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Submission to the review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020

Parliamentary Joint Committee on Intelligence and Security

Joint Agency Submission - Attorney-General's Department and the Department of Home Affairs

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

Introduction

1. The Attorney-General's Department and the Department of Home Affairs welcome the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security (the Committee) to inform its consideration of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (the Bill). This submission has been prepared in consultation with the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO).

2. The Bill would establish an extended supervision order (ESO) scheme for high-risk terrorist offenders who continue to pose an unacceptable risk to the community at the expiration of their custodial sentence. The ESO scheme would form part of the High Risk Terrorist Offenders (HRTO) regime in Part 5.3 of the *Criminal Code*.

3. This submission should be considered in conjunction with the submissions by the Attorney-General's Department, the Department of Home Affairs and the AFP to the Committee's Review of AFP Powers to the extent that those submissions relate to Divisions 104 and 105A of the *Criminal Code*.

Risk environment

4. The current National Terrorism Threat Level remains at PROBABLE, which means that credible intelligence, assessed by Australia's security agencies, indicates that individuals or groups continue to possess the intent and capability to conduct a terrorist attack in Australia. The threat level has been elevated since September 2014, during which there have been seven terrorist attacks on Australian soil, and law enforcement and security agencies have disrupted a further 18 potential or imminent terrorist attacks. The threat of terrorism is likely to remain elevated for the foreseeable future.

5. The growing cohort of released terrorist offenders poses a potential threat to the Australian community. As at 19 October 2020, 86 individuals have been convicted of and sentenced for Commonwealth terrorism offences, and a further 20 people are currently before the courts. Of those individuals convicted of a terrorism offence, 46 were sentenced in the last three years. There are 13 offenders due to be released into the Australian community following the expiry of their custodial sentences between now and 2025 (see **Attachment A**).[1]

6. Experiences of other likeminded countries demonstrates that convicted terrorist offenders returning to the community can continue to pose a risk. In particular, the 2019 London Bridge and 2020 Streatham attackers in the United Kingdom were convicted terrorist offenders who had been released into the community. While Australia has not experienced a similar attack, it is essential that there are measures in place to effectively manage the risk posed by convicted terrorist offenders returning to the community.

[1] Note this is an updated version of the same attachment included in the joint agency supplementary submission (4.1) to the PJCIS Review of AFP Powers.

7. Continuing detention orders (CDOs) are currently available to manage terrorist offenders post-sentence, but these orders are targeted towards offenders who can only be managed by continued detention. The Bill would further strengthen Australia's counter-terrorism framework by introducing ESOs as an additional measure to manage the risks posed by terrorist offenders post-release, as well as to address the potential harm they pose to the community. ESOs would be a less restrictive alternative to CDOs which can be scaled-up and are proportionate to the risk an individual poses to community safety.

Legislative history and context

Managing high risk terrorist offenders post-release

8. The *Criminal Code* currently contains two options for managing a terrorist offender who continues to pose a risk to the community at the end of their custodial sentence – control orders (Division 104) and CDOs (Division 105A). Both control orders and CDOs are civil orders, not criminal orders, because they are protective rather than punitive.

Control orders

9. The control order scheme was established in 2005 by *the Anti-Terrorism Act (No. 2) 2005*. Control orders were created following a Council of Australian Governments (COAG) decision to strengthen Australia's counter-terrorism laws in light of the evolving security environment and in the context of the bombing of the London Underground earlier that year. Since the control order scheme came into force, 16 control orders have been made.

10. Under Division 104, the AFP may apply to the Federal Court of Australia or the Federal Circuit Court of Australia for an interim control order if the AFP Minister consents to the making of an application. A court can make an interim control order if satisfied, on the balance of probabilities, that:

    a. the order would substantially assist in preventing a terrorist act, or the provision of support for or facilitation of a terrorist act, or

    b. the person has trained with a listed terrorist organisation, engaged in a hostile activity in a foreign country, been convicted in Australia of a terrorism offence, or been convicted in a foreign country for conduct that, if engaged in in Australia would constitute a terrorism offence, or has provided support for or facilitated the engagement in a hostile activity in a foreign country, and

    c. each condition is reasonably necessary, appropriate and adapted for the protective purpose of the order.

Continuing detention orders

11. On 1 April 2016, COAG agreed that the Commonwealth should draft legislation to introduce a nationally consistent post-sentence preventative detention scheme, with appropriate protections, for high-risk terrorist offenders. In response, the Government introduced the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 on 15 September 2016 to create a CDO scheme for high risk terrorist offenders in Division 105A of the *Criminal Code*, and on 1 December 2016 the Parliament passed the Bill. As at 19 October 2020 no CDOs have been made. There is one CDO application before the courts.

12. Under section 105A.5, the AFP Minister may apply to a State or Territory Supreme Court for a CDO in relation to an eligible offender. An offender is eligible for a CDO where they are:

a. serving a custodial sentence for a specified terrorism offence

b. detained in custody pursuant to a CDO or an interim detention order (IDO) that is in force, or

c. serving a custodial sentence for an offence other than a specified terrorism offence, and they have been continuously detained in custody since being convicted of a specified terrorism offence, or since a CDO or IDO was in force in relation to the offender

13. Orders can only be sought for persons who are at least 18 years of age when their sentence of imprisonment for an eligible offence ends. Section 105A.7 provides that the Court may impose a CDO for up to three years if 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. The Court cannot make a CDO if a less restrictive measure, for example a control order, would be effective in preventing the unacceptable risk. However, a Supreme Court cannot make a control order as a less restrictive alternative to a CDO – only the Federal Court of Australia or the Federal Circuit Court of Australia can make such an order.

14. This lack of interoperability was one of the key considerations for the Committee's inquiry into the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016. Some amendments were made to that Bill following a Committee recommendation to clarify the operation of the control order scheme. The Government also accepted a Committee recommendation that further enhancements to the control order scheme to improve its interaction with the CDO scheme should be considered as part of reviews of the control order legislation by the Independent National Security Legislation Monitor (INSLM) in 2017 and the Committee in 2018.

INSLM and PJCIS reviews

15. The INSLM's 2017 report, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and* 105A*): Control Orders and Preventative Detention Orders,* examined the interaction between Divisions 104 and 105A. In particular, the INSLM highlighted the fact that a State or Territory Supreme Court could make an order for the continued detention of an offender only if satisfied that conditional release in the community would not be effective, but it could not make such an order for conditional release. The INSLM noted in his report that:

> *Divisions 104 and 105 of the Criminal Code potentially give rise to the need for different applicants to make separate applications in respect of the same offender, in different courts, and seeking to satisfy different tests. That is not in the interests of the offender, the agencies responsible for making the respective applications, or the multiple courts which may have to hear them, hence my recommendation that a single court can make a CDO or alternatively an ESO.*

16. The INLSM recommended that State and Territory Supreme Courts be authorised to make an ESO to address this issue, and made a number of recommendations about the proposed interaction between Divisions 104 and 105A.

17. The Committee's 2018 report, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime,* also considered the interaction between Divisions 104 and 105A and the recommendations made by the INSLM on this issue. The Committee supported the ESO model recommended by the INSLM, noting the need for regular reviews of those orders.

18. The Bill implements the Government's response to recommendations from the INSLM and the Committee, and makes amendments to Division 104 and 105A to improve the interoperability between control orders and CDOs.

19. In addition, the proposed ESO scheme takes account of experience with the control order and CDO schemes, and the experience of states which have post-sentence orders, including the New South Wales *Terrorism (High Risk Offenders) Act 2017* (NSW THRO regime) and the Victorian *Serious Offenders Act 2018* (see **Attachment B** for detail on these schemes). For this reason, the Bill departs from some recommendations made by the INSLM and the Committee in 2017 and 2018. For instance:

    a. The INSLM and the Committee recommended that the Minister be unable to give consent under section 104.2 (for a request for an interim control order) while Division 105A proceedings are pending.

       The Bill would instead provide that a control order *cannot be in force* at the same time as a CDO or ESO, rather than placing limits on the commencement of proceedings, to ensure agencies have the full range of tools available to manage offenders who pose a risk to the community.

    b. The INSLM and the Committee recommended that Division 105A be amended to allow State and Territory Supreme Courts to make a CDO or an ESO if satisfied to a high degree of probability that the offender poses an unacceptable risk.

       The Bill would instead provide the standard of proof for an ESO is the same as that for making a control order *(on the balance of probabilities*), reflecting the fact that both ESOs and control orders impose restrictions on an offender's personal liberties that fall short of custody.

    c. The INSLM and the Committee recommended that the same controls be available for an ESO as a control order made under Division 104.

       The Bill would instead allow a Supreme Court to impose *any condition* that it is satisfied 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, including all of the conditions that may be imposed under a control order. This has been informed by the recent and heightened use of control orders and ensures that orders can be tailored to the specific risk posed by each offender.

Operation of the Bill

Extended supervision orders

20. The Bill would establish a scheme whereby a State or Territory Supreme Court may make an ESO in relation to an eligible offender, if it is satisfied of the relevant thresholds, where the AFP Minister has either applied for an ESO, applied for a CDO but the Court is not satisfied that the thresholds for making a CDO are met, or where the Court has reviewed a CDO and decides not to affirm the CDO. The process for making ESOs and CDOs is set out at **Attachment C**.

Eligibility

21. A post-sentence order (PSO) – an ESO or a CDO – may be made in relation to a person who is convicted of a terrorism offence specified in paragraph 105A.3(1)(a) and is at least 18 years old at the time the sentence for

that offence ends, and where one of the preconditions in section 105A.3A for the making of an order has been met.

22. Under section 105A.3A an offender would be eligible for either a CDO or an ESO where they are:

    a. serving a custodial sentence for a specified terrorism offence (subsection 105A.3A(1))

    b. detained in custody pursuant to a CDO or an IDO (subsection 105A.3A(2))

    c. serving a custodial sentence for an offence other than a specified terrorism offence, and they have been continuously detained in custody since being convicted of a specified terrorism offence, or since a CDO or IDO was in force in relation to the offender (subsection 105A.3A(3))

    d. serving a custodial sentence for breaching an ESO or interim supervision order (ISO), and the Court is satisfied that the offender poses an unacceptable risk of committing a serious Part 5.3 offence as a result of the breach of the ESO or ISO (subsection 105A.3A(4)), or

    e. serving a custodial sentence for breaching a control order, where the process for seeking a control order commenced before the offender was released from prison after serving a sentence for a specified terrorism offence. The Court must be satisfied that the offender poses an unacceptable risk of committing a serious Part 5.3 offence as a result of the breach of the control order (subsection 105A.3A(5)).

23. An offender would be eligible for an ESO only where they are:

    a. subject to an ESO or ISO that is in force (subsection 105A.3A(6))

    b. serving a custodial sentence for an offence other than a specified terrorism offence, and an ESO or ISO was in force in relation to the person at the beginning of the person's detention in custody (subsection 105A.3A(7)), or

    c. subject to a control order, and the process for obtaining that control order commenced before the sentence of imprisonment for a specified terrorism offence ended, and before the ESO scheme commenced (subsection 105A.3A(8)).

Eligibility – transitional cohort

24. Subsection 105A.3A(8) is effectively a transitional measure that provides that offenders who were released prior to the ESO scheme commencing are eligible for an ESO, provided certain criteria are met.

25. This measure would only apply where the AFP commenced the process of making an application for an interim control order before the end of an offender's custodial. Offenders who have been released into the community and later subject to a control order (for example, one that is sought months after their release) would not be eligible for an ESO under this measure.

26. This measure recognises that a number of offenders have been released prior to the commencement of the ESO scheme, and that they may have been subject to an application for an ESO had the scheme been in place at the time of their release. This measure directly aligns with the purpose of Division 105A of the *Criminal Code* to protect the community from the risk of terrorism.

Interim orders

27. Under section 105A.9A, the Court may make an ISO pending the determination of an ESO application, or as an alternative to an IDO in connection with a CDO proceeding. As with an IDO, an ISO may be made for a period of no more than 28 days that the Court is satisfied is reasonably necessary to determine the application for the CDO or ESO. Consecutive ISOs may be made, but the total period of all ISOs must not be more than three months unless the Court is satisfied there are exceptional circumstances.

Risk assessment

28. As is currently the case for CDO applications, a court considering an application for an ESO would be able to appoint suitably qualified experts with medical, psychiatric, psychological or other expertise to assess and report on the risk posed by the offender (section 105A.6), if it considers that doing so is likely to materially assist in deciding whether to make a CDO in relation to the offender.

29. The Bill would also introduce a new section 105A.18D, which would enable the AFP Minister to direct offenders who are eligible for an ESO or CDO, or presently subject to an ESO or CDO, to be subject to an expert assessment of the risk of the offender committing a serious Part 5.3 offence. This will ensure the AFP Minister can make the most informed decision as to whether a CDO or ESO application should be made, and determine the most appropriate measure to be sought (if any) based on the offender's level of risk to the community.

Conditions

30. Subsection 105A.7B(1) would provide that a court may impose on an offender under an ESO any conditions (prohibitions, restrictions or obligations) that it is satisfied on the balance of probabilities are 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. This ensures that the Court can tailor an ESO to the specific risk posed by each offender.

31. Without limiting the operation of subsection 105A.7B(1), subsection 105A.7B(3) lists a number of general conditions that a court may impose on an offender. These conditions have been informed by operational experience under the control order scheme and state and territory schemes, including the NSW THRO regime. The examples in subsection 105A.7B(3) also make clear that a court may empower a person or class of persons (a specified authority) to give directions in connection with some conditions. This supports the efficient and effective day-to-day management of the offender subject to the conditions of an ESO or ISO. Subsection 105A.7B(4) places limits on directions that a specified authority may give. The specified authority may only give a direction if satisfied that it is reasonable in all the circumstances to give effect to the condition or the object of Division 105A.

32. In addition, subsection 105A.7B(5) sets out a range of possible conditions that the Court may impose to support the monitoring of an offender's compliance with conditions and the enforcement of the order. A number of these conditions expressly provide that the Court making an ESO may empower a specified authority to take certain actions, for example, testing for the possession or use of specified substances. Subsection 105A.7B(6) places constraints on the exercise of monitoring and compliance related powers under a condition imposed under subsection 105A.7B(5). The person exercising the power must be satisfied that it is reasonably necessary to do so in order to give effect to the order, or facilitate or monitor compliance with the order.

33. The additional conditions, beyond those available under a control order, recognise that an offender who is eligible for an ESO may be of a higher risk as compared to a person who is eligible for a control order. Accordingly, several of the additional conditions are designed to ensure law enforcement and other specified

authorities are able to assess any changes in the risk posed by the offender across the duration of an order. For example, an ESO may require the offender to:

a. attend and participate in interviews and assessments

b. facilitate access to specified technology they own, or

c. allow police officers to search the offender or the offender's residence.

34. Under section 105A.7C of the Bill, the Court may also specify 'exemption conditions', from which the offender may apply to a specified authority for a temporary exemption. This is intended to provide flexibility to the offender, and accommodate short-term changes to an offender's circumstances where there is no identified risk to the community.

Breach of an ESO

35. Section 105A.18A makes it an offence to breach the conditions of an ESO or ISO. Section 105A.18B makes it an offence to interfere with a monitoring device that has been imposed as a condition of an ESO. As with control orders, these offences carry a maximum penalty of five years' imprisonment.

Variation, review and other procedural matters

36. Section 105A.9B provides that the offender or the AFP Minister (or their respective legal representatives) may apply to vary an ESO or ISO at any time. Section 105A.9C provides that the Court can vary an ESO or ISO by adding, varying or removing conditions.

37. Section 105A.9D provides for applications to vary an ESO or ISO where there is agreement between the parties. The Court may vary the order if satisfied that the other party has given written consent to the variation sought by the applicant, the variation does not involve adding conditions to the ESO or ISO and the variation is appropriate in the circumstances.

38. Sections 105A.10 and 105A.11 provide that an ESO must be reviewed by the Court annually, or sooner if the offender or the AFP Minister applies for a review and the Court is satisfied that new facts or circumstances, or the interests of justice, justify the review. Section 105A.12A provides that the Court may vary an ESO after a review.

39. Under section 105A.14A, when the AFP Minister, or a legal representative of the AFP Minister, applies for a PSO or interim PSO, including a variation or a review of an order, they must give a copy of the application to the offender personally, and the offender's legal representative within two business days after the application is made. This obligation is subject to information protections provided within sections 105A.14B, 105A.14C and 105A.14D.

40. Section 105A.14B provides that the AFP Minister is not required to include any information or material in the application if a Minister is likely to take any actions in relation to the information under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act), or seek an order of a court preventing or limiting disclosure of the information. Subsection 105A.14B(3) outlines the circumstances where the information or material must be provided, including where a Minister does not take any action under the NSI Act or seek an order of the Court preventing or limiting disclosure.

41. Section 105A.14C outlines the obligations of the AFP Minister where information has been excluded from an application on the basis of public interest immunity. In these circumstances, when a copy of the application is

provided to the offender or their legal representative, the AFP Minister must give written notice, personally stating that the information has been excluded on the basis of public interest immunity. Subsection 105A.14C(3) expressly provides that no obligation is imposed on the offender to satisfy the Court that a claim of public interest immunity should not be upheld. The person claiming the immunity must make and substantiate the claim, and satisfy the Court that the claim should be upheld.

42. Section 105A.14D enables the Minister to apply to the Court for an order in relation to the manner in which 'terrorism material' is to be dealt with as part of providing it as part of an application. Terrorism material is material that advocates support for engaging in any terrorist acts or violent extremism, relates to planning or preparing for, or engaging in, any terrorist acts or violent extremism, or advocates joining or associating with a terrorist organisation. The Court may make an order in relation to the manner in which such material is to be dealt with, including that it be provided to the offender's legal representative or be available for inspection by the offender at specified premises. This measure ensures that materials of this nature cannot be disseminated further or used in any way that would pose a risk to the community.

Safeguards, oversight and warnings

43. There are a range of safeguards which would apply to ESO proceedings. In particular:

    a. orders may only be made by a State or Territory Supreme Court, which must be satisfied, on the balance of probabilities, based on admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if released into the community

    b. the making of an ESO is a judicial process that is subject to the rules of evidence and procedure applicable in civil matters

    c. parties to the proceeding (including the offender) can adduce evidence and make submissions, and the Court must give reasons for its decisions

    d. the Court may, at any point during the proceedings, appoint one or more independent experts

    e. the Court may only impose a condition as part of an ESO if it is satisfied 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

    f. the Court must give reasons for its decision, and decisions of the Court can also be appealed, and

    g. the Court is required to review the order on an annual basis, or sooner if the terrorist offender applies for a review and the Court is satisfied that new facts or circumstances, or the interests of justice, justify the review.

44. The ESO scheme would also be subject to important transparency and oversight measures:

    a. Consistent with the approach for CDOs, amended section 105A.22 requires the AFP Minister to report annually to the Parliament about the operation of the ESO scheme, outlining prescribed matters relating to PSOs and interim PSOs.

    b. The INSLM is required to conduct a review of Division 105A, and any other provision of the *Criminal Code* as far as it relates to Division 105A, by 7 December 2021. This review is a statutory requirement under subsection 6(1C) of the *Independent National Security Legislation Monitor Act 2010*.

c. Section 105A.25 of the *Criminal Code* provides that a PSO cannot be applied for, affirmed or made after 7 December 2026. This date is 10 years from the day the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* received the Royal Assent.

45. Section 105.23 requires a court sentencing a person to warn that person about the potential application of PSOs in certain circumstances. This includes where the Court is sentencing a person who has been convicted of an offence against sections 105A.18A (contravention of an ESO or ISO), 105A.18B (relating to monitoring devices), 104.27 (contravention of a control order) and an offence referred to in paragraph 105A.3(1)(a) (eligibility for a PSO).

Supporting rehabilitation and reintegration

46. ESOs are designed to protect the community from serious Part 5.3 offences. Rehabilitation and reintegration of offenders will be an important part of the scheme. This reflects the public interest in ensuring appropriate support is provided to convicted terrorist offenders to address their rehabilitative needs and support their effective integration back into the community.

47. Under paragraph 105A.7B(3)(n), the Court may include in an ESO a requirement that an offender attend and participate in treatment, rehabilitation or intervention programs or activities, or undertake psychological or psychiatric assessment or counselling. These conditions aim to disengage the person from violent extremism and address barriers to successfully re-entering the community. The offender's engagement in tailored programs, assessments and counselling will provide insight into the level of risk the person poses and changes to their level of risk over time, and recognises that offenders may have continuing rehabilitation needs post-sentence.

48. Operating alongside subsection 105A.7B(1), these provisions make clear that the Court can tailor conditions to address the needs of a particular offender. A treatment plan developed by relevant experts may include psychological or medical treatments, or educative activities, including with religious and community leaders, and may require the provision of services across various sectors. Importantly, the Bill provides the Court with the flexibility to require an offender to engage in any activity which the Court considers appropriate, including those which may more broadly support the offender's reintegration into the community.

49. The ongoing development of an Implementation Framework which would support a treatment plan regime in individual cases is discussed under 'Implementation of the ESO scheme'.

Consequential amendments

National security information

50. The Bill would amend the NSI Act to extend the court-only evidence provisions which apply in control order proceedings to ESO proceedings. In relation to control orders, the NSI Act allows a court to consider information that is not disclosed to the respondent or their legal representative (referred to as 'court-only evidence'), where the Court decides this is appropriate. This could be necessary in cases where there is highly sensitive information relevant to control order proceedings, which may disclose law enforcement or intelligence sources, methodologies and capabilities. Disclosure of this information could compromise ongoing counter-terrorism and national security investigations, endanger human sources or disclose the capabilities of law enforcement agencies.

51. The AFP has not needed to rely on the existing provisions to date in relation to control order applications, but their availability is critical for circumstances where a control order could otherwise not be obtained without relying on such information.

52. Consistent with the INSLM's recommendations, the Bill also provides that special advocates, which are available where court-only evidence is considered in control order proceedings under the NSI Act, would also be available where court-only evidence is considered in ESO proceedings. This is important to ensure the offender receives a fair hearing by enabling a special advocate to be appointed to represent the offender's interests during the parts of a hearing in which the offender and their ordinary legal representative are excluded when the Court agrees to consider highly sensitive court-only evidence.

53. The availability of court-only evidence would be limited to ESO proceedings where a court is:

    a. considering an application to make or vary an ESO or ISO

    b. reviewing an ESO or ISO, and

    c. where the AFP Minister has applied for a CDO but the Court is not satisfied of the requisite threshold and instead considers an ESO (in these circumstances, court-only evidence would only be available after the Court had decided it was not satisfied of the CDO threshold, and could only be considered in the ESO decision).

54. The Bill expressly prohibits the Court considering court-only evidence in determining whether to make a CDO.

Monitoring compliance with ESOs

55. To support the implementation of the ESO scheme, the Bill would extend the application of existing surveillance and monitoring powers which are available for control orders to apply also to ESOs and ISOs.

56. The Bill would amend the monitoring warrant regime in Part IAAB of the *Crimes Act 1914* to extend the powers currently available to monitor a subject's compliance with a control order to ESOs and ISOs. The powers include searching premises; inspecting, examining, measuring or testing things on the premises; inspecting or copying documents; and operating electronic equipment to put data into documentary form or to transfer data to a disk, tape or other storage device. The existing powers also include the ability to ask the occupier to answer questions and produce any document relevant to determining compliance with the conditions of a relevant order.

57. The Bill amends the *Surveillance Devices Act 2004* (SD Act) to allow certain law enforcement officers to:

    a. obtain surveillance device warrants and computer access warrants to monitor offenders who are subject to ESOs and ISOs

    b. obtain surveillance device warrants and computer access warrants to collect information to assist the AFP Minister in determining whether to make an application for a CDO, IDO, ESO or ISO, and

    c. use less intrusive surveillance devices (such as optical, listening and tracking devices) without a warrant to monitor offenders who are subject to ESOs or ISOs, if the use of that device does not involve entry onto premises (or interference with a vehicle or thing) without permission.

        a. This is consistent with existing arrangements for the use of certain surveillance devices without a warrant in the SD Act.

58. The Bill would extend the telecommunication interception warrant regime contained within the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to enable Part 5.3 warrant agencies[2] to:

    a. obtain a telecommunications service warrant, or telecommunications named person warrant to monitor an offender who is subject to an ESO or ISO, or to intercept other persons who are likely communicating with the offender, where certain conditions are met, and

    b. obtain telecommunications service warrants and telecommunications named person warrants to assist in determining whether to make an application for a CDO, IDO, ESO or ISO.

59. The Bill expands the availability of existing monitoring powers, including surveillance device warrants, computer access warrants and telecommunication service warrants, to gather information in relation to HRTO-eligible offenders who are serving a custodial sentence. This will ensure that the AFP Minister is provided contemporaneous evidence to understand the offender's level of risk, which will inform the decision whether or not to apply for a PSO. The information obtained while the person is in custody and serving a sentence is likely to be more relevant and in admissible form, as compared to other types of information, and will strengthen the evidence available to the Minister in determining whether it is appropriate to make an application in all the relevant circumstances.

60. The Bill has safeguards in place in relation to these warrants and their scope is appropriately limited to the HRTO regime. There are a number of additional elements the Judge or Administrative Appeals Tribunal member must expressly consider for these warrants, including the likely value of the information sought in determining whether to apply for a PSO. The threshold 'likely to assist' applied here is different from 'likely to substantively assist' which is applied in criminal investigative contexts where law enforcement authorities are in receipt of information informing a higher degree of suspicion of criminal conduct. This is because there will be a lower level of certainty as to how valuable the information obtained would be at the early stages of information gathering in the context of the Minister's determination as to whether or not to make a PSO application. It is vital that the offender's level of risk to the community is comprehensively understood to ensure that the type of order (if any) that is ultimately applied for by the Minister is appropriately adapted and proportionate to the risk posed by the offender if released into the community.

61. The Bill would also expand the TIA Act and SD Act information sharing frameworks to allow information obtained under existing warrants to support the performance of functions and powers under Division 105A of the *Criminal Code*. The Bill also expands the provision of this information to include sharing it with State and Territory agencies for use under their respective supervision or detention order schemes.

62. The Bill would also amend the international production order regime to provide for international production orders to be sought for the purposes of monitoring persons subject to ESOs. These amendments are contingent on the passage of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020.

63. The Bill would amend the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) to exempt all decisions made by the AFP Minister under Division 105A of the *Criminal Code* from judicial review under that Act, which will ensure that there is not fragmentation or frustration of the legal process. This includes the Minister's decision to apply for a CDO or an ESO and the Minister's decision to direct an offender to be subject to an assessment of risk. Judicial review of these decisions may be conducted as part of the substantive proceeding

[2] A 'Part 5.3 warrant agency' means a Commonwealth agency or an eligible authority of a State that a declaration in force under section 34 authorises to apply for Part 5.3 warrants (see section 38A of the TIA Act).

on the application for a PSO, and exemption from ADJR Act review does not present a practical or substantive limitation on a respondent's ability to seek judicial consideration of the Minister's decision. The Bill will also amend the *Australian Security Intelligence Organisation Act 1979*, for the avoidance of doubt, to provide that a condition imposed by an ESO or ISO, or an action relating to electronic monitoring, is not a prescribed administrative action under that Act.

Proposed interaction between Divisions 104 and 105A

64. The Bill would create ESOs as a third key measure in the *Criminal Code* for managing terrorist offenders at the end of their sentence, in addition to CDOs and control orders. The HRTO regime, which currently provides for CDOs, would be expanded to include ESOs. Control orders would remain available as a tool to manage post sentence offenders who do not meet the eligibility criteria or threshold for an ESO or CDO or who may previously have been subject to an ESO or CDO. Control orders would also continue to be available to manage individuals who pose a risk but have not been convicted of an offence. A comparison of these orders is at **Attachment D**.

65. The Bill provides that the AFP Minister may consent to an interim control order (ICO) (and a Federal Court or Federal Circuit Court could make that ICO), while CDO or ESO proceedings are on foot in a State or Territory Supreme Court in relation to the same offender. This reflects the need to ensure that, for offenders posing a significant risk to the community or other exceptional circumstances, there is an order in place to facilitate monitoring of the offender in the community. For example, where an offender has been very recently sentenced for an eligible offence but whose sentence expires in less than 12 months, the making of a CDO or ESO application may be delayed and the proceedings may not be finalised before the offender's release. If this offender posed a risk of harm warranting it, an application may also be made for an ICO.

66. Specifically, the Bill provides that:

    a. A control order cannot commence while an offender is in custody (serving a sentence or subject to a CDO), or while an ESO is in force – the control order would only commence when the person is released from custody and is not subject to an ESO.

    b. If an offender is subject to a control order and a CDO or an ESO is made in relation to the offender, then the control order immediately ceases to be in force.

67. This ensures that, where necessary due to the risk posed to the community, an offender released into the community prior to the finalisation of proceedings may be subject to controls, but also ensures that an offender could only be subject to one order, and one set of obligations, at any point in time.

Implementation of ESO scheme

68. The Australian Government continues to work in close partnership with the states and territories to establish an Implementation Framework to further formalise the operation of the HRTO regime, taking into account the future ESO caseload. The Framework will build upon existing governance structures to support the effective coordination of activities across and between jurisdictions in making or reviewing a CDO or ESO, or varying and monitoring compliance with an ESO.

69. The operation of the ESO scheme will be underpinned by the collective efforts and cooperation of agencies across jurisdictions.

70. The sharing of information between agencies and across jurisdictions is fundamental to the effective implementation of the HRTO regime. The Framework will build on existing arrangements for the engagement of relevant Commonwealth and state and territory agencies to manage the application process prior to the offender's release, and monitoring and enforcement of conditions post-release.

71. The Department of Home Affairs has overall management responsibility for the HRTO regime and has policy responsibility for the HRTO regime, including its ongoing reform and evolution. The Department of Home Affairs will continue to consult with operational agencies to inform considerations to be progressed to the Minister for Home Affairs regarding case management pathways for HRTO-eligible offenders, including ESO conditions. The Department of Home Affairs instructs the Australian Government Solicitor on the management of HRTO-related litigation.

72. The AFP will be responsible for operational coordination for an ESO, including coordinating the monitoring and enforcement of conditions once an offender is released on an ESO. Policy agencies, law enforcement, corrective services, rehabilitation and social services agencies will work together to develop appropriate conditions for the offender and to monitor compliance with those conditions.

Conclusion

73. Protecting the community from terrorist threats is, and will continue to be, one of the Government's highest priorities. The evolving nature of the terrorism threat now includes a specific risk posed by released offenders, who can be highly radicalised, motivated and capable of engaging in further offending (or inspiring others to do so). The Bill seeks to broaden the range of measures available to address the risk posed by convicted terrorist offenders. With a number of convicted terrorist offenders due to complete their custodial sentences of imprisonment in the next five years, ESOs will be an important addition to the Government's response to protect the community and keep Australians safe from terrorist threats.