

Ministerial responses — Report 11 of 2023¹

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OFFICIAL



Attorney-General

Reference: MC23-029578

Mr Josh Burns MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

By email: Human.rights@aph.gov.au

Dear Chair

Thank you for your correspondence of 7 September 2023 regarding the Parliamentary Joint Committee on Human Rights (the Committee)'s request for further information (as set out in report 9 of 2023) on the Counter-Terrorism and Other Legislation Amendment Bill 2023 (the Bill).

The Bill would support Australia's counter-terrorism framework, ensuring that the Government and agencies continue to have the appropriate tools to protect the community from the risk of terrorism, and improve the operational effectiveness of, and safeguards that apply in relation to the use of, those tools.

I appreciate the time the Committee has taken to review the Bill, and have enclosed my response to the Committee's questions for its consideration.

I thank the Committee for bringing these matters to the Government's attention and I trust this response is of assistance.

Yours sincerely



THE HON MARK DREYFUS KC MP

18/9/2023

Encl. *Response to the Committee's questions on the Bill*

OFFICIAL



Attorney-General

Reference: MC23-029578

Response to the Committee's questions on the Bill

Request for further information under paragraph 1.19

(a) Advice in relation to the ongoing necessity of these powers despite the recent downgrade in Australia's national terrorist threat level;

On 28 November 2022 the Director-General of Security, Mike Burgess, announced that the Australian Security Intelligence Organisation had lowered the terrorist threat level from 'PROBABLE' to 'POSSIBLE'. In his announcement, he noted that the 'reduction in the threat level reflects the maturity of Australia's counter-terrorism frameworks, laws and resourcing' and that, 'it is important to note that our assessment assumes there are no radical shifts in these policies, processes, laws or investments'.¹ The current counter-terrorism laws and frameworks, including the control order and the preventative detention order regimes in the *Criminal Code Act 1995* (Criminal Code), and Division 3A of Part IAA (police powers in relation to terrorism) in the *Crimes Act 1914* (Crimes Act), are a key factor in managing the terrorism risk and threat level in Australia.

The potentially catastrophic consequences of a terrorist attack do not change despite the recent downgrade in the National Terrorism Threat Level. The maintenance of counter-terrorism powers and frameworks is a key factor in managing the overall risk of terrorism, and provides a proper basis for the continued existence of these unique powers.

From an operational perspective, the Australian Federal Police (AFP) have advised that in the current threat environment:

- control orders are a 'necessary legislative mechanism of managing individuals who present a significant terrorism risk to the Australian community,'
- preventative detention orders provide critical preventive powers to the AFP in response to terrorism, that traditional policing powers cannot sufficiently address, and
- the stop, search and seizure powers in Division 3A of Part IAA are a necessary part of the suite of emergency police powers in state, territory and Commonwealth law, ensuring police can respond consistently and effectively to incidents in a Commonwealth place.

As the Bill would also bolster safeguards and oversight mechanisms for these powers, providing checks and balances which promote the rule of law and procedural fairness, it strikes a balance between ensuring law enforcement agencies have the powers they need to manage the threat of terrorism, while protecting the rights of individuals.

(b) Why it is proposed that these measures be extended for three years, and not a shorter period of time; and

The Counter-Terrorism and Other Legislation Amendment Bill 2023 (the Bill) would extend the emergency stop, search and seizure powers in the *Crimes Act 1914* and the control order and

¹ Director-General of Security Mike Burgess, 'National Terrorism Threat Level' (Speech, Australian Security and Intelligence Organisation, 28 November 2022).

preventative detention order regimes in the *Criminal Code Act 1995* until 7 December 2026. While the Parliamentary Joint Committee on Intelligence and Security (PJCIS)'s 2021 *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime* (AFP Powers Review) recommended that these powers be extended to 7 December 2025, these recommendations were made almost two years ago. The extension of the sunset dates to 7 December 2026 is consistent with the intent of the PJCIS' recommendations, which was to extend the sunset dates for three years.

The new sunsetting date appropriately reflects the extraordinary nature of these powers and guarantees an opportunity for the Parliament to review them again after a reasonable period to ensure they continue to be fit for purpose.

(c) Why it is proposed that the control orders regime be extended despite the current PJCIS inquiry into matters it has identified as being relevant to an assessment of the ongoing necessity of control orders.

The Government is aware the PJCIS has commenced a review into the operation, effectiveness and implications of Division 105A of the Criminal Code and any other provision of the Criminal Code as it relates to that Division. Division 105A establishes the post-sentence order regime.

The powers contained in the Counter-Terrorism and Other Legislation Amendment Bill 2023 (the Bill) will sunset on 7 December 2023, before a report from the PJCIS is anticipated. The Government is committed to implementing the reforms recommended by the PJCIS' 2021 AFP Powers Review, including extending the sunsetting date for the control order regime. In implementing these recommendations, the Bill provides additional protections and enhancements to support the regime's continued operation.

Request for answers under paragraph 1.39

- (a) Why the current range of available conditions with respect to control orders are inadequate;**
- (b) What is the necessity for each proposed additional available conditions in relation to control orders; and**
- (c) Why is it necessary to enable the court to be empowered to impose any condition that is reasonably appropriate and adapted for the relevant purpose (noting that the listed conditions are stated to be 'without limiting' the conditions that may be imposed), rather than the current non-exhaustive list of conditions;**

The current control order regime provides an exhaustive list of 'obligations, prohibitions and restrictions' that a court can impose (see subsection 104.5(3) of the Criminal Code). The current list of obligations, prohibitions and restrictions constrain a court's ability to tailor orders to the specific circumstances of, and risks posed by, the contolee.

As the AFP advised in its submission to the PJCIS's 2021 AFP Powers Review, 'since control orders were introduced in 2005, the conditions available remain substantially the same, however, management of the enduring risk posed by terrorist offenders, as well as those who pose a risk to the public of committing a terrorist act, has become increasingly complex'.² Additionally, 'there are areas of risk (including based on previously identified behaviour) that cannot be controlled or managed by a control order because there is no applicable obligation, prohibition or restriction

² Australian Federal Police, Submission 2 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into AFP Powers*, August 2020.

available in Division 104'.³

The new provision would have the benefit, recognised by the PJCIS in the 2021 AFP Powers Review, of modernising the range of conditions listed under a control order. For example, new paragraph 104.5A(2)(j) allows for a court to impose a condition that the person must facilitate access, including by providing passwords, to electronic equipment or technology and any data held within or accessible from any electronic equipment or technology owned or controlled by the person, for the purposes of a police officer searching and seizing any such equipment or accessing such data (or both). Currently the legislation does not allow the court to impose a condition like this on the controlee, and its inclusion reflects the need to provide for more modern and technologically appropriate conditions that can address risks posed by controlees.

Consistent with the post-sentence order regime in Division 105A, the Bill would not limit the conditions that the issuing court may impose on a person – it would provide that the court can impose any conditions it considers appropriate so the control order can be customised to address the risk profile of the individual concerned. This could include conditions that are less onerous than those in the current prescribed list, where appropriate. The Bill includes an indicative list of possible condition options to offer clarity about the types of conditions that may be appropriate to achieve the order's purpose and which are enforceable by police.

The new provisions make clear that a control order may include a very broad range of conditions directed at all aspects of a person's life. However, the possible breadth of conditions that may be imposed does not mean that every control order will be so broad. The amendments made by the Bill include a requirement that the issuing court must be satisfied that the conditions imposed—individually and in their totality—are reasonably necessary, and reasonably appropriate and adapted to protecting the public from a terrorist act (see new paragraph 104.4(1)(d)). This is a higher threshold than the current regime and safeguards against the court imposing conditions under a control order that are overly burdensome or disproportionately restrict the rights of the individual.

(d) How are the measures compatible with the rights of the child, noting the protection of the community must be considered to be a paramount consideration, which appears to be a higher consideration than that of the primary consideration as to the best interests of the child.

Article 3 of the Convention on the Rights of the Child (CRC) requires that the best interests of the child shall be a primary consideration in all actions concerning social welfare institutions, courts of law, administrative authorities or legislative bodies. The Bill engages the rights of the child before a court of law because a control order may be obtained in relation to a person as young as 14 years of age.

A control order may be issued by the court in respect of a young person only in the rare circumstance that it is required to prevent the young person from being involved in a terrorist act. Proposed paragraph 104.4(1)(d) of the Criminal Code requires that before issuing a control order in respect of a person the court must be satisfied on the balance of probabilities that the control order is reasonably necessary, and reasonably appropriate and adapted to protecting the public from a terrorist act. When considering these matters in relation to a young person aged between 14 and 17, the issuing court is required to consider the 'best interests' of the young person as a 'primary consideration'.

In determining what is in a young person's 'best interests', subsection 104.4(2A) provides that the issuing court must take into account:

³ Ibid.

- the age, maturity, sex and background (including lifestyle, culture and traditions) of the person
- the physical and mental health of the person
- the benefit to the person of having a meaningful relationship with their family and friends
- the right of the person to receive an education
- the right of the person to practise their religion, and
- any other matter the court considers relevant.

Other rights of the young person set out in the CRC are expressly recognised by subsection 104.4(2A), including the right of the child to education (Article 28) and to practise their religion (Articles 14 and 30). This is in addition to the express provision that the issuing court may also consider any other matter the court considers relevant (subsection 104.4(2A)).

The issuing court is required to consider the best interests of the young person as a primary consideration, but the paramount consideration is achieving the objects of the control order regime. Noting the grave consequences that can result from a terrorist act, it is appropriate that in the hierarchy of matters to be considered by the issuing court, the objects of the control order regime, including protecting the public from a terrorist act, should be the paramount consideration of the issuing court. Nothing in Article 3 of the CRC prevents other matters from being prioritised as paramount considerations, over the best interest of the child.

In addition to each of the safeguards outlined above, and the requirement to consider the best interests of the young person as a primary consideration, the control order regime also includes the following safeguards targeted at ensuring the needs of a young person are met:

- reasonable steps must be taken to serve the interim control order, variations of a control order, a revocation of a control order or the confirmation of the interim control order on at least one parent or guardian of the young person, and
- if a young person does not have a lawyer to act for them in relation to a control order proceeding, the court must appoint a lawyer for the young person, unless the proceedings are *ex parte* or the young person has previously refused a lawyer.

The Bill would also introduce additional safeguards in relation to the variation of control orders by consent (new section 104.22) where the controlee is a minor. These includes the following requirements:

- the AFP or a legal representative of the senior AFP member must give written notice to at least one parent or guardian of the child subject to a control order of the application to vary the order by consent, if that application is being brought by the AFP (new subsection 104.22(5)),
- the issuing court must be satisfied that written consent to the variation has been provided and not withdrawn by the parent or guardian of the controlee who was notified of the application to vary, before making the variation (new subparagraph 104.22(5)(a)(i)), and
- the issuing court must consider the best interests of the controlee, having regard to any

representations made by the controlee about the variations, in satisfying itself that the variation is appropriate in the circumstances (new paragraphs 104.22(5)(b)-(c).

Accordingly, the control order regime, as amended by the Bill, will protect the best interests of the child and comply with Article 3 of the CRC.