



Law Council
OF AUSTRALIA

Office of the President

11 February 2022

Mr Grant Donaldson SC
Independent National Security Legislation Monitor
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

By email: INSLM@inslm.gov.au

Dear Mr Donaldson

REVIEW OF DIVISION 105A OF THE *CRIMINAL CODE ACT 1995* (CTH)

1. Thank you for your letter dated 6 July 2021 inviting the Law Council of Australia to make a submission to your own-motion review of the post-sentence regime for high-risk terrorist offenders in Division 105A of the *Criminal Code Act 1995* (Cth) (**Criminal Code**), and for the subsequent updates from your office regarding the timing of this inquiry, further to recent amendments to its statutory deadline.

Law Council submission

2. The Law Council's policy position on Division 105A is set out in its recent submissions to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**), as part of the following inquiries of that Committee, which were completed in 2021:
 - a statutory review of police powers in relation to terrorism, including the continuing detention order (**CDO**) regime in Division 105A of the Criminal Code, pursuant to paragraph 29(1)(cb) of the *Intelligence Services Act 2001* (Cth) (**AFP powers review**);¹ and
 - a concurrent review of the Counter-Terrorism Legislation Amendment (High-Risk Terrorist Offenders) Bill 2021 (**HRTO Bill**), which was passed and commenced in December 2021. The HRTO Bill sought to establish a regime of 'extended supervision orders' (**ESOs**) under Division 105A as less restrictive alternatives to CDOs (**HRTO Bill review**).² The resulting *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth) (**HRTO Act**) implemented a Government response to recommendations made by your predecessor, Dr James Renwick SC, in 2017 for the establishment of an ESO regime.³ The HRTO Act also includes some of the amendments recommended by the PJCIS in the HRTO Bill review.

¹ PJCIS, [Advisory report on the AFP powers review](#), (October 2021).

² PJCIS, [Advisory report on the HRTO Bill](#), (September 2021).

³ J Renwick SC, Third 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](#), (7 September 2017), Chapter 9, especially pp. 76-77 at [9.40]-[9.47].

3. Copies of the relevant Law Council submissions to the PJCIS are provided as **Attachments 1, 2, 2A and 2B** to this correspondence. Additionally, **Attachment 3** to this correspondence provides the Law Council's responses to the 12 questions appended to your letter of 6 July 2021.
4. Collectively, these documents and this covering letter comprise the Law Council's submission to your inquiry. I confirm that the Law Council is agreeable to these materials being treated as public and uploaded to your inquiry website with the personal contact details at paragraph [21] redacted.

Summary of Law Council position on Division 105A

Continuing detention orders

5. The Law Council's primary position remains that the CDO regime is not a necessary or proportionate response to the threat of terrorism, and should not be renewed beyond its current sunset date of 7 December 2026.
6. Consideration could instead be given to an extended determinate sentencing regime, in the nature of the model in sections 254-257 of the [Sentencing Act 2020 \(UK\)](#). That is, a person is given a criminal sentence with a fixed end date, which includes a discrete and additional protective component known as the 'extension period'. The duration of the extension period is assessed at the time of sentencing, and not later, as a stand-alone application for a post-sentence order when the person is close to completing their sentence of imprisonment.⁴
7. However, the Law Council acknowledges that the PJCIS review of AFP powers did not recommend the cessation of the CDO regime upon sunset, but rather recommended that the PJCIS be given a statutory function to conduct a further review, prior to the sunset date, to inform Parliamentary decision-making about whether it should be extended for a further period.⁵
8. The Law Council also notes the further recommendation of the PJCIS in the HRTO Bill review that the PJCIS should be conferred with a statutory function to undertake a 'mid-point' review of the operation of Division 105A. This parliamentary review would commence within 12 months of the completion of the present INSLM review.⁶
9. Therefore, if the CDO regime is to remain in force, at least until the PJCIS completes the further reviews it has recommended, the Law Council alternatively supports several amendments to the CDO regime. These amendments focus on the issuing thresholds and process; and statutory limitations on indefinite detention as a result of multiple, consecutive CDOs being issued in relation to an individual.
10. The Law Council's key recommended amendments to the CDO regime are set out in the commentary in **Attachment 1** (pp. 12-16 and pp. 54-76). Of these matters, the priority reforms for the Law Council are as follows:
 - **standard of proof**—the imposition of a criminal standard of proof for CDOs (and, ideally, ESOs) in relation to the finding that the person would present an unacceptable risk of committing a serious terrorism offence if released, rather

⁴ See especially, [Sentencing Act 2020 \(UK\)](#), section 256, which provides that an extension period for a person convicted of a serious terrorism offence must be at least one year, but must not exceed eight years.

⁵ PJCIS, [Advisory report on the AFP powers review](#), (October 2021), recommendation 17.

⁶ PJCIS, [Advisory report on the HRTO Bill](#), (September 2021), recommendation 10. (The Government moved amendments to the HRTO Bill in late 2021, which implemented the latter recommendation via the insertion of paragraph 29(1)(bbaaa) of the *Intelligence Services Act 2001* (Cth). However, no statutory provision is currently made for the PJCIS to undertake the further, pre-sunset review it recommended in its AFP powers review.)

than the current standard of ‘satisfaction to a high degree of probability’. This reflects the close connection of post-sentence orders with the criminal process, the grave consequences of the imposition of a post sentence order, and the fraught nature of making predictions about a person’s future risk of offending (especially in the absence of a settled and empirically verified risk-assessment methodology specific to terrorism);

- **rules for drawing inferences about future risk**—even if the criminal standard of proof is not adopted, the imposition of a rule providing that, if the issuing court is to draw an inference from a person’s past conduct that they are an unacceptable risk of committing a serious terrorism offence in the future if released, this must be the only rational inference capable of being drawn from the evidence; and
 - **legal assistance funding**—the practical issue of sufficient and dedicated legal assistance funding in connection with CDOs also requires urgent attention. (The Law Council has similarly recommended the review and reform of legal assistance funding arrangements for persons who are respondents to control order applications, and ESO applications.)
11. Additionally, the Law Council supports prompt implementation of the outstanding recommendations of the PJCIS in its report of October 2021 on AFP powers, as relevant to the CDO regime. In particular, the PJCIS called for:
- the conferral of a statutory review function on the PJCIS, enabling it to undertake a pre-sunset review of the CDO regime, in order to provide advisory recommendations to the Parliament about whether it should be extended for a further period of time (recommendation 17);
 - the government to prioritise work with States and Territories towards securing appropriate accommodation for persons who are subject to CDOs, consistent with the requirements in section 105A.4 to ensure that they are treated in a manner consistent with their status as persons who are not serving sentences of imprisonment for criminal offences (recommendation 18); and
 - enhanced public reporting on the operation of the CDO regime, providing details of matters including the accommodation and rehabilitation programs provided to detainees, and associated costs (recommendation 19).

Extended Supervision Orders

12. The Law Council is cognisant that the terms of your review of Division 105A do not refer explicitly to the ESO regime enacted by the HRTA Act, and that your review was commenced on the basis that the CDO regime was, at that time, the sole post-sentence regime contained in Division 105A. However, the relevant statutory function supporting the present review, in subsection 6(1C) of the *Independent National Security Legislation Monitor Act 2010* (Cth), covers the entirety of Division 105A, which now includes the ESO regime. Consequently, if you are minded to include the ESO regime in your review, the Law Council wishes to place on record its concerns about several aspects of that regime, as set out in its submissions to the PJCIS review of the HRTA Bill. (See **Attachments 2, 2A and 2B.**)
13. In summary, while the Law Council is supportive, in principle, of an ESO regime as a less restrictive alternative to CDOs, it does not support several matters of detail in the HRTA Act that depart from the recommendations of your predecessor, Dr Renwick, about the design of the regime.

14. This includes the standard of proof for ESOs (which Dr Renwick recommended should be consistent with the standard for CDOs) and the range of conditions able to be imposed under those orders (which Dr Renwick recommended should be consistent with the existing conditions available for control orders). In contrast, the ESO regime in Division 105A applies the civil standard of proof,⁷ which is a lower standard of proof than for CDOs (namely, a ‘bespoke’ standard of proof, which requires the court to be satisfied to a high degree of probability, on the basis of admissible evidence, that the person poses an unacceptable risk of committing a serious terrorism offence).⁸
15. In further contrast to Dr Renwick’s recommendations, Division 105A enables ESOs to impose a significantly broader range of conditions on their subjects than those which were available for control orders,⁹ at least until the enactment of the HRTA Act in December 2021, which contained amendments to further broaden the conditions available in respect of control orders, to align them with some of the wider conditions available under ESOs. (This includes, for example: obligations to carry and answer or promptly return all calls to a specified mobile phone; obligations to comply with certain requirements which are determined by specified law enforcement officers, rather than being included directly in the order; and obligations in relation to electronic monitoring devices, including to allow specified officers to enter the person’s residence at any reasonable time, for any purpose relating to the monitoring device.)¹⁰
16. The Law Council is further concerned that the ESO regime in Division 105A contains no statutory safeguards against the risk that applications could be made for control orders in the Federal Court or Federal Circuit Court, as an effective ‘repechage’ for a failed ESO application that was previously made on the same basis, and was refused by the relevant State or Territory Supreme Court.
17. The Law Council is pleased that, in late 2021, the government moved parliamentary amendments to the HRTA Bill, which implemented some of the amendments recommended by the PJCIS in its HRTA Bill review, which were suggested in the Law Council’s submissions to that review. This includes:
 - an issuing criterion requiring the court to take into consideration the combined effect of all ESO conditions on the person, when assessing whether the issuance of the order would be proportionate to the terrorism risk they pose to the community (recommendation 5);
 - a prohibition on an ESO containing curfew conditions which exceed a total of 12 hours in a 24-hour period (recommendation 6); and
 - the conferral of a power on the court considering an ESO application to make an order requiring the Commonwealth to meet the reasonable costs of a person’s legal representation in the matter (recommendation 4).
18. However, the Law Council continues to call for the implementation of the outstanding PJCIS recommendations on the HRTA Bill, which were not addressed in parliamentary amendments, and largely endorsed suggestions made by the Law Council in its submissions to the HRTA Bill review. These include the following:
 - an issuing criterion which explicitly requires the court to ascertain whether the person is subject to a post-sentence order under a State or Territory law, and if so, to consider the combined impact of conditions under the State or Territory

⁷ Criminal Code, paragraph 105A.7A(1)(b).

⁸ Ibid, paragraph 105A.7(1)(b).

⁹ Ibid, section 105A.7B. See also: sections 105A.7C-105A.7E.

¹⁰ Ibid, subsection 104.5(3) and section 104.5A (control order conditions) which replicate several, but not all, of the ESO conditions in sections 105A.7B and 105A.7E. The relevant control order conditions were amended by the HRTA Act, Schedule 1, items 16-20.

and proposed Commonwealth order, as part of assessing whether a proposed ESO would be proportionate to the terrorism risk presented by the person (recommendation 1);

- a governmental review of alternative risk assessment methodologies to the current preferred methodology, the VERA-2R (recommendation 2); and
- the amendment of section 9A of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), so that decisions about making applications for post-sentence orders under Division 105A of the Criminal Code are treated in a consistent manner to decisions about applications for warrants, and other decisions which are closely related to the criminal justice process (recommendation 3).

19. To avoid doubt, the Law Council supports the implementation of the above PJCIS recommendations in addition to the further amendments recommended by the Law Council in its submission to the PJCIS in the HRTO Bill review (**Attachments 2, 2A and 2B**). This reflects that several of the Law Council's recommendations were not the subject of detailed examination or recommendation in the PJCIS's advisory report on the HRTO Bill review. Rather the PJCIS appeared to envisage that these issues would be considered in future reviews of Division 105A.¹¹

Further information

20. Thank you again for the opportunity to participate in this inquiry. Members of the Law Council would be pleased to appear at your public hearings, and provide any supplementary information as required.

■ [REDACTED]

Yours sincerely

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Mr Tass Liveris
President

¹¹ See, for example, PJCIS, [Advisory Report on the HRTO Bill](#), (September 2021) at [3.156].