



PARLIAMENT OF AUSTRALIA

Advisory Report on the Counter-Terrorism and Other Legislation Amendment Bill 2023

Parliamentary Joint Committee on Intelligence and Security

October 2023

CANBERRA

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Abbreviations

AAT	Administrative Appeals Tribunal
AFP	Australian Federal Police
AHRC	Australian Human Rights Commission
ALA	Australian Lawyers Alliance
CDO	Continuing detention order
Crimes Act	<i>Crimes Act 1914</i>
Criminal Code	<i>Criminal Code Act 1995</i>
CO	Control orders
ESO	Extended supervision order
HRTTO	High-Risk Terrorist Offender
ICO	Interim control order
IDO	Interim detention order
ISO	Interim supervision order
IMVE	Ideologically Motivated Violent Extremism
INSLM	Independent National Security Legislation Monitor
IS Act	<i>Intelligence Services Act 2001</i>
JCTT	Joint Counter Terrorism Team
NSW	New South Wales
PCO	Prohibited contact order
PDO	Preventative detention order
PJCIS	Parliamentary Joint Committee on Intelligence and Security
PSO	Post-sentence orders
RMVE	Religiously Motivated Violent Extremism



Membership of Committee

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Mr Peter Khalil MP Wills, VIC

Deputy Chair

Mr Andrew Wallace MP Fisher, QLD

Members

Senator the Hon Simon Birmingham LP, SA

Senator Raff Ciccone ALP, VIC

Mr Luke Gosling OAM MP (*from 14 September 2023*) Solomon, NT

Hon Andrew Hastie MP Canning, WA

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Ms Zoe McKenzie MP (*from 14 September 2023*) Flinders, VIC

Senator James Paterson LP, VIC

Senator Marielle Smith ALP, SA

Senator Jess Walsh ALP, VIC

Mr Josh Wilson MP Fremantle, WA



Terms of reference

On 10 August 2023 the Attorney-General of Australia, the Hon. Mark Dreyfus KC, wrote to the Committee to refer the Counter-Terrorism and Other Legislation Amendment Bill 2023 for inquiry and report.

List of recommendations

Recommendation 1

- 3.11** The Committee recommends that the Government introduce its proposed amendments to establish a post-entry warrant framework.

Recommendation 2

- 3.22** The Committee recommends that, following the implementation of the recommendation in this report, the Bill be passed by Parliament.



1. Introduction

- 1.1 On 10 August 2023 the Attorney-General, the Honourable Mark Dreyfus KC MP, wrote to refer the Counter-Terrorism and Other Legislation Amendment Bill 2023 ('the Bill') to the Committee for inquiry and report. The Attorney-General requested that the Committee present its report by 9 October 2023.

Purpose of the Bill

- 1.2 The Bill would extend the operation of Australian Federal Police (AFP) powers relating to terrorism under the *Crimes Act 1914* ('Crimes Act') and the *Criminal Code Act 1995* ('Criminal Code') for a further three years, to December 2026. These powers relate to:
- authority to stop, question and search persons and seize items in Commonwealth places, including in 'prescribed security zones'; without a warrant (Crimes Act, Part 1AA, Division 3A)
 - the control order regime (Criminal Code Division 104)
 - the preventative detention order regime (Criminal Code Division 105).
- 1.3 The Bill implements changes to counter-terrorism powers in response to this Committee's 2021 *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*,¹ discussed further below.
- 1.4 The amendments proposed by the Bill would impact:
- prescribed security zones, including requiring the Minister to consider particular matters before declaring a zone, and requiring notification of relevant oversight bodies when a zone is declared
 - stop and search powers: implementing a requirement on police to inform the subject of their rights to make a complaint (where practicable)
 - control orders, including amending the issuing authority to only the Federal Court of Australia, and requiring new considerations by the court before issuing an interim control order
 - preventative detention orders, allowing them to be issued only by superior court judges

¹ See the Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime, and the continuing detention order regime*, October 2021.

- the AFP Minister’s public reporting on continuing detention orders.
- 1.5 In addition, the Bill proposes to extend the operation of the offence of unauthorised disclosure of information by current and former Commonwealth officers (section 122.4 of the Criminal Code) by 12 months to December 2024 to allow for the finalisation of the Government’s review of Commonwealth secrecy provisions.
- 1.6 In his second reading speech, the Attorney-General said:
- The bill would provide for the continuation and enhancement of important counterterrorism powers that contribute to the safety and security of all Australians. It strikes a balance between ensuring our law enforcement agencies have the powers they need to manage the threat of terrorism, while protecting the rights of individuals through stronger oversight and safeguards.²

The terrorism threat in Australia

- 1.7 At the time of the inquiry, Australia’s National Terrorism Threat Level was ‘possible’. The Explanatory Memorandum to the Bill said this ‘means there is credible intelligence that, whilst Australia is a possible target of terrorists, there is limited intention or capability to conduct an attack’.³
- 1.8 However, the Explanatory Memorandum also said that the Director-General of Security noted that the current National Terrorism Threat Level does not indicate that the threat of terrorism has been extinguished, and that ‘terrorism is an enduring and evolving threat’.⁴
- 1.9 The Attorney-General’s Department noted that the counter-terrorism laws and frameworks were a key factor in managing the ongoing risk of terrorism:
- The current counter-terrorism laws and frameworks, including the control order and the preventative detention order regimes in the Criminal Code, and Division 3A of Part IAA (police powers in relation to terrorism) in the Crimes Act, are a key factor in managing the terrorism risk and threat level in Australia.
- The potentially catastrophic consequences of a terrorist attack on places of national significance, or in places of mass gathering, do not change despite the recent downgrade in the National Terrorism Threat Level. The maintenance of counter-terrorism powers and frameworks is a key factor in managing the overall risk of terrorism, and provides a proper basis for the continued existence of these unique powers.⁵

² The Hon. Mark Dreyfus KC MP, Attorney-General of Australia, *House of Representatives Hansard*, 10 August 2023, p. 1.

³ Counter-Terrorism and Other Legislation Amendment Bill 2023, *Explanatory Memorandum*, p. 4.

⁴ Counter-Terrorism and Other Legislation Amendment Bill 2023, *Explanatory Memorandum*, p. 4.

⁵ Attorney-General’s Department, *Submission 2*, p. 5.

1.10 The AFP noted that in 2023 (as at 6 October), four individuals had been charged with alleged terrorism offences. Of those that were charged, two were inspired by Ideologically Motivated Violent Extremism (IMVE), one was inspired by Religiously Motivated Violent Extremism (RMVE), and one individual had a mixed or unclear ideology.⁶

1.11 The AFP said that it had observed an increase in the number of individuals, particularly in rural and regional areas, adhering to violent extremist ideologies, 'particularly ideologies associated with nationalist and racist violent extremism'. The AFP noted, further:

This was particularly notable throughout the COVID-19 pandemic as individuals spent increased amounts of time online, often with an enhanced degree of exposure to extremism even on mainstreaming services. Ultimately, this has also been further compounded by more radical views through the broadcasting of conspiracy theories, anti-government sentiments, protests, and more, thereby 'normalising' these perspectives to the broader Australian public.⁷

1.12 The AFP said that RMVE remained the 'predominant threat to Australia'. The AFP noted that while there was limited intent to act, the threat remained:

[RMVE] is enduring and, while many of these extremists appear to have limited genuine intent to act, some continue to aspire to undertake attacks in Australia. RMVE-linked terrorist groups remain a threat, albeit a diminished one.⁸

1.13 The AFP advised that a number of individuals had presented with mixed or unclear ideology. The AFP noted that this was an emerging trend:

Online connectivity has enabled likeminded individuals to connect, communicate and rapidly spread messages. As a result, the AFP is increasingly encountering individuals, particularly vulnerable young people, who are displaying an interest in a diverse range of extremist material. This has contributed to the adoption of mixed ideologies.⁹

1.14 Commander Thomas Hester of the Australian Federal Police noted that the age of those engaged in extremist behaviours was decreasing:

On youth offending, we are seeing an increase in the number of youths, a lot of engagement through online sources, and we're also seeing the age decrease, so becoming lower. That has been the case for a number of years now and it does cause us concerns. But certainly the age, if you look at a recent matter of a 12-

⁶ Australian Federal Police, *Submission 5*, p. 2.

⁷ Australian Federal Police, *Submission 5*, p. 2.

⁸ Australian Federal Police, *Submission 5*, p. 2.

⁹ Australian Federal Police, *Submission 5*, p. 2.

year-old, it's a very challenging environment, but the online engagement through that is a big key linkage for us.¹⁰

Conduct of the inquiry

- 1.15 The Committee announced its inquiry on 7 September 2023 and invited submissions addressing the terms of reference by 6 October 2023.
- 1.16 The Committee received 8 submissions and 1 supplementary submission. **Appendix A** sets out a list of submissions received.
- 1.17 The Committee held a public hearing on 16 October 2023. **Appendix B** sets out a list of witnesses who appeared at the public hearing.
- 1.18 Copies of the submissions, the transcript from the public hearing and links to the Bill and Explanatory Memorandum can be accessed at the Committee website.¹¹

Report structure

- 1.19 This report comprises three chapters:
- The remainder of Chapter 1 contains an overview of the counter-terrorism powers impacted by the proposals in the Bill, as well as a discussion of the Committee's previous consideration of these powers in its 2021 review.
 - Chapter 2 outlines the key provisions of the Bill and the evidence received by the inquiry.
 - Chapter 3 sets out the Committee's comment on the Bill and its recommendations.

Legislative and review history of counter-terrorism powers

- 1.20 In response to the July 2005 terrorist attacks in London, the Government introduced Division 3A into the *Crimes Act 1914* ('Crimes Act') and Divisions 104 and 105 into the *Criminal Code Act 1995* ('Criminal Code') via the *Anti-Terrorism Act (No. 2) 2005*, to assist 'law enforcement and intelligence agencies to effectively prevent and investigate terrorism'.¹²

¹⁰ Commander Thomas Hester, Australian Federal Police, *Committee Hansard*, 16 October 2023, Canberra, p. 16

¹¹ www.aph.gov.au/pjcis

¹² *Anti-Terrorism Bill (No. 2) 2005, Explanatory Memorandum*, p. 2.

- 1.21 The powers introduced by the *Anti-Terrorism Act (No. 2) 2005* included the control order regime, the preventative detention order (PDO) regime and the ‘stop, search and seize powers’.
- 1.22 In 2010, section 3UEA (the emergency entry to premises provisions) was added into the Criminal Code ‘to provide police with a power to enter premises without a warrant in emergency circumstances relating to a terrorism offence where there is material that may pose a risk to the health or safety of the public’.¹³
- 1.23 The counter-terrorism provisions have been amended by legislation several times since their introduction. In addition, the powers have been subject to several reviews, including reviews conducted by this Committee and by the Independent National Security Legislation Monitor (INSLM). Some of the more significant amendments and reviews included:
- Amendments to control order and PDO provisions made by the Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014, considered by the Committee at the time of the Bill’s introduction into Parliament.¹⁴
 - Introduction of the continuing detention order (CDO) regime by the Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016, considered by the Committee at the time of the Bill’s introduction into Parliament.¹⁵
 - Review of the police stop and seize powers, the control order regime and PDO regime completed by the Committee in March 2018,¹⁶ following the completion of an inquiry on the same provisions by the then INSLM, Dr James Renwick SC, in September 2017.¹⁷
- 1.24 In September 2021, the Committee concluded its inquiry into the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 which introduced the extended supervision order (ESO) regime. The ESO scheme complements the CDO regime in providing for post-sentence supervision in the community for those assessed as posing an unacceptable risk of committing a serious terrorism offence at the conclusion of their custodial sentence, as an alternative to continuing detention.¹⁸ These provisions are collectively known as ‘post-sentence terrorism orders’.

¹³ National Security Legislation Amendment Bill 2010, Explanatory Memorandum, p. 3

¹⁴ See Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014.

¹⁵ See Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, November 2016.

¹⁶ Parliamentary Joint Committee on Intelligence and Security, *Review of the police stop, search and seizure powers, the control order regime and the preventative detention order regime*, March 2018.

¹⁷ Independent National Security Legislation Monitor, *INSLM Statutory Deadline Reviews*, March 2018, accessed at <<https://www.inslm.gov.au/reviews-reports/inslm-statutory-deadline-reviews>>

¹⁸ *Criminal Code Act 1995*, s 105A.3A.

1.25 At the time of this inquiry, the Committee had commenced an inquiry into the post-sentence terrorism orders provided in Division 105A of the Criminal Code, following the publication of the INSLM's review of the same provisions in March 2023.¹⁹

1.26 Separately, in October 2021 the Committee concluded its inquiry into the operation, effectiveness and implications of:

- Division 3A of Part IAA of the Crimes Act and any other provision of the Crimes Act 1914 as it relates to that Division; and,
- Divisions 104, 105 and 105A of the Criminal Code and any other provision of the Criminal Code Act 1995 as it relates to those Divisions.

That inquiry considered the stop, search, seize and entry powers, the control order provisions, CDO provisions and PDO provisions. The Committee's report, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, made nineteen recommendations. The Committee recommended that the sunset provisions for the powers, then due to cease in December 2022, be extended to December 2025 (with the exclusion of the CDO provisions which sunset in December 2026).²⁰

1.27 The Committee made several other recommendations directed to improving clarity, oversight and interoperability of counter-terrorism laws, as well as amendments to the *Intelligence Services Act 2001* (IS Act) to allow the Committee to undertake further reviews of the powers prior to their extended sunset period.

1.28 The Bill implements part of the Government response to the Committee's 2021 report into these powers.²¹ The recommendations made by the 2021 inquiry, and the responses proposed in the present Bill, are discussed in more detail in Chapter 2.

¹⁹ Independent National Security Legislation Monitor, *Division 105A (and related provisions) of the Criminal Code Act 1995 (Cth)*, March 2023, accessed at <<https://www.inslm.gov.au/sites/default/files/2023-03/hrto-report-4th-inslm.PDF>>

²⁰ *Criminal Code Act 1995*, s 105A.25.

²¹ Counter-Terrorism and Other Legislation Amendment Bill 2023, *Explanatory Memorandum*, p. 3.

2. Consideration of the Bill

- 2.1 This chapter discusses the amendments proposed by the Bill, compares provisions with the recommendations made by the Committee in its previous reports, and outlines the evidence received in relation to proposed amended provisions.

Stop, search and seize powers

- 2.2 Division 3A of Part IAA of the *Crimes Act 1914* ('Crimes Act') provides that a police officer may stop, question and search a person, as well as seize items, in a Commonwealth place, where a police officer suspects on reasonable grounds that a person may have just committed, may be in the process of committing, or may be about to commit a terrorist act; or where the person is in a 'prescribed security zone'.
- 2.3 To exercise the powers, a police officer may:
- request a person's name, address, their reasons for being in that place and evidence of identity (**stop powers**). The person commits an offence if they fail to comply or provide a false identity;¹
 - conduct a search for a terrorism related item. Such a search could be a standard search or frisk of a person, a search of a vehicle owned or operated by the person, a search of any item under the immediate control of said person, including an item they have brought into a Commonwealth place (**search powers**);² and
 - seize an item which is found in the course of the searches described above, provided the item is a terrorism related item or an item related to a serious offence (**seize powers**).³
- 2.4 In carrying out these powers, an officer is not permitted to use more force or subject the individual to more indignity than is reasonable and necessary, nor detain the individual for longer than necessary to give effect to the intention of the powers.⁴
- 2.5 The definition of a Commonwealth place is defined as a place acquired by the Commonwealth for public purposes that is not a seat of government. For the purposes of the section, examples of Commonwealth places include airports and defence bases.⁵

¹ *Crimes Act 1914*, s. 3UC.

² *Crimes Act 1914*, s. 3UD.

³ *Crimes Act 1914*, s. 3UE.

⁴ *Crimes Act 1914*, ss. 3UE and 3UD.

⁵ Australian Constitution, s 52(i) as provided by *Commonwealth Places (Applications of Laws) Act 1970* (Cth).

- 2.6 The Minister can declare a Commonwealth place to be a ‘prescribed security zone’ where they consider such a declaration would assist in preventing or responding to a terrorist attack.⁶ Where a Commonwealth place has been declared a ‘prescribed security zone’, a police officer may stop, question or search a person, as well as seize items, without suspicion on reasonable grounds of their involvement in terrorist activities.⁷
- 2.7 Division 3A of Part IAA of the Crimes Act also provides for emergency entry to premises without a warrant. A police officer may enter a premises to search for a thing and seize the thing where the police officer suspects on reasonable grounds that exercising the emergency entry power is necessary to prevent the thing from being used in connection with a terrorism offence or because there is an imminent threat to a person’s life, health or safety.⁸ The exercise of the emergency entry power is not limited to a Commonwealth place or ‘prescribed security zone’.⁹

Extending the operation of Division 3A of Part IAA of the Crimes Act

- 2.8 In its 2021 *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime* (hereafter referred to as the ‘Review of Terrorism Powers’) the Committee noted that the stop, search and seize powers had not been exercised since their introduction, but concluded that they were an ‘important part of the Australian counter-terrorism response framework’.¹⁰ The Committee recommended that the sunset provision in Subdivision D of Division 3A of Part IAA of the Crimes Act be extended.¹¹
- 2.9 The Counter-Terrorism and Other Legislation Amendment Bill 2023 (the Bill) would extend the powers to 7 December 2026.¹²
- 2.10 The Australian Human Rights Commission (AHRC) and the Australian Federal Police (AFP) indicated that they supported the extension of these provisions.¹³
- 2.11 The Law Council of Australia also gave conditional support to the extension of the powers, submitting that they ‘have the potential to be necessary and proportionate’ to preventing a terrorist attack or managing the aftermath of such an act, but reiterated its overall concerns about warrantless entry powers, and expressed the view that

⁶ *Crimes Act 1914*, s. 3UJ.

⁷ *Crimes Act 1914*, s. 3UB.

⁸ *Crimes Act 1914*, s. 3UEA.

⁹ Counter-Terrorism and Other Legislation Amendment Bill 2023, *Explanatory Memorandum*, p. 5.

¹⁰ Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 26.

¹¹ See Recommendation 3 of the Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 28.

¹² Counter-Terrorism and Other Legislation Amendment Bill 2023, sch. 1, item 9.

¹³ Australian Federal Police, *Submission 5*, p. 5.

their continued necessity should be carefully considered, and further work should be undertaken on improving processes for expedited and emergency warrants instead.¹⁴

- 2.12 The Australian Lawyers Alliance (ALA) did not support the extension of these powers. The ALA suggested that existing policing powers were adequate to address the objects of the provisions.¹⁵

Informing a person of the right to make a complaint

- 2.13 As stated above, section 3UD of Division 3A of Part IAA of the Crimes Act enables a police officer to conduct stop and search powers on an individual. The provision does not explicitly provide that an individual has the right to make a complaint to a relevant oversight body in the event the person considers the police officer exercised their powers inappropriately.

- 2.14 The Committee recommended in its Review of Terrorism Powers that the section be amended to require:

police officers exercising Division 3A powers to inform a person being stopped and detained for the purpose of a search of their right to make a complaint to the Commonwealth Ombudsman or applicable State or Territory police oversight body or bodies, unless this is not reasonably practicable because of circumstances of urgency.¹⁶

- 2.15 The Bill would insert a new subsection 3UD(1A) and subsection 3UD(1B) in Division 3A of the Crimes Act to give effect to this recommendation.¹⁷ These amendments were supported by the Law Council of Australia.¹⁸
- 2.16 The Bill would also insert a new definition of 'State or Territory police oversight body' to give effect to proposed subsection 3UD(1A), where the powers under Division 3A of the Crimes Act are performed by a member, however described, of a police force of a State or Territory.¹⁹
- 2.17 The Commonwealth Ombudsman noted that its ability to receive complaints was limited to the actions of the AFP and did not extend to the activities of State and Territory Police. Where an individual complains to the Commonwealth Ombudsman about the actions of State and Territory police, the standard practice would be to refer the complainant to the agency responsible for consideration and possible investigation.²⁰

¹⁴ Law Council of Australia, *Submission 8*, pp. 30-32.

¹⁵ Australian Lawyers Alliance, *Submission 3*, p. 6.

¹⁶ See Recommendation 1 of the Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 27.

¹⁷ Counter-Terrorism and Other Legislation Amendment Bill, sch. 1, item 2.

¹⁸ Law Council of Australia, *Submission 8*, p. 32.

¹⁹ Counter-Terrorism and Other Legislation Amendment Bill, sch. 1, item 1.

²⁰ Commonwealth Ombudsman, *Submission 1*, pp. [1]-[2].

- 2.18 In relation to a complaint about stop and search activities undertaken under section 3UD the Commonwealth Ombudsman would ask the person to make a complaint to the AFP's Professional Standards team, 'unless in the particular circumstances it would be unreasonable to ask the person to do so'. The Commonwealth Ombudsman indicated that the proposed amendment would not affect this existing practice.²¹
- 2.19 The AFP said it would update its internal processes to accommodate this change.²²

Particular matters to be considered before declaring a 'prescribed security zone'

- 2.20 Subdivision C of Division 3A of Part IAA of the Crimes Act provides that a police officer may apply to a Minister for a declaration of a 'prescribed security zone' and that the Minister may make the declaration.²³ The Crimes Act does not contain any detail of any consideration that must be undertaken in making such a declaration, and in its Review of Terrorism Powers, the Committee considered that a list of particular matters the Minister must make prior to issuing a declaration may 'assist in the bureaucratic process and enable briefing agencies, namely the AFP and Australian Security Intelligence Organisation, to quickly and effectively prepare ministerial advice for consideration'²⁴ and provide certainty to for members of the public and responding agencies. The Committee made a recommendation to this effect.²⁵
- 2.21 To address this recommendation, the Bill would insert a new subsection in section 3UJ which would provide:
- (1A) In deciding whether to make a declaration under subsection (1) in relation to a Commonwealth place on the ground mentioned in paragraph (1)(a) or (b), the Minister must have regard to:
- a. whether the impact of the declaration on the rights of persons in the Commonwealth place would be:
 - i. reasonable; and
 - ii. proportionate to that ground; and
 - b. the appropriate duration of the declaration; and
 - c. in the case of a declaration made on the ground mentioned in paragraph (1)(a)—the availability and effectiveness of any powers that:

²¹ Commonwealth Ombudsman, *Submission 1*, p. [2].

²² Australian Federal Police, *Submission 5*, p. 5.

²³ *Crimes Act 1914*, s. 3UI and sub-s. 3UJ(1).

²⁴ Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 27.

²⁵ See Recommendation 2 of the Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 28.

- i. are conferred by a law of the Commonwealth (other than this Division) or a law of a State or Territory; and
 - ii. would assist in preventing a terrorist act occurring; and
 - d. in the case of a declaration made on the ground mentioned in paragraph (1)(b)—the availability and effectiveness of any powers that:
 - i. are conferred by a law of the Commonwealth (other than this Division) or a law of a State or Territory; and
 - ii. would assist in responding to a terrorist act that has occurred; and
 - e. in the case of a declaration that is one of a series of successive declarations under subsection (1) in relation to the Commonwealth place—the impact and proportionality of that series of successive declarations; and
 - f. such other matters (if any) as the Minister considers relevant.²⁶

2.22 The Law Council of Australia indicated its support for these new requirements, but took the view that ‘further specification is desirable’ and recommended that the Minister’s power to make a declaration ‘should be further restricted to situations where the Minister is satisfied on reasonable grounds that [making a declaration] is necessary to achieve a counter-terrorism objective’.²⁷

Notification requirements for ‘prescribed security zones’

2.23 The Crimes Act currently provides that a statement following the decision to declare a Commonwealth place a ‘prescribed security zone’ must be prepared to state that the declaration has been made (or revoked as applicable), and be broadcast by television or radio, published in the *Gazette*, and published on the internet.

2.24 In its Review of Terrorism Powers, the Committee recommended that the Crimes Act be amended to require the AFP to notify the Commonwealth Ombudsman, the Independent National Security Legislation Monitor (INSLM) and the Committee of a declaration once made, as soon as practicable, but no later than 72 hours following the declaration.²⁸

2.25 In addition, the Committee recommended that the Minister must prepare a statement of reasons for the making of the declaration to assist the Committee in its oversight responsibilities.²⁹

²⁶ Counter-Terrorism and Other Legislation Amendment Bill 2023, sch. 1, item 3.

²⁷ Law Council of Australia, *Submission 8*, p. 33.

²⁸ See Recommendation 1 of the Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 27.

²⁹ See Recommendation 1 of the Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 27.

- 2.26 The Bill would insert new subsection 3UJ(5A) and subsection 3UJ(5B) to give effect to these recommendations.
- 2.27 The Bill provides that a failure to provide a statement of reasons in accordance with proposed subsection 3UJ(5B) does not make the declaration 'ineffective to any extent'.³⁰
- 2.28 The Attorney-General's Department said that the new notification requirements would:
- ... assist the relevant oversight bodies in performing their critical monitoring and review functions in relation to the declaration of prescribed security zones and the conduct of police therein.³¹
- 2.29 The Law Council of Australia indicated its support for these amendments, which had previously been recommended by both the Law Council and the Parliamentary Joint Committee on Intelligence and Security (PJCIS).³²
- 2.30 The Commonwealth Ombudsman noted that the notification requirement did not 'impose any further responsibilities on the Ombudsman after it receives the notification' and does not authorise the Ombudsman to investigate any Ministerial action in making the declaration of a 'prescribed security zone'. It was the view of the Commonwealth Ombudsman that this requirement would provide context ahead of any potential complaints about the conduct of police officers.³³

Minister able to declare a 'prescribed security zone' for fewer than 28 days

- 2.31 The Crimes Act presently provides that the duration of a declaration of a 'prescribed security zone' is 28 days unless the Minister revokes the declaration before that time.³⁴
- 2.32 The Bill would amend the provision so that the duration of a declaration is 28 days unless the Minister makes the duration of the declaration less than 28 days or revokes the declaration prior to the expiry date.³⁵

Introduction of post-entry warrants

- 2.33 In its submission to the inquiry, the Attorney-General's Department indicated that the Government proposed to introduce amendments to establish a requirement to obtain a 'post-entry warrant' or an ex post facto warrant.³⁶ A copy ('exposure draft') of the

³⁰ Counter-Terrorism and Other Legislation Amendment Bill 2023, sch. 1, item 8.

³¹ Attorney-General's Department, *Submission 2*, p. 7.

³² Law Council of Australia, *Submission 8*, p. 33.

³³ Commonwealth Ombudsman, *Submission 1*, p. [2].

³⁴ *Crimes Act 1914*, sub-s. 3UJ(3).

³⁵ Counter-Terrorism and Other Legislation Amendment Bill 2023, sch. 1, item 4.

³⁶ Attorney-General's Department, *Submission 2*, p. 13.

proposed amendments was provided to the Committee and accepted as evidence to the inquiry.³⁷

2.34 The proposed amendments would establish a new scheme under which a police officer who has exercised emergency entry powers under subsection 3UEA(1) would be required to apply to an ‘assessment officer’ for a post-entry warrant as soon as practicable following the exercise of the powers.³⁸

2.35 An assessment officer would be eligible to be appointed to the role where they were a judge of the Federal Court of Australia or of a Supreme Court of a state or territory, acting in *persona designata*,³⁹ or a nominated member of the Administrative Appeals Tribunal (AAT).⁴⁰

2.36 The Attorney-General’s Department noted, further:

An assessment officer would be empowered to issue a warrant, if and only if, they are satisfied, on the balance of probabilities, that in entering the premises the police officer suspected, on reasonable grounds, the matters mentioned in paragraphs 3UEA(1)(a) and (b) (see proposed new paragraph 3UEB(7)(a)). They must otherwise refuse to issue the warrant, and issue a statement of reasons for that decision.

The Bill would require the assessment officer to provide the warrant or the notice of refusal to the police officer who applied for the warrant, the Commissioner of the relevant Federal, State or Territory police agency, and any current or former owners or occupiers of the premises who have been affected by the exercise of 3UEA powers and to whom the assessment officer considers it is practicable to give the warrant or notice of refusal (see proposed new subsections 3UEB(9)-(11)). While having no legal effect, affected individuals would be notified of the assessment officer’s reasoning for refusing to issue a warrant and informed of rights they may have to make a complaint to the Commonwealth Ombudsman or seek a civil or other remedy.⁴¹

2.37 The ALA noted that police officers already have substantial powers to search people and premises, and that emergency warrants were also possible for police officers to obtain. The ALA noted, further:

The ALA believes that warrants must be required before any search takes place. Ex post facto validation is inadequate... If there is any reform required to facilitate urgent searches, the appropriate reform should ensure that safeguards can also be implemented in a timely fashion, should an urgent need arise. Such reforms

³⁷ Attorney-General’s Department, *Submission 2.1*.

³⁸ Attorney-General’s Department, *Submission 2*, p. 13

³⁹ A judge acting *persona designata* is considered to be acting in a personal capacity, rather than performing the functions of the Court, a principle first set out by *R v Kirby; ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

⁴⁰ Attorney-General’s Department, *Submission 2*, p. 13.

⁴¹ Attorney-General’s Department, *Submission 2*, pp. 13-14.

might include providing funding for judges to be able to authorise urgent warrants.⁴²

- 2.38 While noting its general position against warrantless entry powers (as noted above), the Law Council of Australia submitted that it ‘welcomes in-principle the Exposure Draft as a positive step which provides for a measure of additional scrutiny’.⁴³
- 2.39 However, the Law Council believed that the proposed provisions required further scrutiny, saying that ‘attaching an Exposure Draft to the Department’s submission should not be considered a consultation’. The Law Council expressed particular concern about the lack of a statutory safeguard prohibiting the direct or derivative use of unlawfully obtained material, and requiring the prompt return of such material, in the event a post-entry warrant was not granted.⁴⁴
- 2.40 It was the view of the Attorney-General’s Department that the scheme would offer a considered and informed review of the operation of the powers, and give police officers an early indication on the admissibility of evidence, suggesting:
- If a court considered such a search was not authorised under s 3UEA and that the evidence was therefore unlawfully obtained, s 138(1) of the *Evidence Act 1995* would operate such that the evidence is not to be admitted unless the Court determines the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.⁴⁵
- 2.41 The Law Council did not consider Section 138 of the *Evidence Act 1995* was a sufficient safeguard in this respect, particularly as it would not prohibit derivative use of unlawfully obtained information by the AFP for further investigatory purposes.⁴⁶
- 2.42 The proposed amendments would also include annual reporting requirements in relation to the exercise of the powers to require ‘the number of applications for a post-entry warrant made, the number of post-entry warrants issued and the number of refusals to issue a post-entry warrants made, to be reported in accordance with existing section 3UJB’.⁴⁷

Control orders

- 2.43 Division 104 of the Criminal Code allows an issuing court, the Federal Court of Australia or the Federal Circuit and Family Court of Australia, to impose obligations,

⁴² Australian Lawyers Alliance, *Submission 3*, p. 6.

⁴³ Law Council of Australia, *Submission 8*, p. 30.

⁴⁴ Law Council of Australia, *Submission 8*, p. 31.

⁴⁵ Attorney-General’s Department, *Submission 2*, p. 14.

⁴⁶ Law Council of Australia, *Submission 8*, p. 31.

⁴⁷ Attorney-General’s Department, *Submission 2*, p. 14.

prohibitions, and restrictions in relation to a person of the age of 14 or above for the purpose of:

- protecting the public from a terrorist act
- preventing the provision of support for, or the facilitation of, a terrorist act, and
- preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country.⁴⁸

2.44 The AFP said that control orders support their management of terrorism risks:

Control Orders support the AFP's management of individuals who present a terrorism risk to the Australian community, especially for those in respect of whom there is insufficient evidence or information to charge with terrorism offences, though there is otherwise evidence the person poses a terrorist threat to the community.⁴⁹

2.45 In the first instance, with the written consent of the AFP Minister, a senior member of the AFP⁵⁰ may apply to the issuing court for an interim control order. The issuing court may make the interim control order where the senior AFP officer has made the request in accordance with section 104.3, the court has received and considered further information as the court requires, and the court is satisfied on the balance of probabilities:

- that making the order would substantially assist in preventing a terrorist act; or
- that the person has provided training to, received training from or participated in training with a listed terrorist organisation; or
- that the person has engaged in a hostile activity in a foreign country; or
- that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act; or
- 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
- that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or
- that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country.⁵¹

2.46 Additionally, the court may make the interim control order where satisfied that each of the obligations, prohibitions and restrictions to be imposed on the person is reasonably necessary, and reasonably appropriate and adapted for the purposes

⁴⁸ *Criminal Code Act 1995*, s. 104.1.

⁴⁹ Australian Federal Police, *Submission 5*, p. 3.

⁵⁰ Defined as the Commissioner of the AFP, a Deputy Commissioner of the AFP, or a member of the AFP of, or above, the rank of Superintendent. See *Criminal Code Act 1995*, s. 100.1.

⁵¹ *Criminal Code Act 1995*, sub-s. 104.4(1)(c).

outlined above.⁵² The court must also take into account the impact of the obligations, prohibitions and restrictions on the person's circumstances, including financial and personal circumstances.⁵³

2.47 The obligations, prohibitions and restrictions the issuing court may impose includes the following:

- a prohibition or restriction on the person being at specified areas or places;
- a prohibition or restriction on the person leaving Australia;
- a requirement that the person remain at specified premises between specified times each day, or on specified days, but for no more than 12 hours within any 24 hours;
- a requirement that the person be subject to electronic monitoring (for example, by wearing a monitoring device at all times), and comply with directions given by a specified authority in relation to electronic monitoring;
- a requirement that:
 - the person carry at all times a specified mobile phone; and
 - the person be available to answer any call from a specified authority or, as soon as reasonably practicable, return a call that the person was unable to answer; and
 - the person comply with specified directions, or any directions given by a specified authority, in relation to the above requirements.
- a prohibition or restriction on the person communicating or associating with specified individuals;
- a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet);
- a prohibition or restriction on the person possessing or using specified articles or substances;
- a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
- a requirement that the person report to specified persons at specified times and places;
- a requirement that the person allow himself or herself to be photographed;
- a requirement that the person allow impressions of his or her fingerprints to be taken;
- a requirement that the person participate in specified counselling or education.⁵⁴

⁵² *Criminal Code Act 1995*, sub-s. 104.4(1)(d).

⁵³ *Criminal Code Act 1995*, sub-s. 104.4(2).

⁵⁴ *Criminal Code Act 1995*, sub-s. 104.5(3).

- 2.48 Subdivision C of Division 104 of the Criminal Code provides that a senior AFP member may request an urgent interim control order by telephone, fax, email or other electronic means, or in person, and that where the issuing court is satisfied, an urgent interim control order may be granted. Where the AFP Minister's consent was not sought, the senior AFP member must seek consent within 8 hours of making the request, and where the consent is not granted the order ceases to be in force.⁵⁵
- 2.49 An interim control order is subject to confirmation by the issuing court at least seven days after the order is made where the court considers the 'ongoing need for the control order and the obligations, prohibitions and restrictions imposed by the order.'⁵⁶ The issuing court may consider the original request for the interim control order, any other evidence adduced, or any submissions made by parties.⁵⁷
- 2.50 Following consideration, the issuing court may confirm, confirm and vary, revoke, or declare the interim control order void.⁵⁸ Following confirmation of a control order the person subject to the order, or the AFP Commissioner, may apply to revoke or vary the control order.⁵⁹
- 2.51 A control order may be in place for up to 12 months.⁶⁰ A control order also ceases to be in place if a post-sentence order or an interim post-sentence order begins to be in force in relation to the person.⁶¹
- 2.52 The AFP said that control orders may be the only mechanism to manage offenders who are not eligible for a post-sentence order:
- There are instances where Control Orders may be the only mechanism under the High Risk Terrorist Offender (HRTTO) framework available for offenders who are not eligible for consideration under an [extended supervision order] or [continuing detention order]. An example would be individuals who are under the age of 18 years, or those convicted of non-HRTTO offences (such as advocating terrorism).⁶²
- 2.53 It is an offence for a person to contravene a control order, or where a control order requires a person to wear a monitoring device, a person engaged in conduct that results in interference with, or disruption or loss of, a function of the monitoring device. The penalty for the offence is imprisonment for five years.⁶³ The AFP said that the management and enforcement of control orders is 'highly resource intensive for the AFP but necessary to ensure those that pose a risk to the community are complying with their control order.'⁶⁴

⁵⁵ *Criminal Code Act 1995*, s. 104.10.

⁵⁶ Counter-Terrorism and Other Legislation Amendment Bill 2023, *Explanatory Memorandum*, p. 7.

⁵⁷ See *Criminal Code Act 1995*, div. 104, sub-div. D.

⁵⁸ *Criminal Code Act 1995*, s. 104.15.

⁵⁹ *Criminal Code Act 1995*, div. 104, sub-div. E.

⁶⁰ *Criminal Code Act 1995*, s. 104.16.

⁶¹ *Criminal Code Act 1995*, s. 104.17A.

⁶² Australian Federal Police, *Submission 5*, p. 3.

⁶³ *Criminal Code Act 1995*, div. 104, sub-div. G.

⁶⁴ Australian Federal Police, *Submission 5*, p. 3.

- 2.54 A range of additional conditions apply in relation to interim control orders and control orders made for those between the ages of 14 and 17 ('a minor'), including a three-month (renewable) limit on control orders for minors.⁶⁵ Subsection 104.4(2A) of the Criminal Code provides that in making an interim control order for a minor the issuing court's primary consideration is the best interests of the minor.
- 2.55 The AFP noted that since 2005 the AFP and state and territory partners have:
... obtained 6 preventative control orders to manage the threat of CT persons of interest. An additional 22 control orders were granted to manage the risk of convicted terrorist offenders released in the community.⁶⁶

Extending the operation of Division 104 of the Criminal Code Act 1995

- 2.56 In its 2021 Review of Terrorism Powers, the Committee noted that the introduction of the extended supervision orders regime – discussed below – may impact the ongoing utility of the control order regime, and noted that the extended supervision order regime needed to be evaluated prior to making a recommendation to repeal the provisions of Division 104 of the Criminal Code. The Committee therefore recommended at that time that the provisions of Division 104 of the Criminal Code be extended.
- 2.57 This Bill would extend the powers to 7 December 2026.⁶⁷
- 2.58 The AFP indicated that it supported the extension of these provisions.⁶⁸
- 2.59 Legal Aid NSW said it did not support the extension of the powers. The NSW Council for Civil Liberties said it 'strongly opposes' the extension of control order provisions.⁶⁹ The AHRC did not support the extension of the provisions because control orders were no longer necessary now that the extended supervision order (ESO) regime had been enacted and was operational.⁷⁰
- 2.60 Legal Aid NSW said the control order provisions could be extended for a period of no greater than 12 months to enable the Committee to conclude its *Review of post-sentence terrorism orders: Division 105A of the Criminal Code Act 1995* during which the ongoing utility of control orders since the introduction of ESOs could be explored.⁷¹
- 2.61 For instance, Legal Aid NSW reviewed 15 control order proceedings between 2018 and 2023 and identified that '60% would have been eligible for an ESO (9 of 15) had the ESO regime been in force at the relevant time.'⁷² Legal Aid NSW expressed

⁶⁵ *Criminal Code Act 1995*, sub-ss. 104.28(2)-(3).

⁶⁶ Australian Federal Police, *Submission 5*, p. 4.

⁶⁷ Counter-Terrorism and Other Legislation Amendment Bill 2023, sch. 2, item 42.

⁶⁸ Australian Federal Police, *Submission 5*, p. 5.

⁶⁹ NSW Council of Civil Liberties, *Submission 6*, p. 3.

⁷⁰ Australian Human Rights Commission, *Submission 7*, pp. 19-20.

⁷¹ Legal Aid NSW, *Submission 4*, p. 25.

⁷² Legal Aid NSW, *Submission 4*, p. 18.

further concern that control orders could be used to impose post-sentence conditions on terrorism offenders without going through the ESO process:

At the time of writing, to Legal Aid NSW's knowledge, no application for a Div. 105A order [has] been made in relation to any eligible offender due for release in 2023, despite the total term in each matter being less than 3 months away. If the proposed amendments are enacted, it is a reasonable possibility that the amended CO regime will be used as a 'fast-tracked' and 'backdoor' way of imposing ESO-like conditions upon an eligible Div 105A offender upon release, without the onus of satisfying the rigorous requirements necessary for the imposition of an ESO.⁷³

2.62 The Law Council of Australia similarly submitted that it 'does not support renewing the CO regime beyond its current sunset date in December 2023, because it is not necessary or proportionate'.⁷⁴ The Law Council cited and endorsed the evidence provided by Legal Aid NSW and expressed a range of concerns about control orders, including the risk of the CO regime being used 'either as an alternative to prosecution or a repacege for an unsuccessful prosecution', undermining the presumption of innocence and other fair trial rights.⁷⁵

2.63 Mr Graeme Edgerton of the Australian Human Rights Commission noted they were aware of an instance of a control order being sought where an individual was not convicted:

In one case, the prosecutor made an assessment that there was no reasonable prospect of a conviction, and then a control order was used as a secondary substitute for that. In at least two cases, people have been brought before a court and acquitted, and then a control order has been used as a backup.⁷⁶

2.64 Dr David Neal SC of the Law Council of Australia said that measures like control orders should only be used when there is some form of suspicion that a terrorism offence had been committed:

I think it's fundamental to our political system that you only reserve these extraordinary measures to be used by fallible human organisations against citizens of the country in circumstances where there has been at least a basis for suspicion that they've committed a terrorist offence.⁷⁷

2.65 The Law Council also proposed that, if the CO regime were extended, it should only be for a 12-month period, to allow for completion of the PJCIS review of post-

⁷³ Legal Aid NSW, *Submission 4*, p. 21.

⁷⁴ Law Council of Australia, *Submission 8*, p. 16.

⁷⁵ Law Council of Australia, *Submission 8*, p. 18.

⁷⁶ Mr Graeme Edgerton, Deputy General Counsel, Australian Human Rights Commission, *Committee Hansard*, 16 October 2023, Canberra, p. 4

⁷⁷ Dr David Neal SC, Co-Chair, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, 16 October 2023, Canberra, p. 10.

sentence orders, including ‘further, informed consultation’ on the necessity of the CO regime alongside the ESO regime.⁷⁸

- 2.66 The NSW Council of Civil Liberties recommended that ESOs should operate as the only mechanism for managing a terrorist offender’s risk to the community following the expiry of their sentence.⁷⁹
- 2.67 The AHRC recommended that, should the powers be extended, control orders should be clearly distinguished from ESOs as not being available as an alternative form of a post sentence order (PSO). The AHRC recommended that:
- ... the existing control order regime be amended to focus only on orders for preventative purposes, leaving the extended supervision order regime to apply to post-sentence orders. This should be done by:
 - (a) repealing ss 104.2(2)(b) and (d) of the Criminal Code
 - (b) repealing ss 104.4(1)(c)(ii)-(v) and (vii) of the Criminal Code
 - (c) making any other necessary consequential amendments.⁸⁰

Amendments to definition of ‘issuing court’

- 2.68 The Bill would amend Division 104 of the Criminal Code to provide that only the Federal Court of Australia could issue control orders. The Explanatory Memorandum states:
- Limiting the power to issue control orders to the Federal Court of Australia reflects the serious and extraordinary nature of those orders, and the Federal Court of Australia’s expertise in considering matters that involve a significant volume of evidence.⁸¹
- 2.69 This amendment reflects Recommendation 8 of the Committee’s 2021 Review of Terrorism Powers.⁸²
- 2.70 The AHRC indicated that, should the control order provisions be extended, they supported this amendment.⁸³ The Law Council of Australia also supported the principle ‘that these decisions are best made by superior courts’, but suggested that consideration be given to also conferring jurisdiction on State and Territory Supreme Courts, ‘reflecting the close connection of many COs to the criminal process’ at the state and territory level.⁸⁴

⁷⁸ Law Council of Australia, *Submission 8*, p. 19.

⁷⁹ NSW Council of Civil Liberties, *Submission 6*, p. 18.

⁸⁰ AHRC, *Submission 7*, p. 20.

⁸¹ Counter-Terrorism and Other Legislation Amendment Bill 2023, *Explanatory Memorandum*, p. 9.

⁸² Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 51.

⁸³ AHRC, *Submission 7*, p. 20.

⁸⁴ Law Council of Australia, *Submission 8*, pp. 25-26.

Amendments to conditions that can be imposed in a control order

- 2.71 In the Review of Terrorism Powers, the AFP noted that the obligations, prohibitions and restrictions that can be imposed as part of an interim control order or a control order did not reflect the modern technological landscape.⁸⁵ The Committee considered that the range of conditions that could be applied as part of an interim control order or a control order should reflect the range of conditions available under the extended supervision order (ESO) regime.⁸⁶
- 2.72 The Bill would repeal existing section 104.5A of the Criminal Code and insert new provisions to give effect to this recommendation. The Explanatory Memorandum states:
- In line with the recommendations made by the PJCIS in the AFP Powers Review, the Bill would align the control order conditions (currently termed ‘prohibitions, restrictions and obligations’) with the conditions that may be imposed under an ESO. Conditions available under existing Division 104 have been retained. Consistent with the ESO regime, the Bill would not limit the conditions that the issuing court may impose on a person, but rather, offer clarity about the types of conditions that may be appropriate to achieve the order’s purpose and which are enforceable by police.⁸⁷
- 2.73 Legal Aid NSW and the Law Council of Australia both noted that the effect of the enactment of this proposed provision would apply a ‘substantially lower bar’ to impose the same conditions as an ESO.⁸⁸ The Law Council observed that ‘it should not be possible to effectively revive a failed ESO application before a different court, by effectively ‘rebranding’ it as a CO application’.⁸⁹
- 2.74 The Bill would enable the issuing court to specify conditions that would be exemption conditions. Subject to provisions made by the issuing court in relation to applications for exemption conditions, a person may apply to a specified authority for an exemption, which may be granted subject to additional information being provided or the application of any reasonable directions put forward by the specified authority in writing.⁹⁰
- 2.75 The AFP said that it has been advocating for these amendments to control orders for a number of years. The AFP continued that the amendments to the Bill would make it

⁸⁵ Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 51.

⁸⁶ See Recommendation 10 of the Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 52

⁸⁷ Counter-Terrorism and Other Legislation Amendment Bill 2023, *Explanatory Memorandum*, p. 9.

⁸⁸ Legal Aid NSW, *Submission 4*, p. 11; Law Council of Australia, *Submission 8*, p. 22.

⁸⁹ Law Council of Australia, *Submission 8*, p. 23.

⁹⁰ Counter-Terrorism and Other Legislation Amendment Bill 2023, sch. 2, item 11.

possible for the Federal Court of Australia to tailor conditions to an individual circumstances, and that:

The AFP has observed risks that cannot be adequately controlled or managed by the controls currently available under the Control Order scheme because there is no applicable obligation, prohibition or restriction available.⁹¹

The AFP provided a case study to discuss how a breach of control orders may not have occurred with the amendments in place.

Box 2.1 AFP Case Study – Operation ROSENDAEL-DRIMNAGH

In late 2018, the NSW Joint Counter Terrorism Team (JCTT) commenced an investigation against a number of individuals who were suspected of engaging in terrorist related activities. In July 2019, an individual was arrested and charged with being a member of a terrorist organisation, an offence under section 102.8 of the Criminal Code. In December 2020, the individual was sentenced to 1 year and 2 months imprisonment with time served.

On 31 December 2020, the Federal Court issued an interim control order against the individual, who was released from prison on 1 January 2021. During the first week of his release, he accessed material online that supported the carrying out of executions, beheadings and torture. He made no obvious attempts to conceal his online activity on the provided device.

The first of these breaches occurred four days after his release, where he electronically accessed material which discusses situations where it is permissible to kill a person, notably by beheading. Shortly after, the individual was arrested and charged with three counts of contravening a control order. An additional six charges were later identified and laid.

For this specific circumstance (and noting the short timeframes), the ability to impose conditions such as therapeutic conditions to assist with de-radicalisation (available under the proposed amendments) may have supported the individual to not breach their control order. The individual was sentenced in April 2022 to 1 year and 8 months' imprisonment.

The individual was released in September 2022 on a subsequent Control Order. There were no identified breaches to the order during its enforcement. As such, no successive order was sought and that Control Order expired in September 2023.⁹²

- 2.76 It was the view of the AFP that the amendments to conditions would 'significantly assist the AFP's ability to manage such individuals in the community.'⁹³
- 2.77 Legal Aid NSW expressed concern that a person not convicted of a terrorism offence could be forced to participate in a de-radicalisation program or therapy without

⁹¹ Australian Federal Police, *Submission 5*, p. 4.

⁹² Australian Federal Police, *Submission 5*, p. 4.

⁹³ Australian Federal Police, *Submission 5*, p. 4.

consent, noting that the current section 104.5(6) of the Criminal Code required participation in specified counselling or education only with consent.⁹⁴ The AHRC noted that compulsory participation in these types of programs is contrary to best practice in countering violent extremism programs.⁹⁵

- 2.78 Further, Legal Aid NSW expressed concern that the information obtained through compulsory participation in ‘education’ or ‘treatment’ could be used in pre-charge ‘intelligence gathering’ where:

This created an invidious circumstance where a person risks a breach of a [control order] punishable by imprisonment, if they seek to exercise their fundamental right to silence.

Legal Aid NSW noted there were provisions in Division 105A in relation to the ESO scheme that restricted the use of information contained in court-ordered assessments in criminal proceedings.⁹⁶

- 2.79 The Law Council of Australia echoed these concerns, specifically opposing ‘proposed conditions under the CO regime that would require a person to make potentially prejudicial disclosures in the course of mandatory rehabilitation activities without adequate safeguards regarding the direct use and derivative use of that information’.⁹⁷
- 2.80 The Law Council was particularly concerned that information disclosed by a person when complying with rehabilitation and treatment obligations could be used in pre-charge intelligence gathering, or where a prosecution had been refused or withdrawn.⁹⁸
- 2.81 Legal Aid NSW also noted that the organisation’s experience has been that these treatment, rehabilitation and intervention programs were delivered at centralised centres across NSW for offenders subject to court-ordered supervision. Legal Aid NSW noted that ‘[to] require attendance of persons with no criminal conviction at such locations creates a risk of bringing an individual unnecessarily within the criminal milieu.’⁹⁹

Consideration of totality of conditions on achieving the purpose of the provision

- 2.82 The Bill would repeal current subsection 104.4(2) of the Criminal Code which provides the factors the court must take into account when making an interim control order, see paragraph 2.28 above, and substitute a provision that would require the issuing court to consider each of the conditions and their combined effect of the

⁹⁴ Legal Aid NSW, *Submission 4*, p.10.

⁹⁵ AHRC, *Submission 7*, p. 21.

⁹⁶ Legal Aid NSW, *Submission 4*, p. 11.

⁹⁷ Law Council of Australia, *Submission 8*, p. 20.

⁹⁸ Law Council of Australia, *Submission 8*, p. 21.

⁹⁹ Legal Aid NSW, *Submission 4*, p. 10.

conditions to be imposed on the person in determining if the order is reasonably necessary, and reasonably proportionate and adapted to achieve the purpose of the Division.

- 2.83 The Explanatory Memorandum states that this amendment will 'ensure the totality of the conditions under control orders are appropriate in response to the controlee's risk'.¹⁰⁰
- 2.84 The Law Council recommended that the issuing test in section 104.4 should be further amended so that the issuing court would 'only be permitted to draw an inference about a person's future risk if that inference is the only rational inference able to be drawn from the admissible evidence before the court'.¹⁰¹

Varying control orders by consent

- 2.85 Section 104.11A of the Criminal Code allows the person subject to an interim control order, or a senior AFP member, to apply to the issuing court to vary the interim control order where:
- The involved party who did not make the application – either the person or the AFP member – consents to the amendment.
 - The variation does not add any new obligations, prohibitions or restrictions to the order.
 - The issuing court considers the variation is appropriate in the circumstances.¹⁰²
- 2.86 As noted above, subdivision E of Division 104 of the Criminal Code provides that a person subject to a control order or the AFP Commissioner may apply to revoke or vary a confirmed control order. In contrast with the provisions related to the amendment of interim control orders, an application to vary a control order does not require the consent of the party who did not make the application. However, like the above, the provisions prohibit the issuing court from adding new obligations, prohibitions or restrictions to the order.¹⁰³
- 2.87 The Committee's 2021 Review of Terrorism Powers received evidence from the AFP that the utility of the provisions was impacted by the inability to add new conditions to a control order.¹⁰⁴ The Law Council of Australia suggested that the ability to add new obligations, prohibitions or restrictions should not occur without obtaining the consent of both parties.¹⁰⁵
- 2.88 The Committee recommended that the Criminal Code be amended to allow for new obligations, prohibitions and restrictions to be added to a control order where consent

¹⁰⁰ Counter-Terrorism and Other Legislation Amendment Bill 2023, *Explanatory Memorandum*, p. 10.

¹⁰¹ Law Council of Australia, *Submission 8*, p. 28.

¹⁰² *Criminal Code Act 1995*, sub-s 104.11A(2)

¹⁰³ *Criminal Code Act 1995*, s 104.20.

¹⁰⁴ Australian Federal Police, *Submission 2 to the Review of AFP Powers*, August 2020, p. 6.

¹⁰⁵ Law Council of Australia, *Supplementary Submission 10.1 to the Review of AFP Powers*, October 2020, p. 9.

from both parties has been obtained, and where the consent can be withdrawn at any time.¹⁰⁶

2.89 The Bill would repeal section 104.11A of the Criminal Code¹⁰⁷ and insert a new Subdivision EA into Division 104 which would provide for a senior AFP member, the person subject to a control order or interim control order, or the person's legal representative to apply to vary a control order. The application may include a variation or removal of an order, or the imposing of one or more additional conditions on the person by the order.

2.90 The AHRC noted that the prohibition on adding conditions on an interim control order followed recommendations by the INSLM in 2017 and this Committee in 2018. The AHRC further noted:

The rationale for this provision was that there may be a delay between an interim control order being made and a confirmation hearing and it was reasonable to provide for a process to remove conditions that were no longer appropriate. However, there is far less justification for permitting an interim control order to be varied to add further conditions before a final hearing on whether a control order should be confirmed (even if it is said that the person subject to the control order has 'consented' to the additional conditions).¹⁰⁸

2.91 Where the person is over the age of 18 years, the issuing court may agree to the variation where the court is satisfied that written consent has been provided – and not withdrawn – and the court agrees that the variation is appropriate in the circumstances.¹⁰⁹

2.92 Where the person is a minor, the issuing court may vary the order if consent has been provided and the court agrees the variation is appropriate in the circumstances but must give additional consideration to the best interests of the person, 'having regard to any representations the person makes about the variation and any other matter the court considers relevant'.¹¹⁰

2.93 The Explanatory Memorandum states that this additional requirement is necessary to comply with Australia's international law obligations:

This is an additional requirement to ensure that the rights of children are considered and protected. This accords with Australia's obligations under Article 3.1 of the [Convention on the Rights of the Child] which provides that in all actions concerning children, whether undertaken by public or private social

¹⁰⁶ Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 52.

¹⁰⁷ Counter-Terrorism and Other Legislation Amendment Bill, sch. 2, item 12.

¹⁰⁸ AHRC, *Submission 7*, p. 22.

¹⁰⁹ See proposed subsection 104.22(6) of the Criminal Code as set out by the Counter-Terrorism and Other Legislation Amendment Bill, sch. 2, item 25.

¹¹⁰ See proposed subsection 104.22(5) of the Criminal Code as set out by the Counter-Terrorism and Other Legislation Amendment Bill, sch. 2, item 25.

welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.¹¹¹

2.94 The Attorney-General's Department noted that the paramount consideration would remain the objectives of Division 104 of the Criminal Code:

The issuing court is required to consider the best interests of the young person as a primary consideration, but the paramount consideration is achieving the objects of the control order regime. Noting the grave consequences that can result from a terrorist act, it is appropriate that in the hierarchy of matters to be considered by the issuing court, the objects of the control order regime, including protecting the public from a terrorist act, should be the paramount consideration of the issuing court.¹¹²

2.95 Finally, the proposed clause would allow the application to vary the control order to be withdrawn at any time before the issuing court decides whether or not to vary the order.¹¹³

2.96 In the view of the AFP, these provisions would be beneficial to both parties to provide additional flexibility to address emerging circumstances. Operationally, the AFP noted:

From an operational perspective, this is important where there has been limited ability to assess a person's activity in the community or during custodial management.¹¹⁴

Preventative detention orders

2.97 Division 105 of the Criminal Code provides for a person to be taken into custody for up to 48 hours for the purpose of

- preventing a terrorist act that is capable of being carried out, and could occur within the next 14 days, or
- preserving evidence of, or relating to, a recent terrorist act.¹¹⁵

2.98 An initial preventative detention order (PDO) can be issued for 24 hours¹¹⁶ and where necessary, a continued PDO can extend the period of detention for a further 24 hours.¹¹⁷

2.99 To issue a PDO for the purpose of preventing a terrorist attack, the issuing authority must be satisfied that the terrorist act is capable of being carried out and could occur

¹¹¹ Counter-Terrorism and Other Legislation Amendment Bill 2023, *Explanatory Memorandum*, p. 61.

¹¹² Attorney-General's Department, *Submission 2*, p. 10.

¹¹³ Counter-Terrorism and Other Legislation Amendment Bill 2023, sch. 2, item 25.

¹¹⁴ Australian Federal Police, *Submission 5*, p. 4.

¹¹⁵ *Criminal Code Act 1995*, s 105.1.

¹¹⁶ *Criminal Code Act 1995*, sub-s 105.8(5).

¹¹⁷ *Criminal Code Act 1995*, sub-s. 105.12(5).

within the next 14 days, the making of the order would substantially assist in preventing a terrorist act occurring, and detaining the person is reasonably necessary to prevent a terrorist act from occurring.¹¹⁸

- 2.100 To issue a PDO for the purpose of preserving evidence of, or relating to, a recent terrorist attack, the issuing authority must be satisfied that the terrorist act occurred within the last 28 days, that it is necessary to detain the person to preserve the evidence of, or relating to the terrorist act, and that the detention of the person is reasonably necessary.¹¹⁹
- 2.101 A person cannot have a subsequent initial PDO granted in relation to the same terrorist act.¹²⁰ Additionally, a person cannot have an additional initial PDO granted in relation to a different terrorist act, unless the application or the order is based on information that became available after the initial PDO was made.¹²¹
- 2.102 Restrictions also prevent an initial PDO being made under Division 105 of the Criminal Code where an order for preventative detention has been made under corresponding State laws.¹²² An application for an additional initial PDO can be made if an order has been made under corresponding State laws where the application or order is based on information that became available after the initial PDO was made.¹²³
- 2.103 The Explanatory Memorandum states that the PDO regime supports the objective of preventing terrorist attacks:
- The PDO regime supports the legitimate objective of protecting Australia's national security interests, including preventing terrorist acts. In recent years, there has been an increase in the threat of smaller-scale, opportunistic attacks by lone actors. Law enforcement agencies have had less time to respond to these kinds of terrorist threats than other terrorist plots. In these circumstances, PDOs are a proportionate and necessary measure that enable police to disrupt and respond to terrorist activity at an early stage.¹²⁴
- 2.104 In addition to a PDO, an issuing authority may grant a prohibited contact order (PCO) in relation to a person's detention under a PDO where it is considered reasonably necessary for purposes such as avoiding the risk of a terrorist act, prevent harm to a person, or preserve evidence of a terrorist act.¹²⁵
- 2.105 A person subject to a PDO is entitled to special assistance where the police officer has reasonable grounds to believe that the person is unable to communicate with

¹¹⁸ *Criminal Code Act 1995*, sub-ss. 105.4(4)-(5).

¹¹⁹ *Criminal Code Act 1995*, sub-s. 105.4(6).

¹²⁰ *Criminal Code Act 1995*, sub-ss. 105.6(1) and 105.6(3).

¹²¹ *Criminal Code Act 1995*, sub-s. 105.6(2).

¹²² *Criminal Code Act 1995*, sub-ss. 105.6(4) and 105.6(6).

¹²³ *Criminal Code Act 1995*, sub-s. 105.6(5).

¹²⁴ Counter-Terrorism and Other Legislation Amendment Bill 2023, *Explanatory Memorandum*, p. 11.

¹²⁵ *Criminal Code Act 1995*, sub-s. 105.14A(4).

reasonable fluency due to a disability or lack of knowledge of the English language.¹²⁶ Such assistance may include ‘arranging for an interpreter and assisting the person to choose and contact a lawyer’.¹²⁷

2.106 A PDO may not be made in relation to a person who is under 16 years of age.¹²⁸ However, for detainees over the age of 16 years and under 18 years, additional conditions apply.¹²⁹

2.107 A detainee has the right to see merits review of the decision to make or extend a decision in the Security Division of the Administrative Appeals Tribunal, as well as bring proceedings in a court in relation to the issuing of the order or their treatment in detention.¹³⁰ These rights are enlivened once the PDO expires. While the PDO is in effect the person has the right to contact the Commonwealth Ombudsman.¹³¹ The Criminal Code also provides that a person detained under a law of a State or Territory may, where permitted, make contact to complain:

If the person being detained has the right, under a law of a State or Territory, to complain to an officer or authority of the State or Territory about the treatment of the person by a member of the police force of that State or Territory in connection with the person’s detention under the order, the person is entitled to contact that officer or authority to make a complaint in accordance with that law.¹³²

2.108 At the time of this report, each of the States and Territories had legislation in place to provide for preventative detention.¹³³

Extending the operation of Div 105 of the Criminal Code

2.109 In its 2021 Review of Terrorism Powers the Committee made the following comments in relation to the extension of PDO powers:

The Committee has considered carefully the arguments put forward by submitters in relation to extending the powers and those which advocate for the repeal or sunset of the powers at the end of 2021.

The Committee notes that the State and Territory-based preventative detention powers by law enforcement allow for longer periods [of] detention than the Commonwealth regime, and on the two occasions when the use of such powers

¹²⁶ *Criminal Code Act 1995*, s. 105.5A

¹²⁷ Counter-Terrorism and Other Legislation Amendment Bill 2023, *Explanatory Memorandum*, p. 11.

¹²⁸ *Criminal Code Act 1995*, sub-s. 105.5(1).

¹²⁹ See *Criminal Code Act 1995*, s. 105.33A and 105.39.

¹³⁰ *Criminal Code Act 1995*, s. 105.51.

¹³¹ *Criminal Code Act 1995*, s. 105.36.

¹³² *Criminal Code Act 1995*, sub-s. 105.36(2).

¹³³ See *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Police Powers) Act 2002* (NSW); *Terrorism (Emergency Powers) Act* (NT); *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic); *Terrorism (Preventative Detention) Act 2006* (WA).

were deemed necessary, law enforcement relied on NSW and Victorian preventative detention powers and not the Commonwealth provisions.

The Committee agrees with the conclusion of the former INSLM that non-use of the powers does not indicate lack of usefulness. The Committee considers that in light of the national security threat environment, the PDO powers should not be repealed.¹³⁴

2.110 The Committee recommended that the provisions of Division 105 be extended.¹³⁵ The Bill would give effect to this recommendation and extend the operation of the powers to 7 December 2026.¹³⁶

2.111 The AFP indicated that though the powers had not been used, it supported the extension of these provisions:

The lack of use of preventative detention orders thus far is not an indication of a lack of utility, rather it reflects the careful consideration that is undertaken in considering the use of these powers.¹³⁷

2.112 The Attorney-General's Department said that PDOs remained a valuable tool in the suite of counter-terrorism powers:

The PDO regime remains a valuable tool that forms part of the suite of powers used to counter terrorism. PDOs can be used by police to disrupt imminent terrorist attacks from occurring. This is particularly important where there is little to no lead time to disrupt a terrorist act and there may not be sufficient information available regarding the individual to meet arrest thresholds. The PDO fills this gap by either preventing a person's immediate engagement in a terrorist act, or providing authorities with additional time to secure evidence following a terrorist act.¹³⁸

2.113 Commander Thomas Hester of the Australian Federal Police said that extension of the PDO powers would enable a rapid response before or in the immediate aftermath of a terrorism event:

For the PDO, we would look at it in the proximity of a terrorist event occurring and I think that's an important aspect to look at. It's not about a long-term build-up for what we'd want to do if a terrorist conspiracy is under way and we have a long time to investigate. We're talking about the immediacy in the lead-up to a terrorism event or in the immediate aftermath of a terrorism event. Those are the

¹³⁴ Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 68.

¹³⁵ See Recommendation 14 of the Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 68.

¹³⁶ Counter-Terrorism and Other Legislation Amendment Bill 2023, sch. 2, item 51.

¹³⁷ Australian Federal Police, *Submission 5*, p. 5.

¹³⁸ Attorney-General's Department, *Submission 2*, p. 12.

key points for us in regard to the PDO, the urgency and the necessity to deal with stopping the terrorism event or dealing with the immediate aftermath of a terrorism event.¹³⁹

2.114 The AHRC, the ALA and the Law Council of Australia did not support the extension of the PDO provisions.¹⁴⁰ The AHRC reiterated its previous recommendations that the PDO provisions be repealed, saying that given:

...the serious human rights concerns with PDOs, the availability of equally effective alternative measures that are less restrictive of human rights, the fact that PDOs were introduced as a short term emergency measure in 2005, the fact that they have never been used, and the reduction of the terrorism threat level to 'POSSIBLE', it is now time for the PDO regime to be allowed to sunset as originally intended.¹⁴¹

2.115 The Law Council of Australia recommended that, if the PDO regime were extended, 'urgent reforms' be made to Division 105 including to tighten the issuing threshold and issuing authorities for PDOs, and to remove powers to monitor communications between a person detained under a PDO and their lawyer.¹⁴²

Amendments to issuing authorities

2.116 As presently enacted, the Criminal Code provides that the Attorney-General may, by consent and by writing, appoint certain classes of persons as an issuing authority for the purposes of granting continuing preventative detention orders.¹⁴³

2.117 In its 2021 Review of Terrorism Powers, the Committee recommended that the issuing authority for a continued preventative detention order be amended so that an order could no longer be issued by a member of the AAT or by the Federal Circuit Court.¹⁴⁴

2.118 The Bill would give effect to this recommendation by amending section 105.2 of the Criminal code to omit 'Federal Circuit and Family Court of Australia (Division 2)'¹⁴⁵ and repeal subsection 105.2(1)(e) which would have the effect of preventing AAT members from being appointed by the Attorney-General as an issuing authority.¹⁴⁶

2.119 The Explanatory Memorandum states that '[limiting] the power to issue PDOs to judges of superior courts reflects the serious and extraordinary nature of those

¹³⁹ Commander Thomas Hester, Australian Federal Police, *Committee Hansard*, 16 October 2023, Canberra, p. 15

¹⁴⁰ See AHRC, *Submission 7*, p. 26; ALA, *Submission 3*, p. 7; Law Council of Australia, *Submission 8*, p. 28.

¹⁴¹ AHRC, *Submission 7*, p. 26.

¹⁴² Law Council of Australia, *Submission 8*, p. 29.

¹⁴³ *Criminal Code Act 1995*, s. 105.2.

¹⁴⁴ See Recommendation 15 of the Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 69.

¹⁴⁵ Counter-Terrorism and Other Legislation Amendment Bill 2023, sch. 2, item 43.

¹⁴⁶ Counter-Terrorism and Other Legislation Amendment Bill 2023, sch. 2, item 45.

orders, and the significant volume and complexity of evidence that a court considers as part of these proceedings.¹⁴⁷

2.120 The AHRC said that should the provisions be extended, it would support the amendment to the issuing authority.¹⁴⁸

Post-sentence orders

2.121 Division 105A of the Criminal Code sets out provisions for post-sentence orders (PSO). A PSO enables a terrorism offender to be detained for an additional period following their sentence (a continuing detention order),¹⁴⁹ or allows conditions to be applied to a terrorist offender post-release from imprisonment (an extended supervision order),¹⁵⁰ where there is an unacceptable risk of the individual carrying out additional terrorism activities.

2.122 An application for a PSO must be made no more than 12 months before the release of a terrorism offender, or where the person is already subject to a PSO or control order, no more than 12 months before the conclusion of the existing order.¹⁵¹

2.123 In making an application, the Criminal Code prescribes the information that must be included in the application. This includes a requirement for the applicant to include information that would lead to a conclusion that the order should not be made.¹⁵² In addition, where an application is made in a State or Territory Supreme Court, a preliminary hearing must be held to determine whether the appointment of an expert is necessary.¹⁵³

2.124 The Criminal Code prescribes the matters the court must have regard to in making a decision on whether to grant the post-sentence order. These matters include whether the PSO would have the appropriate effect, the opinion of any expert involved in assessing the offender's risk of reoffending, the offender's degree of participation in the assessment process, any treatment or rehabilitation programs the offender has been involved in, and their compliance with any parole or PSO/control order conditions or obligations, among others.¹⁵⁴

2.125 A PSO cannot be in place at the same time as a control order. However, Legal Aid NSW noted that this is not an effective safeguard, as 'proceedings can be concurrent, and a [control order] can be cumulative upon the expiry of [a PSO]'¹⁵⁵

¹⁴⁷ Counter-Terrorism and Other Legislation Amendment Bill 2023, *Explanatory Memorandum*, p. 12.

¹⁴⁸ AHRC, *Submission 7*, p. 27.

¹⁴⁹ *Criminal Code Act 1995*, sub-s. 105A.3(2).

¹⁵⁰ *Criminal Code Act 1995*, sub-s. 105A.3(3).

¹⁵¹ *Criminal Code Act 1995*, sub-s. 105A.5(2).

¹⁵² *Criminal Code Act 1995*, s. 105A.5.

¹⁵³ *Criminal Code Act 1995*, s. 105A.6.

¹⁵⁴ *Criminal Code Act 1995*, s. 105A.6B.

¹⁵⁵ Legal Aid NSW, *Submission 4*, p. 18.

2.126 A continuing detention order (CDO) may be granted to provide for an additional period of detention of no longer than three years, at the conclusion of the offender's terrorism-related sentence.¹⁵⁶ The court may make successive CDOs.¹⁵⁷ This detention cannot be equivalent to a sentence of imprisonment. This means that the detainee cannot be accommodated or detained in an area of a prison where others are serving prison sentences, although some exemptions apply.¹⁵⁸

2.127 In considering whether to grant a CDO:

- the court must be satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious terrorism offence; and
- the court must be satisfied that there is no less restrictive measure available that would be effective in preventing the unacceptable risk.¹⁵⁹

2.128 The court may grant an interim detention order (IDO) for a period of no longer than 28 days where an application for a CDO has been made. The effect of the IDO is to detain a terrorism offender in prison while the application for the CDO is considered.¹⁶⁰ Successive IDOs can be granted but must not exceed a period of three months unless exceptional circumstances apply.¹⁶¹

2.129 An extended supervision order (ESO) may be granted to provide for a list of conditions to be applied to a terrorism offender upon return to the community, the breach of which is an offence, for a period of no longer than three years.¹⁶² The court may make successive ESOs.¹⁶³

2.130 In considering whether to grant an ESO:

- the court may grant an ESO where the conditions to grant a CDO are not satisfied
- the court must be satisfied, on the balance of probabilities, that the offender poses an unacceptable risk of committing a serious terrorism offence; and
- the court is satisfied that all of the conditions, and the combined effect of the conditions, to be imposed are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from that unacceptable risk.¹⁶⁴ However, the paramount consideration remains the object of the Division.¹⁶⁵

¹⁵⁶ *Criminal Code Act 1995*, sub-s. 105A.7(5).

¹⁵⁷ *Criminal Code Act 1995*, sub-s. 105A.7(6).

¹⁵⁸ *Criminal Code Act 1995*, s. 105A.4.

¹⁵⁹ *Criminal Code Act 1995*, sub-s. 105A.7(1).

¹⁶⁰ *Criminal Code Act 1995*, s. 105A.9

¹⁶¹ *Criminal Code Act 1995*, sub-s. 105A.9(6).

¹⁶² *Criminal Code Act 1995*, sub-s. 105A.7A(4).

¹⁶³ *Criminal Code Act 1995*, sub-s. 105A.7A(5).

¹⁶⁴ *Criminal Code Act 1995*, sub-s. 105A.7A(1).

¹⁶⁵ *Criminal Code Act 1995*, sub-s. 105A.7A(2).

- 2.131 The Criminal Code provides a list of general conditions that can be imposed on behaviour by ESOs,¹⁶⁶ and a list of obligations in relation to monitoring devices.¹⁶⁷ The Criminal Code also provides that the court may determine that a condition be classed as a 'exemption condition' which allows an offender to apply to a 'specified authority' for an exemption from that condition.¹⁶⁸ The conditions of an ESO can be varied by application to the State or Territory Supreme Court with or without consent.¹⁶⁹
- 2.132 The court may grant an interim supervision order (ISO) for a period of no longer than 28 days when an application for an ESO has been made. The effect of an ISO is to apply certain conditions to a terrorism offender until an application for an ESO is considered. Successive ISOs may be granted but cannot exceed a period of three months.¹⁷⁰
- 2.133 At the time of this inquiry, the Committee was considering these provisions in detail in its *Review of post-sentence terrorism orders: Division 105A of the Criminal Code Act 1995*.

Expanding annual reporting requirements

- 2.134 As presently enacted, the Criminal Code requires the AFP Minister to prepare a report about the operation of Division 105A during the most recent year ending 30 June.¹⁷¹ Section 105A.22 of the Criminal Code requires that the following information be included in the report:
- applications for each kind of post-sentence order made during the year;
 - applications for each kind of interim post-sentence order made during the year;
 - each kind of post-sentence order made during the year;
 - each kind of interim post-sentence order made during the year;
 - applications for review of each kind of post-sentence order made by terrorist offenders during the year;
 - applications for review of each kind of post-sentence order made by the AFP Minister, or a legal representative of the AFP Minister, during the year;
 - each kind of post-sentence order affirmed during the year;
 - each kind of post-sentence order varied during the year;
 - post-sentence orders revoked during the year.
- 2.135 In its 2021 Review of Terrorism Powers the Committee recommended that the list of reporting be amended to include details of housing arrangements for individuals

¹⁶⁶ *Criminal Code Act 1995*, s. 105A.7B.

¹⁶⁷ *Criminal Code Act 1995*, s. 105A.7E.

¹⁶⁸ *Criminal Code Act 1995*, s. 105A.7C.

¹⁶⁹ *Criminal Code Act 1995*, div. 105A, sub-div. CB.

¹⁷⁰ *Criminal Code Act 1995*, s. 105A.9A.

¹⁷¹ *Criminal Code Act 1995*, s. 105A.22.

subject to a CDO, use of rehabilitation programs, and use of resources – including rehabilitation program costs, legal assistance costs, and enforcement costs.¹⁷²

2.136 The Bill would insert a new provision requiring the following information to be included:

- the detention arrangements that applied, during the year, to terrorist offenders who were subject to a continuing detention order at any time of the year;
- the rehabilitation or treatment programs that were made available, during the year, to terrorist offenders who were subject to a post-sentence order at any time during the year; and
- funding for the administration of the Division 105A powers during the year.¹⁷³

2.137 The intent of this amendment is to give effect to the Committee's recommendation.¹⁷⁴

2.138 The Attorney-General's Department said this proposed amendment would enhance transparency:

Requiring this information to be published in an annual report is intended to enhance transparency in relation to the implementation of the post-sentence order scheme, and the management of terrorist offenders subject to post-sentence orders. The identified topics are critical to a holistic understanding of the operation of the scheme, which annual reporting aims to support.¹⁷⁵

2.139 The proposed amendment would also include limitations on the provision of information which would require the entity providing the information to consent to its inclusion in the annual report. Where information is withheld as a result of the operation of the provision, the report must include a statement that consent to share the information was not provided.¹⁷⁶

2.140 In relation to these provisions the Attorney-General's Department noted:

The Bill would provide that the annual report must not include information on the above matters if it was given to the AFP Minister, or an officer or employee of the Commonwealth, by a Minister, or an officer or employee, of a State or Territory and that person has not consented in writing to the information being included in the report. This recognises that States and Territories hold certain information that would be relevant to the new reporting requirements, and will safeguard against the release of information that could compromise State and Territory security arrangements, or the safety of individuals.

¹⁷² See Recommendation 19 of the Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, p. 91.

¹⁷³ Counter-Terrorism and Other Legislation Amendment Bill 2023, sch. 2, item 55.

¹⁷⁴ Counter-Terrorism and Other Legislation Amendment Bill 2023, *Explanatory Memorandum*, p. 24.

¹⁷⁵ Attorney-General's Department, *Submission 2*, p. 12.

¹⁷⁶ Counter-Terrorism and Other Legislation Amendment Bill 2023, sch. 2, item 55.

The Bill would require that if the annual report omits information due to the operation of the requirement for State or Territory consent, it must include a statement to that effect. This would provide assurance, and transparency in relation to the fact that, the AFP Minister has sought to fulfil their obligation to publish relevant information in the annual report, but is unable to do so because the required State and Territory consent has not been granted. The department is committed to working with States and Territories in relation to implementing the enhanced public reporting requirements, if the Bill passes.¹⁷⁷

2.141 The AHRC supported the amendments to reporting requirements for post-sentence orders.¹⁷⁸

Extension of secrecy provisions

2.142 Section 122.4 of the Criminal Code provides:

- 1 A person commits an offence if:
 - a. the person communicates information; and
 - b. the person made or obtained the information by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and
 - c. the person is under a duty not to disclose the information; and
 - d. the duty arises under a law of the Commonwealth.

2.143 Approximately 296 non-disclosure duties contained in Commonwealth laws enliven this offence.

2.144 The Explanatory Memorandum states that:

Criminal liability for a breach of these duties would be maintained while each duty is being reviewed through the Commonwealth Review of Secrecy Provisions, which will provide advice to the Government by 31 August 2023 on whether each duty should be converted to a stand-alone specific secrecy offence, or whether criminal liability should be removed.¹⁷⁹

2.145 The Attorney-General's Department provided the following evidence on the status of the review:

On 22 December 2022, the Attorney-General announced the Government had commenced a comprehensive review (to be undertaken by the department) of Commonwealth secrecy offences to address concerns raised by multiple

¹⁷⁷ Attorney-General's Department, *Submission 2*, p. 12.

¹⁷⁸ AHRC, *Submission 7*, p. 28.

¹⁷⁹ Counter-Terrorism and Other Legislation Amendment Bill 2023, *Explanatory Memorandum*, p. 25.

previous reviews about the number, inconsistency, appropriateness and complexity of Commonwealth secrecy offences. The department consulted broadly as part of the review (including whether each non-disclosure duty should be converted into a standalone offence or criminal liability removed). The department delivered a final report to the Attorney-General on 29 August 2023 and the Government is considering the findings of the report. A 12-month extension to the sunset date of section 122.4 is required to maintain criminal liability while the Government finalises its consideration of the review.¹⁸⁰

2.146 As presently enacted, the provision is due to sunset 5 years after its commencement, on 29 December 2023. The Bill would extend this provision to 29 December 2024.¹⁸¹

2.147 The AHRC supported the extension of the sunset provisions, on the basis that the 'Government intends over the next 12 months to reduce and rationalise the number of Commonwealth secrecy offences.'¹⁸²

2.148 The Law Council of Australia advised that it did not oppose the 12-month extension of the offence, however it recommended that 'to facilitate informed public discussion', the final report of the Government's secrecy review should be released at the earliest opportunity.¹⁸³

2.149 The NSW Council of Civil Liberties recommended that the secrecy provisions be allowed to sunset. Its submission stated that:

The current secrecy framework, as at the start of this year, consists of a complex and overlapping array of offences and duties that criminalise the disclosure of a wide range of information held by the Commonwealth. These include:

- 11 general secrecy offences in the Criminal Code;
- 542 specific secrecy offences in 178 Commonwealth laws;
- 296 non-disclosure duties in 107 Commonwealth laws that attract criminal liability; through the operation of section 122.4 of the Criminal Code; and
- 21 override provisions in 18 Commonwealth laws that operate to exclude secrecy provisions in other Commonwealth laws.

This is a sweeping regime that is excessive, inconsistent, and incompatible with the principles of transparency and democratic accountability that underpin a free and open society. It therefore calls for a comprehensive reform of the secrecy framework based on clear, limiting, and proportionate criteria that balance the legitimate interests of the Commonwealth with the public's interest in access to information.¹⁸⁴

¹⁸⁰ Attorney-General's Department, *Submission 2*, p. 13.

¹⁸¹ Counter-Terrorism and Other Legislation Amendment Bill 2023, sch. 2, item 63.

¹⁸² AHRC, *Submission 7*, p. 29.

¹⁸³ Law Council of Australia, *Submission 8*, p. 34.

¹⁸⁴ NSW Council for Civil Liberties, *Submission 6*, pp. 5-6.



3. Committee Comment

- 3.1 In considering the proposed amendments of the Counter-Terrorism and Other Legislation Amendment Bill 2023 the Committee notes that it has a long-standing interest in reviewing the ongoing necessity and proportionality of these powers in protecting Australians from the threat of terrorism, and that the amendments in the Bill have arisen from the Committee's previous review of these powers.
- 3.2 The Committee notes that the threat of terrorism is constantly evolving and changing shape, even since the completion of the last review in 2021. The Committee recognises that these powers were adopted in the aftermath of terrorist events and in a heightened threat environment, and were intended to be temporary measures. However, the Committee supports the maintenance of a robust law enforcement framework to continue to protect Australians from the threat of terrorism.
- 3.3 The Committee acknowledges that the current National Terrorism Threat Level reduced from 'probable' to 'possible' in November 2022. While this suggests that the threat of a terrorist attack on shore has lessened, the Committee notes the advice of the Director-General of Security in successive annual threat assessments that the potential for terrorism activity in Australia persists despite the reduction in threat level.
- 3.4 The Committee also recognises the evidence of the AFP regarding the number of individuals that have been arrested for terrorism offences this year to date, as well as the moderation of religiously motivated violent extremism, and the ongoing rise of ideologically motivated violent extremism, where the type of terrorist activity likely to be undertaken has shifted from a large-scale event to an individual or small group attack that could occur with little or no warning.
- 3.5 While the Committee acknowledges that some submitters to this inquiry hold the view that these extraordinary powers are no longer relevant and should be allowed to sunset in December 2023, the Committee considers on balance that these types of rarely used and properly constrained rapid response powers would continue to be required to disrupt terrorist activity and keep Australians safe.
- 3.6 Therefore, the Committee supports the extension of the sunset provisions of these powers for a further three years noting that the Committee's consideration of Division 105A of the Criminal Code will be completed in the meantime to allow fuller consideration of the interplay between extended supervision orders and control orders.
- 3.7 In relation to the stop, search and seize powers contained in Division 3A of the *Crimes Act 1914*, the Committee notes the concerns of submitters in relation to the proportionality of the powers and their ongoing necessity given that the powers have

not been used since they were first introduced. However, given the above, the current threat environment could give rise to precisely the type of event these powers would be used to prevent or disrupt.

- 3.8 The Committee supports the amendments proposed by the Bill in relation to notification of a declaration for a 'prescribed security zone', informing a person subject to the exercise of these powers of their right to make a complaint, and the introduction of a list of matters the Minister must consider in making a declaration.
- 3.9 The Committee also supports the introduction of a provision that clarifies that the Minister may make a declaration of a 'prescribed security zone' for a period of less than 28 days.
- 3.10 The Committee notes the Government's proposed amendments to establish a post-entry warrant regime, as recommended by this Committee in 2021 as part of the suite of reforms to the counter-terrorism powers. The Committee reiterates its 2021 recommendation for an ex post facto warrant framework and agrees that the Government's proposed amendment would provide additional safeguards on the use of these powers.

Recommendation 1

- 3.11 The Committee recommends that the Government introduce its proposed amendments to establish a post-entry warrant framework.**
- 3.12 The Committee acknowledges that submitters were concerned about the ongoing use of the control orders regime, and notes the views raised by the Committee in its 2021 review of AFP powers that the utility of the scheme should be reviewed following the implementation of the extended supervision orders regime.
- 3.13 The Committee did not receive sufficient evidence to warrant recommending the cessation of the powers at this time. However, the Committee also notes that it is currently undertaking a review of post-sentence terrorism orders under Division 105A, following the completion of the review of the same by the Independent National Security Legislation Monitor. The Committee will consider the ongoing utility and nature of control orders will as part of this review, bearing in mind that the post-sentence counter-terrorism powers cannot be considered in isolation from the overall suite of orders in Divisions 104, 105 and 105A of the Criminal Code.
- 3.14 The Committee acknowledges that submitters were concerned in relation to the amendments to conditions that can be applied as part of a control order, and that, in the view of Legal Aid NSW and the Law Council of Australia, this change could open the powers to misuse by the AFP when a post-sentence order would be more appropriately sought. The Committee also notes the repeated assurances by the AFP that the powers have been, and will continue to be, used appropriately. The Committee will return to this matter in its review of Division 105A of the *Criminal Code Act 1995*.

- 3.15 The Committee supports the amendments in the Bill to the definition of ‘issuing court’, the consideration of totality of conditions on achieving the objectives of the Division, and the ability to vary control orders by consent.
- 3.16 The Committee notes that the preventative detention order powers had not been used at the time of its report, and acknowledges that both the Australian Human Rights Commission and the Law Council of Australia reiterated their previous recommendations that the preventative detention orders provisions be allowed to sunset.
- 3.17 However, the Committee weighed this against the evidence of the AFP and Attorney-General’s Department regarding the ongoing utility of the provisions, particularly that the current threat environment could give rise to a situation where preventative detention may be of significant assistance in preventing a terrorist act or preserving evidence following a terrorist act. The Committee considers that these powers are extraordinary, and their lack of use supports the AFP’s evidence that they would carefully consider the need to use the powers. Therefore, the Committee supports the extension of the powers for a further three years.
- 3.18 The Committee also supports the amendment to issuing authorities as a further strengthening of the safeguards around the use of this provision.
- 3.19 In relation to post-sentence orders, the Committee supports the amendment to annual reporting requirements to enhance the transparency and accountability of the operation of the regime while the Committee concludes its review into Division 105A.
- 3.20 The Committee notes the concerns raised by the NSW Council of Civil Liberties in relation to the extension of the secrecy provisions in section 122.4 of the *Criminal Code 1995*. However, The Committee supports the conclusion of the Australian Human Rights Commission and the Law Council of Australia in that the extension to the sunset of the secrecy offences would allow the Government to consider and implement its response to the review of secrecy provisions.
- 3.21 The Committee supports the extension of the sunset provisions to the secrecy provisions in section 122.4 as provided by the Bill.

Recommendation 2

- 3.22 The Committee recommends that, following the implementation of the recommendation in this report, the Bill be passed by Parliament.**

Mr Peter Khalil MP
Chair



A. List of submissions

- 1 Commonwealth Ombudsman
- 2 Attorney-General's Department
 - 2.1 Supplementary to submission 2
- 3 Australian Lawyers Alliance
- 4 Legal Aid NSW
- 5 Australian Federal Police
- 6 New South Wales Council for Civil Liberties
- 7 Australian Human Rights Commission
- 8 Law Council of Australia



B. Witnesses appearing at public hearings

Monday, 16 October 2023

Committee Room 2S3

Canberra

Australian Human Rights Commission

- Professor Rosalind Croucher, President (via video conference)
- Mr Graeme Edgerton, Deputy General Counsel

Law Council of Australia

- Dr David Neal SC, Co-Chair, National Criminal Law Committee (via video conference)
- Mr Nathan MacDonald, Deputy Director of Policy (via video conference)
- Mr Shounok Chatterjee, Policy Lawyer (via video conference)

Attorney-General's Department

- Ms Brooke Hartigan, First Assistant Secretary, Security and Counter-Terrorism Division
- Mr Luke Muffett, Assistant Secretary, Security Law and Policy Branch

Australian Federal Police

- Commander Thomas Hester
- Ms Susie Williamson-deVries, Manager, Government and Executive Advice