Law Council
OF AUSTRALIA

Counter-Terrorism Legislation Amendment Bill 2026 (Cth)

Parliamentary Joint Committee on Intelligence and Security

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Executive summary

1. Terrorism is an insidious form of political violence: it exposes Australians to risk of death and serious injury, and it is intended to undermine the democratic process. It is vitally important that our laws are fit for purpose and that any impacts on human rights, fundamental freedoms, or rule of law principles are limited to the extent that they are necessary and proportionate to achieve their aims. Achieving this balance is especially important under conditions where the threat posed by terrorism and violent extremism is serious and evolving.

2. Since the publication in 2023 of the Parliamentary Joint Committee on Intelligence and Security Committee (**PJCIS**) *Advisory Report on the Counter Terrorism and Other Legislation Amendment Bill 2023*,[1] the Director-General of Security has raised the terrorism threat level to "probable".[2] Events at Bondi Beach in December 2025, and those in Perth in January 2026 saw that prediction tragically realised. Those actions resulted in devastation and grief for victims, their families and communities.

3. The Counter-Terrorism Legislation Amendment Bill 2026 (Cth) (the **Bill**) would extend the availability of extraordinary counter-terrorism powers beyond their current sunset date, expand reliance on control orders, support the use of surveillance powers in control order investigations, broaden access to criminal history information, and change the process for de-listing terrorist organisations.

4. The Law Council recognises the need to respond effectively to the threat of terrorism, political violence and violent extremism. Responding to political violence requires laws capable of protecting and expressing the values of the rule of law in a liberal democracy. The rule of law and the fundamental freedoms of individuals are central to the national security we seek to protect and enhance. It is for that reason that the Law Council seeks to ensure that the measures in the Bill are justified, appropriately calibrated, and robustly safeguarded.

5. A key aspect of the Bill relates to the control orders framework, elevating it to the primary mechanism for post-sentence monitoring. This framework has the potential to impose intrusive obligations, prohibitions and responsibilities on individuals based on predictions of their future behaviour rather than as punishment for actions they have taken and been duly convicted of.

6. The most serious restriction on liberty is preventative detention. In this regard the Bill would extend the sunset date of both preventative detention and continuing detention measures. For reasons contained in this submission, the Law Council continues to oppose the extension of these frameworks.

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1 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter Terrorism and Other Legislation Amendment Bill 2023* (Report, October 2023) . See Law Council of Australia, Counter-Terrorism Legislation and Other Amendment Bill 2023 (Submission to the Parliamentary Joint Committee on Intelligence and Security, 13 October 2023).

2 Mike Burgess, Director-General of Security: Statement on the National Terrorism Threat Level, Australian Security Intelligence Organisation (Statement, 30 January 2025) <https://www.asio.gov.au/director-general-security-statement-national-terrorism-threat-level>.

7. Our submission addresses Schedules 1–7 to the Bill sequentially. However, our recommendations primarily focus on two overarching themes: (1) enhancing how these frameworks respond to children; and (2) pathways for affected persons to make representations about listed terrorist organisations.

Enhancing legal frameworks for responding to children

8. The increase in the number of children being investigated by the police and security services in connection with allegations of violent extremism, political violence and terrorism is deeply worrying. Our society needs to develop effective policy responses to such behaviour and offending. A range of measures in this Bill, either directly or by implication, apply to children. These amendments would:
    - repeal a special rule limiting the duration of control orders on children to 3 months and apply the standard 12-month duration applicable to adults;
    - retain the power to detain minors without charge in connection with terrorism investigations; and
    - disapply an existing prohibition on the use or disclosure of criminal history information relating to findings of guilt without conviction, as this sentencing disposition is contained in youth justice frameworks, to be disclosed and used for the purposes of the control order or post-sentence order frameworks (see Schedule 6).

9. We do not support extending the maximum period for which a control order can be imposed on a child to 12 months. Further, laws that apply extraordinary powers to children must be particularly sensitive to prioritising rehabilitation and reintegration as safety-enhancing values. Children and young people are particularly vulnerable by virtue of their immaturity and yet they are nevertheless still capable of inflicting serious harms on innocent persons. We are concerned that proposals in the Bill may not best reconcile those aims in a way that mitigates the risk that the involvement of law enforcement or intelligence agencies might further radicalise or alienate affected children.

10. We remain concerned that orders made under these frameworks would likely be perceived by a child or young person as punitive—regardless of how such powers are characterised at law—and there is a risk that the use of such powers may further alienate them from the values and standards of the Australian community. Where these frameworks are to be applied to children, we strongly recommend that the Committee focusses on ensuring the rehabilitation and reintegration of young Australians. To this end, the Law Council recommends that rehabilitation and reintegration should be elevated to an object of the Division 104 and 105A frameworks.

Pathways to make representations about listed terrorist organisations

11. Schedule 7 to the Bill removes a modest avenue for parties affected by the proscription of terrorist organisations to prompt the AFP Minister to consider de-listing an organisation. Proscription frameworks enliven a range of criminal offences and restrict freedom of association. We understand that these organisations are of public concern. However, it is important that safeguards are retained. Accordingly, we oppose amendments that would restrict an already limited pathway for affected persons and entities to make submissions about the ongoing suitability of a listing.

Recommendations

Schedule 1—Extending sunset provisions

The preventative detention order framework in Division 105 and continuing detention orders under Division 105A should be allowed to sunset on 7 December 2026.

A comprehensive independent review of the control order, post-sentence order, and AFP stop, search and seize powers should be undertaken prior to any attempts to further extend these powers beyond 7 December 2029.

Schedules 2 and 3—Expanded reliance on control orders

The extension of the maximum period for which a control order can be imposed on a child to 12 months should not proceed.

The objects clause relating to Division 104 should be revised to state that, where a control order or post-sentence order is to be imposed on a minor, in addition to the purposes in paragraphs (a) to (c), the relevant order should be made for the purposes of supporting the rehabilitation and reintegration of the young person. A corresponding amendment should be made to Division 105A.

Legal assistance funding

There should be a dedicated Commonwealth legal assistance funding stream for all post-sentence orders, including control orders.

Reporting

Annual reporting on control orders should include a brief summary of the facts of each control order in operation, distinguishing between post-sentence risk and pre-prosecution risk.

In relation to control orders applying to children, reporting should include the duration of each control order and the conditions imposed.

Post-sentence orders and the international production order framework

The Explanatory Memorandum should be revised to sufficiently explain and justify the intended operation of Item 59 in Schedule 5.

Schedule 4—Access to surveillance devices and telecommunications warrants for control order investigations

The definition of "serious terrorist offender" should be amended to include an exception for offences located in Division 105A of the Criminal Code.

The Explanatory Memorandum should be revised to provide a full justification of the extension of this definition to offences with maximum penalties of fewer than 7 years' imprisonment.

In circumstances where the subject of a warrant is a child and investigated for the purpose of determining whether to seek consent to request a control order, the relevant issuing authority should be required to consider whether the methods sought are compatible with the best interests of the child as a primary consideration and whether less intrusive methods are more compatible.

Schedule 5—Removal of barriers to information sharing

The information sharing provisions should be amended to require that "an offence that a person is taken to never have been convicted of" must be directly relevant to the control order or post-sentence order frameworks. If information is not directly relevant, the information sharing barrier should not be disapplied.

The proposed information sharing and use provisions in the Crimes Act and Criminal Code should be amended to include special rules relating to minors and information relating to offences committed while a person was a minor. Including:

- **a requirement that decision makers take account of the best interests of the child as a primary consideration alongside the other control order and PSO-related purposes for the disclosure or use of criminal history information that would otherwise be barred from a Commonwealth authority;**
- **a rebuttable presumption that findings of guilt without a recorded conviction are irrelevant if the finding of guilt was more than 12 months old on the date an application is made; and**
- **a requirement that all information about the criminal history of minors without conviction that is held by Commonwealth agencies for the purposes of control orders or PSOs should be destroyed as soon as practicable after it ceases to be relevant.**

The Statement of Compatibility with Human Rights in the Explanatory Memorandum should be revised to address Schedule 4's compatibility with the Convention on the Rights of the Child.

Schedule 6—De-listing proscribed terrorist organisations

The removal of the pathway for individuals or organisations to make an application concerning the de-listing a terrorist organisation should not proceed.

If the PJCIS continues to support this amendment, terrorist organisation listings should be subject to periodic 12-monthly reassessment with the opportunity for affected persons and entities to make submissions to the AFP Minister.

Introduction

12. The Law Council welcomes the opportunity to provide this submission on the Counter-Terrorism Legislation Amendment Bill 2026 (Cth).

13. Schedules 1–5 to the Bill broadly address matters arising in connection with the control order, the preventative detention order (**PDO**), and the post-sentence order (**PSO**) frameworks contained in the *Criminal Code Act 1995* (Cth). The Bill also amends provisions concerning the powers of the Australian Federal Police (**AFP**) that relate to terrorism contained in Division 3A of Part IAA (**AFP stop, search and seize powers**) of the *Crimes Act 1914* (Cth).

14. Schedule 6 amends provisions in the Criminal Code relating to the de-listing of proscribed terrorist organisations. This submission does not comment on Schedules 7 and 8 to the Bill.

15. The existing frameworks that the Bill seeks to amend can be described briefly as follows:

- **control order framework (Division 104 of the Criminal Code):** allows for obligations and restrictions to be imposed on a person for the purpose of protecting the public from a terrorist act, or to prevent the provision of support for the facilitation of a terrorist act;

- **PDO framework (Division 105 of the Criminal Code):** allows a person to be taken into custody and detained for up to 48 hours where it is suspected, on reasonable grounds, that they:
  - "will engage in a terrorist act";
  - "possess a thing in connection with preparation for… a terrorist act"; or
  - have "done an act in preparation for, or planning, a terrorist act"[3]

  and that detention would "substantially assist" in preventing a terrorist act from occurring. Detention is also allowed with 28 days of a terrorist act occurring to "preserve evidence";[4]

- **PSO framework (Division 105A of the Criminal Code):** allows, at the conclusion of a custodial sentence for offences related to terrorist acts, for either:
  - a period of ongoing preventative detention; or
  - obligations and responsibilities to be imposed on a person in the community

  to apply in circumstances in circumstance where a person is judged by a court to pose an "unacceptable risk of committing a serious Part 5.3 or Part 5.3A offence" and

[3] See *Criminal Code Act 1995* (Cth) sub-s 105.4(4).
[4] Ibid, sub-s 105.4(6).

- **AFP stop, search and seizure powers (Part IAA, Division 3A of the Crimes Act):** allow police to stop, question, search, enter and seizure of personal property in Commonwealth Places, or a prescribed zone, without a warrant where an officer suspects on reasonable grounds that material relevant to a terrorism offence is on the premises, or there is a risk to a person's life, health or safety.

16. The proposed changes are to:

- extend the operation of the control order, PDO, PSO, and the AFP stop, search and seize powers (Schedule 1);
- establish the control order framework as the primary mechanism to impose conditions and responsibilities on serious terrorist offenders following their release from custody (Schedules 2 and 3);
- extend the availability of surveillance device, telecommunications service and named person warrants in circumstances where investigators are considering whether to seek the AFP Minister's consent to request a control order (Schedule 4); and
- remove barriers to sharing information about findings of guilt where no conviction is recorded under State and Territory or foreign laws, for purposes related to the control order and PSO frameworks (Schedule 5).

General comments

Measures relating to children

17. The Law Council is concerned that changes introduced in this Bill risk unduly impacting on children. For example, a number of these changes to the control order framework are designed to provide additional flexibility in circumstances where the subject of a possible control order is either a child or the relevant offence was committed while the subject was a child. Changes to the orders frameworks and related procedures give rise to concerns about children that include:

- repealing special rules for children of 14 to 17 years of age, including repealing the three-month limitation on the duration of a control order where the subject of the order is between 14 and 17 years of age. The maximum duration for a control order would be the same 12 months for both adults and children;[5]
- extending the power to detain children of 16 to 17 years of age under the PDO framework; and
- disapplying the prohibition on the disclosure of criminal history information to a Commonwealth authority in circumstances where a finding of guilt was made, but due to the operation of a state, territory or foreign law, no conviction was recorded. This change is only for the purposes of making decisions about, or administering, the control order and PSO frameworks. Provisions that restrict the recording of convictions often form part of State and Territory youth justice

[5] A control order cannot be requested, made or confirmed about a person under 14 years of age: *Criminal Code Act 1995* (Cth) sub-s 104.28(1).

frameworks where limitations are placed on the circumstances where a conviction may be recorded.

18. Each of these measures is discussed further in this submission under the relevant Schedules to the Bill. However, in all cases the Law Council recommends that the Committee consider closely the impacts of the Bill on children, with particular regard to necessity and proportionality. In doing so, we acknowledge with concern the comments made by the Director-General of Security,[6] as well as those by the Five Eyes intelligence partnership,[7] regarding the increased number of children being investigated by both the police and security services in connection with allegations of violent extremism, political violence and terrorism. We recognise that young offenders can and do commit crimes that can have significant effects on their victims and the community, and that our society needs to develop effective policy responses to such offending.

19. Cases such as *CDPP v Thomas Carrick (a pseudonym)* [2023] VChC 2 (***Carrick***) illustrate the possible consequences of not including effective legislative guardrails and oversight at all stages of police engagement with minors who are allegedly contemplating violent political extremism or terrorism. Magistrate Flemming granted a permanent stay of proceedings,[8] following Her Honour's conclusion that:

> *The community would not expect law enforcement to use the guise of a rehabilitation service to entice the parents of a troubled child to engage in a process that results in potential harm to the child.*
>
> *By its conduct in attempting to radicalise TC for the purposes of gaining evidence to prosecute TC for the offences with which he has been charged, the AFP has completely and inevitably undermined the therapeutic process initiated by TC's parents and the [Victoria Police Countering Violent Extremism Unit] to seek help to engage TC in the therapeutic and rehabilitative process.*
>
> *The conduct engaged in by the [Joint Counter Terrorism Team (**JCTT**)] and the AFP falls so profoundly short of the minimum standards expected of law enforcement offices that to refuse this application would be to condone and encourage further instances of such conduct*
>
> *I am satisfied that to allow this proceeding to continue would not only be unjustifiably and unfairly oppressive to TC but would also lead to an erosion in public confidence in the Court's processes. The re-radicalisation of TC which was created by JCTT in the guise of OCO's [a pseudonym for an AFP officer conducting a controlled operation] chats with TC were obtained in circumstances that fall far short of the minimum standard that society expects of law enforcement officers.*[9]

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6 Mike Burgess, *Director-General's Annual Threat Assessment 2025*, Australian Security Intelligence Organisation (19 February 2025) <https://www.asio.gov.au/resources/speeches-and-statements/director-generals-annual-threat-assessment-2025>.

7 Five Eyes, *Young people and violent extremism: a call for collective action* (October 2024) <https://www.asio.gov.au/young-people-and-violent-extremism>.

8 *CDPP v Thomas Carrick (a pseudonym)* [2023] VChC 2, [84].

9 Ibid, [80]–[83].

20. Effective legislative safeguards provide direction to investigating officers and contribute to "protecting the integrity of the system of justice administered by the Court".[10] As *Carrick* demonstrates, such the provision of, and adherence to, frameworks that require the best interests of the child to be considered as a primary purpose, and the formal inclusion of rehabilitation and reintegration purposes as the object for utilising particular frameworks, might have avoided a situation that ultimately resulted in a formal stay of proceedings.

21. If the control order framework (which applies to children from 14 years of age) and the PDO framework (which applies to children from 16 years of age) are to continue to apply to young people, then current safeguards should not be removed. Additional protections must be put in place to mitigate the risk that the application of a preventative framework might instead further radicalise or alienate affected children to the detriment of their long-term rehabilitation and reintegration into the community.

Specific comments on Schedules

Schedule 1—Extending sunset provisions

22. Schedule 1 to the Bill proposes to extend the operation of the control order, PDO, and the PSO frameworks in Part 5.3 of the Criminal Code, as well as the AFP stop, search and seizure powers in the Crimes Act, by a further three years to 7 December 2029.

Preventative detention orders

23. The Law Council maintains its longstanding view that the PDO framework should not be renewed. The PDO framework is not, in our view, proportionate or necessary to address the risk of terrorism and should be allowed to sunset.

24. The legal power to detain persons in a liberal democracy without charge or arrest remains exceptional. The extraordinary status of the PDO framework has not diminished over time despite the extension of earlier sunset clauses. That the PDO framework has never been used[11] does little to displace concerns about the re-drawing of "the careful balance between the rights of accused persons and the public interest in the operation of the ordinary criminal law process"[12] that the framework represents.

25. Federal law criminalises the planning and preparation of a terrorist act.[13] These offences extend criminal liability far earlier in the commission of an act than traditional inchoate offences such as attempt,[14] indeed preparation and planning offences

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10 *CDPP v Thomas Carrick (a pseudonym)* [2023] VChC 2, [84].

11 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human rights scrutiny report* (Report 11 of 2023, 18 October 2023) 68–69 <https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/reports/2023/Report_11/Report_11_of_2023.pdf?la=en&hash=45D8CD5B432ABB11513695CE11AD97C7831018EE>.

12 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 10 of 2026, 19 August 2026) 7–8 [1.09].

13 *Criminal Code Act 1995* (Cth) s 100.6

14 See *Criminal Code Act 1995* (Cth) s 11.1(2) provides that:

themselves give rise to inchoate liability, for example, for conspiracy.[15] The Law Council continues to hold the view that the variety of preparation and planning offences contained in the Criminal Code are sufficient to capture the type of activities that might otherwise be targeted through the PDO framework.[16]

26. We are concerned that the extension of these powers is being proposed by this Bill without a contemporaneous and comprehensive review of the necessity and operation of the PDO framework and the suitability of its safeguards. The Law Council continues to support recommendations made in our 2023 submission from paragraph [91].[17] We previously made a detailed submission to the PJCIS on the PDO framework in 2020; in our view, both the analysis and the recommendations at pages 33 to 41 continue to be relevant.[18]

Post-sentence order framework—continuing detention orders

27. The Law Council continues to have strong concerns about the operation of the continuing detention order (**CDO**) framework. We have previously recommended the abolition of the CDO framework,[19] and consider that these powers represent neither a proportionate nor necessary response to the risk of serious Part 5.3 or Part 5.3A offences for the following reasons:

- the rule of law and international law obligations require that any system designed to authorise detention or restrictive measures after the completion of a sentence imposed by a court with the aim to pre-empt and prevent criminal activity be subject to careful scrutiny;
- detention based on a prediction of a person's future risk is a fraught exercise in the absence of an empirically validated risk assessment methodology;[20]
- terrorism offenders, as a discrete class of offenders of the kind captured by Part 5.3 of the Criminal Code, are associated with low recidivism rates;
- among comparable jurisdictions such as the United Kingdom and New Zealand, there is no current reliance on exceptional mechanisms such as CDOs;

For the person to be guilty [of attempting to commit an underlying criminal offence], the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

15 See *Criminal Code Act 1995* (Cth) s 11.5.

16 See *Criminal Code Act 1995* (Cth) ss 105.4(4)(a)(iii) and 101.6.

17 Law Council of Australia, *Counter-Terrorism and Other Legislation Amendment Bill 2023* (Submission to the Parliamentary Joint Committee on Intelligence and Security, 13 October 2023) [91] <https://lawcouncil.au/resources/submissions/counter-terrorism-and-other-legislation-amendment-bill-2023>.

18 Law Council of Australia, *Review of Australian Federal Police Powers: control orders; preventative detention orders; stop, search and seizure of powers; and continuing detention orders* (Submission to the Parliamentary Joint Committee on Intelligence and Security, 17 September 2020) 33–41 <https://www.aph.gov.au/DocumentStore.ashx?id=0f763c4e-577f-4f65-86b3-dd1192863b83&subId=691812>.

19 See Law Council of Australia, *Review of post-sentence terrorism orders: Division 105A of the Criminal Code Act 1995 (Cth)* (Submission to the Parliamentary Joint Committee on Intelligence and Security, 17 July 2023).

20 Grant Donaldson SC, *Review into Division 105A (and related provisions) of the Criminal Code Act 1995 (Cth)*, Independent National Security Legislation Monitor (Report, March 2023) 74 [253]. See also *Benbrika v A-G (Cth)* [2024] VSC 265, [22(d)–(e)].

- because the objects of Division 105A do not include offender rehabilitation and reintegration into the community, when deciding whether to grant a CDO, a decision maker may be unable to strike an appropriate balance between protecting the community and upholding fundamental individual rights;
- the statutory prohibition on the ability of the issuing court to take into consideration any less restrictive measures under paragraph 105A.7(1)(c) is disproportionate because the court is limited to considering an ESO or control order. There should not be any such fetter on the ability of the issuing court to take into consideration any measures that it identifies as being less restrictive than a CDO in the circumstances of the particular case; and
- the Law Council is concerned that the CDO framework allows a person, after serving their sentence, to be detained indefinitely through successive three-year detention orders.

28. The Law Council supports the former INSLM, Grant Donaldson SC's recommendation to abolish the CDO framework.[21] Following an extensive review of Division 105A, the INSLM concluded that the combination of the unreliability of risk assessment frameworks in predicting human behaviour in the future and the power to order detention in a prison to manage risk—despite the involvement of the judiciary in decision-making—constituted an "irrebuttable risk to justice".[22] The INLSM recommended that CDOs be removed from the PSO framework because:

> *The risk of error posed by untestable judicial predictions about future behaviour, with the consequence of error being that a person will be detained in prison for no good reason, cannot be ignored.*[23]

29. Further, the INSLM observed, in the course of reaching his conclusion, that:

> *It is also relevant that in Div 105A, and Commonwealth law more generally, there is no aspiration that those imprisoned for Pt 5.3 and Pt 5.5 offences be rehabilitated and reintegrated into the community. … [I]t is not credible that lengthy detention is a proportionate response to the risk of an offender committing further Pt 5.3 offences upon release if little is required to be done by way of rehabilitation while an offender is serving their sentence and nothing is required to be done while they are detained post-sentence.*[24]

30. We are concerned that, despite heightened concerns about the risk of terrorism, the Bill makes no attempt to refine the CDO framework to better respond to persons assessed as posing an "unacceptable risk to the community", beyond supporting their continued detention. It is problematic that the objects clause of Division 105A neither refers to rehabilitation or reintegration nor imposes an obligation to consider how post-sentence orders might support serious terrorism offenders in these aims. We

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21 Law Council of Australia, Review of post-sentence terrorism orders: Division 105A of the Criminal Code Act 1995 (Cth) (Submission to the Parliamentary Joint Committee on Intelligence and Security, 17 July 2023) 9 [11].

22 Grant Donaldson SC, *Review into Division 105A (and related provisions) of the Criminal Code Act 1995 (Cth)*, Independent National Security Legislation Monitor (Report, March 2023) 104 [340].

23 Grant Donaldson SC, *Review into Division 105A (and related provisions) of the Criminal Code Act 1995 (Cth)*, Independent National Security Legislation Monitor (Report, March 2023) 104 [340].

24 Grant Donaldson SC, *Review into Division 105A (and related provisions) of the Criminal Code Act 1995 (Cth)*, Independent National Security Legislation Monitor (Report, March 2023) 97 [318].

consider this an oversight in how this framework might respond holistically to risks of political violence.

31. The Australian Government did not accept the INSLM's conclusions, nor did it engage with the reasoning about practical shortcomings in the accuracy of the risk assessment process, and, instead, concluded that:

> *Having regard to the current terrorism threat environment, the existing statutory safeguards, and the judicious use of these powers, the Government considers it would not be appropriate to abolish continuing detention orders.*[25]

32. The Law Council is concerned that the Bill does not address the substance of very serious concerns about the CDO framework. The limited use of these powers to date does not constitute a safeguard against future misuse by others.

Control orders and AFP stop, search and seizure powers

33. The Law Council does not oppose the further extension of the sunset clause relating to either the control order framework nor or the AFP stop, search and seizure powers. The extension of sunset clauses remains preferable to any attempt to make these extraordinary powers permanent. We continue to see value in the public consideration of the necessity and proportionality of extraordinary powers through statutory sunsetting.

34. However, while the Law Council does not object to the temporary extension of the control order and the AFP stop, search and seizure powers, in this instance, we are concerned that there is little justification provided in the materials supporting the Bill for the continuation of these extraordinary measures beyond references such as the "current challenging terrorism threat environment".[26] While few would argue against this assessment, it is important to properly consider how the control order and the AFP stop, search and seizure powers are a necessary part of the response.

35. In this regard, we endorse the following concerns of the Senate Standing Committee for the Scrutiny of Bills about the extension of sunset clauses without adequate scrutiny:

> *The promise of a sunset clause is that it will ensure that there is adequate Parliamentary scrutiny before measures—especially those considered exceptional and temporary—are made permanent. There is, however, a risk that a sunset clause can operate to make permanent changes to legal principles considered fundamental to a liberal democracy by stealth.*[27]

36. We would expect that the Government is able to genuinely engage with issues relating to the necessity and proportionality of the measures, ideally, well before a proposal is made to extend them further. A key consideration that requires a

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[25] Australian Government, *Australian Government response to the Independent National Security Legislation Monitor report Review into Division 105A (and related provisions) of the Criminal Code Act 1995 (Cth)* (June 2026) unpaginated.

[26] Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2026 (Cth) 4 [6].

[27] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 10 of 2026, 19 August 2026) 8 [1.11].

response from Government is why these extraordinary powers remain essential in light of the number of preparatory terrorism offences that now exist. The Law Council has repeatedly queried whether the existence of these preparatory offences means that, in practice, preventative measures such as those subject to the proposed extension are not needed or have little operational utility.

Recommendations arising from the Royal Commission on Antisemitism and Social Cohesion

37. The Terms of Reference of the Royal Commission on Antisemitism and Social Cohesion include examination of the circumstances surrounding the Bondi terrorist attack on 14 December 2025, including whether relevant Commonwealth, State and Territory intelligence and law enforcement agencies were prevented from taking prohibitive actions by the current legislative framework and authorising environment. The Royal Commissioner is directed to make any recommendations arising out of the inquiry, including about policy, legislative, administrative or structural reforms.[28]

38. In these circumstances, it may be desirable to require a further review of the policy and provisions of Divisions 104, 105 and 105A well before the next proposed sunsetting date of 7 December 2029. That process will be well-placed to also examine the impact of any recommendations around the legislative framework for counter-terrorism arising from the Royal Commission that are directed to, or affect, the current framework for counter-terrorism orders.

Recommendations—Extending sunset provisions

The preventative detention order framework in Division 105 and continuing detention orders under Division 105A should be allowed to sunset on 7 December 2026.

A comprehensive, independent review of the control order, post-sentence order, and AFP stop, search and seize powers should be undertaken prior to any attempts to further extend these powers beyond 7 December 2029.

Schedules 2 and 3—Expanded reliance on control orders

Positioning control orders as the primary framework

39. The Bill proposes amendments to the Criminal Code to expand the availability of the control order framework for imposing conditions and responsibilities on a person for the purposes of managing a perceived risk of terrorism-related offences. The Bill proposes changes to the availability of the control orders and post-sentence orders frameworks to position control orders as the primary framework by which significant and intrusive conditions and responsibilities are imposed on persons in response to perceived risks to the community.

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[28] Royal Commission on Antisemitism and Social Cohesion, 'Letters Patent' (Published on Royal Commission webpage on 8 January 2026 and updated on 12 January).

40. As our submission concerns the implications of the proposed changes to the control orders and extended supervision orders frameworks, the **Appendix** to this submission is a table outlining the similarities and differences between key dimensions of the two relevant frameworks as they currently operate. This is intended to assist in understanding the implications of the changes to the frameworks as proposed by the Bill.

41. Positioning control orders as the primary mechanism for post-sentence supervision is a departure from the current situation where an application for post-sentence conditions on an offender may be made under either the ESO *or* control order scheme. While the ESO mechanism would remain, its potential application will be limited to situations where a court declines an application for a CDO.

42. The Law Council has previously raised concerns with the potential duplication between the ESO and control order frameworks, and expressed caution about situations where, for example, a failed ESO application may be effectively "re-branded" as a control order application.[29] We therefore support, in-principle, the additional clarity provided through the removal of this potential overlap.

43. However, with a greater reliance on the control order framework, we highlight concerns that the Law Council expressed and continues to hold about the control order framework in Division 104 of the Criminal Code. In this regard, the highly intrusive and rights-limiting restrictions and responsibilities on persons based on perceptions of risk about future conduct require careful consideration of the evidence base for such a proposal, as well as the suitability of the control order framework for that role.

44. While the scheme is described in the Explanatory Memorandum as "preventative rather than punitive",[30] it must be recognised that the imposition of a control order can significantly curtail the fundamental freedoms of an individual by limiting their activities, including their communications, associations and movements. This raises rule of law concerns, particularly in circumstances where control orders are imposed on persons who have not been charged with any offence under the law. The fact that successive control orders can be imposed means that an individual may be subject to onerous conditions for long periods of time.

45. Despite aspects of the frameworks in question being enlivened by persons serving a custodial sentence for relevant terrorism offences, the conditions imposed on persons by a control order are justified as preventative measures taken to pre-empt the risk of conduct that has, by definition, not yet occurred. Even where the person is currently serving a custodial sentence after conviction for a terrorism offence, the control order and PSO frameworks are justified on the basis that they mitigate the risk of future conduct.

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[29] Law Council of Australia, *Review of post-sentence terrorism orders: Division 105A of the Criminal Code Act 1995 (Cth)* (Submission to the Parliamentary Joint Committee on Intelligence and Security, 17 July 2023) 25 [78] <https://lawcouncil.au/resources/submissions/review-of-post-sentence-terrorism-orders-division-105a-of-the-criminal-code-act-1995>.

[30] Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2026 (Cth) 5 [14].

46. We note that the necessity and proportionality of control orders has previously been called into question, with a recommendation from the first INSLM, Mr Bret Walker SC, that they be repealed and replaced with an orders framework similar to the PSO framework.[31] The Law Council continues to support the conclusions and reasoning of the first INSLM that reliance should instead be placed upon the extensive surveillance and investigatory powers of law enforcement agencies, to enable the enforcement of the wide range of terrorism and security offences under Commonwealth laws. This includes offences that specifically target preparatory and ancillary activities to terrorist acts and foreign incursions.

47. We acknowledge, however, that more recent considerations, including a subsequent review by the INSLM of Divisions 104 and 105 of the Criminal Code,[32] have recognised that control orders have a role to play in the national security landscape,[33] even if their use and the operation of their provisions must continue to be closely monitored.[34] However, the Law Council continues to hold concerns with aspects of the control order framework. The Bill's proposed reliance on the control orders framework exacerbates these concerns. The following matters therefore warrant reconsideration:

- **issuing thresholds**: in relation to the rules governing the drawing of inferences from a person's past conduct, for the purpose of assessing their future risk in applying the issuing test in section 104.4, the Law Council has consistently supported legislative amendments to provide that, in applying the issuing criteria, it is only possible for a court to draw an inference about a person's future risk of engaging in a terrorism or foreign incursions offence, if the court is satisfied it is the only rational inference capable of being drawn from the evidence before it, rather than the existing threshold of being satisfied on the "balance of probabilities".

- **use of control orders in relation to pre-prosecution risk**: the Law Council considers that use of the control order regime in relation to pre-prosecution risk is more likely to be disproportionate. Given the extensive range of terrorism offences that capture preparatory and ancillary conduct, and existing investigatory powers, the use of control orders either as an alternative to prosecution or as a *repêchage* for an unsuccessful prosecution risk undermining the presumption of innocence and other fair trial rights.

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31 See Bret Walker SC, *Declassified Annual Report: 20th December 2012*, Independent National Security Legislation Monitor (Report, 20 December 2012) 43-44.

32 James Renwick SC, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, Independent National Security Legislation Monitor (Report, September 2017).

33 James Renwick SC, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, Independent National Security Legislation Monitor (Report, September 2017) 51–55 [8.12]–[8.26].

34 James Renwick SC, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, Independent National Security Legislation Monitor (Report, September 2017) 55 [8.27].

- **financial assistance for respondents to control applications**: there should be a dedicated Commonwealth legal assistance funding stream for all post-sentence orders, in addition to that for control orders. Consideration should be given to delivering that assistance through State and Territory legal aid commissions, akin to existing arrangements for complex criminal cases. This is discussed further below.

48. Any proposed extension to the availability of such powers—both in time (per Schedule 1) and in scope (per Schedules 2 and 3)—requires a commensurate appraisal by the PJCIS and the Parliament that these powers and their issuing thresholds, procedural and other safeguards, oversight arrangements, and rights of appeal remain necessary and are both appropriate and adapted to the circumstances in which their increased use is anticipated. The recommended review as set out above would be an opportune time to explore these matters.

Expansion of control orders for minors

49. The Criminal Code currently contains special rules for control orders made or confirmed in relation to persons aged between 14 and 17 years of age, placing a three-month limit on the duration of any one control order (noting that this does not prevent the making of successive control orders in relation to the same person).[35]

50. The Bill seeks to amend subsection 104.28(2) by removing the three-month limit for minors and would instead allow control orders of up to 12 months in duration, removing a key distinction between children and adult frameworks. Where a control order is issued in relation to a young person, the court must continue to take into account—as a primary consideration—the best interests of the young person, with reference to the factors outlined in subsection 104.4(2A).

51. While the impetus for this proposed amendment is acknowledged and understood, it fails to recognise the importance of the criminal law differentiating between adult and juvenile offenders. There is no doubt that the exploitation of children by terrorist organisations is a concerning trend.[36] However, the criminal law has long recognised that the immaturity of children demands that they be treated differently from adults.

52. Indeed, the three-month limit on control orders for children was originally "designed to recognise the special needs of young people and the additional care that needs to be exercised when dealing with young people in the criminal and security environments".[37] Notably, this statement was made at a time when the minimum age for a control order was 16 years, not 14 as it now is.

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35 *Criminal Code Act 1995* (Cth) s 104.28.

36 See United Nations Security Council Counter-Terrorism Committee Executive Directorate, *Growing alarm as Terrorist exploitation of children rapidly evolves, outpacing Member State responses* (Report, October 2025).

37 Explanatory Memorandum, Anti-Terrorism Bill (No. 2) 2005 (Cth) 35.

53. The framework will continue to provide for separate considerations for children aged 14 to 17 years in subsection 104.4(2A). However, in our view, this is not an adequate safeguard. The terms of control orders for juveniles should be different in fundamental aspects, including their duration, from those that apply to adults. There is insufficient justification provided in the Bill and explanatory material to establish why it is necessary and proportionate to effectively quadruple the maximum term, as proposed. An advantage of the current 3-month limitation on a single control order, when applied to children, is that the limited duration facilitates regular and independent engagement and oversight by the Courts if additional control orders are sought.

54. The Law Council does not support extending the maximum period for which a control order can be imposed on a young person without further justification and evidence, including reasons why more modest extensions could not achieve similar outcomes while better accounting for the best interests of the child.

55. We emphasise that the preventative response to divert children and young people from being radicalised should not be confined to the criminal law and adjacent processes, such as control orders. There are a range of interrelated factors such as digital media standards, educational interventions, and family and community supports that must be bolstered in the face of this emerging threat. In this respect, we note recommendations 1–4 of the Senate Standing Committee on Legal and Constitutional Affairs' recent report on *Right wing extremist movements in Australia*, which provides holistic responses to the threat of radical extremism in light of evidence that "criminalisation of extremist behaviour is unlikely to fully address the threat of violence and reduce the risk posed to the wider community".[38]

Recommendations—Control orders and minors

The extension of the maximum period for which a control order can be imposed on a child to 12 months should not proceed.

The objects clause relating to Division 104 should be revised to state that, where a control order or post-sentence order is to be imposed on a minor, in addition to the purposes in paragraphs (a) to (c), the relevant order should be made for the purposes of supporting the rehabilitation and reintegration of the young person. A corresponding amendment should be made to Division 105A.

Legal assistance funding

56. The Law Council reiterates that there should be a dedicated Commonwealth legal assistance funding stream for all post-sentence orders. However, this should be prioritised for subjects of control orders in the event that these measures are going to be increasingly relied upon in place of ESOs.

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[38] Senate Standing Committee on Legal and Constitutional Affairs, *Right wing extremist movements in Australia* (Report, December 2024), recommendations 1–4, xiii.

57. Consideration should be given to delivering this assistance through State and Territory legal aid commissions, akin to existing arrangements for complex criminal cases. We note that recommendation 13 of the INSLM's Report should be supported, including the establishment of a dedicated Commonwealth legal assistance funding stream for all post-sentence orders, in addition to that for control orders.[39]

Recommendation—Legal assistance framework

There should be a dedicated Commonwealth legal assistance funding stream for all post-sentence orders, including control orders.

Reporting on use of control orders

58. Section 104.29 of the Criminal Code requires the AFP Minister to report annually on the operation of the control order framework. The Law Council supports this requirement. However, we suggest that scrutiny of the control regime would be enhanced by including a brief summary of the facts of each control order in operation, distinguishing between post-sentence risk and pre-prosecution risk.

59. We are concerned that there is also insufficient public data about post-acquittal control orders, as well as about control orders that are not directly related to criminal proceedings. Anonymised data that provides a more holistic picture of the circumstances and conditions attached to extraordinary powers is necessary to be able to properly adjudicate claims about the necessity and proportionality of the framework.

60. Further, in light of the Bill's proposal to extend the maximum duration for a control order in relation to a child, there is a need for annual reporting to provide further particulars to monitor the implementation of the reforms. In addition to reporting on numbers of control orders applied to minors, detail should be provided on the length of these orders, and the conditions imposed.

Recommendation—Reporting

Annual reporting on control orders should include a brief summary of the facts of each control order in operation, distinguishing between post-sentence risk and pre-prosecution risk.

In relation to control orders applying to children, reporting should include the duration of each control order and the conditions imposed.

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[39] Independent National Security Legislation Monitor, *Review of Division 105A (and related provisions) of the Criminal Code* (Report, 2022), Recommendation 13.

TIA Act Amendments

61. Item 59 of Schedule 2 repeals and replaces the definition of "post-sentence order" in the TIA Act. The proposed definition reads:

> ***post-sentence order*** *means:*
>
> *(a) except in Schedule 1—a continuing detention order or interim detention order made under Division 105A of the Criminal Code; or*
>
> *(b) in Schedule 1:*
>
> *(i) a continuing detention order or interim detention order made under Division 105A of the Criminal Code; or*
>
> *(ii) an extended supervision order or interim supervision order.*

62. The effect of this definition appears to be to retain the existing definition of a "post-sentence order" for the purposes of the international production order (**IPO**) framework contained in Schedule 1 to the TIA Act, which can be utilised to assist with monitoring a person on a supervisory order. However, the Explanatory Memorandum (**EM**) does not adequately explain or justify the intended operation of this provision does not provide sufficient guidance on the necessity of retaining the existing definition in the context of the IPO framework.

Recommendation—PSOs and the international production order framework

The Explanatory Memorandum should be revised to sufficiently explain and justify the intended operation of Item 59 in Schedule 5.

Schedule 4—Access to surveillance devices and telecommunications warrants for control order investigations

63. Schedule 4 to the Bill proposes changes to surveillance powers under warrant to support the Bill's broad proposal to rely primarily on control orders to address the risk of terrorism that might arise where a person's custodial sentence for a relevant offence ends. Schedule 4 to the Bill therefore proposes amendments to the SD Act and TIA Act that are consequential to the changes proposed in Schedules 2 and 3 to the Bill. In substantive terms, as that risk is currently addressed through the PSO framework, SD Act and TIA warrants are not available to law enforcement officers for the purpose of initiating an application for a control order where the person is currently imprisoned in relation to a serious terrorism offence.

64. The specific warrant powers contemplated by this Schedule are:

- surveillance device warrants;[40]
- computer access warrants;[41]
- telecommunications services warrants;[42] and
- named person warrants.[43]

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[40] See *Surveillance Devices Act 2004* (Cth) s 18.
[41] See *Surveillance Devices Act 2004* (Cth) s 27E.
[42] See *Telecommunications (Interception and Access) Act 1979* (Cth) s 9.

65. Currently, each warrant class can only be sought for specified purposes.[44] The Bill proposes to insert an additional purpose for issuing each warrant class in circumstances that relate to a control order application concerning a person who is serving a custodial sentence and that person meets a proposed new definition of "serious terrorist offender".

66. Although this Schedule proposes amendments to both the SD Act and the TIA Act, the proposed amendments necessarily differ according to the drafting conventions of each Act. The concerns we raise apply (with minor changes as necessary) to both Acts. For that reason, the following discussion uses proposed subsection 14(3BB) as an example of the changes proposed by the Schedule, subject to relevant differences. Important differences between SD Act and TIA Act frameworks will be raised as necessary.

Definition of a "serious terrorist offender"

67. The Bill proposes inserting a new definition of a "serious terrorist offender" into both the SD Act and the TIA Act,[45] to establish the class of persons to whom the warrant powers requested in consequence of changes to the control order framework discussed above with reference to Schedules 2 and 3 of this Bill might be sought.

68. The operative provisions of proposed section 6DA of the SD Act and proposed section 6UAA of the TIA Act are expressed in identical terms. The definition establishes a two-stage test requiring that a person:

- have been convicted of a "serious terrorism offence";[46] and
- be in circumstances that meet one of five relevant conditions relating to them currently serving a sentence of imprisonment.

69. This definition limits warrant availability to persons who are currently detained in a custodial setting, in alignment with the circumstances where a person is currently eligible for a warrant in support of an ESO.

70. By contrast, the current warrant requesting criteria for a PSO (which includes an ESO) are distributed across two limbs of the application criteria for a relevant warrant. Using the relevant paragraphs of subsection 14(3BA) as an example:

> *(a) a person is a terrorist offender in relation to whom an application for a post-sentence order could be made; and*
>
> *(b) the person is detained in custody in a prison…*

71. Although the relevant concept in the current warrant requesting framework is not contained in a single key term, paragraph 14(3BA)(a) establishes the relevant class of persons by reference to the definition of a "terrorist offender" and the class of persons to whom orders made under Division 105A of the Criminal Code might apply,

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43 See *Telecommunications (Interception and Access) Act 1979* (Cth) s 9A.

44 See *Surveillance Devices Act 2004* (Cth) ss 14 and 27A; *Telecommunications (Interception and Access) Act 1979* (Cth) ss 46 and 46A.

45 Counter-Terrorism Legislation Amendment Bill 2026 (Cth) Sch 4 items 2 and 6.

46 *Surveillance Devices Act 2004* (Cth) para 6DA(1)(a); *Telecommunications (Interception and Access) Act 1979* (Cth) para 6UAA(1)(a).

and paragraph 14(3BA)(b) requires persons in that class to also be serving a custodial sentence.

"Serious terrorism offence"

72. The first limb of the test adopts the definition of a "serious terrorism offence" at section 3C of the Crimes Act. This definition provides:

> ***serious terrorism offence*** *means:*
>
> *(a) a terrorism offence (other than offence against section 102.8, Division 104, Division 105 or section 112.7 of the Criminal Code); or*
>
> *(b) an offence against a law of a State:*
>
> *(i) that has a federal aspect; and*
>
> *(ii) that has the characteristics of a terrorism offence (other than such an offence that has the characteristics of an offence against section 102.8, Division 104, Division 105 or section 112.7 of the Criminal Code); or*
>
> *(c) an offence against a law of a Territory that has the characteristics of a terrorism offence (other than such an offence that has the characteristics of an offence against section 102.8, Division 104, Division 105 or section 112.7 of the Criminal Code).*

73. Interpreting paragraph 3C(1)(a) requires setting out the definition of a "terrorism offence", as defined at subsection 3(1) of the Crimes Act.

> ***terrorism offence*** *means:*
>
> *(a) an offence against Subdivision A of Division 72 of the Criminal Code; or*
>
> *(aa) an offence against Subdivision B of Division 80 of the Criminal Code; or*
>
> *(b) an offence against Part 5.3, 5.3A or 5.5 of the Criminal Code; or*
>
> *(ba) an offence against Subdivision HA of Division 474 of the Criminal Code; or*
>
> *(c) an offence against either of the following provisions of the Charter of the United Nations Act 1945:*
>
> *(i) Part 4 of that Act;*
>
> *(ii) Part 5 of that Act, to the extent that it relates to the Charter of the United Nations (Sanctions—Al-Qaida) Regulations 2008.*

Relevant circumstances relating to imprisonment

74. The second limb of the definition of a "serious terrorist offender" limits the application of that definition to a cohort of persons who satisfy one of five relevant circumstances relating to the situation of being detained in custody serving a sentence of imprisonment. The relevant circumstances are:

- the person is serving a sentence of imprisonment for a serious terrorism offence;[47]

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[47] *Surveillance Devices Act 2004* (Cth) sub-s 6DA(2); *Telecommunications (Interception and Access) Act 1979* (Cth) sub-s 6UAA(2).

- the person is detained under either a CDO or an IDO;[48]
- the person is serving a sentence of imprisonment for an offence other than a serious terrorism offence, but has either (a) been continuously detained in custody since being convicted of the serious terrorism offence, or (b) has been continuously detained in custody by reason of a CDO or an IDO;[49]
- the person is serving a sentence of imprisonment for an offence relating to an ESO within a relevant time period;[50] or
- the person served a sentence of imprisonment for a serious terrorism offence and before they were released, either an interim control order or a confirmed control order was obtained, and the person is currently serving a sentence of imprisonment for an offence relating to control orders within a relevant time period.[51]

Current provisions relating to post-sentence order investigations

75. The existing warrants are available to support investigations concerning a person who is a terrorist offender to whom a post-sentence order might apply. The definition of a "terrorism offender" is found in section 105A.2 of the Criminal Code, which in turn provides that:

> ***terrorist offender**:*
>
> *(a) has the meaning given by subsection 105A.3(1); and*
>
> *(b) includes a person who meets the conditions in paragraphs 105A.3(1)(a) and (c) and:*
>
> *(i) paragraphs 105A.3A(4)(a) and (b); or*
>
> *(ii) paragraphs 105A.3A(5)(a) to (e).*

76. Relevantly, subsection 105A.3(1) of the Criminal Code outlines the terrorist offenders to whom a PSO may be made:

> *(1) A post sentence order may be made … in relation to a person … if:*
>
> *(a) the person has been convicted of:*
>
> *(i) an offence against Subdivision A of Division 72 (international terrorist activities using explosive or lethal devices); or*
>
> *(ii) a serious Part 5.3 or 5.3A offence; or*
>
> *(iii) an offence against Part 5.5 (foreign incursions and recruitment), except an offence against subsection 119.7(2) or (3) (publishing recruitment advertisements); or*
>
> *(iv) an offence against the repealed Crimes (Foreign Incursions and Recruitment) Act 1978, except an offence against*

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48 *Surveillance Devices Act 2004* (Cth) sub-s 6DA(3); *Telecommunications (Interception and Access) Act 1979* (Cth) sub-s 6UAA(3).

49 *Surveillance Devices Act 2004* (Cth)) sub-s 6DA(4); *Telecommunications (Interception and Access) Act 1979* (Cth) sub-s 6UAA(4).

50 *Surveillance Devices Act 2004* (Cth)) sub-s 6DA(5); *Telecommunications (Interception and Access) Act 1979* (Cth) sub-s 6UAA(5). The provision sets a time limit at paragraph (5)(b), whereby
"the person was charged with the offence before the later of:
(i) the relevant extended supervision order or interim supervision order ceasing to be in force; and
(ii) the end of 6 months after the conduct constituting the offence."

51 *Surveillance Devices Act 2004* (Cth) sub-s s 6DA(6); *Telecommunications (Interception and Access) Act 1979* (Cth) (Cth) sub-s 6UAA(6). The timeframe is the same as set out in the footnote above.

paragraph 9(1)(b) or (c) of that Act (publishing recruitment advertisements); and

(b) a subsection of section 105A.3A provides that the order may be made in relation to the person; and

(c) the person will be at least 18 years old when the sentence for the conviction referred to in paragraph (a) of this subsection ends…

77. Paragraphs 105A.3A(4)(a) and (5)(a)–(e) provide that such warrants may be sought in circumstances where a person is detained for an offence against provisions contained in either the PSO or control order frameworks.[52]

Differences between current and proposed definitions

78. The EM describes the effect of the insertion of a new relevant definition of "serious terrorist offender" as one that:

> *… results in a relatively modest expansion of the category of terrorism offenders in relation to whom warrants could be sought as compared with existing warrants relating to applications for ESOs … This slightly expanded scope appropriately reflects the cohort of offenders anticipated to present a risk of terrorist acts, support or facilitation of terrorist acts, or support or facilitation of engagement in hostile activity in a foreign country.*[53]

79. We are concerned that the EM does not adequately explain or justify the extension of significantly intrusive powers to a wider class of persons.

80. However, the most material difference between the two definitions is that the current definition of a "terrorist offender" for the purposes of the PSO framework only applies to persons over 18 years of age, whereas the proposal allows warrants to be sought against children.[54] This change to the warrant issuing framework is likely in consequence of the proposed removal of special rules for persons under 18 years of age. There is no equivalent provision in the proposed definition to current paragraph 105A.3(1)(c), which provides that "the person will be at least 18 years old when the sentence for the [relevant conviction] … ends".

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52 See *Criminal Code Act 1995* (Cth) paras 105A.3A(4)(a) and (5)(a)–(e).
53 Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2026 (Cth) 63 [179].
54 See Counter-Terrorism Legislation Amendment Bill 2026 (Cth) Sch 3 Items 12–14.

81. The key term “serious terrorist offender” also refers to a wider range of offences than the equivalent provision in the current warrant framework. The differences between the two provisions, in terms of the relevant offences for which a person is imprisoned and a warrant might be sought in the course of investigating whether a control order application might be made, are as follows:

- the definition of “a terrorism offence (other than offence against section 102.8, Division 104, Division 105 or section 112.7 of the Criminal Code)” contains a broader range of offences than the equivalent current provision:
  - the definition of a “terrorist offence” now includes offences in Division 105A that were not previously covered by the equivalent provision, including:
    - an offence relating to contravention of provision concerning the treatment of photographs and fingerprints obtained for ensuring compliance with the PSO framework;[55]
    - contravening conditions or directions imposed by an ESO;[56] and
    - offences relating to monitoring devices.[57]
  - the proposed definition expands to take in offences of treason,[58] treachery,[59] and treason—assisting enemy to engage in armed conflict;[60]
  - using a carriage service relating to violent extremist material,[61] including possessing or controlling such material;[62]
  - the proposed definition applies to a further two foreign incursion and recruitment offences[63] relating to publishing recruitment advertisements that are currently excluded by subsection 105A.3(1)(a)(iii);[64] and
  - offences contained in Part 4 of the *Charter of the United Nations Act 1945* (Cth) concerning dealing with assets relating to terrorism, or Part 5 relating to UN sanctions insofar as they relate to the *Charter of the United Nations (Sanctions—Al Qaida) Regulations 2008* (Cth).
- the proposed definition has also been expanded to include both State offences with a federal aspect and territory offences if those offences have the characteristics of a terrorism offence (other than control order or PDO offences, or associating with either terrorist organisations,[65] or a state sponsor of terrorism[66]); and
- the proposed definition is narrower, insofar as it does not include an offence against the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth)* except an offence contained in paragraphs 9(1)(b) or (c) of that Act.[67]

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55 *Criminal Code Act 1995* (Cth) s 105A.7D.
56 See *Criminal Code Act 1995* (Cth) s 105A.18A.
57 *Criminal Code Act 1995* (Cth) s 105A.18B.
58 *Criminal Code Act 1995* (Cth) s 80.1.
59 *Criminal Code Act 1995* (Cth) s 80.1AC.
60 *Criminal Code Act 1995* (Cth) s 80.1AA.
61 See *Criminal Code Act 1995* (Cth) Div 474 Sub-Div HA.
62 *Criminal Code Act 1995* (Cth) s 474.45C.
63 See *Criminal Code Act 1995* (Cth) Part 5.5.
64 *Criminal Code Act 1995* (Cth) s 119.7(2) and (3).
65 *Criminal Code Act 1995* (Cth) s 102.8.
66 *Criminal Code Act 1995* (Cth) s 112.7.
67 See *Criminal Code Act 1995* (Cth) sub-para 105A.3(1)(a)(iv).

82. We are concerned that this expanded definition captures offences that may not be intended to be covered. For example, offences against Division 105A of the Criminal Code are not excluded in a manner consistent with how the analogous offences contained in Divisions 104 and 105 are addressed. This leads to the availability of these warrant powers where the relevant offence concerns the treatment of photographs and fingerprints obtained for the purpose of ensuring compliance with the PSO framework. We suggest that this definition might be audited to ensure that all offences with maximum penalties of fewer than 7 years' imprisonment are suitable for classification as relating to a "serious terrorist offender" for the purposes of obtaining a warrant. Likewise, the EM should also be revised to fully explain the proposed breadth of changes.

Matters to be considered under the TIA framework

83. Sections 46 and 46A of the TIA Act contain tests for issuing telecommunications service warrants and named person warrants, respectively. As a drafting convention, the provisions concerning each category of warrant purpose includes separate subsections that contain:

- the test for issuing the relevant warrant; and
- matters to which the Judge or nominated ART member must have regard (**matters provision**).

84. Items 7 and 8 each include a matters provision relating to TIA Act service and named person warrants, respectively. Taking the matters provision in item 7, which proposes to amend section 46 of the TIA Act to enable a telecommunications service warrant to be sought for the purpose of investigating whether to seek consent from the AFP Minister to request a control order, the relevant subsection provides:

> *(8B) For the purposes of subsection (8A), the matters to which the Judge or nominated ART member must have regard are:*
>
> *(a) how much the privacy of any person or persons would be likely to be interfered with by intercepting under a warrant communications made to or from the service referred to in subsection (8A); and*
>
> *(b) how much the information referred to in paragraph (8A)(f) would be likely to assist:*
>
> *(i) in determining whether to seek the AFP Minister's consent; and*
>
> *(ii) in connection with achieving a Part 5.3 object; and*
>
> *(c) to what extent methods for:*
>
> *(i) determining whether to seek the AFP Minister's consent; and*
>
> *(ii) achieving a Part 5.3 object;*
>
> *that do not involve so intercepting communications have been used by, or are available to, the senior AFP member; and*
>
> *(d) how much the use of such methods would be likely to assist:*
>
> *(i) in determining whether to seek the AFP Minister's consent; and*
>
> *(ii) in connection with achieving a Part 5.3 object; and*
>
> *(e) how much the use of such methods would be likely to prejudice:*
>
> *(i) determining whether to seek the AFP Minister's consent; and*
>
> *(ii) achieving a Part 5.3 object;*
>
> *whether because of delay or for any other reason; and*

(f) in relation to an application by an interception agency of Victoria—any submissions made by the Victorian PIM under section 44A to the Judge or nominated ART member; and

(g) in relation to an application by an interception agency of Queensland—any submissions made by the Queensland PIM under section 45 to the Judge or nominated ART member.

85. This provision replicates the matters currently required to be considered in relation to PSO warrant application.[68] Because control orders can be sought for children as young as 14 years of age, the associated matters provision should require that where the subject is a child, the issuing authority must be required to treat the best interests of the child as a primary consideration when deciding whether to issue a warrant.

Law Council position

86. Offences against the Division 105A framework should not provide a basis under both limbs of the definition of the test for a "serious terrorist offender". Offences against sections 105A.18A and 105A.18B are appropriately accounted for in the second limb of the definition and should not be double counted as an example of a "serious terrorist offence". Likewise, a conviction for an offence relating to the contravention of a provision concerning the treatment of photographs and fingerprints obtained for ensuring compliance with the PSO framework should also be removed from the first limb of the definition of a "serious terrorist offender".

87. We are concerned that the definition of a "serious terrorist offender" expands the cohort of persons for whom a warrant might be sought for the purposes of making a decision to seek the consent of the AFP Minister for a control order to a broader range of offences and that extension is not sufficiently justified in the EM.

88. The Law Council's primary position is that warrants should not be available in relation to third-party non-suspects.[69] The amendments envisage circumstances where:

- the subject of a possible control order is, at the relevant time, serving a sentence of incarceration in a prison; and
- the control order framework is a civil rather than criminal proceeding.

89. We are concerned that significantly intrusive powers will primarily affect third-party non-suspects who are not themselves the subject of investigation. Therefore, the warrant issuing process should contain a requirement that the officer in question can demonstrate that the impacts on the rights and liberties of third-party non-suspects and children are necessary and that no-less intrusive method are available to obtain the intelligence in question.

90. In this context, we are concerned that these provisions do not contain sufficient safeguards to mitigate the risks to the rights and liberties of third-party non-suspects and children who may be affected by the powers the relevant warrants justify.

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[68] See e.g. *Telecommunications (Interception and Access) Act 1979* (Cth) sub-s 46(8).

[69] Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee Comprehensive Review of the TIA Act* (March 2014), 8-10.

91. The Law Council remains of the view that all electronic surveillance warrants should be issued by judicial officers, to the exclusion of tribunal members. We consider that a requirement for a judicial officer to authorise the issuance of an electronic surveillance warrant provides a greater degree of independence, both substantive and perceived, in the authorisation process.

92. Finally, we continue to recommend that warrant application procedures necessitate the establishment of a Public Interest Monitor to provide oversight and advocate for the rights of affected, non-suspect third parties.

Recommendations—Warrants

- **The definition of "serious terrorist offender" should be amended to include an exception for offences located in Division 105A of the Criminal Code.**
- **The Explanatory Memorandum should be revised to provide a full justification of the extension of this definition to offences with maximum penalties of fewer than 7 years' imprisonment.**
- **In circumstances where the subject of a warrant is a child and investigated for the purpose of determining whether to seek consent to request a control order from the AFP Minster, the relevant issuing authority should consider whether the methods sought are compatible with the best interests of the child as a primary consideration and whether less intrusive methods are more compatible.**

Schedule 5—Removal of barriers to information sharing

93. Schedule 5 to the Bill proposes to disapply, for the purposes of the control order and PSO frameworks, an existing prohibition on a Commonwealth agency obtaining or using information about findings of guilt where no conviction was recorded under the law of a State, territory or foreign jurisdiction. The changes proposed by this Schedule are relevant to the entirety of Divisions 104 and 105A of the Criminal Code.

94. The Law Council is concerned that, while information about previous findings of guilt have some probative value, the proposal requires refinement to ensure that any proposed changes to information sharing provisions are appropriate and adapted to addressing the particular risk of terrorism, and that reasonable measures are employed to reduce the possibility of undue hardship.

95. As the Bill proposes to remove special rules for children in the context of control orders, the Law Council is particularly concerned that changes to barriers to information sharing risk having an outsized impact on minors. Importantly, the proposed provisions of a new Subdivision AC of Division 6 of Part VIIC of the Crimes Act include no specific provision to direct decision-makers to consider the particular needs of minors about whom such information relates.

96. The Statement of Compatibility with Human Rights provides no analysis of the compatibility of Schedule 5 to the Bill with the Convention on the Rights of the Child (**CRC**). The EM justifies this Schedule, in part, on the basis of an interaction between

the provisions contained in this Schedule and State and Territory youth justice frameworks. The example quoted in the EM, of a State or Territory barrier to information sharing, is subsection 184(2) of the *Youth Justice Act 1992* (Qld), which provides that "[e]xcept as otherwise provided by this or another Act, a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose". The EM goes on to explain that:

> *In Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton (2023) 276 CLR 136, the majority held that subsection 184(2) of the Youth Justice Act 1992 (Qld) was a state law that engaged subsection 85ZR(2) of the Crimes Act, because it deemed a person to have never been convicted of an offence. As such, this information cannot be disclosed or taken into account , because of the operation of [the barrier to information sharing in] paragraph 85ZS(1)(d).*[70]

97. As the EM makes clear, the provisions of Schedule 5 are intended to interact with State and Territory youth justice frameworks. We are concerned by the omission of reasoning and evidence in the Statement of Compatibility with Human Rights about this Schedule's compatibility with the CRC.

Current information sharing barrier

98. Subsection 85ZR(2) of the Crimes Act provides that, where a person is deemed by a State or foreign law to have never been convicted of an offence, "a Commonwealth authority shall also treat the person never to have been convicted of the offence for a corresponding purpose".[71]

99. Other exclusions exist to section 85ZR, including where persons have been pardoned for offences for which they have been convicted for the purpose of assessing the risk a person may pose to the safety and well-being of children if they are engaged in child-related work.[72]

100. Provisions that relate to findings of guilt where no conviction is recorded are set out in Division 2 of Part VIIC of the Crimes Act. The relevant provisions are subsection 85ZR(2) and paragraph 85ZS(1)(d). Subsection 85ZR(2) reads:

> *(2) Despite any other Commonwealth law or any Territory law, where, under a State law or a foreign law a person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence under a law of that State or foreign country:*
>
> *(a) the person shall be taken, in any Territory, in corresponding circumstances or for a corresponding purpose, never to have been convicted of that offence; and*
>
> *(b) the person shall be taken, in any State or foreign country, in corresponding circumstances or for a corresponding purpose, by any Commonwealth authority in that State or country, never to have been convicted of that offence.*

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70 Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2026 (Cth) [34].
71 Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2026 (Cth) [33].
72 Explanatory Memorandum, Crimes Amendment (Working with Children – Criminal History) Bill 2009 4.

101. Section 85ZS, more directly, addresses information sharing limitations that flow from the circumstances where a person is taken under section 85ZR of the Crimes Act, to never have been convicted of an offence. Relevant to the provisions in the Bill is paragraph 85ZS(1)(d), which provides:

> *(1) Subject to Division 6, but despite any other Commonwealth law or any State law or Territory law, where, under section 85ZR, a person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence: …*
>
> *(d) anyone else who knows, or could reasonably be expected to know, that section 85ZR applies to the person in relation to the offence shall not:*
>
> *(i) without the person's consent, disclose the fact that the person was charged with, or convicted of, the offence to any other person, or to a Commonwealth authority or State authority, where it is lawful for the first mentioned person not to disclose it to that other person or that authority; or*
>
> *(ii) in those circumstances, or for that purpose, take account of the fact that the person was charged with, or convicted of, the offence.*

Proposed disapplication provision

102. Item 1 inserts a new Subdivision AC into Division 6 of Part VIIC of the Crimes Act. Division 6 addresses exclusions to Part VIIC provisions that address pardons, quashed convictions, and spent convictions. The provisions contained in Item 1 disapply information sharing barriers where the relevant information is "disclosed" or "taken into account":

- for the purposes of the administration or execution" of control orders or PSOs;[73] and
- the information relates to an offence that a person is taken never to have been convicted of under subsection 85ZR(2).[74]

103. Section 85ZZGV relates to control orders and provides that:

> *(1) Paragraph 85ZR(2)(b) does not apply to a Commonwealth authority in a State in relation to the authority's exercise of powers or performance of functions under Division 104 (control orders) of the Criminal Code.*
>
> *(2) Subparagraph 85ZS(1)(d)(i) does not apply in relation to the disclosure of information to or by a person or body referred to in any of paragraphs 104.28E(1)(a) to (k) of the Criminal Code if:*
>
> *(a) the disclosure is for the purposes of the administration or execution of Division 104 of the Criminal Code; and*
>
> *(b) the information relates to an offence that a person is taken never to have been convicted of under subsection 85ZR(2) of this Act.*

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[73] Counter-Terrorism Legislation Amendment Bill 2026 (Cth) item 1, proposed *Crimes Act 1914* (Cth) paras 85ZZGV (2)(a) and (3)(a); and paras 85ZZGW(2)(a) and (3)(a).

[74] Counter-Terrorism Legislation Amendment Bill 2026 (Cth) Sch 5 item 1; *Crimes Act 1914* (Cth) proposed paragraphs 85ZZGV (2)(b) and (3)(b); 85ZZGW(2)(b) and (3)(b).

(3) Subparagraph 85ZS(1)(d)(ii) does not apply in relation to the taking into account of information by a person or body referred to in any of paragraphs 104.28E(2)(a) to (i) of the Criminal Code if:

(a) the taking into account is for the purposes of the administration or execution of Division 104 of the Criminal Code; and

(b) the information relates to an offence that a person is taken never to have been convicted of under subsection 85ZR(2) of this Act.

104. Section 85ZZGW relates to post-sentence orders and provides that:

(1) Paragraph 85ZR(2)(b) does not apply to a Commonwealth authority in a State in relation to the authority's exercise of powers or performance of functions under Division 105A (post-sentence orders) of the Criminal Code.

(2) Subparagraph 85ZS(1)(d)(i) does not apply in relation to the disclosure of information to or by a person or body referred to in any of paragraphs 105A.19B(1)(a) to (j) of the Criminal Code if:

(a) the disclosure is for the purposes of the administration or execution of Division 105A of the Criminal Code; and

(b) the information relates to an offence that a person is taken never to have been convicted of under subsection 85ZR(2) of this Act.

(3) Subparagraph 85ZS(1)(d)(ii) does not apply in relation to the taking into account of information by a person or body referred to in any of paragraphs 105A.19B(2)(a) to (i) of the Criminal Code if:

(a) the taking into account is for the purposes of the administration or execution of Division 105A of the Criminal Code; and

(b) the information relates to an offence that a person is taken never to have been convicted of under subsection 85ZR(2) of this Act.

105. Items 3 and 4 of Schedule 5 to the Bill insert proposed sections 104.28E and 105A.19B into the control order and PSO frameworks of the Criminal Code. Both proposed sections 104.28E and 105A.19B provide broad discretions to identified persons to disclose or use information relating to a conviction or finding of guilt for an offence against Commonwealth, State, Territory or foreign law.[75] Subsection (3) of each proposed section clarifies that provisions do "not limit the information that a person or body may use or disclose for the purposes of the administration or execution" of the relevant Division of the Criminal Code.[76] The Law Council considers this provision may be too broadly drafted and limitations on the information disclosed should be imposed. For example, information disclosed should be limited to criminal history information that is reasonably relevant to assessing the risk of a Part 5.3 or Part 5.3A offence and where the criminal history information concerns a minor (including in circumstances where the person is an adult but the relevant offences were committed while the person was a child), a primary concern should be the best interests of the child alongside other purposes for disclosure.

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[75] See Counter-Terrorism Legislation Amendment Bill 2026 (Cth) Sch 5 Items 3 and 4, proposed amendments *Criminal Code 1995* (Cth) sub-ss 104.28E(1) and (2);105A.19B(1) and (2).

[76] Counter-Terrorism Legislation Amendment Bill 2026 (Cth) Items 3 and 4, proposed amendments Criminal Code 1995 (Cth) sub-ss 104.28E(3) and 105A.19B(3).

Law Council position

106. The Law Council is concerned that these provisions may introduce unintended consequences that do not align with the objectives of the Schedule. We are concerned that:

- while disclosure remains discretionary, there is no requirement that the best interests of the child are taken as a primary consideration when making decisions about disclosure or taking into account information concerning a finding of guilt without a recorded conviction;
- offences which have no conviction recorded are more likely to be less serious offences, such offending may not reliably guide the prediction of a person committing a subsequent serious terrorism offence in the future;
- the offences in question need not be related to terrorism offences at all and therefore may concern offending that is unrelated to the proposed basis for seeking or administering a control order; and
- depending on when the relevant offence was committed, the probative value might be diminished by the passage of time. There is no limitation on when a relevant offence was committed. This consideration is most acute for children.

107. We are concerned that, without a more subtle framework for making decisions about information sharing, there is a risk that this framework may undermine the policy positions of other jurisdictions to classify some sentencing dispositions as non-convictions. Courts may elect to impose sentencing options that do not record a conviction to support a young or first-time offender's rehabilitation and reintegration into the community. Using previous and often minor offences to justify control orders that impose onerous conditions risks undermining the particularity of the sentencing dispositions employed to address specific situations. The management of information and the removal of offences committed by minors from the files of Commonwealth agencies is needed to ensure that spent convictions or unrelated offences committed while a person is a child do not form an ongoing part of the record of a person for the purposes of control orders and PSOs.

108. It is our strong view that, if this Schedule is to proceed, it is necessary to refine these provisions to avoid unintended consequences. We consider the following recommendations would also better align the framework for disclosing or taking account of information with the aim of supplying decision makers with probative information.

Recommendations—Information sharing provisions

The information sharing provisions should be amended to require that "an offence that a person is taken to never have been convicted of" must be directly relevant to the control order or post-sentence order frameworks. If information is not directly relevant, the information sharing barrier must not be disapplied.

The proposed information sharing and use provisions in the Crimes Act and Criminal Code should be amended to include special rules relating to minors and information relating to offences committed while a person was a minor. Including:

- **a requirement that decision makers take account of the best interests of the child as a primary consideration alongside the other control order and PSO-related purposes for the disclosure or use of criminal history information that would otherwise be barred from a Commonwealth authority;**
- **a rebuttable presumption that findings of guilt without a recorded conviction are irrelevant if the finding of guilt was more than 12 months old on the date an application is made; and**
- **a requirement that all information about the criminal history of minors without conviction that is held by Commonwealth agencies for the purposes of control orders or PSOs should be destroyed as soon as practicable after it ceases to be relevant.**

The Statement of Compatibility with Human Rights in the Explanatory Memorandum must be revised to address Schedule 4's compatibility with the Convention on the Rights of the Child.

Schedule 6—De-listing proscribed terrorist organisations

109. Division 102 of the Criminal Code establishes a framework concerning "terrorist organisations". The framework includes a definition of "terrorist organisation",[77] and a system for proscribing organisations as terrorist organisations. Once an organisation is proscribed as a "terrorist organisation", a range of related criminal offences are enlivened, including being a member of, recruiting for, or providing support for a terrorist organisation.

110. The Law Council has a longstanding concern about the framework for proscribing terrorist organisations under Division 102 of the Criminal Code. This is because criminal liability is extended on the basis of association under circumstances where those criminal offences are enlivened by the proscription of an organisation on the basis of lower thresholds of proof than would otherwise attach to an individual.[78]

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[77] *Criminal Code Act 1995* (Cth) sub-s 102.1(1):
terrorist organisation *means:*
(a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or
(b) an organisation that is specified by the regulations for the purposes of this paragraph...

[78] Law Council of Australia, *Anti-Terrorism Reform Project* (Report, 2013), 64–65.

A further problem with the proscription process is that it necessarily involves the attribution of defining characteristics and commonly shared motives or purposes to a group of people based on the statements or activities of certain individuals within the group. We remain concerned that listings are not made following a judicial process.

111. Our submission addresses three aspects of the proposal in this Schedule:

- an amendment to the listing procedure in subsection 102.1(2);
- the removal of the ability of a person or entity to request the de-listing of a proscribed terrorist organisation under Division 102 of the Criminal Code, in favour of a de-listing procedure that is initiated solely on the own motion of the AFP Minister; and
- changes to the obligation to de-list an organisation as the grounds for maintaining a listing change over time.

Current listing provisions

112. The listing procedure contained in subsection 102.1(2) provides that an organisation can be proscribed as a "terrorist organisation" by regulations made by the Governor-General:

> *… the AFP Minister must be satisfied on reasonable grounds that the organisation:*
>
> *(a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or*
>
> *(b) advocates the doing of a terrorist act.*[79]

In addition, before the Governor-General makes the regulation listing an organisation, the AFP Minister must have briefed the Leader of the Opposition in relation to the proposed listing of that organisation.[80]

Change to the listing procedure for a "terrorist organisation"

113. Item 2 of Schedule 6 to the Bill amends the test for whether an organisation meets the description of a "terrorist organisation" in subsection 102.1(2). The item would amend that provision so that it reads (with the substitute text in bold):

> *… the AFP Minister must be satisfied on reasonable grounds that* ***at least one of the following applies to the organisation****:*
>
> *(a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or*
>
> *(b) advocates the doing of a terrorist act*

114. As the EM states, this change is intended to work with the amendment in item 6, discussed below at paragraph [120]–[128], to:

> *[clarify] that an organisation must only be de-listed where the Minister ceases to be satisfied that one of the criteria apply to the organisation, regardless of which criterion the Minister was satisfied of at the time of the listing. In practice this*

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79 See *Criminal Code Act 1995* (Cth) sub-s 102.1(2).
80 *Criminal Code Act 1995* (Cth) sub-s 102.1(2A).

means that an organisation must only be de-listed if the Minister is not satisfied at a particular point in time after the listing that the organisation is engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocating terrorism, or both. This is the case regardless of whether, at the time of the listing, the Minister was satisfied that the organisation was engaged in preparing, planning, assisting in or fostering the doing of a terrorist act, or advocating terrorist acts, or both.

115. This amendment is a relatively minor clarification of the intended conjunction between paragraphs when read in isolation. However, as the statement from the EM makes clear, the intended effect of this change is to enable an organisation to remain listed even in circumstances where the Minister has ceased to be satisfied a criterion on which the listing was originally supported is met, provided another criterion is now met. As will be discussed below in relation to amendments to de-listing provisions, our view is that the issues that flow from these changes are best addressed by enabling periodic opportunities for persons and organisations to make submissions about whether organisations continue to meet criteria for listing.

Current de-listing procedure

116. The procedure for de-listing a duly proscribed terrorist organisation is provided in subsections 102.1(4) and (16) to (18) of the Criminal Code. Currently, subsection 102.1(4) provides that:

> *(4) If:*
>
> *(a) an organisation is specified by regulations made for the purposes of paragraph (b) of the definition of **terrorist organisation** in this section; and*
>
> *(b) the AFP Minister ceases to be satisfied of either of the following (as the case requires):*
>
> *(i) that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act;*
>
> *(ii) that the organisation advocates the doing of a terrorist act;*
>
> *the AFP Minister must, by written notice published in the Gazette, make a declaration to the effect that the AFP Minister has ceased to be so satisfied.*

117. The current de-listing provision requires the AFP Minister to make a declaration de-listing a duly proscribed terrorist organisation if they "cease to be satisfied" that the organisation is neither "directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act", nor "advocates the doing of a terrorist act".[81] At present, subsection 102.1(16) provides that an individual or organisation may make an application to the AFP Minister to have an organisation de-listed. Justice Hill set out how these provisions are intended to function in *Thorpe v Commonwealth of Australia* [2026] FCA 113 at [114]–[115]:

> *There is no express obligation on the AFP Minister to consider the matters raised by a person in a de-listing obligation: to the contrary, the only matters that the AFP Minister is expressly required to consider are set out in s 102.17(a) and (b)*

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[81] See *Criminal Code Act 1995* (Cth) sub-s 102.1A(4).

(which are the same matters as are applied when making a decision under s 102.1(4))…

[The] current version of s 102.1(17) … provides that the AFP Minister must consider, as soon as practicable after receiving the application, whether the listed organisation satisfies the matters in s 102.1(17)(a) and (b). That … language confirms that the AFP Minister addresses the statutory criteria, not the application as such.

118. The application must contend that "there is no basis for the AFP Minister to be satisfied that the listed organisation" is either "directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act" or "advocates the doing of a terrorist act".[82] This framework requires a high level of proof from an applicant to affect the de-listing of an organisation. In addition to considering any representations contained in an application, "[h]owever, the only matters that the AFP Minister is *required* to consider are the matters set out in [section] 102.1(17), not the applicant's arguments as to those matters".[83] As discussed, the AFP Minister may consider any other relevant matters in reaching a decision about an organisation.[84]

119. Once the AFP Minister has received of the application, provided they have not received another application from the same individual or organisation in the previous 12 months,[85] the AFP Minister "must, as soon as practicable after receiving the de listing application", consider the application.[86]

Changes to the de-listing procedure

120. Item 6 of Schedule 6 proposes to replace all words after "in this section" in subsection 102.1(4) of the Criminal Code (see above paragraph [116]) to instead provide that an organisation must issue de-listing declaration in circumstances where:

> *(b) the AFP Minister ceases to be satisfied on reasonable grounds that at least one of paragraph (2)(a) or (b) applies to the organisation …*

121. In addition, item 7 proposes to repeal subsections 102.1(16) to (18): the provisions that outline the procedural framework relating to de-listing applications. The EM justifies repealing this procedure in the following terms:

> *Removing the ability for an individual or an organisation to make a de-listing application would ensure that the decision to de-list a terrorist organisation is driven by intelligence and threat assessments rather than public applications.*[87]

122. We disagree. Existing subsection 102.1(18) allows the AFP Minister to consider any matters, including intelligence and threat assessments, while assessing an application. Further, paragraph 102.1(16)(d) allows the AFP Minister to disregard any application made more frequently than once every 12 months.

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82 See *Criminal Code Act 1995* (Cth) sub-s 102.1A(16).
83 *Thorpe v Commonwealth of Australia* [2026] FCA 113 [116] (emphasis in original).
84 See *Criminal Code Act 1995* (Cth) sub-s 102.1A(18).
85 *Criminal Code Act 1995* (Cth) s 102.1A(16)(d).
86 See *Criminal Code Act 1995* (Cth) sub-s 102.1(17).
87 Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2026 (Cth) 95 [409].

123. The effects of this provision are better interpreted as removing an important but limited mechanism to make representations about a proscription framework that enlivens serious criminal offences and imposes limitations on fundamental freedoms, such as the freedom of association. The Bill's proposal to repeal a pathway for affected persons or groups to prompt the AFP Minister's re-consideration of the basis of a proscription constitutes the removal of an important practical mechanism for ensuring that organisations are not listed initially and indefinitely where the AFP Minister does not have cause to re-consider the activities of a group.

124. The EM also claims that these changes improve consistency between listing regimes, such as the "recently introduced state sponsor of terrorism and prohibited hate group listing frameworks, which do not include equivalent de-listing application provisions".[88] The EM to the Bill understates the similarity of analogous provisions concerning the ability of affected parties to make representations concerning de-listing for entities specified as state sponsors of terrorism by regulation under Part 5.3A of the Criminal Code.

125. Where an entity is a classified as a state sponsor of terrorism under Part 5.3A of the Criminal Code, paragraphs 110.6(1)(a) and (b) allow both the PJCIS and "the foreign country to which the state sponsor of terrorism belongs",[89] to make an application to the AFP Minister representing that it is not appropriate for an entity to continue to be specified as a state sponsor of terrorism.[90]

126. The differences between the procedures relating to state sponsors of terrorism[91] and those concerning terrorist organisations[92] are best interpreted as reflecting the foreign policy sensitivities of listing state sponsored terrorist organisations for the affected state and the Australian Government. Finally, the Part 5.3A provisions require consultation about the appropriateness of maintaining the proscription of an entity with the Foreign Affairs Minister prior to making a declaration.[93] Taken together, the approach in Part 5.3A provides a mechanism for affected parties in circumstances where the national security interests and foreign relations of the Commonwealth intersect.

127. Part 5.3B of the Criminal Code concerns prohibited hate groups.[94] The proposal in Schedule 6 to the Bill also contains fewer protections than those that apply to prohibited hate groups, the Part 5.3B provisions require the AFP Minister to:

    - consider the aims of the Division;
    - consult with the Attorney-General; and
    - arrange to brief the leader of the opposition,[95]

    before they make such a declaration.[96] Although these are limited safeguards in comparison to an ability for an affected party to make an application to the decision

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88 Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2026 (Cth) 95 [409].
89 See *Criminal Code Act 1995* (Cth) sub-s 110.6(1).
90 See *Criminal Code Act 1995* (Cth) para 110.5(1)(b).
91 *Criminal Code Act 1995* (Cth) s110.6.
92 See *Criminal Code Act 1995* (Cth) s 101.1(2).
93 *Criminal Code Act 1995* (Cth) sub-s 110.5(4).
94 See *Combatting Antisemitism, Hate and Extremism Act 2026* (Cth) sch1 pt 4.
95 See *Criminal Code Act 1995* (Cth) para 114A.8(2)(c).

maker, nevertheless, no equivalent provisions are provided in the amendments contained in Schedule 6 to the Bill.

128. The EM provides no evidence to justify the removal of the ability of affected persons and entities to make an application. We note that existing provisions limit the consideration to an annual application for de-listing. The fact that an application has been made does not change the criteria or dictate a particular outcome.

Law Council position

129. The effect of this proposal is to remove a modest mechanism that can, under limited circumstances, require the AFP Minister to actively turn his or her mind to the question of whether the criteria for listing continue to be satisfied. The utility of the application process is that it forces the decision-maker to turn their mind to a matter which gives rise to criminal liability and limits freedom of association based on decisions taken by the Executive. We note that the Law Council has raised similar concerns in the context of the prohibited hate groups framework.[97]

130. The EM states that this provision would ensure that "the decision to de-list a terrorist organisation is driven by intelligence and threat assessments rather than public applications".[98] This justification confuses the procedure with the substantive assessment of whether a listing should continue. Regarding the latter, other provisions contained in Schedule 6 to the Bill—such as the effect of items 2 and 6 as they amend the ongoing sustainability of listings where the criterion supporting the relevant listing shifts over time—effectively broaden the grounds for continuing to list an entity.

131. We recommend that periodic opportunities are afforded to affected persons and entities to make submissions in support of de-listing organisations every 12 months. This would ensure that the Minister actively considers the proscription of each terrorist organisation decision on an annual basis, affords greater procedural fairness to affected parties, and enables the timetable for de-listing decisions to be shaped by Ministerial prerogatives rather than on following *ad hoc* applications from the public. Such a framework mitigates the possibility of listing in perpetuity where there is no clear oversight mechanism to encourage a Minister to delist an organisation (even where it may be clear that an organisation no longer meets the criteria for listing).

Recommendations—Terrorist organisation listing provisions

The removal of the pathway for individuals or organisations to make an application concerning the de-listing a terrorist organisation should not proceed.

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96 *Criminal Code Act 1995* (Cth) sub-s 114A.8(1).

97 Law Council of Australia, *Combatting Antisemitism, Hate and Extremism Bill 2026 (Cth)* (Submission to the Parliamentary Joint Committee on Intelligence and Security, 1 January 2026) 12 [52] <https://lawcouncil.au/resources/submissions/combatting-antisemitism-hate-and-extremism-bill-2026-cth>.

98 Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2026 (Cth) 95 [409].

If the PJCIS continues to support this amendment, terrorist organisation listings should be subject to periodic 12-monthly reassessment with the opportunity for affected persons and entities to make submissions to the AFP Minister.

Appendix—Comparison of key features of current control order and extended supervision order frameworks

	Control Orders	Extended Supervision Orders
Who determines whether an order ought to be granted?	The Federal Court of Australia.	A Supreme Court of a State or Territory.
Who initiates the request for an order?	A senior AFP Member after receiving written consent from the AFP Minister.	The AFP Minister or a legal representative of the AFP Minister. An order can be made by the Court in circumstances where the Court is not satisfied that the threshold for issuing a CDO has been met. An order can also be made by the Court where the Court reviews a CDO and is no longer satisfied that a CDO is appropriate, may revoke the detention order and impose an ESO.
Who can be subject to an order?	A person.	A ”terrorist offender” meaning: • A person convicted of an offence against Div 72 Subdivision A (international terrorist activities using explosives or lethal devices); • A serious Part 5.3 (terrorism) or Part 5.3A (state sponsors of terrorism) offence; • Certain serious foreign incursions and recruitment offences under the Criminal Code and Crimes Act. And the preconditions set out in section 103.3A have also been met.

	Control Orders	Extended Supervision Orders
How many stages are there in the issuing process?	**First stage**: an interim control order must be sought and issued. **Second stage**: the interim control order is confirmed at a separate hearing of the Federal Court, with an opportunity to hear from the subject of the order.	One.
Are there any limitations on when an order can be sought?	There are no limitations on when a control order may be sought.	An order cannot be sought more than 12 months before the end of the relevant sentence of imprisonment.
What, if any, special rules apply to children?	The control order framework does not apply to children under 14 years of age. Children 14 to 17 years of age are subject to special rules consisting of: • a confirmed control order can only be in force for three months; and • successive orders can be made against the same child. If an order has been made against a child, primary consideration must be given to the best interests of the person in determining the suitability of conditions.	The ESO framework does not apply if the person is under 18 years of age on the day their sentence for the conviction relied upon for the order ends.

	Control Orders	Extended Supervision Orders
What is the test for making an order?	The Court is **satisfied on the balance of probabilities:** (i) that making the order would substantially assist in preventing a terrorist act; or (ii) that the person has provided training to, received training from or participated in training with a listed terrorist organisation; or (iii) that the person has engaged in a hostile activity in a foreign country; or (iv) that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act; or (v) that the person has been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence; or (vi) that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or (vii) that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country	The Court is **satisfied on the balance of probabilities**, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 or 5.3A offence.
What is the threshold for the conditions imposed by an order?	The court is **satisfied on the balance of probabilities** that: (i) each of the conditions; and (ii) the combined effect of all of the conditions; to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of: (i) protecting the public from a terrorist act; or (ii) preventing the provision of support for or the facilitation of a terrorist act; or (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.	The Court is satisfied on the balance of probabilities that: (i) each of the conditions; and (ii) the combined effect of all of the conditions; to be imposed on the offender by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from that unacceptable risk.

	Control Orders	Extended Supervision Orders
What standard of information can be relied upon to make a decision?	The court can refer to “such further information as the court requires”.	Decisions must be based on admissible evidence.
What is the maximum duration of an order?	12 months.	Three years.
Can successive orders be issued?	Yes. There are no limitations on the number of successive orders that might be sought.	Yes. There are no limitations on the number of successive orders that might be sought.

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its constituent bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes 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 its constituent bodies:

- the Australian Capital Territory Bar Association;
- the Law Society of the Australian Capital Territory;
- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Northern Territory Bar Association;
- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
- the Tasmanian Bar;
- the Law Society of Tasmania;
- the Victorian Bar Incorporated;
- the Law Institute of Victoria;
- the Western Australian Bar Association;
- the Law Society of Western Australia; and
- Law Firms Australia.

Through these bodies, the Law Council represents more than 110,000 Australian lawyers.

The Law Council is governed by a board of 23 Directors: one from each of the constituent bodies, and six Executive members elected by Directors. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President. In 2026, the Law Council Executive comprises:

- Ms Tania Wolff, President
- Ms Elizabeth Shearer, President-elect
- Mr Lachlan Molesworth, Treasurer
- Ms Jennifer Ball, Executive Member
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple.

The Law Council's Secretariat is based in Canberra. Its website is www.lawcouncil.au