Law Council
OF AUSTRALIA

Supplementary submission:

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

Parliamentary Joint Committee on Intelligence and Security

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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.

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

Acknowledgement

The Law Council gratefully acknowledges the contribution of its National Criminal Law Committee to this supplementary submission.

Introduction

1. The Law Council thanks the Parliamentary Joint Committee on Intelligence and Security (**Committee**) for the opportunity to appear at its public hearing on 13 November 2020, as part of its inquiry into the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (**Bill**).

2. To assist the Committee in its deliberations, the Law Council wishes to provide supplementary information about the following matters:

   (1) questions from Senator Fawcett about the proposed adoption of the civil standard of proof for extended supervision orders (**ESOs**), as distinct to:

      (a) the higher standard of a 'high degree of probability' currently applicable to continuing detention orders (**CDOs**); or

      (b) the criminal standard of proof for both CDOs and ESOs, as recommended by the Law Council;

   (2) questions from the Hon Mark Dreyfus QC MP, regarding differences between the proposed conditions for ESOs and the current conditions available for control orders (**COs**) under existing subsections 104.5(3)-(6) of the *Criminal Code Act 1995* (Cth) (**Criminal Code**); and

   (3) evidence from governmental witnesses at the public hearing, which suggested that the broader range of ESO conditions, as compared to the presently available CO conditions, is considered appropriate because:

      (a) it would be compatible with the unlimited range of conditions able to be imposed under most State and Territory post-sentence supervision orders for dangerous offenders, including sexual offenders; and

      (b) the imposition of each ESO condition is a matter for judicial discretion, in individual ESO applications. To impose a condition, the issuing court must be satisfied that the person presents an unacceptable risk of committing a serious terrorism offence, and that the condition is necessary for, and proportionate to, the management of that risk.

Standard of proof for ESOs

3. Senator Fawcett asked Law Council witnesses whether the Law Council's recommendation to increase the standard of proof for ESOs may have unintended consequences.

4. In particular, it was suggested that there may be a gap in community protection if:

   - the higher threshold of a 'high degree of probability' (or 'beyond reasonable doubt' as recommended by the Law Council) **could not be met** for a post-sentence order (either a CDO or an ESO) in relation to an offender; but
   - the civil standard of proof **could be met** for an ESO in relation to that offender.

5. It was noted that, if an ESO was **not available** on the civil standard of proof, there may be no scope to impose preventive restraints on that person's liberty to protect the community from any risk that the person may commit a serious terrorism offence, once they were released into the community on the expiry of their sentence.

6. It was noted, by way of illustration, that some perpetrators of terrorist acts overseas, including the London Bridge attack in 2019, had previously served sentences of imprisonment for terrorism-related offences.

7. The Law Council provides the additional information set out below to supplement its responses given at the public hearing of 13 November 2020.

Distinction between standard of proof and unacceptability of risk

8. As a preliminary comment, it is important to bear in mind that the standard of proof is distinct from the unacceptability of risk. The relevant test is whether there is an unacceptable risk of the commission of a serious terrorism offence. This test necessarily involves consideration of both the level of risk and the likely consequences were the risk to be realised. The bar of unacceptability is not likely to be high in terrorism cases. A slim risk of a catastrophic outcome may be unacceptable. (See, for example, *State of NSW v Naaman (No.2)* [2018] NSWCA 328; (2018) 365 ALR 179 at [29] at point (5)).[1]

9. The standard of proof is the level of satisfaction by the court that the risk is unacceptable. The competing standards are satisfaction: (a) beyond reasonable doubt; (b) to a high degree of probability; or (c) on the balance of probabilities.

10. The standard of proof is concerned with the quality of the evidence establishing the alleged risk, including the level of risk. The Law Council's position is that a much higher level of satisfaction than a bare balance of probabilities is required before serious restrictions are placed upon an offender who has been punished and served their sentence.

Present availability of intervention mechanisms

11. If the threshold in a particular case cannot be met for a post-sentence order, there are nonetheless extensive powers available to intelligence and law enforcement agencies to identify, prevent and disrupt activities of security concern. This includes powers to:

    - extensively monitor the person's movements, contacts and activities in the community; and
    - intervene, at a very early stage, if surveillance of that person produces evidence indicating that they are, or may be:
        - committing a preparatory terrorism offence, or assisting another person to do so; or
        - engaging in other activities that identify an unacceptable risk of the person engaging in terrorism related activity.

12. In particular, the following tools are presently available, which demonstrate that there is unlikely to be a material gap in the availability of preventive and disruptive powers if the standard of proof for issuing ESOs is aligned with the standard for CDOs, which the Law Council recommends should be the criminal standard:

[1] Basten, McFarlan and Leeming JJA stated, in relation to the reference to 'unacceptable risk' in section 20 of the *Terrorism (High Risk Offenders) Act 2017* (NSW): 'the Court is … to determine whether that risk is or is not "unacceptable". It is entirely possible that the Court might be very comfortably satisfied (ie to the requisite high degree of probability) that there is a slim probability of an unsupervised offender committing a terrorist act, and that that risk is unacceptable having regard to the consequences of the act, even if the probability of the risk eventuating is less than 50%'.

COs, based on proof of a person's post-release activities in the community

- it would be possible to obtain a CO in relation to that person, on the basis of an assessment **that their current conduct in the community post-release** (cf conduct which may be many years in the past) raised a risk of their engaging in terrorism-related activity, and there is an identified need to protect the community by placing prohibitions, restrictions or other limitations or conditions on the person's movements and activities;

- the conditions applicable to COs contain extensive surveillance powers;

Investigation and enforcement of security and other offences

- Chapter 5 of the Criminal Code contains an extremely wide range of preparatory and ancillary terrorism and other security offences (including offences in the nature of foreign incursions). This includes offences that specifically criminalise preparations and planning, and ancillary actions such as providing support for a terrorist act or to a terrorist organisation, or advocating violence;

- the preparatory and ancillary offences in Chapter 5 of the Criminal Code also operate in combination with the extensions of criminal liability in Chapter 2 of the Criminal Code, covering inchoate and ancillary offences such as attempting and conspiring to commit offences against Commonwealth laws, or aiding and abetting the commission of such an offence. For example, a person could be charged with, and convicted of, an offence for **attempting or conspiring** to prepare to commit a terrorist act; and

- the Australian Federal Police (**AFP**) has extensive investigatory powers in relation to the above offences, and to monitor a person's compliance with a CO. The arrest threshold for terrorism offences is also lower than other Commonwealth offences (being **suspicion** on reasonable grounds, rather than the standard of **belief** on reasonable grounds, which applies to the power of arrest in relation to all other Commonwealth offences);[2]

Intelligence collection powers (surveillance and compulsory questioning)

- in addition to law enforcement investigatory powers, the Australian Security Intelligence Organisation (**ASIO**) has extensive surveillance powers for the purpose of collecting intelligence that is important in relation to security. This includes including politically motivated violence, from which there is a need to protect Australia and Australians. Importantly, the Law Council notes that:

    - ASIO's surveillance powers are **not limited** to the investigation of terrorism offences. The High Court has held that intelligence will be relevant to security (and therefore able to form the basis of a security intelligence warrant) if it has a 'real connection' to security, which is judged by reference to what is known to ASIO at the time.[3] It can therefore include the collection of intelligence to determine whether a person is, or is not, a security risk, on the basis of fairly limited initial intelligence that suggests a person might be a security risk.
      (For example, such initial intelligence would likely include evidence about a person's future risk, which did not meet the higher thresholds recommended by the Law Council for the issuing of an ESO);

[2] *Crimes Act 1914* (Cth), section 3WA cf section 3W.

[3] *Church of Scientology v Woodward* (1982) 154 CLR 25 at 61 (per Mason J) and 73-74 (per Brennan J).

- it would be open to ASIO to apply for, and execute, special powers warrants to conduct surveillance of a person who is released from prison as part of its participation in Joint Counter-Terrorism Teams, which comprise relevant Commonwealth, State and Territory agencies;

- intelligence obtained by ASIO can be shared with law enforcement agencies, and used directly or derivatively by those law enforcement agencies in CO proceedings, and in the investigation and prosecution of a terrorism or security offence. Extensive protections for sensitive evidence (which may include ASIO's intelligence) are available under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) including court-only evidence mechanisms in CO proceedings; and

- ASIO also has compulsory, warrant-based questioning powers, which are presently exercisable to collect intelligence that is important in relation to a terrorism offence. A person need not be suspected of having committed a terrorism offence to be the subject of an ASIO questioning warrant. ASIO's compulsory questioning powers are proposed to be expanded significantly by a separate Bill presently under review by the Committee, and would cover all forms of politically motivated violence (as well as other heads of security);[4] and

Powers to stop a person from leaving Australia

- preventative powers are also available to prevent a person from leaving Australia, including powers to suspend and cancel travel documents on security grounds.

Risks in predicting a person's future dangerousness, prior to their release from imprisonment, for the purpose of an ESO

13. Applying a lower (civil) standard of proof to ESOs, as compared to CDOs or the criminal standard of proof, raises substantial risks in relation to the accuracy of predicting a person's future dangerousness within the community.

14. The Law Council's proposals to elevate the standard of proof for ESOs would mitigate this risk—while also enabling reliance on the wide range of significant preventive and disruptive powers outlined above, if the standard of proof for an ESO was not met.

15. Significantly, as members of the High Court[5] and United Nations Human Rights Committee[6] have noted, predicting future risk is an extremely fraught exercise, with often unreliable results. The fraught nature of that task is aggravated in relation to predicting a person's future risk of engaging in terrorism-related offending, due to the absence of an empirically validated and accepted risk assessment tool that is adapted specifically to the prediction of a person's future risk of re-offending.

[4] Australian Security Intelligence Organisation Amendment Bill 2020.

[5] *Fardon v Attorney-General (Qld)* (2003) 223 CLR 575, especially at [125] (per Kirby J), in which predictions of future dangerousness were identified as 'at best, an educated or informed guess' and were described as 'notoriously difficult' and 'unreliable'.

[6] *Tilman v Australia* Communication No. 1635/2007, U.N. Doc. CCPR/C/98/D/1635/2007 (2010): 'The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is **inherently problematic**. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science' (emphasis added).

16. The risk of error or miscarriage in predicting future risk is increased significantly in the context of the proposed ESO regime as drafted in the Bill, because of the combination of the following circumstances:

- ***Applying a low standard of proof to an already fraught predictive exercise:*** applying the lower, civil, standard of proof to an already fraught predictive exercise increases the risk of error in the application of the test of future dangerousness, and the assessment of individual ESO conditions;

- ***Limited reliability of evidence of past conduct:*** unreliable evidence may be used to predict a person's future risk, including evidence of:

  - the person's conduct in the community a long time ago. (That is, the person's actions before their conviction and lengthy sentence of imprisonment, noting that the high maximum penalties and limitations on parole eligibility generally result in long sentences of imprisonment); and

  - the person's conduct in the artificial environment of prison, while serving their sentence of imprisonment. (For example, the reliability of admissions, confessions or statements of future intent may be limited, because they can plausibly be motivated by a person's interactions with other prisoners, for example, a desire to fit in or to avoid being targeted);

- ***Lengthy duration of ESOs, and restrictive nature of conditions*****:** the predictions of a person's future dangerousness made for the purpose of issuing an ESO will result in the person being subjected to an unlimited range of conditions, for up to three years (that is, triple the length of time than for a CO);

- ***Exposure to a 'revolving door' of imprisonment, which may limit a person's prospects of rehabilitation:*** contravention of an ESO condition, even a technical breach, can expose a person to a further offence, punishable by up to five years' imprisonment. Further imprisonment for breach can harm a person's rehabilitation, and may increase their risk of future dangerousness, by:

  - removing them from the community, and therefore removing or severely curtailing their access to family and community support systems, including employment and engagement with counsellors, mentors and other positive influences in the community; and

  - potentially exposing them to a learning environment for further crime or radicalisation in a prison environment, which may neutralise the effect of any rehabilitative services that may be available in prison (which may, in any event, be inadequate for the person's needs); and

- ***Limitations in legal assistance:*** as the Law Council has previously noted, there are severe deficiencies in existing arrangements for legal assistance for respondents, both in responding to ESO applications, and in seeking variations of ESO conditions or cancellation of orders. This creates a risk that there will not be an effective contradictor to the case advanced by the applicant in ESO proceedings, about whether an ESO should be issued and, if so, the conditions of that order. In turn, this raises a risk of miscarriage in the exercise of judicial discretion in the making of orders.

17. The extensive range of measures listed above provide a secure basis for dealing with risk **on the basis of proof of their current conduct within the community,** which strikes a proportionate balance between community safety and Australia' human rights obligations.

Limitations in the effectiveness of protective conditions: example of the 2019 London Bridge attack

18. Finally on the issue of the standard of proof for ESOs, the Law Council notes that a prohibition or limitation on a person's conduct, such as that imposed under an ESO or a CO, is unlikely to prevent a person from engaging in terrorism or other acts of violence if they are determined to do so, and are determined to undertake counter-surveillance and counter-intelligence measures conceal that intention from authorities and other persons known to them. This would be so irrespective of the standard of proof that applies to ESOs (or COs). In these circumstances, security will depend on existing intelligence and law enforcement powers to arrest a person who is, for example, encouraging, planning or taking preparatory steps in relation to an attack.

19. As to the effectiveness of supervisory orders, the Law Council notes that the person responsible for the 2019 London Bridge attacks, Mr Usman Khan, was under release on temporary licence (the UK equivalent of parole) at the time of his offending, having been previously convicted and sentenced to imprisonment for terrorism-related offences in 2012.

20. At the time of the 2019 attack, Mr Khan was reportedly subject to 22 licence conditions, including that he wore an electronic monitoring device to track his location.[7] As the UK Independent Reviewer of Terrorism Legislation has observed, 'increasingly, licence conditions given to released terrorist prisoners resemble the conditions that may be attached under Terrorism Prevention and Investigation Orders' (the latter type of order being the UK's broad equivalent to Australia's COs).[8]

21. The Law Council also notes that post-incident reviews of various 'lone wolf' terrorism incidents in the UK have identified limitations in the prioritisation of surveillance of individuals who are known to intelligence and law enforcement agencies, and further limitations in information-sharing and decision-making about the taking of early disruptive actions or other interventions.[9]

22. It may be that making enhancements to these operational matters ultimately proves more effective than the enactment of further legislation to impose additional, and unlimited, conditions on a person's post-release activities within the community.

23. In considering the evidence of post-sentence crimes committed by convicted terrorist offenders, in the context of assessing the legislative design of the proposed Commonwealth ESO regime, it is important to acknowledge that similar sorts of conditions had already been imposed on the perpetrator of the 2019 London Bridge incident, and nonetheless failed to prevent that attack.

Differences between ESO conditions and CO conditions

24. Secondly, Mr Dreyfus asked Law Council witnesses about areas in which the proposed, non-exhaustive ESO conditions listed in new subsections 105A.7B(3) and (5) of the Criminal Code are more expansive than the CO conditions in existing subsections 104.5(3)-(6) of the Criminal Code.

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[7] See, for example, BBC News, 'London Bridge: What we know about the attack', 3 December 2019, www.bbc.com/news/uk-uk-50594810.

[8] Jonathan Hall QC, Independent Reviewer of Terrorism Legislation (UK), *The Terrorism Acts in 2018: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts of 2000 and 2006*, (March 2020), 148 at [7.52].

[9] David Anderson QC, *Attacks in London and Manchester, March June 2017: Independent Assessment of MI5 and Police Internal Reviews*, (December 2017), Chapter 3 generally.

Detailed comparison (see Attachment 1)

25. At the public hearing, the Law Council's witnesses identified that the proposed ESO regime contains significantly broader monitoring powers (including entry to premises and use of force) than the CO regime, as well as conditions to compel a person's participation in education, counselling and psychological assessment.

26. As the Law Council's witnesses also noted at that hearing, these matters are not exhaustive of the significant expansions proposed in the ESO regime. The comparative table at **Attachment 1** provides a detailed analysis of individual conditions and itemises the expansions in proposed subsections 105A.7B(3) and (5).

Highlights of key proposed expansions of ESO conditions

27. To aid review of the detailed comparative analysis of ESO conditions at **Attachment 1**, the Law Council draws particular attention to the following proposed expansions:

- ***Prohibitions in relation to 'classes' of places and persons:*** the proposed ESO regime includes conditions which prohibit or limit a person's presence at classes of places, and their association with classes of persons, in addition to prohibitions or limitations on presence at specified places, and association with specified individuals (as is presently the case under COs). Further:

  - there are no limitations on what may constitute a 'class' of places or persons for this purpose. For example, could entire States, Territories, regions or countries be classified as a 'class' of places? Could large segments of the public be classified as a 'class' of persons? and

  - it is no answer to state that the risk of potential overbreadth is capable of management by the exercise of judicial discretion in individual ESO applications, given:

    - the low standard of proof proposed for ESOs, coupled with the extremely fraught nature of predicting future risk (noted above);

    - the gravity of consequences of such ESO conditions for an individual (namely, the criminalisation of otherwise lawful conduct), combined with the absence of a judicial requirement to have regard both the individual and cumulative impact of such conditions on the person; and

    - the high risk of a serious inequality of arms as between the Commonwealth as applicant for an ESO, and the offender as respondent, given the deficiencies identified by the Law Council in both the legislative framework and funding arrangements for the provision of legal assistance to ESO respondents;

- ***Compulsory participation in counselling and education:*** the ESO regime would include powers to impose conditions which compel a person to attend counselling and education, without the consent requirement presently applicable to the inclusion of such conditions in COs.

  Again, the Law Council submits that it is no answer to suggest that the imposition of a condition compelling a person to attend counselling, under penalty of liability to criminal prosecution, is simply a matter for the exercise of judicial discretion in individual ESO applications. The Law Council's concerns in the above point about the circumstances in which a court is required to make

a decision in an ESO application (regarding the lower the standard of proof, gravity of consequences and risks of inequality of arms as between applicant and respondent) also apply equally to this point;

- ***Absence of safeguards in relation to rights to have contact with family:*** under the proposed ESO regime, there is no prohibition on a non-association condition that would prevent a person from having contact with close family members in relation to genuine matters of domestic concern (as there is presently for COs);

- ***Absence of safeguards in relation to forced relocation, and forced disqualification from employment:*** the proposed conditions in the ESO regime to prohibit a person from being present at a place, or class of places, do not contain any safeguards against forced relocation orders, or orders that would disqualify a person from their current employment, education or training, if their workplace(s) or educational institution(s) fell within a class of places.

  - ***Forced relocation:*** the proposed power to prohibit a person from being present at a 'place' could, on the ordinary meaning of the word 'place', include the person's residence. This risk is particularly significant in view of the proposed power to prohibit a person's presence at a **class of places**, with no statutory limitation on the breadth of a 'class' of place able to be prescribed. This could effectively force a person to relocate to a new residence, which is a considerable distance away from their usual residence. Consequently, they may be isolated from their family, friends and usual social support systems. This may also expose a person to significant, unintended hardship in commuting to and from their place of employment, education or training. It may also expose the person to significant financial and other hardship in finding new housing (including financial hardship because they may have continuing obligations to service a mortgage or lease on their former place of residence); and

  - ***Forced disqualification from employment:*** a condition prohibiting a person's presence at a particular place or class of places could operate as a *de facto* exclusion from their present employment, education or training, if their place or places of employment or education fall with the specified place or classes of places. The proposed ESO conditions contain no limitations, qualifications or other guidance in relation to this matter. There is also no specific statutory safeguard against the risk of oppression as a result of the separate proposed ESO condition to place prohibitions or limitations on a person's engagement in particular employment or educational activities

- ***Effective delegation of powers to members of the executive government:*** numerous ESO conditions will require a person subject to an ESO to comply with directions given, or other requirements imposed, by a 'specified authority'. In some cases, an ESO condition can permit a 'specified authority' to prescribe further or different matters at their complete discretion, which may be in addition to, or in substitution of, the obligations stipulated in the ESO itself. A 'specified authority' can be any individual person, or class of persons, specified in ESO. This creates significant uncertainty, and amounts to an extremely broad delegation of power to the executive; and

- ***Extremely broad monitoring powers:*** the monitoring powers for ESOs are far broader than those available under COs, and overlap with the warrant or authorisation-based powers that are also proposed to be available for ESOs. They include requirements for the person to:

- submit to testing for specified substances;
- allow 'specified authorities' to enter the person's premises at any time to monitor the person's compliance with curfew conditions;
- allow 'specified authorities' to enter the person's premises at any reasonable time for purposes 'relating to' the electronic monitoring of a person; and
- carry, at all times, a specified mobile phone, and answer or promptly return all calls made to that phone by a 'specified authority'.

Response to arguments of Government witnesses in favour of an unlimited range of ESO conditions

28. The Law Council notes that representatives of the Attorney-General's Department gave evidence at the Committee's public hearing on 13 November 2020, which provide further, limited justification for the proposal to expand the range of ESO conditions as compared to the present CO conditions.

29. This evidence was to the effect that an unlimited range of ESO conditions was considered appropriate because:

- some State and Territory post-sentence regimes enable courts to impose **any condition** that they consider is necessary or appropriate, it is also appropriate for a Commonwealth ESO regime to emulate that approach, and enable an unlimited range of conditions to be imposed under an ESO; and
- in any event, the imposition of individual conditions in an ESO is a matter for judicial discretion, in accordance with the statutory issuing tests in the Bill.

30. For the reasons explained below, the Law Council urges the Committee not to endorse this position, because it:

- overlooks crucial differences between the proposed Commonwealth regime and those of States and Territories, as well as evidence of the Crown's approach to conditions sought under State regimes; and
- appears to assume, incorrectly, that judicial discretion is an effective 'cure' for the significant risks arising from an unlimited range of ESO conditions (as noted above).

Suggested alignment with State and Territory ESO regimes

31. The Law Council cautions strongly against the wholesale adoption of a measure purely because it presently exists in some jurisdictions' post-sentence regimes.

32. This is particularly so in the absence of evidence that these regimes are effective. There is a significant risk, which seems to have materialised in New South Wales, that the applicant for an ESO will routinely apply for a suite of 'standard' conditions devised by the applicant. (See, for example, *State of New South Wales v Sturgeon (No.2)* [2019] NSWSC 883 at [100]-[103].)[10] This may result in injustice to individual

[10] Note, in particular, the comments of Garling J at [101]-[102] about the approach taken by the State of New South Wales to the imposition of conditions on a supervision order under the *Crimes (High Risk Offenders) Act 2006* (NSW). Garling J observed that, during the hearing, counsel for the Crown sought certain conditions 'to prohibit some conduct in respect of which there was no risk that the defendant would engage in it'. His Honour stated that 'this approach does not accord with the duty of any party in civil proceedings. Rather,

respondents, unnecessary engagement of monitoring resources, and very significant court resources being taken up with arguments about conditions.

33. Further, while it is the case that some State and Territory regimes permit an unlimited range of conditions to their supervisory orders, it is also the case that the several distinguishing factors apply to State and Territory regimes. These factors, which are outlined under the two subheadings below, are not present in relation to the proposed Commonwealth terrorism specific ESO regime.

Wider coverage of offences under State and Territory regimes

34. State and Territory post-sentence regimes cover a far wider variety of offences, which are not consistent across all State and Territory regimes. There is considerable variation in the coverage of various types of violent offending, and in some cases, violent and sexual offending are combined into a single post-sentence scheme.

35. This wide coverage of extremely variable types of offending necessarily makes it less feasible for those State and Territory regimes to prescribe an exhaustive range of statutory conditions for their post-sentence orders, given the multiplicity (and significant diversity) of future risks being regulated under a single statutory supervisory regime. For example, the risk profile and specific risk factors applying to a convicted child sex offender will conceivably differ entirely from those applicable to a violent offender, who has demonstrated a pattern of behaviour in committing serious offences against the person, such as murder and grievous bodily harm.

36. This consideration **does not** apply to the proposed Commonwealth ESO regime, which is limited to an assessment of a very specific type of risk of future offending—namely, the person's risk of committing a **serious terrorism offence**.

Higher standard of proof for State and Territory regimes

37. All States and Territories, except South Australia, operate according to a higher standard of proof in relation to future risk, and the necessity and proportionality of individual conditions, in relation to their post-sentence supervisory regimes. This is the standard of 'a high degree of risk'.

38. In sharp contrast, the Commonwealth would be an 'outlier' with the majority of jurisdictions, by adopting the civil standard of proof for terrorism related ESOs.

Overreliance on judicial discretion as a safeguard

39. The Law Council also notes that the determinative weight that governmental witnesses appear to have given to the role of judicial discretion, as a safeguard against the risks arising from an unlimited range ESO conditions, does not take adequate account of the very significant limitations arising from the circumstances in which that discretion is exercised.

40. As members of the High Court have observed repeatedly, not only is the prediction of a person's future risk of offending 'notoriously unreliable at the best of times'[11] but that exercise is also of a kind that 'do[es] not in any way partake of the nature of legal

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it suggests that the State is seeking to avoid its obligation to seek conditions which relate to the risk posed by the particular defendant, and instead to proceed by asking for all standard conditions as a matter of course regardless of the evidence and their relevance to a defendant'. The Law Council considers that the risk of such practices, and their major adverse impacts on respondents and court resources, is greatest where there is an unlimited suite of conditions available under a supervisory order. This risk should be eliminated from the proposed Commonwealth ESO regime, via the statutory prescription of a finite range of potential conditions.

[11] *Fardon v Attorney-General (Qld)* (2003) 223 CLR 575 at [169] (per Kirby J).

proceedings'.[12] That is, proceedings for a post-sentence preventive order 'do not involve the resolution of a dispute between contesting parties as to their respective legal rights and obligations' which is the core of judicial power and, consequently, the focus of courts' adjudicative expertise.[13] Rather, ESO proceedings are 'directed to making a guess'[14] about the person's future conduct, and applying significant restraints on liberty on the basis of that 'guess'.

41. As such, the significant departure of the proposed ESO regime from 'past and present notions of the judicial function in Australia'[15] significantly reduces the degree of weight that can reasonably be given to judicial discretion as a safeguard against the risks of error, oppression, arbitrariness and significant diversion of court and other public resources that arise from the existence of an unlimited range of ESO conditions.

42. It should also be acknowledged that the State post-sentence regimes that were the subject of the strong judicial criticisms quoted above were directed principally to sexual offenders, and utilised risk assessment frameworks that were based on psychiatry, with a focus on risks arising from a diagnosable mental illness.

43. In contrast, the Commonwealth post-sentence regime for terrorism offenders does not operate on the basis of a body of medical expertise and diagnosable illness, and lacks an empirically verified foundation for predicting future risk of committing specific terrorism offences. Consequently, the judicial criticisms quoted above about the unreliability of predictions of future risk, and their inconsistency with the core focus of judicial power (and consequently, judicial expertise), have even stronger force in relation to the post-sentence regime in Division 105A of the Criminal Code.

44. Moreover, the inherently fraught and unreliable nature of the task of predicting future risk is aggravated in the context of the proposed Commonwealth ESO regime for two reasons. First, the proposed ESO regime requires these inherently fraught predictions to be made, and highly restrictive conditions imposed, on the basis of a low standard of proof (being the civil standard).

45. Secondly, given the critical limitations that the Law Council has previously identified in the availability of legal assistance funding for respondents in proceedings for post-sentence orders, there is a serious risk that the court will be required to undertake this fraught predictive exercise, on the basis of a low standard of proof, in the absence of an effective contradictor. This risk is further compounded by the absence of dedicated financial assistance arrangements for respondents to engage their own 'relevant experts' who are independent of any person or persons appointed by the Minister at the pre-application stage, or by the court during proceedings.

46. These factors, together with the gravity of the consequences of ESO conditions on the individual (and their families and associates),[16] make it essential that sole or primary reliance is not placed on judicial discretion as the effective 'cure' for the significant and real risks arising from an unlimited suite of potential ESO conditions.

[12] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at [22] (per Gaudron J).

[13] Ibid.

[14] Ibid.

[15] *Fardon v Attorney-General (Qld)* (2003) 223 CLR 575 at [125] (per Kirby J).

[16] It should be noted that the grave consequences for an individual do not merely arise from the restrictive nature of the ESO conditions to which they are subjected for a prolonged period (up to three years, subject to unlimited renewal). They also expose a person to a significant criminal penalty for contravention (up to five years' imprisonment), further post-sentence orders, and highly intrusive surveillance and monitoring for the duration of the order, without suspicion that the person is contravening an ESO condition.

Law Council's recommended approach to ESO conditions

47. For the reasons given above, the Law Council cautions against the selective adoption of arguments in favour of national consistency; and an assumption that judicial discretion will necessarily cure the significant risks presented by the absence of statutory prescription of the range of conditions available under an ESO.

48. Rather, the legislative features of a Commonwealth post-sentence supervisory regime for terrorist offenders should be determined solely by reference to the specific circumstances surrounding that regime. This principle led the third Independent National Security Legislation Monitor to recommend that the range of conditions available for ESOs should be identical to those presently available for COs.

Stronger facilitation of accuracy in tailoring conditions to manage future risk

49. As the Law Council has noted its previous evidence, and in the above comments, the drawing of inferences about a person's future risk of engaging in terrorism-related offending is a fraught and highly uncertain exercise. In ESO proceedings, the court must assess whether each ESO condition sought by the Minister for Home Affairs is necessary and proportionate to the risk that has been identified.

50. The wider the range of conditions able to be imposed under an ESO—especially under the lower, civil standard of proof—the greater the risk of error in predictions about future risk of terrorism-related offending in this highly volatile and uncertain context. The Law Council therefore recommends that there should be a fixed range of conditions, from which a court may select in considering an ESO application. (See further **recommendation 4** of the Law Council's main submission.)

Stronger oversight and approval role for the Parliament

51. Importantly, under the Law Council's recommended approach, the Australian Parliament would play a critical and strong role in specifically approving each type of condition able to be included in an individual terrorism related ESO, by passing legislation prescribing those conditions (or declining to do so, as appropriate).

52. The upshot of this approach is that a detailed case will need to be made to the Parliament, in the future, about the specific inadequacies identified in the existing range of ESO conditions, and the need to address them via additional proposed conditions that will be open the Minister to seek, and courts to impose, in individual ESOs. The requirements of particularity in establishing this case would far exceed the general appeal that governmental witnesses have made to operational flexibility.

53. Rather, under the Law Council's recommended approach, it would be incumbent on the Parliament to scrutinise and be satisfied of the merits of proposals for **each additional type of condition sought from time-to-time**. This would include a detailed assessment of the stated, specific operational case of the particular conditions sought to be included in the regime (including evidence of the security risks that are sought to be addressed). It would also require detailed assessment of the human rights and other implications of each proposed expansion of the range of conditions available, to ensure their proportionality.

54. The Law Council considers that legislative endorsement of an open-ended and unlimited range of ESO conditions would represent a sub-optimal use of legislative power, which would miss an opportunity to enshrine adequate protection against overbreadth and error, while also facilitating a workable protectie regime with a broad but fixed range of potential conditions. Judges are not legislators with complete discretion, but rather must assess the proposed conditions put before them in applications (subject to all of the significant constraints identified above).

Attachment 1:
Comparison of current CO and proposed ESO conditions

CO conditions: **existing ss 104.5(3)-(6)**	**ESO conditions:** **proposed ss 105A.7B(1), (3) and (5)** **(Bill, Schedule 1, item 87: pp. 34-37)**
Limited range of conditions **104.5(3):** the conditions that the court may impose are as specified in paragraphs (a)-(l), as qualified or supplemented by subsections (4)-(6)).	**Unlimited range of conditions *(broader than COs)*** **105A.7B(1):** court may impose any condition, it satisfied, on the balance of probabilities, the condition is necessary and proportionate to the purpose of protecting the public from an unacceptable risk of the offender committing a serious terrorism offence. Subsections (3) and (5) set out non-exhaustive conditions that the issuing court may impose.
104.5(3)(a)-(l): exhaustive conditions for COs ***Places*** **(a)** prohibition or restriction on the person being at specified areas or places. <u>Note on relocation orders under s 104.5(3)(a):</u> In May 2018, the Government declined to implement a recommendation of the second INSLM, the Hon Roger Gyles AO QC (2016) and the COAG Review of Counter-Terrorism Laws (2013) that there should be an express prohibition on relocation orders, to ensure that the prohibitions and restrictions in this condition were not applied to a person's primary place of residence. However, this was on the basis that the recommendation was considered unnecessary because there is no explicit CO condition permitting a relocation order. The Law Council disagrees with that reasoning, because a 'place' in s 104.5(3)(a) could, the ordinary meaning of that term, include a person's residence. This was the very concern which the second INSLM sought to address, by removing any possibility that such an interpretation could be adopted by the AFP in an individual CO application. In any event, the non-exhaustive nature of the proposed ESO conditions means that the Government's reasons for rejecting the second INSLM's recommendations in the CO context **do not apply** to the proposed ESOs regime.	**105A.7B(3)(a)-(r): 'General conditions' for ESOs which correspond with those in the CO regime** ***Places (broader than COs)*** **(a)** in addition to prohibiting or restricting presence at specified areas or places, can also prohibit or restrict presence at: • classes of areas or places, and • any other area or place determined by a 'specified authority' (any person specified in the order). **(b)** residency requirements (requirement to reside at specified premises, unless permission is granted in writing by a 'specified authority' with no statutory conditions or process for the granting of permission). <u>Note on relocation orders under s 105A.7B(3)(a):</u> Proposed paragraph 105A.7B(b) could amount to a relocation order ***(see comments at left).***
Travel **(b)** prohibition or restriction on the person leaving Australia.	***Travel (broader than COs)*** **(d)** equivalent prohibition on the person leaving Australia, but also includes a <u>prohibition on leaving State or Territory or usual residence</u>. **(e)** requirement to surrender passport(s) **(g)(i) and (ii)** prohibition on applying for travel documents (Australian and foreign travel documents).

CO conditions: existing ss 104.5(3)-(6)	**ESO conditions: proposed ss 105A.7B(1), (3) and (5) (Bill, Schedule 1, item 87: pp. 34-37)**
Curfews **(c)** curfew requirement (up to 12 hours per day).	***Curfews*** ***(broader than COs due to related monitoring power)*** **(c)** equivalent to COs, but see additional condition: **105A.7B(5)(g):** obligation to allow a specified authority to visit the premises that are the subject of a curfew order, at any time, for the purpose of monitoring compliance with the curfew.
Tracking devices **(d)** person must wear a tracking device. **The court must also impose the obligations in s 104.5(3A)** to: • take the steps (if any) specified in the CO to keep the device and any equipment necessary for its operation in good working order • report, as specified in the CO, for the purpose of having the device inspected; • notify the AFP, no later than four hours after becoming aware that the device is not in good working order.	***'Electronic monitoring devices' (s 105A.7B(5))*** ***(broader than COs)*** **105A.7B(5)(d):** obligation to allow themselves to be subject to electronic monitoring, including wearing an electronic monitoring device and complying with directions given by a specified authority in relation to electronic monitoring. Court must also impose conditions in **s 105A.7E,** including obligations to keep the device in good working order, and allow a specified authority to enter the person's residence at any reasonable time, for any purpose relating to the electronic monitoring of the offender. Other monitoring conditions that may be imposed in **s 105A.7B(5)** include**: (c)** an obligation to carry, at all times, a specified mobile phone, and answer or return promptly all calls from a specified authority. (This condition is not limited to circumstances in which a court imposes monitoring conditions, but must be imposed if monitoring conditions are imposed. The court has no discretion in the matter.)
Non-contact and non-association **(e)** prohibition on communicating or associating with specified individuals. This is subject to s 104.5(4), which provides that a non-association condition cannot prevent a person from associating with a close family member for genuine matter of domestic concern. Also subject to s 104.5(5) which prevents a non-association or contact condition from prohibiting a person to communicate or associate with their lawyer. If a particular lawyer is specified in a non-contact or association condition, the person is permitted to contact any other lawyer who is not so specified.	***Non-contact and non-association*** ***(broader than COs)*** **(h)** prohibition on contacting or associating with classes of persons, and individuals determined by a specified authority (in addition to specified individuals). Contact with family: No exemption for contact or association with close family members for matters of domestic concern. Contact with lawyers: However, there is an equivalent safeguard to COs regarding contact with lawyers: **s 105A.7B(7).**
ICT access **(f)** prohibition or restriction on accessing or using specified forms of telecommunication (including the internet).	***ICT access*** ***(same as COs)*** **(i)** same as corresponding CO condition.
Possession and use of articles / substances **(g)** prohibition on possessing or using specified articles or substances.	***Possession and use of articles / substances*** ***(broader than COs due to related monitoring power concerning testing requirements)*** **(j)** same as corresponding CO condition, but additional monitoring requirements apply, as follows: A person is subject to testing condition in **s 105A.7B(5)(a):** requirement to submit to testing by a

CO conditions: existing ss 104.5(3)-(6)	**ESO conditions: proposed ss 105A.7B(1), (3) and (5) (Bill, Schedule 1, item 87: pp. 34-37)**
	specified authority in relation to the possession or use of specified articles or substances, which can include but is not limited to testing for the purpose of monitoring compliance with a condition imposed under s 105A.7B(3)(j)).
Activities (including work) **(h)** prohibition or restriction on carrying out specified activities (including work or occupation).	***Activities (including work) (broader than COs)*** **(k)** prohibition on carrying out specified activities. **(l)** prohibition on specific work or classes of work, or specified activities relating to specified work or classes of work (including voluntary work). **(m)** prohibition on undertaking any education or training without prior permission of a specified authority (with no process or criteria for granting permission).See also, conditions in **(g)(iii):** prohibition on applying for any licence to operate equipment, machinery or a heavy vehicle, or a weapons licence.
Reporting **(i)** requirement to report to specified persons at specified times.	***Reporting (broader than COs)*** **105A.7B(5)(f):** requirement to report to persons specified in order, at times specified in order or as directed by a specified authority.
Photographing and fingerprinting **(j)** requirement to allow themselves to be photographed; and **(k)** requirement to allow themselves to be fingerprinted.	***Photographing and fingerprinting (same as COs)*** **105A.7B(5)(b) and (c):** same as corresponding CO conditions.
Counselling / education **(l)** requirement to participate in specified counselling or education. **Subject to s 104.5(6)** which provides that a counselling or education condition may only be imposed if the controlee consents.	***Counselling / education / assessment (broader than COs)*** **(n)(i)** requirement to attend and participate in treatment, rehabilitation or intervention programs or activities, as specified in the order or as directed by a 'specified authority' (with no criteria, conditions or limitations on power of direction). **(n)(ii)** requirement to undertake psychological or psychiatric assessment or counselling, as specified in the order or as directed by a 'specified authority' (with no criteria, conditions or limitations on power of direction). **(o)** requirement to attend and participate in interviews and assessments (including those in para (n) but not so limited) as specified in the order **or** as directed by a specified authority (with no criteria, conditions or limitations on power of direction). **(p)** requirement to permit disclosure of results of interviews and assessments and any other specified information to a 'specified authority'. (***Continued)*** ***Absence of corresponding safeguards in COs*** No consent requirement equivalent to COs. No limitation of conditions other than (n)(i) to the purpose of offender's rehabilitation.

CO conditions: **existing ss 104.5(3)-(6)**	**ESO conditions:** **proposed ss 105A.7B(1), (3) and (5)** **(Bill, Schedule 1, item 87: pp. 34-37)**
No other conditions ***(ie, no equivalent to corresponding ESO conditions noted at right).*** CO conditions are limited expressly to those in s 104.5(3) as outlined above.	**105A.7B(3)(a)-(r): 'General conditions' for ESOs which have no equivalent in the CO regime** ***(broader than COs)*** **(f)** prohibition on changing the person's name, or using any name that is not specified in the ESO. **(r)** requirement to comply with 'any reasonable direction' given by a 'specified authority'. Subject to requirement in **s 105A.7B(4)** that the specified authority must be satisfied the direction is 'reasonable in all of the circumstances' to give effect to an ESO condition, or the objects of Division 105A.
Monitoring conditions ***No equivalent to corresponding ESO conditions*** No specific monitoring conditions beyond reporting, and inspection of tracking devices. Monitoring is otherwise done via the CO monitoring powers under the *Crimes Act 1914* (Cth), *Telecommunications (Interception and Access Act 1979* (Cth) and *Surveillance Devices Act 2004* (Cth). These include warrant-based powers to intercept telecommunications, use surveillance devices, and gain remote access to computers. They also include internally authorised access to telecommunications metadata. The Telecommunications Legislation Amendment (International Production Orders) Bill 2020 also proposes to expand International Production Orders (authorising access to offshore communications content and data) to CO monitoring.	**105A.7B(5): 'monitoring conditions' which have no equivalent in CO regime *{broader than COs)*** **(h)** obligation to provide schedule of intended movements to a specified authority, and comply with that schedule **(i)** obligation to allow any police officer to enter premises specified in the ESO regime and conduct a search of the offender and the premises, and seize any item **(j)** obligation for the offender to facilitate access to electronic equipment or technology, or any data held or, or accessible from, such equipment or technology (eg, giving passwords) **Subject to the requirement in s 105A.7B(6):** these powers must be exercised only if the person exercising the power is satisfied it is reasonably necessary to give effect to the ESO, or facilitate or monitor compliance with a condition of the ESO. **Additional monitoring powers** The powers under s 105A.7B(5) conditions are additional to further proposals to extend the warrant and authorisation-based monitoring powers, comparable to those presently available for COs. The monitoring conditions in proposed s 105A.7B(5) are also additional to the proposal to amend the Telecommunications Legislation Amendment (International Production Orders) Bill 2020 to expand International Production Orders (authorising access to offshore communications content and data) to ESO monitoring (as well as CO monitoring).