



Australian Government
Attorney-General's Department

September 2023

Parliamentary Joint Committee on Intelligence and Security

**Review of the Counter-Terrorism and Other Legislation Amendment Bill
2023**

Attorney-General's Department Submission

Contents

Parliamentary Joint Committee on Intelligence and Security	1
Review of the Counter-Terrorism and Other Legislation Amendment Bill 2023	1
Attorney-General’s Department Submission	1
Introduction.....	3
Part 1: Context and development of the Bill	5
Context	5
Development of the Bill and consultation.....	5
Part 2: Details of measures.....	6
Police powers in relation to terrorism (stop, search and seize powers).....	6
Prescribed Security Zones	6
Extending the operation of Division 3A of Part IAA of the Crimes Act.....	7
Control Orders	8
Issuing courts	8
Aligning control order conditions with extended supervision order conditions.....	9
Variations by consent	10
Extending the control order regime	11
Preventative Detention Orders	11
Issuing authorities	11
Extending the operation of the Preventative Detention Order regime	11
Post-Sentence Orders.....	12
Annual reporting on the operation of Division 105A	12
Extension of the sunseting date of section 122.4 of the Criminal Code	13
Part 3 – Proposed Government amendments.....	13
Post-entry warrants.....	13

Introduction

1. The Attorney-General's Department (the department) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's (the Committee) Review of the Counter-Terrorism and Other Legislation Amendment Bill 2023 (the Bill).
2. The Bill would implement part of the Government's response to the Committee's 2021 *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime* (AFP Powers Review), and also facilitate consideration of criminal liability for non-disclosure duties as part of the Government's response to the Review of Commonwealth Secrecy Provisions.
3. The Bill, introduced into Parliament by the Attorney-General on 10 August 2023, would amend the *Crimes Act 1914* (Crimes Act) to:
 - Extend the operation of Division 3A of Part IAA (which provides for police powers in relation to terrorism) for a further three years to 7 December 2026.
 - Require the Minister to consider particular matters before declaring a 'prescribed security zone', including the reasonableness and proportionality of the impact of a declaration on the rights of persons in that location, the duration of the declaration, and the availability and effectiveness of any Commonwealth or State or Territory powers that would assist in preventing or responding to a terrorist act.
 - Require the Australian Federal Police (AFP) Commissioner to notify the Commonwealth Ombudsman, the Independent National Security Legislation Monitor (INSLM), and the Committee of any declaration of a prescribed security zone as soon as practicable, but within 72 hours after the Minister has made the declaration.
 - Require the Minister to give the Committee a written statement of reasons in relation to the making of a declaration of a prescribed security zone as soon as practicable after the declaration is made.
 - Require a police officer exercising powers under section 3UD, which allows police to stop and search for a terrorism-related item, to inform the person who is searched of their right to make a complaint to the Commonwealth Ombudsman or applicable State or Territory police oversight body or bodies, unless informing the person is not reasonably practicable due to circumstances of urgency.
4. The Bill would also amend the *Criminal Code Act 1995* (Criminal Code) to do the following:
 - Extend the operation of the control order and preventative detention order (PDO) regimes in Divisions 104 and 105 respectively for a further three years to 7 December 2026.
 - Amend the definition of 'issuing court' in relation to control orders to include only the Federal Court of Australia.

- Require an issuing court, before making an interim control order, to consider whether each of the conditions, and the combined effect of all the conditions imposed, are reasonably necessary, appropriate, and adapted for the purpose for which the order is issued.
- Align the conditions that can be imposed as a part of a control order with those that can be imposed as part of an extended supervision order (ESO) – in other words, provide that a court can impose any conditions it considered appropriate so the control order can be better tailored to address the risk profile of the individual concerned. This would also include conditions from which the controllee may apply for a temporary exemption.
- Introduce provisions that would enable the variation of a control order, including the addition of new conditions, by consent.
- Limit the classes of persons who may be appointed as an issuing authority for PDOs to superior court judges only.
- Require the AFP Minister to include information in their annual report under section 105A.22 on the detention arrangements that applied to terrorist offenders who were subject to a continuing detention order (CDO), rehabilitation or treatment programs made available to terrorist offenders subject to a post-sentence order, and funding for the administration of Division 105A during the year.
- Extend the operation of section 122.4 (unauthorised disclosure of information by current and former Commonwealth officers) by 12 months to 29 December 2024.

5. The Bill would also make consequential amendments to the following Commonwealth Acts:

- *Administrative Decisions (Judicial Review) Act 1997* (ADJR Act) - to provide that the decision of an AFP member to provide or refuse consent to vary an interim or confirmed control order would not be subject to judicial review (as is currently the case in relation to variations of interim control orders under the provision of the Criminal Code that the Bill would repeal and replace).
- *Australian Security Intelligence Organisation Act 1979* (ASIO Act) - replace references to 'obligations, prohibitions or restrictions' with 'conditions', as consequential to the amendment to the objects of Division 104.
- Crimes Act – to remove the reference to 'obligations, prohibitions or restrictions' in section 3ZZOD, as consequential to the amendment to the objects of Division 104.

6. In preparing this submission, the department consulted the Department of Home Affairs (Home Affairs), the Australian Security Intelligence Organisation (ASIO), the Office of the Commonwealth Ombudsman, and the AFP.

Part 1: Context and development of the Bill

Context

7. On 28 November 2022, the Director-General of Security, Mike Burgess, announced that the Australian Security Intelligence Organisation had lowered the terrorist threat level from 'PROBABLE' to 'POSSIBLE'. In his announcement, he noted that the 'reduction in the threat level reflects the maturity of Australia's counter-terrorism frameworks, laws and resourcing' and that, 'it is important to note that our assessment assumes there are no radical shifts in these policies, processes, laws or investments'.¹ The current counter-terrorism laws and frameworks, including the control order and the preventative detention order regimes in the Criminal Code, and Division 3A of Part IAA (police powers in relation to terrorism) in the Crimes Act, are a key factor in managing the terrorism risk and threat level in Australia.
8. The potentially catastrophic consequences of a terrorist attack on places of national significance, or in places of mass gathering, do not change despite the recent downgrade in the National Terrorism Threat Level. The maintenance of counter-terrorism powers and frameworks is a key factor in managing the overall risk of terrorism, and provides a proper basis for the continued existence of these unique powers.
9. In this context, the Bill is designed to ensure Australia's law enforcement agencies continue to be equipped with the tools needed to prevent and respond to terrorism and violent extremism in order to keep the Australian community safe, while also enhancing safeguards and oversight mechanisms for these tools, promoting the rule of law and procedural fairness.

Development of the Bill and consultation

10. The department undertook extensive consultation across Australian Government agencies in developing the measures in the Bill, including with the AFP, ASIO, the Departments of Home Affairs, and the Prime Minister and Cabinet.
11. The department also engaged with the States and Territories on the proposed measures through the Legal Issues Working Group (LIWG) of the Australia-New Zealand Counter-Terrorism Committee. As required under the 2004 *Intergovernmental Agreement on Counter-Terrorism Laws*,² the Prime Minister wrote to State and Territory First Ministers to seek approval of the proposed amendments to Part 5.3 of the Criminal Code. As required by the Intergovernmental Agreement, a majority of jurisdictions approved these amendments prior to introduction of the Bill.

¹ Director-General of Security Mike Burgess, 'National Terrorism Threat Level' (Speech, Australian Security and Intelligence Organisation, 28 November 2022).

² Council of Australian Governments, *Intergovernmental Agreement on Counter-Terrorism Laws* (25 June 2004).

Part 2: Details of measures

Police powers in relation to terrorism (stop, search and seize powers)

12. Division 3A Part IAA of the Crimes Act allows a police officer to stop, question and search persons, and seize items in a Commonwealth place (such as an airport). To exercise these powers, which do not require a warrant, the police officer must suspect on reasonable grounds that the person may have just committed, might be committing, or might be about to commit, a terrorist act. A police officer may also exercise these powers in a prescribed security zone, without requiring any suspicion on reasonable grounds that the person may have just committed, might be committing, or might be about to commit, a terrorist act.

Prescribed Security Zones

13. In accordance with recommendations 1 and 2 of the Committee's AFP Powers Review, the Bill would enhance safeguards that apply to the declaration of a Commonwealth place as a prescribed security zone for the purposes of preventing or responding to a terrorist act.
14. The Bill would require the Minister to consider, in deciding whether to declare a prescribed security zone, whether the impact of a declaration on the rights of persons in the Commonwealth place would be reasonable and proportionate; and have regard to the appropriate duration of the declaration.
15. Where the ground giving rise to the proposed declaration relates to preventing a terrorist act from occurring, the Minister must consider the availability and effectiveness of any powers conferred by a law of the Commonwealth, a State or a Territory that would assist in preventing the terrorist act from occurring.
16. Where the ground giving rise to the proposed declaration relates to responding to a terrorist act that has occurred, the Minister must consider the availability and effectiveness of any powers conferred by a law of the Commonwealth, a State or a Territory that would assist in responding to a terrorist act that has occurred.
17. Where the declaration is one of a series of successive declarations in relation to the Commonwealth place, the Minister must also consider the impact and proportionality of successive declarations.
18. As the Committee indicated in its AFP Powers Review, requiring the Minister to consider these particular matters would assist the Minister in considering whether to declare a prescribed security zone and would also support agencies to quickly and effectively prepare advice for the Minister's consideration, in what would likely be a time of heightened uncertainty for the public and requiring swift action from responding agencies. Given the impacts of such a declaration on the rights and freedoms of individuals in a prescribed security zone, the new requirements would also ensure that the power is only exercised when absolutely necessary and appropriate.
19. The Bill would also require the AFP Commissioner to notify the Commonwealth Ombudsman, the INSLM and the Committee 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 notification would need to advise that the declaration has been made and identify the prescribed security zone. The Minister would also be required to give the Committee a written statement setting out the reasons for making the declaration as soon as practicable after the declaration is made.

20. These new requirements would assist the relevant oversight bodies in performing their critical monitoring and review functions in relation to the declaration of prescribed security zones and the conduct of police therein.

Safeguard in relation to the use of stopping and searching powers under section 3UD

21. Section 3UD allows a police officer to stop and detain a person for the purpose of conducting a search, and search the person for a terrorism-related item where:
- the person is in a Commonwealth place in a prescribed security zone, or
 - the person is in a Commonwealth place other than a prescribed security zone and the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit, a terrorist act.
22. In accordance with recommendation 1 of the Committee's AFP Powers Review, the Bill would require a police officer exercising their powers under section 3UD to inform the person of their right to make a complaint to the Commonwealth Ombudsman or a State or Territory police oversight body about the conduct of the police officer in exercising the stop and search powers. This would ensure that persons whose rights have been affected by the purported exercise of section 3UD powers are aware of their ability to request that the conduct of the police officer is investigated or reviewed by the body responsible for oversight of the relevant policing agency, in the event that the person considers that the powers may have been exercised inappropriately.
23. However, this obligation to inform the person of their avenues to make a complaint does not apply where it is not reasonably practicable for the police officer to do so due to circumstances of urgency. Noting the context in which these powers can be exercised are limited to situations in which:
- a prescribed security zone has been declared to prevent or respond to a terrorist act, or
 - the police officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit, a terrorist act,

yet noting the importance of the safeguard, it is important that police officers are empowered to take appropriate and necessary steps to respond to, or prevent, an incident.

24. A person would still have a 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 even if the police officer did not advise them of this right due to circumstances of urgency. This would ensure that a person does not forfeit their right to make a complaint due to the police officer failing to notify the person of this right.

Extending the operation of Division 3A of Part IAA of the Crimes Act

25. In reviewing the operation, effectiveness and implications of Division 3A of Part IAA, the Committee found that these powers are an important part of Australia's counter-terrorism response framework. The Committee recognised that although the Division 3A powers have not been used since their introduction, there is a continued need for the powers. The powers have not been used since the Committee's report.

26. In his 2017 *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers*, the then INSLM, Dr James Renwick SC, also supported the ongoing utility and importance of these powers. The INSLM's 2017 Review concluded that the police powers were:³
- consistent with Australia's human rights, counter-terrorism and international security obligations and contain appropriate safeguards for protecting the rights of individuals
 - proportionate to the current threats of terrorism and to national security, and
 - necessary.
27. Division 3A of Part IAA of the Crimes Act is currently due to sunset on 7 December 2023. Consistent with the intention of recommendation 3 of the Committee's AFP Powers Review, the Bill would extend the operation of the Division by a further three years, until 7 December 2026.

Control Orders

28. The control order regime in Division 104 of the Criminal Code allows an issuing court to impose obligations, prohibitions and restrictions on a person for the purposes of protecting the public from a terrorist act; preventing the provision of support for, or the facilitation of, a terrorist act; and preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country. A control order can last up to 12 months (or three months if the person is aged between 14 and 17) from the day after the interim control order is made, and successive orders may be issued. A control order cannot be made in relation to a person who is under the age of 14.

Issuing courts

29. One of the safeguards under the control order regime is that control orders can only be issued by an independent judicial authority. In accordance with recommendation 8 of the Committee's AFP Powers Review, the Bill would amend the definition of 'issuing court' to include only the Federal Court of Australia, with the effect that the Federal Circuit and Family Court of Australia will no longer be able to issue control orders. Limiting the power to issue control orders to the Federal Court of Australia reflects the serious and extraordinary nature of those orders, and the Federal Court of Australia's expertise in considering matters that involve significant volumes of evidence.

³ Independent National Security Legislation Monitor, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers* (Report no. 1) September 2017, 39 [9.4] <<https://www.inslm.gov.au/sites/default/files/rpt-stop-search-seize-powers.pdf>>.

Aligning control order conditions with extended supervision order conditions

30. In accordance with recommendation 10 of the Committee's AFP Powers Review, the Bill would align the control order conditions (currently termed 'prohibitions, restrictions and obligations') with the conditions that may be imposed under an ESO. Conditions available under existing Division 104 have been retained. Consistent with the ESO regime, the Bill would not limit the conditions that the issuing court may impose on a person – it would provide that the court can impose any conditions it considers appropriate so the control order can be tailored to address the risk profile of the individual concerned. This could include conditions that are less onerous than those in the current prescribed list of control order conditions, where appropriate. The Bill does however include an indicative list of possible condition options to offer clarity about the types of conditions that may be appropriate to achieve the order's purpose and which are enforceable by police. The list, which mirrors the non-exhaustive list of possible conditions options in ESO regime, includes conditions that the controlee:
- reside or not begin to reside at a premises without permission of the specified authority (that is, a police officer or any other person that the court is satisfied is appropriate in relation to the condition)
 - not leave the State or Territory in which their residence is located
 - provide their passport to a specified authority
 - not change their name or use another name not specified in the order
 - not apply for certain travel documents or licences relating to the use of equipment, machinery or weapons
 - not engage in specified work or classes or work
 - not engage in any training or education without the approval of the specified authority
 - allow the results of interviews and assessments undertaken in compliance with the orders to be provided to the specified authority
 - comply with any reasonable direction given to the specified authority
 - submit to testing in relation to possession or use of specified articles or substances
 - allow a specified authority to enter a specified premises and search the person, the premises and seize any items found during those searches.
31. The new provisions would have the benefit, recognised by the Committee in the 2021 AFP Powers Review, of modernising the range of conditions listed under a control order. For example, new paragraph 104.5A(2)(j) allows for a court to impose a condition that the person must facilitate access, including by providing passwords, to electronic equipment or technology owned or controlled by the person, for the purpose of a police officer searching and seizing any such equipment or accessing such data (or both). Currently, the legislation does not allow the court to impose a condition like this on the controlee, and its inclusion reflects the need to provide for more modern and technologically appropriate conditions that can address risks posed by controlees.

32. The Bill would additionally provide that the combined effect of all the control order conditions must be considered by the court in addition to the appropriateness of the individual conditions, as this will ensure that the totality of the conditions under control orders are appropriate in response to the controlee's risk.
33. To provide more flexibility to support the day-to-day management of offenders subject to control orders, the Bill would also enable the issuing court to include 'exemption conditions' in a control order – that is, conditions from which the controlee may apply to a specified authority for a temporary exemption. For example, a control order may prohibit a person from going to a particular location, such as the area around an airport. If the court had made that an exemption condition, then the person could apply for a temporary exemption to attend that location at a particular time for a particular reason, such as a medical appointment. The exemption could be approved subject to certain conditions, such as identifying a specific period of time in which the person may be present in that location, or requiring the person to make themselves known to a particular person at the relevant building before attending the appointment.
34. The offence in section 104.27 of the Criminal Code would not apply if a controlee contravenes an exemption condition, and a relevant exemption is in force at the time of the contravention. This is important to prevent criminality and alleviate the burden on police to enforce contraventions that are reasonable and foreseeable, and can therefore be approved or excused in advance. A controlee would however commit an offence if they breached a direction issued in relation to an exemption condition in a control order.
35. The fact that a condition is designated as an exemption condition would not prevent either the person or the AFP member seeking to vary that condition, including by seeking a variation of the condition if an exemption has been refused, or by seeking new conditions.

Variations by consent

36. In accordance with recommendation 12 of the Committee's AFP Powers Review, the Bill 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, by consent, and allow the court to make the variation if it is satisfied on the balance of probabilities that the control order is reasonably necessary, and reasonably appropriate and adapted to protecting the public from a terrorist act. The application may be withdrawn at any time before the issuing court decides whether or not to vary the order.
37. Variations by consent would be available for all controlees, in relation to interim and confirmed control orders. However, when considering these matters in relation to a young person aged between 14 and 17, the Bill provides that the issuing court is required to consider the 'best interests' of the young person as a 'primary consideration'. In determining what is in a young person's 'best interests', subsection 104.4(2A) of the Criminal Code provides that the issuing court must take into account the age, maturity, sex and background (including lifestyle, culture and traditions) of the person, the physical and mental health of the person, the benefit to the person of having a meaningful relationship with their family and friends, the right of the person to receive an education, the right of the person to practise their religion, and any other matter the court considers relevant.
38. The issuing court is required to consider the best interests of the young person as a primary consideration, but the paramount consideration is achieving the objects of the control order regime. Noting the grave consequences that can result from a terrorist act, it is appropriate that in the hierarchy of matters to be considered by the issuing court, the objects of the control order regime, including protecting the public from a terrorist act, should be the paramount consideration of the issuing court.

Extending the control order regime

39. The control order regime is currently due to sunset on 7 December 2023. In accordance with the intention of recommendation 7 of the Committee's AFP Powers Review, the Bill would extend the operation of the Division by a further three years, until 7 December 2026.
40. Control orders continue to be a significant part of the comprehensive suite of powers that can be used as a medium-to-long-term risk mitigation measure for persons of counter-terrorism interest in the community. The availability of control orders continues to be necessary and of high utility in both the pre-prosecution and post-sentence context in dealing with individuals who pose a significant terrorism risk to the community, and in instances where there is not enough evidence to reach the threshold for a criminal offence.
41. In the Committee's AFP Powers Review it noted that 'it is necessary to evaluate the extended supervision order scheme prior to making a determination that the control order scheme is no longer necessary to address the threat of terrorism.'⁴

Preventative Detention Orders

42. A preventative detention order (PDO) under Division 105 of the Criminal Code allows a person to be taken into custody for up to 48 hours for the purposes of either preventing a terrorist attack that is capable of being carried out, and could occur within the next 14 days, or preserving evidence of, or relating to, a recent terrorist act. There are two types of PDOs: initial PDOs, which can last up to 24 hours, and continued PDOs, which can extend detention by a further 24 hours. PDOs are an important measure—albeit an extraordinary one — that enable police to disrupt terrorist activities.

Issuing authorities

43. In accordance with recommendation 15 of the Committee's AFP Powers Review, the Bill would limit the classes of persons who may be appointed as an issuing authority for PDOs to judges of the Federal Court of Australia or the Supreme Court of a State or Territory only. Limiting the power to issue PDOs 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 as part of these proceedings.

Extending the operation of the Preventative Detention Order regime

44. The PDO regime in Division 105 of the Criminal Code is currently due to sunset on 7 December 2023. In accordance with the intention of recommendation 14 of the Committee's AFP Powers Review, the Bill extends the operation of the Division by a further three years, until 7 December 2026.

⁴ Parliamentary Joint Committee on Intelligence and Security, Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime (Report 2021).

45. As the Committee concluded, in light of the current national security threat environment the PDO powers should be extended, noting that non-use of the powers does not indicate a lack of usefulness. The PDO regime remains a valuable tool that forms part of the suite of powers used to counter terrorism. PDOs can be used by police to disrupt imminent terrorist attacks from occurring. This is particularly important where there is little to no lead time to disrupt a terrorist act and there may not be sufficient information available regarding the individual to meet arrest thresholds. The PDO fills this gap by either preventing a person's immediate engagement in a terrorist act, or providing authorities with additional time to secure evidence following a terrorist act.

Post-Sentence Orders

Annual reporting on the operation of Division 105A

46. The Bill would expand the public reporting requirements in relation to the operation of Division 105A of the Criminal Code in accordance with Recommendation 19 of the Committee's AFP Powers Review. Without limiting existing reporting obligations, the Bill would require the AFP Minister's annual report about the operation of Division 105A to also contain information about all of the following matters:
- the detention arrangements that applied to terrorist offenders who were subject to a CDO at any time during the year
 - rehabilitation or treatment programs that were made available during the year to terrorist offenders who were subject to a post-sentence order at any time during the year, and
 - funding for the administration of Division 105A during the year.
47. Requiring this information to be published in an annual report is intended to enhance transparency in relation to the implementation of the post-sentence order scheme, and the management of terrorist offenders subject to post-sentence orders. The identified topics are critical to a holistic understanding of the operation of the scheme, which annual reporting aims to support.
48. The Bill would provide that the annual report must not include information on the above matters if it was given to the AFP Minister, or an officer or employee of the Commonwealth, by a Minister, or an officer or employee, of a State or Territory and that person has not consented in writing to the information being included in the report. This recognises that States and Territories hold certain information that would be relevant to the new reporting requirements, and will safeguard against the release of information that could compromise State and Territory security arrangements, or the safety of individuals.
49. The Bill would require that if the annual report omits information due to the operation of the requirement for State or Territory consent, it must include a statement to that effect. This would provide assurance, and transparency in relation to the fact that, the AFP Minister has sought to fulfil their obligation to publish relevant information in the annual report, but is unable to do so because the required State and Territory consent has not been granted. The department is committed to working with States and Territories in relation to implementing the enhanced public reporting requirements, if the Bill passes.

Extension of the sunseting date of section 122.4 of the Criminal Code

50. The Bill would extend the sunseting date of section 122.4 of the Criminal Code by 12 months, to 29 December 2024. Section 122.4 imposes criminal liability on current and former Commonwealth officers for breaches of approximately 296 non-disclosure duties in Commonwealth laws. It was enacted in 2018 to preserve criminal liability for breaches of these non-disclosure duties until each duty could be reviewed to determine whether it should be converted into a standalone specific secrecy offence or that criminal liability is no longer required.
51. On 22 December 2022, the Attorney-General announced the Government had commenced a comprehensive review (to be undertaken by the department) of Commonwealth secrecy offences to address concerns raised by multiple previous reviews about the number, inconsistency, appropriateness and complexity of Commonwealth secrecy offences. The department consulted broadly as part of the review (including whether each non-disclosure duty should be converted into a standalone offence or criminal liability removed). The department delivered a final report to the Attorney-General on 29 August 2023 and the Government is considering the findings of the report. A 12-month extension to the sunseting date of section 122.4 is required to maintain criminal liability while the Government finalises its consideration of the review.

Part 3 – Proposed Government amendments

Post-entry warrants

52. Recommendation 6 of the Committee's AFP Powers Review recommended that the powers permitting emergency entry to premises without warrant, in limited circumstances, be amended to require an ex post facto warrant to be obtained as soon as possible following the use of the warrantless entry powers. The Government response to the recommendation, tabled on 14 September 2023, provided that the Government accepts the recommendation, however the complexity and significance of the matter warranted further consideration and consultation to develop an appropriate legislative response.
53. Further consideration and consultation has now been given and the Government intends to introduce amendments to the Bill, which would implement recommendation 6 by establishing a requirement to obtain a 'post-entry warrant'. A copy of these proposed amendments is at Attachment A.
54. The proposed amendments would establish an administrative scheme under which a police officer who has exercised subsection 3UEA(1) powers (emergency entry without warrant) is required to apply to an assessment officer for a post-entry warrant as soon as practicable following the exercise of the power (see proposed new section 3UEB). Judges of the Federal Court of Australia or of a Supreme Court of a state or territory would be eligible to be appointed as assessment officers, and they would perform this function *persona designata*, that is, in their personal capacity. Nominated members of the Administrative Appeals Tribunal would also be able to perform the functions of an assessment officer (see proposed new section 3UJC).
55. An assessment officer would be empowered to issue a warrant, if and only if, they are satisfied, on the balance of probabilities, that in entering the premises the police officer suspected, on reasonable grounds, the matters mentioned in paragraphs 3UEA(1)(a) and (b) (see proposed new paragraph 3UEB(7)(a)). They must otherwise refuse to issue the warrant, and issue a statement of reasons for that decision.

56. The Bill would require the assessment officer to provide the warrant or the notice of refusal to the police officer who applied for the warrant, the Commissioner of the relevant Federal, State or Territory police agency, and any current or former owners or occupiers of the premises who have been affected by the exercise of 3UEA powers and to whom the assessment officer considers it is practicable to give the warrant or notice of refusal (see proposed new subsections 3UEB(9)-(11)). While having no legal effect, affected individuals would be notified of the assessment officer's reasoning for refusing to issue a warrant and informed of rights they may have to make a complaint to the Commonwealth Ombudsman or seek a civil or other remedy.
57. The amendments would also amend the annual reporting requirements in relation to the exercise of powers under Division 3A (powers in relation to terrorist acts and terrorism offences) to require the number of applications for a post-entry warrant made, the number of post-entry warrants issued and the number of refusals to issue a post-entry warrants made, to be reported in accordance with existing section 3UJB.
58. The scheme would offer a considered and informed review of subsection 3UEA(1) police powers by an appropriately skilled person that can provide confidence to both police and the public alike that these extraordinary powers are being used appropriately. The scheme would provide affected individuals with notice of possible wrong-doing or infringements of their legal rights by the police. It may also better inform law enforcement agencies about the appropriate use of these extraordinary powers.
59. The issue or refusal to issue a warrant may provide police officers and prosecutors with early indications about the admissibility of evidence obtained from the use of section 3UEA powers as the failure to be issued a warrant may indicate that evidence was collected improperly and may be inadmissible. If a court considered such a search was not authorised under s 3UEA and that the evidence was therefore unlawfully obtained, s 138(1) of the *Evidence Act 1995* would operate such that the evidence is not to be admitted unless the Court determines the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.