

23 June 2022

CDO regime should not be extended

People should not be detained based on a prediction they might commit a future offence, the Law Council of Australia has told the Independent National Security Legislation Monitor (INSLM) today.

Speaking at the INSLM's public hearing on its Review of Division 105A of the *Criminal Code Act 1995* (Cth), the Law Council has reiterated that detention should be imposed only as a criminal sentence following a person's conviction of an offence.

"What is under consideration is whether someone sentenced for a terrorist act can be kept in jail beyond their criminal sentence, perhaps indefinitely, based on a perceived risk that they might commit a further terrorist offence sometime in the future," Law Council of Australia President, Mr Tass Liveris explained.

"This is a very slippery slope, and the Law Council is not aware of any empirically validated methodology which would help courts and judges accurately assess this risk."

The Law Council's position remains that continuing detention orders (CDO) are not a necessary or proportionate response to the threat of terrorism and should not be renewed beyond their current sunset date of 7 December 2026.

"Instead, what could be considered is an extended determinate sentencing regime like the United Kingdom has established," Mr Liveris said. "This would require a decision to be made by the court at the time of sentencing to add a discrete and additional protective component known as the 'extension period'.

"If the CDO regime is extended, there must be some significant amendments to ensure justice is served. The most crucial of these is the adoption of the criminal standard of proof in relation to the finding that the person would present an unacceptable risk of committing a serious terrorism offence if released. Under the current system, the court only needs 'satisfaction to a high degree of probability'."

"Anyone facing the possibility of a CDO must have access to legal representation and this would require availability of timely legal assistance funding."

The Law Council also told the INSLM that it does not have any 'in-principle' opposition to extended supervision orders (ESO), so long as the ESO regime requires the higher standard of proof recommended by then INSLM, Dr James Renwick SC in 2017. An ESO imposes prohibitions, restrictions and other conditions on a person's activities, association and movements in the community for up to three years.

"Minimising risk of harm to our community is vitally important, but it must be balanced against individual rights," Mr Liveris said. "The amendments we have proposed are designed with that goal in mind."

Contact: Kristen Connell, P. 0400 054 227, E. kristen@talkforcemedia.com.au

The Law Council of Australia is the national voice of the legal profession, promoting justice and the rule of law.