



**Australian Government**  

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**Attorney-General's Department**  

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**Department of Home Affairs**

August 2021

# **Supplementary 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

## Introduction

1. The Attorney-General's Department and the Department of Home Affairs (the Departments) welcome the opportunity to provide this additional supplementary submission to the Parliamentary Joint Committee on Intelligence and Security in relation to proposed Government amendments to 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).
2. In May 2021, the Departments provided a joint supplementary submission to the Committee outlining proposed Government amendments to the Bill (the May submission). The Departments have considered the issues raised in the submissions made by the Australian Human Rights Commission (AHRC),<sup>1</sup> and the Law Council of Australia (Law Council),<sup>2</sup> in their recent submissions to the Committee, in relation to the proposed amendments.
3. The purpose of this additional supplementary submission is to provide further information to assist the Committee in its consideration of the draft amendments, a copy of which is at **Attachment A**. In particular, this submission outlines further amendments which the Government proposes to adopt in response to some issues identified in the AHRC and Law Council submissions, and responds to other recommendations that the Government does not propose to adopt.
4. As noted in the May submission, any Government amendments to the Bill are subject to consultation with, and agreement from, states and territories, in accordance with the *Intergovernmental Agreement on Counter-Terrorism Laws*.
5. The Departments and the AFP are available to provide further information to assist the Committee's review.

## Proposed amendments

6. An exposure draft of the proposed amendments is at **Attachment A**.
7. As outlined in the May submission, these amendments would clarify the operation of extended supervision orders (ESO) and control orders in immigration detention by ensuring that such orders can commence where a person is in immigration detention, and that the conditions of these orders would remain enforceable against an offender who is in immigration detention.
8. Also, in response to issues raised by the AHRC and the Law Council, amendments have been included to provide that a person does not commit an offence of breaching a control order or ESO, where they are unable to comply with a condition because they are detained in non-prison custody.

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<sup>1</sup> Australian Human Rights Commission, *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 Supplementary submission to the Parliamentary Joint Committee on Intelligence and Security – 11 June 2021* (AHRC Submission)

<sup>2</sup> Law Council of Australia, *Supplementary Submission: Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 – 22 June 2021* (Law Council Submission)

9. As outlined in the May submission, the amendments would also provide that ESOs and control orders are the only measures that may be considered by a State or Territory Supreme Court when deciding whether there is a 'less restrictive measure' to a continuing detention order (CDO) that would be effective in preventing the offender's unacceptable risk of committing a serious terrorism offence.
10. Finally, in response to issues raised by the AHRC and the Law Council since the May submission, the draft amendments would also introduce a requirement for the Minister for Home Affairs to apply to vary an ESO, where satisfied that a condition is no longer reasonably necessary, or 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 has been modelled on an existing requirement imposed on the AFP Commissioner in respect to control orders.
11. The amendments are subject to further consultation with, and agreement from, States and Territories. In accordance with the *Intergovernmental Agreement on Counter-Terrorism Laws*, a majority of jurisdictions (including at least four states) must approve the text of the amendments before they can be introduced.

## Immigration detention

12. As noted in the May submission, the proposed immigration detention amendments would ensure that ESOs and control orders may commence and be enforced in all circumstances while a person is in immigration detention.
13. Across the existing Criminal Code provisions and the proposed new provisions to be introduced by the Bill, there are instances where references to a person being detained in custody should encompass both detention in prison or similar contexts (such as lock-up and remand) as well as non-prison settings, such as immigration detention. In other cases, such references should only apply where a person is detained in prison-like settings.
14. To achieve this, the proposed amendments would create a new definition for 'detained in custody', and two sub-definitions that would cover the terms 'detained in custody in a prison' and 'detained in non-prison custody':
  - a. A person is *detained in custody* if the person is detained in custody under a law of the Commonwealth, a State or a Territory.
  - b. A person is *detained in custody in a prison* if the person is detained in custody in a gaol, lock-up or remand. The list included in this definition is exhaustive. A person detained under a continuing detention order (CDO) or interim detention order would fall within this definition.
  - c. A person is *detained in non-prison custody* if the person is detained in custody, but is not detained in custody in a prison. A person would fall within this definition if the person is in immigration detention (whether in a gaol, lock-up, remand or otherwise).
15. The amendments defining 'detained in custody' will provide clarity around the applicability of each of the relevant provisions to different types of detention. The table at **Attachment B** sets out the application of the proposed amendments to relevant provisions in the Criminal Code.

16. This approach provides flexibility for ESOs and control orders to apply in other forms of ‘non-prison’ detention, for example, where a person is subject to quarantine under the *Biosecurity Act 2015* – to the extent this may be considered detained in non-prison custody.
17. The Law Council in their submission recommended further evidence be provided about the necessity of imposing ESO and control order conditions in addition to existing arrangements in immigration detention.<sup>3</sup>
18. Immigration detention in Australia is administrative rather than punitive, in nature. While the conditions in immigration detention and prisons vary in accordance to risk, the fundamental difference in purpose means that there can be significant differences in the conditions of detention between immigration detention and prisons. These can include differences in access to communications technology, access to visitors, and general freedom of movement throughout the detention facility.
19. Further, due to the administrative nature of immigration detention, detention can take place in various locations. While an immigration detention centre may typically be where a person subject to an ESO or control order is housed, there may be circumstances where it is appropriate for that person to be in an alternative place of detention or community detention. It is imperative that the conditions of an ESO or control order remain in force in these types of immigration detention.

## **Additional safeguards for detention amendments**

20. In response to issues raised in the AHRC and Law Council submissions, the Government has adopted two additional safeguards in the proposed amendments in relation to non-prison detention.
21. The first safeguard would provide that an offender who is unable to comply with a condition of their control order or ESO, due to the fact that they are detained in non-prison custody, does not commit an offence under section 104.27 or proposed section 105A.18A for breach of a control order or an ESO (Items 13 and 52 of the proposed amendments).
22. This would mean that an offender is not subject to criminal liability for breaching an order where compliance with an imposed condition is not possible because the person is in immigration detention (and the order has not yet been varied).<sup>4</sup>
23. The second safeguard would provide that while an ESO is in force, the AFP Minister must make an application to the Court under proposed section 105A.9C to remove or vary an ESO condition if they are satisfied that the condition is no longer reasonably necessary, or 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 (Items 38-43 of the proposed amendments).
24. This amendment will have broad application and require the Minister to make a variation application in any situation where they are satisfied that a condition is no longer reasonably necessary or reasonably appropriate and adapted for the relevant purpose. This models a similar provision in relation to control orders,

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<sup>3</sup> Law Council Submission pp8-9

<sup>4</sup> AHRC Submission Recommendation 2 at pp5, 9; Law Council Submission recommendation 2 at p16

paragraph 104.19(1)(b), which requires the AFP Commissioner to apply to vary a control order, where they are satisfied that an obligation, prohibition or restriction should no longer be imposed on a person.

25. This amendment responds to the issue identified by the Law Council that the current review provisions in the Bill would not provide for sufficient judicial consideration of the appropriateness of ESO and control order conditions applying to a person who is in immigration detention.<sup>5</sup> In the circumstances raised by the Law Council, this amendment will ensure that there is an obligation on the Minister to make an application to vary the ESO, ensuring the Court is able to consider and remediate any such condition.

## No less restrictive measures

26. As outlined in the May submission, the proposed amendments would clarify that the only alternative measures to a CDO that the court may consider are Commonwealth statutory orders which are specifically designed to manage terrorism risk.
27. Item 33 of the proposed amendments would explicitly provide that the Court be satisfied that *‘there is no less restrictive measure available under this Part [being Part 5.3] that would be effective in preventing the unacceptable risk’*.
28. The Government notes the views expressed by the Law Council and the AHRC that this amendment should not be made. However, the Government maintains that the amendment is a necessary and appropriate amendment to the threshold for making CDOs, and does not undermine the ‘no less restrictive measure’ limb as a fundamental safeguard in the CDO scheme.
29. Part 5.3 orders are the only appropriate less restrictive measures designed to prevent the full spectrum of risk that terrorist offenders pose to the Australian community. The conditions of such orders can be tailored to meet the specific risks posed by an individual offender and are subject to the safeguard that the Court must be satisfied that each condition is reasonably necessary, and reasonably appropriate and adapted, for the protective purpose of the relevant order. Further, under an ESO, a Court will be able to impose any condition it considers meets this threshold. This means that the Court could consider the full range of possible conditions which fall short of the offender’s continued detention, preserving the broad discretion of the Court to consider possible less restrictive measures.

## Other issues raised by submitters

30. The Departments have carefully considered the submissions from the AHRC and the Law Council. In addition to the recommendations addressed above, the submissions raise additional issues that are outlined and responded to below.

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<sup>5</sup> Law Council submission recommendation 2 at pp14-15

## Obligation to notify the Court

31. Both the Law Council and the AHRC suggested that the Bill be amended to provide that, if an ESO or control order is anticipated to commence while a person is in immigration detention, the applicant should be required to notify the Court of this fact during the application.<sup>6</sup>
32. The Government is satisfied that the existing provisions in the Criminal Code (and as they would be amended by the Bill) are sufficient. Where it is known that a person will be in immigration detention when an order comes into effect, there are mechanisms which would ensure that the Court is advised of this fact. Such mechanisms include that an application for an ESO must include an explanation as to why each of the proposed conditions should be imposed on the offender (proposed subparagraph 105A.5(3)(d)(ii)). If the Minister is aware of any facts relating to why any of those conditions should not be imposed on the offender, a statement of those facts must also be included in the application, except facts that are likely to be protected by public interest immunity (proposed subparagraph 105A.5(3)(d)(iii)). Similarly, an application for a control order must include any facts relating to why the order should not be made, or why any of the obligations, prohibitions or restrictions sought should not be imposed (paragraph 104.3(b)).
33. Additionally, under the obligation to act as a model litigant, the Commonwealth would be required to advise the Court of all matters that would be relevant to the Court's consideration of control orders and ESOs.

## Definition of immigration detention

34. The Law Council submission sought clarity about the intended definition of immigration detention for the purposes of Part 5.3.<sup>7</sup> Item 2 of the amendments provides that for the purposes of Part 5.3, 'immigration detention' would have the same meaning as in the *Migration Act 1958*.

## Further safeguards

35. In addition to the recommended safeguards which are responded to above, the Law Council submission also recommended that the amendments should:
  - a. include a requirement for the Court to consider the implications of immigration detention,<sup>8</sup> and
  - b. provide for arrangements for individuals in immigration detention to access legal assistance, relevant information, and professional risk assessment and counselling services.<sup>9</sup>
36. The inclusion of statutory requirements for the Court to specifically consider the implications of immigration detention when making an ESO or control order is not necessary. The Court is required to be satisfied on the balance of probabilities that:
  - a. each of the conditions to be imposed on the offender by an ESO is reasonably necessary, and reasonably appropriate and adapted (proposed paragraph 105A.7A(1)(c)), or

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<sup>6</sup> AHRC Submission recommendation 1 at p5, Law Council Submission recommendation 2 at pp13-14

<sup>7</sup> Law Council Submission recommendation 2 at 12-13

<sup>8</sup> Law Council Submission recommendation 2 at p14

<sup>9</sup> Law Council Submission recommendation 2 at pp15-16

- b. each of the obligations, prohibitions and restrictions to be imposed on the person by a control order is reasonably necessary, and reasonably appropriate and adapted (paragraph 104.4(1)(d)).
37. Additionally, when making an ESO, the Court has a wide discretion about matters that can be taken into account when making ESOs (proposed subsection 105A.6B(2)) and to tailor conditions to address the specific risk posed by an offender. This ensures that conditions are appropriate and adapted to each individual.
38. Finally, in respect of access to information and services, the immigration detention network has long-established processes for detainees to access legal assistance and health services, including counselling, as well as providing access to communications and technology, visitors and programs and activities.

2019-2020-2021

The Parliament of the  
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

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

*(Government)*

- (1) Schedule 1, item 2, page 3 (lines 9 to 13), omit the definition of *detained in custody* in subsection 100.1(1), substitute:

*detained in custody* has the meaning given by subsection (3A).

**[definition of detained in custody]**

- (2) Schedule 1, item 2, page 3 (after line 13), after the definition of *detained in custody* in subsection 100.1(1), insert:

*detained in custody in a prison* has the meaning given by subsection (3B).

*detained in non-prison custody* has the meaning given by subsection (3C).

*immigration detention* has the same meaning as in the *Migration Act 1958*.

**[definition of detained in custody]**

- (3) Schedule 1, page 4 (after line 17), after item 3, insert:

### **3A Before subsection 100.1(2) of the *Criminal Code***

Insert:

*Elements of the definition of terrorist act*

### **3B After subsection 100.1(3) of the *Criminal Code***

Insert:

*Definition of detained in custody etc.*

- (3A) A person is *detained in custody* if the person is detained in custody under a law of the Commonwealth, a State or a Territory.

- (3B) A person is *detained in custody in a prison* if the person is detained in custody in a gaol, lock-up or remand centre, including under a continuing detention order or interim detention order. However, a person is not *detained in custody in a prison* if the person is in immigration detention in a gaol, lock-up or remand centre.



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- (3C) A person is ***detained in non-prison custody*** if the person is detained in custody, but is not detained in custody in a prison.

Note: An example of a person who is detained in non-prison custody is a person who is in immigration detention (whether in a gaol, lock-up, remand centre or otherwise).

*References to person, property or public*

***[definition of detained in custody]***

- (4) Schedule 1, page 5 (after line 13), after item 6, insert:

**6A Subsection 104.2(5) of the *Criminal Code* (note)**

Repeal the note, substitute:

Note: An interim control order in relation to a person who is detained in custody in a prison does not begin to be in force until the person ceases to be detained in custody in a prison (see paragraph 104.5(1)(d) and subsection 104.5(1D)).

***[detained in custody]***

- (5) Schedule 1, item 13, page 6 (line 15), after “custody”, insert “in a prison”.

***[detained in custody]***

- (6) Schedule 1, item 13, page 6 (after line 17), at the end of subsection 104.5(1D), add:

Note: An interim control order in relation to a person who is detained in non-prison custody begins to be in force when the order is served personally on the person (see paragraph (1)(d)).

***[detained in custody]***

- (7) Schedule 1, item 13, page 6 (line 18), after “control order”, insert “referred to in subsection (1D)”.

***[detained in custody]***

- (8) Schedule 1, item 13, page 6 (line 21), after “custody”, insert “in a prison”.

***[detained in custody]***

- (9) Schedule 1, item 13, page 6 (after line 29), at the end of subsection 104.5(1E), add:

Note: Persons detained in non-prison custody are taken to be in the community (see section 105A.18AA).

***[detained in custody]***

- (10) Schedule 1, item 28, page 11 (line 19), after “custody”, insert “in a prison”.

***[detained in custody]***

- (11) Schedule 1, item 28, page 11 (after line 25), at the end of subsection 104.15(5), add:

Note: Persons detained in non-prison custody are taken to be in the community (see section 105A.18AA).

***[detained in custody]***

- (12) Schedule 1, page 12 (after line 20), after item 30, insert:

**30A Section 104.27 of the *Criminal Code***

Before “A person”, insert “(1)”.

***[detained in non-prison custody]***

- (13) Schedule 1, page 12 (after line 26), after item 31, insert:

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**31A At the end of section 104.27 of the *Criminal Code***

Add:

- (2) Subsection (1) does not apply if the person contravenes the order because the person is detained in non-prison custody.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2). See subsection 13.3(3).

**[detained in non-prison custody]**

- (14) Schedule 1, page 13 (after line 15), after item 37, insert:

**37A Section 104.28B of the *Criminal Code***

Repeal the section, substitute:

**104.28B Giving documents to persons detained in custody**

- (1) A document that is required under this Division to be given to a person (the *detainee*) personally who is detained in custody is taken to have been given to the detainee at the time referred to in paragraph (3)(b) if the document is given to the following person (the *recipient*):

- (a) the legal representative of the detainee;
- (b) if the detainee does not have a legal representative—the chief executive officer (however described) of the prison or other facility in which the person is detained, or a delegate of the chief executive officer.

Note: The obligation to inform the detainee of the matters referred to in paragraphs 104.12(1)(b), 104.17(1)(b) and 104.26(1)(b) and (c) might not apply if it is impracticable for an AFP member to comply with the obligation (see subsections 104.12(3A), 104.17(2A) and 104.26(3A)).

- (2) The recipient must, as soon as reasonably practicable, give the document to the detainee personally.
- (3) Once the recipient has done so, the recipient must notify the Court and the person who gave the recipient the document, in writing:
- (a) that the document has been given to the detainee; and
  - (b) of the day that document was so given.

**[detained in custody]**

- (15) Schedule 1, page 15 (after line 29), after item 47, insert:

**47A Paragraph 105.26(5)(b) of the *Criminal Code***

After “custody”, insert “, and detained in custody”.

**[detained in custody]**

- (16) Schedule 1, page 17 (after line 31), after item 53, insert:

**53A Section 105A.2 of the *Criminal Code* (definition of *prison*)**

Omit “or other place of detention”, substitute “or remand centre”.

**[detained in custody]**

- (17) Schedule 1, item 59, page 20 (line 18), omit “*detained in custody*”, substitute “*imprisoned*”.

**[detained in custody]**

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- (18) Schedule 1, item 59, page 20 (line 21), after “custody”, insert “in a prison”.  
**[detained in custody]**
- (19) Schedule 1, item 59, page 20 (line 27), omit “*detained in custody*”, substitute “*imprisoned*”.  
**[detained in custody]**
- (20) Schedule 1, item 59, page 20 (line 30), after “custody”, insert “in a prison”.  
**[detained in custody]**
- (21) Schedule 1, item 59, page 21 (line 1), after “custody”, insert “in a prison”.  
**[detained in custody]**
- (22) Schedule 1, item 59, page 21 (line 4), after “custody”, insert “in a prison”.  
**[detained in custody]**
- (23) Schedule 1, item 59, page 21 (line 7), after “*custody*”, insert “*in a prison*”.  
**[detained in custody]**
- (24) Schedule 1, item 59, page 21 (line 9), after “custody”, insert “in a prison”.  
**[detained in custody]**
- (25) Schedule 1, item 59, page 21 (line 25), after “custody”, insert “in a prison”.  
**[detained in custody]**
- (26) Schedule 1, item 59, page 21 (line 32), after “custody”, insert “in a prison”.  
**[detained in custody]**
- (27) Schedule 1, item 59, page 22 (line 17), omit “*detained in custody*”, substitute “*imprisoned*”.  
**[detained in custody]**
- (28) Schedule 1, item 59, page 22 (line 20), after “custody”, insert “in a prison”.  
**[detained in custody]**
- (29) Schedule 1, item 59, page 22 (line 23), after “custody”, insert “in the prison”.  
**[detained in custody]**
- (30) Schedule 1, item 59, page 23 (line 1), after “custody”, insert “in a prison”.  
**[detained in custody]**
- (31) Schedule 1, page 23 (after line 34), after item 59, insert:  
**59A Subsection 105A.4(1) of the Criminal Code**  
After “detained in”, insert “custody in”.  
**[detained in custody]**
- (32) Schedule 1, item 77, page 26 (line 27), omit “prison”, substitute “custody”.  
**[detained in custody]**
- (33) Schedule 1, item 84, page 30 (lines 1 to 10), omit the item, substitute:  
**83A Paragraph 105A.7(1)(c) of the Criminal Code**  
Repeal the paragraph, substitute:

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- (c) the Court is satisfied that there is no less restrictive measure available under this Part that would be effective in preventing the unacceptable risk.

#### **84 Subsection 105A.7(1) of the *Criminal Code* (notes 1 and 2)**

Repeal the notes, substitute:

- Note 1: The rules of evidence and procedure for civil matters apply when the Court has regard to matters in accordance with section 105A.6B, as referred to in paragraph (1)(b) of this section (see subsection 105A.6B(3) and section 105A.13).
- Note 2: For paragraph (1)(c), an example of a less restrictive measure that is available under this Part is an extended supervision order. A court can make an extended supervision order under section 105A.7A even if a continuing detention order was applied for (see subsection 105A.6A(1)).

***[less restrictive measure]***

- (34) Schedule 1, item 86, page 30 (line 35), after “custody”, insert “in a prison”.  
***[detained in custody]***
- (35) Schedule 1, item 87, page 32 (line 20), after “custody”, insert “in a prison”.  
***[detained in custody]***
- (36) Schedule 1, item 92, page 42 (line 25), after “custody”, insert “in a prison”.  
***[detained in custody]***
- (37) Schedule 1, item 95, page 45 (line 25), after “custody”, insert “in a prison”.  
***[detained in custody]***
- (38) Schedule 1, item 95, page 46 (before line 5), before subsection 105A.9B(1), insert:

*Requirement to apply for variation*

- (1A) If the AFP Minister is satisfied that a condition in an extended supervision order or interim supervision order in relation to a terrorist offender is no longer reasonably necessary, or 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, the Minister or a legal representative of the Minister must apply to a Supreme Court of a State or Territory to vary, under section 105A.9C, the order by:
- (a) removing the condition; or
  - (b) varying the condition.

Note 1: The AFP Minister or legal representative may also apply under subsection (1) for other variations of the order, including adding conditions.

Note 2: A copy of the application must be given to the offender under section 105A.14A.

***[requirement to vary conditions]***

- (39) Schedule 1, item 95, page 46 (line 5), omit “*apply*”, substitute “*otherwise apply*”.  
***[requirement to vary conditions]***
- (40) Schedule 1, item 95, page 46 (line 6), after “may”, insert “(subject to subsection (1A))”.  
***[requirement to vary conditions]***
- (41) Schedule 1, item 95, page 46 (line 19), omit “The application”, substitute “An application under subsection (1A) or (1)”.  
***[requirement to vary conditions]***

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- (42) Schedule 1, item 95, page 46 (line 23), before “(1)”, insert “(1A) or”.  
**[requirement to vary conditions]**
- (43) Schedule 1, item 95, page 48 (line 4), omit “subsections 105A.9B(1) and (2)”, substitute “subsection 105A.9B(1A) or (1), and subsection (2),”.  
**[requirement to vary conditions]**
- (44) Schedule 1, item 102, page 51 (line 18), after “custody”, insert “in a prison”.  
**[detained in custody]**
- (45) Schedule 1, item 102, page 51 (line 19), after “detention”, insert “in the prison”.  
**[detained in custody]**
- (46) Schedule 1, item 121, page 60 (line 19), omit “prison”, substitute “custody”.  
**[detained in custody]**
- (47) Schedule 1, page 60 (after line 19), after item 121, insert:  
**121A Subsection 105A.15(1) of the Criminal Code**  
Omit “in a prison”, substitute “in custody”.  
**121B Paragraph 105A.15(1)(b) of the Criminal Code**  
After “prison”, insert “or other facility in which the offender is detained”.  
**[detained in custody]**
- (48) Schedule 1, page 61 (after line 4), after item 126, insert:  
**126A Section 105A.18 of the Criminal Code (heading)**  
Omit “release of terrorist offender”, substitute “sentences ending or orders ceasing to be in force”.  
**[detained in custody]**
- (49) Schedule 1, item 132, page 62 (line 3), after “custody”, insert “in a prison”.  
**[detained in custody]**
- (50) Schedule 1, item 132, page 62 (lines 7 and 8), omit “being released from custody or despite the period for which the order is in force ending”, substitute “the event in subsection (1) occurring”.  
**[detained in custody]**
- (51) Schedule 1, page 62 (after line 8), after item 132, insert:  
**132A After section 105A.18 of the Criminal Code**  
Insert:  
**105A.18AA Persons in non-prison custody taken to be in the community**  
A person who is detained in non-prison custody is, for the purposes of this Part, taken to be in the community.  
**[detained in custody]**

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- (52) Schedule 1, item 133, page 63 (after line 14), at the end of section 105A.18A, add:
- (3) Subsection (1) or (2) does not apply if the contravention of the condition or direction occurs because the person is detained in non-prison custody.
- Note: A defendant bears an evidential burden in relation to the matter in subsection (3). See subsection 13.3(3).
- [detained in non-prison custody]**
- (53) Schedule 1, item 134, page 64 (line 12), before “**detention**”, insert “**prison**”.
- [detained in custody]**
- (54) Schedule 1, item 134, page 64 (line 13), before “*detention*”, insert “*prison*”.
- [detained in custody]**
- (55) Schedule 1, item 134, page 64 (line 16), after “custody”, insert “in a prison”.
- [detained in custody]**
- (56) Schedule 1, item 134, page 64 (line 17), after “*custody*”, insert “*in a prison*”.
- [detained in custody]**
- (57) Schedule 1, item 134, page 64 (line 20), after “custody”, insert “in a prison”.
- [detained in custody]**
- (58) Schedule 1, item 149, page 70 (line 10), after “detained”, insert “in custody”.
- [detained in custody]**
- (59) Schedule 1, item 149, page 70 (line 19), after “custody”, insert “in a prison”.
- [detained in custody]**
- (60) Schedule 1, item 151, page 71 (after line 12), after subsection 106.11(1), insert:
- (1A) The amendments of section 104.27 made by Schedule 1 to the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2020* apply in relation to conduct occurring after this section commences.
- [detained in non-prison custody]**
- (61) Schedule 1, item 151, page 71 (line 24), after “custody”, insert “in a prison”.
- [detained in custody]**
- (62) Schedule 1, item 151, page 71 (line 34), after “*custody*”, insert “*in a prison*”.
- [detained in custody]**
- (63) Schedule 1, item 215, page 89 (line 12), after “*custody*”, insert “*in a prison*”.
- [detained in custody]**
- (64) Schedule 1, item 221, page 91 (line 27), after “custody”, insert “in a prison”.
- [detained in custody]**
- (65) Schedule 1, item 222, page 92 (line 26), after “custody”, insert “in a prison”.
- [detained in custody]**
- (66) Schedule 1, item 240, page 99 (line 3), after “custody”, insert “in a prison”.
- [detained in custody]**
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- (67) Schedule 1, item 315, page 115 (line 12), after “*custody*”, insert “*in a prison*”.  
***[detained in custody]***
- (68) Schedule 1, item 328, page 119 (line 16), after “custody”, insert “in a prison”.  
***[detained in custody]***
- (69) Schedule 1, item 351, page 123 (line 32), after “custody”, insert “in a prison”.  
***[detained in custody]***
- (70) Schedule 1, item 362, page 127 (line 27), after “custody”, insert “in a prison”.  
***[detained in custody]***

### Application of the proposed Government amendments

The proposed Government amendments to the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 would clarify the operation of extended supervision orders (ESO) and control orders in immigration detention by ensuring that:

- such orders can commence where a person is in immigration detention, and
- the conditions of these orders would remain enforceable against an offender who is in immigration detention.

The amendments achieve this by creating a new definition for the concept of ‘detained in custody’. Across the existing Criminal Code provisions and the provisions to be introduced by the Bill, there are instances where references to a person being detained in custody should encompass both detention in prison or similar contexts (such as lock-up and remand) as well as non-prison settings, such as immigration detention. In other cases, such references should only apply where a person is detained in prison-like settings.

The table below outlines the effect of the amendments in relation to immigration detention. Where the table is coloured in green, the provision as amended would have the effect of including (or applying to) immigration detention. Where the table is coloured in red the provision as amended would have the effect of excluding (or not applying to) immigration detention. Other or neutral provisions are coloured in grey.

#### Criminal Code

Exposure draft item number	Relevant provision (existing, and as amended by the Bill)	Effect of the proposed amendment
(1), (2), (3)	<b>100.1</b> Definitions	These amendments would create new definitions of <b><i>detained in custody</i></b> , <b><i>detained in custody in a prison</i></b> and <b><i>detained in non-prison custody</i></b> .  As per the new proposed definitions: <ul style="list-style-type: none"> <li>- A person is <b><i>detained in custody</i></b> if the person is detained in custody under a law of the Commonwealth, a State or a Territory (this broader concept would encompass both prison and non-prison detention, as defined below).</li> <li>- A person is <b><i>detained in custody in a prison</i></b> if the person is detained in custody in a gaol, lock-up or remand, including under a continuing detention order or interim detention order. However, a person is not <b><i>detained in custody in a prison</i></b> if the person is in immigration detention in a gaol, lock-up or remand.</li> <li>- A person is <b><i>detained in non-prison custody</i></b> if the person is detained in custody, but is not detained in custody in a prison.</li> </ul>
<b>Division 104 – Control orders</b>		
No amendment required	<b>104.2(5)</b> AFP Minister’s consent to request an ICO	This provision provides that the AFP may seek an interim control order (ICO) against a person who is <b><i>detained in custody</i></b> . The effect of the amended definitions is an ICO could be sought in relation to a person either in prison and non-prison custody.



Exposure draft item number	Relevant provision (existing, and as amended by the Bill)	Effect of the proposed amendment
(4)	<b>104.2(5) (note)</b>	The note for this provision clarifies when an ICO commences for a person who is detained in custody. The amendments refer only to <i>custody in a prison</i> , and would mean an ICO in relation to a person who is detained in custody in a prison does not begin until the person is released from prison.
No amendment required	<b>104.5(1B)</b> Terms of an ICO	This provision allows the Court takes into account any other matter relating to the person's detention that the Court deems relevant. The effect of the amended definitions is that this provision would apply to both prison and non-prison custody.
No amendment required	<b>104.5(1C)</b> Terms of an ICO – attending court for confirming, voiding or revoking an ICO	This provision provides that a person detained in any form of custody has the right to attend court for the confirmation hearing. The effect of the amended definitions is that this provision would apply where the person is in either prison or non-prison custody.
(5), (6), (7), (8), (9)	<b>104.5(1D), 104.5(1E), 104.5(1F)</b> Terms of an ICO – when an ICO comes into force	These provisions provide that an ICO cannot come into force while a person is detained in custody in a prison. The amendments would clarify that the provisions do not apply to non-prison custody, meaning that an ICO could come into force for a person in immigration detention.
No amendment required	<b>104.5(2AA)</b> Terms of an ICO – when an ICO comes into force	This provision provides that a control order does not cease to be in force merely because a person is detained in custody. The effect of the amended definitions is that a control order will not cease to be in force if a person is transferred to non-prison custody.
No amendment required	<b>104.12(3A)</b> Service, explanation and notification of an interim control order	This provision sets out the requirements of the AFP relating to personal service, explanation and notification of an ICO to a person in custody – specifically, the service requirements do not apply if the person is in custody and it would be impracticable to comply with those requirements. The effect of the amended definitions is that this provision would apply if the person is in either prison or non-prison custody.
(10), (11)	<b>104.15(5)</b> Effect of confirmation process on ICOs - Interim control orders that were not in force	This provision provides that if an ICO that has not come into force is confirmed, then the confirmed control order begins when the person is released from custody, or their ESO or ISO ends. The amendment would provide that custody in this context only refers to prison custody.
No amendments required	<b>104.17</b> Service of a confirmed control order <b>104.26</b> Service and explanation of a varied control order	These provisions require AFP members to fulfil certain service requirements unless the person, who is the subject of the confirmed control order, is in any form of custody and it is impracticable to comply with the requirements. The effect of the amended definitions is that this provision would apply if the person is in either prison or non-prison custody.
(12), (13)	<b>104.27(2)</b> Offence for contravening a control order	This new subsection would ensure that a person who is detained in non-prison custody is not taken to have contravened an order if the contravention occurred because the person is <i>detained in non-prison custody</i> .

Exposure draft item number	Relevant provision (existing, and as amended by the Bill)	Effect of the proposed amendment
(14)	<b>104.28B</b> Giving documents to person detained in custody	This provision allows for documents requiring personal service to be provided to the person's legal representative or the head of the facility in which the person is detained, such as the head of an immigration facility. The effect of the redrafted provision is that both prison and non-prison custody are captured.
<b>Division 105 – Preventative detention orders</b>		
(15)	<b>105.26(5)</b> Release of person from preventative detention	This provision sets out the circumstances where a person is taken to be released from preventative detention. The provision will be amended to clarify that a person will be taken to be released from detention under a preventative detention order where the person has been immediately taken into custody or <i>detained in custody</i> on some other basis (such as immigration detention).
No amendments required	Various other references throughout Division 105	Provisions throughout Division 105 contain various references to detained in custody specifically in relation to a preventive detention order. Amendments are not required because provisions in this Division are sufficiently limited to apply only to individuals <i>detained in custody in a prison</i> .
<b>Division 105A – CDOs and ESOs (post-sentence orders)</b>		
(16)	<b>105A.2</b> Definition of prison	This provision provides a definition of 'prison' for the purpose of Division 105A. It would be amended to clarify the definition is limited to the concept of where a person is <i>detained in custody in a prison</i> (and not other forms of detention).
No amendment required	<b>105A.2A</b> Persons who have escaped from custody	This provision preserves eligibility for a post-sentence order where a person is continuously detained in custody in a prison, even if the person escapes from custody. An amendment is not required because this provision as drafted is sufficiently limited to where a person is <i>detained in custody in a prison</i> .
(17), (18), (19), (20), (21), (22), (23), (24), (25), (26), (27), (28), (29), (30)	<b>105A.3A</b> Preconditions for post-sentence orders	This provision outlines circumstances where a person may be eligible for a post sentence order. References to <i>detained in custody</i> will be amended to clarify that eligibility for a post-sentence order is only preserved where a person is (or was) <i>detained in custody in a prison</i> .
(31)	<b>105A.4</b> Treatment of a terrorist offender in a prison under a continuing detention order	This provision relates to the treatment of an offender detained in a prison under a continuing detention order, noting that such a person would no longer be serving a term of imprisonment and should be treated accordingly. This provision would be amended to clarify that it is limited to a person <i>detained in custody in a prison</i> under a continuing detention order.
(32)	<b>105A.6(4)</b> Appointment of and assessment by relevant expert	This provision contains a note about giving documents to an offender who is in prison. The note to this provision would be amended to clarify that it refers to a person detained in custody so would include a person in non-prison custody.
(33)	<b>105A.7(1)</b>	Amendment to 'less restrictive measures' threshold

Exposure draft item number	Relevant provision (existing, and as amended by the Bill)	Effect of the proposed amendment
(34)	<b>105A.7(4)</b> Making a continuing detention order	This provision contains a note which refers to an ESO being suspended under s105A.18C while a person is detained in custody. The note would be amended to clarify that an ESO is only suspended where an individual is <i>detained in custody in a prison</i> . The amendment to s105A.18C would provide that ESOs are not suspended if a person is in non-prison custody.
(35)	<b>105A.7A(4)</b> Making an extended supervision order	This provision contains a note which refers to an ESO being suspended under s105A.18C while a person is detained in custody. The note would be amended to clarify that an ESO is only suspended where an individual is <i>detained in custody in a prison</i> . The amendment to s105A.18C would provide that ESOs are not suspended if a person is in non-prison custody.
No amendment required	<b>105A.7E(3)</b> Obligations relating to monitoring devices	This provision provides for obligations and arrangements where a condition of an ESO provides for a person to wear a monitoring device. It provides that the device may be removed where a person is detained in custody in the absence of a specific authorisation from the court. Under the proposed new definitions, this reference would apply to prison and non-prison custody, allowing for a monitoring device to be removed where an offender is detained in any form of custody.
(36)	<b>105A.9(4)</b> Interim detention orders	This provision contains a note which refers to an ESO being suspended under s105A.18C while a person is detained in custody. The note would be amended to clarify that an ESO is only suspended where an individual is <i>detained in custody in a prison</i> . The amendment to s105A.18C would provide that ESOs are not suspended if a person is in non-prison custody, such as immigration detention.
(37)	<b>105A.9A(7)</b> Interim supervision orders	This provision contains a note which refers to an ESO being suspended under s105A.18C while a person is detained in custody. The note would be amended to clarify that an ESO is only suspended where an individual is <i>detained in custody in a prison</i> . The amendment to s105A.18C would provide that ESOs are not suspended if a person is in non-prison custody.
(38), (39), (40), (41), (42), (43)	<b>105A.9B</b> Application for variations of extended supervision orders and interim supervision orders	The new subsection would require the AFP Minister to remove or vary an ESO or ISO condition if it is no longer reasonably necessary or appropriate for the purpose of protecting the community. This provision does not contain a reference to detained in custody and would apply more broadly.
(44), (45)	<b>105A.10(1B)(c)</b> Periodic review of post-sentence order	This provision provide for how an application for a review of a post-sentence order must be made and contains a reference to an order being suspended under s105A.18C while a person is detained in custody. The provision will be amended to clarify that an ESO is only suspended where an individual is <i>detained in custody in a prison</i> .
(46), (47)	<b>105A.15</b> Giving documents to terrorist offenders who are in prison	This provision relates to the provision of documents to terrorist offenders who are detained in prison. The amendment would change this to refer to detained in custody, so that the provision also applies where an offender is in non-prison detention.

Exposure draft item number	Relevant provision (existing, and as amended by the Bill)	Effect of the proposed amendment
(48), (49), (50)	<b>105A.18</b> Consequences of release of terrorist offender	This provision provides that for the purposes of post-sentence order proceedings, a person <i>detained in custody in a prison</i> serving a sentence of imprisonment remains a terrorist offender despite being released from custody or the period for which the order is in force ending. The amendments will clarify that the provision applies only in relation to prison custody.
(51)	<b>105A.18AA</b> Persons in non-prison custody taken to be in the community	This amendment would create a new provision to clarify people who are detained in non-prison custody are taken to be in the community for the purposes of post-sentence order proceedings.
(52)	<b>105A.18A(3)</b> Offence for contravening an extended supervision order or an interim supervision order	This new subsection would ensure that a person who is detained in non-prison custody is not taken to have contravened an ESO or ISO if the contravention occurred because the person is <i>detained in non-prison custody</i> .
(53), (54), (55), (56), (57)	<b>105A.18C</b> Effect of detention on post-sentence orders	This provision provides that post-sentence orders are only suspended during the period that the person is detained in custody in a prison. The amendments clarify that the provision only applies where a person is <i>detained in custody in a prison</i> .
(58), (59)	<b>105A.23</b> Warning about post-sentence orders when sentencing for certain offences	This provision provides that the Court must warn a person of the possibility of post-sentence orders which can be made before the end of the sentence for that offence, or before the end of any later sentence if the person is continuously detained in custody in prison. The amendments clarify that the provision only applies where a person is <i>detained in custody in a prison</i> .
No amendment required	<b>106.8</b> Application provision for amendments in the Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016	Amendment not required because provisions are an application provision of past amendment Bill which has been passed.
No amendment required	<b>106.10</b> Application – Counter Terrorism Legislation Amendment (2019 Measures No. 1) Act 2019	Amendment not required because provisions are an application provision of past amendment Bill which has been passed.
(60), (61), (62)	<b>106.11</b> Application provision for certain amendments in the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2020	This provision would be amended to clarify that all amendments made by this Bill will apply only to people who are <i>detained in custody in a prison</i> on the day the provisions commence.

#### **Surveillance Devices Act 2004**

Item number/s	Provision	Whether or not non-prison custody is included or excluded by the provision
(63), (64), (65), (66)	<b>6(1), 6C, 14(3BA), 27A(5A)</b>	These provisions will be amended to clarify that they apply in relation to custody in a prison and do not apply to non-prison custody.

**Telecommunications (Interception and Access) Act 1979**

Item number/s	Provision	Whether or not non-prison custody is included or excluded by the provision
(67), (68), (69), (70)	<b>5(1), 6T, 357(7), 46(7), 46A(2C)</b>	These provisions will be amended to clarify that they apply in relation to custody in a prison and do not apply to non-prison custody.