Australian Government
Attorney-General's Department
Department of Home Affairs

May 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 welcome the opportunity to provide this supplementary submission to the Parliamentary Joint Committee on Intelligence and Security (the Committee) to inform its review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (the Bill). This submission has been prepared in consultation with the Australian Federal Police (AFP).

2. The purpose of this submission is to inform the Committee about proposed amendments to the Bill that the Government is intending to progress. Further details about these proposed amendments, including reasons for progressing them, are provided below.

3. The Departments are available to provide further information on these reforms or other aspects of the Bill if that would assist the Committee's consideration.

Proposed amendments

4. The proposed amendments would provide that:

    a. in all circumstances, extended supervision orders (ESOs) and control orders can commence where a person is in immigration detention, and ensure that the conditions of the orders remain enforceable against an offender who is in immigration detention.

    b. ESOs and control orders are the only measures to 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 unacceptable risk posed by an offender.

5. The Government will consult states and territories on the proposed amendments, noting that a majority of jurisdictions (including at least four states) must approve the text of the amendments before they can be introduced, as required under the *Intergovernmental Agreement on Counter-Terrorism Laws*.

Context

6. These proposed amendments seek to address potential issues which may arise in the practical application of Part 5.3 orders (that being CDOs, ESOs and control orders), which are designed to manage the risk posed by terrorist offenders and persons of counter-terrorism interest. In particular, the amendments would clarify how Part 5.3 orders operate, including where a person is, or becomes, an unlawful non-citizen, and is subject to immigration detention.

7. There are 15 offenders eligible for the High Risk Terrorist Offenders (HRTO) scheme under Division 105A of the *Criminal Code Act 1995* (Cth) (the *Criminal Code*) due to be released over the next five years (2021-2026). There are also a number of individuals before the courts who may become eligible during that period and additional HRTO-eligible individuals currently subject to control orders. This Bill is therefore an appropriate and timely vehicle to progress these amendments to ensure Part 5.3 orders operate as intended.

Amendments to clarify interaction between control orders/ESOs and immigration detention

8. The purpose of these proposed amendments is to ensure that ESOs and control orders may commence and be enforced in all circumstances while a person is in immigration detention. The amendments would ensure that where the Court makes an ESO or control order, the order applies even if the person is in immigration detention.

9. Immigration detention is different in nature to other forms of custody. Immigration detention is administrative rather than punitive in purpose. Practically, immigration detention facilities are less restrictive than prison facilities and will, for example, afford a person access to individuals and technology, which could be inconsistent with the conditions of a particular ESO or control order.

10. There are a number of incarcerated terrorist offenders who may be considered for cancellation of their visa (if they hold one) on character grounds. There are also circumstances where the cancellation of a person's visa would be mandatory under section 501(3A) of the *Migration Act 1958*. This would include if they have been sentenced to imprisonment for life, or 12 months or more, for a Commonwealth, state or territory offence, and are serving that sentence on a full-time basis in a custodial institution. If an offender is not an Australian citizen and does not hold a valid visa at the time of their release from prison, the *Migration Act 1958* imposes an obligation on officers (as defined under section 5 of the Act) to detain that offender (as an unlawful non-citizen). In practice, an offender may be transported directly from prison to immigration detention.

11. Under current paragraph 104.5(1)(d) of the *Criminal Code*, an interim control order does not commence until the individual subject to the control order is 'released from custody'. In a circumstance where an offender is transported directly to immigration detention at the conclusion of their sentence, the current drafting of the legislation does not make clear that a control order can commence.

12. Under the current drafting of the Bill, this potential issue also arises for ESOs due to the proposed definition of 'detained in custody', which does not explicitly exclude immigration detention. Proposed section 105A.18C provides that if an offender subject to an ESO is detained in custody, the ESO would be suspended and the offender would not be required to comply with any of the conditions of the ESO. If 'detained in custody' is interpreted as including immigration detention, an offender in immigration detention would not be subject to controls imposed by a Court under an ESO.

13. Accordingly, the Government proposes to amend the Bill to clarify that control orders and ESOs can commence where an individual is in immigration detention and prevent ESOs from being suspended where the offender is transferred to immigration detention.

14. This would ensure that the purpose and operability of ESOs and control orders would not be undermined. Without amendment, there is an unintended and foreseeable gap in the ability of law enforcement to manage persons who pose a terrorism risk and ensure the safety and protection of the community from terrorism activity. Such a gap would be inconsistent with the intended purpose and role of Part 5.3 orders within the Commonwealth's counter-terrorism framework.

15. The amendments would not affect the safeguards currently drafted in the Bill and already contained in the *Criminal Code* to ensure that ESOs and control orders are appropriate in all the circumstances.

- In relation to ESOs:
    - An ESO must be reviewed by the Court annually, or sooner if the offender or the AFP Minister applies for a review and the Court is satisfied that new facts or circumstances, or the interests of justice, justify the review, and
    - A Court may revoke the ESO if it does not continue to be satisfied that the offender in immigration detention continues to meet the requisite thresholds for the order.
- In relation to control orders:
    - An individual may apply to the Court to vary an interim or confirmed control order, and
    - The AFP Commissioner must seek a variation for confirmed control orders in circumstances where certain controls should no longer be imposed on the person.

Amendment to the less restrictive measures provision in relation to continuing detention orders

16. Currently section 105A.7 of the *Criminal Code* provides that to make a CDO, the Supreme Court must be satisfied (amongst other things) that there is no other 'less restrictive measure' that would be effective in preventing the unacceptable risk of an eligible offender committing a serious Part 5.3 offence if the offender is released into the community.

17. The term 'less restrictive measure' is not defined in the *Criminal Code*. There is only a note that a control order is an example of a less restrictive measure (which the ESO Bill will amend to be a reference to an ESO). As a result, the current provision allows a court to potentially consider *any* measure or action (or combination of measures or actions) that it deems less restrictive, which may allow for consideration of measures which are not specifically designed to manage the risk posed by high risk terrorist offenders to the Australian community.
    - This arose during the only CDO application to have been considered by a Court to date.[1] While the CDO was made, the Court considered 24-hour police monitoring, a control order, and the hypothetical cancellation of the offender's visa (and resulting immigration detention and removal from Australia) as alternative 'less restrictive measures'.

18. The intention of the proposed Government amendment to the less restrictive measures provision is that the Court should only have regard to Commonwealth measures which are specifically designed to address the terrorism risk posed by offenders to the Australian community. To achieve this, the proposed amendment would clarify that the measures to be considered only include Commonwealth statutory orders which are specifically designed to manage terrorism risk (control orders and ESOs).

[1] See *Minister for Home Affairs v Benbrika* [2020] VSC 888 (24 December 2020), in particular paragraphs 466-469, available online at http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2020/888.html

19. The Government's view is that the amendment does not unreasonably limit the discretion of the court in relation to the consideration of an offender's risk and the appropriate order to manage that risk for the following reasons:

    - The threshold for the Court to make a CDO could not be met if it were established that an offender may be managed effectively in the community.

    - Part 5.3 orders are designed to manage the full spectrum of risk that terrorist offenders pose to the Australian community by enabling a Court to tailor an order and impose conditions according to the level of risk an offender poses.

        - The Court, under an ESO, would have the ability to make *any* conditions it considers reasonably necessary, and reasonably appropriate and adapted to prevent the risk posed to the community.

    - The amendment would not remove the Court's broad discretion when determining an application for a CDO, including the discretion to not make a CDO even where the Minister has satisfied the Court of all the legislative requirements for the order to be made.

State or territory orders

20. The responsibility to manage the risk posed by terrorism to the community is a joint responsibility of the Commonwealth, and state and territory governments. This is reflected by the June 2004 *Intergovernmental Agreement on Counter-Terrorism Laws* to which refers state power to the Commonwealth so that it may enact jointly-agreed terrorism legislation, including the HRTO scheme.

21. This amendment would have the effect that state or territory terrorism-related orders would not be considered by the Court as a less restrictive measure to a CDO. However, with the introduction of the ESO scheme, state and territory measures would no longer be necessary to consider because Part 5.3 of the Criminal Code will provide the Court with a comprehensive range of Commonwealth orders for the management of terrorist offenders on their release.