

## Chapter 2

### Concluded matters

2.1 The committee considers a response to matters raised previously by the committee.

2.2 Correspondence relating to these matters is available on the committee's website.<sup>1</sup>

### Bills

#### Counter-Terrorism and Other Legislation Amendment Bill 2023<sup>2</sup>

<b>Purpose</b>	<p>This bill seeks to extend for 12 months the following Australian Federal Police counter-terrorism powers that are scheduled to sunset on 7 December 2023:</p> <ul style="list-style-type: none"> <li>• the control order regime in Division 104 of the <i>Criminal Code Act 1995</i>;</li> <li>• the preventative detention order regime in Division 105 of the <i>Criminal Code Act 1995</i>; and</li> <li>• the stop, search and seizure powers in Division 3A of Part IAA of the <i>Crimes Act 1914</i>.</li> </ul> <p>The bill also seeks to amend provisions relating to the control order regime, and stop, search and seizure powers in Division 3A of the <i>Crimes Act 1914</i>, and make other consequential amendments</p>
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives, 10 August 2023
<b>Rights</b>	Children's rights; fair hearing; freedom of association; freedom of expression; freedom of movement; liberty; privacy; torture or cruel, inhuman or degrading treatment or punishment

<sup>1</sup> See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports)

<sup>2</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, Counter-Terrorism and Other Legislation Amendment Bill 2023, *Report 11 of 2023*; [2023] AUPJCHR 110.

2.3 The committee requested a response from the Attorney-General in relation to the bill in [Report 9 of 2023](#).<sup>3</sup>

### **Extension of counter-terrorism powers**

2.4 This bill seeks to extend, by three years, the operation of several counter-terrorism related provisions which are due to sunset on 7 December 2023. In particular, the bill would extend the operation of:

- (a) the stop, search and seizure powers in Division 3A of the *Crimes Act 1914* (Crimes Act), which provides a range of powers for the Australian Federal Police (AFP) and state and territory police to exercise in a Commonwealth place (such as an airport) relating to counter-terrorism;<sup>4</sup>
- (b) the control order regime in Division 104 of the *Criminal Code Act 1995* (Criminal Code), which allows courts to impose conditions on a person restricting their ability to do certain things;<sup>5</sup> and
- (c) the preventative detention order regime in Division 105 of the Criminal Code, which allows a person to be taken into custody and detained if it is suspected on reasonable grounds that they are preparing to engage in a terrorist act.<sup>6</sup>

2.5 The bill would also extend, by 12 months, the operation of section 122.4 of the Criminal Code, which makes it an offence for a current or former Commonwealth officer to disclose information without authorisation.<sup>7</sup>

### **Summary of initial assessment**

#### ***Preliminary international human rights legal advice***

##### *Multiple rights*

2.6 The powers sought to be extended by this measure are intended to protect Australia's national security interests and protect against the possibility of terrorist acts in Australia. As such, if these powers were capable of assisting to achieve these objectives, it would appear that extending these powers would promote the rights to life and security of person. The right to life includes an obligation on the state to protect people from being killed by others or identified risks. The right to security of person requires the state to take steps to protect people against interference with personal integrity by others.

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<sup>3</sup> Parliamentary Joint Committee on Human Rights, [Report 8 of 2023](#) (6 September 2023), pp. 13–27.

<sup>4</sup> Schedule 1, item 9, *Crimes Act 1914* (Crimes Act), section 3UK.

<sup>5</sup> Schedule 2, Part 1, item 42; *Criminal Code Act 1995* (Criminal Code), section 104.32.

<sup>6</sup> Schedule 2, Part 1, item 51; Criminal Code, section 105.53.

<sup>7</sup> Schedule 2, Part 2, item 63.

2.7 However, the extended powers also engage and limit numerous human rights, including the:

- right to liberty;
- right to freedom of movement;
- right to a fair trial and fair hearing;
- right to privacy;
- right to freedom of expression;
- right to freedom of association;
- right to equality and non-discrimination;
- right to be treated with humanity and dignity;
- right to the protection of the family;
- right to work;
- rights to social security and an adequate standard of living; and
- rights of children.

2.8 These measures were first introduced in 2005, pursuant to the *Anti-Terrorism Act (No. 2) 2005*, and their operation has been extended several times since then. Consequently, the committee has considered the human rights compatibility of the provisions that are sought to be extended by this measure on numerous occasions.<sup>8</sup> The committee has previously found that while all of the measures likely sought to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there were questions whether the measures would be effective to achieve this and were necessary, and, in particular, the measures did not appear to be proportionate. As a result, the committee has previously found the measures were likely to be incompatible with a range of human rights.

2.9 While the bill seeks to make several amendments to these three measures (proposed amendments which are considered below), the same human rights concerns as were previously raised apply in relation to the further proposed extension of these coercive powers.

2.10 In addition, there are questions as to whether these powers remain necessary, including in light of the downgrading in 2022 of Australia's National Terrorism Threat Level. Further, it is noted that the stop, search and seizure powers in Division 3A of the Crimes Act, and the preventative detention order powers in the Criminal Code, have

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<sup>8</sup> See most recently, Parliamentary Joint Committee on Human Rights, [Report 4 of 2022](#) (28 September 2022), pp. 7–11; [Report 10 of 2018](#) (18 September 2018) pp. 25–53.

never been used since their introduction.<sup>9</sup> Questions also arise as to why it is necessary to extend the control order regime for three years, given that a relevant review of related powers is currently underway.

2.11 As such, noting the committee's previous conclusion that these provisions do not contain sufficient safeguards to constitute a proportionate limit on rights, and the absence of specific information as to the continued necessity of all these powers despite the recent reduction in Australia's terrorist threat level, further information is required to establish whether there is an ongoing necessity for the control order, preventative detention order and stop, search and seizure provisions.

### ***Committee's initial view***

2.12 The committee considered further information was required to assess the compatibility of these measures with human rights and therefore sought the advice of the Attorney General in relation to the questions set out in the Attorney-General's response below.

2.13 The full initial analysis is set out in [Report 9 of 2023](#).

### **Attorney-General's response<sup>10</sup>**

2.14 The Attorney-General advised:

#### **(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'.<sup>11</sup> 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.

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<sup>9</sup> The Hon Mark Dreyfus MP, Attorney General, the Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022, [Second Reading speech](#), *House of Representatives Hansard*, 8 September 2022, p. 3.

<sup>10</sup> The Attorney-General's response to the committee's inquiries was received on 19 September 2023. This is an extract of the response. The response is available in full on the committee's [webpage](#).

<sup>11</sup> Director-General of Security Mike Burgess, 'National Terrorism Threat Level' (Speech, Australian Security and Intelligence Organisation, 28 November 2022).

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 APP 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 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 sunset 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 sunset date for the control order regime. In implementing these recommendations, the Bill provides additional protections and enhancements to support the regime's continued operation.

## **Concluding comments**

### ***International human rights legal advice***

2.15 As to the ongoing necessity of these powers despite the recent downgrade in Australia's national terrorist threat level, the Attorney-General stated that the current counter-terrorism laws and frameworks (including the control order and the preventative detention order regimes and police powers in relation to terrorism) are 'a key factor in managing the terrorism risk and threat level in Australia'. The Attorney-General advised that the potentially catastrophic consequences of a terrorist attack do not change despite the recent downgrade in the threat level and that 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. The Attorney-General further stated that the AFP has advised that in the current threat environment the three measures sought to be extended by this bill continue to be required. He stated that the AFP advises that control orders are a necessary legislative mechanism of managing individuals who present a significant terrorism risk; preventative detention orders provide critical preventative powers to the AFP in response to terrorism that traditional policing powers cannot sufficiently address; and the stop, search and seizure powers 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.

2.16 As noted in the preliminary legal advice, 28 control orders have been made against 21 individuals (including one against a child) since September 2014.<sup>12</sup> By contrast, the stop, search and seizure powers in Division 3A of the Crimes Act, and the preventative detention order powers in the Criminal Code, have never been used since

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<sup>12</sup> The Hon Mark Dreyfus MP, Attorney General, [Second Reading speech](#), *House of Representatives Hansard*, 10 August 2023, p. 1.

their introduction.<sup>13</sup> While the continued availability of counter-terrorism powers (including those that have never been used) may contribute to the level of terrorism threat in practice, for example by deterring terrorists who would have engaged in acts of terrorism but for the existence of these powers, no evidence is available to this effect.

2.17 The Attorney-General further stated that the bill would bolster safeguards and oversight mechanisms for these powers, thereby providing checks and balances which promote the rule of law and procedural fairness, and that the bill 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. The bill would require a minister seeking to declare a Commonwealth place to be a 'prescribed security zone' (thereby enlivening police stop, search and seizure powers in that area) to have regard to a range of matters, including whether the impact on the rights of persons in the place would be proportionate and reasonable.<sup>14</sup> It would also require the Independent National Security Legislation Monitor (INSLM), PJCIS and Commonwealth Ombudsman be notified of a declaration within 72 hours of it being made, and would enable a declaration to be revoked earlier than the default period of 28 days.<sup>15</sup> Further, if a police officer did exercise a stop and search power with respect to terrorism related items, they would be required to inform the person of their right to make a complaint to the Commonwealth Ombudsman or an oversight body (unless not reasonably practicable to do because of circumstances of urgency).<sup>16</sup> As noted in the analysis below, these amendments may assist somewhat with proportionality. However, it is noted that the majority of these amendments would be enlivened after any breach of rights had already occurred, and the requirement that the rights of persons be considered prior to making a declaration would not require that a declaration not be made were it to be a disproportionate or unreasonable limit on rights.

2.18 As to why it is proposed that these measures be extended for three years, and not a shorter period of time, the Attorney-General stated that the extension of the sunset dates to 7 December 2026 is consistent with the intent of the PJCIS' recommendations, namely to extend the sunset dates for three years. He stated that the proposed new sunset date reflects the extraordinary nature of these powers and ensures an opportunity for the Parliament to review them again after a reasonable period. However, it is again noted that this recommendation was made in 2021, and that since that time Australia's threat level was reduced for the first time since 2014. It is also not clear that the recommendation by the PJCIS fully took into account the

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<sup>13</sup> The Hon Mark Dreyfus MP, Attorney General, the Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022, [Second Reading speech](#), *House of Representatives Hansard*, 8 September 2022, p. 3.

<sup>14</sup> Item 3, *Crimes Act 1914*, section 3UJ.

<sup>15</sup> Items 3–4, *Crimes Act 1914*, section 3UJ.

<sup>16</sup> Item 2, *Crimes Act 1914*, section 3UD.

human rights concerns regarding these measures (noting this is not specifically within the PJCIS' remit).

2.19 As to 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 Attorney-General stated that the government is aware the PJCIS has commenced this review, but that the powers in this bill will sunset before a report from the PJCIS is anticipated. The Attorney-General stated that the government is committed to implementing the reforms recommended by the PJCIS in 2021, including extending the sunset date for the control order regime. However, a commitment to implement recommendations from the PJCIS in 2021 does not constitute a sufficient justification for these coercive powers and their potentially significant limit on human rights, noting that the sunset of these powers could be deferred for a shorter period, during which time relevant inquiries from the PJCIS into related matters could be considered.

2.20 Relevantly, in 2017, the United Nations (UN) Human Rights Committee raised specific concerns regarding the measures sought to again be extended by the bill, in particular with respect to their necessity and proportionality, and the concern that these emergency measures could become the norm rather than exception over time.<sup>17</sup>

2.21 While the measures sought to be again extended by this bill likely seek to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there remain questions as to whether the measures would be effective to achieve this and

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<sup>17</sup> The UN Human Rights Committee specifically stated: 'While acknowledging the State party's need to adopt measures to respond to the risk of terrorism, and while noting the safeguards in place to ensure respect for fundamental rights and freedoms, the Committee is nonetheless concerned about the...necessity and proportionality of certain counterterrorism powers, including control orders, stop, search and seizure powers...preventive and post-sentence detention order regimes, [and] "declared areas" offences...While welcoming the mandate of the Independent National Security Legislation Monitor to review counter-terrorism legislation, the Committee is concerned that in the past, the State party has not promptly acted upon a number of recommendations made by the Monitor and by the Council of Australian Governments, and has in fact reauthorized measures such as control orders and preventive detention orders and referred them to a new round of reviews by the Monitor and the Parliamentary Joint Committee on Intelligence and Security. While noting the State party's explanation that many of the prescribed powers have not been used, or have been used only rarely as a last resort, the Committee is concerned that there is a risk that such emergency measures could, over time, become the norm rather than the exception...[Australia] should comprehensively review its current counter-terrorism laws, policies and practices on a continuing basis with a view to ensuring their full compliance with the Covenant, in particular by ensuring that any limitations of human rights for national security purposes serve legitimate government aims, are necessary and proportionate to those legitimate aims and are subject to appropriate safeguards. Moreover, it should act diligently on the outcome of such reviews'. See UN Human Rights Committee, *Concluding observations on the sixth report of Australia* (1 December 2017), CCPR/C/AUS/CO/6, [15]–[16].



are necessary. The measures do not appear to be proportionate, and therefore are likely to be incompatible with a range of human rights.

### **Committee view**

2.22 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the recent downgrading of Australia's national terrorism threat level assumed no significant change in relevant legislation, and that these powers are nevertheless still necessary. The committee further notes that the bill would seek to implement some safeguards with respect to the use of these powers. However, while these may assist with transparency and review rights, they appear to have limited safeguard value with respect to human rights.

2.23 The committee considers that it remains unclear that there is an ongoing necessity for these powers, noting that many of these powers have never been used. The committee considers that the proposed extension of these powers for a further three years has not been sufficiently justified, noting in particular that a relevant inquiry into related powers will likely provide its advice to Parliament much sooner. Consequently, the committee reiterates its previous advice that while the measures sought to be extended by this bill likely seek to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there are questions whether the measures would be effective to achieve this and are necessary, and, in particular, the measures do not appear to be proportionate, and therefore are likely to be incompatible with a range of human rights.

2.24 The committee is also concerned that the statement of compatibility with human rights fails to set out the compatibility of these measure with several human rights the committee has previously identified in relation to these powers. These include, in particular: the right to equality and non-discrimination; the right to be treated with humanity and dignity; the right to protection of the family; the right to work; the right to social security; and the right to an adequate standard of living.

### **Suggested action**

2.25 The committee recommends that the statement of compatibility be updated to identify the compatibility of the measures sought to be extended by this bill with the right to equality and non-discrimination; the right to be treated with humanity and dignity; the right to protection of the family; the right to work; the right to social security; and the right to an adequate standard of living.

2.26 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

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## Proposed amendments to counter-terrorism powers

2.27 In addition to seeking to extend the operation of these counter-terrorism provisions, the bill also seeks to amend provisions relating to control orders and stop, search and seizure powers.

2.28 In particular, the bill seeks to make several amendments to the control order regime in Division 104 of the Criminal Code.<sup>18</sup> These would largely extend the available conditions under control orders to include all of those conditions currently available with respect to extended supervision orders.<sup>19</sup> The bill would repeal and replace sections 104.5 and 104.5A, which specify the particular conditions and obligations that a court may impose on a person under a control order.<sup>20</sup> In particular, proposed new section 104.5A would provide that a court's ability to impose conditions on a person is not limited by the section, and would further provide that a court may impose conditions that 'relate to' a listed matter.

2.29 The proposed amendments would introduce several new conditions that may be imposed on a person subject to a control order. These would include conditions that relate to requiring a person to:

- (a) reside at specified premises and not begin to reside at any other premises without prior permission from a specified authority;
- (b) surrender travel documents (including passports) and not apply for any travel documents;
- (c) not change their name or use another name;
- (d) not apply for a licence to operate an equipment, machinery, a heavy vehicle or a weapon, or any licence to possess a weapon;
- (e) not engage in any education or training without prior written permission from a specified authority;
- (f) provide specified information to a specified authority within a specified period or before a specified event;
- (g) attend at places, and report to persons at specified times;
- (h) provide a schedule setting out their proposed movements for a specified period and comply with that schedule for that period;
- (i) allow any police officer to enter specified premises to search them, their residence, or any premises they intend to reside in, search any other premises under their control, and seize any item found during those searches (including allowing them to be examined forensically); and/or

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<sup>18</sup> Schedule 2, Part 1, items 3–42.

<sup>19</sup> See, Criminal Code, Division 105, subdivisions A–EA.

<sup>20</sup> Schedule 2, item 11.

- (j) facilitate access to electronic equipment or technology (including by providing passwords or in any other way), or any data held within or accessible from it, which is owned or controlled by them, for the purposes of police searching and seizing or accessing any such equipment or data.

2.30 The bill would also broaden several existing conditions, to include requirements that a person:

- (a) not be present at a specified place or area, classes of places or areas, or any area or place determined by a specified authority;
- (b) not leave Australia, or the state or territory in which they reside;
- (c) not communicate or associate by any means (including through third parties) with specified individuals or classes of individuals, or any individuals determined by a specified authority;
- (d) attend and participate in treatment, rehabilitation or intervention programs or counselling, and/or undertake psychological or psychiatric assessment or counselling, including as directed by a specified authority (including where they do not agree to do so);
- (e) attend and participate in interviews and assessments (including for the purposes of the matters set out at (d) immediately above) and allow the results of these, and any other specified information, to be disclosed to a specified authority;
- (f) comply with any reasonable direction by a specified authority in relation to any specified condition;
- (g) not possess or use specified articles or substances, and submit to testing in relation to them; and/or
- (h) remain at specified premises between specified times for up to 12 hours per day, and allow visits at specified premises by a specified authority at any time to ensure compliance with this.<sup>21</sup>

2.31 The bill would permit a court to specify that certain conditions in a control order are exemption conditions, meaning conditions from which the person may apply to a specified authority in writing for a temporary exemption.<sup>22</sup> In addition, the bill would create a new mechanism by which the AFP, or the affected individual, may apply to the issuing court to vary a control order by either varying or removing existing conditions or imposing further additional conditions.<sup>23</sup> The court would be able to vary the order if satisfied that: the other party consents to the variation; the variation is

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<sup>21</sup> See Schedule 2, item 11, proposed section 104.5A.

<sup>22</sup> Schedule 2, item 11.

<sup>23</sup> Schedule 2, Part 1, item 26, proposed s 104.22.

'appropriate in all the circumstances'; and, where the affected individual is a child, the variation is in their best interests, having regard to any representations the child makes about the proposed variation and any other matters the court considers to be relevant.<sup>24</sup>

2.32 The bill would also amend the circumstances in which a court may make an interim control order. Currently, the court must be satisfied that each of the proposed obligations, prohibitions or restrictions in a control order is reasonably necessary, appropriate and adapted towards preventing a terrorist act, taking into account: the objects of Division 101 of the Criminal Code (as a paramount consideration); the best interests of the child (as a primary consideration, where applicable); and the impact of these proposed conditions on the person's financial and personal circumstances.<sup>25</sup> The bill would require the court to also be satisfied that these criteria are met having regard to the combined effect of all the proposed conditions.<sup>26</sup>

2.33 With respect to the stop, search and seizure powers in Division 3A of the Crimes Act, the bill would provide that where a police officer exercises their stop and search powers with respect to terrorism related items, they must inform the person of their right to make a complaint to the Commonwealth Ombudsman or other oversight body (unless not reasonably practicable to do because of circumstances of urgency).<sup>27</sup> It would require a minister to have regard to a range of matters before declaring a Commonwealth place to be a prescribed security zone, including the availability of existing laws to assist in responding to a threat of terrorism, and whether the impact on the rights of persons in the place would be reasonable and proportionate.<sup>28</sup> Further, it would permit such declarations to be made for a shorter period than the current default minimum of 28 days.<sup>29</sup> It would also require that the Commonwealth Ombudsman, INSLM and PJCIS be notified of a declaration being made within 72 hours.<sup>30</sup>

2.34 The bill would also make minor amendments to other counter-terrorism measures. It would limit the classes of persons who may be appointed as an issuing authority for preventative detention orders to Judges of the Federal Court of Australia or the Supreme Court of a state or territory only.<sup>31</sup> It would also amend the annual reporting requirements that apply with respect to continuing detention orders and

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<sup>24</sup> A decision by the AFP to provide or refuse consent to vary a control order would not be subject to judicial review. See, Schedule 2, Part 1, items 57—58, proposed amendments to the *Administrative Decisions (Judicial Review) Act 1977*.

<sup>25</sup> Criminal Code, section 104.4.

<sup>26</sup> Schedule 2, items 5 and 7.

<sup>27</sup> Schedule 1, item 2, Crimes Act, proposed subsections 3UD(1A) and (1B).

<sup>28</sup> Schedule 1, item 3, Crimes Act, proposed subsection 3UJ(1A).

<sup>29</sup> Schedule 1, item 4, proposed subsection 3UJ(3).

<sup>30</sup> Schedule 1, item 5, proposed subsection 3UK(5A).

<sup>31</sup> Schedule 2, Part 1, item 44, Criminal Code, section 105.2.

extended supervision orders, requiring the inclusion of specified additional statistical and financial information.<sup>32</sup>

## Summary of initial assessment

### *Preliminary international human rights legal advice*

#### *Multiple rights*

2.35 The proposed amendments to these measures engage and limit multiple human rights, as identified above at paragraph [2.7].

2.36 Some of these proposed amendments may provide for greater oversight and accountability with respect to the exercise of these powers and may assist with their proportionality. For example, with respect to the stop, search and seizure powers in Division 3A of the Crimes Act, requiring the minister to have regard to certain matters before declaring a Commonwealth place to be a prescribed security zone may facilitate greater accountability with respect to the measure.<sup>33</sup> With respect to control orders, requiring that the court must be satisfied that the combined effect of the conditions in a control order is reasonably necessary, appropriate and adapted may assist with the proportionality of the measure. In addition, enabling a court to determine that the subject of a control order may seek an exemption from specified conditions, and to vary an order with the consent of the AFP, may provide for some flexibility in practice (albeit in the context of potentially extremely broad coercive limitations on the person's human rights).

2.37 However, many of the proposed amendments to the control order regime would substantially broaden the potential conditions that may be imposed on a person, meaning the potential interference with human rights would be greater. The explanatory memorandum states that the intention behind the proposed expansion of available conditions is to align them with the conditions that can be imposed under an extended supervision order (ESO), in line with recommendations of the PJCIS in 2021.<sup>34</sup> In this regard, it is noted that in 2020, the advice of this committee was that there was a significant risk that the extended supervision order provisions could impermissibly limit multiple human rights.<sup>35</sup>

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<sup>32</sup> Schedule 2, Part 1, items 52–55, Criminal Code, section 105A.22. This bill would not extend the operation of powers related to post-sentence orders (which are currently due to sunset on 7 December 2026). See, section 105A.25.

<sup>33</sup> The other proposed amendment to Division 3A of the Crimes Act is that officers exercising these powers be required to advise persons being stopped or searched of their ability to make a complaint. This would appear to have very limited safeguard value, noting that a complaint would only be made once a breach of human rights had already occurred.

<sup>34</sup> Statement of compatibility, p. 9.

<sup>35</sup> See, Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, [Report 11 of 2020](#) (24 September 2020), pp. 2-29 and [Report 13 of 2020](#) (13 November 2020), pp. 19-62.

2.38 No specific information is provided in relation to this bill to demonstrate either the inadequacy of the existing range of available conditions, or the need for each proposed additional potential condition. For example, a person subject to a control order may already be prohibited from communicating or associating with specified individuals but it is proposed that a person may be prohibited from communicating or associating with specified classes of individuals. However, no information is provided as to why the existing power is inadequate to achieve the stated objective of the control order regime, and why it is necessary that the power be expanded.

2.39 Noting that the committee has previously found the existing control order regime to be a disproportionate limit on multiple rights, further information is required to assess whether expanding the conditions that may be imposed under a control order is a proportionate limit on multiple human rights.

### ***Committee's initial view***

2.40 The committee considered further information was required to assess the compatibility of these measures with human rights and therefore sought the advice of the Attorney General in relation to the questions set out in the Attorney-General's response below.

2.41 The full initial analysis is set out in [Report 9 of 2023](#).

### **Attorney-General response<sup>36</sup>**

2.42 The Attorney-General advised:

**(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 controlee.

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

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<sup>36</sup> The Attorney-General's response to the committee's inquiries was received on 19 September 2023. This is an extract of the response. The response is available in full on the committee's [webpage](#).

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'.<sup>37</sup> 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 available in Division 104'.<sup>38</sup>

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.

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<sup>37</sup> Australian Federal Police, *Submission 2 to Parliamentary Joint Committee on Intelligence and Security*, Inquiry into AFP Powers, August 2020.

<sup>38</sup> *Ibid.*

**(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:

- 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 an addition to the express provision that the issuing court may also consider any other matter the court considered 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.

## **Concluding comments**

### ***International human rights legal advice***

2.43 Further information was sought as to why the current range of available conditions with respect to control orders are inadequate; why each proposed additional condition in relation to a control order is necessary; and why it is 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 Attorney-General advised that the current list of obligations, prohibitions and restrictions that may be imposed under a control order constrains a court's ability to tailor orders to the specific circumstances of, and risks posed by, the controlee. The Attorney-General noted a submission by the AFP in 2021, which stated that since control orders were introduced in 2005 the conditions available have largely remained the same while managing the enduring risk posed by terrorist offenders has become increasingly complex, and there are areas of risk that cannot be controlled or managed by a control order. The Attorney-General noted the example of the proposed condition that a person be required to facilitate access to electronic equipment (such as by providing passwords). The Attorney-General stated that currently the legislation does not allow the court to impose a condition like this, and its inclusion reflects the need to provide for more modern and technologically appropriate conditions that can address risks posed by controlees.

2.44 While this appears to explain the inclusion of this specific condition, it does not explain the inclusion of other proposed broadened conditions which do not relate to technological developments the Attorney-General has identified. For example, the bill would provide that a control order may require a person to surrender travel documents, not change their name, not engage in any education or training without prior permission, provide a schedule of their proposed movements for a specified period, and not leave the state or territory in which they reside. These could mean that much more restrictive individual and collective conditions could be imposed on persons under a control order. No information has been provided to demonstrate the need for these other proposed additional and broadened potential conditions.

2.45 The Attorney-General further stated that a control order may include a very broad range of conditions directed at all aspects of a person's life, but this does not mean that every control order will be so broad. He noted that the bill would not limit the conditions that the issuing court may impose on a person so the order can be customised to address the risk profile of the individual concerned. The Attorney-General stated that this could include conditions that are less onerous than those in the current prescribed list, noting that the bill includes an indicative list of possible conditions to offer clarity about the types of conditions that may be appropriate to achieve the purpose of the order, and which are enforceable by police. Providing the court with the discretion to impose less restrictive control orders may assist with the proportionality of the measure. However, as a matter of law, the bill would permit the making of extremely restrictive control orders. The Attorney-General stated that the bill would require 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. He stated that 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. However, it is not clear that this would be its effect. A court would need to consider that each of the proposed

conditions, and their combined effect, are reasonably necessary and appropriate to protect the public from a terrorism act or preventing the provision of support for, or the facilitating of, such an act. It would require no consideration of the effects of the conditions on the person's human rights. As such, this requirement would not appear to have safeguard value with respect to significant interferences with human rights.

2.46 Further, the initial analysis noted that the list of proposed available conditions is non-exhaustive and would not limit the power of the court to impose additional conditions. As with ESOs, the conditions the court may impose include that an offender remain at specified premises between specified times of the day, but this must be no more than 12 hours within any 24 hours'. However, this general condition is stated to apply 'without limiting' the overall section which states that a court could impose 'any conditions' which the court is satisfied, on the balance of probabilities, are reasonably necessary, and reasonably appropriate and adapted.<sup>39</sup> In relation to ESOs, advice was provided to the committee from the then Attorney-General that the 12 hour period listed as a possible condition would not constrain the court from requiring that a person remain at specified premises for longer than this.<sup>40</sup> Consequently, as a matter of statutory interpretation, there is a risk a court could require that, in order to address the unacceptable risk of a person engaging in terrorist conduct, they must remain at specified premises for 24 hours a day. Such a condition would amount to a deprivation of liberty under international human rights law.<sup>41</sup> The Attorney-General's response did not address this concern, nor explain why the bill would not limit the conditions that the issuing court may impose on a person, other than to say this is consistent with the post-sentence order regime in Division 105A. Consistency with existing legislation is not an appropriate basis on which to empower the making of potentially extremely coercive powers.

2.47 Further, as noted in the initial analysis, a court may impose conditions that 'relate to' the conditions specified, and so it appears that a person may be required to do (or refrain from doing) additional things in order to comply with a condition. For example, it is proposed that an affected person be required to undertake psychological assessment, including where they do not consent to it, and it appears that complying with this condition may, for example, require that they attend specific premises, answer questions, and/or provide personal medical or other records to a clinician. Consequently, the full extent of the potential interference with human rights arising from these proposed amendments is unclear.

2.48 Aside from the information relating to facilitating access to electronic services, no information has been provided to demonstrate that each of the proposed new and

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<sup>39</sup> See Schedule 2, item 5.

<sup>40</sup> See Parliamentary Joint Committee on Human Rights, [Report 13 of 2020](#) (13 November 2020), p. 38.

<sup>41</sup> See *Fardon v. Australia*, UN Human Rights Committee, CCPR/C/98/D/1629/2007, 10 May 2010, [7.4].

broadened potential conditions that may be imposed under a control order is necessary and proportionate. As a matter of law, the proposed measures would facilitate the making of control orders including extremely onerous conditions that may significantly limit many human rights. As such, the proposed expansion of the control order measures risk constituting a disproportionate, and therefore impermissible, limit on multiple human rights.

### *Rights of the child*

2.49 Noting that these provisions apply with respect to children aged 14 and above, further information was sought as to how the measures are compatible with the rights of the child, noting the control order provisions provide that 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.

2.50 The Attorney-General stated that 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. He stated that 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. The Attorney-General stated that nothing in article 3 of the UN Convention on the Rights of the Child (CRC) prevents other matters from being prioritised as paramount considerations, over the best interest of the child. He further noted that other rights of the child set out in the CRC are expressly recognised by subsection 104.4(2A) (including the right of the child to education and to practise their religion), in addition to the express provision that the issuing court may also consider any other matter the court considers relevant. The Attorney-General also noted further requirements in the legislation designed to ensure the needs of children are met, including with respect to service of documents relating to an order, the requirements to appoint a lawyer in some circumstances, and similar requirements with respect to proposed provisions for the variation of orders by consent.

2.51 The UN Committee on the Rights of the Child has recognised the need for flexibility in applying the best interests of the child, including where the best interests of the child conflict with other rights. It has guided that such conflicts should be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise, and if harmonisation is not possible:

authorities and decision-makers must analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations.

Therefore, a larger weight must be attached to what serves the child best interests.<sup>42</sup>

2.52 Requiring another consideration, such as the objects of the control order regime, to be a 'paramount' consideration to be considered in priority to the best interests of the child in all cases, would appear to be inconsistent with this approach. As the Committee on the Rights of the Child has further stated, treating the best interests of the child as primary 'requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned'.<sup>43</sup>

2.53 The requirement that the court must, in all control order proceedings, have regard to the objects of Division 104 of the Criminal Code as the paramount consideration (that being to allow conditions to be imposed on a person for purposes including protecting the public from a terrorist act) may, where the person in question is a child, not comply with the requirement that the best interests of the child be a primary consideration because it requires the best interests of the child to be a subordinate consideration in all proceedings relating to children and permits no flexibility. Further, while subsection 104.4(2A) empowers a court to consider any matter it considers relevant in assessing the best interests of the child, it is not clear how such an assessment would be made in practice, particularly where an application was being heard *ex parte*. For example, it is not clear whether a court would have access to any submissions by or on behalf of the child or receive expert advice from a professional trained to assist children. There is extensive guidance under international law as to how an assessment of the best interests of the child must occur, with a particular emphasis on the need for individualised application and recognition of the evolving capacities of children.<sup>44</sup> As such, there may also be a risk that, in practice, the

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<sup>42</sup> UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, [39].

<sup>43</sup> UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, (2013), [40]. The UN Office on Drugs and Crime has also provided guidance relating to the appropriate treatment of children who are regarded as being at risk of engaging in terrorism offences, stating that where children have been recruited by terrorist organisations, legal systems should provide not only for criminal liability and other forms of accountability, but should also recognise the status of the child as themselves being a victim of violence. See, [UNODC Roadmap on the Treatment of Children Associated with Terrorists and Violent Extremist Groups](#), and [Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System](#) (2017), pp. 39–68.

<sup>44</sup> See, UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, [52]–[84].

processes by which the best interests of an individual child are assessed do not meet the standard required under international law.<sup>45</sup>

### **Committee view**

2.54 The committee thanks the Attorney-General for this response. The committee notes that this bill seeks to expand existing coercive powers in relation to which it has repeatedly raised human rights concerns. The committee considers that no information has been provided to demonstrate the necessity and proportionality of the majority of the proposed new and broadened conditions that may be imposed under a control order. The committee notes that, as a matter of law, the proposed measures would facilitate the making of control orders including extremely onerous conditions that may significantly limit many human rights. As such, the committee considers that the proposed expansion of the control order measures risks constituting a disproportionate, and therefore impermissible, limit on multiple human rights.

2.55 The committee notes that control orders may be made in relation to children aged 14 and above and notes the Attorney-General's advice that 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. However, the committee considers that this requirement may not comply with the requirement that the best interests of the child be a primary consideration because it requires the best interests of the child to be a subordinate consideration in all proceedings relating to children and permits no flexibility. The committee further considers that there may be a risk that the processes by which the best interests of an individual child are assessed in this context do not meet the standard required under international law.<sup>46</sup>

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<sup>45</sup> Further, with respect to the term 'person' in section 104.4(2) and (2A) of the Criminal Code, the United Nations has stated that the term 'child' (or 'children') is to be preferred over alternatives because 'child' has a precise legal meaning and a related legal framework in international law. See, UN Office on Drugs and Crime, [Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System](#) (2017) p. 7.

<sup>46</sup> Further, the term 'person' is used in subsections 104.4(2) and (2A) of the Criminal Code rather than 'child' or 'children'. The United Nations has stated that the term 'child' (or 'children') is to be preferred over alternatives because 'child' has a precise legal meaning and a related legal framework in international law. See, UN Office on Drugs and Crime, [Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System](#) (2017) p. 7.

2.56 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

**Mr Josh Burns MP**

**Chair**