Law Council
OF AUSTRALIA

Review of the Expensive Commonwealth Criminal Cases Fund

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

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.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- 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
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

Acknowledgement

The Law Council is grateful for the assistance of the South Australian Bar Association, the Law Society Northern Territory, as well as its National Criminal Law Committee and National Access to Justice Committee in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to provide input to the review of the Expensive Commonwealth Criminal Cases Fund (**ECCCF**).

2. The Law Council strongly supports the ECCCF as a critical source of funding to defend those charged with offences contrary to Commonwealth law by funding state and territory Legal Aid Commissions (**LACs**) to represent individuals being prosecuted for serious, high cost Commonwealth criminal offences. The intended outcomes of the ECCCF are to ensure:

    - LACs have sufficient resources to provide a legal defence for people charged with serious Commonwealth criminal offences who cannot afford private legal representation;
    - LACs do not need to reallocate funding away from other Commonwealth service priorities, such as family law matters and less expensive criminal cases, to meet the cost of expensive Commonwealth criminal law matters; and
    - Commonwealth criminal law proceedings are prevented from being adjourned, postponed, or stayed in accordance with the principle established by the High Court's decision in *Dietrich v The Queen* (1992) 177 CLR 292 due to a lack of legal representation for an indigent accused.

3. Underpinning the policy rationale for the ECCCF is the principle of equality of arms as a key component to of a fair trial. In complex criminal matters involving serious offences, there is a particular interest in having both the prosecution and defence properly resourced, whatever the reasonable costs of that necessity may be. This reflects the view expressed by the Attorney-General's Department (**AGD**) in its public sector guidance sheet relating to fair trial and fair hearing rights, which states:

    > *… procedures followed in a hearing should respect the principle of 'equality of arms', which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings.*[1]

4. The Law Council supports the rationale for the ECCCF and provides the following submissions in support of the continuation (and in some case, improvement) of the scheme into the future.

5. In particular, the Law Council recommends that:

    - the administration of the ECCCF should shift to a reimbursement model without restrictive caps;
    - estimated funding allocations for the ECCCF should be based on projections informed by dialogue between the Office of the Commonwealth Director of Public Prosecutions (**CDPP**), LACs and AGD rather than by reference to historical expenses;
    - estimated funding allocations for the ECCCF should comprehend the increasing number of serious criminal offences in Commonwealth legislation and the greater priority being given to criminal prosecutions in some areas (e.g. as recommended by the Financial Services Royal Commission);

[1] Commonwealth Attorney-General's Department, *Public sector guidance sheet: Fair trial and fair hearing rights* <www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/fair-trial-and-fair-hearing-rights>.

- as a minimum, additional resourcing should be allocated under the ECCCF to ensure that LACs are not required to draw on funds from other Commonwealth priority areas;
- the ECCCF remains a standalone dedicated funding program, and not be integrated into a broader legal assistance funding mechanism such as the National Legal Assistance Partnership (**NLAP**);
- justice impact tests should be introduced at the Commonwealth level to identify downstream impacts on the justice system, including the likely demand on legal assistance funding;
- consideration should be given as to how the CDPP and LACs can facilitate greater cooperation at the early stages of an ECCCF matter, with a particular emphasis on improved plea negotiation and the narrowing of pre-trial issues;
- clarity is required as to whether the ECCCF is available for Control Order and Continued Detention Order (and similar) matters, and if so, whether the ECCCF should be increased accordingly; and
- the review should engage with Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) in relation to the extension (or replication) of the ECCCF framework to cover high-cost matters, including coronial inquests.

Resourcing of the ECCCF

Quantum and administration of funding

6. Complex Commonwealth criminal matters can be extremely expensive to run, and in many cases, there exists a large disparity in resources between the prosecution and the defence. There are frequently significant amounts of surveillance material in complex drug cases, and large volumes of documents in complex fraud cases. This is quite apart from the complexity and volume of evidence in relation to counter-terrorism offences and people smuggling cases.

7. As discussed below, LACs have very little control over the volume and nature of cases that will require ECCCF funding. Clearly, more complex prosecutions will result in greater demand on the ECCCF. The introduction of caps on the amounts each LAC can access under the ECCCF has the potential to substantially lessen the ability to respond to an increased demand for assistance in relation to these cases and may require LACs to draw on their general Commonwealth funding.

8. Indeed, previous shortfalls in ECCCF funding have caused LACs to consider the reallocation funds from other streams of the Commonwealth legal aid program, including funding for family law matters.[2] This is a detrimental outcome that remains ad hoc, unreliable and diverts funds from the Government's other legal aid priorities. Further, it is noted that many of the matters attracting ECCCF funding are progressed by private lawyers under a grant of legal aid. It is important that the fees provided under this scheme adequately reflect the amount of work required to undertake these complex cases to ensure the sustainability of this arrangement.

9. In the 2019-20 Budget, the Australian Government provided $17.3 million over four years for the ECCCF, increasing the Government's total investment to $8.1 million (indexed) each year. In announcing the package, the Attorney-General stated:

> *This will ensure that major commonwealth criminal cases are appropriately resourced and don't impact frontline civil and family law services*.[3]

10. This increased funding for the ECCCF is in recognition of the fact that the ECCCF has recorded an operating deficit for eight of the last nine years, with the quantum of the increase presumably developed with reference to expenses incurred across previous years. However, a topping-up of the ECCCF, while welcome, does not address fundamental deficiencies with the resourcing framework underpinning the ECCCF. In particular, the current approach of allocating an annual pool of funding to the ECCCF and then requiring LACS to work within those parameters is not, in the view of the Law Council, sustainable. Instead, the Law Council supports a reimbursement model for the ECCCF that reflects the fluctuating nature of these expenses.

11. When anticipating the likely demand on the ECCCF in an upcoming period, the method in which each year's allocation of funds is determined requires adjustment. In particular, there is scope for improved forecasting of matters that are likely to require ECCCF support in the forthcoming period, rather than relying solely on data and expenses from previous years. It is submitted that more accurate forecasting could be promoted

[2] Tammy Mills, 'Fund squeeze will hurt family law, Legal Aid says', *The Age* (online, 21 February 2020) <www.theage.com.au/national/victoria/fund-squeeze-will-hurt-family-law-legal-aid-says-20200220-p542qm.html>.
[3] Commonwealth Attorney-General '*Budget increase provides funding certainty for legal assistance services*' (2 April 2019) <www.attorneygeneral.gov.au/media/media-releases/budget-increase-provides-funding-certainty-legal-assistance-services-2-april-2019>.

through enhanced dialogue between the LACs, CDPP and AGD, as it is understood that many of the large expenses associated with these complex matters are generally foreseeable at least 12 months in advance.

12. Regardless of the funding model for the ECCCF, the Commonwealth should accept that the landscape now requires more than $8 million in funding for these cases each year. As explained further in this submission, the demand for the ECCCF is only likely to increase a result of escalations in intelligence and national security enforcement powers and resourcing, in addition to the increased criminal trial jurisdiction in the Federal Court of Australia.

13. To ensure equality of arms in these emerging areas, it is critical that as a minimum step, resourcing for the ECCCF (as well as legal assistance services mor generally) is increased.

Recommendations:

- **The administration of the ECCCF should shift to a reimbursement model without restrictive caps.**
- **Estimated funding allocations for the ECCCF should comprehend the increasing number of serious criminal offences in Commonwealth legislation and the greater priority being given to criminal prosecutions in some areas (e.g. as recommended by the Financial Services Royal Commission).**
- **Estimated funding allocations for the ECCCF should be based on projections informed by dialogue between the CDPP, LACs and AGD rather than by reference to historical expenses.**
- **As a minimum, additional resourcing should be allocated under the ECCCF to ensure that LACs are not required to draw on funds from other Commonwealth priority areas.**

Interaction with other Commonwealth legal assistance funding

14. The introduction of the NLAP funding mechanism for legal assistance services on 1 July 2020 was the result of a lengthy negotiation process which included consideration of the various legal assistance funding streams, and whether there was scope to consolidate funding into the NLAP mechanism. While some previously standalone Commonwealth-administered funding streams were moved into the mainstream NLAP framework (such as the former Indigenous Legal Assistance Partnership), the ECCCF has itself remained a standalone funding program.

15. The Law Council understands that as part of the NLAP negotiation, the potential for the ECCCF to be administered under this broader funding mechanism was an option considered by the Attorney-General. While this clearly did not proceed, the Law Council urges caution against any future decision to mainstream or consolidate the ECCCF program. To do so would increase the risk of LACs having to prioritise funding for serious criminal cases at the expense of grants of aid in family and civil law.

16. Finally, as the ECCCF falls outside of the NLAP, it is now required to be administered through the Community Grants Hub as maintained by the Department of Social Services (**DSS**). It is critical that while the administration of the grant scheme rests with DSS, the role of AGD in providing leadership is not reduced over time. In particular, the role of AGD in providing policy support for the ECCCF scheme, including driving enhancements and improvements to the funding model as suggested in this submission, remains critical.

Recommendation:

- **It is essential that the ECCCF remains a standalone dedicated funding program, and not be integrated into a broader legal assistance funding mechanism such as the National Legal Assistance Partnership.**

Drivers of demand for funding under the ECCCF

Expanding jurisdiction of Commonwealth criminal law

17. There has been a strong focus under the current Government on areas of Commonwealth criminal law, including terrorism and exploitation of children. However, changes to these laws and systems must be accompanied by appropriate downstream funding for legal assistance services, especially for LACs and their engagement with the ECCCF.

18. Clearly, the legal landscape relating to offences likely to require ECCCF resourcing has changed dramatically since the scheme was established in 2000. An expansion of intelligence gathering resources to combat terrorist activity and address matters of national security has clear flow-on impacts on the ECCCF. Evidence gathered from seizure of Cloud-based information will increase the length and complexity of cases relying on that data. Further, the increase to the Federal Court's criminal jurisdiction and ongoing fallout from the 2019 Financial Services Royal Commission is likely to create additional pressures on the availability of the ECCCF, together with the potential implementation of the model recommended by the Australian Law Reform Commission for Australia's corporate criminal responsibility.

19. The Law Council has not had the opportunity to provide a comprehensive list of the recent measures that have been introduced that may require the assistance of the ECCCF, however a brief sample of newly enacted or proposed legislative measures and their anticipated or actual impacts on Commonwealth criminal cases is included at Appendix A.

20. In this context of increasing Commonwealth criminal enforcement measures, the primary goal of the ECCCF must be to ensure that LACs have sufficient resources to provide a legal defence for individuals subject to an expanding list of offences, without having to draw on funds that would otherwise be used for other legal assistance priorities.

21. To promote this goal, the Law Council recommends that the availability and adequacy of funding within the ECCCF (and legal assistance resourcing more broadly) should be examined each time new initiatives in relation to Commonwealth law enforcement are introduced, new funding is provided to police or the CDPP, or where the jurisdiction of the Federal Court is increased to hear proceedings for charges contrary to Commonwealth criminal offences.

22. As part of this pre-legislative consideration process, the introduction of Justice Impact Tests would greatly assist to measure and respond to pressures on the justice system that are created from new laws and policies, and would help to avoid unintended consequences and their often life-shattering impacts on those charged with complex Commonwealth offences. Justice Impact Tests were a key recommendation of the Law Council's 2018 *Justice Project*, and if implemented, would provide a mechanism to allow Parliament to consider the downstream impacts on the justice system, particularly the

likely demands on legal assistance funding, prior to any new offences or shifting policy priorities being implemented.[4]

23. Ideally, regulatory proposals impacting on the use of the ECCCF (and the legal assistance sector more broadly) should entail genuine consultation with key stakeholders, including the LACs at all stages of the regulatory cycle.

Recommendation:

- **Justice Impact Tests should be introduced at the Commonwealth level to identify downstream impacts on the justice system, including the likely demand on legal assistance funding.**

Commonwealth DPP's litigation practices and policies

24. As noted earlier, LACs have very little control over the extent to which the ECCCF is drawn upon. These matters are often reliant on the litigation practices and policies of the CDPP, including decisions relating to which witnesses to call, what documentary evidence to present and when to propose agreed facts. However, these matters are also reliant on timely engagement from the defence team. As such, both the CDPP and LAC's approach to case management is crucial in criminal proceedings and ultimately may determine how much funding is required to defend complex matters.

25. Clearly, effective prosecution case management that includes a collaborative process of charge-negotiation may lead to efficiencies. As such, the Law Council encourages the current review to comprehensively engage with the LACs and CDPP to determine strategies to enhance pre-trial dialogue with the view to reducing expenses associated with complex criminal matters.

26. There are no doubt improvements that can be made in this regard, for example in relation to plea negotiations which have the potential to minimise the use of ECCCF. However, these improvements are reliant on greater collaboration between the CDPP and LACs, and a genuine willingness to reach an outcome prior to the point at which significant expenses are incurred on both sides. Further, enhanced negotiation about disclosure of prosecution materials and timing of disclosure would lead to better forecasting of pre-trial and trial lengths, and assist in narrowing pre-trial issues between the parties thereby creating potential to lessen the amount of court days required However, it should be noted that there have been many reforms on these questions in recent years and, given the nature of these cases, it would not be realistic to plan on large savings in these areas.

Recommendation:

- **Consideration should be given as to how the CDPP and LACs can facilitate greater cooperation at the early stages of an ECCCF matter, with a particular emphasis on improved plea negotiation and the narrowing of pre-trial issues.**

[4] Law Council of Australia, '*Justice Project: Final Report*' (2018), rec 7.3, <www.lawcouncil.asn.au/justice-project/final-report>.

Scope of the ECCCF

Control order matters

27. The Law Council is concerned that there is a lack of clarity regarding funding availability, including from the ECCCF, in relation to applications of control orders (**CO**) or continuing detention orders, despite their obvious connection to with criminal process.

28. The third Independent National Security Legislation Monitor (**INSLM**) recommended in 2017 that the Attorney-General give further consideration to the adequacy of legal aid for all controlees in CO proceedings.[5] This recommendation responded to significant concerns raised by the Law Council about inadequacies in existing arrangements.

29. In evidence to the INSLM and Parliamentary Joint Committee on Intelligence and Security in 2017, the Law Council gave an example from one matter in 2016, *Gaughan v Causevic,*[6] in which legal aid was not available under the ECCCF, and an application for Commonwealth legal assistance funding was refused on the basis of that the case did not involve any novel points of law. The Law Council expressed concern about the resultant risk of inequality of arms as between a controlee and the Australian Federal police (whose counsel are paid Commonwealth rates). The Law Council noted that this may ultimately reduce the level of scrutiny given to CO applications, if the respondent does not have a properly resourced and experienced lawyer to act as a contradictor. There is also a danger that the court will not receive the assistance it requires when considering whether a CO should be issued.[7]

30. In response to the INSLM's recommendation, the Government stated in May 2018 that the Attorney-General would 'further consider' the matter.[8] However, the outcomes of any such consideration do not appear to have been announced.

31. Accordingly, the Law Council continues to recommend the allocation of specific Commonwealth funding to ensure that legal aid is available to all respondents in CO proceedings, and clarity as to whether this could fall within the parameters of the ECCCF. As an alternative, consideration could be given to establishing a specific Commonwealth legal financial assistance scheme for COs, administered by the Attorney-General.

Recommendation:

- **Clarity is required as to whether the ECCCF is available for Control Order and Continued Detention Order (and similar) matters, and if so, whether the ECCCF should be increased accordingly.**

[5] Independent National Security Legislation Monitor, '*Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (September 2017), [11.9] <www.inslm.gov.au/sites/default/files/control-preventative-detention-orders.pdf>.

[6] *Gaughan v Causevic* [2016] FCCA 397 (24 February 2016, Hartnett J); and *Gaughan v Causevic (No 2)* [2016] FCCA 1693 (8 July 2016, Hartnett J).

[7] Law Council of Australia, *Submission to the Independent National Security Legislation Monitor inquiry into stop, search and seizure powers, declared areas, control orders, preventative detention orders and continuing detention orders* (May 2017). 25-25 at [82]-[83] and 40-41 at [5]-[6] (Annexure A, Memorandum from Dr David Neal SC, Defence Counsel in *Gaughan v Causevic* [2016] FCCA 1693).

[8] Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018), 7. It is noted that no orders have been issued to date, however the first application for such an order is being considered by the Supreme Court of Victoria, in respect of a terrorist offender (Abdul Nacer Benbrika) whose sentence for a terrorism offence will be completed in in November 2020.

Extension of the fund to ATSILS

32. The Law Society Northern Territory (**LSNT**) has noted that consideration should be given to extending the ECCCF to ATSILS in addition to LACs to assist in complex criminal cases whether Commonwealth or State/Territory matters. Alternatively, consideration should be given to the establishment of a similar expensive case fund for ATSILS, noting that this latter point may fall outside of the current review's Terms of Reference.

33. LSNT has submitted that the inability to access expensive case funds for ATSILS in the Northern Territory creates a significant issue impacting access to justice for Aboriginal people as serious and high cost cases and coronial inquests are often borne by ATSILS without adequate funding.

34. It is submitted that the review should further engage with ATSILS on this issue with the view to determining whether it is appropriate to extend the ECCCF, or alternatively explore a similar fund for high-cost matters involving Aboriginal and Torres Strait Islander individuals.

Recommendation:

- **The review should engage with ATSILS in relation to the extension (or replication) of the ECCCF framework to cover high-cost matters, including coronial inquests.**

Appendix A

The Following provides a sample of recent and proposed legislative measures that are likely to have future impact on ECCCF resourcing. While some of the impacts are direct and self-evident, others are indirect, and it is necessary to understand the context of the legislation.

Proposed measures (as of October 2020)

Telecommunications Legislation Amendment (International Production Orders) Bill 2020

Key measures

- Proposes to amend the *Telecommunications (Interception and Access) Act 1979* (Cth) to establish a legislative framework to implement Australia's future bilateral and multilateral agreements with foreign countries, to enable reciprocal access to electronic communications content and data stored offshore, effectively bypassing mutual legal assistance.
- Australia is negotiating a bilateral agreement of this kind with the United States, which would be supported on the United States' side by the *Clarifying Lawful Use of Overseas Data Act* (**CLOUD Act**). It is anticipated that a bilateral agreement between Australia and the US (where the majority of global electronic communications data is stored) would be the first of Australia's international agreements to enliven the framework in the Bill, if passed. It is anticipated Australia may also enter into an agreement with the United Kingdom, which in 2019 concluded the first bilateral agreement of this kind with the United States.

Anticipated impacts on criminal cases

- Australian law enforcement agencies will have access to increased volumes of digital evidence (both the content of communications and metadata) which can be admitted against a defendant in criminal proceedings. Specific resource implications for defendants in these circumstances are likely to include:
  - the need for defence counsel to review and respond to considerably larger volumes of evidence; and
  - the increased prospects for challenges to admissibility of evidence, by reason of increased volume alone.
- In addition, evidence obtained under an 'international production order' may increase the prospects for challenges to the admissibility of that evidence on the grounds of legal professional privilege. This is likely to be an issue in cases in which an international production order authorises access to communications data that is stored offshore on a cloud-based data account (for example, Apple iCloud, Google Docs, Dropbox or Microsoft Office 365). Some of that data may include confidential lawyer-client correspondence. It will be extremely difficult, if not impossible, to quarantine that information. This is particularly because the Bill contains secrecy offences that would prohibit a communications provider (for example, Apple, Google or Microsoft) from disclosing the existence of the production order to the account holder, to give them an opportunity to claim privilege.
- Further grounds for challenging the admissibility of evidence obtained under an international production order may arise if there are allegations that;

- the international production order was not compatible with the conditions of the underlying international agreement with the relevant foreign country (for example, conditions in the agreement prescribing special procedures for the investigation of particular types of offences, or evidence that may have particular sensitivities); or

- the underlying international agreement did not, in fact, meet the legislative prerequisites under the *Telecommunications (Interception and Access) Act 1979* (Cth) for being recognised under that framework (as proposed in the Bill).

- The Bill also purports to establish a scheme of prima facie and conclusive evidentiary certificates in relation to certain acts undertaken by foreign communications providers, in order to facilitate to access communications data in purported compliance with an international production order. Those certificates may be the subject of challenge in, or in connection with, criminal proceedings. For example, it might be argued that the communications provider's conduct contravened conditions or limitations imposed in the order or as part of the underlying executive agreement, with the result that the evidence obtained under the order is inadmissible.

Crimes Legislation Amendment (Economic Disruption) Bill 2020

Key measures

- Schedule 1 contains an assortment of amendments to the money laundering offences in Division 400 of the *Criminal Code Act 1995* (Cth) essentially to make it easier to prosecute. The key measures propose to:
  - dilute requirements of particularisation of 'predicate offences' from which the relevant money or property has been derived, by creating 'proceeds of general crime' offences. This new offence type will remove any requirement for the prosecution to prove that:
    - that the money or property was derived from a particular offence (e.g., importing a controlled substance) or a particular type of offence (e.g., a drug importation offence); and
    - that the person believed, or was reckless or negligent as to the circumstance that the money or property was derived from a particular offence or a particular type of offence;
  - create higher 'tiers' of money laundering offences, which will apply if the money or property dealt with is valued at $10 million or more, and will carry a maximum penalty of life imprisonment (a sizeable increase from the current highest tier of penalty of 25 years' imprisonment); and
  - narrow the partial defence of 'reasonable mistake as to value of money or property' where the alleged conduct constituting the offence is a 'state of affairs' (such as possession of money or property) rather than a 'positive act' (such as receiving or disposing of money or property).

- Schedule 2 repeals existing obligations under Division 3 of Part IC of the *Crimes Act 1914* (Cth) (**Crimes Act**), which require law enforcement officials who are conducting undercover investigations to make recordings of admissions or confessions obtained from protected suspects while acting covertly, and to make copies of those recordings available to the suspect as soon as this would not prejudice the covert investigation. Other than in exceptional circumstances,

compliance with these requirements is a precondition to the admissibility of the admission or confession against the suspect.

Anticipated impacts on criminal cases

Schedule 1 (money laundering offences):

- As the proposed amendments are intended to make it easier to prove money laundering offences (particularly by diluting requirements of particularisation in relation to predicate offences) there will conceivably be higher numbers of prosecutions.
- The proposed dilution of requirements to particularise predicate offences may create greater practical scope for error in applying the rules for the drawing of inferences of criminal guilt from circumstantial evidence and may consequently increase the number of appeals against convictions. That is, if the elements of an offence are framed in extremely broad or vague terms, it is more likely that there will be argument as to whether circumstantial evidence adduced to prove those elements could reasonably support an inference other than the person's guilt. Argument on this point may lead to appeals against conviction.

Schedule 2 (removal of obligations of investigating officials in relation to covertly elicited admissions or confessions of protected suspects):

- The removal of an obligation to make and disclose recordings of admissions or confessions of protected suspects obtained in undercover investigations may lead to the abandonment or decreased use of the practice of making and disclosing recordings (when disclosure would not prejudice the covert operation). If so, this may increase the number of challenges made by defence counsel during criminal proceedings to the admissibility of such evidence on other grounds (for example, on the basis of unfairness under section 90 of the Uniform Evidence Law; or prejudice outweighing probative value under section 137; or impropriety under section 138).
- The inclusion of this measure in the Bill may create an incentive to officials investigating Commonwealth offences to make greater use of undercover operations, particularly scenario evidence techniques that actively seek to elicit a confession from a suspect. An increased use of such a technique is likely to lead to challenges to the admissibility of the evidence obtained (see, for example, the grounds of exclusion in sections 84, 90, 135, 137 and 138 of the Uniform Evidence Law).

Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019

Key measures

- Proposes a variety of amendments to the *Criminal Code Act 1995* (Cth) (**Criminal Code**) and the *Director of Public Prosecutions Act 1983* (Cth) relevant to the commission of offences by corporations and the enforcement of those offences, including:
  - expanding the offence of bribery of a foreign public official;
  - creating a new offence of a failure of a body corporate to prevent foreign bribery by an associate; and
  - enabling the Commonwealth Director of Public Prosecutions to enter into a deferred prosecution agreement with a person who is suspected of being engaged in serious corporate crime, under which a person will agree to comply with a range of specified conditions.

Anticipated impacts on criminal cases

- Expansions of existing offences and the enactment of new offences may increase the number of prosecutions (and potentially the complexity of prosecutions).
- Prospective corporate defendants will need legal assistance in negotiating deferred prosecution agreements.

Crimes Legislation Amendment (High Risk Terrorist Offenders) Bill 2020

Key measures

- Proposes to amend Part 5.3 of the Criminal Code to establish a new regime of 'post-sentence supervision' of people who have served sentences of imprisonment for terrorism offences and are released into the community. The relevant orders ('extended supervision orders') will impose various conditions on a person's location, activities, associations and movements within the community, to prevent the risk of their engaging in a serious terrorism offence. These orders will be sought by the Minister for Home Affairs or a representative on application to a State or Territory Supreme Court (in civil jurisdiction), which must be made before a prisoner has completed their sentence of imprisonment.
- Police will also be able to exercise various warrant-based surveillance powers (such as telecommunications interception and surveillance devices) to monitor whether a person is complying with the order. Contravention of the conditions of an order will be a criminal offence. Extended supervision orders could be issued in the alternative to a 'continuing detention order' under Division 105A of the Criminal Code (which authorises the detention of a person for a further three years after completing their sentence of imprisonment, in order to protect the community from the person's risk of committing a serious terrorism offence if released).

Anticipated impacts on criminal cases

- The Bill does not propose to extend the existing financial assistance provision in section 105A.15A of the Criminal Code for continuing detention orders, so that it covers an extended supervision order. (Under section 105A.15A, the court can order the Commonwealth to bear the respondent's reasonable costs of legal representation, if they are unable to obtain representation due to circumstances beyond their control.)
- Respondents are likely to 'fall between the cracks' of legal assistance funding streams.
- As an extended supervision order is technically civil order (despite its close connection with the criminal process, and significant impacts on a person's liberties) it may not be covered by the ECCCF. Nor is there a dedicated stream of Commonwealth legal financial assistance funding.

Recently enacted measures

Counter-terrorism preventive powers in Part 5.3 of the *Criminal Code Act 1995* (Cth) ('control orders' and 'continuing detention orders')

Key measures

- Control orders are civil orders issued by the Federal Court or Federal Circuit Court under Division 104 of the Criminal Code. These orders impose various restrictions on a person's movements, activities and associations within the

community. For example, non-association with named individuals, or non-attendance at meetings of organisations or certain premises, limitations on access to the internet and mobile phones, prohibitions on travel, requirements to report to police or participate in counselling, and obligations to wear tracking devices.

- In broad terms, they are issued if the issuing court is satisfied that the person has engaged in a terrorism or foreign incursions-related activity, or that there is a risk the person will do so in future, and the court is satisfied that the conditions on the control order would manage that risk. Control orders have a maximum duration of 12 months. Contravention is an offence, punishable by a maximum penalty of five years' imprisonment.
- The control order regime was enacted in 2005 subject to a sunset clause, which has been extended twice (and was significantly expanded in 2014 to cover people who have engaged in foreign incursions offences). The regime is next due to sunset in 2021 and is currently under statutory review by the Parliamentary Joint Committee on Intelligence and Security.
- Continuing detention orders are civil orders issued by a State or Territory Supreme Court, in relation to persons convicted of specified security offences against the Commonwealth (in the nature of terrorism and foreign incursions). They enable the further detention of a person for up to three years, if the court is satisfied to a high degree of probability that there is an unacceptable risk the person would commit a serious terrorism offence if released upon the expiry of their criminal sentence. No orders have been issued to date, however the first application for such an order is being considered by the Supreme Court of Victoria, in respect of a terrorist offender (Abdul Nacer Benbrika) whose sentence for a terrorism offence will be completed in in November 2020.

Anticipated impacts on criminal cases

- As control orders are civil orders, they may not be eligible for ECCCF funding. The Law Council is aware of contested control order applications in which Commonwealth legal financial assistance was denied, and only partial legal aid funding was available. In the result, much of the work was done on a pro bono basis.
- An issuing court only has power, under subsection 104.28(4) of the Criminal Code, to make an order to appoint a lawyer for a person aged under 18 who is a respondent to a control order application. There is no provision for adult respondents. The AFP has also made various proposals to the Parliamentary Joint Committee on Intelligence and Security (as part of its current statutory review of the control order regime) to reduce a number of procedural safeguards in that regime, which if enacted, would be likely to have resource impacts with respect to legal assistance for respondents.
- Continuing detention orders are also civil orders, but section 105A.15A of the Criminal Code confers power on the court to make an order requiring the Commonwealth to pay for the reasonable costs for the legal representation of a respondent, if the respondent is unable to engage a lawyer due to circumstances beyond their control. However, there is a regulation-making power which permits regulations to prescribe matters that the court must not consider when determining whether circumstances were beyond the person's control.

***Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2020* (Cth)**

Key measures

- Relevantly enacted various measures to strengthen the investigative powers of law enforcement agencies, in relation to accessing the content of communications that have been encrypted, including:
  - Enacting Part 15 of the *Telecommunications Act 1997* (Cth) to create a regime to enable law enforcement agencies to compel technical assistance from telecommunications providers, to make intelligible encrypted communications, and to enable those agencies to confer civil immunities on those providers (and limited immunities from computer offences) for voluntary assistance.
  - Enacting a new regime of computer access warrants in the *Surveillance Devices Act 2004* (Cth) to enable law enforcement agencies to gain remote access to data held in computers, for the purpose of investigating Commonwealth offences or State offences with federal aspects (similar to ASIO's computer access warrant regime.
  - Expanding the existing powers to compel people to provide access to phones or computers (such as passwords) seized from premises during the execution of a search warrant, under section 3LA of the Crimes Act.

Anticipated impacts on criminal cases

- Potential increase to the number of prosecutions.
- Potential increase to the volume evidence required to be reviewed by defence counsel in prosecutions.
- Grounds of challenge to mandatory or voluntary assistance notices, computer access warrants and orders issued under section 3LA of the Crimes Act.

***National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth)**

Key measures

- Created a large number of new offences in Chapter 5 of the Criminal Code directed to acts in the nature of espionage, foreign interference and official secrecy. Several of these offences incorporate an expanded definition of 'national security' which covers acts or threats that may damage Australia's economic interests.

Anticipated impacts on criminal cases

- Expands the scope for more prosecutions or investigations (including potential challenges to search warrants).
- Expands the scope for the invocation of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) in such proceedings.