



Australian Government

Australian Government response to the
Parliamentary Joint Committee on Intelligence and Security report:

Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime

September 2023

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The Government thanks the Parliamentary Joint Committee on Intelligence and Security (the Committee) for its work on these complex and important issues and provides the following responses to the Committee's recommendations.

Recommendation 1

The Committee recommends that Division 3A of the *Crimes Act 1914* be amended so that:

- the Australian Federal Police must notify the Commonwealth Ombudsman, the Independent National Security Legislation Monitor and the Parliamentary Joint Committee on Intelligence and Security of any declaration of a 'prescribed security zone' as soon as practicable, but no later than 72 hours after the Minister has made the declaration;
- the Minister of [*sic*] Home Affairs must ensure that the PJCIS is given a written statement of reasons for the making of the declaration of a 'prescribed security zone' to enable the Committee to perform its function under subparagraph 29(1)(bba)(ii) of the *Intelligence Services Act 2001* to monitor and review the basis of the Minister's declaration of prescribed security zones; and
- police officers exercising Division 3A powers to inform a person being stopped and detained for the purpose of a search of their right to make a complaint to the Commonwealth Ombudsman or applicable State or Territory police oversight body or bodies, unless this is not reasonably practicable because of circumstances of urgency.

The Government accepts this recommendation.

The Government acknowledges that receiving prompt notification from the Australian Federal Police (AFP) after a declaration has been made will enhance the ability of the Commonwealth Ombudsman, the Independent National Security Legislation Monitor (INSLM), and the Committee to perform relevant oversight functions.

While the Commonwealth Ombudsman does not hold a specific oversight function once a prescribed security zone is in place, early notification of a declaration would alert the Commonwealth Ombudsman to the exercise of powers in the prescribed security zone.

The INSLM has a statutory role in ensuring Australia's counter-terrorism and national security legislation is effective, remains proportionate to terrorism or national security threats, remains necessary and is consistent with Australia's international obligations. The Committee similarly has a statutory role in reviewing the operation, effectiveness and implications of the use of Division 3A powers. Early notification of a declaration would help ensure the INSLM and Committee are appropriately informed to conduct relevant reviews, which serve an important function in holding Government to account for maintaining fit for purpose, proportionate counter-terrorism legislation, and ensuring the proper exercise of powers. Early notification to the Committee would also support the Committee's role in monitoring and reviewing the performance of the AFP of its Division 3A functions and enhance the Committee's oversight of those functions.

The Government notes that under the Administrative Arrangements Order that commenced on 14 October 2022, the Attorney-General is the Minister responsible for making declarations of prescribed security zones. The Attorney-General is also the Minister who will be responsible for providing a written statement of reasons to the Committee when the *Crimes Act 1914* (the Crimes Act) is amended in accordance with this recommendation.

The Government also notes that a person's right to complain to the Commonwealth Ombudsman or applicable state or territory police oversight body about the conduct of a police officer exercising Division 3A powers would not be affected if the police officer did not advise them of this right due to circumstances of urgency.

Recommendation 2

The Committee recommends that the *Crimes Act 1914* be amended to provide a list of particular matters the Minister must consider before declaring a prescribed security zone, including:

- **the identified impacts on third party rights would be reasonable and proportionate to the purpose of preventing, or responding to, a terrorist act**
- **the availability and effectiveness of alternative powers**
- **an appropriate duration of such a declaration (within the maximum 28 day period)**
- **the impact – and proportionality – of successive declarations**

The Government accepts this recommendation.

The Government supports the Committee's observation that a list of specific factors may provide guidance to Ministers and agencies that would aid in efficiently preparing and making a declaration at what would likely be a time of heightened uncertainty.

The Government also supports clarifying in the legislation that if the Minister makes a declaration for a period shorter than 28 days, the declaration will cease to be in force at the end of that shorter time period. This would provide more certainty as to the duration of a declaration.

Recommendation 3

The Committee recommends that the stop, search and seizure powers under Subsections 3UK(1), (2) and (3) of the *Crimes Act 1914* be extended to 7 December 2025.

The Government accepts this recommendation.

The stop, search and seizure powers under subsections 3UK(1), (2) and (3) of the Crimes Act are important measures under Australia's counter-terrorism response framework. There is an ongoing need to ensure police can respond and prevent terrorist attacks, and the inclusion of a sunset mechanism reflects the need to continually review the powers to ensure they are appropriate to respond to the evolving threat environment.

The Government proposes to extend the sunset date to 7 December 2026 to align with the intent of the Committee's recommendation, which was to allow a three-year extension of the powers to 7 December 2025. In 2022 the Parliament agreed to extend the sunset powers for one year to 7 December 2023, to enable sufficient time for the Government to consider the Committee's recommendations. Given Parliament's consideration of the powers last year, the Government considers it appropriate to extend the sunset period for a further three years.

Recommendation 4

The Committee recommends that the *Intelligence Services Act 2001* be amended to provide the Committee with the option to conduct a further review prior to the sunset date into the operation, effectiveness and implications of the stop, search and seizure powers in Division 3A of Part IAA of the *Crimes Act 1914*.

The Government accepts this recommendation.

This will be implemented through the Intelligence Services Legislation Amendment Bill 2023 which is currently before Parliament.

Recommendation 5

The Committee recommends that the Attorney-General's Department consider the appropriateness of the implementation of a duty judge system where applications for search warrants could be received and considered on an expedited basis.

The Government accepts this recommendation.

The Attorney-General's Department, in consultation with the Australian Federal Police, has considered the appropriateness of the implementation of a 'duty judge system' for search warrants. Following this consideration, the Commonwealth's position is that implementation of such a system by all states and territories could deliver benefits, such as ensuring consistent, ready access across jurisdictions to those authorised to issue search warrants (being magistrates, or justices of the peace or other persons employed in a court of a state or territory). A clear framework for access to issuing officers ensures warrants can be issued to meet operational needs as necessary.

The Commonwealth has identified that the Legal Issues Working Group of the Australia-New Zealand Counter-Terrorism Committee is the appropriate forum to progress this matter with representatives from state and territory jurisdictions. The Commonwealth will propose that the working group's Forward Work Plan be amended to consider options for implementing a duty judge system, noting the states and territories will need to agree to the Forward Work Plan, and that the progress of this proposal (including resourcing) is ultimately a matter for each state and territory.

Recommendation 6

The Committee recommends an amendment to section 3UEA of the *Crimes Act 1914* requiring any agency that enters premises in accordance with section 3UE to obtain an ex post facto warrant as soon as possible following the use of warrantless entry powers.

The Government accepts this recommendation.

A mechanism by which an ex post facto assessment is undertaken of whether or not an officer who has entered premises in accordance with section 3UEA has done so properly, and in accordance with the law, would provide assurance that powers have been exercised only in response to extraordinary circumstances and would enhance oversight of these powers.

However, the complexity and significance of this matter warrants further consideration and consultation to develop an appropriate legislative response. This includes having regard to the consequences that should flow from an assessment that the powers were not exercised appropriately.

Recommendation 7

The Committee recommends that the control order regime as outlined in Division 104 of the *Criminal Code Act 1995* be extended to 7 December 2025.

The Government accepts this recommendation.

The control order regime achieves the legitimate objective of protecting Australia's national security interests, including preventing terrorist acts.

The Government proposes to extend the sunset date to 7 December 2026 to align with the intent of the Committee's recommendation, which was to allow a three-year extension of the powers to 7 December 2025. In 2022, the Parliament agreed to extend the sunset powers for one year to 7 December 2023, to enable sufficient time for the Government to consider the Committee's recommendations. Given Parliament's consideration of the powers last year, the Government considers it appropriate to extend the sunset period for a further three years.

Recommendation 8

The Committee recommends that the definition of 'issuing court' in the *Criminal Code Act 1995* be amended to only the Federal Court of Australia.

The Government accepts this recommendation.

Limiting the power to issue control orders to the Federal Court of Australia acknowledges the serious and extraordinary nature of those orders.

The Government does not propose to cease or invalidate any decisions and orders made by the Federal Circuit and Family Court of Australia before the *Criminal Code Act 1995* (Criminal Code) is amended in accordance with this recommendation.

Recommendation 9

The Committee recommends that section 29 of the *Intelligence Services Act 2001* be amended to provide that the Parliamentary Joint Committee on Intelligence and Security may commence a review of Division 104 of the *Criminal Code Act 1995* prior to the sunset of the provisions.

The Government accepts this recommendation.

This will be implemented through the Intelligence Services Legislation Amendment Bill 2023 which is currently before Parliament.

Recommendation 10

The Committee recommends that section 104.5(3) of the *Criminal Code Act 1995* be amended to align the conditions that can be imposed as part of the control orders regime with proposed Schedule 1, clause 105.7A of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020.

The Government accepts this recommendation.

Aligning control order and extended supervision order conditions would enable a court to impose any condition that is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act or preventing a terrorist act. This would include, but would not be limited to, a range of therapeutic conditions for example, requiring the offender to attend treatment, rehabilitation or intervention programs or activities or participate in case management. This would provide the court with the greatest discretion to tailor control order conditions to mitigate the specific risk posed by an individual and their circumstances, rather than be limited to a confined list of possible controls.

The implementation of this recommendation has been informed by the review conducted in response to recommendation 11.

Recommendation 11

The Committee recommends the Australian Government undertake a review of the range of conditions that could be imposed as part of a control order, and report back to the Parliamentary Joint Committee on Intelligence and Security by July 2022.

The Government accepts this recommendation.

The Attorney-General's Department has conducted this review having regard to the need to ensure that control orders conditions are suitably tailored to protect the community from the risk of terrorism posed by a particular individual, and only infringe that individual's rights and freedoms to the extent that is necessary and proportionate for that purpose. The review found that the proposed alignment of conditions would be fit for purpose and appropriate.

Recommendation 12

The Committee recommends that Division 104 of the *Criminal Code Act 1995* be amended to provide that the Australian Federal Police may add conditions with the consent of both parties, provided that:

- **the consent of the subject of the order is fully informed and he or she has been given every reasonable opportunity to consult with a legal representative; and**
- **consent may be withdrawn by either party at any time.**

The Government accepts this recommendation.

The Government supports inserting a new provision into Division 104 that would allow the AFP or the controlee to apply to a court to vary a control order or interim control order, including to add new conditions to the order, and allow the court to make the variation if satisfied that:

- written consent to the variation has been given by both parties, and
- the variation is appropriate in the circumstances.

The Government supports allowing either party to withdraw consent to the variation at any time before the issuing court determine the variation application.

The Government considers it appropriate that variations by consent should be available to all controlees. However, the Government proposes to include a requirement that, where the controlee is under 18 years of age, the court must consider the best interests of the controlee in determining whether each new or varied control order condition is appropriate, and that the controlee's views must be taken into account for the purposes of determining what is in their best interests. The Government also proposes to require that consent be provided on the controlee's behalf by a parent or guardian in these circumstances.

Recommendation 13

The Committee recommends that the Attorney-General's Department:

- **investigate the cost of providing legal aid for those subject to proceedings under Division 104 of the *Criminal Code Act 1995*, including continuing detention orders and control orders, on the basis that people subject to the most rights-restrictive powers should receive assistance to ensure adequate representation provided the costs to the Commonwealth are reasonable; and**
- **provide a report to the Parliamentary Joint Committee on Intelligence and Security within the 12 months of the tabling of this report.**

The Government accepts this recommendation.

The Government provides specific legal aid funding to state and territory legal aid commissions, predominantly through the Expensive Commonwealth Criminal Cases Fund, for costs incurred in defending clients in Commonwealth post-sentence matters, including control orders issued under Division 104 of the Criminal Code, and continuing detention orders and extended supervision orders issued under Division 105A of the Criminal Code.

The Attorney-General's Department will provide a report on the relevant legal aid costs under the Expensive Commonwealth Criminal Cases Fund. This will be provided to the Parliamentary Joint Committee on Intelligence and Security as soon as practicable.

Recommendation 14

The Committee recommends that the preventative detention order regime in Division 105 of the *Criminal Code Act 1995* be continued for a period of three years and sunset on 7 December 2025.

The Government accepts this recommendation.

Preventative detention orders remain an important part of Australia's counter-terrorism framework. In extraordinary circumstances, preventative detention orders may continue to be a proportionate and necessary measure that enable police to keep the community safe by disrupting and responding to terrorist activities at an early stage.

The Government proposes to extend the sunset date to 7 December 2026 to align with the intent of the Committee's recommendation, which was to allow a three-year extension of the powers to 7 December 2025. In 2022 the Parliament agreed to extend the sunset powers for one year to 7 December 2023, to enable sufficient time for the Government to consider the Committee's recommendations. Given Parliament's consideration of the powers last year, the Government considers it appropriate to extend the sunset period for a further three years.

Recommendation 15

The Committee recommends that Division 105 of the *Criminal Code Act 1995* be amended to remove:

- a member of the Administrative Appeals Tribunal (other than the AAT President or a Deputy President who also holds a commission as a Federal Court Judge); and
- a Judge of the Federal Circuit Court.

The Government accepts this recommendation.

The effect of implementing this recommendation would be that only persons who hold a commission as Judge of a state or territory Supreme Court, or as a Judge of the Federal Court of Australia could be appointed as an issuing authority for preventative detention orders.

Limiting the power to issue preventative detention orders to judges of superior courts reflects the serious and extraordinary nature of those orders, and the significant volume and complexity of evidence that must be considered in making these decisions.

For a person who held an appointment as an issuing authority immediately before the Criminal Code is amended in accordance with this recommendation, and who will no longer be eligible to be an issuing authority after the amendments commence, the Government considers that their appointment should lapse immediately after the amendments commence. The amendments should not affect the continuity of any order or decision made prior to commencement by a person's whose appointment as an issuing authority lapses upon commencement.

Recommendation 16

The Committee recommends that section 29 of the *Intelligence Service Act 2001* be amended to provide that the Committee may commence a review the provisions of Division 105 of the *Criminal Code Act 1995* prior to the sunset of the provisions.

The Government accepts this recommendation.

This will be implemented through the Intelligence Services Legislation Amendment Bill 2023 which is currently before Parliament.

Recommendation 17

The Committee recommends that section 29 of the *Intelligence Services Act 2001* be amended to provide that the Committee may conduct a further review into the operation, effectiveness and implications of the continuing detention order regime in Division 105A of the *Criminal Code Act 1995* prior to the sunset date.

The Government accepts this recommendation.

This will be implemented through the Intelligence Services Legislation Amendment Bill 2023 which is currently before Parliament.

Recommendation 18

The Committee recommends that the Department of Home Affairs coordinates with relevant State and Territory Departments to source appropriate accommodations to facilitate interim and confirmed continuing detention orders. The Committee recommends coordination with New South Wales on appropriate accommodation should start as soon as possible, noting the number of eligible offenders due to be released in the next five years.

The Government accepts this recommendation.

The Government supports the ongoing coordination between the Department of Home Affairs and relevant state and territory departments to locate appropriate accommodation to facilitate terrorist offenders subject to interim and confirmed continuing detention orders.

Recommendation 19

The Committee recommends that the *Criminal Code Act 1995* be amended to require public reporting requirements on the use and implementation of Division 105A, including:

- details of housing arrangements for individuals subject to a continuing detention order;
- use of rehabilitation programs (pre and post-release); and
- use of resources; including rehabilitation program costs, legal assistance costs, and costs associated with enforcement.

The Government accepts this recommendation.

Expanding the public reporting requirements in relation to Division 105A would improve transparency in relation to the operation and resourcing of the post-sentence order scheme, and the management of terrorist offenders subject to a post-sentence order. The topics identified in this recommendation are critical to a holistic understanding of the operation of the scheme, which annual reporting aims to support.