Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019

Monica Biddington
Law and Bills Digest Section
Cat Barker
Foreign Affairs, Defence and Security Section

Contents

The Bills Digest at a glance ........................................... 3
History of the Bill ......................................................... 4
Purpose and structure of the Bill .................................... 4
Background ...................................................................... 4
Bail laws in Australia .................................................... 5
Parole laws ................................................................. 5
Catalyst for changing the bail and parole laws ............ 7
COAG agreement ............................................................ 7
State and territory implementation of the COAG agreement ................................................... 8
Independent National Security Legislation Monitor’s report ........................................... 8
Continuing detention orders regime for terrorist offenders .............................................. 9
Committee consideration ................................................. 10
Parliamentary Joint Committee on Intelligence and Security ........................................ 10
Senate Standing Committee for the Scrutiny of Bills .................................................... 10
Bail and parole ............................................................ 10
Continuing detention orders .................................... 11
Parliamentary Joint Committee on Human Rights ... 11
Policy position of non-government parties/independents............................................ 12
Position of major interest groups .................................. 12
Australian Human Rights Commission ....................... 12
Law Council of Australia .............................................. 13
Academics .................................................................. 13

Date introduced: 1 August 2019
House: Senate
Portfolio: Attorney-General
Commencement: The day after Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at October 2019.
Key issues and provisions

Schedule 1—restrictions on bail and parole
  Presumption against bail
  Previous charges and convictions
  Associating with terrorist organisations
  Control orders and supporting/advocating terrorism
  Minimum non-parole period
  Presumption against release on parole
  Determining exceptional circumstances in relation to persons under 18 years of age

Schedule 2—amendments to the continuing detention order regime
  Eligibility for the CDO scheme (Part 1 of Schedule 2)
  Provision of information to individuals about proposed CDOs (Part 2 of Schedule 2)
The Bills Digest at a glance
The Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019 (August Bill) will:

- Expand the existing presumption against bail for persons charged with or convicted of certain Commonwealth offences to include a broader group of individuals, including those that a bail authority is satisfied have made statements or carried out activities supporting terrorist acts or advocating support for terrorist acts; and also apply it to bail decisions in relation to other Commonwealth offences if a person was previously charged with or convicted of certain offences

- Introduce a presumption against parole that will apply in similar circumstances to the expanded presumption against bail

- Provide an exception to the minimum non-parole period for certain offences, where an offender is under 18 years of age and exceptional circumstances exist

- Provide that in determining whether exceptional circumstances exist to justify going against the presumption against bail or parole, or setting a shorter non-parole period, in relation to a person under 18 years of age a court must have regard to certain matters

- Expand the eligibility for the continuing detention order (CDO) scheme for high risk terrorist offenders by ensuring that terrorist offenders who are imprisoned for a terrorism offence and another offence remain eligible for consideration for a CDO at the conclusion of the term of their imprisonment and

- Remove the requirement for an individual in relation to whom an application has been made for a CDO to be provided with a complete copy of the application in certain circumstances.

The amendments to expand the presumption against bail and introduce a presumption against parole respond to a 2017 decision of the Council of Australian Governments (COAG) that followed a terrorist incident in Victoria. However, stakeholders consider that the proposed amendments go beyond what would be required to give effect to the COAG decision, and are problematic in several respects, including by capturing individuals with only a tenuous link to terrorism. The Bill also includes changes to bail and parole provisions to implement one recommendation and respond to another recommendation made by the Independent National Security Legislation Monitor (INSLM) in a recent report.

The proposed amendments to the CDO regime will address a gap in the CDO scheme that has been identified. An offender is not currently eligible for a CDO when their sentence for an offence other than an eligible terrorism offence concludes after their sentence for the terrorism offence, even though they have been detained continuously. The proposed amendments to bring the information disclosure obligations for a CDO application into closer alignment with the procedures that apply in other contexts (such as proceedings for criminal prosecutions) are more controversial.

The Parliamentary Joint Committee on Intelligence and Security (PJCIS) is inquiring into the August Bill. The Committee commenced but did not complete an inquiry into an earlier version of the Bill that lapsed on prorogation of the 45th Parliament. It will consider submissions made to the earlier inquiry. There are no substantive differences between the two versions of the Bill.

The Parliamentary Joint Committee on Human Rights (PJCHR) and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) raised concerns about both sets of proposed amendments.
History of the Bill
An earlier version of the August Bill was introduced into the 45th Parliament on 20 February 2019 (the Counter-Terrorism Legislation Amendment Bill 2019 (February Bill)). The February Bill lapsed on prorogation of Parliament before being debated in either House of Parliament. There are no substantive differences between the two versions of the Bill.

Purpose and structure of the Bill
The purpose of Schedule 1 of the August Bill is to amend provisions in the Crimes Act 1914 relating to restrictions on bail and parole to:

- expand the existing presumption against bail for persons charged with or convicted of certain offences (including terrorism offences) to include individuals:
  - charged with or convicted of certain offences previously, and who are being considered for bail for another Commonwealth offence
  - charged with or convicted of an offence of associating with a terrorist organisation
  - subject to a control order or
  - who the bail authority is satisfied have made statements or carried out activities supporting terrorist acts or advocating support for terrorist acts
- introduce a presumption against parole that will apply in similar circumstances to the expanded presumption against bail
- provide an exception to the requirement for the imposition of a non-parole period of at least three quarters of the head sentence for certain offences, where an offender is under 18 years of age and exceptional circumstances exist and
- provide that in determining whether exceptional circumstances exist to justify going against the presumption against bail or parole, or setting a shorter non-parole period, in relation to a person under 18 years of age a court must have regard to community protection as the paramount consideration and the best interests of the person as a primary consideration.

The purpose of Schedule 2 is to amend the continuing detention order (CDO) scheme in the Criminal Code Act 1995 (Criminal Code) to:

- expand the eligibility for the scheme so that high risk terrorist offenders who are imprisoned for a terrorism offence and another offence remain eligible for consideration for a CDO at the conclusion of the term of their imprisonment and
- remove, in certain circumstances, the requirement for an individual in relation to whom an application has been made for a CDO to be provided with a complete copy of the application.

Background
The amendments to expand the presumption against bail and introduce a presumption against parole respond to a 2017 COAG decision that followed a terrorist incident in Victoria.1

The Bill also includes changes to respond to two of the recommendations made by the Independent National Security Legislation Monitor (INSLM) in a recent report on the prosecution and sentencing of children for Commonwealth terrorism offences.2

The Government has pointed to the number of terrorist offenders due for release in the coming months in making its case for amendments to expand eligibility for CDOs to be passed quickly. The Attorney-General stated: ‘Eleven of these individuals are due for release over the course of the next 18 months, which is why it is vital that Labor supports this Bill’.

**Bail laws in Australia**

Bail laws provide a framework for decisions about whether a person who is alleged to have committed an offence should be detained until his or her trial or released, with or without conditions. Bail and parole laws apply to state offenders under state law and to federal offenders under Commonwealth law. Commonwealth legislation does not contain comprehensive provisions dealing with bail. Sections 68, 79 and 80A of the *Judiciary Act 1903* provide that the relevant state or territory bail provisions apply to persons arrested for Commonwealth offences. However, sections 15AA and 15AB of the *Crimes Act* affect the exercise, by a state or territory bail authority, of the power to grant or refuse bail in respect of a Commonwealth offence.

In 2004, section 15AA was inserted into the *Crimes Act* to ‘provide for a national solution to bail for terrorism offences rather than relying on a patchwork of bail laws to be updated by the states and territories’. A further amendment was made later that year so that the presumption did not apply to a person charged with or convicted of one of the new offences of associating with terrorist organisations in section 102.8 of the *Criminal Code*.

Section 15AA of the *Crimes Act* currently provides a presumption against bail for persons charged with or convicted of certain serious Commonwealth offences, including terrorism offences. Unless exceptional circumstances exist to justify bail, a bail authority cannot grant bail to a person charged with or convicted of such an offence. While the decision of the bail authority is discretionary, it can be appealed under subsection 15AA(3A) of the *Crimes Act*.

While the presumption against bail for certain offences is well established, the Bill proposes to expand the circumstances in which the presumption against bail applies, including by applying the presumption to defendants charged with or convicted of an association offence.

**Parole laws**

Parole is a key tenet of the criminal justice system and helps to motivate, reform and rehabilitate prisoners, preparing them for the transition to their life outside prison. When a person is released on parole, conditions are imposed by the jurisdiction’s parole board and might include reporting requirements, travel restrictions and specific conditions such as counselling or drug testing.

A sentencing judge may set a period of time that is a non-parole period, which is the minimum ‘period of imprisonment to be served because the sentencing judge considers that the crime

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4. For background on bail in the legal process, see M Bagaric, *Ross on crime*, 7th edn, Thomson Reuters, Pyrmont, 2016, p. 177. See also state and territory bail legislation: *Bail Act 2013* (NSW); *Bail Act 1977* (Vic); *Bail Act 1980* (Qld); *Bail Act 1982* (WA); *Bail Act 1985* (SA); *Bail Act 1994* (Tas); *Bail Act 1992* (ACT); *Bail Act 1992* (NT).
6. *Anti-Terrorism Act (No.2) 2004*.
committed calls for such detention’. Further, ‘in fixing the non-parole period a judge will give weight to his estimate of the capacity of the prisoner for reformation’.

Section 19AG of the Crimes Act provides that the following federal offences are **minimum non-parole offences**, for adults and children:

- a terrorism offence
- an offence against Division 80 of the Criminal Code (treason, urging violence and advocating terrorism or genocide) and
- an offence against subsection 91.1(1) or 91.2(1) of the Criminal Code (certain espionage offences).

For these offences, the sentencing court must fix a single non-parole period of at least three-quarters of the head sentence for the offence (or three-quarters of the aggregate of the sentences if the person is sentenced for more than one minimum non-parole offence).

There are currently no presumptions against parole under federal legislation. The Bill proposes to create circumstances where there is a presumption against parole in similar circumstances to the expanded presumption against bail. The changes in the Bill have been unfavourably compared with reforms made in the United Kingdom (UK) in 2015, which removed the right of those convicted of terrorism offences to automatic release half-way through their sentences, instead providing that they will only be released before the end of their prison term where the Parole Board considers they no longer represent a risk to the public. Academic Jessie Blackbourn stated that the proposed changes go ‘far beyond those in the UK’, by restricting bail and parole for individuals ‘merely associated in some way with terrorism, even when they have not be arrested for—or convicted of—a specific terrorism offence’.

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9. Ibid., at 629.
10. **Terrorism offence** is defined at section 3 of the Crimes Act as an offence against: Subdivision A of Division 72 of the Criminal Code Act 1995 (Criminal Code) (international terrorist activities using explosive or lethal devices); Subdivision B of Division 80 of the Criminal Code (treason); Part 5.3 or 5.5 of the Criminal Code (terrorism; foreign incursions and recruitment); Part 4 of the Charter of the United Nations Act 1945 (Security Council decisions that relate to terrorism and dealings with assets); or Part 5 of the Charter of the United Nations Act (offences relating to UN sanctions) to the extent that it relates to the Charter of the United Nations (Sanctions—Al-Qaida) Regulations 2008.
11. For the purposes of this provision, a sentence of life imprisonment is taken to be a sentence of 30 years imprisonment (subsection 19AG(3)).
13. Ibid.
Catalyst for changing the bail and parole laws

In 2017, a Victorian man who was on parole and had been acquitted of a charge of conspiracy to commit a terrorist attack, killed one person and took another person hostage. The offender, Yacqub Khayre, injured three police officers before being shot dead. The Islamic State group claimed responsibility for the attack. In response to the incident, then Prime Minister Malcolm Turnbull questioned why the gunman was on parole:

He had a long record of violence. A very long record of violence. He had been charged with a terrorist offence some years ago and had been acquitted. He was known to have connections, at least in the past, with violent extremism. But he was a known violent offender. How was he on parole?

... It is clear that this is a real issue where people with known records of violence and, including people with known terrorist connections or at least connections with extremists have been released on parole.

The incident prompted COAG to consider and agree on consistent changes to bail and parole laws. A meeting of COAG was held a few days after the incident, at which it was agreed that there will be a presumption that ‘neither bail nor parole will be granted to those persons who have demonstrated support for, or have links to, terrorist activity’. Further:

First Ministers agreed that they will reconvene as soon as practicable at a special COAG to fully and more comprehensively review the nation’s laws and practices directed at protecting Australians from violent extremism.

COAG agreement

A special meeting of COAG to review laws and practices directed at protecting Australians from violent extremism was held on 5 October 2017. At that meeting, ministers agreed that the June 2017 decision should be underpinned by nationally consistent principles to ensure that there is a presumption against bail and parole in agreed circumstances across Australia.

The COAG agreement has been criticised by some, including on the basis that decisions about bail and parole should be left to the courts and parole boards, and that the reforms could prove to be counter-productive by removing opportunities for rehabilitation and supervision.

The Australia-New Zealand Counter-Terrorism Committee (ANZCTC) subsequently developed nationally consistent principles in consultation with each Australian jurisdiction:

15. Ibid.
18. COAG, Communique, June 2017, op. cit.
19. Ibid.
20. COAG, Communique, Special Meeting, op. cit.
21. M Davey, “Handing victory to terrorists”: lawyers warn over denial of bail and parole’, The Guardian (online edition), 10 June 2017 (the article includes quotes from barrister and human rights advocate Julian Burnside, criminal defence lawyer Rob Stary, criminology lecturer Dr Diana Johns and Executive Director of the Human Rights Law Centre Hugh de Krester); Blackbourn, ‘Restricting bail and parole for those with terror links is no cure-all’, op. cit.; T Rossi (President of the Law Society of South Australia), ‘Stricter parole won’t curb terrorism’, Adelaide Advertiser, 19 June 2017, p. 18.
Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019

Principle 1—the presumption against bail and parole should apply to categories of persons who have demonstrated support for, or links to, terrorist activity.

Principle 2—high legal thresholds should be required to overcome the presumption against bail and parole.

Principle 3—the implementation of the presumption against bail and parole should draw on and support the effectiveness of the Joint Counter Terrorism Team model, and

Principle 4—implementing a presumption against bail and parole should appropriately protect sensitive information.

State and territory implementation of the COAG agreement

Prior to the COAG decision, New South Wales had already amended its legislation to introduce presumptions against bail and parole for individuals relating to terrorism risks. South Australia, Victoria, Tasmania, Western Australia, and Queensland have since updated their legislation to respond to the COAG agreement. Neither the Northern Territory nor the Australian Capital Territory Governments appeared to have proposed amendments in line with the COAG agreement at the date of publication of this Digest.

Independent National Security Legislation Monitor’s report

In late 2018, the INSLM reported to the Prime Minister on his review of the prosecution and sentencing of children for Commonwealth terrorism offences. The INSLM noted:

Since 2014, the risk of children committing terrorism offences has emerged as a significant issue, as measured by significant increases (sometimes from zero) in the levels of:

a. intelligence interest, adverse security assessments and passport cancellations;

b. police investigations and arrests by the [Joint Counter-Terrorism Teams] which exist now in each jurisdiction; and

c. charges and convictions.

Since 2014, ten per cent of people charged with terrorism offences were under the age of 18 at the time of the alleged offending. Of the eight young people charged, six had been convicted, four of whom received a custodial sentence (one case remained before the courts). Based on evidence given by the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police

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22. Department of Home Affairs (DoHA) and Attorney-General’s Department (AGD), Submission to Parliamentary Joint Committee on Intelligence and Security (PICIS), Review of the Counter-Terrorism Legislation Amendment Bill 2019, [Submission no. 3], n.d., p. 4.


24. Statutes Amendment (Terror Suspect Detention) Act 2017 (SA); Justice Legislation Amendment (Terrorism) Act 2018 (Vic); Terrorism (Restrictions on Bail and Parole) Act 2018 (Tas); Bail Amendment (Persons Linked to Terrorism) Act 2019 (WA); Justice Legislation (Links to Terrorist Activity) Amendment Act 2019 (Qld). WA bail laws were amended, but there did not appear to have been changes proposed to parole laws as at the date of publication of this Digest.

25. Renwick, Report to the Prime Minister: the prosecution and sentencing of children for terrorism, op. cit. Submissions to the review are available on the INSLM’s website.

26. Ibid., p. 1. Footnote references have been omitted from this quotation and can be viewed in the source document.
(AFP), the INSLM expects that there will continue to be arrests and trials of young people for terrorism offences.27

The INSLM’s report included 11 recommendations relating to the treatment throughout the justice system of young people charged with or convicted of terrorism offences. The Bill will implement one of those recommendations to the extent it can be addressed through changes to Commonwealth law (relating to consideration of the rights of the child and community protection in bail decisions), and respond to another (relating to the required non-parole period for certain offences).28

**Continuing detention orders regime for terrorist offenders**

The CDO regime for high risk terrorist offenders in Division 105A of the *Criminal Code* was introduced in 2016 to allow for the continued detention of terrorist offenders who are considered to pose an unacceptable risk of committing certain serious terrorism offences if released into the community at the end of their custodial sentence.29 A CDO may only be made if the Court is satisfied that there is no less restrictive measure that would be effective in preventing that unacceptable risk.30 The scheme commenced on 7 June 2017.31

A CDO is an order which, when put in place by the Court, commits an offender to incarceration for a specified time period.32 The CDO may apply to any person convicted of specified terrorism and terrorism-related offences, including foreign incursions and recruitment. The person needs to be serving a prison sentence for the specified offence or already subject to a CDO or an interim detention order. As part of its consideration, the Court may appoint one or more relevant experts to conduct an assessment and provide a report on the risk of the offender committing a serious terrorism offence if released into the community.33

The Bill will address an unintended consequence of the current CDO scheme to ensure that terrorist offenders who are imprisoned, who are also serving time for non-terrorist related offences, are eligible for consideration for a CDO when their imprisonment ends.

At a PICIS hearing into the August Bill, the Attorney-General’s Department advised:

> The management of high-risk terrorist offenders reaching the end of their sentences is a key priority for the government. As at 23 August this year, 52 offenders are serving periods of imprisonment for terrorism offences and may be eligible for continuing detention at the end of their sentences. Eleven of these offenders may become eligible for a continuing detention order, or CDO, from August 2019 through to December 2020. They may be considered for a CDO if they pose an unacceptable risk to the community of committing a serious part 5.3 terrorism offence, and there is no less restrictive mechanism to mitigate that risk.34

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27. Ibid., pp. 1, 4–6.
28. The Bill will implement recommendation 2(a) and respond to (but not implement) recommendation 1.
32. An order may detain a person for up to a further three years; successive orders may be made: *Criminal Code*, subsections 105A.7(4)–(6).
33. *Criminal Code*, Division 105A.
The Department took on notice the question of how many offenders would be affected by the proposed change to eligibility for a CDO included in the Bill, and later advised:

If any of the current 52 terrorist offenders, including the eleven offenders who become eligible for release over the next 18 months, were to commit a further offence under the current provisions, those offenders could become ineligible for the purposes of the HRTO scheme.

Committee consideration

Parliamentary Joint Committee on Intelligence and Security

The August Bill has been referred to the PJCIS for inquiry and report. Details of the inquiry are at the inquiry homepage. No reporting date has been set.

The February Bill was referred to the PJCIS, but the inquiry was not completed in the 45th Parliament. The PJCIS is considering submissions made and evidence given to the lapsed inquiry in its inquiry into the August Bill.

Senate Standing Committee for the Scrutiny of Bills

In its report on the February Bill, the Scrutiny of Bills Committee raised concerns about the proposed expansions to the presumption against bail and introduction of a presumption against parole, and about changes relating to CDOs. It restated those concerns in its report on the August Bill, and requested further justification from the Attorney-General for the amendments to which its concerns relate.

Bail and parole

In relation to bail, the Committee considered that the Bill will ‘significantly expand’ the presumption against bail, and stated:

The presumption against bail applies both to those convicted of, but also those charged with, certain offences. The committee notes that it is a cornerstone of the criminal justice system that a person is presumed innocent until proven guilty, and presumptions against bail (which deny a person their liberty before they have been convicted) test this presumption. As such the committee expects that a clear justification be given in the explanatory materials for imposing a presumption against bail, including any evidence that courts are currently failing to consider the serious nature of an offence in determining whether to grant bail.

The Committee had concerns about all of the proposed expansions to the presumption against bail, and about the introduction of a presumption against parole. It also noted:

35. Ibid., p. 13.
36. AGD, Supplementary submission to PJCIS, Review of the Counter-Terrorism Legislation Amendment Bill (2019 Measures No. 1) Bill 2019, [Submission no. 5.1], n.d., p. 3.
41. Ibid., pp. 1–2.
42. Ibid., pp. 1–5.
In light of those concerns, the Committee requested that the Attorney-General provide more detailed justification for the necessity and appropriateness of the proposed amendments to bail and parole.44

**Continuing detention orders**

The Committee noted that it raised significant scrutiny concerns about the CDO scheme when it was introduced, including that it ‘can plausibly be characterised as retrospectively imposing additional punishment’ for past offending.45 It reiterated its concerns in relation to the proposed expansion of the scheme and stated that it did not consider the explanatory materials contained adequate justification for the change.46

The Committee also had concerns regarding the proposed limitation of an offender’s right to receive a complete copy of a CDO application. It considered that this ‘may limit an offender’s right to a fair hearing as the offender may not have access to all of the relevant information on which the application for the order is made’.47 It noted that this will partially reverse changes made to the Bill that introduced CDOs to address concerns that offenders would not receive sufficient information ahead of the hearing for an application.48

On both matters, the Committee requested that the Attorney-General provide more detailed justification for the proposed amendments.49

**Parliamentary Joint Committee on Human Rights**

In its report on the February Bill, the PJCHR raised concerns about the human rights compatibility of the proposed expansions to the presumption against bail and introduction of a presumption against parole, and changes relating to CDOs.50

With respect to the presumptions against bail and parole, the PJCHR had concerns about the compatibility of the amendments with:

- the right to liberty: ‘there is a risk that if the threshold for displacing the rebuttable presumption against bail is too high, it may result in loss of liberty in circumstances that may be incompatible with the right to release pending trial’ and
- the rights of the child, by requiring the best interests of the child to be accorded less importance (as a primary consideration) than the protection of the community (as the

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43. Ibid., p. 4.
44. Ibid., p. 5.
45. Ibid., pp. 5–6 (quote taken from p. 6).
46. Ibid., p. 6.
47. Ibid., p. 7.
48. Ibid., pp. 6–7.
49. Ibid.
50. Parliamentary Joint Committee on Human Rights (PJCHR), Human rights scrutiny report, 2, 2019, 2 April 2019, pp. 27–37. The Committee chose not to report in detail on the August Bill. Noting that it was substantially similar to the February Bill, it stated that it reiterated the views set out in the report on the earlier Bill: PJCHR, Human rights scrutiny report, 4, 2019, 10 September 2019, p. 10.
paramount consideration). The PJCHR sought the advice of the Attorney-General on this matter.\textsuperscript{51}

The PJCHR also considered that those amendments may engage and limit the rights to freedom of expression and freedom of association, but noted that the statement of compatibility for the February Bill did not include an assessment against those rights. Accordingly, it sought the advice of the Attorney-General on the matter.\textsuperscript{52}

The Attorney-General’s response to the PJCHR had not been published at the date of publication of this Digest.\textsuperscript{53} However, as noted in a later report of the PJCHR, the statement of compatibility for the August Bill includes an assessment of the bail and parole amendments with the rights to freedom of expression and freedom of association.\textsuperscript{54}

In relation to CDOs, the PJCHR noted that it had previously found that the regime ‘raised serious human rights concerns, particularly in relation to the right not to be arbitrarily detained’, and that the amendments proposed in the Bill may increase concerns about the compatibility of the regime with human rights.\textsuperscript{55}

**Policy position of non-government parties/independents**

At the time of publication of this Bills Digest, there was no public indication of the policy position of any non-government parties or independents on the Bill.

**Position of major interest groups**

Views expressed in submissions on the February and August Bills are summarised below, with further detail included in the ‘Key issues and provisions’ section of this Digest.

**Australian Human Rights Commission**

In its submission to the PJCIS, the Australian Human Rights Commission (AHRC) made three recommendations on the February Bill. The AHRC recommended that most of the Bill not be passed (recommendation 1), or that if the Bill does proceed, that it be amended in key ways to protect child offenders on bail or parole, and so that all information is provided to a respondent to an application for a CDO, unless certain circumstances are present (recommendations 2 and 3).\textsuperscript{56}

In its submission on the August Bill, the AHRC stated that its views about the human rights implications were unchanged and included an expanded set of recommendations, including that sections 15AA and 19AG of the *Crimes Act* (presumption against bail and minimum non-parole periods for certain offences) should be amended so that they do not apply to children.\textsuperscript{57}
Law Council of Australia

The Law Council of Australia (LCA) had significant concerns with the February Bill. It noted what it considered to be problematic aspects of the proposed changes to bail and parole:

- amendments relating to bail and parole would not give effect to nationally consistent principles given that discrepancies exist among jurisdictions that have sought to implement the Council of Australian Governments (COAG) Agreement of 2017;
- the expanded application of a presumption against bail and a presumption against parole provisions for a broader group of individuals has not been demonstrated to be necessary or proportionate or in the interests of rehabilitation and deradicalisation efforts;
- the exceptional circumstances standard of proof is higher than a presumption against bail and parole as per the COAG decision of 9 June 2017.\(^{58}\)

And in relation to the amendments relating to CDOs:

- the amendments relating to CDOs expand their potential application in the absence of adequate risk assessment and properly funded and available rehabilitation programs. The amendments also have the potential to apply retrospectively; and
- the proposed amendments in relation to management of sensitive information for CDOs would mean that a person bears the onus of disproving a public interest immunity claim. The timeframes regarding a public interest immunity claim or a certificate under the NSI Act are also unclear.\(^{59}\)

The LCA’s submission on the August Bill provided further information on some of its concerns in light of the public release of the INSLM’s report on prosecution and sentencing of children for Commonwealth terrorism offences in the meantime. The LCA reiterated its previous concerns and additionally recommended that children be excluded from the proposed presumption against parole.\(^{60}\)

Academics

Several legal academics with expertise in terrorism laws also made a joint submission to the inquiry into the February Bill.\(^{61}\) The submission raised concerns about insufficient coordination between the Commonwealth and the states and territories in drafting consistent legislation following the COAG Agreement.\(^{62}\) Further, the submission asserts that no evidence has been put forward to justify amendments to bail and parole laws that are incursions into the presumption of innocence and right to liberty.\(^{63}\) The submission also stated that those amendments ‘go too far in capturing people with only a tenuous connection to terrorism’.\(^{64}\)

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58. Law Council of Australia (LCA), Submission to PJCIS, Review of the Counter-Terrorism Legislation Amendment Bill 2019, [Submission no. 4], 13 March 2019, p. 6 (see further pp. 7–13).
59. Ibid., p. 6 (see further pp. 14–18).
60. LCA, Supplementary submission to PJCIS, Review of the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019, 20 August 2019 [Submission no. 4.1].
62. Ibid., pp. 4–5.
63. Ibid., pp. 5, 10.
64. Ibid., pp. 6, 10.
The legal academics also considered that the amendments relating to providing information to individuals about proposed CDOs are ‘a significant concern’ and should be rejected. 65

As noted in the ‘Background’ section of this Digest, other legal experts have also expressed concern about the COAG agreement to which the bail and parole amendments relate. 66

**Department of Home Affairs and Attorney-General’s Department**

The submission from the Department of Home Affairs and the Attorney-General’s Department was prepared in consultation with ASIO and the AFP. It outlines the intended operation of the legislation and the ANZCTC’s four principles to ensure that there is a presumption against bail and parole in agreed circumstances across Australia. 67 The Attorney-General’s Department’s submission on the August Bill outlined the minor change between the February and August Bills and provided updated statistics on offenders who may become eligible for a CDO. 68

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the August Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible. 69 However, as outlined above, the PJCHR raised concerns about several measures in its report on the February Bill. Content has been added to the Statement of Compatibility with Human Rights for the August Bill in relation to some of the concerns raised. The AHRC also questioned whether key measures met the required standard of limitations on human rights being reasonable, necessary and proportionate. 70

**Key issues and provisions**

**Schedule 1—restrictions on bail and parole**

**Presumption against bail**

Bail for federal offences is governed by state laws and sections 15AA and 15AB of the *Crimes Act*. Section 15AA of the *Crimes Act* currently provides for a presumption against bail for persons being considered for bail as a result of a charge or conviction for certain serious Commonwealth offences, including terrorism offences. Unless exceptional circumstances exist to justify bail, a bail authority cannot grant bail to a person charged with or convicted of such an offence. The Bill will make several expansions to this existing presumption.

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65. Ibid., pp. 14–16 (quote taken from p. 16). The submitters did not have objections to the changes to eligibility for a CDO, but stated that they are opposed to the existence of a CDO regime ‘until a mechanism exists to accurately assess the level of risk that a convicted terrorist poses upon his or her release’ and ‘effective rehabilitation programs are available for convicted terrorists in jail’, neither of which they consider to be the case currently: pp. 13–14.

66. See under the ‘COAG agreement’ sub-heading.

67. DoHA and AGD, Submission to PJCIS, op. cit.

68. AGD, Submission to PJCIS, Review of the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019, [Submission no. 5], n.d.

69. The Statement of Compatibility with Human Rights can be found at page 5 of the Explanatory Memorandum to the Bill.

70. AHRC, Submission to PJCIS, op. cit., p. 2 (see further pp. 7–12).
Previous charges and convictions

Items 1 and 3 of Schedule 1 will amend section 15AA so that the presumption applies to an individual being considered for bail for any Commonwealth offence, if the person has ever been charged with or convicted of an offence set out in subsection 15AA(2) (which includes terrorism offences, and other offences involving certain circumstances, such as where a person’s conduct is alleged to have caused another person’s death).

This amendment was criticised by the Scrutiny of Bills Committee and some stakeholders. The Committee stated:

... a person may have been previously charged with a terrorism offence but the charges were later dropped or they may have been acquitted of that offence, yet a presumption against bail would exist in relation to them if later charged with any Commonwealth offence. The committee notes that this places the onus of proof onto the accused to prove that exceptional circumstances exist. [emphasis in original]

The legal academics noted that while these individuals may previously have been identified as posing a risk to society, ‘that risk is not necessarily current. It is inconsistent with the rehabilitative purpose of our criminal justice system to assume that a person who has served their sentence for a terrorism offence continues to pose a risk to society’. They and others were particularly concerned that the provision will capture individuals charged with certain offences previously, but not convicted, with some noting that applying the presumption to such individuals had been rejected by the Victorian Expert Panel on Terrorism on the basis that it would capture ‘tenuous, incidental links to terrorism’.

Associating with terrorist organisations

Item 4 will remove an existing limitation in paragraph 15AA(2)(a) of the Crimes Act that applies to offences of association with terrorist organisations (section 102.8 of the Criminal Code) which the Explanatory Memorandum states is part of implementing the COAG Agreement of 9 June 2017. The Anti-Terrorism Act (No. 2) 2004 amended paragraph 15AA(2)(a) of the Crimes Act to expressly exclude the association offences in section 102.8 of the Criminal Code from the presumption against bail. The Bill proposes to remove the exclusion of section 102.8 from the application of the presumption. However, as the Scrutiny of Bills Committee noted, limited justification has been provided, other than that it is part of implementing the COAG agreement of 9 June 2017, and that ‘the severity of the danger posed by terrorists and terrorist organisations’ make it necessary to ‘limit the rights of individuals who, by their association with a terrorist organisation, pose a threat to Australians’. The removal of this this exception may yield some unintended consequences. The terrorism association offences in the Criminal Code allow for exceptions in the case of associations with close family members, or in a place being used for public religious worship and

71. Scrutiny of Bills Committee, Scrutiny digest, 5, op. cit., p. 2; Legal academics, Submission to PJCIS, op. cit., pp. 5–7; LCA, Submission to PJCIS, op. cit., pp. 8–9.
73. Legal academics, Submission to PJCIS, op. cit., p. 6.
75. Explanatory Memorandum, p. 27.
76. Ibid., pp. 16, 27 (quotes taken from p. 16); Scrutiny of Bills Committee, Scrutiny digest, 5, op. cit., pp. 2–3. The matter is not addressed in DoHA and AGD’s submissions to the PJCIS’s inquiry into the February or August Bills, nor was it discussed at the hearings held for the purpose of those inquiries.
other circumstances. However, those exceptions to the offence will not be considered by a bail authority, as they would only be raised at trial.

The legal academics proposed an alternative approach:

We submit that a better approach—if simplification is the desired outcome—would be to repeal section 102.8 as prior inquiries have frequently recommended. The fact that no person has been charged with an association offence in the 15 years that the section has been in effect indicates that repeal would not leave a gap in Australia’s national security framework.

The LCA also recommended the repeal of the association offences.

Control orders and supporting/advocating terrorism

Item 7 will insert proposed subsection 15AA(2A) to extend the presumption against bail to include individuals subject to a control order and individuals who the bail authority is satisfied have made statements or carried out activities supporting, or advocating support for, terrorist acts.

The Scrutiny of Bills Committee, LCA and legal academics raised concerns about these extensions of the presumption against bail. With respect to individuals subject to a control order, those stakeholders were particularly concerned about the application to people on interim control orders, which are made in ex parte proceedings at which the person in relation to whom the order is proposed is not represented. While interim control orders are intended to apply only briefly until a contested hearing is held for the confirmation of an order, in practice, some individuals have been subject to interim orders for extended periods.

In relation to supporting or advocating support for terrorism, the Scrutiny of Bills Committee, LCA and legal academics were concerned at the breadth of conduct potentially captured by the provision, such as comments on social media made several years before. The legal academics pointed out that the Explanatory Memorandum states that a person’s support or advocacy of support for terrorism is an appropriate factor for a bail authority to consider. They contended that it ‘fails to recognise that there is a fundamental difference’ between allowing or requiring consideration to be given to a matter and requiring bail to be refused on the basis of that matter unless exceptional circumstances can be demonstrated. They suggested an alternative approach for this and the other extensions outlined above; instead of expanding the presumption against bail, they recommended amending the Crimes Act to list specific factors a bail authority must take into account.

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77. Criminal Code, subsection 102.8(4).
78. Legal academics, Submission to PJCIS, op. cit., pp. 5–6.
79. LCA, Submission to PJCIS, op. cit., pp. 9–10.
81. LCA, Submission to PJCIS, op. cit., p. 10; Legal academics, Submission to PJCIS, op. cit., p. 6.
82. The interim control order imposed on Ahmad Naizmand on 5 March 2015 was not confirmed until 30 November 2015; that imposed on Harun Causevic in September 2015 was not confirmed until July 2016: C Barker and C Raymond, Counter-Terrorism Legislation Amendment Bill (No. 1) 2016, Bills digest, 20, 2016–17, Parliamentary Library, Canberra, 10 October 2016, p. 32.
83. Scrutiny of Bills Committee, Scrutiny digest, 5, op. cit., p. 4; LCA, Submission to PJCIS, op. cit., p. 10; Legal academics, Submission to PJCIS, op. cit., pp. 7–8.
84. Legal academics, Submission to PJCIS, op. cit., p. 7; see Explanatory Memorandum, p. 28.
85. Legal academics, Submission to PJCIS, op. cit., p. 7.
86. Ibid., p. 8. For an example of such a provision, see Bail Act 1980 (Qld), section 16 (paragraphs 16(2)(g) and (h) and subsections 16(2B) and (2C) were inserted by the Justice Legislation (Links to Terrorist Activity) Amendment Act 2019 (Qld)).
Minimum non-parole period

Section 19AG of the *Crimes Act* requires the court to impose a non-parole period of at least three-quarters of the head sentence imposed on conviction for certain Commonwealth offences, including terrorism offences.

The INSLM considered that the application of section 19AG to children breached Australia’s obligations under the *Convention on the Rights of the Child* by precluding judicial discretion in the setting of a non-parole period for a child, and therefore recommended that the provision be amended so as not to apply to offenders who were under 18 years of age at the time of offending.  

He noted that it appeared that ‘the prospect of children being convicted of the serious offences to which s 19AG applies was not contemplated at the time of the provision’s enactment’.

Instead of providing that section 19AG does not apply to children, the Government proposes to include an exception. **Item 13 of Schedule 1** will insert proposed subsection 19AG(4A), which will require a court to comply with the three-quarters rule in relation to a person under 18 years of age, unless it is satisfied that exceptional circumstances exist to justify fixing a shorter single non-parole period. The Explanatory Memorandum notes that this differs from the approach recommended by the INSLM but is ‘intended to be responsive to the issues raised during the INSLM inquiry and report’ in a way that is ‘consistent with the obligation upon government to protect the community from terrorist threats’, given that terrorist acts committed by children have ‘the same impact on the victims and society in general’ as those committed by adults.

See below under ‘Determining exceptional circumstances in relation to persons under 18 years of age’ for factors to be considered in making such a determination.

The LCA argued that section 19AG should be repealed, but that if it is retained, children should be exempted from its operation.

Presumption against release on parole

Division 5 of Part IB of the *Crimes Act* governs the release on parole or licence of federal offenders.

Of most relevance:

- section 19AKA states that the purposes of parole are the protection of the community, rehabilitation of the offender and reintegration of the offender into the community
- section 19AL provides that before the end of a non-parole period, the Attorney-General must either make or refuse to make an order directing that the person be released on parole and
- section 19ALA sets out a non-exhaustive list of matters that the Attorney-General may take into account in making a decision of whether to grant or refuse parole.

The decision of the Attorney-General whether to grant parole and the conditions of any such parole is a reviewable decision under the *Administrative Decisions (Judicial Review) Act 1977*.

**Item 16 of Schedule 1** will insert proposed section 19ALB to provide a presumption against the granting of parole to certain offenders. The Attorney-General will be required not to make a

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88. Ibid., p. 51.
parole order in relation to the following individuals, unless he or she is satisfied that exceptional circumstances exist to justify the making of an order:

- a person who has been convicted of a terrorism offence (whether or not the sentence the person is currently serving is for a terrorism offence)
- a person subject to a control order and
- a person who the Attorney-General is satisfied has made statements or carried out activities supporting, or advocating support for, terrorist acts.

See below under ‘Determining exceptional circumstances in relation to persons under 18 years of age’ for factors to be considered in making such a determination.

If the Attorney-General refuses to grant parole, section 19AL will require him or her to inform the person and provide a statement of reasons, and to notify the person of the obligation to reconsider whether to grant parole within 12 months.

The Explanatory Memorandum states:

The presumption against parole gives primacy to the first purpose of parole stated in section 19AKA of the Crimes Act—the protection of the community—by placing the onus on the terrorism-related offender to demonstrate exceptional circumstances exist to justify their release on parole.

Like the presumption against bail, the presumption against parole is a mechanism to enhance the management of the particular risks posed by terrorist offenders and other offenders who have expressed support for, or have links to, terrorist activity.91

The LCA considered that the introduction of this presumption and the exceptional circumstances test do not encourage rehabilitation or deradicalisation efforts, and that a person subject to the proposed provision will be unlikely to be in a position to prove exceptional circumstances.92 It also recommended that the new provision should not apply to children.93 The Scrutiny of Bills Committee did not consider that adequate justification had been provided in relation to the presumption’s extension to individuals who have not been convicted of a terrorism offence.94 It also noted:

… while the presumption against parole will not technically be of retrospective effect, in practice there may be people who have been convicted of offences prior to the commencement of this bill who will now be subject to a presumption against parole that did not exist when they were initially sentenced.95

Determining exceptional circumstances in relation to persons under 18 years of age

Item 8 of Schedule 1 will insert proposed subsection 15AA(3AA) to provide that in determining whether exceptional circumstances exist to justify the granting of bail to a person under 18 years of age despite the presumption against it, the bail authority must have regard to the protection of the community as the paramount consideration and the best interests of the child as a primary

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91. Explanatory Memorandum, p. 31.
92. LCA, Submission to PJCIS, op. cit., p. 12; LCA, Supplementary submission, op. cit., p. 4.
93. LCA, Supplementary submission, op. cit., p. 4. The AHRC recommended that the proposed section not be passed, but that if it is passed, it should not apply to children: AHRC, Supplementary submission, op. cit., p. 6.
95. Ibid., p. 4.
consideration. The bail authority may also have regard to other matters. This amendment will implement a recommendation of the INSLM.96

**Items 13 and 16** will make equivalent provision in relation to determining whether exceptional circumstances exist to justify:

- the imposition of a non-parole period shorter than three quarters of the head sentence on a person under 18 years of age, despite the presumption against it (proposed subsection 19AG(4B)) and
- the granting of parole to a person under 18 years of age, despite the proposed new presumption against it (proposed subsection 19ALB(3)).

The PJCHR and the AHRC considered that these amendments may be inconsistent with the rights of the child, by requiring the best interests of the child to be accorded less importance (as a primary consideration) than the protection of the community (as the paramount consideration).97

**Schedule 2—amendments to the continuing detention order regime**

Division 105A of the *Criminal Code* contains a scheme for the continuing detention of high risk terrorist offenders who pose an unacceptable risk of committing a serious terrorism offence if released into the community once their sentence of imprisonment has ended. This scheme commenced in 2017 following a COAG agreement to develop a nationally consistent post sentence preventative detention scheme, with appropriate protections, that covers high risk terrorist offenders.98 The regime intends to ensure the safety and protection of the community from terrorist offenders who pose an unacceptable risk to the community of committing a *serious Part 5.3 offence* if released at the expiry of their custodial sentence.99

A gap has been identified in the operation of the CDO scheme that the August Bill proposes to address. The Bill proposes to expand the eligibility criteria for the scheme to include offenders who are serving sentences for non-terrorism-related offences and who have been continuously detained in custody since being convicted of a terrorism-related offence:

> It should not matter whether a terrorist offender’s final day of detention is for a terrorist offence or another offence. What matters is the safety of the Australian public, and the Bill will ensure that the community can be protected from terrorist offenders who pose an unacceptable risk to the community of committing a terrorism offence if released from prison.100

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99. *Criminal Code*, section 105A.1. For background and further information, see Biddington, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, op. cit. A *serious Part 5.3 offence* is an offence against that Part of the *Criminal Code* (terrorism) that carries a maximum penalty of at least seven years imprisonment: *Criminal Code*, section 105A.2.

Further, and somewhat more controversially, the Bill also proposes amendments to bring the information disclosure obligations for a CDO application ‘more in line with the procedure in other contexts, such as proceedings for criminal prosecutions’.101

Eligibility for the CDO scheme (Part 1 of Schedule 2)

Items 3–7 of Schedule 2 will amend section 105A.3 of the Criminal Code to provide that a CDO may be made in relation to an offender if:

• he or she is serving a sentence of imprisonment for an eligible terrorism offence and will be at least 18 years old when the sentence ends or
• he or she:
  – is serving, concurrently and/or cumulatively with a sentence for an eligible terrorism offence, a further sentence of imprisonment for another Commonwealth, state or territory offence and
  – has been continuously detained in custody since being convicted of the eligible terrorism offence
  – and will be at least 18 years old when the last sentence ends or
• he or she is subject to a CDO or an interim CDO.102

The amendments will address the gap in the CDO scheme that has been identified, that is, where an offender is not eligible for a CDO when their sentence for an offence other than an eligible terrorism offence concludes after their sentence for the terrorism offence, even though they have been detained continuously.

Items 8–13 will make consequential changes to sections 105A.5, 105A.9, 105A.18 and 105A.23.

Items 1 (amending the definition of terrorist offender) and 2 (inserting proposed section 105A.2A) will clarify that a person who escapes from custody is taken to be detained in custody and serving a sentence of imprisonment until they resume serving their sentence. The purpose of these amendments is to ensure that a terrorist offender who escapes custody does not break the continuity of their detention and therefore their eligibility for a CDO at the conclusion of their time in prison.103

The LCA stated that ‘in the absence of effective risk assessment tools and adequately available rehabilitation programs’, it does not support the CDO regime, or its proposed expansion.104 The legal academics took a similar position, stating that they did not have objections to the proposed changes to eligibility for a CDO, but were opposed to the existence of a CDO regime until ‘a mechanism exists to accurately assess the level of risk that a convicted terrorist poses upon his or her release’ and ‘effective rehabilitation programs are available for convicted terrorists in jail’, neither of which they consider to be the case currently.105 The PJCHR and Scrutiny of Bills

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102. By eligible terrorism offence, we mean one of the offences listed in paragraph 105A.3(1)(a): an offence against Subdivision A of Division 72 of the Criminal Code (international terrorist activities using explosive or lethal devices); a serious Part 5.3 offence; an offence against Part 5.5 of the Criminal Code (foreign incursions and recruitment) except subsection119.7(2) or (3) (publishing recruitment advertisements); or an offence against the repealed Crimes (Foreign Incursions and Recruitment) Act 1978, except paragraph 9(1)(b) or (c) (publishing recruitment advertisements).
103. Explanatory Memorandum, p. 35.
Committee both stated that the proposed amendments would exacerbate their existing concerns about the CDO regime.106

**Item 17** will insert *proposed section 106.10* into the *Criminal Code* to govern how the above amendments will apply. The amendments will apply to any person who:

- on the day the section commences (the day after Royal Assent), is detained in custody (including a person whose sentence for an eligible terrorism offence ended before the section commences) or
- on or after the day the section commences, begins a sentence of imprisonment for an eligible terrorism offence.

The Explanatory Memorandum states:

> While the continued detention of terrorist offenders who previously would not have been eligible for a CDO engages the prohibition on the retrospective operation of criminal laws, it does not constitute a prohibited form of retrospective punishment or the imposition of a penalty for an offence heavier than that which was applicable at the time the offence was committed.

> In this context, the continued detention is protective rather than punitive or retributive ... 107

The LCA objected to the ‘retrospective application of legislation to sentences that have expired’, and recommended that if the amendments do proceed, they should not apply to sentences that have expired or already commenced.108

**Provision of information to individuals about proposed CDOs (Part 2 of Schedule 2)**

Currently, the Commonwealth is not able to access the full range of protections available under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (*NSI Act*) for exculpatory and inculpatory material included in applications for CDOs.109 In the context of an application for a CDO, inculpatory material is that which the applicant intends to rely on, and exculpatory material is that of which the Minister is aware ‘would reasonably be regarded as supporting a finding that the order should not be made’.110

Under the existing CDO provisions:

> ... a terrorist offender who is the subject of a CDO application by the AFP Minister must be given a ‘complete copy’ of that application. Section 105A.5 allows for sensitive information in the application to be withheld from the terrorist offender for a period to enable the AFP Minister to seek court orders protecting its disclosure to the broader public. However, the section ultimately requires all information in the application to be given to the terrorist offender.111

The Explanatory Memorandum states that ‘the requirement to ultimately provide a “complete copy” of the application to the terrorist offender means that the Commonwealth is not able to

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108. LCA, Submission to PJCIS, op. cit., pp. 15–16.
109. The purpose of the *National Security Information (Criminal and Civil Proceedings) Act 2004* is to ‘prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice’ (section 3). For an overview of the information protections available under the *NSI Act*, see: DoHA and AGD, Submission to PJCIS, op. cit., Appendix B.
111. Ibid.
access this more flexible option [under the NSI Act] to protect sensitive inculpatory and exculpatory information’. It also notes that inculpatory and exculpatory information is treated differently, which has implications for whether or not the Government may resist the disclosure of information by making a public interest immunity (PII) claim. Under the doctrine of PII, the Government may seek to claim immunity from requests or orders for the production of documents on the grounds that disclosure would be prejudicial to the public interest.

Item 16 of Schedule 2 will repeal subsection 105A.5(6) and substitute it with proposed subsections 105A.5(6)–(9) to ‘enable the more sophisticated information protections under the NSI Act to apply’, and to allow the Minister responsible for the AFP to remove exculpatory material from a CDO application on PII grounds (and require the offender to be notified of the removal).

Under section 105A.5 as amended, the applicant would still be required to give the offender a copy of the application, but that copy would not be required to include information:

- likely to be protected by PII
- in relation to which the Attorney-General has issued a certificate under Subdivision C of Division 2 of Part 3A of the NSI Act (under which the Attorney-General may give a civil non-disclosure certificate or a civil witness exclusion certificate) or
- in relation to which a court has made an order:
  - under section 38B of the NSI Act (under which an order may be made to give effect to an arrangement reached between the Attorney-General and the parties to a proceeding or their legal representatives about the disclosure, protection, storage, handling or destruction of national security information in the proceeding) or
  - preventing or limiting disclosure.

The PJCHR, Scrutiny of Bills Committee and all non-government submitters to the PJCIS’s inquiry into the February Bill had concerns with these amendments. The submission from the legal academics noted these amendments as being of significant concern:

The existing provisions relating to exculpatory material were carefully considered by the [PJCIS] and the Senate when the amendments were agreed to by the Government and included in the 2016 Bill. They constitute important safeguards that protect the fairness of CDO proceedings by ensuring that the offender and the Court are apprised of all relevant material and, in particular, material that is difficult to independently source of challenge. These safeguards are commensurate with the extraordinary nature of the regime. We submit that the amendments made by the Bill should be rejected.

With respect to claims of public interest immunity, the LCA stated:

112. Ibid., p. 41.
113. Ibid.
114. DR Elder, ed., House of Representatives practice, 7th edn, House of Representatives, Canberra, 2018, pp. 625–629. For a flow chart showing how the process for claiming PII in CDO proceedings will operate under the proposed changes, see DoHA and AGD, Submission to PJCIS, op. cit., Appendix A.
115. Explanatory Memorandum, p. 45.
116. National security information means information that relates to national security (Australia’s defence, security, international relations or law enforcement interests) or the disclosure of which may affect national security: National Security Information (Criminal and Civil Proceedings) Act 2004, sections 7 and 8.
118. Legal academics, Submission to PJCIS, op. cit., p. 16.
... the onus will be on the terrorist offender to choose to contest the public interest immunity claim. That is, the terrorist offender will be required to disprove the claim. The Law Council considers that it is an unworkable proposition for a terrorist offender to seek to disprove a public interest immunity claim over information which will not be known to the offender or the legal representative. Such a proposition may unduly interfere with the fair trial hearing rights of the offender. It may also mean that, should the terrorist offender not contest the claim, the Court may be placed in the invidious position of granting a CDO without the benefit of being aware of relevant exculpatory information. The onus should therefore be on the AFP Minister or relevant operational agencies to satisfy the Court of the public interest immunity claim.119

The LCA pointed to the INSLM’s recommendation that the Government consider extending the special advocates regime introduced in 2016 for control order proceedings to applications for CDOs.120 It endorsed that recommendation, stating that ‘given the increasing complexity of litigating such applications’, this would provide ‘an additional important safeguard in balancing the right to a fair hearing with the protection of national security information’.121

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119. LCA, Submission to PJCIS, op. cit., p. 17. Footnote references have been omitted from this quotation and can be viewed in the source document.

120. Ibid., pp. 17–18. See J Renwick, Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of divisions 104 and 105A), INSLM, Canberra, September 2017, p. 76. The Government’s response (tabled on 24 May 2018) stated that it ‘will consider whether to make the special advocate regime available for applications under Division 105A’.

121. Ibid., (quotes taken from p. 18).