



**Australian
Human Rights
Commission**

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

Submission to the Parliamentary Joint Committee on Intelligence and
Security

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in relation to its Review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth) (the Bill) introduced by the Australian Government.
2. The Commission welcomes the opportunity to make a submission to this inquiry.

2 Summary

3. The Bill proposes to introduce an extended supervision order (ESO) regime that would permit the Supreme Court of a State or Territory to make orders in relation to a person who has been convicted of a serious terrorism offence and who would pose an unacceptable risk to the community of committing a further serious terrorism offence after completing their sentence of imprisonment.
4. The Court would be able to make an ESO for up to three years at a time, imposing conditions on the offender designed to protect the community from that risk.
5. The Criminal Code already contains provisions that permit the Supreme Court to make a continuing detention order (CDO) in relation to the same category of offender. A CDO requires a person convicted of a serious terrorism offence to remain in detention for a period of up to three years at a time after the conclusion of their sentence.
6. The Commission has previously made detailed submissions about the existing CDO regime. Given the grave risks to the community posed by terrorism, an appropriate regime, with effective protections against unjustified detention and other human rights infringements, could be a reasonable and necessary response. However, the regime itself imposes very severe restrictions on liberty outside the parameters of the ordinary criminal justice system. The proportionality of the regime is heavily dependent on the ability to accurately assess the future risk posed by terrorist offenders. The Commission has previously made a range of recommendations to the PJCIS directed to these issues.¹
7. The Commission has called for the introduction of an ESO regime because it provides a less restrictive way of effectively managing the risk to the community of terrorist recidivism, than resort to the CDO regime alone. Where such a risk is proven to exist, and the Court considers that the community can be protected through conditions imposed on an offender after they are released, this action should be preferred to continued detention because it is a more proportionate response. It is also consistent with the general principle of criminal law that an offender should be released from custody after serving the sentence of imprisonment imposed by the Court for their offence.

8. However, there are two broad structural problems with the ESO regime proposed in this Bill which mean that the Commission is unable to support it in its current form. First, the ESO regime would leave in place the current control order regime. Secondly, the ESO regime in the Bill departs in very significant ways from the model recently proposed by the third Independent National Security Legislation Monitor (INSLM), Dr James Renwick CSC SC.
9. The Australian Parliament has passed well over 70 counter-terrorism laws in the last two decades. Those laws create a range of sometimes overlapping counter-terrorism powers and offence provisions. Such overlap can add to the cumulative human rights impact of these laws, and can raise concerns about the proportionality of a particular law that, were it considered in isolation, might be justified. It is very rare that reform in this area reduces these powers and offences, even where counter-terrorism laws are subject to a sunset provision. Rather, any new law generally has the effect of limiting a range of human rights, on the basis that the new law will give increased protection against terrorist activity.
10. The introduction of an ESO regime would further add to Australia's extensive counter-terrorism regime. For this reason, it is important that the Bill not be assessed in isolation. The Bill should be assessed by reference to its likely effect taking into account the other elements of Australia's counter-terrorism regime, especially given that CDOs, control orders and the proposed ESO regime would all operate to address the same, or at least a similar, risk—namely, that an individual is likely to commit a terrorist offence in the future. To this end, the Commission recommends here and in another recent submission a number of important changes to the CDO regime,² and in this submission the Commission sets out its position that the introduction of an ESO regime should be accompanied by the repeal of the existing control order regime.
11. At present, control orders are being used in the way that it is proposed that ESOs would be used, but for a range of reasons they are a second-best alternative. There have been 10 control orders made since January 2019 and this followed a period of more than three years where no control orders were made at all.³ Nine of the 10 control orders imposed in recent times have been imposed on terrorist offenders at the point in time when they were being released from custody. This is the function that ESOs would perform. Details of those nine offenders are set out in Annexure A to this submission.
12. The only remaining control order made in recent times was the control order imposed on Ms Zainab Abdirahman-Khalif after her acquittal for a terrorism offence. The High Court has recently overturned that acquittal and, unless she is granted parole which she currently qualifies for, she will be required to serve the last six months of a three year sentence.⁴ However, there remain real questions about the degree of risk that she posed to the community and whether the control order imposed on her was justifiable.⁵

13. The Commission's view is that once an ESO regime is in place, there will be no need for the control order regime and it should be repealed to avoid situations where it may be inappropriately used. This includes situations where a person cannot be arrested because there is no reasonable basis to suspect that they have been involved in a terrorist act; where the Commonwealth Director of Public Prosecutions (CDPP) has advised that there is no reasonable prospect of conviction; and where a person has been tried and acquitted of a terrorism offence. These issues are dealt with in more detail in previous submissions by the Commission to the PJCIS.⁶
14. The Bill also departs from the ESO model proposed by the third INSLM in significant ways. The Commission is concerned about the following aspects of the Bill in particular:
 - (a) the Bill proposes a lower standard of proof to obtain an ESO (satisfaction on the balance of probabilities) than is currently required to obtain a CDO (satisfaction to a high degree of probability), contrary to the recommendation of the third INSLM and contrary to every other comparable regime in Australia
 - (b) the conditions that may be imposed pursuant to an ESO extend far beyond the conditions that may be imposed pursuant to a control order and, for example, could require:
 - a person to comply with directions given by a 'specified authority,' which is not limited to law enforcement authorities and in fact could be any other person in Australia
 - the compulsory participation in de-radicalisation and other programs in a way that is counterproductive to efforts to counter violent extremism
 - *de facto* home detention, rather than limited curfews
 - a person to give consent to entry into their home by a 'specified authority' (which could be any person in Australia), in circumstances where that consent was not truly voluntary and where alternatives such as the use of warrants are readily available
 - (c) the current safeguard in control order proceedings, requiring the personal circumstances of the respondent to be taken into account, would be removed for ESO proceedings
 - (d) an offender in custody could be compelled to attend an assessment by an expert chosen by the AFP Minister, in addition to the existing requirement to be assessed by an independent expert chosen by the Court, and failure to participate in the assessment with the Minister's expert could count against them in a post-sentence order proceeding (that is, a proceeding for either a CDO or ESO)

- (e) the current use immunity that applies to participation in an assessment by the Court's independent expert would be watered down, and this lower level of protection would also be applied to participation in the compulsory assessment by the Minister's expert
 - (f) the Minister would be given the ability to apply to vary an interim supervision order (ISO) to add conditions, in a way that is not permitted under the control order regime.
15. The Commission has made a number of recommendations about the way in which breaches of an ESO are dealt with. These recommendations are designed to ensure that those responsible for monitoring compliance with ESOs have a discretion to deal appropriately with minor breaches. Experience with Commonwealth control orders and ESOs made under the two current regimes in New South Wales demonstrates that a framework like this is necessary to avoid prosecution and imprisonment for trivial conduct. In addition, there should be an explicit defence of reasonable excuse built into each of the relevant offence provisions.
16. If ESOs are introduced and control orders are not repealed, offenders in New South Wales could be subject to up to four overlapping post-sentence order regimes. The Commission's Recommendations 2 and 3 offer ways to eliminate or reduce the overlap at the Commonwealth level. Steps should also be taken to ensure that offenders are not liable to both Commonwealth and State regimes in relation to the same conduct.
17. Finally, the Bill would extend the monitoring warrants currently available in relation to control orders to ESOs. These warrants allow people who have already been assessed as posing an unacceptable risk to the community to be monitored for the purpose of ensuring that they adhere to the conditions of their ESOs and do not engage in terrorist activity while the ESO is in force. However, the Bill also proposes to create a new class of warrants that can be sought in relation to people in custody who could qualify for a post-sentence order (PSO). These are not people who have been assessed as posing an unacceptable risk to the community. Nor are they people who are at large in the community. The purpose of these warrants is to gather evidence to support a PSO application. The Commission considers that spying on inmates for this purpose is not justifiable and this new class of warrants should be removed from the Bill.

3 Recommendations

18. In summary, while the Commission opposes the Bill in its current form, the Commission does support the introduction of an ESO regime, subject to two key provisos. First, any federal ESO regime should be in the form recommended by the third INSLM, and the regime proposed by the Bill should be amended in a number of ways that would ensure it remains consistent with Australia's human

rights obligations. Secondly, if an ESO regime is introduced, the existing control order regime should be repealed.

19. To that end, the Commission makes the following recommendations.

Recommendation 1

The Commission recommends that the Bill not be passed in its current form.

Recommendation 2

The Commission recommends that the existing control order regime be repealed and replaced by an extended supervision order regime in the form recommended by the third INSLM.

Recommendation 3

If Recommendation 2 is not accepted, the Commission recommends that the existing the control order regime be amended to focus only on orders for preventative purposes, as recommended by the PJCIS in 2016, 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.

Recommendation 4

The Commission recommends that the offence in s 119.2 of the Criminal Code (entering, or remaining in, declared areas) be excluded from the definition of ‘terrorist offender’ in proposed s 105A.3(1)(a) of the Criminal Code, with the effect that a person convicted for such an offence is not liable for a post-sentence order.

Recommendation 5

The Commission recommends that the threshold for making an extended supervision order in proposed s 105A.7A(1)(b) of the Criminal Code be amended to require that the Court 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 Part 5.3 offence’.

Recommendation 6

The Commission recommends that the proposed definition of ‘specified authority’ in s 100.1(1) of the Criminal Code be limited to police officers and public authorities responsible for corrections.

Recommendation 7

The Commission recommends that any condition imposed by an extended supervision order or interim supervision order that requires a person to

participate in treatment, rehabilitative or intervention programs or activities, psychological or psychiatric assessment or counselling, interviews or other assessments, be subject to a further condition that a person is only required to participate if they agree, at the time of the relevant activity, to so participate.

Recommendation 8

The Commission recommends that the Bill be amended to prevent the imposition of a condition in an extended supervision order or an interim supervision order that would permit or amount to home detention.

Recommendation 9

The Commission recommends that the conditions requiring a person to consent to certain monitoring and enforcement activity in proposed ss 104.5A(1)(c)(i), (2)(a) and (5); 105A.7B(5)(g)–(j); and 105A.7E(1)(c)(i), (2)(a) and (5) of the Criminal Code be removed from the Bill on the basis that they are not necessary, given the existing and proposed new monitoring warrants.

Recommendation 10

The Commission recommends that the Bill be amended to set out the parameters for decision making by a specified authority in relation to an application for an exemption under s 105A.7C of the Criminal Code. This should include:

- (a) the considerations that the specified authority must take into account in making its decision
- (b) the timeframe for a decision by the specified authority
- (c) a requirement that the specified authority provide written reasons for its decision
- (d) clear review rights for an applicant.

Recommendation 11

The Commission recommends that proposed ss 105A.7A(2), 105A.9A(5), 105A.9C(2) and 105A.12A(5) of the Criminal Code be amended to ensure that a Court hearing an application for the making or variation of an extended supervision order or interim supervision order, or conducting a review of an extended supervision order, is required to take into account the impact of the proposed conditions on the person's circumstances, including their financial and personal circumstances, for the purpose of determining whether the condition is reasonably necessary and reasonably appropriate and adapted.

Recommendation 12

The Commission recommends that proposed s 105A.18D of the Criminal Code, dealing with the power of the AFP Minister to direct an offender to be assessed by an expert chosen by the Minister, be removed from the Bill.

Recommendation 13

If Recommendation 12 is not accepted, the Commission recommends that:

- (a) proposed s 105A.18D of the Criminal Code be amended to confirm that the offender is not required to attend an assessment with an expert chosen by the AFP Minister; and
- (b) proposed s 105A.6B of the Criminal Code be amended to remove the requirement for the Court to take into account the level of the offender's participation in any assessment under s 105A.18D.

Recommendation 14

The Commission recommends that proposed s 105A.6(5A) of the Criminal Code, which would weaken the use immunity provided to individuals required to attend an assessment with a court appointed expert, be removed from the Bill.

Recommendation 15

The Commission recommends that if s 105A.18D of the Criminal Code, dealing with compulsory attendance at an assessment by an expert chosen by the AFP Minister, is retained in the Bill, then sub-section (5), dealing with the use immunity provided to individuals required to attend an assessment, be removed from the Bill and replaced with a use immunity in the same terms as the current s 105A.6(5A).

Recommendation 16

The Commission recommends that the Bill be amended to remove the ability of the AFP Minister to apply for a variation of an interim supervision order to add conditions prior to the hearing of an application for a continuing detention order or an extended supervision order.

Recommendation 17

The Commission recommends that the agency responsible for monitoring compliance with control orders and ESOs should be given discretion to allow them to respond appropriately to different kinds of breaches, including by warning the offender, or deciding not to take action, in relation to minor breaches.

Recommendation 18

The Commission recommends that the agency responsible for monitoring compliance with control orders and ESOs should publish a policy providing guidance as to how it will exercise the discretion referred to in Recommendation 17.

Recommendation 19

The Commission recommends that the offences of contravening a control order (s 104.27 of the Criminal Code), contravening an ESO (proposed s 105A.18A), and interfering with a monitoring device that a person is required to wear pursuant to

a control order or an ESO (proposed ss 104.27A and 105A.18B) be subject to a defence of reasonable excuse.

Recommendation 20

The Commission recommends that the maximum penalty for the offences of contravening a control order (s 104.27 of the Criminal Code), contravening an ESO (proposed s 105A.18A), and interfering with a monitoring device that a person is required to wear pursuant to a control order or an ESO (proposed ss 104.27A and 105A.18B) be three years imprisonment.

Recommendation 21

The Commission recommends that the PJCIS seek advice from the Attorney-General's Department about how to ensure, whether by amendment to the Bill or negotiation through COAG, that a person cannot be made subject to both the Commonwealth PSO regime and a State or Territory PSO regime in relation to the same underlying conduct.

Recommendation 22

The Commission recommends that ss 104.4(3) and 104.24(3) of the Criminal Code, which provide that the Court need not include in a control order an obligation, prohibition or restriction that was sought by the AFP if the Court is not satisfied that that it is necessary or proportionate, not be repealed.

Recommendation 23

The Commission recommends that the provisions in the Bill to amend the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2004* (Cth) to create a new class of warrants for post-sentence order applications be removed.

Recommendation 24

If Recommendation 23 is not accepted, the Commission recommends that the provisions proposed to be inserted into ss 46 and 46(A) of the *Telecommunications (Interception and Access) Act 1979* (Cth), dealing with warrants sought for post-sentence order applications, be amended to require the issuing authority to be satisfied that:

- (a) there are reasonable grounds to suspect that there is an unacceptable risk of the person committing a serious Part 5.3 offence (see proposed ss 46(7)(f) and 46A(2C)(f)); and
- (b) information that would be likely to be obtained would be likely to substantially assist in determining whether to apply for the post-sentence order (see proposed ss 46(7)(h) and 46A(2C)(h))

and that the issuing authority must have regard to:

- (c) whether intercepting communications under the warrant would be the method that is likely to have the least interference with any person's privacy (see proposed ss 46(8) and 46A(2D)).

Recommendation 25

If Recommendation 23 is not accepted, the Commission recommends that the provisions proposed to be inserted into ss 14 and 27A of the *Surveillance Devices Act 2004* (Cth), dealing with warrants sought for post-sentence order applications, be amended to require the law enforcement officer applying for the warrant to be satisfied that:

- (a) there are reasonable grounds to suspect that there is an unacceptable risk of the person committing a serious Part 5.3 offence (see proposed ss 14(3BA)(c) and 27A(5A)(c)); and
- (b) the use of a surveillance device or access to the data would be likely to substantially assist in determining whether to apply for the post-sentence order (see proposed ss 14(3BA)(e) and 27A(5A)(e))

and, in addition to the matters in subsection 16(2) or 27C(2), the issuing authority must have regard to:

- (c) whether the use of the surveillance device or access to the data in accordance with the warrant would be the means of obtaining the evidence or information sought to be obtained, that is likely to have the least interference with any person's privacy.

4 Background

4.1 Commonwealth regime

20. In 2016, the continuing detention order (CDO) regime was inserted into Div 105A of Part 5.3 of the Criminal Code by the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth). The CDO regime was made subject to a 10-year sunset provision from the date the Act received Royal Assent. Unless extended, it will expire on 7 December 2026.
21. At the time that the 2016 Bill was being considered by the PJCIS, the then Attorney-General wrote to the PJCIS and raised two issues in relation to the interaction between the proposed CDO regime and the existing control order regime: a jurisdictional issue and an operational issue.⁷
22. The jurisdictional issue involved the following propositions:
- continuing detention orders would only be able to be made by a Supreme Court of a State or Territory⁸
 - the Supreme Court would only be able to make an order if it was satisfied that there was no other less restrictive measure that would be effective in

preventing the unacceptable risk posed by the offender of committing a serious Part 5.3 offence if released into the community⁹

- one example of a less restrictive measure is a control order¹⁰
- control orders can only be made by the Federal Court or the Federal Circuit Court.¹¹

23. The key problem revealed by the jurisdictional issue is that the Court that is considering making a CDO does not also have the power to make a control order if it considers that a control order would be more appropriate in the circumstances. This means that a separate application would need to be made by the Australian Federal Police (AFP) for an interim control order.

24. The operational issue was said to involve the following propositions:

- the control order regime 'is premised on an assumption that the persons who may pose a terrorist risk are already in the community'
- therefore, it was 'unclear whether the legislation would support the AFP applying for a control order while a person is serving a sentence of imprisonment, with the conditions of the control order to apply on release'.¹²

25. In response to a recommendation from the PJCIS,¹³ the operational issue was clarified by repealing and replacing s 104.2(5) which now provides, for the avoidance of doubt, that an interim control order can be sought even if a person is detained in custody. In those cases, the interim control order commences when the person is released from custody.¹⁴

26. Since 2019, control orders have been sought in relation to nine people who had previously been convicted of terrorism offences. Details of these cases are set out in Annexure A to this submission. In six of these cases the AFP obtained an interim control order while the person was still serving a period of imprisonment for a terrorism offence.

27. In the other three cases, the application for an interim control order was made shortly before the release of the person from imprisonment, but without enough time for the Court to hear the proceeding prior to the release of the prisoner. In the cases of each of Mr Paul James Dacre, Mr Kadir Kaya and Mr Antonino Alfio Granata, the AFP waited until two days before they were due to be released from prison before making an application for an interim control order.¹⁵ Each of these offenders was free, apparently without any restrictions, for almost a week (in the case of Mr Dacre), almost three weeks (in the case of Mr Kadir Kaya) and three weeks (in the case of Mr Granata) before the interim control order proceeding could be heard. In each case, the interim control orders were made on the same day as the hearing.

28. In relation to the jurisdictional issue, the PJCIS recommended that 'the Government consider whether the existing control order regime could be further improved to most effectively operate alongside the proposed continuing

detention order regime'.¹⁶ This matter was also referred to the INSLM for consideration.

29. The third INSLM, Dr James Renwick CSC SC, recommended that there be a separate ESO regime to operate alongside the CDO regime. The INSLM made a number of specific recommendations about how the ESO regime should operate. In particular, he recommended that:
- State and Territory Supreme Courts be authorised to make an ESO as an alternative to a CDO on application by the relevant Minister
 - the conditions that may be imposed on a person pursuant to an ESO should be the same as the conditions that can currently be imposed on a person pursuant to a control order under s 104.5(3)
 - the threshold for making an ESO should be the same as the threshold for making a CDO, namely that the Court is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community
 - the Court should only make a CDO if satisfied that an ESO would not be effective in preventing the identified risk
 - the period of any ESO be up to three years at a time
 - the same controls and monitoring regime be available for an ESO as for control orders
 - the Government should consider making the special advocate regime currently available for use in relation to control orders also available for applications under Div 105A.¹⁷
30. The INSLM's recommendations were supported by the PJCIS during its 2018 review of counter-terrorism provisions.¹⁸ The Australian Government also agreed with the INSLM's recommendations in its response to the report of the PJCIS.¹⁹

4.2 State and Territory regimes

31. At the time the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) (HRTTO Bill) was introduced in 2016, there was a range of post-sentence preventative detention regimes in operation in Australia. New South Wales and South Australia had regimes that covered both sex offenders and violent offenders.²⁰ Queensland, Victoria, Western Australia and the Northern Territory had regimes that covered sex offenders only.²¹ Tasmania and the Australian Capital Territory did not have post-sentence preventative detention regimes, although in Tasmania the Supreme Court had the power to make a 'dangerous criminal declaration' which could result in indefinite detention.²²

32. Since 2016, there has been an expansion in State and Territory post-sentence detention regimes, including:
- the *Terrorism (High Risk Offenders) Act 2017* (NSW), which introduced a separate regime dealing with people convicted of: being a member of a terrorist organisation under s 310J of the *Crimes Act 1900* (NSW); a serious indictable offence committed in a ‘terrorism context’; or any indictable offence by a person who had engaged in certain ‘terrorism activity’ at any time
 - the insertion of s 5A into the *Criminal Law (High Risk Offenders) Act 2015* (SA) to include ‘terror suspects’ within the scope of the regime
 - the *Serious Offenders Act 2018* (Vic), which replaced the previous regime dealing only with sex offences, and now deals with people convicted of a serious sex offence or a serious violence offence
 - the *High Risk Serious Offenders Act 2020* (WA), which replaced the previous regime dealing only with sex offences, and now deals with people convicted of a serious sex offence or a serious violence offence
 - the exposure draft Sentencing Amendment (Dangerous Criminals and High Risk Offenders) Bill 2020 (Tas) which would have amended the existing regime for making a declaration that an offender is a ‘dangerous criminal’ (permitting post-sentence detention) and inserted a new regime for the making of High Risk Orders (which would have been in the nature of extended supervision orders). Following feedback on the exposure draft, the Tasmanian Government now proposes to introduce a new standalone Act rather than amending the *Sentencing Act 1997* (Tas).²³
33. The current position for post-sentence orders at the State and Territory level is as set out in the following table:

Jurisdiction	Offence types	CDO	ESO
New South Wales	Terrorism Violent offences Sex offences	Yes	Yes
South Australia	Terrorism Violent offences Sex offences	Yes	Yes
Victoria	Violent offences Sex offences	Yes	Yes

Jurisdiction	Offence types	CDO	ESO
Western Australia	Violent offences Sex offences	Yes	Yes
Queensland	Sex offences	Yes	Yes
Northern Territory	Sex offences	Yes	Yes
Tasmania	Violent offences Sex offences	Yes (declaration as part of sentencing)	Proposed
Australian Capital Territory	None	No	No

5 Relationship with control orders

34. The primary position of the Commission is that Div 104 of the Criminal Code, dealing with control orders, should be repealed and replaced with an ESO regime in the form recommended by the third INSLM.
35. Control orders permit particular kinds of obligations, prohibitions and restrictions to be imposed on a person, based on the person’s anticipated future involvement in terrorism activity. These orders can be sought in a range of situations. They can be sought:
 - (a) as an alternative to prosecution—for example, where a person cannot be arrested because there is no reasonable basis to suspect that they have been involved in a terrorist act, or where they have been arrested but the CDPP has advised that there is no reasonable prospect of conviction
 - (b) as a ‘second attempt’ following an unsuccessful prosecution—for example, where a person has been tried and acquitted
 - (c) once a terrorist offender has been released from prison, in circumstances where they still pose an unacceptable risk to the community.
36. The Commission provided detailed submissions to the PJCIS as part of its Review of AFP Powers about why the use of control orders in categories (a) and (b) could not be justified, particularly in light of the availability of more appropriate alternatives including surveillance, and arrest and prosecution for those reasonably suspected of having engaged in criminal conduct.²⁴ If there is insufficient evidence to ground a ‘reasonable suspicion’ of criminal conduct, including preparatory offences such as planning a terrorist act, then the significant restrictions involved in a control order cannot be considered to be a

proportionate response. If a person has been tried and acquitted of a criminal offence, then the use of control orders based on the same evidence but a lower standard of proof raises serious concerns from a rule of law perspective.

37. However, where a convicted terrorist offender can be demonstrated, through cogent and reliable evidence, to still pose an unacceptable risk to the community at the end of their sentence, then continuing controls, which are reasonable, proportionate and necessary to manage that risk, can be justified. In recent times, control orders have been used overwhelmingly in the post-conviction context. Since January 2019, 10 control orders have been made. In nine of those cases, the control order was sought in relation to a person who was being released into the community after serving a period of imprisonment for a terrorism offence. Prior to this group of control orders, no control orders had been sought at all for more than three years.
38. An ESO regime is a better way of dealing with people in category (c) above. This is because:
 - the regime is appropriately targeted to people who have a demonstrated history of having committed a terrorism offence and who have been shown to pose an unacceptable risk to the community
 - as a result, the degree to which the conditions imposed limit the human rights of the person subject to the regime would be more likely to be proportionate to the purpose for their imposition
 - it avoids problematic aspects of the control order regime, including *ex parte* applications for interim orders based on hearsay evidence, and long delays prior to confirmation hearings
 - instead, the evidence in support of an application could be properly tested in court proceedings when an order is first sought.
39. As described in paragraph 29 above, the third INSLM recommended that aspects of the current control order regime be built into the ESO regime. The Bill departs from these recommendations in material respects.
40. Taking both of the steps that the Commission considers necessary, namely repealing the control order regime and implementing the INSLM's recommendations in relation to ESOs, would require a substantial revision to the present Bill. As a result, the Commission recommends that the Bill not be passed in its current form.
41. If the Commission's primary recommendation is not accepted and control orders are retained, there should at least be a clear delineation between 'preventative' orders made under the control order regime, and post-sentence orders made under Div 105A. Control orders should not continue to be available as an alternative form of post-sentence order once the ESO regime has been introduced.

42. The desirability of such a split was recommended by the PJCIS as early as 2016. In its report on the HRTTO Bill, the PJCIS noted that control orders can currently be made for a range of different purposes. It went on to note:
- Given these differing purposes, an appropriate solution to the interoperability issue could be that, in the first instance, the application processes for the existing control order regime be retained for preventative cases. In addition, a separate application process could be introduced for post-sentence control orders that aligns more closely to the CDO regime. The Committee suggests that consideration be given to these options.²⁵
43. At the least, this would involve amending s 104.4(1)(c) of the Criminal Code to remove those grounds for making a control order that are based on *past* conduct involving a conviction, or conduct that could be the subject of a conviction, and leaving only those grounds that relate to the prevention of *future* terrorist acts.
44. If a person has engaged in conduct that could be the subject of a prosecution, they should be prosecuted rather than having a control order imposed. In substance, all of the conduct described in ss 104.4(1)(c)(ii), (iii) and (vii) could be the subject of a criminal prosecution.²⁶
45. If a person has been convicted of a terrorist offence but does not pose an unacceptable risk to the community on release, they should not be subject to a control order (see s 104.4(1)(c)(iv)).
46. If, as recommended by the PJCIS, control orders were limited to preventative purposes, each of the grounds for control orders other than ss 104.4(1)(c)(i) and (vi) could be repealed.
47. Under this alternative recommendation, the Commission maintains that the ESO regime should still be in the form recommended by the third INSLM.

Recommendation 1

The Commission recommends that the Bill not be passed in its current form.

Recommendation 2

The Commission recommends that the existing control order regime be repealed and replaced by an extended supervision order regime in the form recommended by the third INSLM.

Recommendation 3

If Recommendation 2 is not accepted, the Commission recommends that the existing the control order regime be amended to focus only on orders for preventative purposes, as recommended by the PJCIS in 2016, 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.

6 Structure of the extended supervision order regime

48. The Bill would introduce an ESO regime alongside the existing CDO regime. Both kinds of orders would be referred to as post-sentence orders (PSO).
49. The AFP Minister (currently the Minister for Home Affairs) would have the option of applying to the Supreme Court for either a CDO or an ESO.²⁷
50. If the Minister applied for a CDO, the Supreme Court would have the option of either:
- making a CDO, or
 - making an ESO:
 - if the threshold for making a CDO was not met, or
 - as a less-restrictive measure than a CDO that would be effective in preventing the unacceptable risk, or
 - dismissing the application.²⁸
51. The first step by the Court would be to ask whether it was ‘satisfied to a high degree of probability ... that the offender poses an unacceptable risk of committing a serious Part 5.3 offence’.²⁹
52. If the answer to that question was ‘no’, the Court could not make a CDO, but would then need to consider whether it was satisfied of such a risk to a lower degree of confidence (balance of probabilities), which would permit it to make an ESO.
53. If the answer to that first question was ‘yes’, the Court would then have to consider whether there was a less restrictive alternative, including the making of an ESO, that would be effective in preventing the unacceptable risk.
54. If, on either of these alternatives, the Court was called on to consider whether to make an ESO, it would be required to seek material from the Minister to assist it in determining whether to make an ESO. This material includes:
- a copy of the proposed conditions that would be sought for an ESO
 - an explanation as to why each condition should be imposed
 - a statement of any facts relating to why any of the conditions should not be imposed.³⁰
55. In assessing whether to make an ESO, the Court would consider whether it was ‘satisfied on the balance of probabilities ... that the offender poses an unacceptable risk of committing a serious Part 5.3 offence’.³¹ This is a lower threshold than required for making a CDO, and is contrary to the

recommendation of the third INSLM. This issue is discussed in more detail in section 7.2 below.

56. The Court would also consider whether it was satisfied, on the balance of probabilities, that each of the proposed conditions was reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from that unacceptable risk. This is substantially the same test that currently exists for control orders (subject to the assessment of the conditions against the different purposes of each regime).
57. In each kind of application, the onus is on the Minister to satisfy the Court to the relevant standard.
58. As with a CDO, an ESO may be in force for up to three years at a time and multiple ESOs may be granted in relation to the same offender.

7 Proposed amendments to the extended supervision order regime

59. As noted above, the Commission's primary recommendations would require substantial amendments to the Bill. The preferable course would be for the PJCIS to make recommendations in the nature of high-level drafting instructions and for the drafting process for this Bill to start again.
60. The discussion below engages with the detail of the current Bill and is in the alternative to the Commission's primary position.
61. It should be emphasised that the Bill departs in material respects from the model recommended by the third INSLM in 2017 and endorsed by the PJCIS and the Australian Government in 2018. In other words, it appears that the Government has changed its position since issuing its response to the third INSLM's 2017 report. Given that only two years have passed since the Government set out its position, at the very least it would be important to understand why that position appears to have changed in ways that lessen a number of human rights protections.
62. Key differences relate to:
 - The scope of the regime, in terms of who it applies to.
 - The 'balance of probabilities' standard for making an ESO.
 - The range of conditions that may be imposed under an ESO.
 - The lack of a requirement to consider the impact of an ESO on the circumstances of the person in respect of whom the ESO is made.
 - The addition of a new requirement that the offender participate in assessments with an expert chosen by the Minister, which duplicates the

existing requirement that the offender participate in an assessment with an independent expert chosen by the Court.

- The reduction of ‘use immunity’ for offenders in relation to the compulsory expert assessments.
 - Rules in relation to the variation of the ESO.
63. These differences, along with a discussion about the consequences of a breach of an ESO, are considered in more detail below.

7.1 Scope of post-sentence order regime

64. The Bill proposes to expand the scope of the PSO regime by amending s 105A.3 of the Criminal Code.
65. At present, a CDO can be made in relation to a person who:
- is serving a sentence of imprisonment for a terrorist offence;
 - was serving a sentence of imprisonment for a terrorist offence and is still in custody serving a sentence of imprisonment for another offence; or
 - is detained under a CDO.³²
66. The Bill would extend the scope of the regime to also allow a PSO to be made in relation to a person who is serving a sentence of imprisonment for:
- a breach of an ESO (provided that they were charged before the ESO expired, or within 6 months of the breach); or
 - a breach of a control order that was applied for while the person was in custody for a terrorist offence (provided that they were charged before the control order expired, or within 6 months of the breach).³³
67. The Bill would also extend the scope of the regime to allow an ESO to be made in relation to a person who:
- is subject to an ESO;
 - is serving a sentence of imprisonment for another offence and was taken into custody while subject to an ESO; or
 - had been convicted of a terrorism offence and is subject to a control order sought before being released (and before these amendments took effect).³⁴
68. In the case of the last criterion, this would permit an ESO to be made in relation to the eight people who are currently subject to control orders after being released from custody after serving a sentence of imprisonment for a terrorism offence, provided that the control order had not expired by the time the Bill is passed. These people are listed in rows 2 to 9 of Appendix A. Although in three cases the control order was not obtained until after the person was released

from detention, in each case the control order was sought while the person was still in detention.

69. In general terms, the proposed extension of the regime is relatively limited and still requires a temporal nexus and some degree of continuity with the commission of a relevant terrorism offence. It appears open to find that these amendments are directed towards the legitimate purpose of protecting the community from a serious Part 5.3 offence, and are proportionate to that purpose.
70. However, as the Commission has previously recommended, the scope of offences that bring a person within this regime in the first place should be narrowed to ensure that it only includes offences where the nature of the offence gives rise to an inference that there would be a high risk to community safety once a person is released after serving their term of imprisonment. The Commission reiterates Recommendation 9 in its recent submission to the PJCIS in its Review of AFP Powers that the offence in s 119.2 of the Criminal Code (entering, or remaining in, declared areas) be excluded from the definition of ‘terrorist offender’. The reasons for this are set out at [259]–[266] of that submission.³⁵

Recommendation 4

The Commission recommends that the offence in s 119.2 of the Criminal Code (entering, or remaining in, declared areas) be excluded from the definition of ‘terrorist offender’ in proposed s 105A.3(1)(a) of the Criminal Code, with the effect that a person convicted for such an offence is not liable for a post-sentence order.

7.2 Standard of proof

71. The Bill proposes a lower standard of proof to obtain an ESO than is currently required to obtain a CDO.
72. This issue was given detailed consideration by the third INSLM who recommended that the threshold for making an ESO should be the same as the threshold for making a CDO, namely, that the Court 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 Part 5.3 offence if the offender is released into the community’ without the order being made.³⁶
73. This recommendation by the INSLM was specifically supported by the Australian Government.³⁷
74. However, the Bill departs from this recommendation by proposing that an ESO could be made on the ordinary civil standard of ‘balance of probabilities’.³⁸
75. There is little explanation in the Explanatory Memorandum for why this standard of proof was chosen. The EM notes that a balance of probabilities standard applies in control order proceedings and that an ESO is a less restrictive measure

than a CDO.³⁹ However, the INSLM specifically considered, and rejected, the option of using the balance of probabilities standard of proof, as applies to control orders, in respect of ESOs, noting that the difference in standards and associated assessments 'is consistent with the differing nature of the risk that the respective regimes are designed to address'.⁴⁰

76. Ordinarily, a court will punish an individual, by ordering that they be detained or in some other way restricting their rights, only following proof that the individual committed a relevant offence on the basis of the exacting criminal standard—'beyond reasonable doubt'. The criminal standard of proof is difficult to satisfy, because in our liberal democratic system the prospect of an innocent person being wrongly punished is rightly viewed with revulsion. The criminal standard of proof offers an important protection against wrongful conviction and punishment.
77. Where detention or other restrictions are imposed on a person for reasons other than punishment following conviction for an offence, then a lower standard of proof typically applies. However, whether imposed as punishment for commission of an offence or for another reason, the effects of detention and other such restrictions are severe, and so it remains vital that such restrictions are not imposed wrongly. Lowering the standard of proof increases the risk of error; the more the standard is lowered, the greater that risk.
78. It is important that a court be very confident in the correctness of any decision to impose a PSO on an offender at the end of their criminal sentence. While there may be pragmatic reasons to support a lower standard of proof than beyond reasonable doubt, the standard chosen for a PSO should reflect the seriousness of the decision making and the consequences of error. This is true regardless of whether a PSO leads to the individual being detained or to the imposition of conditions on what the individual may do in the community.
79. In every other jurisdiction in Australia, with the exception of South Australia, there is a consistent standard of proof for the making of PSOs regardless of whether the PSO will lead to detention or some other restriction.⁴¹ All of those jurisdictions require satisfaction to a 'high degree of probability' and apply this standard to the making of both CDOs and ESOs. (South Australia has a unique regime where a person can only be subject to a CDO if they breach a term of an ESO while in the community, and they may only be detained for the remainder of the period of the ESO.)⁴²
80. The Commission considers that the standard of proof proposed in the Bill does not give sufficient weight to the significant restrictions on liberty imposed by the ESO regime. This is a quasi-criminal regime that, as presently drafted, can impose restrictions on all areas of a person's life, based on an assessment of their risk of engaging in future criminal activity. Those restrictions may be imposed for up to three years at a time. It is appropriate that a standard higher than the usual civil standard be applied for the imposition of such extensive restrictions. The Commission recommends that the same standard apply as for a CDO, namely,

satisfaction to a ‘high degree of probability’. This standard remains lower than the criminal standard (beyond reasonable doubt), and so is less difficult to satisfy than would ordinarily be the case in criminal proceedings that could result in an individual being detained or otherwise subject to punishment. As noted above, the high degree of probability standard is the standard used in every comparable regime in Australia.

81. Once that standard is met for the application of the regime to a particular offender, the Commission agrees that the imposition of particular conditions should be subject to the proposed balance of probabilities test. That is, the Court should be satisfied on the balance of probabilities that each of the conditions to be imposed on the offender by the order is reasonably necessary, and reasonably appropriate and adapted (or proportionate), for the purpose of protecting the community from that unacceptable risk.⁴³
82. This change would have some impact on the making of an ISO. The relevant threshold for making an ISO is that the Court is satisfied that there are reasonable grounds for considering that an ESO will be made in relation to the offender.⁴⁴ If the standard of proof for making an ESO is amended as recommended by the Commission, then a Court considering whether to make an ISO would need to be satisfied that there were reasonable grounds for considering that an ESO based on that higher standard would be made.

Recommendation 5

The Commission recommends that the threshold for making an extended supervision order in proposed s 105A.7A(1)(b) of the Criminal Code be amended to require that the Court 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 Part 5.3 offence’.

7.3 Conditions of an extended supervision order

83. The third INSLM recommended that if an ESO regime were incorporated into Div 105A, ‘the conditions to which such an order may be subject should be the same as the terms of s 104.5(3)’.⁴⁵ In making that recommendation, the INSLM had regard to the kinds of conditions that could be imposed on a person under State and Territory legislation dealing with post-sentence regimes for high-risk or serious sex offenders.
84. This recommendation was specifically supported by the Australian Government.⁴⁶
85. However, the kinds of conditions that may be imposed under the proposed ESO regime are not limited to the conditions that may be imposed under the control order regime. Instead, any kind of condition may be imposed under the ESO regime, provided the court making the order is satisfied, on the balance of probabilities, that the condition is reasonably necessary, and reasonably

appropriate and adapted, for the purpose of protecting the community from the unacceptable risk of the offender committing a serious Part 5.3 offence.⁴⁷

86. Two non-exhaustive lists of possible conditions, significantly more extensive than the conditions that may be imposed in relation to a control order, are included in the Bill.⁴⁸
87. Some of these conditions are broadly equivalent to conditions that may be imposed under a control order. In relation to the first list in s 105A.7B(3), these are conditions in paragraphs (a)(i) and (ii), (b), (c), (d), (h)(i) and (ii), (i), (j), (k) and (l). In relation to the second list in s 105A.7B(5), these are the conditions in paragraphs (b), (c), (d) and (f)(i).
88. Other conditions extend significantly beyond the conditions that may be imposed under a control order.

(a) General comments

89. As noted above, the two lists are not exhaustive. The Explanatory Memorandum makes clear that the lists merely contain 'examples' of conditions that could be imposed and that, in practice, an ESO 'may include a very broad range of conditions directed at all aspects of an offender's life'.⁴⁹
90. The fact that the range of possible conditions is 'at large' provides a risk that over time they may become more onerous. Without some legislative limit on these kinds of orders, it will be left to courts to determine the appropriate upper threshold of what are, in essence, civil obligations.
91. The Commission's Recommendations 5 and 6 in its submission to the Review of AFP Powers inquiry by the PJCIS were directed to amending the nature of the conditions that may be imposed under either control orders or ESOs to ensure that there are proper limits on their scope.
92. It is not a sufficient safeguard that a Court must find that the particular requirements to be imposed must be reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from an unacceptable risk.⁵⁰ The fact that particular examples of conditions are set out in ss 105A.7B(3) and (5) indicates strongly to the Court that the Legislature considers the specified conditions to be ones that may reasonably be imposed. In this sense, the legislation seeks to establish norms and delineate a range of conduct that is deemed to be acceptable and to which a Court would need to have regard when determining the conditions to impose in a particular case. As discussed in more detail below, there are real concerns about some of these new specified conditions.

(b) Discretions granted to a 'specified authority'

93. Many of the new suggested conditions in the Bill would permit a Court to give power to a 'specified authority' to do certain things. For example, conditions may be imposed that allow a 'specified authority' to:
- determine an area or place where the offender may not be present
 - grant or withhold permission to the offender to move residence
 - take possession of the offender's passport
 - grant or withhold permission to the offender to engage in training or education
 - direct the offender to attend and participate in treatment, rehabilitation or intervention programs or activities
 - direct the offender to undertake psychological or psychiatric assessment or counselling
 - direct the offender to attend and participate in interviews and assessments
 - test the offender in relation to the possession or use of specified articles or substances
 - photograph the offender
 - take impressions of the offender's fingerprints.⁵¹
94. A condition may also be made that the offender comply with any other reasonable direction given by a 'specified authority'. Proposed amendments to the control order regime would also provide greater scope for a 'specified authority' to exercise powers in relation to electronic monitoring.⁵²
95. The definition of the new term 'specified authority' is drafted inclusively and could be a police officer, but could equally be 'any other person or class of person'.⁵³ It need not be an 'authority' at all, in the way that word is usually understood. There is a requirement that the Court be satisfied that the person 'is appropriate in relation to the requirement or condition'. However, in practice, it could be any person in Australia.
96. If a condition is imposed in the terms of proposed s 105A.7B(3)(r), which allows a 'specified authority' to give other binding directions to a person, there are few limits on the kind of directions that the 'specified authority' could give. The directions must be:
- 'reasonable'
 - in relation to another condition (which are not limited in type),
- and the person giving the direction must be satisfied that the direction is reasonable in all the circumstances to give effect either to the condition or to the objects of the Division.

97. It is a criminal offence, punishable by up to five years imprisonment, to contravene a condition of an ESO, including a condition that is dependent on a power exercised by a 'specified authority'.
98. The Commission considers that the definition of 'specified authority' is too broad. It should not be an available option to nominate any person in Australia, who may give onerous directions to a person the subject of an ESO, with criminal consequences if the person fails to comply with them. The definition should be much more closely targeted so that it is properly limited to police and public authorities responsible for corrections.

Recommendation 6

The Commission recommends that the proposed definition of 'specified authority' in s 100.1(1) of the Criminal Code be limited to police officers and public authorities responsible for corrections.

99. The potential for a broad and indeterminate range of directions to be given by a 'specified authority' (ie, any nominated person) adds a significant level of uncertainty to the scope of a person's obligations that cannot be determined merely from reading the terms of the ESO (or control order) itself. This increases the risk that a person may inadvertently breach an ESO (by doing an act that is contrary to a direction by a specified authority, which may be a direction received over the phone, but not otherwise prohibited by the particular terms of the ESO). Breach of such a direction would expose the person to criminal sanctions.
100. It may well be necessary for authorities to have some increased flexibility to give directions to people subject to an ESO (or control order) to ensure that electronic monitoring devices are working appropriately. However, the increased uncertainty about the scope of ESOs that this creates, reinforces the importance of ensuring that any sanctions imposed for breach of an ESO can be appropriately tailored to the circumstances. This issue is considered in more detail in section 7.8 below.

(c) Compulsory engagement in de-radicalisation programs and other activities

101. Some of the new specified conditions permit people to be forced to participate in various kinds of programs against their will, in a way that at least one member of this Committee identified may be counterproductive.
102. Under the existing control order regime, one of the conditions that may be imposed is a requirement that the person participate in specified counselling or education.⁵⁴ However, this obligation is expressly limited to situations of voluntary participation. A person can only be required to participate in counselling or education, if they agree to participate at the time of the counselling or education.⁵⁵ The way in which such conditions have been imposed in practice is to require the person to 'consider in good faith participating in counselling or education' relating to particular matters.⁵⁶

103. Evaluations of programs aimed at countering violent extremism have identified a number of essential elements: religious rehabilitation, education and vocational training, psychological rehabilitation, social and economic support, family rehabilitation and post-release support to assist in reintegration.⁵⁷
104. During the last hearing of the PJCIS in relation to its Review of AFP Powers, the First Assistant Secretary, Integrity and Security, Attorney-General's Department, agreed with a proposition made by Senator Abetz that trying to force a person to be de-radicalised would be counterproductive, saying:
- Yes, that's essentially the reasoning as to why that hasn't been the case in the past. For somebody who is not willing to participate, there's little benefit in compelling that person to do so.⁵⁸
105. The Department of Home Affairs said in response to questions on notice that it was not aware of any State or Territory legislation that mandates participation in such programs while offenders are in prison.⁵⁹ For example, the Proactive Integrated Support Model (PRISM) is a program aimed both at prison inmates and those on parole in New South Wales who have a terrorist conviction or who have been identified as at risk of radicalisation. PRISM has been delivered by Corrective Services NSW since 2016 and operates on a voluntary basis.⁶⁰
106. The approach taken by the States and Territories is consistent with research in this area which finds that:
- in order for individuals to be disengaged, they must first be willing to hear alternate ideas and accept the support on offer. Forced participation is unlikely to achieve either the desired results or positive outcomes and, in many cases, may harden the radical views of those forced to participate.⁶¹
107. The Bill would depart from that principle by permitting conditions to be imposed on an ESO that would force a person to:
- attend and participate in treatment, rehabilitative or intervention programs or activities
 - undertake psychological or psychiatric assessment or counselling
 - participate in interviews and assessments
 - allow the results of interviews and assessments to be disclosed to a 'specified authority'
 - provide specified information to a 'specified authority'.⁶²
108. None of these conditions is subject to the existing, appropriate safeguard in the control order regime that they be voluntary.
109. Whether a person is prepared to voluntarily engage in particular programs or activities may be a factor that the Court properly takes into account in determining whether an ESO would be effective in preventing an unacceptable risk to the community. However, the Commission considers that there is little

value in compelling participation in circumstances where it is not voluntary, and that this in fact is likely to be counterproductive.

Recommendation 7

The Commission recommends that any condition imposed by an extended supervision order or interim supervision order that requires a person to participate in treatment, rehabilitative or intervention programs or activities, psychological or psychiatric assessment or counselling, interviews or other assessments, be subject to a further condition that a person is only required to participate if they agree, at the time of the relevant activity, to so participate.

(d) Home detention

110. It appears that, unlike the case with control orders, an ESO would permit conditions authorising home detention.
111. One of the example conditions that may be imposed pursuant to an ESO is a condition:
 - that the offender remain at specified premises between specified times each day, or on specified days, but for no more than 12 hours within any 24 hours⁶³
112. This condition is in the same form as one of the existing conditions in relation to control orders.⁶⁴ However, the fact that it is only an *example* means that the limitation that any curfew imposed be no longer than 12 hours would appear to have no effect. The limitation is also only an example. There appears to be nothing preventing a court from imposing a curfew for longer than 12 hours per day, including a curfew that lasted 24 hours per day. Nor are there limits on the number of consecutive days of home detention that could be imposed.
113. It appears that one of the fundamental safeguards of the control order regime protecting against home detention would be taken away.
114. In some cases, where an Act contains both a specific power to do something and a more general power which could also extend to the same thing, the Act is interpreted in a way that does not permit the thing to be done otherwise than in accordance with the more specific power.⁶⁵ That is, an affirmative grant of power necessarily implies a negative—a prohibition on doing the thing in another way. However, it is far from clear that the principle would apply in this case. One reason for that is that the power to impose conditions by an ESO is expressed in broad terms, and the curfew condition is explicitly framed as merely an example of one condition that could be imposed. Further, there is no suggestion in the Explanatory Memorandum that this example represents an outer limit of the curfew power.⁶⁶
115. The Commission has previously expressed concerns about the breadth of the current curfew power in relation to control orders in its submission to the PJCS Review of AFP Powers. In particular, the Commission reiterated a concern of the second INSLM, the Hon Roger Gyles AO QC, that ‘a 12 hour daytime curfew plus

residence at home overnight would be close to home detention'. The Government Response to the second INSLM's report appeared to accept that creating *de facto* home detention through the control order regime would be inappropriate. The Commission recommended that s 104.5(3) of the Criminal Code be amended to expressly prohibit long curfew periods during daylight hours as part of a control order.⁶⁷

116. The same concerns arise even more starkly in relation to the proposed ESO regime. The conditions should be expressly limited to prevent home detention.

Recommendation 8

The Commission recommends that the Bill be amended to prevent the imposition of a condition in an extended supervision order or an interim supervision order that would permit or amount to home detention.

(e) Electronic monitoring

117. The Bill would add new obligations that can be imposed under a control order in relation to electronic monitoring and extend these new obligations to the ESO regime. These obligations expand on the existing obligation in the control order regime to wear a tracking device.⁶⁸ They include requirements that the person:
- comply with directions given by a 'specified authority' in relation to electronic monitoring⁶⁹
 - carry a specified mobile phone at all times, be available to answer any call from a 'specified authority' (or return a call that they were unable to answer) and comply with directions in relation to these obligations.⁷⁰
118. A 'specified authority' includes, but is not limited to, any public or private entity contracted by the AFP to perform functions relating to electronic monitoring of persons.⁷¹ As noted above, a 'specified authority' could also be any person in Australia.
119. As with the more general conditions in relation to ESOs, there are few limits on the directions that a 'specified authority' could give when it comes to electronic monitoring. In the case of conditions imposed pursuant to a control order that permit the giving of directions, the directions must be 'in relation to' electronic monitoring and the person giving the direction must be satisfied that the direction is reasonable in all the circumstances to give effect to the requirements of the paragraphs dealing with electronic monitoring, or the objects of Div 104.⁷²
120. The Commission reiterates Recommendation 6 above that the definition of a 'specified authority' should be more tightly circumscribed.

(f) Entering the home of a person subject to an order

121. The control order regime already contains extensive provisions in relation to monitoring and enforcement.⁷³ These provisions are substantially replicated in relation to ESOs (see section 10 below). However, the Bill also indicates that appropriate conditions to be imposed on an ESO could include *requiring* the offender to consent to a range of things including entry into their home.
122. In particular, the Bill would permit conditions *requiring* a person to consent to:
- visits at specified premises (including their own home) from a ‘specified authority’ at any time for the purpose of ensuring compliance with a curfew condition
 - entry to specified premises (including their own home) by a ‘specified authority’ at any time for the purposes of ensuring compliance with a curfew condition
 - entry to the person’s home by a ‘specified authority’ at any reasonable time for any purpose relating to electronic monitoring (this provision applies to both control orders and ESOs)⁷⁴
 - providing a ‘specified authority’ with a schedule setting out their proposed movements, and complying with that schedule (noting that any deviation from the schedule would be a criminal offence, subject to penalties of imprisonment)
 - entry to specified premises (including their own home) by a police officer for the purposes of:
 - searching the person
 - searching the person’s residence
 - searching any other premises under the person’s control
 - seizing any item found during those searches (whether or not connected to any offence) including to allow the item to be examined forensically
 - providing a police officer with passwords and access to:
 - electronic equipment or technology owned or controlled by the person
 - any data held on, or accessible from, such equipment or technologyand allowing the equipment or data to be seized.
123. The Bill would also authorise a police officer to use reasonable force to enter a person’s home to install, repair, fit or remove an electronic monitoring device if the person did not give consent to that action.⁷⁵

124. The Commission's view is that these proposed conditions should be removed from the Bill because they unnecessarily restrict human rights. If a police officer monitoring compliance with an ESO wants to search the person, enter their premises, or carry out some task in relation to an electronic monitoring device, they can do so either:
- with the *actual* consent of the person; or
 - pursuant to a warrant where the proposed conduct must be justified before an independent decision maker.
125. As the Bill's Statement of Compatibility with Human Rights observes, the warrant regime ensures that where entry is on the basis of consent 'entry and search are only authorised if consent is informed and voluntary, limiting the impact on privacy'.⁷⁶ The proposed conditions would undermine these protections.
126. Warrantless entry to premises clearly engages the right to privacy. This right is also recognised at common law. Every unauthorised entry onto private premises, whether by police officers or anyone else, amounts to a trespass.⁷⁷
127. In the absence of permission from the lawful owner or occupier, a police officer may normally only enter private premises pursuant to a warrant. Legislation provides for warrants to be issued by justices or magistrates and to be subject to conditions, in order to 'balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his privacy and property'.⁷⁸
128. The proposed conditions in the Bill effectively circumvent the already extensive warrant provisions and the requirement for judicial oversight of these intrusive powers on a case-by-case basis.

Recommendation 9

The Commission recommends that the conditions requiring a person to consent to certain monitoring and enforcement activity in proposed ss 104.5A(1)(c)(i), (2)(a) and (5); 105A.7B(5)(g)–(j); and 105A.7E(1)(c)(i), (2)(a) and (5) of the Criminal Code be removed from the Bill on the basis that they are not necessary, given the existing and proposed new monitoring warrants.

(g) Exemptions

129. The Bill provides that the Court making an ESO may specify certain conditions of the ESO to be 'exemption conditions'.⁷⁹ Such conditions would permit an offender to apply to a 'specified authority' for a temporary exemption. The 'specified authority' would then have a discretion about whether to grant or refuse the exemption.
130. One example of where an exemption could apply is if a person subject to an ESO had been asked by their employer to work a night shift that conflicted with a curfew requirement under the ESO.⁸⁰ If the curfew condition was specified to be

- an 'exemption condition', then the person could seek permission for an exemption from that condition so that they could work the night shift.
131. The Commission supports the ability for conditions to be made subject to temporary exemptions. However, as discussed in section 7.8 below, dealing with penalties, further amendments to the ESO and control order regime are required to enhance flexibility and ensure proportionality in the application and enforcement of the regime.
132. In relation to exemption conditions, further detail is also required. For example, the proposed section would appear to grant an unconstrained discretion on a 'specified authority' to either grant or refuse an exemption application. However, there is no detail about how the 'specified authority' is to make its decision, what factors it should take into account, when the decision should be made, whether reasons should be provided and how the applicant could seek review of any adverse decision.
133. It is not enough for an unfettered discretion to be provided to a 'specified authority'. There needs to be a framework for decision making that ensures that any decision about whether or not to grant an exemption application is fair.

Recommendation 10

The Commission recommends that the Bill be amended to set out the parameters for decision making by a specified authority in relation to an application for an exemption under s 105A.7C of the Criminal Code. This should include:

- (a) the considerations that the specified authority must take into account in making its decision
- (b) the timeframe for a decision by the specified authority
- (c) a requirement that the specified authority provide written reasons for its decision
- (d) clear review rights for an applicant.

7.4 Consideration of personal circumstances

134. The ESO regime proposed in the Bill does not require the Court to take into account the impact of proposed conditions on the circumstances of the offender. By contrast, in control order proceedings, this is a mandatory consideration. It is an important protection against disproportionate decision making.
135. When a Court is considering making or confirming an interim control order, it must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order are reasonably necessary, and reasonably appropriate and adapted, for the purpose of achieving the objects of Div 104.⁸¹ In carrying out this assessment, the Court must take into account the impact of the obligation, prohibition or restriction on

the person's circumstances, including the person's financial and personal circumstances.⁸²

136. This requirement has been part of the control order regime since it was first introduced in 2005. The rationale given by the Australian Government for including this provision at the time was:
- to ensure an obligation that would, for example, have an adverse impact on the ability of person to earn a living and support his or her family must be taken into account before the obligation, prohibition or restriction is imposed.⁸³
137. There is no such protection in the Bill in relation to imposing conditions in an ESO. The Explanatory Memorandum recognises that the protection has been omitted, but does not provide a convincing justification.⁸⁴
138. While a Court generally has a discretion to take into account matters that it considers relevant when making decisions, it is striking that this is not a mandatory consideration, particularly given the existing control order model. The Commission submits that this missing protection should be inserted into the provisions dealing with:
- making an ESO
 - making an ISO
 - varying an ESO or ISO
 - varying an ESO after review.

Recommendation 11

The Commission recommends that proposed ss 105A.7A(2), 105A.9A(5), 105A.9C(2) and 105A.12A(5) of the Criminal Code be amended to ensure that a Court hearing an application for the making or variation of an extended supervision order or interim supervision order, or conducting a review of an extended supervision order, is required to take into account the impact of the proposed conditions on the person's circumstances, including their financial and personal circumstances, for the purpose of determining whether the condition is reasonably necessary and reasonably appropriate and adapted.

7.5 Duplication of mandatory expert assessment requirement

139. Currently, the Supreme Court can appoint an independent expert to conduct an assessment of the offender's risk of committing a Part 5.3 offence and provide a report of that assessment to the Court.⁸⁵ The offender is required to attend the assessment.⁸⁶ The offender is not required to participate in the assessment, but the Court must have regard to the offender's level of participation (including a refusal to participate) in deciding whether it is satisfied that the offender poses an unacceptable risk of committing a serious Part 5.3 offence.⁸⁷

140. While the Minister and the offender can nominate an expert to carry out this task, ultimately the decision on which expert (or experts) to appoint is one for the Court.
141. The fact that the Court selects the person it considers to be the most appropriate expert does not preclude either the Minister or the offender from calling expert evidence from an expert of their choosing at the hearing.⁸⁸
142. The Bill would duplicate the existing mandatory expert assessment requirement by giving the Minister the power to direct the offender to also attend assessments with an expert nominated by the Minister.⁸⁹ The mandatory assessments by the Minister's expert could take place before any application for a PSO is made or while a PSO is in force.⁹⁰ There is no limit to the number of sessions the offender may be required to attend with the Minister's expert.⁹¹ The decision by the Minister to direct an offender to attend an assessment with the Minister's expert would not be subject to merits review, or judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).⁹²
143. Significantly, in deciding whether to make a PSO, the Court *must* have regard to the report from the Minister's expert, and the level of the offender's participation in the assessments by the Minister's expert, in the same way as that of the independent expert chosen by the Court.⁹³ This means that if an offender refuses to participate in assessments by the Minister's expert, this fact can be later held against them.
144. The Commission considers that this additional provision is not warranted and has a significant adverse impact on the fairness of PSO proceedings. It is inconsistent with the general requirement that the onus is on the AFP Minister to prove that the person poses an unacceptable risk to the community.⁹⁴
145. It is a fundamental principle of criminal law proceedings, also reflected in the *Evidence Act 1995* (Cth), that a defendant is not competent, and cannot be compelled, to give evidence as a witness for the prosecution.⁹⁵ This is a protection that cannot be waived.⁹⁶ It is a protection recognised in international law, including in article 14(3)(g) of the ICCPR. While the offender here has the right not to participate in the assessment by the Minister's expert, the offender must attend any assessments and failure to participate must be taken into account by the Court hearing the PSO proceeding.
146. The Bill's Statement of Compatibility with Human Rights asserts that article 14(3) of the ICCPR is not applicable because PSO proceedings are civil and not criminal.⁹⁷ Further, it asserts that the fact that the Court must take into account the offender's level of participation 'does not create a de facto obligation to participate'.⁹⁸
147. These justifications are insufficient. The human rights restrictions that may be imposed via a PSO are extensive, and include detention. That those restrictions are imposed pre-emptively, as distinct from the more conventional situation whereby they are imposed as punishment for the commission of a criminal

offence, does not lessen their impact on the individual concerned. The Commission reiterates its view that these proceedings have a quasi-criminal character because the decision making turns on the risk of a person committing a criminal offence in the future, and the outcomes for a respondent include orders such as detention and restrictions on liberty that are commonly made by criminal courts.

148. Moreover, the Court must take into account a failure to participate in an assessment. The only reason for including such a provision is so that negative inferences could be drawn against a respondent as a result. Given the nature of these proceedings, the Commission considers that the proposed obligations on an offender in relation to the Minister's expert are contrary to longstanding common law and human rights principles designed to ensure that proceedings are conducted fairly.

Recommendation 12

The Commission recommends that proposed s 105A.18D of the Criminal Code, dealing with the power of the AFP Minister to direct an offender to be assessed by an expert chosen by the Minister, be removed from the Bill.

Recommendation 13

If Recommendation 12 is not accepted, the Commission recommends that:

- (a) proposed s 105A.18D of the Criminal Code be amended to confirm that the offender is not required to attend an assessment with an expert chosen by the AFP Minister; and
- (b) proposed s 105A.6B of the Criminal Code be amended to remove the requirement for the Court to take into account the level of the offender's participation in any assessment under s 105A.18D.

7.6 Use immunity in relation to compulsory assessment by an expert

149. As described in the preceding section, an offender can be required to attend an assessment by an independent expert appointed by the Court for the purpose of assessing the offender's risk of committing a Part 5.3 offence. One important safeguard built into this compulsory system is that the offender is not required to participate in the assessment.
150. A second safeguard is that neither:
- the answer to a question or information given at the assessment; nor
 - the fact of answering a question or giving information at the assessment
- is admissible in evidence against the offender in civil or criminal proceedings.⁹⁹
151. The second safeguard is described as a 'use immunity' in relation to answers and participation. The Commission considers that such a use immunity is appropriate

because it recognises the infringement on a person's liberty by requiring them to attend an assessment with an expert.

152. There is also a practical benefit to the provision, in that it provides an incentive for an offender to actively participate in the assessment and thus provide the best possible basis for the Court to make an assessment about whether a CDO should be made. As the Australian Government identified when the provision was first enacted:

In order to avoid the terrorist offender having to decide between participating in the assessment but potentially disclosing self-incriminating information, and not participating in the assessment at all, subsection 105A.6(5A) guarantees that the terrorist offender will be protected from self-incrimination.¹⁰⁰

153. The Bill would weaken the use immunity by allowing the information to be used:

- in civil proceedings for a control order
- in sentencing for any offence against a provision in Divs 104 or 105A.¹⁰¹

154. To permit this material to be used in a control order proceeding is to allow it to be used in a proceeding for which the expert report was not prepared. A Court in a control order proceeding is not required to assess whether the respondent poses an unacceptable risk to the community. This is one of the reasons why the Commission says that the control order regime should be repealed when an appropriate ESO regime is enacted. However, if the current control order regime is permitted to operate alongside an ESO regime, the Commission considers that the use immunity over material related to the compulsory expert assessment in Div 105A should continue to extend to control order proceedings.

155. In terms of criminal proceedings, the amendment would weaken the current protection for individuals by allowing the answers given to an expert in a compulsory assessment, or the fact of a person's participation (or non-participation) in a compulsory assessment, to be used in sentencing for unrelated criminal conduct, namely, the offences of:

- using fingerprints or photographs of a person subject to a control order for a purpose other than ensuring compliance with the control order (this appears to be focused on conduct by a person other than the person subject to the control order)¹⁰²
- contravening a control order (noting that the compulsory assessment under Div 105A is not undertaken for the purpose of determining whether a control order should be granted)¹⁰³
- interference with, or disruption or loss of, a function of a tracking device required to be worn by any person subject to a control order (this includes offences committed by the person wearing the tracking device or by another person)¹⁰⁴

- using fingerprints or photographs of a person subject to an ESO for a purpose other than ensuring compliance with the ESO (this appears to be focused on conduct by a ‘specified person’ rather than the person subject to the ESO)¹⁰⁵
 - contravening an ESO (noting that the compulsory assessment would precede any breach of the ESO and may have nothing to do with the circumstances of the breach)¹⁰⁶
 - contravening a direction given by a ‘specified authority’ under proposed s 105A.7C (again, noting that the compulsory assessment would precede any breach of the ESO and may have nothing to do with the circumstances of the breach)¹⁰⁷
 - interference with, or disruption or loss of, a function of a tracking device required to be worn by any person subject to an ESO (this includes offences committed by the person wearing the tracking device or by another person).¹⁰⁸
156. The current protection in s 105A.6(5A) was listed by the Australian Government as one of the ‘important safeguards’ in its Statement of Compatibility with Human Rights when the CDO regime was first introduced.¹⁰⁹ The Commission is concerned that this important protection for individual rights is now being eroded once the regime is in place and before it has been used.
157. The appropriate use of the report by the court appointed expert is solely for the purpose of the Court considering whether to make a CDO or an ESO. This use is sufficiently covered by proposed s 105A.6(9) which provides, for the avoidance of doubt:
- An assessment of an offender conducted under paragraph (4)(a), and the report of the assessment, may be taken into account in proceedings to make or vary any post-sentence order or interim post-sentence order, or to review any post-sentence order, in relation to the offender.

Recommendation 14

The Commission recommends that proposed s 105A.6(5A) of the Criminal Code, which would weaken the use immunity provided to individuals required to attend an assessment with a court appointed expert, be removed from the Bill.

158. The same issues arise in relation to the proposed mandatory assessments by an expert chosen by the Minister, discussed in the previous section. A similarly weakened use immunity is contained in proposed s 105A.18D(5). For the reasons set out above, the Commission submits that if this parallel mandatory assessment provision is retained, it should be subject to a use immunity in the same terms as is currently contained in the Criminal Code.

Recommendation 15

The Commission recommends that if s 105A.18D of the Criminal Code, dealing with compulsory attendance at an assessment by an expert chosen by the AFP

Minister, is retained in the Bill, then sub-section (5), dealing with the use immunity provided to individuals required to attend an assessment, be removed from the Bill and replaced with a use immunity in the same terms as the current s 105A.6(5A).

7.7 Variation of interim supervision orders

159. Under the control order regime, once an interim control order is made, it can be varied by the Court before the confirmation hearing if there is consent between the AFP and the person subject to the control order.¹¹⁰ However, it cannot be varied to *add* any obligations, prohibitions or restrictions.¹¹¹ This provision for variations followed recommendations of both the third INSLM in 2017 and the PJCIS in 2018. 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.¹¹²
160. Similarly, at a confirmation hearing, the Court may confirm and vary the order by removing one or more conditions, but it may not add new conditions.¹¹³ Once a confirmed control order is in force, the AFP Minister may apply to the Court to vary the order, including by adding conditions.¹¹⁴ In those circumstances, the new conditions must be justified on the same basis as the original conditions.
161. No changes are proposed in the Bill to these aspects of the control order regime. However, a different approach is proposed in relation to ESOs and ISOs.
162. The Bill makes provision for a Court to make an ISO if it is satisfied that:
- an offender will be released from custody or no longer subject to a relevant order before the application for a CDO or ESO can be determined, and
 - there are reasonable grounds for considering that an ESO will be made in relation to the person.¹¹⁵
163. Unlike the case for interim control orders, the AFP Minister may apply to the Court to vary an ISO without the consent of the person who is the subject of the order, and it may be varied to *add* conditions to the ISO before the Court hears the application for a CDO or ESO.¹¹⁶
164. As with many of the other provisions of this Bill, this reduces the protections for a person subject to an ESO when compared with the existing control order regime.

Recommendation 16

The Commission recommends that the Bill be amended to remove the ability of the AFP Minister to apply for a variation of an interim supervision order to add conditions prior to the hearing of an application for a continuing detention order or an extended supervision order.

7.8 Penalties

165. The Bill proposes to introduce an offence of contravening an ESO, and an offence of interfering with a monitoring device that a person is required to wear pursuant to an ESO.¹¹⁷ The maximum penalty for each offence is imprisonment for five years. The offences are substantially the same as the current offences in relation to control orders.¹¹⁸
166. The Commission is concerned that the structure of these offences, the penalties available, and the way in which breaches have been enforced in practice are more severe than those relating to offences for breach of parole conditions. It is important to make amendments to these provisions in order to prevent disproportionate outcomes.
167. Two people have been prosecuted for a breach of a control order: Mr MO and Mr Ahmad Saiyer Naizmand. A third person, Ms Alo-Bridget Namoa, was arrested and charged in July 2020 for contravening a control order and has been remanded in custody.¹¹⁹ The cases of Mr MO and Mr Naizmand were described in case studies 2 and 3 in the Commission's recent submission to the PJCIS Review of AFP Powers.¹²⁰ In summary:
- Mr MO was prosecuted for using a public telephone on two occasions, and using an unapproved mobile phone on one occasion, contrary to the requirements of the control order made in relation to him. It was common ground that the content of the phone calls was 'trivial' and did not relate to any criminal activity. He pleaded guilty and was sentenced to two years imprisonment.¹²¹
 - Mr Naizmand was prosecuted for watching on YouTube three short videos that contained extremist material. At the time he was 22 years old. The videos were publicly available, and he was permitted to have a phone and use the internet, but the terms of his control order prohibited him from watching material of this nature. Two of the videos he watched twice. As a result, he was charged with five counts of breaching the control order made in relation to him and sentenced to four years of imprisonment in the highest security prison in New South Wales.¹²²
168. These are severe penalties and arguably disproportionate to the seriousness of the breach. There is a real risk in cases like these of a blanket approach being taken that treats all conduct constituting a violation of a control order as intrinsically serious by reason of the fact that it is a breach of a control order, and that one of the purposes of control orders is to protect the public from a terrorist act.¹²³ This involves a substantial leap in logic which draws an equivalence between a failure to comply with control order conditions and an act of terrorism.
169. By way of example, Mr Naizmand, who has never been convicted of any substantive terrorism offence, spent either the same period or more time in

prison for the breach of his control order than seven other terrorist offenders released from prison over the past year (including Ms Abdirahman-Khalif who has recently been re-detained to serve the last six months of her three year sentence after her acquittal was overturned by the High Court). Those offenders are:

Offender	Offence	Term of imprisonment
Ms Zainab Abdirahman-Khalif	Taking steps to become a member of a terrorist organisation	3 years
Ms Alo-Bridget Namoa	Conspiring to do an act in preparation for a terrorist act	3 years and 9 months
Mr Murat Kaya	Preparation for incursion into a foreign country for the purpose of engaging in hostile activities	3 years and 8 months
Mr Shayden Jamil Thorne	Preparation for incursion into a foreign country for the purpose of engaging in hostile activities	3 years and 10 months
Mr Paul Dacre	Preparation for incursion into a foreign country for the purpose of engaging in hostile activities	4 years
Mr Kadir Kaya	Preparation for incursion into a foreign country for the purpose of engaging in hostile activities	4 years
Mr Antonino Granata	Preparation for incursion into a foreign country for the purpose of engaging in hostile activities	4 years

170. As noted above, Ms Alo-Bridget Namoa was released from imprisonment and had a control order imposed on her. She has since been charged with 12 counts of breaching that control order.¹²⁴ Those offences reportedly include allowing someone else to use her phone, using a phone other than the one permitted by the AFP, and asking someone to contact another person on her behalf.¹²⁵ The AFP said that no specific or impending threat to the community had been identified in relation to the alleged misuse of her phone.¹²⁶ Each count is punishable by a maximum of five years imprisonment. It seems entirely possible that, if convicted, she could be imprisoned for the breach of the control order for longer than her substantive offence.
171. Experience in New South Wales shows that breaches of ESO conditions imposed under the two State regimes are also punished severely.

172. The High Risk Offender Unit within Legal Aid NSW is a specialist team that represents offenders subject to applications for CDOs and ESOs under the *Crimes (High Risk Offenders) Act 2006* (NSW) and the *Terrorism (High Risk Offenders) Act 2017* (NSW). In its submission to the PJCIS in relation to its Review of AFP Powers, Legal Aid NSW described its experience of penalties imposed under these regimes in New South Wales:
- ESOs carry heavy penalties for breach, notwithstanding the conduct that gives rise to the breach would in normal circumstances be lawful. In our experience, a zero tolerance approach is taken by supervising agencies to even relatively minor or technical breaches of ESOs which are dealt with by criminal punishment, namely, incarceration. This is in stark contrast to the approach taken to parole orders, where warnings are routinely utilised as an alternative management strategy for less serious breaches. For example, we are aware of offenders under ESOs imposed under the [*Terrorism (High Risk Offenders) Act 2017* (NSW)] being charged and/or incarcerated, for shaving their beard, deviating from a movement schedule, drinking alcohol and sending/receiving messages from a dating app.¹²⁷
173. The comparison with parole is apt. Parole is a system that allows a person who has been convicted of an offence to be released before the end of their sentence, subject to conditions imposed for the protection of the community. Parole is generally available in relation to all sentences, regardless of the degree of seriousness of the offence (other than very short sentences—eg, less than six months—and sentences of life imprisonment without parole).
174. In New South Wales, community corrections officers are given discretion about how to deal with breaches of parole conditions. This allows the response to be tailored to the seriousness of the breach. If a community corrections officer is satisfied that an offender has failed to comply with the offender’s obligations under a parole order, the officer may:
- record the breach and take no action
 - give an informal warning to the offender
 - give the offender a formal warning that further breaches will result in referral to the Parole Authority
 - give a reasonable direction to the offender relating to the kind of behaviour by the offender that caused the breach
 - impose a curfew on the offender of up to 12 hours in any 24 hour period
 - in the event of a serious breach, refer the breach to the Parole Authority and make a recommendation as to the action the Parole Authority may take in respect of the offender.¹²⁸
175. This legislative framework was introduced in 2018 and is supported by a policy developed by Corrective Services NSW that sets out the circumstances in which a breach will trigger a report to the Parole Authority.

176. The new framework responded to a 2015 report of the New South Wales Law Reform Commission (NSW LRC) on Parole, which recommended a system of graduated sanctions for breaches of parole, which should be applied in a way that ensures a ‘proportionate, swift and certain response’.¹²⁹ The NSW LRC described the goals of a breach and revocation system in the following way:
- The goals of managing risk and ensuring compliance are closely linked in a breach and revocation system. The system is strongest if responses to breaches serve both purposes simultaneously.
- A breach and revocation system should allow Community Corrections and SPA [the State Parole Authority] to be responsive and flexible in dealing with breaches. Breaches should attract clear and proportionate consequences so that the practice of attaching conditions to parole remains meaningful. It should be clear to stakeholders in the system what is expected for a parolee to complete parole successfully.
- The best way to manage the risk and behaviour of offenders on parole is to impose a proportionate sanction as soon as possible after a breach. A recent review of 20 studies of case management programs for substance abusing offenders in the US concluded that case management has a greater effect when coupled with sanctions that are swift and certain, and that swiftness and certainty of punishment has a larger deterrent effect than severity. ...
- In a system aimed at providing proportionate, swift and certain sanctions, Community Corrections should perform a function over and above reporting breaches to SPA and SPA does not need to receive notification of all breaches. In our view, in order for Community Corrections to carry out professional and effective case management it must have the discretion to respond to minor, non-reoffending breaches of parole.¹³⁰
177. The Commission considers that officers responsible for monitoring compliance with control orders and ESOs should be given equivalent discretions to allow them to respond appropriately to different kinds of breaches. While the Bill permits a Court to specify certain conditions in an ESO from which an offender may apply for a temporary exemption,¹³¹ this is not sufficient to deal with the issues identified above because:
- some conditions may not be made subject to exemptions, and
 - the temporary exemption regime is only effective if an exemption is applied for in advance—it does not give officers flexibility to deal with minor breaches after they have occurred.
178. Further, there should be changes to the substantive offence provisions themselves to insert a defence of reasonable excuse. This would ensure that offenders are not prosecuted for trivial breaches for which a reasonable excuse was available.
179. Finally, the Commission considers that the maximum penalty for breaches of conditions should be reduced to three years. This is the maximum duration of any single CDO or ESO, and it aligns better with the nature of the regime as a

whole. In order for an ESO to have been made, a Court must have already determined that it is not appropriate for the person to be subject to continuing detention for three years and that the degree of risk they pose to the community instead justifies release into the community subject to conditions. It would be a strange result if breach of those conditions then resulted in a longer period of imprisonment, particularly because the breach of conditions typically involves conduct that is not of itself unlawful. Of course, if a person subject to an ESO engages in criminal conduct, they should be prosecuted and subjected to the penalty the Court considers appropriate to that criminal conduct.

180. A maximum penalty of three years imprisonment for breach of an ESO would also align this regime with the penalty that applies to a failure to appear in accordance with a bail acknowledgment.¹³²

Recommendation 17

The Commission recommends that the agency responsible for monitoring compliance with control orders and ESOs should be given discretion to allow them to respond appropriately to different kinds of breaches, including by warning the offender, or deciding not to take action, in relation to minor breaches.

Recommendation 18

The Commission recommends that the agency responsible for monitoring compliance with control orders and ESOs should publish a policy providing guidance as to how it will exercise the discretion referred to in Recommendation 17.

Recommendation 19

The Commission recommends that the offences of contravening a control order (s 104.27 of the Criminal Code), contravening an ESO (proposed s 105A.18A), and interfering with a monitoring device that a person is required to wear pursuant to a control order or an ESO (proposed ss 104.27A and 105A.18B) be subject to a defence of reasonable excuse.

Recommendation 20

The Commission recommends that the maximum penalty for the offences of contravening a control order (s 104.27 of the Criminal Code), contravening an ESO (proposed s 105A.18A), and interfering with a monitoring device that a person is required to wear pursuant to a control order or an ESO (proposed ss 104.27A and 105A.18B) be three years imprisonment.

8 Liability to multiple different regimes

181. If the Bill were passed in its present form it would result in multiple overlapping regimes of PSOs. For example, there is the potential for an offender in New South Wales to be subject to up to four PSO regimes under:
- the *Terrorism (High Risk Offenders) Act 2017* (NSW)¹³³
 - the *Crimes (High Risk Offenders) Act 2006* (NSW)
 - the control order provisions in Div 104 of the Criminal Code
 - the proposed ESO provisions in the Bill.
182. This overregulation of the same space reinforces the Commission's recommendations 1 to 3. If an ESO regime is to be introduced, it should be *instead* of the current control order regime or, at the very least, the control order regime should be amended so that it does not apply in the post-sentence context.
183. Instead, the Bill anticipates that a control order could be *sought* while a person is in custody or subject to a CDO or ESO. The control order would not begin to be *in force* at that time.¹³⁴ This would mean that the person would not simultaneously be subject to two sets of Commonwealth post-sentence obligations. The control order would only begin to be in force after the person was both released from custody and no longer subject to a CDO or ESO.
184. The 12 month maximum duration of a control order commences from when the order is made (not from when it begins to be in force), meaning that if the control order is made while the person is subject to an ESO, the time will start running while the ESO is still in force, and the control order would only be in force for the remainder of the 12 month period after the expiry of the ESO.¹³⁵
185. If a person is subject to a control order and is subsequently detained in custody, the control order continues to be in force (even though it is difficult to see how the person could continue to comply with certain conditions such as curfew or reporting requirements while in custody).¹³⁶
186. The provisions identified above prevent the conditions of a control order and an ESO operating at the same time. However, leaving to one side a Court's inherent power to protect against an abuse of process, there does not appear to be any statutory provision that would prevent the concurrent operation of either the ESO regime or the control order regime on the one hand, and the two post-sentence regimes in force in New South Wales on the other.
187. By contrast, when it comes to criminal law, there are both common law rules that protect against double prosecution (that is, being tried for two different offences in respect of the same set of facts)¹³⁷ and statutory provisions that prevent a person being punished for both State and Commonwealth terrorism offences dealing with the same subject matter.¹³⁸

Recommendation 21

The Commission recommends that the PJCIS seek advice from the Attorney-General's Department about how to ensure, whether by amendment to the Bill or negotiation through COAG, that a person cannot be made subject to both the Commonwealth PSO regime and a State or Territory PSO regime in relation to the same underlying conduct.

9 Proposed amendments to control order regime

188. As noted above, the primary position of the Commission is that the control order regime should be repealed and replaced with the ESO regime recommended by the third INSLM.
189. However, if the control order regime is retained, the PJCIS should consider the proposed amendments to Div 104 in the Bill. The Commission is concerned about the proposed repeal of two existing provisions in Div 104 that are there for the avoidance of doubt and that provide a benefit to respondents to control order proceedings.
190. The Bill proposes to repeal ss 104.4(3) and 104.24(3) of the Criminal Code. These sections provide a prompt to a Court hearing an application for an interim control order (which may be *ex parte*), or for a variation of a control order, that the Court need not include in the order an obligation, prohibition or restriction that was sought by the AFP if the Court is not satisfied that it is necessary or proportionate.
191. The Explanatory Memorandum says that these provisions are being repealed because they are not necessary.¹³⁹ However, there are other provisions in Div 104 that are included for the avoidance of doubt, most of which are not of benefit to a respondent, which the Bill does not propose to repeal (eg, ss 104.2(3A), 104.2(5), 104.5(1C), 104.5(2AA), 104.5(2A), 104.12A(3), 104.14(3A), 104.23(3A)). Further, there are other provisions contained in the Bill which are strictly not necessary and yet are proposed for enactment. The clearest example is the list of potential conditions for an ESO which, strictly speaking, are only examples and are unnecessary to list in light of the ability of a Court to make *any* condition provided it meets the test set out in proposed s 105A.7B(1).

Recommendation 22

The Commission recommends that ss 104.4(3) and 104.24(3) of the Criminal Code, which provide that the Court need not include in a control order an obligation, prohibition or restriction that was sought by the AFP if the Court is not satisfied that that it is necessary or proportionate, not be repealed.

10 New monitoring powers

192. The Bill proposes to make amendments to permit warrants to be issued under the *Crimes Act 1914* (Cth), the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act) and the *Surveillance Devices Act 2004* (Cth) (SD Act) for the purpose of monitoring compliance with ESOs.
193. The existing warrant regime, which applies to control orders, would be extended to ESOs. This would allow police and other relevant authorities to obtain:
- a ‘monitoring warrant’ to enter and search premises owned or occupied by the relevant person¹⁴⁰
 - a ‘monitoring warrant’ to conduct a frisk search of the person or a search of a recently used conveyance¹⁴¹
 - a ‘Part 5.3 warrant’ to intercept communications made by the person over a telecommunications service¹⁴²
 - a ‘Part 5.3 warrant’ for the installation and use of surveillance devices or for access to computers¹⁴³
 - a tracking device authorisation, where one of the conditions of the ESO is that the person wear a tracking device.¹⁴⁴
194. Each of these warrants and authorisations may be obtained for a range of purposes including determining whether the ESO is being complied with.
195. These kinds of warrants were considered briefly in the Commission’s previous submission to the PJCS in relation to its Review of AFP Powers.¹⁴⁵
196. The Parliamentary Joint Committee on Human Rights noted that it has not conducted a foundational human rights compatibility assessment in relation to the monitoring and surveillance powers in each of the three Acts identified above because they were all passed prior to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).¹⁴⁶ It noted that it was therefore difficult to assess whether the application of this regime to ESOs was consistent with human rights. In this submission, the Commission does not intend to comprehensively analyse whether the existing warrant system is consistent with human rights, including the right to privacy. Instead, the Commission makes two points.
197. **First**, the extension of these warrants to ESOs needs to be taken into account when considering the proposal in the Bill that conditions could be imposed on an ESO requiring an offender to give consent to various matters including entry by police into their home. If warrants can be obtained, there is far less justification for imposing conditions in ESOs that require people to consent to actions that could be achieved either through genuine consent or pursuant to a warrant. These issues are considered in more detail in section 7.3(f) above. The extraordinary nature of authorisation of warrantless entry to premises was

discussed in more detail in the Commission's submission to the PJGIS Review of AFP Powers.¹⁴⁷

198. **Secondly**, in addition to the Bill extending the use of telecommunications interception, surveillance devices and computer access warrants to *monitor compliance* with a control order or an ESO while the offender is in the community, the Bill would also create a new class of warrants. The new class of warrants would allow the AFP to obtain information in relation to a person in custody, who had committed an offence that meant they could qualify for a Commonwealth post-sentence order, for the purpose of determining *whether to apply* for a such an order.¹⁴⁸
199. Before assessing the nature of this new class of warrants, it is important to appreciate that law enforcement agencies already have extensive investigatory powers which include:
- in the case of ASIO, obtaining telecommunications interception warrants if the Director-General of Security reasonably suspects that a person is likely to engage in activities in the future that would be prejudicial to security.¹⁴⁹ Acts prejudicial to security include politically motivated violence.¹⁵⁰
 - in the case of certain other law enforcement agencies, obtaining surveillance devices and computer access warrants if they have reasonable grounds to suspect that a relevant offence is likely to be committed in the future.¹⁵¹ A serious Part 5.3 offence is a relevant offence.¹⁵²
200. The Bill would create a new class of warrants that can be obtained in relation to a person in custody who has been convicted of an offence that would mean that the PSO regime could apply to them. The purpose of these warrants is not to obtain evidence for the purpose of investigating and preventing acts of terrorism that are reasonably suspected of happening in the future – such powers already exist. Instead, the purpose of these warrants appears to be to fish for evidence that could support an application for a PSO, on a much lower standard than applies for either monitoring warrants or warrants for the investigation of a terrorism offence.
201. The threshold for obtaining a warrant in relation to a person in custody would be reduced in a variety of ways when compared with the monitoring warrants that currently apply in relation to control orders:
- First, it would be sufficient that there are 'reasonable grounds to suspect that there is an *appreciable risk* of the person committing a serious Part 5.3 offence'.¹⁵³ The threshold of an 'appreciable risk' is not one that is used anywhere else in either the Criminal Code, the TIA Act or the SD Act. It is lower than the threshold required when agencies are actually investigating potential future wrongdoing (where the relevant test is a reasonable suspicion that a relevant offence is likely to be committed). It appears to be a very low bar to clear, particularly bearing in mind that in order for a PSO to be

made, the Court must be satisfied that there is an ‘unacceptable risk’ of the person committing such an offence.

- Secondly, unlike the case with monitoring warrants, it would be sufficient that the information likely to be obtained would be ‘likely to assist’ (rather than ‘likely to substantially assist’) in determining whether to apply for a PSO.¹⁵⁴
- Thirdly, unlike the case with monitoring warrants, there would be no requirement to consider whether the use of the warrant in relation to a person in custody is the means of obtaining evidence that is likely to have the least interference with any person’s privacy.¹⁵⁵ That is, it would be permissible to resort to monitoring a person’s phone calls or placing surveillance devices in their prison cell, even if relevant evidence could be obtained in a way that did not interfere so significantly with the person’s privacy. There are obvious concerns about a lack of proportionality in such a provision. If evidence can be obtained in a way that involves less interference with a person’s human rights, this option should be taken.

202. The argument put forward in the Explanatory Memorandum in favour of the lower threshold for obtaining warrants in relation to people in detention is counterintuitive. The suggestion is that a *lower* threshold should apply when seeking a warrant in relation to a terrorist offender in custody where there has not yet been any assessment that the person poses a risk to the community warranting the making of an ESO, in comparison to the threshold that applies when seeking a warrant in relation to a terrorist offender who is subject to an ESO because they have already been found to pose an unacceptable risk.¹⁵⁶
203. The impact of the lower threshold for obtaining a warrant in relation to a person in custody is compounded by the fact that, unlike the case with monitoring warrants,¹⁵⁷ no amendment is proposed to require law enforcement to revoke a surveillance device warrant or computer access warrant once the purpose for obtaining the information or data has been served. The rationale for this given in the Explanatory Memorandum is ‘to ensure relevant information can continue to be gathered prior to the determination of the application’ for a PSO.¹⁵⁸ This reinforces the view that these warrants amount to a fishing exercise. Once granted, there is no event that would require these warrants to be revoked while a person is still in custody. They would continue in force regardless of whether or not any information was obtained that would support an application for a PSO, and even in circumstances where there were no reasonable grounds for suspecting that the person would commit a serious Part 5.3 offence in the future.
204. The Commission considers that speculatively building a case for a PSO is not a sufficient basis for a new class of warrants.

Recommendation 23

The Commission recommends that the provisions in the Bill to amend the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance*

Devices Act 2004 (Cth) to create a new class of warrants for post-sentence order applications be removed.

Recommendation 24

If Recommendation 23 is not accepted, the Commission recommends that the provisions proposed to be inserted into ss 46 and 46(A) of the *Telecommunications (Interception and Access) Act 1979* (Cth), dealing with warrants sought for post-sentence order applications, be amended to require the issuing authority to be satisfied that:

- (a) there are reasonable grounds to suspect that there is an unacceptable risk of the person committing a serious Part 5.3 offence (see proposed ss 46(7)(f) and 46A(2C)(f)); and
- (b) information that would be likely to be obtained would be likely to substantially assist in determining whether to apply for the post-sentence order (see proposed ss 46(7)(h) and 46A(2C)(h))

and that the issuing authority must have regard to:

- (c) whether intercepting communications under the warrant would be the method that is likely to have the least interference with any person's privacy (see proposed ss 46(8) and 46A(2D)).

Recommendation 25

If Recommendation 23 is not accepted, the Commission recommends that the provisions proposed to be inserted into ss 14 and 27A of the *Surveillance Devices Act 2004* (Cth), dealing with warrants sought for post-sentence order applications, be amended to require the law enforcement officer applying for the warrant to be satisfied that:

- (a) there are reasonable grounds to suspect that there is an unacceptable risk of the person committing a serious Part 5.3 offence (see proposed ss 14(3BA)(c) and 27A(5A)(c)); and
- (b) the use of a surveillance device or access to the data would be likely to substantially assist in determining whether to apply for the post-sentence order (see proposed ss 14(3BA)(e) and 27A(5A)(e))

and, in addition to the matters in subsection 16(2) or 27C(2), the issuing authority must have regard to:

- (c) whether the use of the surveillance device or access to the data in accordance with the warrant would be the means of obtaining the evidence or information sought to be obtained, that is likely to have the least interference with any person's privacy.

205. The Bill would also extend the use of information obtained pursuant to a telecommunications interception warrant, a surveillance devices warrant or a computer access warrant to allow lawfully acquired information to be used, not

only for purposes connected with control orders or Commonwealth PSOs, but also for purposes, including in legal proceedings, connected with State and Territory CDOs and ESOs.¹⁵⁹

11 Use of special advocates

206. The Bill would extend the regime under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act), which applies to control orders, to also apply to ESOs. The regime permits orders to be made under s 38J of the NSI Act that allow the Court hearing a control order proceeding to consider national security information that is withheld from the respondent. These provisions of the Bill substantially implement a recommendation of the third INSLM.¹⁶⁰
207. Appropriately, the Bill does not extend this regime to applications for CDOs on the basis that the potential outcome of a CDO proceeding—ongoing detention—is much more severe and is more analogous to a criminal sanction, and the withholding of relevant information from a respondent in those circumstances could not be justified.¹⁶¹
208. The ability to withhold information from a respondent and also rely on that same information in civil proceedings against the respondent engages the right to a fair hearing protected by article 14 of the ICCPR. The right to a fair hearing includes the right to ‘equality of arms’, namely, that there be a fair balance between the opportunities afforded to each party in the proceeding to present their case. The right to a fair hearing also requires that hearings be conducted in public to the extent possible and without resort to secret evidence.
209. In determining whether to make an order under s 38J, the Court must be satisfied that the respondent has been given sufficient information about the allegations on which the control order request was based to enable effective instructions to be given in relation to those allegations. This requirement is based on minimum standards set in proceedings of this nature by the European Court of Human Rights and the House of Lords.¹⁶²
210. The NSI Act provides for a special advocate to be appointed in relation to a control order proceeding. The role of the special advocate is to represent the interests of the respondent in:
 - the proceeding in which the Court is considering making an order under s 38J; and
 - the parts of the substantive control order proceeding in which the national security information is being considered and the respondent is excluded.
211. The special advocate can do this by making submissions to the Court, adducing evidence and cross examining witnesses during parts of the hearing when the respondent is not entitled to be present.¹⁶³ The special advocate is not the lawyer

- for the respondent, but is required to represent the respondent's interests where the respondent cannot do so themselves.¹⁶⁴
212. When the control order regime was first introduced in 2005, the Commission called for a special advocate regime to be used in circumstances where security sensitive information was to be relied on as part of a control order application and it was necessary that this information not be shared with the respondent.¹⁶⁵
 213. Following similar recommendations by the COAG Review Committee,¹⁶⁶ the PJCIS¹⁶⁷ and the second INSLM,¹⁶⁸ a special advocate regime for control order proceedings was eventually introduced in 2016.¹⁶⁹
 214. The special advocate procedure provides greater fairness to respondents in proceedings where claims have been made by the State that relevant evidence should be withheld from a respondent on national security grounds. However, there are still aspects of this regime that need to be kept under review in relation to their compliance with human rights.
 215. One of the key limitations of the special advocate regime is that once the national security information has been disclosed to the special advocate, there are restrictions on the ability of the special advocate to take instructions from the respondent. The NSI Act provides for communication in writing between the special advocate and the respondent in a way that is monitored and approved by the Court.¹⁷⁰
 216. It appears that there has been little, if any, need to resort to these procedures in the control order proceedings heard to date. The AFP gave evidence to the second INSLM in December 2015 (prior to the introduction of special advocates) that in the previous four control order proceedings no information had been withheld from a respondent, and no proposal for an application for a control order had been abandoned by the AFP because of the prospect of the need to deal with sensitive information.¹⁷¹
 217. There was no question about the withholding of information in *Thomas v Mobray* (2007) 233 CLR 307, which involved a challenge to the constitutional validity of control order proceedings brought by Mr Jack Thomas, the first person to have a control order made against them.¹⁷²
 218. On the basis of searches conducted by the Commission, it does not appear that it has been necessary for special advocates to be appointed in the 10 control order cases since their introduction. Many of those cases have been resolved through consent orders.
 219. The Commission will continue to monitor this area to assess whether experience with special advocates suggests that any procedural amendments are required.

Appendix A: Timing of control orders

This table sets out the details of interim control orders obtained in relation to convicted terrorist offenders, including when the application was made, when the interim control order was made, and when the person was released from imprisonment. The highlighted cells show offenders who were released from detention prior to an interim control order being made.

No	Name	Application	Interim control order made	Release	Judgment (interim control order)
1.	Mr EB	13/12/2018	30/01/2019	2/02/2019	<i>McCartney v EB</i> [2019] FCA 183
2.	Ms Alo-Bridget Namoa	6/12/2019	19/12/2019	22/12/2019	<i>Booth v Namoa</i> [2019] FCA 2213
3.	Mr Murat Kaya	19/12/2019	22/01/2020	23/01/2020	<i>Booth v Kaya</i> [2020] FCA 25
4.	Mr Ahmad Saiyer Naizmand	20/02/2020	27/02/2020	28/02/2020	<i>Booth v Naizmand</i> [2020] FCA 244
5.	Mr Shayden Jamil Thorne	27/02/2020	6/03/2020	7/03/2020	<i>Booth v Thorne</i> [2020] FCA 445
6.	Mr Paul James Dacre	6/05/2020	14/05/2020	8/05/2020	<i>Booth v Dacre</i> [2020] FCA 751
7.	Mr Kadir Kaya	6/05/2020	28/05/2020	8/05/2020	<i>Booth v Kadir Kaya</i> [2020] FCA 764

No	Name	Application	Interim control order made	Release	Judgment (interim control order)
8.	Mr Antonio Alfio Granata	6/05/2020	29/05/2020	8/05/2020	<i>Booth v Granata</i> [2020] FCA 768
9.	Mr Belal Saadallay Khazaal	5/08/2020	26/08/2020	30/08/2020	<i>Booth v Khazaal</i> [2020] FCA 1241

Endnotes

- ¹ Australian Human Rights Commission, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)*, submission to the PJICIS, 12 October 2016, at <https://www.aph.gov.au/DocumentStore.ashx?id=32397a66-a179-4a07-a5fb-ab60b776676f&subId=414693>; Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJICIS, 10 September 2020, at <https://www.aph.gov.au/DocumentStore.ashx?id=b2a784cc-435f-4cbd-b5c7-6831eeb05e81&subId=691580>.
- ² Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJICIS, 10 September 2020.
- ³ Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJICIS, 10 September 2020, Appendix A.
- ⁴ *The Queen v Abdirahman-Khalif* [2020] HCA 36.
- ⁵ Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJICIS, 10 September 2020, case study 5, pp 54-56.
- ⁶ Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJICIS, 10 September 2020, at [97]-[192].
- ⁷ Letter from Senator the Hon George Brandis QC to Mr Michael Sukkar MP, Chair of the PJICIS dated 13 October 2016, at Appendix C to the PJICIS *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (November 2016) at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/HRTBill/Report-PDF.
- ⁸ *Criminal Code* (Cth), s 105A.7.
- ⁹ *Criminal Code* (Cth), s 105A.7(1)(c).
- ¹⁰ *Criminal Code* (Cth), Note 1 to s 105A.7.
- ¹¹ *Criminal Code* (Cth), ss 100.1 (definition of ‘issuing court’), 104.4, 104.14.
- ¹² Letter from Senator the Hon George Brandis QC to Mr Michael Sukkar MP, Chair of the PJICIS dated 13 October 2016, at Appendix C to the PJICIS *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (November 2016).
- ¹³ PJICIS, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (November 2016) at [3.186].
- ¹⁴ *Criminal Code* (Cth), s 104.5(1)(d).
- ¹⁵ *Booth v Dacre* [2020] FCA 751 at [4]; *Booth v Kadir Kaya* [2020] FCA 764 at [6]; *Booth v Granata* [2020] FCA 768 at [3].
- ¹⁶ PJICIS, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (November 2016) at [3.187].
- ¹⁷ Independent National Security Legislation Monitor, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, 7 September 2017, at [9.40]-[9.42].
- ¹⁸ PJICIS, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (February 2018), at [3.140].
- ¹⁹ Australian Government, *Response to the Committee’s review of police stop, search and seizure powers, the control order regime and the preventative detention order regime, and to the INSLM Statutory Deadline Reviews*, 24 May 2018, pp 3 and 8-9, at <https://www.aph.gov.au/DocumentStore.ashx?id=ed7b9dc5-07b4-4672-a2e6-1b015c1248dd>.
- ²⁰ *Crimes (High Risk Offenders) Act 2006* (NSW) and *Criminal Law (High Risk Offenders) Act 2015* (SA).
- ²¹ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Dangerous Sexual Offenders Act 2006* (WA); *Serious Sex Offenders Act* (NT).
- ²² *Sentencing Act 1997* (Tas), s 19.

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- ²³ Tasmanian Government, Department of Justice, *Dangerous Criminals and High Risk Offenders Bill 2020*, at <https://www.justice.tas.gov.au/community-consultation/closed-community-consultations2/sentencing-amendment-dangerous-criminals-bill-2020>.
- ²⁴ Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJCS, 10 September 2020, at [97]-[192] <https://www.aph.gov.au/DocumentStore.ashx?id=b2a784cc-435f-4cbd-b5c7-6831eeb05e81&subId=691580>.
- ²⁵ PJCS, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (November 2016) at [3.182].
- ²⁶ Conduct described in (ii) is prohibited by s 101.2 of the Criminal Code, provided that the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act and the person knows or is reckless as to the existence of the connection; conduct described in (iii) is prohibited by s 119.1(2) of the Criminal code; conduct described in (vii) is prohibited by ss 11.2, 119.1(2) and 119.4 of the Criminal Code.
- ²⁷ Proposed s 105A.5(1).
- ²⁸ Proposed s 105A.6A(1).
- ²⁹ Proposed s 105A.7(1).
- ³⁰ Proposed s 105A.7(2).
- ³¹ Proposed s 105A.7A(1)(b).
- ³² *Criminal Code* (Cth), s 105A.3(1)(b).
- ³³ Proposed s 105A.3A(4) and (5).
- ³⁴ Proposed s 105A.3A(6)–(8).
- ³⁵ Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJCS, 10 September 2020.
- ³⁶ Independent National Security Legislation Monitor, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, 7 September 2017, at [9.41].
- ³⁷ Australian Government, *Response to the Committee’s review of police stop, search and seizure powers, the control order regime and the preventative detention order regime, and to the INSLM Statutory Deadline Reviews*, 24 May 2018, p 8.
- ³⁸ Proposed s 105A.7A(1)(b).
- ³⁹ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), at [182].
- ⁴⁰ Independent National Security Legislation Monitor, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, 7 September 2017, at [9.29]–[9.35].
- ⁴¹ *Terrorism (High Risk Offenders) Act 2017* (NSW), ss 20(d) and 34(1)(d); *Crimes (High Risk Offenders) Act 2006* (NSW), ss 5B(d) and 5C(d); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), ss 13(3) and 30(2); *Serious Offenders Act 2018* (Vic), ss 14(3) and 62(2); *High Risk Serious Offenders Act 2020* (WA), s 7(1); *Serious Sex Offenders Act 2013* (NT), s 7(1). See also the exposure draft of the Sentencing Amendment (Dangerous Criminals and High Risk Offenders) Bill 2020 (Tas), ss 20(3) and 42AZD.
- ⁴² *Criminal Law (High Risk Offenders) Act 2015* (SA), s 18.
- ⁴³ Proposed s 105A.7A(1)(c).
- ⁴⁴ Proposed s 105A.9A(4)(c).
- ⁴⁵ Independent National Security Legislation Monitor, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, 7 September 2017, at [9.28].
- ⁴⁶ Australian Government, *Response to the Committee’s review of police stop, search and seizure powers, the control order regime and the preventative detention order regime, and to the INSLM Statutory Deadline Reviews*, 24 May 2018, p 8.
- ⁴⁷ Proposed s 105A.7B(1).

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- 48 Proposed ss 105A.7B(3) and (5).
- 49 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth) at [188] and [191].
- 50 Proposed s 105A.7A(1)(c).
- 51 Proposed ss 105A.7B(3)(a)(iii), (b), (e), (m), (n), (o) and (r), and (5)(a), (b) and (c).
- 52 Proposed s 104.5A.
- 53 Proposed s 100.1(1), definition of ‘specified authority’.
- 54 *Criminal Code* (Cth), s 104.5(3)(l).
- 55 *Criminal Code* (Cth), s 104.5(6).
- 56 For example, see *McCartney v Abdirahman-Khalif (No 2)* [2020] FCA 1002 at [126].
- 57 Hamed El-Said, *New approaches to countering terrorism: Designing and evaluating counter radicalization and de-radicalization programs* (2015).
- 58 PJCIS hearing, *Australian Federal Police powers*, Canberra, 25 September 2020, Proof Committee Hansard, p 17 (Mr Andrew Walter, First Assistant Secretary, Integrity and Security, Attorney-General’s Department).
- 59 Department of Home Affairs, *Answers to Questions on Notice*, PJCIS hearing on Review of AFP Powers, 25 September 2020, p 1, at <https://www.aph.gov.au/DocumentStore.ashx?id=5706d767-85b5-4c1b-9f69-39193ea623d6&subId=691389>.
- 60 Adrian Cherney, ‘Evaluating interventions to disengage extremist offenders: a study of the proactive integrated support model (PRISM)’ (2020) 12(1) *Behavioural Sciences of Terrorism and Political Aggression* 17 at 22.
- 61 Kristen Bell, ‘Looking Outward: Enhancing Australia’s Deradicalisation and Disengagement Programs’ (2015) 11(2) *Security Challenges* 1 at 17, citing Tinka Veldhuis, *Designing Rehabilitation and Reintegration Programmes for Violent Extremist Offenders: A Realist Approach*, ICCT Research Paper (The Hague: International Centre for Counter Terrorism, 2012).
- 62 Proposed s 105A.7B(3)(n)–(q).
- 63 Proposed s 105A.7B(3)(c).
- 64 *Criminal Code* (Cth), s 104.5(3)(c).
- 65 *Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 7.
- 66 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), at [192].
- 67 Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJCIS, 10 September 2020, at [199]–[204] and Recommendation 7, at <https://www.aph.gov.au/DocumentStore.ashx?id=b2a784cc-435f-4cbd-b5c7-6831eeb05e81&subId=691580>.
- 68 *Criminal Code* (Cth), s 104.5(3)(d).
- 69 Proposed ss 104.5(3)(d) and 105A.7B(5)(d).
- 70 Proposed ss 104.5(3)(da) and 105A.7B(5)(e).
- 71 Proposed ss 104.28D and 105A.21A.
- 72 Proposed s 104.5(3A).
- 73 Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJCIS, 10 September 2020, at [125]–[127].
- 74 Proposed ss 104.5A(1)(c)(i) and (2)(a); and 105A.7E(1)(c)(i) and (2)(a).
- 75 Proposed ss 104.5A(5) and 105A.7E(5).
- 76 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), Statement of Compatibility with Human Rights at [115]–[116].
- 77 *Halliday v Nevill* (1984) 155 CLR 1 at 10 (Brennan J).
- 78 *George v Rockett* (1990) 170 CLR 104 at 109–110.
- 79 Proposed s 105A.7C.

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- ⁸⁰ See, in the context of proposed amendments to the control order regime, Australian Federal Police, *Inquiry into AFP Powers*, submission to the PJCS Review of AFP Powers, August 2020 at [23].
- ⁸¹ *Criminal Code* (Cth), ss 104.4(1)(d) and 104.14(7).
- ⁸² *Criminal Code* (Cth), s 104.4(2)(c).
- ⁸³ Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth), p 21.
- ⁸⁴ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), Statement of Compatibility with Human Rights at [100].
- ⁸⁵ *Criminal Code* (Cth), s 105A.6.
- ⁸⁶ *Criminal Code* (Cth), s 105A.6(5).
- ⁸⁷ *Criminal Code* (Cth), s 105A.8(1)(b).
- ⁸⁸ *Criminal Code* (Cth), s 105A.6(8).
- ⁸⁹ Proposed s 105A.18D.
- ⁹⁰ Proposed s 105A.18D(2); Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), at [343].
- ⁹¹ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), at [346].
- ⁹² Bill, Sch 1, Part 2, item 153.
- ⁹³ Proposed s 105A.6B(1)(b).
- ⁹⁴ *Criminal Code* (Cth), s 105A.7(3).
- ⁹⁵ *Lee v The Queen* (2014) 253 CLR 455 at [33]; *Evidence Act 1995* (Cth), s 17(2).
- ⁹⁶ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 565 [51]-[52]; *Evidence Act 1995* (Cth), s 190.
- ⁹⁷ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), Statement of Compatibility with Human Rights at [78].
- ⁹⁸ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), Statement of Compatibility with Human Rights at [104].
- ⁹⁹ *Criminal Code* (Cth), s 105A.6(5).
- ¹⁰⁰ Revised Explanatory Memorandum, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth), Statement of Compatibility with Human Rights at [47].
- ¹⁰¹ Proposed s 105A.6(5A).
- ¹⁰² *Criminal Code* (Cth), s 104.22(3).
- ¹⁰³ *Criminal Code* (Cth), s 104.27.
- ¹⁰⁴ *Criminal Code* (Cth), s 104.27A.
- ¹⁰⁵ Proposed s 105A.7D(3).
- ¹⁰⁶ Proposed s 105A.18A(1).
- ¹⁰⁷ Proposed s 105A.18A(2).
- ¹⁰⁸ Proposed s 105A.18B.
- ¹⁰⁹ Revised Explanatory Memorandum, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth), Statement of Compatibility with Human Rights at [108].
- ¹¹⁰ *Criminal Code* (Cth), s 104.11A.
- ¹¹¹ *Criminal Code* (Cth), s 104.11.
- ¹¹² PJCS, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (February 2018), at [3.92]-[3.97].
- ¹¹³ *Criminal Code* (Cth), s 104.14(7)(b).
- ¹¹⁴ *Criminal Code* (Cth), s 104.23–104.26.
- ¹¹⁵ Proposed s 105A.9A.
- ¹¹⁶ Proposed s 105A.9B(1).
- ¹¹⁷ Proposed ss 105A.18A and 105A.18B.
- ¹¹⁸ *Criminal Code* (Cth), ss 104.27 and 104.27A.

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- ¹¹⁹ Australian Federal Police, *Answers to Questions on Notice*, PJICIS hearing on Review of AFP Powers, 25 September 2020, p 4, at <https://www.aph.gov.au/DocumentStore.ashx?id=6500c6e7-7417-4a82-80d4-4bbad2caac63&subId=691311>.
- ¹²⁰ Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJICIS, 10 September 2020, at [113]-[115].
- ¹²¹ *R v MO (No 2)* [2016] NSWDC 145.
- ¹²² *R v Naizmand* [2017] NSWDC 4.
- ¹²³ Tim Matthews, 'Under Control, But Out of Proportion: Proportionality in Sentencing for Control Order Violations' (2017) 40(4) *University of New South Wales Law Journal* 1422 at 1434.
- ¹²⁴ Australian Federal Police, *Answers to Questions on Notice*, PJICIS hearing on Review of AFP Powers, 25 September 2020, p 4.
- ¹²⁵ 7NEWS Sydney, 26 July 2020, at <https://twitter.com/7NewsSydney/status/1287312356771377153>; Joanne Vella, 'Alo-Bridget Namoa, convicted of plotting Sydney NYE terror attack, refused bail' *Daily Telegraph*, 28 July 2020.
- ¹²⁶ Gerard Cockburn, 'Sydney woman on terror charges to front court after allegedly misusing a mobile phone' *The Australian*, 26 July 2020.
- ¹²⁷ Legal Aid NSW, *Review of AFP Powers*, submission to the PJICIS, August 2020, p 13, at <https://www.aph.gov.au/DocumentStore.ashx?id=0190439a-c410-4385-a42e-142b7f8e949c&subId=691314>.
- ¹²⁸ *Crimes (Administration of Sentences) Act 1999* (NSW), s 170.
- ¹²⁹ New South Wales Law Reform Commission, *Parole*, Report 142 (June 2015), Recommendation 10.1.
- ¹³⁰ New South Wales Law Reform Commission, *Parole*, Report 142 (June 2015), at [10.4]-[10.7].
- ¹³¹ Proposed s 105A.7C.
- ¹³² *Bail Act 2013* (NSW), s 79.
- ¹³³ See, in particular, s 16.
- ¹³⁴ Proposed ss 104.5(1D)-(1F), 104.15(4)-(6) and 104.17A.
- ¹³⁵ *Criminal Code* (Cth), ss 104.5(1)(f), 104.16(1)(d).
- ¹³⁶ *Criminal Code* (Cth), s 104.5(2AA).
- ¹³⁷ *Pearce v R* (1998) 194 CLR 610.
- ¹³⁸ Eg, *Crimes Act 1910* (Cth), s 310K.
- ¹³⁹ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), at [34] and [65].
- ¹⁴⁰ *Crimes Act 1914* (Cth), ss 3ZZKA-3ZZKG.
- ¹⁴¹ *Crimes Act 1914* (Cth), ss 3ZZLA-3ZZLD.
- ¹⁴² *Telecommunications (Interception and Access) Act 1979* (Cth), ss 46(4) and 46A(2A).
- ¹⁴³ *Surveillance Devices Act 2004* (Cth), ss 14(3C) and 27A(6).
- ¹⁴⁴ *Surveillance Devices Act 2004* (Cth), s 39(3B).
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- ¹⁴⁷ Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJICIS, 10 September 2020 at [81]-[94].
- ¹⁴⁸ *Telecommunications (Interception and Access) Act 1979* (Cth), proposed ss 46(7) and 46A(2C).
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- ¹⁵⁰ *Australian Security Intelligence Organisation Act 1979* (Cth), s 4, definitions of 'activities prejudicial to security' and 'security'.
- ¹⁵¹ *Surveillance Devices Act 2004* (Cth), ss 14(1) and 27A(1).
- ¹⁵² *Surveillance Devices Act 2004* (Cth), s 6(1), definition of 'relevant offence', paragraph (a).

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- ¹⁵⁵ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), at [570], [604], [699] and [719].
- ¹⁵⁶ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), at [559], [591], [696] and [716].
- ¹⁵⁷ *Surveillance Devices Act 2004* (Cth), proposed ss 21(5) and (6).
- ¹⁵⁸ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), at [579] and [616].
- ¹⁵⁹ See the extension of definitions of ‘permitted purpose’ in s 5(1) and ‘exempt proceeding’ in s 5B of the TIA, and the dealing permitted under proposed new s 139B of the TIA. See also the extension of the definition of ‘relevant proceeding’ in s 6(1) of the SD Act, and the extension of the definition of ‘State or Territory relevant proceeding’ in s 45(9) of the SD Act.
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- ¹⁶² *A v United Kingdom* (2009) 49 EHRR 29 [220]; *Secretary of State for the Home Department v AF* [2009] UKHL 28 [59].
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