Law Council
OF AUSTRALIA

Supplementary Submission:

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

Parliamentary Joint Committee on Intelligence and Security

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Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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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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- Law Society of South Australia
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The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council gratefully acknowledges the assistance of members of its National Criminal Law Committee in the preparation of this supplementary submission.

Executive Summary

1. The Law Council of Australia thanks the Parliamentary Joint Committee on Intelligence and Security (**Committee**) for the invitation to comment on Supplementary Submission 5.3, in which the Attorney-General's Department and Department of Home Affairs identified the Government's intention to move certain amendments to the Bill under inquiry (**HRTO Bill**).

2. The proposals outlined in Supplementary Submission 5.3 appear to derive from an assessment of parts of the judgment on the first application for a continuing detention order (**CDO**), in *Minister for Home Affairs v Benbrika* [2020] VSC 888 (24 December 2020) (***Benbrika***) as well as an assessment of the attributes and circumstances of the present cohort of offenders who are eligible for CDOs upon their release.

3. There has not yet been an opportunity to comment on the text of any proposed amendments, which would be essential to the Law Council's ability to form a definitive policy position on the proposals described in Supplementary Submission 5.3. However, Supplementary Submission 5.3 provides the following general description of two proposals under consideration, at [4]:

   (a) *in all circumstances, extended supervision orders (**ESOs**) and control orders [**COs**] can commence where a person is in immigration detention, and ensure that the conditions of the orders remain enforceable against an offender who is in immigration detention.*

   (b) *ESOs and [COs] are the only measures to be considered by a state or territory Supreme Court when deciding whether there is a 'less restrictive measure' to a continuing detention order (**CDO**) that would be effective in preventing the unacceptable risk posed by an offender.*

4. The Law Council's initial policy position, based on the short description of the proposed amendments in Supplementary Submission 5.3, is listed on the following page, and explained in the balance of this supplementary submission. In brief, the Law Council's views are:

   - proposal (a) should not proceed unless and until further evidence of its necessity can be established, and further statutory safeguards in the issuing criteria for post-sentence orders are included; and
   - proposal (b) should not proceed at all, either in the HRTO Bill or in any future legislative vehicle.

5. The Law Council provides these initial views with the caveat that it is likely to have further comments on the text of any proposed amendments, should the Government decide to proceed with the proposals. The Law Council would therefore welcome an opportunity to review and comment on the legislative text in due course.

Overview of Law Council policy position on the proposals

Summary of position on proposal (a)

6. In relation to proposal (a), concerning the commencement of ESOs and COs while a person is held in immigration detention, the Law Council's position is as follows:

(1) **Necessity:** this measure should not proceed unless evidence of its necessity is provided, over and above the extensive restrictions and limitations that can already be applied under the *Migration Act 1958* (Cth) (**Migration Act**) to persons who are in immigration detention, including persons whose visas are cancelled on character grounds; and

(2) **Proportionality:** if the Committee is persuaded that the measure is necessary, further safeguards are required, including the following:

(a) there should be no power 'at large' for a CO to commence, or continue in force, while the subject of that order is in immigration detention. This would ensure that the only circumstances in which a preventive order under Part 5.3 of the Criminal Code could commence or continue in force while a person is in immigration detention would be if that person has been determined by a court to be a 'high-risk terrorist offender' under Division 105A of the Criminal Code and is the subject of an ESO issued under that Division (if the HRTO Bill is passed).

Importantly, this narrower application would ensure that the onerous obligations under post-sentence orders under Part 5.3 of the Criminal Code (and the ensuing exposure of the subject to criminal liability for breaching the conditions of an order) could only apply to persons who are in immigration detention, if those persons are high-risk terrorist offenders who are subject to ESOs that are issued (but not commenced) prior to their release, and are immediately transferred to immigration detention upon completion of their criminal sentences of imprisonment, because their visas have been cancelled or their dual Australian citizenship has ceased on terrorism-related grounds.

This approach would remove the possibility that a CO and immigration detention could be relied upon, in combination, to provide a form of 'repechage' for a failed ESO (or CDO) application in relation to a high-risk terrorist offender (or to remediate an administrative failure to make an application for a Division 105A order in the requisite timeframe before the offender is released from prison, and immediately thereafter taken to immigration detention).

This approach would also prevent the unexplained and potentially intended consequence that proposal (a) would enable the significant obligations, prohibitions and liabilities available under COs to apply much larger cohort of persons who are in immigration detention than merely high-risk terrorist offenders. (For example, without the Law Council's suggested limitation, COs could be issued and take effect in respect of asylum seekers who arrive in Australia without a valid visa and are taken into immigration detention. Supplementary Submission 5.3 does not acknowledge, and consequently does not provide justification for, this possibility); and

(b) in any event, the statutory issuing criteria, conditions, associated breach offences, and periodic review requirements for ESOs, as proposed in the HRTO Bill, should be amended to take explicit account of the subject's

circumstances, as a person being held in immigration detention, in line with this submission (see especially paragraphs [32]-[58]). Equivalent amendments should also be made to the CO regime, should the Committee take a different view to the Law Council in relation to the matter at item (1)(a) above.

Summary of position on proposal (b)

7. Proposal (b) seeks to confine judicial discretion in the factual identification and assessment of less restrictive measures to a CDO under paragraph 105A.7(1)(c) of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).

8. The Law Council's position is that proposal (b) should not proceed. It would be an inappropriate fetter on judicial discretion in the making of findings of fact which are essential to an assessment of the necessity and proportionality of continuing detention. Questions of proportionality are also material to the human rights compatibility and constitutionality of the CDO regime.

Summary of position on common issues to both proposals

9. If the Government proceeds with either or both of the measures described in Supplementary Submission 5.3, the Law Council suggests that text of any proposed amendments should be referred to the Committee for review and report.

10. Such a review should provide an adequate opportunity for non-government stakeholders, including the Law Council, to review and make submissions on the proposed legislation. Any programming of Parliamentary debate should also await the completion of final reports by the Senate Scrutiny of Bills Committee and Parliamentary Joint Committee on Human Rights on the proposed amendments, and ensure that all Parliamentarians will have had an adequate opportunity to consider all committee reports prior to debate.

11. The timing for the debate and passage of any proposed amendments should be compatible with effective Parliamentary and public scrutiny. If the Government proceeds with either or both of the proposals described in Supplementary Submission 5.3, the Law Council emphasises that any urgency for the desired passage of the HRTO Bill, due to the need to establish an ESO regime, should not be used as a basis for bypassing or truncating opportunities for thorough Parliamentary and public scrutiny of the additional proposals.

12. Rather, it would be preferable for the proposals described in Supplementary Submission 5.3 to be progressed in a separate Bill, to ensure that reasonable time and focus is devoted to their scrutiny, which is commensurate with the gravity of their legal consequences.

Proposal (a): ability for ESOs and COs to commence when the subject is in immigration detention

13. In principle, the Law Council does not categorically oppose a power for ESOs to commence, or continue in force, while the subject is being held in immigration detention, following their release from prison after completing a sentence of imprisonment for a 'serious terrorism offence' within the meaning of Division 105A of the Criminal Code. (However, for the reasons explained below, the Law Council is categorically opposed to COs being capable of commencing, or continuing in force, while the subject is in immigration detention.)

14. As the Australian Human Rights Commission (**AHRC**) has noted in its supplementary submission on the proposals in Supplementary Submission 5.3,[1] a judicially issued order such as an ESO, which imposes conditions that are directed specifically to an individual's level of risk as determined by a court, may be more likely to result in the imposition of proportionate limitations on that individual's rights and liberties, as compared to the exercise of executive power under the Migration Act to control the conditions of a person's immigration detention.

15. For example, under proposed section 251A of the Migration Act,[2] which remains before the Parliament, the responsible Minister would be invested with discretion to make a determination prescribing an entire class of things as 'prohibited items' for all persons in immigration detention. This could include items which are capable of lawful and innocuous use, such as smartphones, computers and other personal communications devices.[3] In the result, all persons in immigration detention would be prohibited from possessing an item that is prescribed as a 'prohibited item', irrespective of their individual circumstances and personal motivation for possessing the relevant item.

16. However, the Law Council has two principal concerns with proposal (a), which are directed to questions of necessity and proportionality.

Necessity

17. The Law Council considers that the necessity of proposal (a) has not been clearly established for two reasons, as outlined under the subheadings below.

Concurrent operation of post-sentence orders with immigration detention

18. If ESOs and COs could commence and remain in force while a person is being held in immigration detention, they would operate concurrently with the extensive suite of powers under the Migration Act, which empower the executive government to establish or designate places of immigration detention and control the conditions of detention. This includes a power to designate State and Territory prisons as immigration detention centres, and any other place as determined in writing by the responsible Minister.[4] Substantial restrictions can be imposed on the entry of persons to detention centres.[5] Immigration detainees are subject to significant powers of search and seizure,[6] which are additional to general powers of criminal investigation,

[1] AHRC, *Supplementary Submission*, (11 June 2021), 7 at [21] (**'AHRC Supplementary Submission'**).

[2] Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (Cth).

[3] Ibid, Schedule 1, item 2 (inserting proposed subsection 251A(2) of the Migration Act). The note to this provision specifically refers to mobile phones, sim cards an electronic devices capable of being connected to the internet, as examples of the categories of things that may be prescribed as 'prohibited items'.

[4] Migration Act, subsection 5(1). See subparagraphs (b) of the definition of 'immigration detention'.

[5] Ibid, section 273. See also, section 252.

[6] Ibid, Part 2, Division 13.

and powers to conduct surveillance or compulsory questioning for security or criminal intelligence purposes.

19. Paragraph [9] of Supplementary Submission 5.3 appears to proceed on an assumption that immigration detention facilities are necessarily less restrictive than prisons, and as such, 'will … afford a person access to individuals or technology, which could be inconsistent with the conditions of a particular ESO or [CO]' that has been issued in relation to that person. As such, it does not specifically countenance the need for, and implications of, the concurrent operation of two sets of obligations, restrictions and liabilities. Nor does it specifically identify a need for provisions dealing with interoperability of the two regimes, or provide an indication of the intended approach to the design of such provisions.

20. While it may be the case that some forms of immigration detention could be less restrictive than the conditions of a person's imprisonment as part of their criminal sentence, this is not legally guaranteed to be the universal or invariable position. Further, it should be acknowledged the restrictions imposed upon persons in immigration detention can objectively be very onerous in their own right, irrespective of any comparisons which may be drawn with other types of detention.

21. The Law Council therefore cautions against legislating (or formulating the underlying policy settings) on the basis of a generalisation or assumption that the conditions of immigration detention are, and will invariably be, inadequate to manage the security risk presented by a high-risk terrorist offender who is placed in immigration detention—with the result that the person the must be made subject to two concurrent sets of controls. (That is, one set under the Migration Act, and the other set under a post-sentence order which has been made pursuant to Part 5.3 of the Criminal Code.)

22. In particular, it is readily conceivable that, in practical terms, the existing powers available under the Migration Act in relation to the designation and control of immigration detention facilities may limit the opportunities for persons in immigration detention to engage in terrorism-related activities (many of which may, themselves, constitute a preparatory or ancillary terrorism offence under Division 101 of the Criminal Code, which can be investigated and enforced accordingly, irrespective of whether a person is in immigration detention or resides in the community).

23. However, a critical practical difference would be that, if a post-sentence order under Part 5.3 of the Criminal Code commenced while the person is in the highly controlled environment of immigration detention, they would additionally be liable to criminal offences for breaching the conditions of that order. This could then form the basis for the Minister for Home Affairs seeking a further post-sentence order under Part 5.3 of the Criminal Code. The commission of a breach offence in relation to a post-sentence order could also provide a fresh basis for a Ministerial decision to cancel or refuse the issuance of a visa. (This may be material if the person is challenging the original visa cancellation or refusal decision, as it could effectively neutralise any utility in the person pursuing those challenges.)

Potential for COs to be issued in considerably broader circumstances than in relation to the HRTO cohort

24. Further, Supplementary Submission 5.3 indicates that proposal (a) is intended to apply to both ESOs and COs, such that both types of order could commence while the subject is being held in immigration detention. Although paragraph [8] states that the proposal is intended to enable ESOs and COs to 'commence and be enforced in ***all circumstances*** while a person is in immigration detention' (emphasis added), the policy justification offered for this proposal is confined to a specific factual scenario. Namely, it is restricted to the context of high-risk terrorist offenders who are visa-holders, and are immediately transferred to immigration detention after their release from prison upon completion of their sentences, because their visas are cancelled (presumably by reason of their conviction and sentence of imprisonment for terrorism offences).

25. The limited purview of the policy justification is evident in paragraph [11] of Supplementary Submission 5.3, which describes the perceived problem in the following terms:

> *Under current paragraph 104.5(1)(d) of the Criminal Code, an interim control order does not commence until the individual subject to the control order is 'released from custody'. In a circumstance where an offender is transported directly to immigration detention at the conclusion of their sentence, the current drafting of the legislation does not make clear that a control order can commence.*

26. However, COs are available in far broader circumstances than those described in paragraph [11] of Supplementary Submission 5.3 (as extracted above) which are confined to high-risk terrorist offenders who complete their criminal sentences of imprisonment.[7] The supplementary submission does not acknowledge the legal possibility for broader application beyond this discrete factual scenario, and consequently does not provide a justification for this outcome.

27. By way of example, unless explicit statutory limitations are adopted, proposal (a) could potentially operate to enable COs to commence in the following circumstances, which are not directly addressed in Supplementary Submission 5.3:

- ***in the case of a HRTO-eligible offender***—a court may refuse an application for a post-sentence order in relation to the person (whether a CDO, ESO or CO) or the AFP Minister or AFP Commissioner (as applicable) might decline to apply for an order, or may otherwise fail to make an application for a CDO or ESO within the statutory timeframe. However, an application for a CO may subsequently be made, including on the basis of the person's conduct in the community after their release.[8] If the person is subsequently taken into immigration detention as a result of the cancellation of their visa, proposal (a) would appear to enable a CO to be sought, issued and commence while the person is in immigration detention;

- ***in the case of a non-HRTO eligible offender who is transferred to immigration detention after completing a custodial sentence for a non-terrorism offence***—proposal (a) would appear to enable that person to be made subject to obligations under a CO while they are in immigration

[7] Criminal Code, paragraphs 104.2(2)(a)-(d).

[8] Note that the Law Council has recommended that the HRTO Bill should be amended to include an express provision in Division 104 of the Criminal Code, which prevents a court from issuing a CO (and the AFP from making an application for a CO) if the facts and grounds are identical to, or substantially the same as, a previous application by the Minister for Home Affairs for an ESO in relation to the person, and that ESO application was refused by the relevant State or Territory issuing court. See: Law Council, *Primary Submission*, (6 November 2020), 26-27 at [94]-[101] and recommendation 10.

detention, in addition to the restraints imposed on them by reason of being in an immigration detention facility (which could potentially be a State or Territory prison, or any other place prescribed in a Ministerial determination). For example, if there is a concern that a non-HRTO prisoner has been radicalised while serving a sentence of imprisonment for their non-terrorism offence or offences, proposal (a) would make it legally possible for that person to be made subject to obligations under a CO, concurrently with being placed in immigration detention;

- ***in the case of a person who has not served any sentence of imprisonment that is imposed following their conviction for a criminal offence, but whose visa is cancelled while they are in the community and is transferred to immigration detention***—proposal (a) would appear to enable that person to be made subject to a CO which would commence while they are in immigration detention. The CO could potentially be made on the basis of a future risk arising from either their conduct in the community, or in immigration detention; and

- ***in the case of a person who is already in immigration detention (for example, because their visa has been cancelled, or because a visa was never issued as may be the case for certain asylum seekers)***—proposal (a) would appear to make it possible for COs to be sought, issued and commence while those persons are in immigration detention.

28. The potential for proposal (a) to apply much more broadly than the specific factual scenario described in Supplementary Submission 5.3 is significant, as it would 'open up' the CO regime to a much broader cohort of people than those contemplated in the official policy justification. As breach of a CO condition is a criminal offence punishable by a maximum penalty of five years' imprisonment,[9] the contravention of such a condition may trigger significant legal consequences for the subject. Not only would this create a new legal pathway for the transfer of persons from immigration detention into imprisonment, conviction for a breach offence could also enable the issuance of further post-sentence orders against the person.[10]

29. Additionally, in the case of immigration detainees who are awaiting a decision on a visa application, or who are exercising legal rights to challenge a visa cancellation or refusal decision, exposure to a CO and subsequent contravention of its conditions may create a legal basis for a separate decision to refuse or cancel their visa.

30. Accordingly, the Law Council encourages the Committee to seek clarification of the policy intent concerning the circumstances in which it is envisaged that a CO would be capable of commencing (or continuing in force) when the subject is in immigration detention.

31. It may be that there is a deliberate policy intent for COs to be capable of commencing (or continuing in force) in relation to immigration detainees beyond those who are part of the cohort of HRTO-eligible offenders who are transferred to immigration detention immediately after the completion of their sentences of imprisonment. However, if this is the case, it is important that this intent is specifically acknowledged and justified. Accordingly, the Law Council submits that proposal (a) should not proceed unless and until this specific information is provided about the policy intent, and its underlying justification, and there is an adequate opportunity for its scrutiny.

[9] Criminal Code, section 104.27.

[10] HRTO Bill, Schedule 1, item 59 (inserting new subsection 105A.3(1) and new section 105.3A of the Criminal Code).

Recommendation 1: the need for further evidence of necessity of proposal (a)

- **Proposal (a) should not proceed unless and until a clear and compelling justification is provided in relation to its necessity, which addresses the two issues raised at paragraphs [18]-[31] of the Law Council's supplementary submission, concerning:**
  - **the concurrent operation of CO conditions with the conditions of immigration detention (as are able to be set by the executive government under the Migration Act); and**
  - **the possibility that immigration detainees could be subject to CO conditions (and criminal liability for breach) in considerably broader circumstances than the 'post-sentence HRTO context' identified in Supplementary Submission 5.3 as the basis for the proposal.**

Proportionality

32. The Law Council is concerned that the brief outline of proposal (a) in Supplementary Submission 5.3 does not identify adequate safeguards to ensure the potential amendments dealing with the commencement of post-sentence orders would operate in a manner that is proportionate to the security risk sought to be addressed.[11]

33. The Law Council has identified three principal issues which go to matters of proportionality, which are set out below. If the Committee is persuaded that proposal (a) is necessary, the Law Council encourages it to consider recommending the inclusion of statutory safeguards in the nature of those outlined below, which are variously consistent with, and complementary to, those recommended by the AHRC.

Intended meaning of 'immigration detention' for the purpose of proposal (a)

34. Proposal (a) is directed to the commencement of ESOs and COs that are issued in respect of persons who are in 'immigration detention', and the continuation in force of such orders if the subject is placed in immigration detention after the issuance and commencement of the ESO or CO. However, Supplementary Submission 5.3 does not explain the intended interpretation of the term 'immigration detention' for the purpose of proposal (a).

35. Significantly, subsection 5(1) of the Migration Act defines 'immigration detention' for the purpose of that Act, in a way that extends considerably beyond the placement of a person in a designated immigration detention centre established under the Migration Act, or a State or Territory prison or remand centre, or another place specified by the responsible Minister via a written determination. In particular, subsection 5(1) of the Migration Act also provides that a person is taken to be in immigration detention in circumstances which include the following:

- being in the company of, and restrained by, an officer who is authorised to do so under the Migration Act (or another person directed by the Secretary of the Department of Home Affairs or Australian Border Force Commissioner);
- being held by, or on behalf of, such an officer in a police station or watch house, or on a vessel in certain circumstances; and
- being subject to a Ministerial residence determination made under section 197AB of the Migration Act (the effect of which is that the person is still taken to

[11] AHRC, *Supplementary Submission*, 7-9 at [19]-[28].

be in immigration detention but is able to live in the community, at a specified address and in accordance with specified conditions).[12]

36. It is unclear whether there is a policy intent for proposal (a) to apply to all components of the definition of 'immigration detention' under subsection 5(1) of the Migration Act, or only a subset (and if so, which individual components of the definition). The limited policy justification provided in Supplementary Submission 5.3 appears to contemplate circumstances in which a high-risk terrorist offender whose visa is cancelled is being held at a dedicated facility of some kind after their release from prison (although it does not refer specifically to a dedicated 'immigration detention centre' established under the Migration Act).

37. However, Supplementary Submission 5.3 does not indicate whether the reference to this circumstance was intended to be an illustrative and non-exhaustive example only, or whether it was intended to exclude persons who may be in other forms of immigration detention which are possible under the Migration Act (such as being detained in a State or Territory prison, or being under the restraint of a competent official, or being in the community under a residence determination).

38. The concept of 'immigration detention' is the key determinant of the scope of application of proposal (a) and therefore its proportionality. As such, it is important that there is precision in relation to its intended meaning. The Law Council encourages the Committee to seek clarity about this matter from the proponents of the potential amendments.

39. If there is an intention for proposal (a) to apply the definition of 'immigration detention' in subsection 5(1) of the Migration Act in full, then it would also be important for the proponents to explain how issues of interoperability and potential conflict between the two discrete sets of obligations would be managed. (For example, the potential for conflict between the conditions of an ESO or CO issued under Part 5.3 of the Criminal Code, and the conditions specified in a residence determination made under section 197AB of the Migration Act.)

Need for specific statutory preconditions to the commencement or continuation in force of a post-sentence order in respect of an immigration detainee

40. Paragraph [15] of Supplementary Submission 5.3 appears to indicate that there would be no additional statutory safeguards under Part 5.3 of the Criminal Code, which would apply specifically when an ESO or CO is proposed to commence, or continue in force, while the subject of that order is being held in immigration detention.

41. In particular, paragraph [15] of Supplementary Submission 5.3 appears to evince a policy intention to place sole reliance on the generally applicable issuing criteria for ESOs and COs; together with generally applicable periodic review requirements and discretionary revocation powers for ESOs, the ability for a CO subject to apply to the court for the variation of the CO, and the obligation of the AFP Commissioner to apply to the court for variations of COs in certain circumstances.

42. The Law Council considers that additional protections are needed, to ensure that the cumulative effect of the conditions of the CO and the conditions of immigration detention are taken into account in the assessment of the need for the ESO or CO, as well as the specific conditions of the order. In particular, the Law Council supports the following measures:

- **Obligation to inform court of certain matters:** the Minister for Home Affairs (in the case of ESOs) and the AFP Commissioner (in the case of COs) should

[12] See especially note 2 to the definition of 'immigration detention' which provides expressly that the definition applies to persons who are subject to residence determinations (as is provided for by section 197AC).

be subject to an explicit statutory obligation to inform the issuing court in an ESO or CO application as to:

- the visa and citizenship status of the subject of the proposed order; and

- whether it is intended that the ESO or CO will commence when the person is in immigration detention. (For example, if a decision has been made to cancel the person's visa, including by reason of the mandatory cancellation requirements under the Migration Act due to the person's conviction and sentence, or potentially if the person's Australian citizenship has ceased by reason of their conduct constituting the offence for which they have been convicted and sentenced. This would likely result in the immediate transfer of the person to immigration detention after completing their sentence of imprisonment);

- **Consideration of implications of immigration detention:** if the Minister for Home Affairs or the AFP Commissioner (as applicable) informs the court that there is an intention for the ESO or CO to commence while the subject is in immigration detention, then the court must take this matter into consideration in applying the issuing criteria for the ESO and CO, and in fashioning each of the individual conditions of the order (if issued). This should include a requirement to consider whether any of the proposed conditions in an ESO or CO would:

  - conflict, or be reasonably likely to conflict, with any legal rights and obligations that would otherwise apply in relation to a detainee under the Migration Act (particularly in relation to residence, curfew, reporting and counselling obligations under the CO or ESO as applicable, as well as ESO conditions requiring a person to keep in their possession and answer or promptly return calls to a specified mobile phone); and

  - be feasible to administer and comply with in the immigration detention environment; and

- **Obligation on Minister or AFP Commissioner to seek review of orders**: if the subject of an application for an ESO or CO is a visa holder or a dual citizen of Australia and another country, and the Minister for Home Affairs or the AFP Commissioner (as applicable) informs the court that there is no intention, at the time the ESO or CO application is made, for that order to commence while the subject is in immigration detention, then there should be a statutory requirement for the Minister or AFP Commissioner to make an immediate application to the court for the review of the order and its conditions, if the person is taken into immigration detention after the order is issued. Compliance with this requirement should be a statutory pre-condition to the ESO or CO continuing in force when the subject is taken into immigration detention.

43. In proposing these safeguards, the Law Council concurs with the views of the AHRC that the issuing court for an ESO or CO should be specifically informed of any intention for an order to apply to a person in immigration detention, as these matters are relevant to an assessment of the necessity and proportionality of the order and each of its proposed conditions.[13]

44. In particular, the Law Council submits that the provision of this information to the court in every case is central to the notion of judicial oversight for the issuance and terms of orders. The Law Council is concerned that the silence of Supplementary Submission 5.3 on this matter may reflect an intent that proposal (a) would create a legislative mechanism for the automatic commencement or continuation of COs or ESOs in respect of persons in immigration detention, by reason of a statutory rule,

[13] AHRC, *Supplementary Submission*, 7 at [19] and recommendation1.

rather than judicial approval in each case. This approach presents risks to the integrity of judicial decision-making about the issuance and conditions of COs and ESOs, because there would be no statutory assurance that all relevant information would be placed before the court about the environment in which the proposed order would or could foreseeably operate.

45. Further, in proposing the mandatory judicial review of extant ESOs or COs, if the subject of the order is taken into immigration detention after that order has commenced, the Law Council emphasises that it would not be satisfactory to rely solely on the operation of general application-based variation or periodic review mechanisms for ESOs or COs. The Law Council concurs with the submission of the AHRC that these mechanisms fail to establish a process which will ensure that inappropriate conditions are not in force for any period of time.[14]

46. Significantly, there may be many reasons that an ESO or CO subject does not, or cannot, exercise their discretion to apply for a variation of an order. For example, lack of awareness of their legal rights, lack of ability to access legal representation or to review relevant information from immigration detention, or a lack of inclination which may arise from their prolonged detention and anticipated deportation. Reliance on the discretion of the Minister for Home Affairs or AFP Commissioner (as applicable) to seek variation also falls short of a legal safeguard in this respect. Even in circumstances in which there is an obligation to seek variation, there is scope for subjectivity and delay in executive decision-making about whether the obligation is enlivened in particular circumstances.

47. Moreover, reliance on general mechanisms for the judicial review of orders—such as annual judicial review requirements for ESOs, or confirmation proceedings for interim COs, or applications for a new ESO or CO after the expiry of the previous order—would not ensure the timely remediation of conditions which are no longer necessary or proportionate to the subject's risk, or are otherwise impossible to comply with, if the subject is in immigration detention.

48. As discussed further below, the risk that proposal (a) could lead to the imposition or continuation of ESO or CO conditions that are not necessary, proportionate or feasible to comply with, where the subject is in immigration detention, also has implications for a person's exposure to criminal liability for breach of those conditions. This makes it even more important that the management of this risk is not left to general discretion under the existing issuing criteria and periodic review requirements for ESOs (as proposed in in the HRTO Bill) and COs (as per Division 104 of the Criminal Code). Rather, this factor heightens the need for Divisions 104 and 105A of the Criminal Code to make specific provision for the circumstances of persons who are in administrative detention, especially immigration detention.

Safeguards directed to access to legal assistance, access to relevant information, and professional risk assessment and counselling services

49. The Law Council also highlights the need for regard to be had to practical matters to facilitate the person's access to necessary assistance and information relevant to the post-sentence order. This includes the following matters:

- access to legal assistance (including the person's lawyer of choice);
- access to independent risk assessment services (for example, by a psychologist of the person's choice) should they wish to obtain such an assessment as part of a review or variation request; and

[14] Ibid, 8 at [25]-[26].

- access to all relevant information concerning applications for the renewal or variation of the ESO or CO (or its making, if the proposal proceeds with COs contrary to the Law Council's above recommendation).[15]

50. The Law Council notes that the legal and practical management of these matters in the confined setting of immigration detention is likely to raise additional human rights risks and other complexities. As Supplementary Submission 5.3 makes no mention of these matters, the Law Council considers that the proposal should not proceed unless and until adequate information has been provided, from which the Parliament and the public could reasonably take assurance.

Safeguards in relation to offences for breaching a post-sentence order

51. The Law Council is of the view that where compliance with a condition of a CO or ESO would be impossible by reason of the subject being in immigration detention, then there should be an express exception to this effect in relation to the offences for contravening these orders. (This might include, for example, residence and curfew requirements, prohibitions on associating with particular persons, obligations to keep on the person's possession and answer a specified mobile phone, and obligations to participate in specified counselling or education).

52. It is preferable that this matter is dealt with clearly on the face of the legislation, rather than a person's potential exposure to significant criminal liability being left to the discretion of law enforcement agencies at the point of investigating potential breaches of orders.

53. This reflects the gravity of the criminal consequences of breach and the exposure of the person to the ordeal of investigation and potential prosecution. It also reflects the significant flow-on effects, including the enlivening fresh and additional grounds for visa cancellation (for example, if the original cancellation decision is overturned on review or appeal), and the exposure to further post-sentence orders under Part 5.3 of the Criminal Code as a result of committing a breach offence.

Impacts of overbreadth in the potential ESO conditions proposed in the HRTO Bill

54. Proposal (a) in Supplementary Submission 5.3 may also compound the problems identified in the Law Council's primary submission and first supplementary submission, about the proposal to enable ESOs to impose an unlimited range of conditions on the subject, including several non-exhaustive statutory conditions that are broader than those presently available for COs.[16]

55. The breadth of the power to set an unlimited range of ESO conditions makes it possible that an issuing court may assess the proposed conditions of an order to be reasonable and proportionate either before the person is required to be taken to immigration detention, or even possibly on the basis of extant or anticipated conditions of immigration detention. However, the balance of considerations may change significantly if the facts underlying those assumptions were to change. In the result, a person may be subject to a post-sentence order that could require, in effect, a complete overhaul almost immediately after it is made. (Or such an order may no longer be needed if the conditions of immigration detention are sufficient to manage the person's risk without a specific post-sentence order—as could potentially be the case if a person's place of immigration detention was a State or Territory prison, as is permitted under the Migration Act).

[15] In this regard, the interaction of the proposed restriction in proposed section 105A.14D of the Criminal Code on access to certain material ('terrorism material') which is relied upon by the Minister for Home Affairs in support of an ESO application (HRTO Bill, Schedule 1, item 120) should be considered carefully.

[16] Law Council, *Primary Submission*, 14-17 at [35]-[43] and recommendation 4; and Law Council, *Supplementary Submission 1*, (27 November 2020), 13-17 at [28]-[54] and Attachment 1.

56. The broader the conditions available under an ESO, the greater the risk described above. For example, the HRTO Bill proposes that ESOs should be able to impose conditions requiring person to participate in specified counselling even if they do not consent,[17] and conditions requiring a person to keep a specified mobile phone in their possession and to answer or promptly return calls to that phone.[18] It also confers significant power on members of the AFP and others to determine the requirements in individual circumstances, and the court would approve such conditions on the basis of an assessment of the person's circumstances at a given time.[19]

57. The proposal to extend the application of ESOs to persons who are in immigration detention (so that an ESO would operate concurrently with the limitations and restrictions arising from the person's conditions of immigration detention) exacerbates the risks identified previously by the Law Council about overbreadth in the unlimited range of ESO conditions. The Law Council considers that proposal (b) further strengthens the case for limiting the range of available ESO conditions to those presently available for COs, as the Law Council recommended in its primary submission.

Recommendation 2: further statutory safeguards are required for proposal (a)

- **Proposal (a) in Supplementary Submission 5.3 should not proceed, unless and until the matters raised at paragraphs [32]-[56] of this submission are addressed.**

Proposal (b): limitation of judicial discretion to assess less restrictive alternatives to CDOs

58. The Law Council does not support proposal (b) and encourages the Committee to recommend that it should not proceed, either as part of the HRTO Bill or in any other future legislative vehicle.

59. The present ability of the court to consider the existence and relative effectiveness of all less restrictive alternatives to a CDO, which are available in the circumstances of a particular case, is an important safeguard to the proportionality of post-sentence detention, and consequently both its human rights compatibility and compatibility with Chapter III of the *Constitution*.

60. Proposal (b) seeks to fetter the ability of the court to identify and assess less restrictive measures to a proposed CDO, so that it may only consider an ESO and a CO. This increases the risk that the regime may not be proportionate to the legitimate objective of protecting the community from the unacceptable risk presented by a high-risk terrorist offender who has completed their sentence of imprisonment.

61. Supplementary Submission 5.3 appears to lack substantive justification for weakening this fundamental safeguard. The supplementary submission refers to the possibility, as occurred in *Benbrika,* that the issuing court may consider any measure or action (or combination thereof) that it deems less restrictive, irrespective of whether those measures are designed specifically to manage the risk posed by a high-risk terrorist offender. That is, the court is concerned in functional or substantive terms with the likely effect of an alternative measure on managing the unacceptable risk presented by the person. It is not concerned with the subjective categorisation or 'label' ascribed

[17] HRTO Bill, Schedule 1, item 87 (inserting new paragraph 105A.7B(3)(n) of the Criminal Code).

[18] Ibid, Schedule 1, item 87 (inserting new paragraph 105A.7B(5)(e) of the Criminal Code).

[19] See, for example: ibid, Schedule 1, item 87 (inserting new subparagraph105A.7B(3)(h)(iii), new paragraphs 105A.7B(3)(m)-(r) and new subsection 105A.7B(4) of the Criminal Code).

to a particular measure (that is, as a 'HRTO-specific measure') under legislation or administratively by security or law enforcement agencies.

62. However, there is no reason that this approach is inherently problematic, such that the ability of the court to make a factual assessment on the basis of all relevant evidence should be displaced or fettered in any way. It is open to the Minister for Home Affairs to make submissions to the court about the existence and likely effectiveness of alternatives. The supplementary submission does not identify reasoning underlying any concerns arising from this state of affairs.

63. Indeed, the result in *Benbrika* tends in strong support of this mechanism. The court considered, in detail, alternatives identified in that case, including 24-hour surveillance and the cancellation of the defendant's visa leading to his deportation from Australia (in addition to a CO) and found that these measures would not be effective in the circumstances.[20] There is no apparent reason that the factual circumstance or necessarily fact-specific outcome in *Benbrika* should be the basis for a statutory restriction on the ability of the court to consider all relevant facts about the ability to manage a person's risk if they were not detained under a CDO.

64. The Law Council further concurs with the submissions of the AHRC that it is no answer to suggest that the issuing court has a residual discretion to decline to issue a CDO, even if it is satisfied that the issuing criteria are met.[21] Supplementary Submission 5.3 appears to assume that a court may be inclined to exercise this residual discretion if it considers that there are effective alternatives to a CDO, apart from those which are proposed to be prescribed expressly in the statutory issuing test (being ESOs and COs alone).[22] It appears to be illogical and arbitrary to separate the relevant factual considerations in this way. The Law Council further agrees that that the remarks of Tinney J in *Benbrika* about the absence of judicial authority on the exercise of residual discretion, and the reluctance of the court to countenance its exercise in *Benbrika*, appear to make it less likely that court would exercise its residual discretion in this way.[23]

65. Moreover, there is a legal risk that the proposal to place an express restriction on the meaning of the expression 'other less restrictive measure' in paragraph 105A.7(1)(c) so that it covers only ESOs and COs may be taken to evince an intention, by necessary implication, to remove any residual discretion that might otherwise exist to consider measures other than ESOs and COs, which the court considers to be less restrictive than a CDO and effective in managing the offender's risk. In other words, the implementation of proposal (b) might, itself, unintentionally limit the scope of any residual discretion to decline to grant an order on the basis of other, non-terrorism specific risk management options.

Recommendation 3: proposal (b) should not proceed

- **The Law Council urges the Committee to recommend that proposal (b) in Supplementary Submission 5.3 should not proceed.**
- **Rather, the identification and assessment of less restrictive measures to a CDO should remain a question of fact to be determined exclusively by the court on the basis of all relevant, admissible evidence. Division 105A of the Criminal Code should not purport to create a statutory rule which prescribes two specific measures (namely, COs and ESOs) as the only less restrictive alternatives to a**

[20] *Benbrika* [2020] VSC 888, at [466]-[469]. See also [337]-[349] (submissions on behalf of the Minister for Home Affairs on the issue of less restrictive alternatives, which were accepted by the Court).

[21] AHRC, *Supplementary Submission*, 12 at [38].

[22] Attorney-General's Department and Department of Home Affairs, *Supplementary Submission 5.3*, (May 2021), 5 at [19] (third dot point).

[23] *Benbrika* [2020] VSC 888 at [472]-[473].

CDO that the court may take into consideration in applying the issuing criteria.

Opportunities to scrutinise the text of amendments implementing both proposals

66. The Law Council appreciates the intent of Supplementary Submission 5.3 to provide the Committee and interested stakeholders with some advance notice of intended amendments to the HRTO Bill. However, an announcement of a general policy intention does not dispense with the need for the Parliament and wider public to have adequate opportunities to scrutinise and comment on the legislative text of those proposed amendments.

67. The post-sentence regime in Division 105A of the Criminal Code is technical and complex. It operates in particularly 'high-stakes' circumstances, in that it enables the imprisonment of an individual on the basis of a prediction about their future risk, which is made according to a lower standard of proof than the criminal standard. Much will therefore turn upon a detailed and technical examination of the legislative design and drafting of the provisions giving effect to the proposals.

68. Accordingly, it is important that any policy intent to enact a Commonwealth ESO regime as soon as possible, via the passage of the HRTO Bill on a time-critical basis, is not also used as a basis to seek the urgent passage of the two proposals described in Supplementary Submission 5.3. These two proposals are significant in their own right. They should not be subjected to a truncated scrutiny process because of time constraints pertinent to the separate policy objective to establish the ESO regime, so as to provide an alternative preventive order to CDOs which is available in relation to prisoners whose release dates are imminent.

69. Rather, if the Government intends to proceed with the proposals described in Supplementary Submission 5.3, the relevant amendments will require detailed examination, which should be conducted via the usual, well-established, and participatory mechanisms of Parliamentary scrutiny. That includes the review of the proposed legislation by the Committee, as well as the usual reviews by the Senate Scrutiny of Bills Committee and Parliamentary Joint Committee on Human Rights (covering both their interim and final reports, with the latter reports taking account of matters raised in correspondence with the relevant responsible Minister).

70. It will also be necessary for the Parliament as a whole to be afforded reasonable and adequate time to consider the final reports of all of three committees, together with Government responses to their conclusions and recommendations, and (if desired) consideration of evidence given by relevant submitters to those committee inquiries.

Recommendation 3: scrutiny of the text of the proposal amendments

- **The Law Council encourages the Committee to recommend that, if the Government proceeds with amendments of the kind described in Supplementary Submission 5.3, the relevant amending legislation should be referred to the Committee for public inquiry and report.**
- **The Committee may also wish to consider recommending mechanisms to ensure that adequate time is available for the thorough scrutiny of those amendments, for example, via their inclusion in a stand-alone Bill with a longer timeframe for intended passage than the HRTO Bill (in recognition of the urgency to enact an ESO regime in Division 105A of the Criminal Code).**