



Law Council
OF AUSTRALIA

Review of the Counter- Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020

Parliamentary Joint Committee on Intelligence and Security

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About the Law Council of Australia

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

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

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

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

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

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

Acknowledgement

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Executive Summary

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security (**Committee**) review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (**Bill**).
2. The Bill proposes to establish a new type of ‘post-sentence order’ in Division 105A of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) to manage the future risk presented by a person who has completed a sentence of imprisonment for a terrorism or security offence. The new form of order is an ‘extended supervision order’ (**ESO**), which will enable a person to be released into the community, subject to prohibitions and other conditions on their activities, associations, and movements.
3. The Law Council does not oppose, in principle, the establishment of an ESO regime, as a less-restrictive alternative to ‘continuing detention orders’ (**CDOs**). However, the Law Council makes 21 recommendations for amendments to the Bill, to ensure that the ESO regime:
 - is consistent with the recommendations of the third Independent National Security Legislation Monitor (**INSLM**), Dr James Renwick CSC SC about the core elements of the regime, especially the applicable standard of proof and conditions able to be imposed under an ESO;¹ and
 - applies a fair, reasonable and proportionate process for the determination of ESO applications, including adequate access to legal assistance; and
 - effectively manages interactions between ESOs, the control order (**CO**) regime in Division 104 of the Criminal Code, and applicable State or Territory post-sentence regimes. In particular, the Law Council supports safeguards to ensure that a person is not exposed to oppression by being subjected to:
 - multiple orders under different regimes, on the same or substantially similar grounds;
 - proceedings seeking a particular type of order (for example, a CO) as an effective ‘repechage’ to a previous, failed application for a different type of order (for example, an ESO), irrespective of outcome; or
 - conflicting conditions or obligations, or conditions or obligations whose combined effect is oppressive.
4. In particular, the Law Council considers that the ESO regime should only proceed if it implements the third INSLM’s recommendations, as a minimum standard for the legislative framework governing ESOs. In the alternative, State and Territory Supreme Courts should be invested with jurisdiction to issue COs.
5. The Bill also contains measures that are unrelated to ESOs, or which apply far more broadly than to ESOs alone. This includes a proposal to significantly expand CO conditions. The Law Council has significant concerns about these proposals, and recommends that they are withdrawn from the Bill and examined separately as part of the Committee’s current statutory review of the CO regime.

¹ Dr James Renwick CSC SC, INSLM, *Report on the Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, (September 2017), 67-75, especially 76 at [9.41]-[9.45].

Overview of the proposed ESO regime

A component of a broader 'post-sentence' preventive regime

6. The proposed ESO regime forms part of a broader suite of measures under Commonwealth law to manage 'post-sentence' terrorism risks. That is, the risks presented by people:
 - who have finished serving sentences of imprisonment for terrorism and other security offences in Chapter 5 of the Criminal Code; and
 - are assessed as presenting an unacceptable terrorism risk if released (either at all, or without restraints on their movements and other activities).
7. Since 2016, there have been two primary mechanisms in Part 5.3 of the Criminal Code to manage this risk, other than by prosecuting further offences arising from a person's conduct post-release:
 - CDOs issued under Division 105A, which enable the post-sentence detention of a person, in unlimited three-year increments. The first CDO application is presently before the Supreme Court of Victoria;² and
 - COs issued under Division 104, to impose prohibitions, conditions and other obligations on offenders within the community, following their release. Nine of the 16 COs issued to date have applied to convicted terrorist offenders, and immediately after their release from prison.³

Issuing court and applicant for ESOs

8. State or Territory Supreme Courts would be responsible for issuing ESOs, on the application of the Minister for Home Affairs (**Minister**) or representative.⁴
9. An ESO could be issued as an outcome of a CDO application, if the issuing court is not satisfied that it is necessary to detain a person under a CDO beyond their sentence. The Minister could also make an application seeking only an ESO.⁵

Duration and conditions of ESOs

10. An ESO would last for up to three years, with no limitations on subsequent orders.⁶ The proposed threshold for issuing an ESO is that the court is satisfied, on the balance of probabilities, that the person presents an unacceptable risk of committing a serious terrorism offence, and that each condition of the ESO is necessary and proportionate to managing that risk.⁷

² *Minister for Home Affairs v Abdul Nacer Benbrika* (Case Number: S ECI 2020 03527).

³ See further: Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security Review of AFP Powers*, (October 2020), 23 at [42] (**PJCIS Review of AFP Powers Submission**).

⁴ Bill, Schedule 1, item 62 (inserting new subsection 105A.5(1) of the Criminal Code).

⁵ Ibid, items 59, 62, 82, 85 and 87 (inserting proposed sections 105A.3, 105A.5(1), 105A.6A, 105A.7(2) and 105A.7A of the Criminal Code).

⁶ Ibid, item 87 (inserting proposed paragraph 105A.7A(4)(d) of the Criminal Code).

⁷ Ibid, item 87 (inserting proposed subsection 105A.7A(1) of the Criminal Code).

11. In significant contrast to COs, there are no statutory limitations on the types of conditions which a court may impose under an ESO.⁸ The non-exhaustive conditions specified in the Bill far exceed those presently available for COs.⁹

Consequences of breaching ESO conditions

12. Breach of an ESO condition would be an offence, punishable by a maximum penalty of five years' imprisonment, equivalent to the offence for breaching a CO condition.¹⁰
13. In addition, a person who is sentenced to imprisonment for the offence for breaching an ESO condition could be eligible for a further post-sentence order (an ESO or a CDO) upon completing that sentence.¹¹

Retrospective application of ESO regime to certain CO subjects

14. In addition, the Bill proposes to give the ESO regime retrospective application. It would permit an ESO to be sought and issued in relation to a terrorist offender who finished their sentence of imprisonment before the ESO regime commenced, and was the subject of a CO at the time the ESO regime commenced.¹²

Powers and procedures relating to ESOs

15. The Bill also proposes to make the following consequential amendments to related powers and procedures, to accommodate the ESO regime:
 - an expansion of the search and surveillance powers of the Australian Federal Police (**AFP**) to cover monitoring a person's compliance with an ESO, as well as powers to share information obtained in the exercise of those powers;¹³
 - an expansion of the proposed access regime for offshore communications data in the Telecommunications Legislation Amendment (International Production Orders) Bill 2020 (**IPO Bill**), which is currently being considered by the Committee, to cover monitoring powers with respect to ESOs;¹⁴
 - an expansion of the special advocates regime in the *National Security (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**) to cover proceedings for ESO applications in addition to CO applications;¹⁵
 - an exclusion of Ministerial decisions about applications for ESOs from statutory judicial review, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**);¹⁶ and

⁸ Ibid, item 87 (inserting proposed section 105A.7B of the Criminal Code).

⁹ Cf Criminal Code, subsections 104.5(3)-(6).

¹⁰ Bill, Schedule 1, item 133 (inserting new Subdivision EA of Division 105A of the Criminal Code).

¹¹ Ibid, item 59 (inserting proposed subsections 105A.3(4) and (5) of the Criminal Code).

¹² Ibid, item 59, (inserting proposed subsection 105A.3A(8) of the Criminal Code).

¹³ Ibid, items 155-188 (amendments to Part IAAB of the *Crimes Act 1914* (Cth) (**Crimes Act**) regarding powers of search), items 211-312 (amendments to the *Surveillance Devices Act 2004* (Cth) (**SDA**) regarding surveillance device warrants and remote computer access warrants), and items 313-392 (amendments to the *Telecommunications Interception and Access Act 1979* (Cth) (**TIA Act**) regarding telecommunications interception warrants and telecommunications data access authorisations).

¹⁴ Ibid, Schedule 2, items 1-105 (amendments to the IPO Bill, inserting proposed Schedule 1 in the TIA Act).

¹⁵ Ibid, Schedule 1, items 189-210 (amendments to the NSI Act).

¹⁶ Ibid, item 153 (inserting new paragraph (dad) of Schedule 1 to the ADJR Act).

- the removal of any obligation on the Australian Security Intelligence Organisation (**ASIO**), when giving security advice to the Minister for Home Affairs about a prospective application for an ESO or a variation of such an order, to do so via a formal security assessment issued under Part IV of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**).¹⁷

Separate proposed amendments to CDOs and COs

16. The Bill contains additional measures that are separate to the proposed ESO regime, or which cover CDOs as well as ESOs, namely:

Expanded eligibility for post-sentence orders (CDOs and ESOs)

- people who have been convicted of offences for breaching a CO or an ESO condition would be eligible for an ESO or a CDO, if they are prosecuted while the ESO or CO is in force, or no later than six months after the conduct constituting the alleged breach offence (whichever is later);¹⁸

Expanded grounds for withholding information from ESO or CDO respondents

- certain material can be withheld from a person who is subject to an application for an ESO or CDO (in addition to the existing power to withhold material from CDO applications on national security and public interest immunity grounds). The new ground will cover 'terrorism material' which advocates for 'terrorist acts or violent extremism' or preparatory acts, or association with a terrorist organisation;¹⁹

Expanded CO conditions

- the Bill proposes the following expansions of the conditions able to be imposed by COs (with breach constituting a criminal offence, which may result in a person also becoming eligible for an ESO or CDO if convicted and sentenced to imprisonment for any length of time):
 - a requirement that the person carries, at all times, a specified mobile phone, and is available to answer calls from a 'specified authority' or return such calls promptly;²⁰
 - additional, mandatory obligations on a person who is required to wear an electronic monitoring device, which a court has no discretion to dispense with or modify, including:
 - the above requirement to carry at all times, a specified mobile phone, and answer or return promptly calls from a 'specified authority';
 - a requirement to allow a 'specified authority' (being any person specified in the CO, not limited to police) to enter the controlee's house at any time, for any purpose 'relating to the electronic monitoring of the person'; and
 - detailed obligations in relation to the maintenance of the monitoring device, as specified in the individual CO (with no statutory parameters on the conditions that may be specified);²¹

¹⁷ Ibid, item 154 (inserting new subsection 35(2) of the ASIO Act).

¹⁸ Ibid, item 59 (inserting new subsection 105A.3(1) and new section 105.3A of the Criminal Code).

¹⁹ Ibid, item 120 (inserting new section 105A14D).

²⁰ Ibid, item 16 (inserting new paragraph 104.5(da) of the Criminal Code).

²¹ Ibid, items 16 and 20 (inserting new paragraph 104.5(d) and section 104.5A of the Criminal Code).

Issuing and enforcement of ESOs

Standard of proof for ESOs

17. Proposed paragraph 105A.7A(1)(b) provides that an ESO may be issued if the issuing court is satisfied, on the balance of probabilities, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious terrorism offence. Proposed subsection 105A.7A(4) provides that the Minister bears the onus of satisfying the Court of the abovementioned risk.
18. Paragraph 105A.7A(1)(b) requires the court to consider the factors in proposed section 105A.6B in assessing the offender's level of risk. These factors include:
 - the protective objects of Division 105A;²²
 - the report of a 'relevant expert'²³ and the results of any other assessment conducted by such a person;
 - reports of the relevant State or Territory corrective service authority and 'any other person' who the court considers is competent the extent to which the offender can be reasonably and practicably managed in the community;
 - evidence of the offender's participation in treatment or rehabilitation;
 - whether the offender was released on parole;
 - the offender's criminal history; and
 - the views of the sentencing court, in sentencing the person for the terrorism or security offence which made them eligible for a post-sentence order.

Rejection of former INSLM recommendation

19. The proposed standard of proof for an ESO (the balance of probabilities) is lower than the standard for a CDO (a 'high degree of probability').²⁴ This contradicts the recommendation of the third INSLM in his 2017 report, that the ESO regime should adopt the same standard of proof as the CDO regime.²⁵
20. The third INSLM's recommendation was accepted by the Government in May 2018, with its response to the former INSLM's report stating that 'the Government supports the features of the ESO scheme recommended by the INSLM'.²⁶
21. The Explanatory Memorandum to the Bill does not acknowledge that the Bill proposes to reject the third INSLM's recommendation, or retreat from the Government's acceptance of that recommendation two years ago. It offers minimal justification for the proposal, stating that the civil standard of proof is considered appropriate because applying conditions on a person's activities within the

²² Bill, Schedule 1, item 50 (inserting an objects clause, in new section 105A.1 of the Criminal Code).

²³ Criminal Code, section 105A.2 (an Australian-registered psychiatrist, psychologist or medical practitioner, or 'any other expert' who is 'competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence if released into the community').

²⁴ Criminal Code, s 105A.7(1)(b).

²⁵ Dr James Renwick CSC SC, *Review of Divisions 104 and 105 of the Criminal Code*, 76 at [9.41]. The Senate Scrutiny of Bills Committee also identified this issue and sought further explanation of the proposed departure: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2020*, (October 2020), 15 at [1.50]-[1.51].

²⁶ Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018), 8.

community under an ESO is 'less restrictive' than detaining a person under a CDO.²⁷ The effect of the proposal in the Bill is to align the standards of proof for ESOs with the standard for COs, which is presently the civil standard.²⁸

Law Council position

22. The Law Council urges the Parliament to reject the proposal to retreat from the previous acceptance of the third INSLM's recommendation. As a bare minimum, ESOs should be subject to the same (higher) standard of proof as for CDOs (namely, 'a high degree of probability' and not 'the balance of probabilities').
23. Adopting the higher standard of proof of 'a high degree of probability' would also be consistent with the standard of proof applied to post-sentence orders (covering both detention and supervision) in New South Wales for dangerous offenders and terrorist offenders.²⁹ The standard of 'a high degree of probability' is also applied to both detention and supervision orders in the post-sentence regimes in Queensland and Victoria, under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) and the *Serious Offenders Act 2018* (Vic).³⁰
24. However, as the Law Council commented in its submission to the Committee's current review of the AFP's counter-terrorism powers, it would be preferable for CDOs to apply the criminal standard of proof (beyond reasonable doubt) and the criminal rules for drawing adverse inferences (the matter must be the only rational inference).³¹ The Law Council similarly recommends that ESOs should be subject to the criminal standard of proof and criminal rules for drawing adverse inferences.

Adoption of the criminal standard of proof and criminal rules for drawing inferences

25. Subjecting ESOs to the criminal standard of proof and criminal rules for drawing inferences of future risk is appropriate for the following reasons:
 - the close connection of post-sentence orders with the criminal process (a consideration which applies equally to ESOs and CDOs);
 - the gravity of the consequences of an ESO for the individual, including:
 - the extremely onerous (and unlimited) conditions, restrictions, prohibitions and other obligations that can be imposed on a person who is subject to an ESO, under pain of criminal penalty for breach;
 - the imposition of significant criminal penalties (up to five years' imprisonment) for the offence of contravening the conditions of an ESO;
 - the potential exposure of a person to a further post-sentence order if they are convicted of breaching an ESO and are sentenced to imprisonment;

²⁷ Explanatory Memorandum, 67 at [182].

²⁸ Criminal Code, paragraph 104.4(1)(c).

²⁹ *Crimes (High Risk Offenders) Act 2006* (NSW), paragraphs 5B(d) and 5C(d); and *Terrorism (High Risk Offenders) Act 2017* (NSW), paragraphs 20(d) and 34(1)(d).

³⁰ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), paragraph 13(3)(b); and *Serious Offenders Act 2018* (Vic), subsections 14(3) and 62(2).

³¹ Law Council of Australia, *PJCIS Review of AFP Powers Submission*, 62-63 at [252]-[253].

- the exposure of a person who is subject to an ESO to highly intrusive search and surveillance powers, which do not require a suspicion of non-compliance with the conditions of an ESO; and
- the ability for an unlimited number of ESOs to be sought and issued in relation to a person (notwithstanding the three-year maximum duration of individual orders);
- the highly extraordinary and unusual nature of ESOs, in that they involve making predictions about a person's future risk, based on evidence of their past conduct. This raises difficult and complex issues, including:
 - the inherently difficult task of predicting a person's future conduct, for which there is no settled and empirically validated risk assessment framework. As the Law Council has observed previously, the risk assessment framework favoured by the Government, the VERA-2R, appears to be in a formative stage of development;³² and
 - in the absence of direct evidence of a person's preparation or planning to engage in a terrorist act, the task of predicting a person's future risk will generally rely upon the drawing of inferences based on their past conduct. Such inferences may need to be drawn in volatile and rapidly changing circumstances. This supports adopting the criminal rules for the drawing of adverse inferences. That is, the matter must be the only reasonable inference that is capable of being drawn,³³ and
- the threshold of 'unacceptable risk' is vague, fluid and subjective, especially when applied in the context of assessing a non-specific threat of re-offending at an unspecified point in the future, rather than a specific and imminent threat. If this threshold is to be used for any kind of post-sentence order, then the criminal standard of proof should be adopted to counterbalance the risks of arbitrariness and error that arise from its vagueness and subjectivity.

Recommendation 1—criminal standard of proof and rules for drawing inferences

Preferred option

- **Proposed paragraphs 105A.7(1)(b) and 105A.7A(1)(b) and (c) (items 82 and 87 of Schedule 1 to the Bill) should be amended to provide that:**
 - **the criminal standard of proof applies to decisions to issue ESOs and CDOs; and**
 - **the criminal rules for drawing inferences apply to any findings of a person's future risk for the purpose of issuing an ESO or CDO.**

Alternative (non-preferred) option

- **As a minimum, paragraphs 105A.7A(1)(b) and (c) (item 87 of Schedule 1 to the Bill) should be amended to provide that the standard of proof for an ESO is 'a high degree of probability' (the standard for CDOs).**

³² See further: Law Council of Australia, *PJCIS Review of AFP Powers Submission*, 63 at [250] (including footnote 159). See also: Law Council of Australia, *PJCIS Review of AFP Powers Supplementary Submission* (September 2020), 12-13 at [47]-[50].

³³ *Shepherd v R* (1990) 170 CLR 573, 57.

Recommendation 2—withdrawal of ESO regime if standard of proof not increased

- **If there is no appetite to increase the standard of proof for ESOs, to at least the standard recommended by the third INSLM ('a high degree of probability') then:**
 - **the ESO regime should not proceed; and**
 - **Division 104 of the Criminal Code should be amended to confer jurisdiction on State and Territory Supreme Courts to issue COs.**

Necessity and proportionality of proposed ESO conditions

26. Proposed paragraph 105A.7A(1)(c) would require the issuing court to apply the tests of necessity and proportionality to each condition that is proposed to be included in an ESO. That is, the court must be satisfied, to the civil standard, that each of the proposed conditions is reasonably necessary for, and reasonably appropriate and adapted to, the purpose of protecting the community from an unacceptable risk that the person will commit a serious terrorism offence. This corresponds with the current issuing test for control orders in section 104.5 of the Criminal Code.
27. While the Law Council supports an explicit threshold of necessity and proportionality, it continues to support the implementation of outstanding recommendations of the second INSLM, the Hon Roger Gyles AO QC, in relation to the application of that issuing test for COs. The second INSLM's recommendations should be replicated in the proposed ESO regime. In particular, the second INSLM recommended that the issuing test should require an assessment of the necessity and proportionality of each individual condition, as well as the **combined effect** of all proposed conditions.³⁴
28. As the Law Council observed in its submission to the Committee's current review of the AFP's counter-terrorism powers, there is no cogent reason for rejecting the second INSLM's recommendation.³⁵ The recommendation was developed specifically to address concerns about limitations in the proportionality assessment (and therefore the compatibility of the CO regime with Australia's human rights obligations). The second INSLM placed weight on the exposure of a controlee to highly intrusive surveillance powers to monitor their compliance, which are subject to low thresholds for their exercise. These considerations also apply to ESOs.³⁶
29. As the Law Council has noted previously, the Government's explanation for rejecting this recommendation in May 2018 that this would 'add complexity' to the issuing is not persuasive in relation to either COs or ESOs.³⁷ The resolution of legal and factual complexity is an inherent part of the judicial function. Courts are well equipped to resolve such issues with expertise and efficiency.
30. This observation has particular force in the context of the functions of State and Territory Supreme Courts in determining applications for post-sentence orders. Their extensive criminal jurisdiction, and consequent expertise, makes them

³⁴ The Hon Roger Gyles AO QC, INSLM, Control order safeguards: Part 2, (April 2016), 18 at [13.7].

³⁵ Law Council of Australia, *PJCIS Review of AFP Powers Submission*, 28-29 at [75]-[76].

³⁶ The Hon Roger Gyles AO QC, INSLM, Control order safeguards: Part 2, (April 2016), 18 at [13.7].

³⁷ *Ibid* and Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018), 19.

well-placed to make findings on complex issues of fact and law, in matters that are very closely related to the criminal process.

Recommendation 3—cumulative assessment of all ESO conditions

- **Proposed paragraph 105A.7A(1)(c) (item 87 of Schedule 1 to the Bill) should be amended to require the issuing court to assess, and be satisfied of, the necessity and proportionality of:**
 - **each individual condition proposed to be included in an ESO; and**
 - **the combined effect of all of the proposed conditions of the ESO.**

Conditions able to be imposed under ESOs

Rejection of third INSLM's recommendation

31. The third INSLM, Dr James Renwick CSC SC, specifically recommended that ESOs should apply the **same conditions** as those applicable to COs.³⁸ The proposed ESO regime contradicts this in two respects, which are not acknowledged in the Explanatory Memorandum as departures from the Government's previous acceptance of the former INSLM's recommendation in May 2018.³⁹
32. **First**, the Bill proposes to enable the Minister or representative to seek, and the court to issue, an unlimited range of conditions. It also provides inclusive lists of potential conditions that may be included in an ESO, which far exceed those currently available for COs. For the reasons set out below, the Law Council does not support the unlimited nature of conditions available for ESOs.
33. **Secondly**, the Bill proposes to allow a 'specified authority' (being any person or class of persons specified in an order) to unilaterally grant temporary 'exemptions' from certain ESO conditions.
34. The Law Council does not oppose, in principle, a limited ability to temporarily vary the terms of an ESO to accommodate urgent circumstances without requiring an ESO subject to initiate legal proceedings (especially given the significant inadequacies in Commonwealth legal assistance funding, as identified in the Law Council's previous submissions).⁴⁰ However, this must be accompanied by rigorous safeguards, as outlined in the Law Council's recent submission to the Committee on a similar proposal advanced by the AFP in relation to COs.⁴¹

Breadth and unlimited nature of ESO conditions

35. The Bill proposes to empower an issuing court to make an ESO with **any** conditions it considers are reasonably necessary for, and reasonably appropriate and adapted to, the purpose of protecting the community from the 'unacceptable risk' that the

³⁸ James Renwick CSC SC, INSLM, *Review of Divisions 104 and 105 of the Criminal Code*, (September 2017), 76 at [9.42] paragraph (c).

³⁹ Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018), 8.

⁴⁰ Law Council of Australia, *PJCIS Review of AFP Powers Submission*, (September 2020), 31-33 and 77-79.

⁴¹ Law Council of Australia, *PJCIS Review of AFP Powers Supplementary Submission* (September 2020), 6-7 at [11]-14].

offender poses.⁴² Subsections 105A.7B(3) and (5) set out non-exhaustive conditions that may be imposed under an ESO.

36. Subsection 105A.7B(3) contains 'general conditions', which have some similarities to CO conditions in existing subsection 104.5(3) of the Criminal Code but are far more extensive. They include:
- prohibitions on the person's presence at specified places;
 - residency requirements (with no prohibition on mandatory relocation);
 - requirements to stay at a particular place for up to 12 hours per day;
 - limitations on overseas travel and possession of travel documents;
 - prohibitions on communicating or associating with specified persons;
 - prohibitions on carrying out certain work and undertaking certain education or training;
 - prohibitions on using specified forms of technology including the internet;
 - requirements to participate in treatment, rehabilitation or counselling (which, in contrast to existing CO conditions, does not require a person to consent to the condition being imposed under an ESO);
 - requirements to participate in psychological or psychiatric assessment (not specifically for rehabilitative purposes) and requirements to permit the disclosure of results (and any other specified information) to a specified authority (again, without a requirement that the person must consent to the condition being imposed under an ESO); and
 - a requirement to 'comply with any reasonable direction given to the offender by a specified authority'.
37. An ESO could potentially place some limitations on the ability of a person to contact and instruct a lawyer, in that a particular lawyer may be specified in the classes of persons with whom contact is prohibited.⁴³ However, such a condition would be subject to the issuing test of necessity and proportionality. In apparent contrast to the provisions governing CO conditions, there is no specific prohibition on ESO conditions preventing a person from associating with close family members, with respect to matters of family or domestic concern.⁴⁴
38. Subsection 105A.7B(5) prescribes further conditions pertaining to monitoring of the person, which exceed the range of conditions able to be included in COs in existing subsection 104.5(3). They include requirements that the person:
- submits to testing for specified substances or articles;
 - allows their fingerprints and photographs to be taken;
 - wears an electronic monitoring device;
 - carries, at all times, a specified mobile phone, and answers calls to that phone from a 'specified authority' or returns such calls within a reasonable period;
 - reports to specified persons at specified times;

⁴² Bill, Schedule 1, Item 87, proposed subsection 105A.7B(1).

⁴³ Ibid, item 87, proposed paragraph 105A.7B(3)(h) and proposed subsection 105.7B(7).

⁴⁴ Cf Criminal Code, subsection 104.5(3)(4).

- provides an advance schedule of their proposed movements for a specified period, and complies with that schedule;
- allows any police officer to enter and search their residence or other premises at any reasonable time, for any purpose relating to the electronic monitoring of the person (not merely the installation or maintenance of a monitoring device);
- facilitates access to data held on their computers or other technology, including by providing passwords.

Law Council views

39. The Law Council holds concerns about the breadth and non-exhaustive nature of the conditions listed in subsections 105A.7B(3) and (5), which enliven offences for non-compliance that can further expose persons to additional post-sentence orders.
40. As the Parliamentary Joint Committee on Human Rights observed in its initial comments on the Bill, a power to impose an unlimited range of conditions has the potential to place significant limitations on human rights, including rights to liberty and security of the person, privacy, freedom of expression and movement, peaceful assembly and association.⁴⁵
41. Consequently, it is problematic that the Explanatory Memorandum to the Bill fails to acknowledge that the proposed ESO conditions are far more expansive than those which apply to COs, and explain why each condition (particularly the proposed expansions from CO conditions) is considered necessary and proportionate. In the absence of cogent justification, the Law Council considers that the conditions available under an ESO should be identical to those presently available for COs in section 104.5(5) of the Criminal Code, as recommended by the third INSLM.
42. In particular, there should be statutory limitations on the range of conditions that a Court may impose, in view of the gravity of consequences of an ESO for the individual. A fixed, statutory range of potential conditions would provide an important safeguard against the miscarriage of an unlimited discretion to fashion a condition of any kind. Such a miscarriage could, as the Supreme Court of New South Wales cautioned in 2017, result in the imposition of conditions that are ‘unjustifiably onerous or simply punitive’ or reflect what is most ‘convenient or resource efficient’ for the relevant authorities administering the order.⁴⁶
43. Further, a fixed range of statutory conditions would enhance Parliamentary control over the post-sentence regime, as legislative amendments would be required to expand the range of conditions able to be imposed (as presently occurs for COs). The Parliament would have an opportunity to scrutinise, and specifically approve, each proposal for a new type of condition. This would include detailed consideration of the justification provided, and an examination of its human rights implications.

Recommendation 4—limitations on the range of ESO conditions

- **Proposed section 105A.7B (item 87 of Schedule 1) should be amended so that:**

⁴⁵ Parliamentary Joint Committee on Human Rights, *Report 11 of 2020* [2020] 11 AUPJCHR 131 at [1.14]. The Law Council’s members have also reported on their experience that, in the context of the Victorian post-sentence regime, offenders have been prohibited from contacting family members under those orders.

⁴⁶ *State of New South Wales v Bugmy* [2017] NSWSC 855, [89] (per Fullerton J).

- **the conditions prescribed in subsections 105A.7B(3) and (5) are exhaustive of the conditions that may be imposed under ESOs; and**
- **the conditions available for an ESO should be limited to those available for a CO under subsection 104.5(5). In particular:**
 - **there should be no power to impose an ESO condition requiring a person to participate in counselling, education, psychiatric or psychological assessment unless the person has consented to the inclusion of that condition (equivalent to existing subsection 104.5(6) in relation to COs); and**
 - **the power to impose conditions prohibiting a person's association with others should be subject to a limitation on associations with close family members for matters of family or domestic concern (equivalent to the existing subsection 104.5(4) in relation to COs).**

Temporary exemptions from ESO conditions

Proposed temporary exemption regime

44. Proposed section 105.7C provides that an issuing court for an ESO may specify conditions of the ESO as 'exemption conditions'. This means that a 'specified authority' may administratively grant temporary exemptions from those conditions, once the ESO is in force.
45. The offender may make a written application to the specified authority, who may grant or refuse the application. An application may be granted subject to 'any reasonable directions' that the specified authority decides to impose.
46. There is no requirement for the court to apply any statutory criteria in deciding whether to designate an ESO condition as an 'exemption condition'. Nor is the 'specified authority' subject to any statutory criteria in deciding whether to approve an application for a temporary exemption.
47. There is also no obligation on the specified authority to make a decision on an exemption application, including within a specified timeframe. Nor are there any statutory limits on the maximum duration of a temporary exemption, with an obligation on the Minister to consider whether the substantive ESO condition remains necessary or proportionate (and, if satisfied that it is not, further obligations to notify the person, and apply the court for a permanent variation of the ESO).

Law Council position on a temporary exemption regime

48. The Law Council acknowledges that there is value in creating a mechanism for fast and flexible temporary variations of ESO conditions, which are sought by the person who is subject to an ESO, to deal with unforeseen personal circumstances.
49. This will ensure that such persons are not exposed to criminal liability and made reliant on prosecutorial discretion not to enforce a breach offence, if they were unable to make a variation application to a court and have the matter heard in time.
50. However, the Law Council is concerned that there are inadequate safeguards to prevent the arbitrary exercise of discretion by 'specified authorities' and to protect the person against exposure to criminal liability (and further post-sentence orders).

Recommended safeguards for the temporary exemption regime

51. The Law Council considers that the following additional safeguards are needed, which are based on its recent submission to the Committee's review of AFP counter-terrorism powers, commenting on an equivalent proposal in relation to COs:⁴⁷
- the specified authority should be required to make a decision on an application within 48 hours (with failure to decide within this time constituting a deemed refusal, which would enliven the additional obligations below);
 - the specified authority should be subject to statutory decision-making criteria, which require an assessment of:
 - the impact of a refusal on the person, particularly their employment, education, contact with family, and physical and mental health; and
 - an assessment of whether the temporary exemption sought may raise an unacceptable risk to public safety, and if so, whether that risk can be managed by approving the exemption subject to directions;
 - the power of the specified authority to grant an exemption subject to directions should be limited, given that this is effectively a power to prescribe the substance of the offence for contravention of a direction under proposed subsection 105A.18A(2). In particular, the direction-making power should be subject to express requirements to:
 - assess the necessity, proportionality of the proposed directions, and the practical feasibility of the person's compliance with them; and
 - give the person a reasonable opportunity to comment on the feasibility of the proposed direction or directions;
 - the specified authority must make a written record of the exemption decision, which sets out the following matters:
 - if the exemption application is approved, the activities in which the person is permitted to engage, including details of any directions to which they are subject, and the date and time at which the exemption will commence and cease; or
 - if the exemption is refused, the reasons for refusing the application (consideration should also be given to the availability of review rights for a refusal decision, comprising at least a prescribed avenue of internal review within a fixed timeframe);
 - the specified authority must:
 - give a copy of the written record of the decision to the ESO subject as soon as possible after the decision is made; and
 - take all reasonable steps to ensure that the person understands the decision, particularly the duration and terms of the exemption (including any directions) and the effect of the offence in proposed subsection

⁴⁷ Law Council of Australia, *PJCIS Review of AFP Powers Supplementary Submission* (September 2020), 12-13 at [47]-[50].

105A.18A(2) for contravening a direction that has been given in relation to a temporary exemption;

- the specified authority must ensure that the Minister for Home Affairs is notified of a decision to grant an exemption, and the Minister for Home Affairs must consider whether the relevant condition of the ESO remains necessary and proportionate. If the Minister considers that it is no longer necessary or proportionate, they must:
 - notify the person, in writing, of this view as soon as possible; and
 - apply to the court for a variation of the ESO to remove or modify the condition;
- the Minister for Home Affairs must include in their annual reports on Division 105A the number of temporary exemptions granted each year; and
- the offences in proposed sections 105A.18A and 105A.18B for contravening an ESO condition should be subject to an express exception for people who act in accordance with a temporary exemption. This would make explicit that the contravention of a substantive ESO condition, by complying with a temporary exemption, is not an offence.

Implications for legal assistance funding

52. Further, the Law Council emphasises that any mechanism for the temporary variation of ESO conditions should be seen as a 'last resort' for unforeseen circumstances that arise urgently—for example, if an ESO subject is asked to work a night shift the day before, and their ESO contains a curfew condition.
53. A temporary variation mechanism is no substitute for properly funding legal assistance for ESO respondents so that they can make submissions in proceedings for ESO applications, to ensure that any conditions are appropriately tailored.
54. It is also important to ensure that the proposed temporary exemption regime does not become a 'de facto variation mechanism'. This risk may arise if an ESO applicant cannot afford legal representation to make an application to the court for a permanent variation or revocation of an ESO condition, or to seek the review of an ESO in entirety. In these circumstances they may become dependent on temporary variations to avoid exposure to criminal liability for breaching conditions, as a result of changes in their personal circumstances that do not present any security risk.

Recommendation 5—safeguards for the temporary variation power

- **Proposed section 105.7C (item 87 of Schedule 1 to the Bill) should be amended to include the safeguards at paragraph [51] of this submission.**

Ministerial appointment of 'relevant experts'

55. Proposed section 105A.18D empowers the Minister to direct a prisoner, or a person in relation to whom a post-sentence order is in force, to attend a mandatory risk assessment, which will be conducted by a person who the Minister has unilaterally appointed as a 'relevant expert'.

56. The purpose of such an assessment would be to inform the Minister's decision-making about whether to seek a post-sentence order (or a further order), or the variation of such an order. If the Minister subsequently makes an application for a post-sentence order, or the variation of an existing order, the court is required to consider the report of the 'relevant expert' appointed by the Minister.⁴⁸
57. A person's mandatory participation in a risk assessment under proposed section 105A.18D would be additional to their mandatory participation in any court-ordered risk assessment by a 'relevant expert' who may be appointed by the court under section 105A.6, for the purpose of the court's consideration of the application for the post-sentence order, if ultimately sought by the Minister.

Limitation of the power to appoint 'relevant experts' to courts

58. The Law Council does not support the proposal to empower the Minister to unilaterally determine a person to be a 'relevant expert' (within the meaning of existing section 105A.2 of the Criminal Code) and to require an offender to attend a risk assessment carried out by that person.
59. The Law Council considers that the court, and not a Minister, should be solely responsible for the appointment of 'relevant experts' and ordering a person to participate in a mandatory risk assessment. As explained below, this reflects the significant discretion in making a finding of fact that a person is a 'relevant expert', the status that is given to that person's reports in subsequent proceedings for a post-sentence order, and the gravity of the consequences of a post-sentence order for the offender.

Findings of fact about a person's expertise and independence

60. The definition of a 'relevant expert' in existing section 105A.2 of the Criminal Code requires an objective assessment of a person's competence to assess an offender's future risk.
61. A 'relevant expert' is not limited to an Australian-registered psychiatrist, psychologist or medical practitioner, and can be any person who is determined to be competent to make a prediction of future risk. There is no requirement in the present definition for the 'relevant expert' to be independent of law enforcement, corrections and security agencies, or the Executive Government more broadly. Further, as the Law Council has previously noted, there is presently no empirically verified risk assessment framework for terrorist offenders.
62. These factors make it particularly important that the power to appoint a person as a 'relevant expert' and direct an offender to participate in a mandatory risk assessment are conferred only on a court.

Judicial decision-making

63. Importantly, any decisions of a court about the appointment of a person as a 'relevant expert' would be subject to the constitutional requirements governing the manner in which a judicial power must be exercised. These requirements would not apply to a unilateral decision by the Minister.
64. Such requirements include standards of independence, impartiality and equality before the law. They require parties to be given an opportunity to present their case

⁴⁸ Bill, Schedule 1, item 1, item 18, inserting proposed paragraph 105A.6B(1)(b)(ii).

and respond to the opposing case. Decisions must be made on the basis of an application of the law to the facts as found, and must apply the rules of evidence.⁴⁹

65. In further contrast to the process for exercising a Ministerial decision-making power, judicial proceedings concerning the appointment of a 'relevant expert' would generally be conducted in open court, and decisions would be subject to appeal.

Status of reports of 'relevant experts' appointed by the Minister

66. Further, as noted above, if the Minister subsequently makes an application for a post-sentence order, the court is obliged under proposed subparagraph 105A.6B(1)(b)(ii) to consider the report of a 'relevant expert' who was appointed by the Minister under proposed section 105A.18D.
67. While the court has discretion about the degree of weight to be given to such a report in proceedings for a post-sentence order, an express statutory direction to take that report into consideration gives it a privileged status over other evidence. As a matter of practicality, that statutory direction may have some influence on the degree of weight the person's report is given. It may also have some bearing on a court's decision on whether to separately appoint another 'relevant expert' and require the offender to participate in a further mandatory risk assessment.

Evidentiary complexities in CDO and ESO hearings

68. The Law Council also notes that proposed subsection 105A.6B(3) provides that the court must apply the rules of evidence to its assessment of the report of the Ministerially appointed 'relevant expert' under proposed subparagraph 105A.6B(1)(b)(ii).
69. The Law Council takes this to mean that the court **will not** be able to consider that person's report if it does not satisfy the applicable rules of evidence in the particular State or Territory in relation to the admission of expert opinion, or another exception to the general rule against opinion evidence.⁵⁰
70. Therefore, if the court is not satisfied that the person appointed by the Minister possesses the requisite specialised knowledge to predict future risk, or that such a specialised body of knowledge exists, it cannot admit the report on the basis of expert evidence. Unless it is possible to admit the report on another basis (for example, as 'lay opinion' based on the person's observations of the offender during a risk assessment interview)⁵¹ then the court could not consider it under subparagraph 105A.6B(1)(b)(ii) when assessing the offender's future risk.
71. However, this approach is likely to add significant complexity to the determination of CDO or ESO applications. It will increase the risk that there will be complex arguments (and potential appeals against decisions) about whether the person appointed by the Minister as a 'relevant expert' under proposed section 105A.18D, in fact, possessed the requisite degree of expertise for their reports to be admissible as expert opinion evidence in subsequent CDO or ESO proceedings.
72. Argument about this matter would be additional to arguments about the potential exercise by the court of its separate power under existing section 105A.6 to appoint

⁴⁹ See, for example, *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209 (per Gaudron J).

⁵⁰ See, for example, sections 76 and 79 of the Uniform Evidence Law (which is applied in NSW, Vic, Tas, ACT, NT in addition to the Commonwealth).

⁵¹ See, for example, section 78 of the Uniform Evidence Law.

a relevant expert (or experts) in CDO or ESO proceedings, and the admissibility of the reports of that person or those persons.

73. Such complexity has the potential to prolong a person's detention or supervision (for example, it may result in the issuing of interim orders). It would be preferable to avoid these problems by removing the Minister's power to appoint 'relevant experts' (and consequently removing the obligation on the court to consider those reports).

Circumstances in which 'pre-application risk assessments' should be permitted

74. Given the significant consequences of a post-sentence order for the individual offender, the Law Council recommends that the Minister should only be able to obtain risk assessments in relation to an offender, for the purpose of deciding whether to apply for a post-sentence order, if:
- the offender has consented to participating in such an assessment; or
 - the offender is subject to an existing post-sentence order, which includes a condition requiring the person to participate in a risk assessment, which has been imposed **with the consent of the offender** to that condition. Such a condition could only be imposed if the issuing court is satisfied of its necessity and proportionality to the person's future terrorism-related risk.

Recommendation 6—removal of Ministerial power to appoint 'relevant experts'

- **Proposed section 105A.18D (item 134 of Schedule 1) should be omitted from the Bill.**
- **If an offender voluntarily participates in a 'pre-application' risk assessment conducted by a person nominated by the Minister:**
 - **the court which hears a subsequent application for a CDO or ESO against that person should not be subject to an express statutory obligation to consider a report of that person, as part of its assessment of the offender's future risk; and**
 - **instead, the admission and treatment of such a report in CDO or ESO proceedings should be left to the general discretion of the court to admit relevant evidence and determine its weight.**

Legal assistance for ESO applications

75. Presently, section 105A.15A of the Criminal Code empowers a court to make an order requiring the Commonwealth to meet the reasonable costs of legal representation for a person who is subject to an application for a CDO, if that person has been unable to engage a lawyer due to circumstances beyond their control.
76. The Bill proposes to amend section 105A.15A to restrict its application to those cases in which the Minister (or representative) seeks a CDO.⁵² As a result, a court will be empowered to make an order for legal assistance funding in cases in which it is considering making an ESO as an alternative to a CDO. However, a court will have no power to make an order for legal assistance funding if the Minister (or representative) only applies for an ESO, or a review of an ESO. The

⁵² Bill, Schedule 1, item 122, inserting new paragraph 105A.15A(1)(a) of the Criminal Code.

Explanatory Memorandum does not explain the reasons for the exclusion of 'ESO-only' proceedings from the legal assistance mechanism in section 105A.15A.

77. This means that all of the serious deficiencies identified previously by the Law Council about legal assistance funding arrangements for COs would apply equally to applications for ESOs.⁵³ This is so notwithstanding the significantly more onerous conditions that can be imposed under an ESO as compared to a CO; the longer duration of ESOs as compared to COs (three years as opposed to 12 months); and the potential that a conviction for the offence of breaching an ESO condition can make the person liable to a new post-sentence order (a CDO or an ESO).
78. The Law Council recommends that section 105A.15A is amended to cover all post-sentence orders under Division 105A. This section (or similar provisions inserted in Divisions 104 and 105A) should also cover legal assistance funding for persons who are charged with an offence of breaching an ESO or CO condition, if those offences are to be the basis for a CDO or ESO application, pursuant to proposed subsections 105A.3A(4) and (5).
79. These recommendations are additional to the amendments to section 105A.15A and the establishment of a dedicated Commonwealth legal assistance funding stream, which the Law Council has recommended in its submission to the Committee's inquiry into the AFP's counter-terrorism powers.⁵⁴

Recommendation 7—legal assistance funding for all post-sentence orders

- **Item 122 of Schedule 1 to the Bill should be omitted and substituted with amendments to section 105A.15A of the Criminal Code, which empower the court to make orders for legal assistance in proceedings for all post-sentence orders (that is, both CDOs and ESOs).**
- **The Bill should further amend one or both of Divisions 105A and 104 of the Criminal Code to include a similar power to that in section 105A.15A, enabling a court to make orders for legal assistance in prosecutions for the offence of breaching an ESO or CO condition, if those offences are to be the basis for making a person eligible for an ESO or CDO, under proposed subsections 105A.3A(4) and (5).**
- **There should be a dedicated Commonwealth legal assistance funding stream for all post-sentence orders, in addition to COs.**

Offences for breaching ESO conditions

80. Proposed section 105A.18A contain new offences for engaging in conduct which contravenes an ESO condition. Proposed section 105.18B contains further offences for interfering with an electronic monitoring device that the person is required to wear under an ESO. These offences are punishable by a maximum penalty of five years' imprisonment.
81. The Law Council is concerned that the proposed offence regime may effectively create a 'revolving door' that exposes offenders to prolonged imprisonment on the basis of relatively minor infractions of ESO conditions. Prolonged imprisonment also raises a further risk that the person may be exposed to radicalisation and new forms of criminal activity while a serving a sentence of imprisonment for breaching an

⁵³ Law Council of Australia, *PJCIS Review of AFP Powers Submission*, 31-32 at [82]-[88].

⁵⁴ *Ibid*, 77-78 at [316]-[322].

ESO. This may impede their prospects of rehabilitation and, in turn, enlarge the risk that they present to the safety and security of the wider community.

82. For example, Law Council members have identified that, in their experience under the *Crimes (High Risk Offenders) Act 2006* (NSW) and *Terrorism (High Risk Offenders) Act 2017* (NSW), offenders have received lengthy sentences for breaches of ESO conditions that are often unrelated to their risk of committing a further serious offence.
83. In one instance, an offender had a five-year extended supervision order imposed on him at after he committed three serious sexual offences at the age of 16. This order remained in force for over 11 years due to repeated minor breaches, such as cannabis consumption and curfew breaches. The offender was ultimately incarcerated for around 11 of the 16 years that had passed since he completed his sentence for the sexual offences. In revoking the supervision order earlier this year, the Supreme Court of New South Wales observed that the offender's prospects of rehabilitation had been adversely affected by his repeated incarceration for relatively minor infractions of the order and his consequent 'institutionalisation'.⁵⁵
84. To help prevent this problem in the context of Commonwealth post-sentence orders, the Law Council recommends that consideration should be given to amending sections 105A.18A and 105A.18B to create a 'two-tiered' offence regime, as follows:
- a 'lower tier' breach offence would apply if the conduct constituting the breach did not, and was not likely to, cause serious harm to another person, and was not otherwise connected with a terrorism or security offence. It would be punishable by a maximum penalty of two years' imprisonment; and
 - a 'higher tier' breach offence would apply if the conduct constituting the breach caused, or was likely to cause, serious harm to another person, or was otherwise connected with a terrorism or security offence. It would be punishable by a maximum penalty of five years' imprisonment.

Recommendation 8—offences for breaching ESO conditions

- **Proposed sections 105A.18A and 105.18B (item 133 of Schedule 1 to the Bill) should be amended to establish the 'two-tiered' breach offence regime outlined at paragraph [84] of this submission.**

Interaction with State and Territory post-sentence orders

Absence of a statutory regime to manage interaction

85. The Bill contains no provisions to manage the interaction of Commonwealth post-sentence orders with post-sentence orders issued under State or Territory laws, as in force from time-to-time.
86. For example, there are no prohibitions on:
- the power of the Minister to apply for a Commonwealth post-sentence order while an application for an equivalent State or Territory order is on foot, or while a State or Territory order is already in force in relation to the person; or

⁵⁵ *State of New South Wales v Carr* [2020] NSWSC 643; *State of New South Wales v Hill* [2016] NSWSC 913.

- the power of the court to issue a Commonwealth ESO while a person is also the subject of a supervision order, or an application for such an order, under State or Territory legislation.

87. Further, the Bill does not contain any measures to guide judicial decision-making, such as issuing criteria which require the court to routinely consider the following matters (and supported by disclosure obligations on the Minister to inform the court of any concurrent or imminent orders under State or Territory post-sentence laws):

- whether the person is subject to a post-sentence supervision order under State or Territory legislation, and if so, the conditions of that order; and
- the cumulative impact on the person of multiple post-sentence orders under Commonwealth and State or Territory laws, including the risk of oppression.

The need for express statutory guidance

88. While it is conceivable that an issuing court would consider matters of interaction and potential conflict in individual cases, it would be desirable for the Bill to provide express statutory guidance in relation to the consideration of these matters. This would ensure that potential issues of interaction and conflict are identified and managed consistently across all ESO applications.

89. In addition, a prohibition on concurrent post-sentence orders would create a degree of consistency with the prohibition on double jeopardy and the prohibition on double punishment in sentencing. Such consistency is appropriate having regard to the close connection of post-sentence orders with criminal offences.

90. A statutory framework to avoid conflict and manage interaction would also help to prevent constitutional challenges under sections 109 and 122 of the Constitution, if there is conflict between conditions of individual Commonwealth and State or Territory post-sentence orders.

Examples of potential interaction of post-sentence regimes

91. The risk of duplication or conflict between Commonwealth and State or Territory ESOs is not merely theoretical. Experience under the post-sentence regime in the *Terrorism (High Risk Offenders) Act 2017* (NSW) (**THROA**) is instructive.

92. For example, in 2019, the Supreme Court of New South Wales held that a person who was serving a sentence of imprisonment for assaulting prison guards, and had previously been convicted of a foreign incursions offence under section 119.1 of the Commonwealth Criminal Code, was eligible for an order under the THROA.⁵⁶

93. If the Bill is passed, proposed subsection 105A.3A(3) would provide that the person would also be eligible for a Commonwealth post-sentence order, if they had been continuously imprisoned since being convicted of the foreign incursion offence.

Recommendation 9—express provisions dealing with interaction of regimes

- **The Bill should be amended to include a statutory scheme to manage interactions between post-sentence orders issued under Commonwealth, State and Territory laws (as in force from time-to-time). This should include:**

⁵⁶ *State of New South Wales v Elmir (Final)* [2019] NSWSC 1867.

- **a prohibition on a person being subject to concurrent post-sentence orders under Commonwealth and State or Territory legislation; and**
- **issuing criteria that specifically require a court to consider the cumulative impacts on the person of being subject to multiple, consecutive post-sentence orders under Commonwealth and State or Territory legislation.**

Interaction of ESOs with ‘post-sentence’ COs

94. The Bill would not restrain the ability of the Minister to seek a CO from the Federal Court or Federal Circuit Court, where a State or Territory Supreme Court had refused an ESO application brought on the same, or substantially similar, grounds.
95. This creates a risk that COs could be sought as a form of ‘repechage’ for a failed ESO application. This raises the types of concerns the Law Council has previously identified about the use of COs after charges against a person have been withdrawn, or a brief from the AFP is refused by the Commonwealth Director of Public Prosecutions, due to lack of evidence. This occurred in the CO proceedings in *Gaughan v Causevic* in 2016.⁵⁷
96. The Law Council considers that all ‘post-sentence’ preventive orders should be dealt with under a single regime in Division 105A of the Criminal Code. It should not be possible to effectively ‘revive’ a failed ESO application before a different court, by essentially ‘re-branding’ it as a CO, despite the proposed CO:
- being based on the same or substantially similar grounds as the unsuccessful ESO application; and
 - seeking the same or substantially similar conditions as those in the unsuccessful ESO application.
97. The availability of COs in these circumstances has the potential to cause significant oppression to the affected individual, and divert significant public resources into making and responding to duplicative applications (namely, the costs of the Commonwealth as applicant, legal assistance costs for respondents, and the operating costs of the issuing courts). This would aggravate the Law Council’s existing concerns about serious inadequacies in Commonwealth legal assistance funding for respondents to CO applications.⁵⁸
98. The Law Council recommends that there should be a prohibition on seeking a CO in the Federal Court or Federal Circuit Court, if a previous ESO application made on the same or substantially similar grounds, has failed before a State or Territory Supreme Court.
99. Rather, the person should be monitored in the community. (For example, via ASIO’s intelligence collection powers, if the applicable thresholds are met.) If the person’s conduct after their release from prison indicates that they remain a security threat, the evidence of their conduct should form the basis of a separate CO application, or their arrest and charge, as applicable.

⁵⁷ *Gaughan v Causevic (No.2)* [2016] FCCA 1693 (8 July 2016, Hartnett J).

⁵⁸ Law Council of Australia, *PJCIS Review of AFP Powers Submission*, 31-33 at [82]-[88].

100. However, if there is an appetite to allow COs to be available as a 'repechage' for failed ESO applications, then express statutory safeguards are needed.
101. For example, a court should only be able to hear a CO application that is based on the same or substantially similar grounds as a failed ESO application if the court is satisfied that there are exceptional circumstances which justify hearing the CO application (such as the identification of significant, new evidence).

Recommendation 10—limitations & safeguards in relation to 'post-sentence' COs

Preferred option

- **Division 104 of the Criminal Code should be amended to remove the ability to obtain a CO, if a State or Territory Supreme Court has refused an ESO application made on the same, or substantially similar, grounds.**

Alternative (non-preferred) option

- **Alternatively, there should be a condition which prevents a CO application from being made in such cases, unless the issuing court for the CO is satisfied that there are exceptional circumstances.**

Law Council recommendations on CDOs that also apply to ESOs

102. As part of its recent submissions to the Committee's current statutory review of AFP counter-terrorism powers, the Law Council recommended several amendments to the CDO regime.⁵⁹ The Law Council considers that equivalent amendments should be made to the proposed ESO regime, in particular:
- a statutory limitation on the total number of ESOs that can be issued in relation to a person;
 - a requirement that the court must take additional matters into consideration when assessing a person's future risk, including:
 - the nature of the person's conviction for the underlying terrorism or security offence, and the fault elements of the offence (in addition to their sentence and the views of the sentencing court);
 - the views of any parole authority on granting parole (the Commonwealth Attorney-General in the absence of a federal parole commission); and
 - any practical limitations in the ability of the offender to test or challenge the information relied on in an application for an ESO;
 - limiting the persons who are eligible to be appointed as 'relevant experts' under section 105A.2 to Australian-registered psychiatrists, psychologists and medical professionals, who are assessed by the court as being competent to assess an offender's future risk (not 'any other person'); and
 - prohibiting the issuing of ASIO's questioning warrants in relation to people who are the subject of current or imminent proceedings for a post-sentence order, or alternatively prohibiting the use of such questioning material in proceedings for post-sentence orders.

⁵⁹ Law Council, *PJCIS Review of AFP Powers Submission*, 55-79.

Recommendation 11—amendments to the ESO regime to align with Law Council recommendations on the CDO regime

- **The Bill should be amended to incorporate the measures at paragraph [102] of this submission. These measures would implement, in relation to ESOs, the Law Council’s recommended amendments to CDOs (made as part of the Committee’s current review of the CDO regime).**

Proposed retrospective application of the ESO regime

103. Proposed subsection 105A.3A(8) would give the ESO regime retrospective application. It would enable an ESO to be sought and issued in relation to a person who had served their sentence of imprisonment for a terrorism or security offence before the ESO regime commenced, and was the subject of a ‘post-sentence’ CO upon their release (which remained in force when the ESO regime commenced).

Inadequacy of policy justification

104. The Explanatory Memorandum to the Bill suggests that this retrospective application is appropriate because this cohort of persons could have been eligible for a CDO, and an ESO is merely ‘a less restrictive measure than the CDO for which they were already eligible’.⁶⁰ It further argues that this cohort of persons ‘is already subject to some obligations, prohibitions and restrictions in the community under a [CO]’.⁶¹

105. However, this reasoning does not engage with the fact that, once a person is released after serving their sentence, they are no longer eligible for a CDO. It is therefore irrelevant that, prior to the person’s release from prison, they could have been eligible for an ESO or a CDO, if the ESO scheme had then existed.

106. Further, in all of the cases involving ‘post-sentence’ COs since 2016, the Minister had an opportunity to seek a post-sentence order (namely, a CDO) prior to the person’s release date and elected not to do so. There is no compelling reason to provide a subsequent opportunity to the Minister to revisit that decision. This would remove the safeguards imposed by the Parliament in passing the legislation enacting Division 105A in 2016, which deliberately limited the ‘window’ within which a post-sentence order could be sought against a person (namely, within the final 12 months of their sentence of imprisonment).

107. In addition, the mere fact that a person is subject to conditions under a ‘post sentence’ CO is not an adequate justification for making them liable to an application for an ESO, which would effectively replace the current CO. The ability to seek an ESO against a person who is currently subject to a ‘post-sentence’ CO is not a benign, technical legal exercise in changing the particular type of order to which the person is subject. Rather, an ESO will place significantly greater limitations on a person’s rights than their present CO for the following reasons:

- as explained above, the conditions that may be imposed under an ESO far exceed those presently available for COs;
- there is a risk that a person could be subject to an application for an ESO which seeks to impose conditions that were refused by the issuing court for

⁶⁰ Explanatory Memorandum, 60 at [135].

⁶¹ Ibid.

the 'post-sentence' CO (effectively making the ESO a 'repechage' for a prior, unsuccessful application for a particular CO condition); and

- subjecting a person to an ESO in substitution of their current 'post-sentence' CO could make that person eligible for a further post-sentence order (namely, a further ESO, or a CDO) if they were convicted of an offence for breaching an ESO condition and were sentenced to imprisonment.

International human rights implications

108. The Explanatory Memorandum to the Bill asserts that the proposed ESO regime, in its entirety, 'does not engage the prohibition on the retrospective operation of criminal laws' in Article 15(1) of the *International Covenant on Civil and Political Rights (ICCPR)*.⁶² The basis for this assertion is a view that 'the imposition of an ESO is not a penalty for criminal offending' because its purpose is 'protective rather than punitive or retributive' and these orders are 'based on an assessment of future risk rather than punishment for past conduct'.⁶³
109. However, this assertion does not advert to the fact that the United Nations Human Rights Committee (**UNHRC**) has taken a contrary view. It has determined that the absolute prohibition on retrospective criminal laws under Article 15(1) of the ICCPR applies with equal force to post-sentence orders, given their close connection with criminal offences.⁶⁴ The absence in the Explanatory Memorandum of any reference to the views of the UNHRC is surprising, given that this finding was made in response to a complaint about certain Australian post-sentence legislation.
110. In particular, the UNHRC held in 2010 that the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) breached the prohibition in Article 15(1), because it exposed an offender to post-sentence detention on the basis of laws that were enacted after his conviction for the relevant sexual offences. In 2010, the UNHRC held that the exposure of the offender to post-sentence detention under laws which were made after he had committed the offence, and was convicted, amounted to 'a heavier penalty ... than the one that was applicable at the time when the criminal offence was committed'.⁶⁵
111. The Law Council considers that this reasoning is also capable of application to a law that makes a person liable to a new form of post-sentence order (such as an ESO) to which they were not liable when they committed the relevant offence, or when they were convicted, or when they completed their sentence of imprisonment. This is because, for the reasons explained above, the conditions and liabilities imposed under ESOs exceed those presently available for COs.

Commonwealth criminal law policy implications

112. For the same reasons as those identified by the UNHRC, the Law Council also considers that the requirements of Commonwealth criminal law policy in relation to the creation of retrospective criminal offences should apply equally to proposals for a regime of post-sentence orders to be applied retrospectively.
113. In particular, the Australian Government *Guide to Framing Offences, Infringement Notices and Enforcement Powers* states that retrospectivity should be limited to the

⁶² Ibid, 36 at [172].

⁶³ Ibid, 35 at [172].

⁶⁴ *Fardon v Australia*, UNHRC Communication No. 1629/2007, CCPR/C/98/D/1629/2007, 9.

⁶⁵ Ibid.

most exceptional cases where there is strong justification.⁶⁶ The limited justification provided in the Explanatory Memorandum does not meet this high threshold.

Recommendation 12—ESO regime must only apply prospectively

- **The Bill should be amended to omit proposed subsection 105A.3A(8) of the Criminal Code (inserted by item 59 of Schedule 1 to the Bill).**

Monitoring powers in relation to ESOs

Domestic search and surveillance powers

114. The Bill proposes to amend Part IAAB of the Crimes Act to extend the monitoring powers presently available for COs to ESOs, as well as surveillance powers under the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2004* (Cth).
115. These monitoring powers enable law enforcement agencies to search persons subject to a supervisory order, or a premises the person occupies, either with consent or pursuant to a search warrant. They also allow the interception of telecommunications (under warrant), access to telecommunications data (under internal authorisation), the use of surveillance devices (under warrant), and remote access to computers (under warrant).
116. The Law Council has previously expressed concern that the broad range of monitoring powers available to determine whether a breach of a CO has occurred, rather than investigating a suspected criminal offence (including a breach offence), is likely to be a disproportionate response under human rights law.⁶⁷
117. The Law Council also holds this concern in relation to the proposed expansion of monitoring powers to ESOs. It recommends the repeal of existing monitoring powers, and the removal of the proposed expansions of those powers from the Bill.

Recommendation 13—removal of monitoring powers for ESOs

- **The Bill should be amended to omit the proposed expansions of monitoring powers in Parts 2 and 3 of Schedule 1.**

International Production Orders

118. The Bill proposes to expand the IPO regime, which is separately under review by the Committee, to enable IPOs to be issued for the purpose of monitoring compliance with an ESO. This would enable law enforcement agencies to access communications data that is stored offshore, in a country with which Australia has a bilateral agreement for the cross-border sharing of such data.
119. Consistent with the Law Council's submissions to the Committee on the IPO Bill, the Law Council does not support the application of the IPO regime to monitoring

⁶⁶ Australian Government, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, (September 2011), 15-17 at [2.1.3]. See also: Attorney-General's Department, *Prohibition on Retrospective Criminal Offences*, Public Sector Guidance Sheet, <www.ag.gov.au>.

⁶⁷ Law Council of Australia, *PJCIS Review of AFP Powers Submission*, 30-31 at [80]-[81].

powers for either COs or ESOs, and considers that IPOs should be reserved for the investigation of serious offences.⁶⁸

120. However, if the Committee is minded to support the expansion of the IPO regime to these powers, the Law Council submits that this expansion will make it even more crucial for the IPO Bill to be amended to implement the additional safeguards recommended by the Law Council in its submissions on the IPO Bill. In particular, the Law Council recommended:

- stronger conditions for the recognition of international agreements under the IPO regime, which requires the Attorney-General to certify their compliance with a range of human rights obligations, consistent with a corresponding condition in the US *Clarifying Lawful Overseas Use of Data Act (CLOUD Act)*;
- stronger thresholds for the issuing of IPOs, including specific protections for types of particularly sensitive information (such as information subject to legal professional privilege and health information);
- independent issuing by judicial officers not tribunal members;
- the establishment of an independent statutory office to review IPOs before being served on communications providers, and to resolve complaints from communications providers; and
- enhancements to reporting requirements and oversight arrangements.⁶⁹

121. In addition, Australia and the US are presently negotiating a bilateral agreement that would be supported by the IPO regime in Australia, and the CLOUD Act in the US. The CLOUD Act contains a condition that the US Attorney-General must certify that an international agreement meets certain minimum human rights compatibility standards. Congress may have regard to such a certification and the underlying reasons in deciding whether to exercise its power to disallow the agreement for the purpose of US laws (namely, the framework under the CLOUD Act).⁷⁰

122. The proposed expansion of the IPO regime to cover ESO-related monitoring would likely be material to such an assessment by the US Government, and subsequent scrutiny of an agreement by Congress. The Law Council is aware that the US Government is presently considering the compliance of the proposed IPO regime with the human rights compatibility requirements in the CLOUD Act. Accordingly, the Committee may wish to seek an assurance from the Government that it has informed the US of the proposed expansion of the IPO regime in the present Bill, so that this may be taken into account as part of the US's human rights assessment of Australia's laws (particularly the proposed IPO legislation) under the CLOUD Act.

Recommendation 14—expansion of IPO regime to ESO monitoring powers

- **If there is an intention to retain monitoring powers for ESOs, and to expand the IPO regime to cover these powers:**
 - **the IPO Bill should be further amended to implement the Law Council's recommended amendments to strengthen safeguards**

⁶⁸ Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020* (May 2020); and Law Council of Australia, *Supplementary Submissions to the Parliamentary Joint Committee on Intelligence and Security Review of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020* (May and June 2020).

⁶⁹ *Ibid.*

⁷⁰ 18 USC 121 §2523(b)(1).

for that regime (as set out in its separate submissions to the Committee's inquiry into the IPO Bill); and

- the Government should provide advice as to whether it has informed the US Government of the proposed expansion of the IPO regime, for the purpose of the US determining whether a potential bilateral agreement with Australia would satisfy the human rights conditions of the US CLOUD Act (18 USC 121 §2523(b)(1)).

Expansion of special advocates regime to ESO proceedings

123. The Bill proposes to amend the NSI Act to expand the special advocates regime to ESOs, as well as COs, where the court makes an order preventing the disclosure of documents or information or the calling of witnesses.⁷¹

124. The Law Council continues to support this measure. However, the Law Council reiterates its recent recommendation to the Committee's statutory review of the AFP's counter-terrorism powers that the proposed expansion of the special advocates regime warrants the establishment of an independent office (preferably established under statute) to administer it.⁷²

Recommendation 15—administration of the special advocates regime

- **The Government should establish an independent office to administer the special advocates regime, including the appointment of special advocates and the provision of administrative support to special advocates.**
- **The office should be independent to all law enforcement and security agencies and government departments.**
- **Consideration could be given to conferring this function on legal aid commissions, contingent on adequate additional resourcing.**
- **Resourcing for this function should not be drawn from existing legal assistance budgets, or the budgets of the federal courts, the Administrative Appeals Tribunal, or oversight bodies.**

Administrative review rights in relation to ESOs

Exclusion of statutory judicial review rights regarding ESOs

125. Item 153 of Schedule 1 to the Bill proposes to amend the ADJR Act to exempt from statutory judicial review decisions of the Minister made under Division 105A of the Criminal Code. These include decisions of the Minister to:

- apply for CDOs or ESOs under section 105A.5; and
- exercise the power under proposed section 105A.18D to:

⁷¹ Bill, Schedule 1, items 189-210.

⁷² Law Council of Australia, *PJCIS Review of AFP Powers Submission*, 29-30 at [77]-[79].

- appoint a person as a 'relevant expert' and direct them to perform a risk assessment of a detainee, for the purpose of the Minister's decision-making about whether to seek a post-sentence order; and
- direct a detainee to attend such a risk assessment, which may be conducted in a single session or over an unlimited number of sessions.

126. The Law Council does not support the proposed exclusion of these decisions from statutory judicial review under the ADJR Act. The removal of statutory judicial review rights reduces the practical ability of an aggrieved individual to seek review of decisions they believe to be unlawful. It also reduces transparency in decision-making about applications for post-sentence orders.

Inadequacy of judicial review rights under original / constitutional jurisdiction

127. The Explanatory Memorandum notes that a person will retain the ability to seek judicial review under the original jurisdiction of the High Court or the Federal Court under section 39B of the *Judiciary Act 1903* (Cth) (which reflects constitutional limitations on Commonwealth legislative power to exclude such review).⁷³

128. However, judicial review in original jurisdiction (or section 39B jurisdiction) is no substitute for a right to ADJR Act review. In the absence of a statutory right to reasons for an administrative decision, as exists under section 13 of the ADJR Act, it may be extremely difficult for an individual to obtain the necessary evidence to make an application for judicial review under original or section 39B jurisdiction. This will be particularly difficult should the Commonwealth respond to a review application with extensive claims for public interest immunity over relevant evidence.

Deficiencies in the reasons given in the Explanatory Memorandum

129. The Explanatory Memorandum suggests that:

- the complete extinguishment (rather than deferment) of statutory judicial review rights is necessary to avoid 'fragmenting' or 'frustrating' a parallel legal process—that is, an application for a post-sentence order;⁷⁴ and
- judicial determination of the substantive application for a post-sentence order will, in all instances, provide an adequate opportunity for a person to 'seek judicial consideration of the Minister's decision'.

130. The Law Council does not support these suggestions, as their underlying reasoning is problematic for the three reasons explained below.

131. **First**, Ministerial decisions in relation to CDOs have been subject to statutory judicial review under the ADJR Act since 2016. No evidence has been advanced of the asserted risk of 'fragmentation' or 'frustration' eventuating in practice.

132. **Secondly**, while the Administrative Review Council has previously identified that an exclusion from ADJR Act review **may be** justified where such review has the potential to frustrate or fragment another legal process, that observation was not intended as a rigid rule of universal application.⁷⁵ Rather, this factor must be

⁷³ Explanatory Memorandum, 103 at [386].

⁷⁴ Ibid, 103 at [387]-[391].

⁷⁵ Administrative Review Council, *Federal Judicial Review in Australia*, Report No 52, (2012), 105. See also: Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2003), 38.

balanced against other salient policy considerations, which arise in the circumstances of particular types of administrative decisions.

133. In the case of decision-making about post-sentence orders under Division 105A of the Criminal Code, important countervailing considerations include the gravity of the consequences of a post-sentence order on the person; and the fact that the court is required to consider the report of a 'relevant expert' appointed by the Minister (even if the court would not have appointed the particular person as a 'relevant expert').
134. **Thirdly**, the role of the issuing court, in considering the substantive application for a post-sentence order, does not necessarily or invariably provide an adequate opportunity for an individual to contest the Minister's decision-making under Division 105A. The contrary suggestion in the Explanatory Memorandum overlooks the fact that the Bill contains a regime for 'court-only' evidence in ESO applications, which would exclude the respondent and their lawyer from those proceedings.
135. Under this regime, a special advocate who is appointed by the court to act as a contradictor in closed proceedings would be prevented from communicating that evidence to the respondent and their lawyer. This means that a respondent to an ESO application may not have access to the necessary particulars about the Minister's decision-making, even if it were possible to make a collateral challenge to the substantive application as part of those proceedings.

Alternative solution—amendments to section 9A of the ADJR Act

136. If the Committee considers that there is a case for limiting statutory judicial review rights in relation to the Minister's decision-making under Division 105A of the Criminal Code, the preferable option would be to amend section 9A of the ADJR Act, so that post-sentence orders are included as a form of 'related criminal justice process decision'. This would have the following effects:
 - rather than extinguishing statutory judicial review rights, subsection 9A(1) of the ADJR Act would apply to defer their exercise until the completion of the hearing and the expiry of any appeal period for the post-sentence order; and
 - if the person had applied for ADJR Act review **before** the Minister commenced proceedings for a post-sentence order, then the Minister could apply for a permanent stay of those review proceedings under subsection 9A(3) of the ADJR Act. The court could only make an order for a permanent stay if satisfied, in the circumstances of the particular case, that:
 - the matter that is the subject of the ADJR Act review application is better dealt with in the substantive proceedings concerning the application for the post-sentence order; and
 - a permanent stay would not cause prejudice to the applicant who is seeking ADJR Act review (that is, the prisoner who is potentially the subject of a post-sentence order, if the Minister made an application).
137. The circumstances identified in the second bullet point above may arise if a prisoner was subjected to a mandatory risk assessment, by a 'relevant expert' appointed by the Minister under proposed section 105A.18D, for the purpose of the Minister deciding whether to make an application for a post-sentence order.
138. In such a case, the prisoner may wish to contest the decision of the Minister to appoint a person as a 'relevant expert' under proposed subsection 105A.18D(2).

For example, the person might submit that the decision was an improper exercise of the power, because it was unreasonable or an abuse of power,⁷⁶ or the appointment decision was not based on evidence of the person's expertise.⁷⁷

139. The alternative approach of amending section 9A of the ADJR Act to include decisions about post-sentence orders as 'related criminal justice process decisions' would have three key benefits, which are outlined below.

Benefit 1—enabling an assessment of the circumstances of individual cases

140. First, it would enable the court to make an assessment, in the individual circumstances of each case, as to whether a matter that is the subject of an ADJR Act review application is better dealt with in the substantive proceedings concerning an application for a post-sentence order.
141. In contrast, the proposal in the Bill to categorically exclude ADJR Act review assumes that the subject matter of a statutory judicial review application will **invariably** be better dealt with in the proceedings concerning the substantive post-sentence order. For the reasons given above, the Law Council cautions against making such a generalised assumption.

Benefit 2—clear and consistent treatment of warrants under the ADJR Act

142. Secondly, the Law Council's suggested alternative approach would close a 'loophole' that presently exists in relation to decisions of the AFP about monitoring warrants for ESOs. The proposed exclusion in item 153 of Schedule 1 to the Bill is limited expressly to decisions of the Minister under Division 105A of the Criminal Code, and therefore does not extend to decisions of AFP officials about monitoring warrants.
143. While section 9A of the ADJR Act limits statutory judicial review rights in relation to decisions about warrants, that provision applies only to administrative decisions that are made 'in connection with an offence'.⁷⁸ This would appear to exclude monitoring warrants, as they do not require any suspicion that a person has contravened, or may be contravening, a condition of an ESO (which is, itself, an offence).
144. Consequently, if administrative decisions about post-sentence orders were included in section 9A of the ADJR Act, then courts would have greater ability to assess the risks of 'fragmentation' as a result of a separate statutory judicial review application, and to balance any such risks against the potential for prejudice to the rights and interests of aggrieved persons.
145. Amending section 9A of the ADJR Act as suggested would make this balancing exercise possible in relation to administrative decisions about applications for post-sentence orders, as well as decision-making by the AFP about monitoring warrants.

Benefit 3—accurate reflection of the character of post-sentence orders

146. Thirdly, the Law Council's suggested alternative approach would accurately reflect the close connection of post-sentence orders with the criminal justice process, in

⁷⁶ ADJR Act, paragraph 5(1)(e) and subsection 5(2).

⁷⁷ Ibid, paragraph 5(1)(h).

⁷⁸ ADJR Act, subsection 9A(4). See subparagraph (a)(iii) of the definition of 'related criminal justice process decision', which covers 'a decision in connection with the issue of a warrant, including a search warrant or a seizure warrant'. However, this is qualified by the chapeau (opening sentence) to the definitional provision, which provides that the administrative decision must be 'in relation to an offence'.

that the post-sentence regime is only enlivened if a person has been convicted of, and sentenced to a period of imprisonment for, a terrorism or security offence.

Recommendation 16—statutory judicial review rights regarding Division 105A

Preferred option

- **The Bill should be amended to omit item 153 of Schedule 1 so that Ministerial decision-making under Division 105A is subject to ADJR Act review. In particular, this should include Ministerial decisions to:**
 - **apply for an order under proposed section 105A.5; and**
 - **appoint a person as a ‘relevant expert’ and to direct that person to conduct a mandatory risk assessment of a prisoner under proposed section 105A.18D.**

Alternative option

- **The Bill should be amended to:**
 - **omit item 153 of Schedule 1; and**
 - **substitute it with amendments to section 9A of the ADJR Act, to bring administrative decisions under Division 105A of the Criminal Code within the definition of a ‘related criminal justice process decision’ in subsection 9A(4) of the ADJR Act.**

Requirements for ASIO security advice about ESOs

Proposed exclusion of the security assessment regime

147. Item 154 of Schedule 1 to the Bill proposes to amend section 35 of the ASIO Act to relieve ASIO of any requirement to furnish security assessments in respect of its advice about ESO conditions or the electronic monitoring of ESO subjects.
148. It does so by excluding ASIO’s advice on these matters from the definition of ‘prescribed administrative action’ (**PAA**) in section 35 of the ASIO Act, which is a component of the definition of ‘security assessment’ that section.
149. Effectively, section 35 of the ASIO Act defines a ‘security assessment’ as a form of advice by ASIO which expresses a recommendation, opinion, advice or other reference to one or both of the following questions:
- ‘whether it would be consistent with the requirements of security’ for PAA to be taken in relation to a person; or
 - ‘whether the requirements of security make it necessary or desirable for [PAA] to be taken in respect of a person’.
150. ‘PAA’ is defined in section 35 of the ASIO Act as covering a range of administrative decisions. Relevantly, paragraph (a) of the definition of PAA applies to administrative decisions about a person’s access to information or a place, or their ability to undertake an activity, where such access or activity is controlled on security grounds. A decision to seek a particular ESO condition, or to monitor compliance with an existing ESO condition, could fall within this ground of PAA.

151. Importantly, security assessments are subject to certain rights of notification and review under Part IV of the ASIO Act. This includes obligations to notify the person of an ‘adverse security assessment’ (essentially, a form of security assessment that is prejudicial to the person’s interests) and rights to seek merits review of such an assessment in the Security Division of the Administrative Appeals Tribunal.⁷⁹ These rights do not apply to ASIO’s security advice that is not covered by the definition of a ‘security assessment’ in section 35 of the ASIO Act.
152. The proposed amendments in the Bill provide that ASIO **would not** be required to furnish a security assessment in respect of any of its advice that:
- makes a recommendation or suggestion about the desirability of the Minister applying for an ESO which includes particular conditions (or applying for a variation of the conditions of an existing ESO); or
 - makes a recommendation or suggestion about the desirability of the AFP excising monitoring powers in relation to a person who is subject to an ESO.
153. Consequently, the notification and review requirements under Part IV of the ASIO Act would not apply to such security advice given in relation to the ESO regime.

Absence of justification

154. The Explanatory Memorandum comments that the proposed measure would ‘put beyond doubt’ that the security assessment provisions of Part IV of the ASIO Act do not apply to ASIO’s advice in relation to ESOs.⁸⁰ However, it does not explain why it is considered necessary to exclude the application of the Part IV requirements.
155. It is conceivable that significant weight could be placed on ASIO’s security advice in ESO proceedings. It is also conceivable that such advice may be withheld from the person under the ‘court only evidence’ provisions of the NSI Act. This makes the rights to seek merits review of ASIO’s ESO-related security advice under Part IV of the ASIO Act particularly important.
156. Accordingly, the Law Council recommends that the proposed amendments to the ASIO Act should be omitted from the Bill, in the absence of a cogent explanation.

Recommendation 17—ASIO’s ESO-related advice should be subject to Part IV

- **In the absence of a cogent justification, the Bill should be amended to omit the proposed amendments to section 35 of the ASIO Act in item 154 of Schedule 1.**
- **That is, ASIO should be required to furnish a security assessment if:**
 - **it gives security advice about ESO conditions or the exercise of monitoring powers in relation to a person subject to an ESO; and**
 - **that advice meets the current definition of a ‘security assessment’ in existing section 35 of the ASIO Act, including the current definition of the component term ‘prescribed administrative action’.**

⁷⁹ ASIO Act, section 38 (notification) and Division 4 of Part VI (review rights).

⁸⁰ Explanatory Memorandum, 104 at [393].

Proposed amendments to CDOs and COs

157. The Bill also contains several measures that go beyond what is strictly necessary to establish an ESO regime, namely proposed amendments to:

- aspects of the CDO regime (concerning eligible offences and access to information) in addition to applying these measures to the ESO regime and
- the conditions able to be imposed under COs.

158. For the reasons outlined below, the Law Council does not support these measures. In particular, the Law Council consider that:

- the proposals in relation to ‘eligible offences’ and access to information for CDOs and ESOs should be omitted entirely (that is, they should not apply to either type of post-sentence order); and
- the proposals in relation to COs should be withdrawn from the present Bill and scrutinised as part of the Committee’s statutory review of COs.

‘Eligible offences’ for CDOs (in addition to ESOs)

159. The Bill proposes to expand the range of Commonwealth offences which enliven the post-sentence regime, to cover offences for breaching ESO or CO conditions where:

- the person previously served a sentence of imprisonment for a terrorism or security offence; and
- the person was charged with an offence for contravening the condition of an ESO or a CO before the later of:
 - the ESO or CO ceasing to be in force; or
 - six months after the conduct constituting the breach offence;
- the person is serving a sentence of imprisonment for the breach offence; and
- the court making the post-sentence order is satisfied that, as a result of the offence of breaching the ESO or CO condition, the person poses an unacceptable risk of committing a serious terrorism offence.⁸¹

160. For the reasons outlined at paragraphs [80]-[84] above in relation to the breach offences for ESOs, the Law Council does not support the expansion of the post-sentence regime to breach offences in relation to ESOs or COs.

161. The proposed expansion of the eligible offences risks creating a ‘revolving door’ in which offenders are subject to prolonged detention, variously under sentences of imprisonment for breaching ESO or CO conditions, and post-sentence orders.

162. The Law Council acknowledges that the requirement in the final dot point at paragraph [159] above may go some way towards mitigating this risk. (That is, the requirement for the court to be satisfied that the ESO or CO breach offence indicates that the person poses an unacceptable risk of committing a serious terrorism offence.)

163. However, this compounds the difficulties the Law Council has previously identified in making predictions about a person’s future risk. The court is not merely required to

⁸¹ Bill, Schedule 1, item 59 (inserting new subsections 105A.3A(4) and (5) of the Criminal Code).

make a generalised prediction of a person's future risk (as it must in applying the issuing test in proposed section 105A.7) which is an inherently fraught exercise. Rather, the effect of proposed subsections 105A.3A(4) and (5) is that the court must also attempt to make that prediction on the basis of a single instance of conduct—namely, the breach offence in relation to the ESO or CO.

164. The Law Council submits that, if the conduct constituting a breach offence in relation to an ESO or CO raises a risk that the person is likely to commit a serious terrorism offence, then that conduct is, itself, likely to constitute an offence that attracts the post-sentence regime.
165. This reflects that the eligible terrorism and foreign incursions offences specifically target preparatory and ancillary conduct, such as preparations and planning for, or supporting, terrorist acts or foreign incursions. The extensions of criminal liability in Chapter 2 of the Criminal Code also apply to these preparatory and ancillary offences. For example, it is an offence to attempt or conspire to prepare to commit a terrorist act. These offences enliven the application of the post-sentence regime.
166. Consequently, if a person is to be exposed to a post-sentence order for conduct that constitutes a breach of an ESO or CO condition, it should be on the basis of a separate prosecution for a terrorism or foreign incursions offence.

Recommendation 18—exclusion of offences for breach of CO or ESO conditions

- **Proposed subsections 105A.3A(4) and (5) (item 59 of Schedule 1) should be omitted from the Bill.**

Access to information forming part of CDO and ESO applications

167. The Bill proposes to expand the grounds for limiting an offender's access to information that is part of an application for a post-sentence order. Currently, paragraph 105A.5(3)(aa) and subsection 105A.5(5) permits the Minister to withhold information that is likely to be protected by a claim of public interest immunity, or the subject of an Attorney-General's certificate or protective orders under the NSI Act.
168. Proposed section 105A.14D contains a further ground for withholding or limiting access to information in an application for an ESO or a CDO. This is if the application contains 'terrorism material', being material that:
 - advocates support for 'any terrorist acts' or 'violent extremism' (the latter term is undefined in the Bill);
 - relates to planning or preparations for any such acts; or
 - advocates joining or associating with a terrorist organisation.
169. In these circumstances, the Minister may apply to a State or Territory Supreme Court seeking 'an order in relation to the manner in which the material is to be dealt with'. The court may make an order which requires the information to be given to the person's lawyer only, or to be available for inspection at specified premises.
170. There are no statutory criteria for the making of orders, such as a requirement that the court may only make an order limiting or prohibiting access if satisfied that this is necessary and proportionate to any security risks. There are also no provisions would ensure that there will always be an effective 'contradictor' in such applications (for example, the offender or their lawyer, or a special advocate).

171. The Explanatory Memorandum states that the ability to withhold or limit access to 'terrorism material' is necessary because 'having access to extremist material within a prison setting may increase the risk of other inmates being exposed to the material and may potentially inhibit efforts to de-radicalise, rehabilitate or disengage from violent extremist ideologies [by] the offender or other offenders'.⁸²
172. The Law Council remains of the view expressed in its recent submission to the Committee's review of AFP powers (set out below) which commented on a similar proposal to withhold or limit access to materials forming part of a CO application:

The Law Council considers that limitations on the subsequent dissemination of materials [given to a prisoner who is the subject of an application for a post-sentence CO, as part of the service obligations in relation to that application] should be managed in practice within correctional facilities, by removing the opportunity for a CO respondent to make such disclosures, and to remove the ability for recipients to retain any materials that may have been inappropriately disclosed by the CO respondent. Further, there is already an ability in paragraph 104.12A(3)(d) of the Criminal Code for the AFP to withhold information from a CO respondent, if it would put at risk the safety of the community or law enforcement officers.

In the absence of any evidence that such practical steps have been exhausted, or that it has not been possible to rely on the existing ability to withhold information on community safety grounds, the service requirements should not be reduced, given the risk of reducing or removing the ability of the respondent to know the case against them, and instruct their lawyers.⁸³

Recommendation 19—power to withhold or limit access to 'terrorism material'

- **The Bill should be amended to omit proposed section 105A.14D (item 120 of Schedule 1 to the Bill).**

Proposed expansions of CO conditions

173. The Bill also proposes two major expansions to the conditions able to be imposed under a CO. They cover obligations in relation to electronic monitoring devices;⁸⁴ and obligations to carry at all times a specified mobile phone, and to answer or promptly return calls to that phone from a 'specified authority'.⁸⁵
174. For the reasons explained below, the Law Council does not support these proposed expansions. If there is a desire to pursue them, they should be examined separately as part of the Committee's statutory review of the CO regime.

⁸² Explanatory Memorandum, 90 at [303].

⁸³ Law Council of Australia, *PJCIS Review of AFP Powers Supplementary Submission* (September 2020), 10 at [33]-[34].

⁸⁴ Bill, Schedule 1, item 16 (inserting new paragraph 104.5(3)(d) of the Criminal Code). See also, item 20 (inserting new section 104.5A of the Criminal Code).

⁸⁵ *Ibid*, item 16 (inserting new paragraph 104.5(3)(da) of the Criminal Code).

Electronic monitoring devices

175. The Bill proposes to expand the existing condition in section 104.5(3)(d) that a person must wear a tracking device by:

- replacing the requirement to ‘wear a tracking device’ with a requirement that the person ‘be subject to electronic monitoring’ which may include a requirement to wear a monitoring device and to comply with specified directions about the maintenance of that device;⁸⁶
- imposing extensive, additional conditions to those in existing section 104.5(3A) that require persons to keep the device in good working order, to attend for inspections of the device, and inform the AFP if the person becomes aware the device is not in good working order.

In particular, if the court imposes an ESO condition that the person wears a monitoring device, then it would be **required** to impose additional conditions, including requirements that the person must:

- carry, at all times, a specified mobile phone and answer or promptly return calls to that phone from a specified authority;
- allow a specified authority to enter the person’s residence at any reasonable time for ‘any purpose relating to the electronic monitoring of the person’; and
- take the steps specified in the CO ‘and other reasonable steps’ to ensure that the monitoring device and any related equipment are in good working order.⁸⁷

176. If a person does not consent to a specified authority entering their premises for the above purposes, then a police officer is permitted to use reasonable force to gain entry and perform the relevant activities specified in the ESO.⁸⁸

Law Council views

177. The Law Council is concerned that a court has no discretion about whether to impose these additional conditions (either at all, or subject to further limitations that the court considers appropriate in the circumstances). The Explanatory Memorandum does not explain why the Bill proposes to remove all judicial discretion, in the context of potentially onerous and highly intrusive CO conditions, which attract significant criminal sanctions for breach.

178. The combined effect of proposed paragraph 104.5(3)(d) and proposed section 104.5A also adds force to the Law Council’s previous submissions in support of implementing the recommendations of the second INSLM, to require the court to assess the necessity and proportionality of the combined effect of all CO conditions.

179. Further, the requirement in proposed subparagraph 104.5A(1)(c)(i) that the controlee must allow a ‘specified authority’ to enter their residence at any reasonable time, for ‘any purpose relating to the electronic monitoring of the person’, far exceeds the stated policy intent in the Explanatory Memorandum to enable law enforcement officers to ensure that the device and related equipment are installed

⁸⁶ Ibid, item 16 (inserting new paragraph 104.5(3)(d) of the Criminal Code).

⁸⁷ Ibid, item 16 (inserting proposed paragraph 104.5A(1)(c) and subsection 104.5A(2) of the Criminal Code).

⁸⁸ Ibid, item 16 (inserting proposed subsection 104.5A(5) of the Criminal Code).

correctly and are in good working order.⁸⁹ The obligation should be limited to the purposes identified in the Explanatory Memorandum as the basis for the proposal.

180. To the extent that entry to a person's residence may be sought for broader purposes, such as determining whether a person is complying with their obligations in relation to electronic monitoring, these matters are already covered by the CO-related monitoring powers in the *Crimes Act 1914* (Cth).

Recommendation 20—additional conditions for monitoring devices

Preferred option

- **The Bill should be amended to omit item 16 of Schedule 1. Any proposed expansion of CO conditions should be examined separately in the Committee's current statutory review of the CO regime.**

Alternative (non-preferred) option

- **Proposed subsection 104.5A(1) (item 16 of Schedule 1 to the Bill) should be amended so that the court has discretion about whether to impose the requirements in paragraphs (b) and (c).**
- **The obligation in proposed subparagraph 104.5A(1)(c)(i) to allow a specified authority to enter the controlee's residence should be limited to entry for the purpose of maintaining a monitoring device (not 'any purpose relating to the electronic monitoring of the person').**

Obligations to carry and answer a specified mobile phone

Lack of demonstrated necessity

181. The Law Council considers that there is an inadequate case for the condition in proposed paragraph 104.5(3)(da), requiring a person to carry a specified mobile phone, and answer or promptly return calls from a specified authority. For the reasons outlined below, the Law Council supports its removal.
182. While this requirement may provide a degree of convenience for law enforcement agencies in monitoring the movements and activities of a person subject to a CO, it has not been demonstrated that it is necessary to expose a person to a criminal offence, punishable by a maximum of five years' imprisonment, for failing to carry a mobile phone or answer or promptly return calls.⁹⁰
183. This is particularly significant in view of the availability of extensive monitoring powers, which authorise intrusive powers of search and electronic surveillance to assess whether a person is complying with a condition of a CO.
184. These are critical distinctions to the imposition of similar sorts of requirements in parole conditions, which require parolees to be contactable by the relevant authority.

Overbreadth of proposed condition

185. Further, the condition in proposed paragraph 104.5(3)(da) is not limited to circumstances in which a court also imposes a condition that the person wears a

⁸⁹ Explanatory Memorandum, 44 at [49].

⁹⁰ Criminal Code, section 104.27 (offence of breaching a CO condition).

monitoring device. While a court is obliged to impose the condition in proposed paragraph 104.5(3)(da) if it imposes a condition under paragraph 104.5(3)(d) requiring a person to wear a monitoring device,⁹¹ it may also impose the condition in paragraph 104.5(3)(da) any other circumstances.

186. The availability of the condition in broader circumstances than the use of monitoring devices exceeds the justification given for proposed paragraph 104.5(3)(da) in the Explanatory Memorandum. That justification is directed to ensuring compliance with the requirement to wear a monitoring device, stating that the requirement:

*would ensure that the controlee can be contacted as needed, for example to advise them to charge an electronic monitoring device if the battery is running low, or to confirm their whereabouts if the electronic monitoring device indicates a controlee is not complying with other obligations, prohibitions or restrictions in the order.*⁹²

187. Given that contravention of this condition is an offence,⁹³ which may potentially also expose a person to a post-sentence order,⁹⁴ it should only be available to serve the specific purpose to which it is directed—that is, in connection with electronic monitoring. It should not be possible to seek or obtain a CO containing this condition for any other purpose.
188. In view of the gravity of the consequences of a CO for the individual, the Law Council emphasises that a general appeal to a desire for operational flexibility would not be a sufficient justification for enabling the power in proposed paragraph 104.5(3)(da) to be available more broadly.

Recommendation 21—omission of obligations to carry & answer specified phone

Preferred option

- **The Bill should be amended to omit proposed paragraph 104.5(3)(da) (item 16 of Schedule 1 to the Bill).**

Alternative (non-preferred) option

- **If the condition in proposed paragraph 104.5(3)(da) is to be retained, the Bill should be amended as follows:**
 - **the condition in proposed paragraph 104.5(3)(da) should only be available if the court also imposes a condition under new paragraph 104.5(3)(d), which requires the person to be subject to electronic monitoring; and**
 - **proposed paragraph 104.5(3A)(b) should be omitted from the Bill, so that the power to give directions under proposed paragraphs 104.5(3)(da)(iii) is limited to the purpose of giving effect to the obligations in subparagraphs 104.5(3)(da)(i) and (ii) to carry a specified mobile phone, and to answer or return calls promptly.**

⁹¹ Bill, Schedule 1, item 20 (inserting proposed paragraph 104.5A(1)(b) of the Criminal Code).

⁹² Explanatory Memorandum, 42-43 at [43].

⁹³ Criminal Code, section 104.27.

⁹⁴ Bill, Schedule 1, item 59 (inserting proposed subsection 105A.3A(5) of the Criminal Code).