



Law Council
OF AUSTRALIA

Counter-Terrorism Legislation Amendment Bill 2019

Parliamentary Joint Committee on Intelligence and Security

13 March 2019

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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 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Tony Rossi, Executive Member

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

Acknowledgement

The Law Council acknowledges the assistance of its National Criminal Law Committee and the Law Society of South Australia in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's (**the Committee**) inquiry into the Counter-Terrorism Legislation Amendment Bill 2019 (Cth) (**the Bill**).
2. The Bill would amend the *Crimes Act 1914* (Cth) (**Crimes Act**) to introduce an exceptional circumstances test for persons charged with or convicted of a terrorism offence (or previously charged with or convicted of certain offences), persons subject to a control order and persons who have made statements or carried out activities supporting, or advocating support for, terrorist acts. That is, there is not only a presumption against bail and parole but a further stringent test to be satisfied. It also provides that the best interests of the child are a primary consideration, with the protection of the community the paramount consideration, when determining whether exceptional circumstances exist where the person is under the age of 18 years. The similar provision applies when determining whether exceptional circumstances exist to justify a departure from the minimum non-parole period for a terrorism offence where the offender is under the age of 18 years, and when determining whether exceptional circumstances exist to justify the release of a young terrorist offender or terrorism-related offender on parole.
3. The Bill would also amend the *Criminal Code Act 1995* (Cth) (**Criminal Code**) to: provide that terrorist offenders serving a term of imprisonment for a terrorism offence and another offence are eligible for consideration of a continuing detention order (**CDO**) at the conclusion of their term; and provide that the requirement to provide a complete copy of a CDO application to a terrorist offender is subject to any court orders made relating to the protection of information in the application or any certificate issued by the Attorney-General under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**).
4. The Law Council recognises that terrorism related offences are serious and that offenders who commit this type of offence ought to receive an appropriate penalty that reflects the severity of their conduct. The Law Council acknowledges that the protection of the community is an important consideration in relation to both the question of bail and sentencing for these types of offences.
5. The Law Council notes the very limited timeframe in which to make submissions (approximately eleven business days). It also notes that the Bill has been introduced in the absence of the Independent National Security Legislation Monitor's (**INSLM**) report into the prosecution and sentencing of children for Commonwealth terrorist offenders (**INSLM's report**) being publicly released. This is despite this report being used as the justification for some of the measures in the Bill relating to bail and parole.¹ These two factors significantly limit the ability of submission-makers to provide up-to-date and informed submissions to the Committee to ensure that effective Parliamentary scrutiny of the Bill is achieved.
6. The Law Council urges the Committee to delay its consideration of the proposed bail and parole measures in the Bill until the public have been given adequate time to assess the measures in light of the INSLM's report.
7. In the absence of the INSLM's report and in relation to the proposed amendments regarding children, the Law Council refers to the Committee its submission to the

¹ Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2019 (Cth) para 5.

INSLM's inquiry for consideration (**attached**) and reiterates the following recommendations to the INSLM's inquiry that:

- section 15AA should be amended to provide that the requirement for exceptional circumstances imposed by the section does not apply to a child charged with any of the offences to which the section 15AA applies;
- section 15AA should also provide that, when bail is being considered for a child charged with a Commonwealth offence, the best interests of the child shall be a primary consideration;
- section 19AG of the Crimes Act should be repealed on the basis that it:
 - (a) is an attenuated form of mandatory sentencing which interferes with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime; and
 - (b) may be inconsistent with Australia's international human rights obligations;
- if section 19AG is to be retained, children should be exempted from its operation.

8. In addition, the Law Council notes the following problematic aspects of the Bill:

- amendments relating to bail and parole would not give effect to nationally consistent principles given that discrepancies exist among jurisdictions that have sought to implement the Council of Australian Governments (**COAG**) agreement of 2017;
- the expanded application of a presumption against bail and a presumption against parole provisions for a broader group of individuals has not been demonstrated to be necessary or proportionate or in the interests of rehabilitation and deradicalisation efforts;
- the exceptional circumstances standard of proof is higher than a presumption against bail and parole as per the COAG decision of 9 June 2017;
- the amendments relating to CDOs expand their potential application in the absence of adequate risk assessment and properly funded and available rehabilitation programs. The amendments also have the potential to apply retrospectively; and
- the proposed amendments in relation to management of sensitive information for CDOs would mean that a person bears the onus of disproving a public interest immunity claim. The timeframes regarding a public interest immunity claim or a certificate under the NSI Act are also unclear.

9. Accordingly, the Law Council does not support the Bill in its current form.

10. If the Bill is to proceed, the Law Council notes the above recommendations in relation to children and makes the below additional recommendations.

11. In relation to bail and parole:

- The exceptional circumstances test in section 15AA should be reconsidered on the basis of agreed nationally consistent principles regarding bail in terrorism cases; and
- The bail amendments should not proceed and the exceptional circumstances test for parole should be limited to offenders who seek parole following conviction for a terrorism offence.

12. In relation to CDOs:

- In the absence of adequate risk assessment and available rehabilitation programs, the proposed amendments in relation to cumulative and concurrent amendments should not proceed. If the amendments are to proceed, they not apply retrospectively to ‘terrorism offences’ that have already expired or to sentences that have already commenced;
- The onus should be on the AFP Minister or relevant operational agencies to satisfy the Court of the public interest immunity claim;
- To avoid doubt, it should be made clear that the giving information in applications to offenders measures must be taken at the point of twelve months before the person’s relevant sentence expires and at which time the CDO application is required to be made; and
- Consideration should be given to the introduction of a special advocate regime for continuing detention orders.

Part A: Bail and Parole Amendments

Bail – Section 15AA of the Crimes Act

No nationally consistent principles

13. Section 15AA of the Crimes Act specifies that bail is not to be granted unless the bail authority is satisfied that ‘exceptional circumstances exist to justify bail’. The Bill seeks to amend section 15AA of the Crimes Act so as to add further categories of people who fall within the ambit section 15AA. The additional categories of defendants to be added to subsection 15AA(2) by the addition of a new subsection 15AA(2A) are those who:

- (a) have previously been charged with, or convicted of a ‘terrorist offence’ and are currently being considered for bail for a further federal offence;
- (b) have been charged under section 102.8 of the Criminal Code with associating with a terrorist organisation;
- (c) are subject to a control order within the meaning of Part 5.3 of the Criminal Code; or
- (d) have made statements or carried out activities supporting or advocating support for terrorist acts within the meaning of Part 5.3 of the Criminal Code.

14. The Law Council notes that at the Special Meeting of COAG held in Canberra on the 5 October 2017, there was agreement for there to be ‘consistent principles to ensure there is a presumption against bail and parole in agreed circumstances across Australia’.² The Explanatory Memorandum to the Bill notes that:

*The amendments to the Crimes Act in this Bill are necessary to give effect to the COAG decision, by expanding the application of section 15AA, and introducing a presumption against parole for a broader group of offenders.*³

² Council of Australian Governments, ‘Special Meeting of the Council of Australian Governments on Counter-Terrorism Communiqué, 5 October 2017’ (Communiqué, 5 October 2017) 2.

³ Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2019 (Cth) para 5.

15. However, the Law Council queries the necessity of the proposed amendments given that the nationally consistent principles still appear to be illusory. That is, offenders across various jurisdictions will continue to be treated differently in applications for bail. For example, there are differences in various state and territory legislation or Bills that seek to respond to the COAG agreement, including discrepancies regarding whether a presumption against bail or parole applies and the standard of proof. The legislation in the jurisdictions applies to different alleged offenders, ranging from those who are simply assessed to be a terrorist risk by security or law enforcement, to those who may have been charged with terror offences, associated with a terrorist organisation, and those who have been subject to preventative detention or control orders. The jurisdictions also differ in the standard of proof that is to be applied, including 'special circumstances,' 'exceptional circumstances' and other models.⁴ As a result, defendants are subject to different rules depending on which jurisdiction they are in, and there is no nationally consistent regime. The imposition of an exceptional circumstances test also appears to be a higher threshold than the COAG recommendation for a presumption against bail and parole.
16. In the absence of nationally consistent principles and the public release of the INSLM's report (noted above), the Law Council does not consider that the proposed measures should proceed at this time.

Expansion for broader group of offenders

17. The Law Council supports cogent, evidence-based and proportionate legal responses to the threat of terrorism. Counter-terrorism legislation must strike a balance between protecting the community and preserving fundamental rule of law principles. Overturning longstanding criminal law principles such as the presumption in favour of bail, especially regarding the deprivation of an adult or child's liberty, must not be taken lightly.
18. The Law Council has advocated for the maintenance and promotion of rule of law principles, including as they apply to detention in a criminal law context.⁵ The Law Council's *Policy Statement on Principles Applying to Detention* states that:

A person who has been charged with a criminal offence, including an indictable offence, and is awaiting trial, should not generally be detained in custody. For that reason, there should be a presumption in favour of bail in all cases. This presumption may be rebutted where the court is satisfied there is an unacceptable risk, which cannot be mitigated by the imposition of conditions, that the person:

- i. will not appear in court when required, or*
- ii. will reoffend,*
- iii. will interfere with the investigation, or*
- iv. will intimidate or attempt to influence potential witnesses, or*

⁴ See, eg, Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018 (QLD); *Statutes Amendment (Terror Suspect Detention) Act 2017* (SA); *Justice Legislation Amendment (Terrorism) Act 2018* (VIC); and Terrorism (Restrictions on Bail and Parole) Bill 2018 (TAS).

⁵ See Law Council of Australia, *Policy Statement on Principles Applying to Detention in a Criminal Law Context* (23 June 2013) 5 <<http://www.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines>>.

- v. *will threaten or cause harm to another person or the community at large.*⁶

*The presumption in favour of bail should not be reversed regardless of the nature of the offence. Although the seriousness of the offence with which a person is charged may be taken into account in determining whether he or she is: a flight risk, at risk of reoffending, or a risk to the community, the seriousness of the offence alone should not determine whether bail is granted.*⁷

*Throughout any pre-trial detention, the right to the presumption of innocence should be guaranteed.*⁸

19. The secondary materials do not contain an evidence-base demonstrating why the expansion to the broader group of charged persons with the corresponding limitations on liberty is a necessary or proportionate response to the terrorism threat.
20. Given the below problematic features of the proposed expansion of section 15AA of the Crimes Act for a broader group of charged persons and the potential for significant limitations on a person's liberty, the Law Council recommends that the measures not proceed:
- (a) *People who have previously been charged with, or convicted of a 'terrorist offence' and are currently being considered for bail for a further federal offence* – this may leave open the possibility of a person charged but acquitted of a terrorist offence and subsequently being considered for bail on a further non-terrorism related offence being subject to the proposed provisions in a manner inconsistent with the presumption of innocence and principles of incontrovertibility of acquittals. The Law Council notes that the Victorian Expert Panel on Terrorism and Violent Extremism did not support a presumption against bail for people who have been charged with a terrorism offence on the basis that it would only involve 'tenuous, incidental links to terrorism' and that '[a]ny real risk posed by such individuals will be captured' by other categories.⁹ The proposed amendments also do not encourage rehabilitation efforts for individuals who have previously been convicted of a terrorism offence and served out their sentence for that offence.
- (b) *People who have been charged under section 102.8 of the Criminal Code with associating with a terrorist organisation* – the Law Council's concerns in relation

⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9.3; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, UN Doc A/RES/43/173 (9 December 1988) Principle 39. The sorts of matters that the Court might take into consideration in determining whether to refuse to grant bail reflect the factors generally accepted under Australian law (see, eg, *Bail Act 1977* (Vic) para 4(2)(d); *R v Light* [1954] VLR 152). In New South Wales, the *Bail Act 2013* (NSW) has replaced the existing system of presumptions for and against bail with a new test of whether an 'unacceptable risk' existed that a person would fail to appear, commit a serious offence, endanger community or individual safety or interfere with witnesses or evidence (see *Bail Act 2013* (NSW) s 17). A right to release was however included for fine-only offences and some summary offences (see *Bail Act 2013* (NSW) para 21(c)). A bail authority that makes a bail decision must have regard to the presumption of innocence and the general right to be at liberty (see *Bail Act 2013* (NSW) s 3(2)).

⁷ The Law Council acknowledges that this principle is contrary to the present law in many Australian jurisdictions (see, eg, *Bail Act 1977* (Vic) para 4(2)(a)). However, the Law Council has always taken the view that a reverse presumption denies the court adequate discretion to properly address the necessity and proportionality of detention in the particular circumstances of the case.

⁸ *Ibid.*

⁹ Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, Victorian Government, *Report No 1* (2017) 62.

to section 102.8 of the Criminal Code were recently noted in its submission to the Committee on the Australian Citizenship Amendment (Strengthening Citizenship Loss) Bill 2018 (16 January 2019). For the reasons outlined in that submission, the Law Council recommends that section 102.8 of the Criminal Code be repealed.

- (c) *People who are subject to a control order within the meaning of Part 5.3 of the Criminal Code* – control orders are civil orders. It is not clear why people the subject of a control order (who may not have previously even been charged with an offence) should have the proposed more stringent exceptional persons test imposed, particularly where they are charged with a non-terrorism related offence. This may occur in circumstances where an interim control order may be issued ex parte where the person did not have the opportunity to present their case to a judge.
- (d) *People who have made statements or carried out activities supporting or advocating support, for terrorist acts within the meaning of Part 5.3 of the Criminal Code* – advocating support for terrorist acts may capture a broad range of conduct, particularly given the broad potential range of conduct captured under the ‘terrorist act’ definition under section 100.1 of the Criminal Code. Terrorism is defined to include political, religious or ideological violence (including threats of violence) intended to coerce, or influence by intimidation, Australian or foreign governments, or to intimidate the public. There are difficult areas where legitimate public debate and the right to free speech may be characterised as advocating support for terrorism. The most obvious example being that Nelson Mandela was denounced as a terrorist by his critics. For this reason, there should be very careful scrutiny of any provision that attempts to capture with broad terms actions that may fall within all of these characterisations. Any such provision should be limited and targeted with clear and precise language.

Exceptional circumstances test

21. The Law Council also notes that the test of a ‘presumption against bail’ is a lower test to be applied in a bail determination than one which requires an applicant to show ‘exceptional circumstances’ before bail can be granted. The effect of a presumption against bail is that an applicant must satisfy a court that bail should not be refused. An exceptional circumstances test is different and more onerous. Not only do reasons need to be shown why bail should not be refused but those reasons must be exceptional. Special reasons would also not satisfy the test. The exceptional circumstances test as applied under section 15AA has been interpreted very narrowly. The exceptional circumstances requirement is particularly stringent and means that bail will only be available in the rarest of cases. The Law Council notes the legislative history and judicial consideration of section 15AA as outlined in the INSLM’s *Background Paper: ss 15AA, 19AG and 20C of the Crimes Act (Background Paper)*.¹⁰ It also notes that the INLSM’s Background Paper indicates that judicial authority has determined the standard required by ‘exceptional circumstances’ is high.¹¹ As noted in the Explanatory Memorandum to the Bill:

¹⁰ Independent National Security Legislation Monitor, *Background Paper: Review of the Prosecution and Sentencing of Children for Terrorism Offences* (June 2018) <<https://www.inslm.gov.au/sites/default/files/files/INSLM%20-%20background%20paper%20%20ss%2015AA%2C%2019AG%20and%2020C%20of%20the%20Crimes%20Act.pdf>>.

¹¹ Ibid 14.

The onus of proof is on the accused or convicted person to satisfy the bail authority that exceptional circumstances exist to justify bail. The threshold of exceptional circumstances is not defined in the Crimes Act, but is already supported by a body of case law regarding the meaning of the expression. The offender must show that there is a situation which is out of the ordinary or unusual in some respect to satisfy the bail authority that exceptional circumstances exist to justify bail. Without limiting the bail authority's discretion, examples of factors relevant to whether exceptional circumstances exist might include evidence that the offender's link to terrorism was incidental, or advice from relevant agencies that the offender's risk of committing a terrorist offence is low or negligible.¹²

22. The Law Council is concerned that the current exceptional circumstances test in section 15AA is a higher test than what was agreed to being implemented at the Special Meeting of COAG on the 5 October 2017. The Law Council considers that such a test may be inconsistent with the presumption of innocence and reverses the onus of proof by requiring the accused person to establish the reasons why they should be able to retain their liberty. In this regard, the exceptional circumstances test is inconsistent with the observations of the United Nations Human Rights Committee, who stated that section 15AA operates to reverse the onus of proof and, in doing so, is inconsistent with Australia's obligations under the *International Covenant on Civil and Political Rights (the ICCPR)*.¹³ The COAG agreed test of a presumption against bail should be the standard, and not exceptional circumstances. A test of exceptional circumstances should be reserved for those cases where there has been a conviction and appeals bail is sought.

Parole

23. Proposed subsection 19ALB(3) provides that if the Attorney-General is not satisfied that exceptional circumstances exist in relation to a person covered by the subsection, the Attorney-General must not make a parole order. The three new categories to which the exceptional circumstances test would apply include:
- (a) a person who has been convicted of a terrorism offence, including a person currently serving a sentence for a terrorism offence;
 - (b) a person who is subject to a control order within the meaning of Part 5.3 of the Criminal Code (terrorism); and
 - (c) a person who the Attorney-General is satisfied has made statements or carried out activities supporting, or advocating support for, terrorist acts within the meaning of that Part.
24. The practical effect of the amendments would be that a person who falls within one of the above categories is unlikely to be in a position to prove exceptional circumstances allowing release on parole. As noted, the exceptional circumstances test is high and is 'something unusual or out of the ordinary in the circumstances relied on by the applicant before those circumstances can be characterised as exceptional'.¹⁴

¹² Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2019 (Cth) para 121.

¹³ United Nations Human Rights Committee, *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: International Covenant on Civil and Political Rights: 5th Periodic Report of State Parties: Australia*, UN GAOR, 95th sess, UN Doc CCPR/C/AUS/5 (19 February 2008) [11].

¹⁴ *Re Scott* [2011] VSC 674, [14].

25. The Law Council notes that such a proposed test for terrorist-related activities does not encourage rehabilitation or deradicalisation efforts.
26. It also reiterates its concerns above in relation to bail for the second and third proposed categories, namely, that an exceptional circumstances test does not appear justified when there may only be tenuous links to terrorism.
27. In light of this, the Law Council recommends that should the Bill proceed, the exceptional circumstances test for parole should be limited to offenders who seek parole following conviction for a terrorism offence.

Children

28. Currently, sections 15AA and 19AG of the Crimes Act apply to both adults and children. In circumstances where a person is under the age of 18 years, the proposed amendments in the Bill would:
 - (a) make it explicit that a bail authority, when determining whether exceptional circumstances exist to rebut the presumption against bail, will consider the best interests of the child as a primary consideration, with the protection of the community the paramount consideration;
 - (b) require the sentencing court, when determining whether exceptional circumstances exist to justify a departure from the mandatory minimum non-parole period for a terrorism offence, to consider the best interests of the child as a primary consideration, with the protection of the community the paramount consideration; and
 - (c) require the Attorney-General, when determining whether exceptional circumstances exist to justify the release of a terrorist offender or terrorism-related offender on parole, to consider the best interests of the child as a primary consideration, with the protection of the community the paramount consideration.
29. As noted, the Bill has been introduced in the absence of the INSLM's report being publicly released. This is despite this report being used as the justification for some of the measures in the Bill relating to bail and parole.¹⁵ This means that the public are not in a position to provide the Committee with its views as to the extent to which (a) it agrees with the INSLM's report; and (b) the proposed amendments are consistent with recommendations made by the INSLM.
30. The Law Council urges the Committee to delay its consideration of the proposed bail and parole measures in the Bill until the public have been given adequate time to assess the measures in light of the INSLM's report.
31. In the absence of the INSLM's report and in relation to the proposed amendments regarding children, the Law Council refers to the Committee its submission to the INSLM's inquiry and reiterates the following recommendations to the INSLM's inquiry that:
 - section 15AA should be amended to provide that the requirement for exceptional circumstances imposed by the section does not apply to a child charged with any of the offences to which the section 15AA applies;

¹⁵ See Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2019 (Cth) paras 5, 19.

- section 15AA should also provide that, when bail is being considered for a child charged with a Commonwealth offence, the best interests of the child shall be a primary consideration;
- section 19AG of the Crimes Act should be repealed on the basis that it:
 - (a) is an attenuated form of mandatory sentencing which interferes with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime; and
 - (b) may be inconsistent with Australia's international human rights obligations;
- if section 19AG is to be retained, children should be exempted from its operation.

32. While the Law Council acknowledges the proposed Bill seeks to make the best interest of the child a primary consideration consistent with Australia's international obligations under the *Convention on the Rights of the Child*, the practical reality of imposing the exceptional circumstances test on children is that the obligation to ensure that a child is only detained or imprisoned as a measure of last resort and for the shortest period of time is not observed.¹⁶

Recommendations:

- **The exceptional circumstances test in section 15AA should be reconsidered on the basis of agreed nationally consistent principles regarding bail in terrorism cases.**
- **The bail amendments should not proceed and the exceptional circumstances test for parole should be limited to adult offenders who seek parole following conviction for a terrorism offence.**
- **Section 15AA should be amended to provide that the requirement for exceptional circumstances imposed by the section does not apply to a child charged with any of the offences to which the section 15AA applies.**
- **Section 15AA should also provide that, when bail is being considered for a child charged with a Commonwealth offence, the best interests of the child shall be a primary consideration.**
- **Section 19AG of the Crimes Act should be repealed on the basis that it:**
 - **is an attenuated form of mandatory sentencing which interferes with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime; and**
 - **may be inconsistent with Australia's international human rights obligations.**
- **If section 19AG is to be retained, children should be exempted from its operation.**

¹⁶ See *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37(b).

Part B: Continuing Detention Orders

Concurrent and Cumulative Sentences

33. In 2016, a scheme for the continuing detention of high-risk terrorist offenders who pose an unacceptable risk to the community at the conclusion of their custodial sentence was introduced.¹⁷ The scheme commenced on 7 June 2017.¹⁸ Division 105A of the Criminal Code allows for Minister for the Australian Federal Police (**AFP**) to make an application to the state or territory Supreme Court in which the person is detained for a CDO in relation to what are considered to be high risk 'terrorist offenders' who pose an unacceptable risk of committing a serious terrorism offence if released into the community at the expiry of their sentence. A 'terrorist offender' is defined in subsection 105A.3(1) as a person who:
- (a) has been convicted of a specific terrorism offence (as defined in paragraph 105A.3(1)(a), for example, international terrorist activities using explosive or lethal devices, a Part 5.3 offence that carries a maximum penalty of at least 7 years imprisonment, or a foreign incursions and recruitment offence);
 - (b) is either detained in custody and serving a sentence of imprisonment for the offence, or a CDO or interim detention order is in force; and
 - (c) will be at least 18 years of age when the sentence ends.
34. The AFP Minister or their legal representative may make an application for a CDO¹⁹ and, upon the application being made, the Court must hold a preliminary hearing to determine whether to appoint one or more relevant experts²⁰ to conduct a risk assessment of the person and provide a report.²¹
35. The Supreme Court of a State or Territory may make a CDO where, having regard to the matters in section 105.8, the Court is satisfied to a high degree of probability, on the basis of admissible evidence, that the person poses an unacceptable risk of committing a serious Part 5.3 offence if the person is released into the community and the Court is satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.²²
36. The Court must review a CDO every 12 months²³ and a person subject to a CDO may apply to the Court for a review.²⁴ The Attorney-General must prepare a report each year in relation to the operation of the scheme.²⁵
37. Part 1 of Schedule 2 of the Bill seeks to amend subsection 105A.3(1) of the Criminal Code to expand the range of persons to whom an application for a CDO (including an interim CDO) can be made to include people who are still in custody and serving a longer, concurrent or cumulative sentence for a non-terrorism related offence, with one of the terrorist related offences listed in subsection 105A.3(1) of the Criminal Code (the 'eligible offence'). It will do this by inserting new paragraph (ia) after subparagraph

¹⁷ *Criminal Code Act 1995* (Cth) div 105A.

¹⁸ By virtue of the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth) s 2(1).

¹⁹ *Ibid* s 105A.5.

²⁰ *Ibid* s 105A.6(1).

²¹ *Ibid* s 105A.6(4).

²² *Ibid* s 105A.7.

²³ *Ibid* s 105A.10.

²⁴ *Ibid* s 105A.11.

²⁵ *Ibid* s 105A.22.

105A.3(1)(b)(i) to add offences other than the offence referred to in paragraph (a) (being the terrorism related offence) and to enable the application for a CDO to be made where the person has been continuously in custody since being convicted of the 'eligible offence'. According to the Explanatory Memorandum, this will also include people on remand for another unrelated offence, after the expiry of the sentence imposed for their 'eligible offence'.²⁶ The criteria will be whether the offender has been 'continuously detained in custody' since the expiry of the 'eligible offence', rather than nature of the other offences, so long as the chain of custody has not been broken since serving a sentence for a 'terrorism offence'.

38. In its submission to the Committee in relation to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, the Law Council raised a number of concerns in relation to the regime; some of which were addressed prior to enactment.²⁷ However, the Law Council still holds a number of concerns in relation to the CDO regime.
39. The Law Council maintains its view that the CDO regime is problematic, particularly in light of the lack of accurate risk predicting tools for terrorist behaviour.²⁸ While work is currently underway to develop a risk assessment tool, the Law Council understands that there still remains a lack of data and longitudinal studies for a court to be in a position to make an accurate assessment as to this issue. This may lead to circumstances where courts are not able to make a determination on the basis of very limited or arguable evidence. This stands in contrast to predictive methodologies for sex offenders which have been established for a period of many years. The Law Council considers that in the absence of such tools the laws themselves are not able to operate effectively.
40. Further, to hold a detainee in prison in such conditions, in circumstances where their sentence has been served in full, highlights the importance of appropriate detention facilities that encourage an environment of rehabilitation. The Commonwealth, States and Territories should properly fund effective rehabilitation programs for detainees. Legislation should also require a preliminary assessment of high risk terrorist offenders to determine an appropriate rehabilitation program as soon as possible after an offender has been sentenced.
41. The Law Council acknowledges that the proposed changes in the Bill are consistent with the objective of the CDO regime – namely, to prevent terrorist offenders who have not been rehabilitated from being released into the community.
42. Nonetheless, in the absence of effective risk assessment tools and adequately available rehabilitation programs, the Law Council does not support the CDO regime or the proposed expansion under Schedule 2 of the Bill.

Retrospectivity issues

43. The Law Council considers that the Bill is not consistent with the rule of law principle relating to retrospectivity. The Law Council notes that proposed paragraph 106.10(1)(a) of the Bill says the amendments will apply in relation to:

²⁶ Explanatory Memorandum, *Counter-Terrorism Legislation Amendment Bill 2019 (Cth)* 34.

²⁷ For example, removing the offence of treason from the list of offences that can trigger eligibility for a continuing detention order.

²⁸ Law Council of Australia, Submission No 4 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (12 October 2016) 19.

- (a) any person who, on the day this section commences, is detained in custody; and
 - (b) any person who, on or after that day, begins a sentence of imprisonment for an offence referred to in paragraph 105A.3(1)(a) (whether the conviction for the offence occurred before, on or after that day).
44. Proposed subsection 106.10(2) goes on to say that ‘to avoid doubt’ the amendments referred to above listed in Part 1 of Schedule 2 of the Bill will ‘apply in relation to a person referred to in paragraph (1)(a) of this section whose sentence of imprisonment for an offence referred to in paragraph 105A.3(1)(a) ended before the day this section commences’.
45. This means offenders whose sentences for an ‘eligible offence’ have expired and would not have previously been subject to an application for a CDO, would be subject to an application for a CDO if they are still in custody serving a sentence or on remand for another unrelated offence, invoking a retrospective application of legislation to sentences that have expired.
46. It is an important element of the rule of law that laws are capable of being known in advance so that people are aware of their legal rights and obligations. This is of particular importance when the changes can impact on the potential liberty of a person.

Recommendations:

- **In the absence of adequate risk assessment and available rehabilitation programs, the proposed amendments in relation to cumulative and concurrent amendments should not proceed.**
- **If the amendments are to proceed, they should not apply retrospectively to ‘terrorism offences’ that have already expired or to sentences that have already commenced.**

Information Given to Offenders for CDO Applications

47. The Bill also seeks to make a number of amendments to the type of information that is given to an offender when an application for a CDO is made and the way in which decisions in relation to ‘sensitive information’ contained in CDO applications are managed.
48. Part 2 of Schedule 2 would amend the information disclosure requirements under section 105A.5 by:
- making public interest immunity available to remove sensitive material from a CDO application;
 - ensuring the full range of protections under the NSI Act are available. These may include: permitting information the subject of a certificate to be disclosed with appropriate deletions, redactions and summaries of information or facts (subsection 38L(2) of the NSI Act); non-disclosure of the information (subsection 38L(4) of the NSI Act); or disclosure of the information (subsection 38L(5) of the NSI Act); and
 - ensuring that the disclosure requirements may also be subject to any order by the Court such as non-publication or suppression of information orders.

49. Currently, subsection 105A.5(6) of the Criminal Code provides that the AFP Minister must ultimately provide the terrorist offender with the 'complete copy' of the CDO application. All exculpatory information that the AFP Minister is aware or in possession of must be included in the CDO application and be provided to the terrorist offender.
50. The Law Council acknowledges that it is a matter for the AFP Minister to determine what information they choose to rely on in the application for a CDO. The Law Council strongly supports the subject of a CDO application being provided with sufficient detail of both inculpatory and exculpatory detail in the claim in order that they know the case they must answer and so that the basic requirements of procedural fairness are observed. Provisions relating to exculpatory material recognise the difficulty of a terrorist offender in independently challenging material provided by the executive that may be based on human sources or law enforcement and security operations.
51. The Law Council recognises under the proposed amendments and once a decision is taken to include or exclude certain information in a CDO application:
- the important role of the court to ultimately determine whether information can be disclosed to a terrorist offender because it is likely to be protected by public interest immunity or protections under the NSI Act; and
 - the maintenance of the court's inherent jurisdiction to order a stay of proceedings on the basis that the withholding of information may mean that the terrorist offender cannot be given a fair hearing.
52. However, the onus will be on the terrorist offender to choose to contest the public interest immunity claim.²⁹ That is, the terrorist offender will be required to disprove the claim. The Law Council considers that it is an unworkable proposition for a terrorist offender to seek to disprove a public interest immunity claim over information which will not be known to the offender or the legal representative. Such a proposition may unduly interfere with the fair trial hearing rights of the offender. It may also mean that, should the terrorist offender not contest the claim, the Court may be placed in the invidious position of granting a CDO without the benefit of being aware of relevant exculpatory information. The onus should therefore be on the AFP Minister or relevant operational agencies to satisfy the Court of the public interest immunity claim.
53. There would also be benefit in further clarifying the timeframe in which the Minister must make for example a claim of public interest immunity or issue a certificate under the NSI Act. For example, to avoid doubt, it should be made clear that such measures must be taken at the point of twelve months before the person's relevant sentence expires and at which time the CDO application is required to be made.
54. Further, the Law Council notes the following comments by the current INSLM:
- The CDO regime raises issues for the management of national security information and the balance that must be struck between the protection of this sensitive information and ensuring that the rights of the individual who is the subject of an application for a CDO are protected. This issue is not novel and, for the control orders regime, has been addressed by the introduction of the special advocates regime. I consider that this system*

²⁹ Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2019 (Cth) para 219.

is (in principle) equally capable of striking the correct balance for CDOs, and if introduced, for ESOs [extended supervision orders].³⁰

55. The INSLM therefore recommended that the Government consider making the special advocates regime available for applications under division 105A.³¹
56. The Law Council considers that there should be inclusion of supports for the respondents to CDO applications. Given the increasing complexity of litigating such applications, there should be inclusion of special advocates for applications under Division 105A relating to CDOs as an additional important safeguard in balancing the right to a fair hearing with the protection of national security information. Special advocates should be given appropriate administrative support and should be properly remunerated. This will ensure that there is a sufficiently large pool of special advocates to assist with CDO cases.

Recommendations:

- **The onus should be on the AFP Minister or relevant operational agencies to satisfy the Court of the public interest immunity claim.**
- **To avoid doubt, it should be made clear that the giving information in applications to offenders measures must be taken at the point of twelve months before the person's relevant sentence expires and at which time the CDO application is required to be made.**
- **Consideration be given to the introduction of a special advocate regime for continuing detention orders.**

³⁰ James Renwick, Independent National Security Legislation Monitor, *Review of Divisions 104 and 105 of the Criminal Code (Including the Interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (3rd INSLM, Report No 3, September 2017) 9.36.

³¹ *Ibid* 9.42.e.