

Government Response to PJICIS recommendations in the Advisory Report on the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020

	Recommendation	Government response
1.	<p>Proposed clause 105A of the Counter-Terrorism Legislation Amendment (High-Risk Terrorist Offenders) Bill 2020 be amended to provide that an issuing authority must have regard to:</p> <ul style="list-style-type: none"> • whether the person is subject to a post-sentence supervision order under State or Territory legislation, and if so, the conditions of that order; and • the cumulative impact on the person of multiple post-sentence orders under Commonwealth and State or Territory laws, including the risk of oppression <p>when considering an application for a post-sentence order.</p>	<p>Accepted</p> <p>The Government agrees to amend the Bill in line with this recommendation.</p> <p>The Government notes that the extended supervision order (ESO) scheme will operate independently of post-sentence order (PSO) schemes at the State and Territory level. Where an offender is eligible under a State and Territory scheme and the ESO scheme, the Commonwealth would work in close collaboration with relevant jurisdictional partners to consider appropriate options on a case-by-case basis. It is not the intention that an offender would be subject to concurrent Commonwealth and State or Territory orders.</p>
2.	<p>An independent review of the range of risk assessment tools used, including the Violent Extremism Risk Assessment Version 2 Revised (VERA-2R) framework and alternatives, be conducted and findings reported to the Parliament. The independent review should consider the existing assessment framework, alternative tools, improvements which could be made and the effectiveness of mandating participation in deradicalisation programs.</p>	<p>Accepted</p> <p>The Department of Home Affairs will commission an independent review.</p>

3.	<p>The Committee recommends that the Bill be amended to remove the exclusion of proposed Division 105A from administrative review processes and s 9A of the <i>Administrative Decisions (Judicial Review) Act 1977</i> be amended to include post sentence order processes as ‘related criminal justice process decisions’.</p>	<p>Noted</p> <p>Decisions made by the AFP Minister under Division 105A of the <i>Criminal Code</i> form part of the process leading up to the Courts consideration of whether a PSO should be made. Exempting these decisions from review under the <i>Administrative Decisions (Judicial Review) Act 1977</i> (ADJR Act) is consistent with the principle that the Court hearing the substantive proceeding will be best placed to determine any collateral matters in relation to the lawfulness of associated decisions. An application for an ADJR Act review would be made at the same time as the Court’s consideration of the Minister’s application for a PSO. This would mean that an ADJR Act review would interrupt the application for a PSO. During the proceeding, the Court can consider any submissions made by the respondent, thus allowing for judicial consideration.</p> <p>Notwithstanding the exemption, the Government is of the view that appropriate avenues of review remain available to the offender, and that the exemption does not present a practical or substantive limitation on a respondent’s ability to seek judicial consideration of the Minister’s decisions.</p> <p>Providing access to judicial review of Ministerial decisions under the ADJR Act may contribute to drawn-out timeframes. Given the High Risk Terrorist Offenders (HRTTO) regime is designed to be responsive to risk in the community, any administrative processes which unduly impact the flexibility and responsiveness of the regime are undesirable.</p> <p>All decisions made by the Minister will ultimately be heard by the Court in the case of an application for an ESO. Judicial review of these decisions will remain available under section 39B of the <i>Judicial Act 1903</i> and section 75(v) of the Constitution.</p> <p>In its 2012 report <i>Federal Judicial Review in Australia</i>, the Administrative Review Council outlined a number of principles that may justify an exemption from review under the ADJR Act. One such principle is where a review under the ADJR Act has the potential to fragment or frustrate another legal process.</p>
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4.	<p>Proposed clause 105A.15A of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 be amended to provide that the Court may make an order requiring the Commonwealth to bear all or part of the reasonable costs and expenses of the offender’s legal representation for an extended supervision order proceeding.</p>	<p>Accepted</p> <p>The Government supports amending section 105A.15A to provide that it applies in relation to extended supervision order proceedings, to ensure that all offenders subject to post-sentence proceedings are appropriately represented.</p> <p>In addition, the Government committed an additional \$10 million in funding to the Expensive Commonwealth Criminal Cases Fund (ECCCF) in 2021-22. The additional funding will support legal aid commissions to begin to represent convicted offenders in CDO proceedings, and ESO proceedings pending the establishment of the scheme. The Attorney-General's Department will monitor demand on the ECCCF, to inform the Government’s consideration of future funding needs.</p>
5.	<p>Proposed section 105A.7A(1)(c) be amended to require the issuing court to assess, and be satisfied of, the necessity and proportionality of:</p> <ul style="list-style-type: none"> • each individual condition proposed to be included in an Extended Supervision Order (ESO); and • the combined effect of all of the proposed conditions of the ESO. 	<p>Accepted</p> <p>The Government agrees to amend the Bill to require a court issuing an ESO to assess and be satisfied of the necessity and proportionality of each individual condition of the ESO, as well as the combined effect of all the proposed conditions.</p>
6.	<p>Proposed clause 105A of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 be amended to stipulate that a condition imposed as part of an extended supervision order or interim supervision order cannot require an individual to remain at specified premises for more than 12 hours in a 24 hour period.</p>	<p>Accepted</p> <p>The Government agrees to amend the Bill to stipulate that a condition imposed as part of an ESO or interim supervision order (ISO) should not require an individual to remain at specified premises for more than 12 hours in a 24 hour period, unless the court is satisfied of extenuating circumstances.</p>
7.	<p>Proposed clause 105A of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 be amended to require that interim supervisions orders</p> <ul style="list-style-type: none"> • may not be subject to application to include new conditions prior to confirming an extended supervision order 	<p>Accepted in part</p> <p>The Government agrees that ISOs should be able to be amended with the consent of both parties. Variation by consent is provided under proposed section 105A.9D in the Bill.</p> <p>The Government does not accept that ISOs should not be subject to application to include new conditions prior to an ESO being confirmed. Between the time that an ISO</p>

	<ul style="list-style-type: none"> • may be amended with the consent of both parties. 	<p>and a substantive ESO is made, the offender’s personal circumstances or level of risk may change. It is therefore appropriate that conditions can be adapted to account for those changes.</p> <p>Restricting the ability to amend an ISO would undermine the scheme’s ability to be responsive to community risk.</p> <p>Any variation to an ESO or ISO would only be sought in response to a change in the risk level to the community, and an assessment of whether the conditions on the current ESO or ISO are reasonably necessary, and reasonably appropriate and adapted to manage the risk. If the offender disagrees with the variation, they have the opportunity to challenge it in court.</p>
8.	<p>The Department of Home Affairs develop a decision-making framework as part of the implementation of the extended supervision order scheme that provides guidance to a specified authority of:</p> <ul style="list-style-type: none"> • the considerations that must be undertaken by a specified authority • the timeframe for a decision under an exemption condition • the record-keeping requirements of a decision made under an exemption condition. 	<p>Accepted</p> <p>The Department of Home Affairs is currently finalising the HRTTO Regime Implementation Framework. The Implementation Framework outlines the governance arrangements for the HRTTO regime, including the management and enforcement of ESOs. The Framework will be supplemented by operational implementation plans that will provide guidance for specified authorities on considerations of exemption conditions and appropriate documentation of decisions made by the authorities.</p>
9.	<p>Proposed clause 105A of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 be amended to make clear a specified authority can apply discretion to whether a minor or unintentional breach of an extended supervision order or interim supervision order be subject to prosecution.</p>	<p>Accepted in-principle</p> <p>The Government agrees in-principle that specified authorities should exercise appropriate discretion to consider the appropriate response to minor, technical or unintended breaches of conditions, as the particular circumstances require. Operational discretion exists already for law enforcement agencies as to whether to investigate and charge a person for breaching an order.</p> <p>The Commonwealth Director of Public Prosecutions (CDPP) is responsible for deciding whether to proceed with prosecutions of alleged offending. In accordance with the <i>Prosecution Policy</i>, the CDPP will generally only commence prosecution where there is</p>

		<p>sufficient evidence, and the prosecution would be in the public interest respect to the prosecution of an offence created under the Bill.</p> <p>The Government considers the CDPP is best placed to perform this function as the Commonwealth's independent prosecution service.</p>
10.	<p>Section 29 of the <i>Intelligence Services Act 2001</i> be amended to provide that the Committee may commence an inquiry into Division 105A of the <i>Criminal Code Act 1995</i> within twelve months of the INSLM's report being completed.</p>	<p>Accepted</p> <p>The Government agrees to amend the reporting date for the PJCIS review of Division 105A. Currently, s29(1)(cb) of the <i>Intelligence Services Act 2001</i> provides that the PJCIS is to review the operation, effectiveness and implications of Division 105A of the Criminal Code by 7 December 2022 (6 years from the commencement of the <i>Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016</i>).</p> <p>Following passage of Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021, the <i>Independent National Security Legislation Monitor Act 2010</i> now provides that the Independent National Security Legislation Monitor is to review Division 105A as soon as practicable after 7 December 2021.</p>
11.	<p>The Committee recommends that, following implementation of the recommendations in this report, the Bill be passed by Parliament.</p>	<p>Accepted</p>

Additional Comments by Labor

The bill departs from the recommendations made by the former Independent National Security Legislation Monitor, Dr James Renwick SC, in September 2017 when Dr Renwick recommended the introduction of an extended supervision order regime

For example, Dr Renwick recommended that the standard of proof for an extended supervision order should be a “high degree of probability” – not “balance of probabilities”, as provided for in the bill.

Dr Renwick also recommended that the conditions that could be imposed under an extended supervision order should be identical to the conditions that can currently be imposed under a control order. And yet, under this bill, the list of potential conditions for an extended supervision order is not only different to – and longer than – the conditions that can currently be imposed under a control order, the list is not even exhaustive.

It should be noted that the Committee is, in effect, endorsing a departure from recommendations made by the Monitor where the Committee has, in a previous report, accepted those recommendations.

In its *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* in 2017 and 2018, this Committee endorsed the Independent Monitor’s recommendations.

On the basis of the evidence considered by the Committee, Labor members do not believe that the departures have been adequately justified by the Government.

Noted

The Government considers the departures necessary in order to ensure the interoperability of ESOs and CDOs.