a person of a right to make a complaint

106. New sections 3UD(1A) and 3UD(1B) would require a police officer exercising certain powers to inform a person of their right to make a complaint.

107. This amendment is in line with the 2021 PJCIS Review[143] and the Law Council's previous recommendation.[144] The Law Council is therefore supportive of this measure.

Further statutory criteria to guide Ministerial decision making about the declaration of prescribed security zones'

108. New section 3UJ(1A) would impose new requirements for the Minister, before declaring a prescribed security zone, to consider specific matters including the reasonableness of this course of action and whether other, less invasive powers are available to prevent or respond to the terrorist act.

[142] 2021 PJCIS Review, 29 [2.70].
[143] 2021 PJCIS Review, Recommendation 1.
[144] Law Council 2020 Submission, 55 Recommendation 27.

109. Broadly speaking, this is in line with the recommendations[145] of the 2021 PJCIS Review and the Law Council's previous recommendation.[146] Accordingly, the Law Council also supports this measure.

110. However, the Law Council reiterates its view that further specification is desirable to ensure that the Minister is only permitted to make a declaration if they are satisfied, on reasonable grounds, that making a declaration is necessary to achieve a counter-terrorism objective.[147]

Oversight of stop, search and seizure powers

111. New section 3UJ(5A) and 3UJ(5B) provide for strengthened notification obligations, in relation to a declaration of a Commonwealth place as a prescribed security zone, to relevant oversight bodies including the Commonwealth Ombudsman, INSLM and PJCIS.

112. This amendment is in line with the 2021 PJCIS Review[148] and the Law Council's previous recommendation.[149] The Law Council again supports this measure.

Recommendation

- **The proposed measures to inform a person of their right to make a complaint, introduce further statutory criteria to inform Ministerial decision-making, and increase oversight with respect to emergency AFP stop, search and seizure powers should be passed. However, the Minister's power to make a declaration should be further restricted to situations where the Minister is satisfied on reasonable grounds that it is necessary to achieve a counter-terrorism objective.**

Commonwealth secrecy offence

113. Section 122.4 of the Criminal Code establishes an offence where:

- a person communicates information;
- the person made or obtained the information by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity;
- the person is under a duty not to disclose the information; and
- the duty arises under a law of the Commonwealth.

114. For context, there are 296 non-disclosure duties, located in 178 Commonwealth laws, that might enliven the offence.[150] The Bill proposes to extend the sunsetting date of this section by 12 months to 29 December 2024.

115. On 22 December 2022, the Attorney-General announced that the Government had commenced a comprehensive review of Commonwealth secrecy offences (the **Secrecy Review**), including these non-disclosure duties.

[145] 2021 PJCIS Review, Recommendation 1.
[146] Law Council 2020 Submission, 49 Recommendation 20.
[147] Ibid, Recommendation 20, first bullet point.
[148] 2021 PJCIS Review, Recommendation 1.
[149] Law Council 2020 Submission, 54 Recommendation 26.
[150] Commonwealth of Australia, Attorney-General's Department, Review of Secrecy Provisions – Consultation Paper (March 2023).

116. The Law Council provided a detailed submission to the Secrecy Review which included detailed recommendations for improvements to the framing of the offence in section 122.4 and related provisions, including defences under section 122.5.[151]

117. In that submission, the Law Council set out detailed recommendations[152] for amendment to section 122.4 and related provisions. It also set out its general support for the development and amendment of Commonwealth secrecy provisions in a manner consistent with the Australian Law Reform Commission's report: *Secrecy Laws and Open Government in Australia*.[153]

118. The Law Council notes the Explanatory Memorandum states that '[t]he Review will deliver its final report to Government by 31 August 2023'[154] and that '[a] 12-month extension to the sunsetting date of section 122.4 is required to maintain criminal liability until the Review is finalised, and Government can consider the final report, including any proposed legislative reforms on non-disclosure duties'.[155]

119. For the reasons outlined in the Explanatory Memorandum, the Law Council does not oppose renewal of this offence. However, to facilitate informed public discussion, the Law Council encourages the Government to release the final report of the Secrecy Review.

120. The Law Council welcomes further engagement with the Attorney-General's Department on law reform proposals arising in relation to the recommendations of the Secrecy Review.

Recommendations

- **The final report of the Government's Secrecy Review should be released at the earliest opportunity.**
- **The PJCIS should consider the Law Council's submission to the Secrecy Review, including its detailed recommendations for improvements to the framing of the offence in section 122.4 and related provisions, including defences under section 122.5.**

[151] Law Council of Australia, Submission to Attorney-General's Department, Review of Secrecy Provisions (22 May 2023).
[152] Ibid, see summary of recommendations, 6 [8].
[153] Australian Law Reform Commission, Secrecy Laws and Open Government in Australia (Report 112, 11 March 2010).
[154] Explanatory Memorandum, 71 [172].
[155] Ibid, 71 [173].