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Office of the President

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Michael Tidball
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: [redacted]

Dear Mr Tidball

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

Thank you for the opportunity to comment on the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020. This response has been compiled with the assistance of the QLS Criminal Law and the Human Rights and Public Law Committees, whose members have substantial expertise in this area. QLS supports the issues you intend to examine as foreshadowed in the Law Council Memorandum.

QLS supports proportionate legal responses to the threat of terrorism. Such legal responses must respect the principles of necessity, legality and proportionality. QLS acknowledges that, in some circumstances, preventive legal measures may be justified to prevent terrorist activity. Appropriate oversight and review mechanisms are crucial to ensuring the proposed amendments represent a measured and suitable response.

We understand that the Law Council has sought specific feedback about Queensland's experience with the *Dangerous Prisoner (Sexual Offenders)* regime and if there are specific issues relevant to the proposed extended supervision order (**ESO**) regime.

***Dangerous Prisoner (Sexual Offenders) Act 2003* (Qld) (DPSOA)**

The DPSOA enables the Queensland Attorney-General to apply to the Supreme Court for either a continuing detention order or a supervision order in respect of prisoners who are serving a period of imprisonment for a serious sexual offence. If the Court is satisfied that the prisoner is a 'serious danger to the community', it may order that the prisoner be detained in custody for an indefinite term for "control, care or treatment[1]" (***continuing detention order***) or released from custody subject to supervision requirements (***supervision order***).

The QLS has previously recorded its opposition to preventative detention regimes and their use in Queensland. Preventative detention and supervision regimes violate the fundamental democratic assumptions that a person should not be punished for a crime they have not yet committed, or punished twice for an offence for which s/he has already been convicted.

[1] *Dangerous Prisoner (Sexual Offenders) Act 2003* (Qld), s 13(5).

Section 13 of the DPSOA requires a court to only make a continuing detention or supervision order if it is satisfied:

(a) *by acceptable, cogent evidence; and*

(b) *to a high degree of probability;*

that the evidence is of sufficient weight to justify the decision.

The practical application of the *DPSOA* in Queensland has given rise to some significant issues, many of which will be relevant to the operation of the ESO regime.

First, the risk assessment process is an inexact science. The potential to inaccurately attempt to predict a person's future behaviour is high. This is particularly so in the terrorism context compared with, for example, sexual or violence offences, where there is significantly more empirical data to guide the risk assessment process. It is also a reality that governments seek to limit some of the empirical methods associated with terrorist matters on national security grounds.

It might be said that the concerns associated with the validity and reliability of risk assessment tools are balanced somewhat by the requirement in the DPSOA for the courts to be satisfied "*by acceptable, cogent evidence*" and "*to a high degree of probability*". By contrast, the ESO regime applies the lower standard of "balance of probabilities". In our view, the relative imprecision of the risk assessment process in the terrorism context, together with the lower standard of proof, creates a risk of orders being made that are not properly connected to the perceived risk to community safety.

Second, there may be a smaller number of persons who can provide evidence with the requisite expertise in relation to these risk assessments. It may well be that a protocol would need to be developed for assessing whether an expert is in fact suitably qualified.

Third, there are systemic delays that undermine the purpose of the *DPSO* regime. For instance, delays associated with forensic assessments, filing originating applications and obtaining court dates are not unusual in any of the Australian jurisdictions with preventative detention and supervision regimes. Delay was is in fact one of the grounds relied upon in *Attorney-General v Watego* (2003) A Crim R 537 in seeking that a DPSO application be dismissed.

We submit that there is a need for legislative mechanisms to ensure that strict timelines for making applications, and for the assessment, investigation and adjudication process, with penalties for noncompliance. Further, ensuring that there are rigorous process in place within the relevant Commonwealth government departments would also go some way to reducing the impact of systemic delay.

Fourth, we submit that there is a need to ensure that sufficient Commonwealth funding is available to ensure that affected prisoners can access legal assistance. We also note that this is a specialist practice area.

Fifth, consideration should be given to providing a Commonwealth body such as the Independent National Security Legislation Monitor with an oversight role with respect to the balancing of human rights considerations with the public interest.

Whilst there is no federal equivalent of the legislative protection of human rights, many of the rights contained in Queensland's *Human Rights Act 2019* (Qld) are well known at common law[2] and within other discrete statutes. Australia is also a party to many international human rights instruments. For example, Article 7 ICCPR[3] 'prohibits three distinct types of conduct: torture; cruel, inhuman or degrading treatment or punishment; and medical or scientific experimentation or treatment without consent'.[4] The right to a fair hearing is considered a 'cardinal requirement of the rule of law'[5]. What constitutes 'fair' hearing will vary depending on the specific factual circumstances of the case, the community interest and the interests of the victim.[6] At a minimum, a party must be afforded the reasonable opportunity to advance their case 'in conditions that do not place them at a substantial disadvantage compared to their opponent'.[7]

Scope for review

Finally, we are concerned by the proposed amendments rendering decisions of the Home Affairs Minister about CDO's and ESO's exempt from review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). This decision reduces the legal avenues of a prisoner whose rights have already been diminished. Additionally, it hinders transparency within our justice system. Appeal, review and revocation pathways need to be proportional and assessable to those who will be adversely impacted by the powers of law enforcement, Courts and the Executive Government.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Luke Murphy
President

[2] In Australia, the common law right to a fair trial was firmly established by the High Court in *Jago v District Court (NSW)* (1989) 168 CLR 23 and *Dietrich v. The Queen* (1992) 177 CLR 292. The common law remedies rest on the abuse of process doctrine and the inherent power of the court to stay proceedings to prevent a trial that is unfair or otherwise improper.

[3] International Covenant on Civil and Political Rights.

[4] Queensland Government, *Guide: Nature and scope of the protected human rights* (June 2019) p.10.

[5] Tom Bingham, *The Rule of Law* (Penguin UK, 2011) 243. It is modelled on Article 14(1) ICCPR and protects the right to a fair and public hearing by an impartial decision-maker.

[6] *R v A (No 2)* [2002] 1 AC 45.

[7] *Knight v Wise* [2014] VSC 76, [36].