



2 September 2019

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: pjicis@aph.gov.au

Dear Chair

Supplementary Submission: Review of the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019

On 27 August 2019, the Law Council appeared before the Parliamentary Joint Committee on Intelligence and Security (**the Committee**) as part of its review of the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019 (**the Bill**).

This supplementary submission addresses two issues raised by the Committee during the Law Council's appearance. The first is to answer a question on notice from Senator Stoker in relation to the Law Council's position on an alternative amendment to section 15AA of the *Crimes Act 1914* (Cth) (**Crimes Act**). The second is to clarify the Law Council's evidence in relation to proposed section 19ALB of the Crimes Act in response to a question from the Committee.

Bail – section 15AA

During the Committee hearing Senator Stoker raised an issue in relation to the proposed amendments to section 15AA of the Crimes Act. Senator Stoker noted the Law Council does not support the proposed amendment that would enable a bail authority to take into account that a person had been 'charged with' (as opposed to being 'convicted' of) an offence listed in subsection 15AA(2) as being a legitimate reason to bring the person within the ambit of section 15AA. Senator Stoker asked would the Law Council's position be different if the person had been charged with an offence listed in subsection 15AA(2) and the charge was still pending before the court when the person was seeking bail for the new offence.

The amendments make significant changes to the current section 15AA which is confined to bail for certain very serious offences. As amended, subsection 15AA(1) would apply to any offence 'against a law of the Commonwealth'.¹ This is a considerable change which the Explanatory Memorandum does not appear to explain. The Law Council questions whether this is the intended effect of the Bill.

¹ Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019, sch 1, item 1.

The drafting of the amendment – ‘charged with or convicted of’ – is ambiguous. It might refer to a pending charge or a charge for which a person has been found guilty or acquitted. According to the Explanatory Memorandum, it includes both current and previous charges in relation to an offence listed in subsection 15AA(2).²

Accordingly, the Law Council raises the following serious concerns:

- (i) The Law Council accepts that a prior conviction for an offence listed in subsection 15AA(2) may be a proper basis for the exceptional circumstances criterion;
- (ii) However, the fact that a person has been charged does not mean that the person is guilty. A pending charge is an important consideration in a bail decision regarding a subsequent charge but that will depend on the strength of the evidence to prove that charge among the other usual criteria to be considered by the bail authority. Nonetheless, a pending charge is not a proper basis for automatic application of the exceptional circumstances category;
- (iii) The pending charge may be dropped or the person may be ultimately acquitted; and
- (iv) The new offence (for example, wilful damage of Commonwealth property) may bear no relationship to any of the offences listed in subsection 15AA(2).

Similar serious concerns arise in relation to the proposed subsection 15AA(2A). This provision would apply to persons subject to a control order, or who had made statements or carried out activities supporting or advocating support for terrorist acts.

People in this category would have to show exceptional circumstances to obtain bail for any offence (that is not restricted to the offences listed in subsection 15AA(2)). To impose an exceptional circumstances test on people who have neither been charged with nor convicted for any offence has not been adequately justified.

The Law Council considers that for the high threshold of the ‘exceptional circumstances’ test to be applied fairly, it should still be limited to where a person has previously been convicted of an offence listed in subsection 15AA(2).

In relation to children charged with an offence to which section 15AA would apply, the Law Council’s primary position is that, as with setting a non-parole period, or determining release on parole, there needs to be greater flexibility within criminal law legislation to take into account the immaturity and the developmental issues particular to children. For this reason children should be exempt from the application of section 15AA. However, if section 15AA is to continue to apply to children, the Law Council would prefer to see both the best interests of the child and the protection of the community as matters of equal and primary importance to be considered by the bail authority.

Parole – proposed section 19ALB

During the Committee hearing Senator Stoker asked a question of the Law Council regarding the operation of proposed section 19ALB. That section requires the Attorney-General to consider, inter alia, if a person has made statements of support for or advocated terrorist acts within the meaning of Part 5.3 of the *Criminal Code Act 1995* (Cth) (**Criminal**

² Explanatory Memorandum, Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019, 10 [26].

Code) when deciding to release a federal offender to parole. If the Attorney-General is satisfied this has occurred, the Attorney-General is then required to only grant parole to the offender if the Attorney-General finds there are 'exceptional circumstances' to justify the release to parole.

In relation to proposed paragraphs 19ALB(2)(b) and (c), the Law Council reiterates the points made about control orders and statements or activities in support of terrorism in relation to proposed subsection 15AA(2A). They are matters to be taken into consideration but should not trigger an exceptional circumstances criterion for denial of parole. The Law Council notes that the provisions are unclear as to the process to be applied by the Attorney-General in order to be 'satisfied' of the matters listed in proposed paragraph 19ALB(2)(c), including the standard of proof to be applied by the Attorney-General.

The Law Council is also concerned that an offender being considered for parole for a non-terrorism related Commonwealth offence (such as drug related offence or an offence of damaging Commonwealth property) would be required establish 'exceptional circumstances' if the Attorney-General was satisfied that the person has made statements supporting terrorism at any time in the past – even if those statements were unrelated to the offence for which they are seeking parole and the person had not been charged in relation to those statements.

The Law Council also considers that the proposed amendment illustrates why consideration should be given to establishing an independent, statutory federal parole board or parole authority to make determinations in relation to the granting of parole. This model, as is adopted throughout the states and territories and has been recommended at a Commonwealth level by the Australian Law Reform Commission,³ provides an independent forum where these factual determinations can be made in accordance with the principles of procedural fairness.

The Law Council maintains its position that it does not support proposed paragraph 19ALB(2)(c) applying to a person who has never been charged, let alone convicted, of a terrorism related offence and where the proposed section does not specify the standard of proof or procedure by which the Attorney-General is to be satisfied of the matters listed in proposed paragraph 19ALB(2)(c), nor the means by which the offender can challenge such a finding.

Thank you for the opportunity to provide this supplementary submission.

Yours sincerely

Arthur Moses SC
President

³ Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, (Report No 103, April 2006) 52 [23-1].