



Law Council
OF AUSTRALIA

Office of the President

20 October 2016

The Hon. Michael Sukkar MP
Committee Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
CANBERRA ACT 2600

Dear Chair

Interaction of control order regime and proposed post-sentence preventive detention for terrorism offenders

Thank you for the opportunity for Law Council representatives to appear before the Parliamentary Joint Committee on Intelligence and Security (**the Committee**) on 14 October 2016 as part of its inquiry into the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (the Bill)*.

In response to a question from the Shadow Attorney-General, the Hon. Mark Dreyfus QC, and evidence provided to the Committee by the Attorney-General's Department, the Law Council has prepared this supplementary submission to further inform the Committee's consideration of the Bill.

In a letter of 13 October 2016 (one day before the hearing), the Committee was asked by the Attorney-General to consider the interaction of the proposed continuing detention order (**CDO**) regime with the control order regime.

The text of the Attorney-General's letter is as follows:

As you are aware, under the HRTTO Bill, the Court will not be able to make a control order as an alternative to a continuing detention order. This is because the two regimes are distinct with different procedural and threshold requirements. If a Court does not make a continued detention order, the Australian Federal Police (AFP) will need to consider whether to seek a control order. A fundamental practical issue will be the timing of seeking a control order.

The control order regime is premised on an assumption that the persons who may pose a terrorist risk are already in the community. Currently, Division 104 requires the AFP to apply first for an interim control order (so that the conditions can apply for the full duration of the order). It is unclear whether the legislation would support the AFP applying for a control order while a person is serving a sentence of imprisonment, with the conditions of the control order to apply on release.

The Attorney-General then asked the Committee to consider whether appropriate amendments might be pursued to address this issue.

The Attorney-General's Department and AFP Deputy Commissioner provided evidence on this matter during the public hearing. The Attorney-General's Department's submission also addresses this issue.

The Shadow Attorney-General asked whether the Law Council is in a position to provide a further submission to the Committee about the possibility of the interaction between the control order and proposed post-sentence preventive detention regimes.

Proposed interaction of control orders and continuing detention orders

The proposed Commonwealth scheme of post-sentence preventive detention for terrorism offenders does not allow (unlike State and Territory regimes for sex offenders and high risk violent offenders) the Court to make an extended supervision order as an alternative to a CDO. Under the proposed scheme, the Court is also not permitted to make a control order instead of a CDO.

The Court may only make a CDO if the Court is satisfied that there is no less restrictive measure that would be effective in preventing the unacceptable risk to the safety of the community.¹ The Explanatory Memorandum to the Bill indicates that a control order under sections 104.4 or 104.14 of the Criminal Code may be an example of a less restrictive measure.² The Explanatory Memorandum explains:

However, this will not require an application for a control order to be made or for the Court to consider whether the threshold for obtaining a control order would be met. Rather, the Court would need to be satisfied that the kinds of conditions that may be available under a control order, such as wearing a tracking device or placing restrictions on who the offender can communicate or associate with, would not be effective in preventing the unacceptable risk of the offender committing a Part 5.3 offence if they were released into the community. It is not open to the Court to make a control order as an alternative to a continuing detention order. Subject to the Attorney-General's consent, a senior Australian Federal Police member would need to separately request an issuing court to make an interim control order pursuant to section 104.3 of the Criminal Code. An issuing court is defined at subsection 100.1(1) of the Criminal Code as the Federal Court of Australia, the Family Court of Australia or the Federal Circuit Court of Australia.³

Attorney-General's Department suggested amendments

The Attorney-General's Department's submission to the Committee suggested that the Bill should be amended to improve the relationship between control orders and CDOs. The Department's submission notes:

This could potentially lead to an undesirable situation in which the offender is subject to two court processes and there is a duplication of effort. One option is to create extended supervision orders under the proposed regime in the Bill that can be made in the alternative to a continuing detention order. Despite the apparent overlap between control orders and continued detention order regimes, there are

¹ *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (Cth), paragraph 105A.7(1)(c).

² Explanatory Memorandum to the *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (Cth), 21.

³ *Ibid.*

*nuanced differences in focus of the regimes in terms of the persons and behaviour to be managed. An alternative option is to amend the control order regime so that a control order could be obtained as an alternative to a continuing detention order. Both approaches would give the Court greater flexibility to make appropriate orders for managing the risk the community posed by terrorist offenders.*⁴

Law Council position

Preliminary

The Law Council considers that the urgency of enacting the Bill has not been demonstrated. The Law Council understands that the first person that might be subject to the provisions has a sentence which expires in 2019. That person, however, may be subject to deportation subsequent to their sentence being served. The Attorney-General's Department's submission notes that the Independent National Security Legislation Monitor and the Committee will conduct reviews into the control order regime by 7 September 2017 and 7 March 2018 respectively. It has also noted that:

*Given the detailed and complex policy and practical issues that would need to be explored, it may be better to defer a detailed consideration of how the control order scheme and the proposed scheme under the Bill interact with each other until those reviews occur.*⁵

The detailed and complex policy and practical issues, however, suggest that the review should be brought forward, prior to enactment of the Bill, so that the control orders, preventative detention orders and CDOs can be harmonised and form a consistent counter-terrorism framework.

Harmonisation difficulties arise because the CDO scheme is largely based on State and Territory schemes which are not set in the context of the Commonwealth counter-terrorism framework, which includes control orders and preventative detention orders. The tests for control orders, preventative detention orders and proposed CDOs are different as are the procedures and courts which can administer them.

A number of questions arise in this context, including (but not limited to):

- (a) Given that at present the control order regime uses different tests, how can the control order regime and CDO scheme operate in an efficient, fair and consistent manner?
- (b) Are the procedural steps for and time limits applicable to a control order compatible with those applicable to a continuing detention order?
- (c) Should the Bill adopt a test similar to the preventative detention test – namely a test based on whether the person will engage in a terrorist act – rather than the 'unacceptable risk' test?
- (d) How is the 'unacceptable risk' to be reconciled with the test for a preventative detention order?
- (e) How can the stricter test applied to preventative detention - an essentially short term measure – be reconciled with the looser unacceptable risk test for the long-term continuing detention orders?

⁴ Attorney-General's Department, Submission to the Parliamentary Joint Committee on Intelligence and Security (October 2016) 6.

⁵ Ibid.

- (f) Would a test which required the Court to be satisfied beyond reasonable that there are reasonable grounds to believe that the person will engage in a terrorist act strike a better balance between protection of the community and over-prediction of future terrorist acts and compliance with Australia's human rights obligations?

In its initial submission to the Committee, the Law Council noted that the unacceptable risk test should be amended in a manner more consistent with the preventative detention order test.

Interaction between control orders and CDOs

The Law Council sees a benefit in an approach whereby it is open to the Court to make a control order or extended supervision order as an alternative to a CDO under the proposed scheme in the Bill. A single court process, where an application for a CDO is sought to be made, would assist efficiencies in the judicial process for all parties concerned. The Law Council's preliminary view is that the control order option (rather than an extended supervision order) is preferable on the basis that it would ensure consistency within Australia's counter-terrorism framework.

However, the Law Council would be concerned if, in practice, the ability of the Court to provide an alternative to a CDO would mean that there were increased applications for CDOs in the first instance rather than sole applications for control orders.

To ameliorate this concern, the Law Council recommends that the Attorney-General should be required to be satisfied in an application for a CDO that there is no other less restrictive measure (for example, a control order) that would be effective in preventing the unacceptable risk of a serious Part 5.3 offence if the offender is released into the community.

The Attorney-General's decision in this regard should be required to be made on the basis of information which is sworn or affirmed by a senior AFP member with an explanation as to why each of the possible obligations, prohibitions or restrictions or a combination of such would not be effective. The AFP member should also be required to present:

- a statement outlining any facts relating to why any of those obligations, prohibitions or restrictions may be effective;
- outcomes and particulars of all previous requests for interim control orders/CDOs, interim CDOs/CDOs/preventative detention orders, applications for variations or revocations of control orders/CDOs; and
- relevant expert reports, including from corrective services; and
- information about the offender's conviction and period for which the offender has been sentenced and detained; and
- any information that the member has about any periods for which the person has been detained under a corresponding State preventative detention law or State CDO law.

In addition, the Attorney-General must have regard to matters as outlined in proposed section 105A.8 of the Bill.

Scrutiny of amendments

Further, given the significant rule of law and human rights issues raised by the Bill, it is critical that non-government organisations and the Committee have an opportunity to consider any further amendments prior to enactment. The Law Council also strongly

recommends that any amendments to the Bill that are made to improve the interaction between the control order regime and proposed Commonwealth post-sentence preventive detention regime must be reviewed by the Committee prior to enactment. Similarly, the Committee should have regard to the findings of the Parliamentary Joint Committee on Human Rights on any proposed amendments.

The Law Council appreciates the opportunity to make this supplementary submission.

Please contact Dr Natasha Molt, Senior Legal Advisor, on
or , in the first instance, should you require further
information.

Yours sincerely

S Stuart Clark AM
President