



AFP

AUSTRALIAN FEDERAL POLICE



Parliamentary Joint
Committee on Intelligence
and Security

Review of Post-Sentence
Terrorism Orders:
Division 105A of the
Criminal Code Act 1995

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Submission by the
Australian Federal Police

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Introduction

1. The Australian Federal Police (AFP) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security (PJCS) review of post-sentence terrorism orders in Division 105A of the *Criminal Code Act 1995* (Cth) (Criminal Code).
2. We note this review follows the recent review by the Independent National Security Legislation Monitor (INSLM) of Division 105A, which the AFP actively participated in with other Commonwealth agencies.¹
3. This submission provides an operational perspective on the following issues relevant to the committee's consideration of Post-Sentence Orders (PSOs):
 - the current terrorism threat environment,
 - the AFP's role in relation to Division 105A, and
 - the interaction between PSOs (namely Continuing Detention Orders (CDO), Extended Supervision Orders (ESO) and Control Orders.
4. We note the Attorney-General's Department (AGD) and the Department of Home Affairs will provide a joint submission to this review. The AFP was consulted on the joint submission.
5. The AFP also notes that from a law enforcement perspective our role is to protect the community and manage risks to the community from terrorism. The HRTTO regime is a key mechanism to manage risks posed by the High Risk Terrorist Offender (HRTTO) cohort.

Threat Environment

6. Despite the change in the threat level from 'probable' to 'possible' in November 2022, the threat of terrorism in Australia remains enduring, increasingly diverse and complex. The AFP's caseload remains consistent and has not decreased following the change in threat level. The AFP continues to place significant effort and resourcing into countering terrorism, in particular the threat posed by the HRTTO cohort.
7. Detailed below are key trends that the AFP has identified in the current terrorism threat environment, namely, the repatriation of Australians from Syrian Internally Displaced Person (IDP) camps, Ideologically Motivated Violent Extremism (IMVE), Religiously Motivated Violent Extremism (RMVE), and youth and online extremism. While the predominant threat is from RMVE, we are increasingly seeing a rise in matters involving IMVE and related beliefs. The AFP has also observed increasingly younger people being radicalised online. These trends are likely to have an impact on the nature and size of the HRTTO cohort and their management under the HRTTO regime into the future.

High Risk Terrorist Offenders

8. Individuals convicted of terrorism related offences are considered by the AFP if, from an operational perspective, they pose a high risk to community safety on release, which needs appropriate management (such as through a PSO). Noting however, that not all of this cohort is eligible for consideration for a PSO, for example, where an individual has committed a terrorism

¹ <https://www.inslm.gov.au/node/236>

offence not listed in Division 105A.3(1). The AFP, with our domestic partners, manage the reintegration of convicted offenders into the community upon their release from prison. PSOs are key measures to mitigate and manage the risk posed by offenders to the community. In very limited circumstances, Control Orders may be an appropriate post-sentence option, for example, to mitigate the risk posed by an individual who is not eligible for a PSO.

9. In Australia, **105** individuals have been convicted of terrorism offences since 2001. There are currently **55** terrorism offenders scheduled to complete their sentence of imprisonment and be released into the community between March 2023 and 2066. As at 15 June 2023, **53** of these offenders are eligible to be considered for a PSO. Significantly, **24** of these offenders are due for release within the next five years. This number may increase, with **20** charged individuals currently before the courts.
10. As at 9 June 2023, **eight (8)** offenders are scheduled to complete their sentence of imprisonment before the end of 2023. **One (1)** of these offenders is subject to a CDO which is currently undergoing annual review which commenced on 2 June 2023.
11. Towards the end of 2023, we will have the highest ever number of HRTO-eligible individuals available for release into the community at the one time. As at 19 June in 2023, **three (3)** offenders have been released, with an additional **six (6)** HRTO-eligible individuals scheduled for release by the end of 2023. The application of the HRTO regime will be essential in managing public safety and will further build an evidential basis for future reviews on the effectiveness of this scheme.
12. While Australia has not experienced an attack by a terrorist offender released into the community, there have been two instances of offenders who have re-offended while serving a prison sentence. Blake Pender (referenced in the joint submission) and Momena Shoma have both re-offended while serving a prison sentence, representing the risk HRTOs pose. Momena Shoma was serving a sentence for committing a terrorist act for stabbing an individual at a homestay, and then conducted another attack on an individual in the name of the Islamic State while in custody. Momena Shoma pleaded guilty to committing a terrorist act, and to being a member of a terrorist organisation.
13. It takes significant AFP resources to manage HRTOs once released into the community. This is compounded by an increased caseload of HRTOs recently released or expected to be released in the upcoming years. The cohort eligible for consideration under the HRTO regime is likely to increase as more terrorism related proceedings are finalised and additional matters prosecuted.
14. The risk posed by HRTOs is evident from a number of international incidents, including the 2019 London Bridge attack, the 2020 Vienna attack, the 2020 Streatham attack and the 2021 Auckland attack. These attacks were all committed by an offender released into the community after serving a sentence for terrorism related offences.
15. In recent years the AFP has encountered a number of matters (investigations and other operational activity) in relation to young people under 16 years of age, with the youngest being **12** years old. Should these young people be charged and sentenced for terrorism offences, we may witness an increase to the overall HRTO caseload (noting however, that if an individual is a juvenile at the conclusion of their sentence, they will not be eligible for a PSO).
16. In response to the emergence of this threat, the AFP has been collaborating with traditional and non-traditional domestic and international partners to build capabilities to respond to youth

radicalisation. A ministerial-led National Summit on Youth Radicalisation, convened by the Australian New Zealand Counter-Terrorism Committee, was held on 17 and 18 August 2022 to consider whole-of-sector responses for the prevention and disruption of radicalised youth, and the AFP contributed to outcomes.

Repatriation

17. Since 2012, around **230** Australians have travelled to Syria or Iraq to fight with or support groups involved in the conflict. Of those, around **120** Australians are assessed to be deceased. Around **70** people have returned to Australia after travelling to Syria/Iraq and joining groups involved in the conflict. The vast majority returned before 2016. Since 2012, around **250** Australian passports have been cancelled or refused in relation to the Syria/Iraq conflict.
18. As at 9 June 2023, there are approximately **62** Australian men and women known to still be offshore in the Syria/Iraq region who have fought with, or were otherwise associated with religiously motivated violent extremist groups. There are approximately **35** Australian children remaining in the IDP camps in Syria.
19. The AFP established Operation Ammersoyen in 2019 to coordinate all investigations in response to the threat of Australian Foreign Terrorist Fighters and families returning from the conflict in Syria and Iraq to ensure the safety of the Australian community.
20. In October 2022, the Government returned **four (4)** women and **13** children to Australia from IDP camps in Syria. Any future repatriations remain the decision of the Government.
21. On 5 January 2023, the New South Wales (NSW) Joint Counter Terrorism Team (JCTT) arrested and charged **one (1)** of the women repatriated from Syria, with entering, or remaining in, declared areas, contrary to section 119.2 of the Criminal Code. The offence carries a penalty of up to 10 years' imprisonment. This matter remains before the court.
22. The AFP will consider any risk posed by and to the remaining Australian-linked women and children in the IDP camps. Any Australian suspected of the commission of a criminal offence while in the conflict zone will be investigated by the AFP, and the return to Australia of these individuals will likely increase existing workloads for the JCTTs and HRTO caseloads.

Ideologically Motivated Violent Extremism

23. The number of individuals who adhere to IMVE is continuing to increase across the country, especially in rural and regional areas.
24. IMVE narratives are influencing a broad mainstream audience. This includes spreading disinformation, conspiracy theories, and in some cases, incitement to violence. IMVE narratives gained traction particularly during the COVID-19 pandemic, likely due to an increased amount of time spent online and a heightened level of exposure to alternative IMVE-related narratives.
25. A number of IMVE groups exist in Australia:
 - **Three (3)** of which are proscribed terrorist organisations: Sonnenkrieg Division (also known as SKD; Sun War Division), the National Socialist Order, and the Base.
 - Other IMVE linked groups the AFP are aware of include: the National Socialist Network, the Lads Society, the European Australian Movement, and more.

26. During the pandemic, there was an increase in anti-government and anti-democratic sentiment at both the State and Federal level, primarily driven by COVID-19 restrictions, lockdowns and vaccination mandates. By extension, the AFP has further witnessed recruitment occurring not only in encrypted messaging platforms, but also on mainstream social media channels, thereby suggesting this is also reaching a broader audience. This has enabled the targeting of vulnerable individuals to adopt ideologies they may not ordinarily have been exposed to, leading to an increase in IMVE-supporting individuals.

Religiously Motivated Violent Extremism

27. The AFP continues to see the predominant terrorism threat as RMVE, primarily in the form of Islamist extremism. However, other types of extremism have been identified. For example, in February 2023, the Queensland Police Service confirmed that the attack on 12 December 2022 in Wieambilla, Queensland, leading to the death of two police officers and a member of the public (in addition to the offenders who passed as the result of the incident), was Australia's first recorded RMVE attack derived from an interpretation of Christian fundamentalism.
28. In the domestic context, attack planning from a small number of Islamist extremists, principally lone actors or small groups, continues to threaten Australia. Globally, transnational jihadist groups continue to dominate the terrorism threat environment.

Youth and the Online Environment

29. The expansion of social media and communication platforms has enabled like-minded individuals to connect, communicate and spread online propaganda to an extent not previously possible.
30. Young people are more susceptible to radicalisation by extremists, who are deliberately targeting young and vulnerable individuals for radicalisation. The AFP's operational observation is that we are increasingly encountering individuals who are being radicalised at a younger age.
31. This risk of radicalisation of a young person is influenced by several factors, including social dislocation, peer influence, mental health/neurodiversity challenges, and active online engagement with extremists.
32. These can be incredibly complex and layered investigations which require a tailored case-by-case response, and working with partners to provide appropriate expertise and support services. This extends to young people who may engage with IMVE, RMVE, or mixed/unclear ideologies, who may present additional complexities due to mental health issues or forms of neurodiversity.

Division 105A – Role of the AFP

Application for Post-Sentence Orders

33. The Attorney-General, as the Minister administering the *Australian Federal Police Act 1979* (Cth) (AFP Minister), is the applicant for PSOs under Division 105A (CDOs and ESOs). The AGD is the lead agency in these applications but AFP plays a key role in utilising various tools and source to assist in informing the assessment of risk posed by an individual and mitigation strategies from a law enforcement perspective.

34. AFP witnesses provide evidence in PSO applications on:
- the risk of an individual engaging in terrorist conduct;
 - necessary mitigations required to address the risk posed; and
 - the effectiveness of any identified mitigations (in particular, the proposed conditions of an ESO), and
35. In a CDO application, the AFP may provide an expert opinion on whether there is a less restrictive measure available (for example, an ESO), that would be effective in preventing the risk posed by the offender of committing a serious Part 5.3 offence if released into the community.
36. In an ESO application, the AFP provides an expert opinion to explain the effect of the proposed non-therapeutic conditions, in relation to which the AFP would be responsible for enforcement and compliance.
37. Draft conditions for an ESO are proposed based on whether they are reasonably necessary, appropriate and adapted to the risk as assessed by a relevant expert (usually a psychologist and/or psychiatrist). The AFP will consider the opinion of the experts in formulating what we consider are reasonably necessary, appropriate and adapted conditions for an ESO.
38. AGD prepares the proposed conditions in close consultation with the AFP, and may also include advice from corrective services agencies or specialist service providers, which goes to both therapeutic and rehabilitative as well as traditional law enforcement considerations.
39. Corrective services agencies and specialist service providers (such as state or territory countering violent extremist programs, health and education providers) often have insight into mitigation strategies and treatments that support an individual's reintegration into the community. Consideration is also given to the interoperability and enforceability of the whole suite of proposed conditions. This addresses the 'whole' risk posed by the offender in the community.
40. The expert opinion provided by the AFP is based on the AFP witness's knowledge and experience in monitoring and enforcing Control Orders and ESOs, and general experience with terrorism offenders and investigation of terrorism offences. The AFP also takes into account a range of other information, including:
- expert risk assessments,
 - original brief of evidence, judgments and sentencing remarks from the offender's trial,
 - other AFP holdings interviews with the offender,
 - psychological assessments (where available – by appointed experts or corrections facility clinicians throughout time in custody),
 - telephone intercept and/or surveillance device products,
 - physical surveillance information,
 - criminal history information, and
 - correctional facility reports, including conduct in prison, and state and territory police holdings.
41. On request from AGD, the AFP will provide information relevant to the individual that assists to form a holistic view of the risk posed by each individual. This information assists AGD in forming a holistic view of the risk posed by each individual and advice to the AFP Minister on whether an application for a CDO or ESO should be considered.

Risk of Future Offending

42. There are inherent challenges in foreseeing an individual's risk to the community, given that the information on which assessments of risk is based generally reflects behaviour in a restrained, custodial environment from the time of an individual's arrest (noting the presumption against bail, and limitations on parole except in extraordinary circumstances, for terrorism offenders) There may be additional extraneous, dynamic risk factors which the AFP is unable to consider, and an individual's risk profile and propensity can change over time. Further, terrorist offenders are not a homogenous group.
43. In assessing future risk, consideration must be given to past behaviour and factors which were present in the context of that behaviour.
44. Division 105A accounts for this uncertainty in predicting risk, through the legislative requirement for the court to annually review both CDOs and ESOs allows consideration of changing circumstances and risks in relation to an individual.

Administering ESOs

45. The AFP has overarching responsibility for oversight of individuals after they are released and is the lead agency responsible for enforcement and compliance of non-therapeutic ESO conditions imposed on an individual, including breaches of conditions. The AFP consults with agencies that provide rehabilitative and therapeutic services to assess if there is any change in the individual's risk (including escalation).
46. To administer an ESO that has been issued by the court, the AFP works with AGD and relevant state and territory law enforcement agencies, for example, through the Rehabilitation Compliance and Enforcement Group (RCEG) which is co-chaired by the AFP and AGD. The RCEG is comprised of officials from relevant Commonwealth, state and territory agencies. Any non-compliance with an ESO condition is considered in the context of the 'whole' of the risk posed by the offender. This informs the best course of action, which may include issuing a warning or a caution to the individual, or arrest in some cases. The AFP and law enforcement partners work with individuals to build rapport and ensure that they understand the ESO conditions.

International Engagement

47. Many other countries have legislated schemes that allow for the imposition of conditions as a means of addressing the risk posed by convicted terrorist offenders. For example, the UK's *Terrorism Prevention and Investigation Measures Act 2011* (UK) (the TPIM Act) permits UK authorities to impose almost identical restrictions to Australian Control Orders on an individual suspected of preparing to commit terrorism offences. The AFP is heavily relied upon by our Five Eyes (FVEYS) law enforcement counterparts to share experiences, advice and operational insights into the effectiveness of our legislation and enduring risk frameworks to manage HRTO-eligible offenders. The AFP's enduring risk framework is far more advanced (with the exception of UK) in comparison to our FVEYS partners. The AFP aligns itself with the UK's progressive lead in the management of HRTOs and has established a Community of Practice between UK/Australia Police as a mechanism for the sharing of strategies, techniques and lessons learnt in managing HRTOs in the community.

Continuing Detention Orders

48. The AFP notes the recommendation made by the INSLM to repeal CDOs in his recent report on the Review into Division 105A (and related provisions) of the Criminal Code.² While the response to this recommendation is a matter for Government, from an operational risk management perspective, the AFP has detailed below the current interaction between CDOs and ESOs, as well as the potential consequences of repealing CDOs.
49. The AFP considers CDOs are an important feature of the HRTO regime and assists to manage the risk posed by terrorism offenders in an evolving threat environment. There are a number of safeguards such as high thresholds, the requirement for the Minister to be the applicant (who is also subject to Commonwealth model litigant rules), final decision-making by the court, and periodic reviews. Collectively these measures ensure only the highest risk offenders, whose risk is assessed to be unmanageable in the community, are ultimately subject to a CDO.
50. **Forty three (43)** offenders have completed a sentence of imprisonment for Commonwealth terrorism offences in Australia. The AFP understands at least **34** of these individuals have completed their sentence since the commencement of Division 105A in 2017. Eligible offenders have been subject to consideration by relevant agencies on a case-by-case basis to determine whether a PSO application should be made. To date, **five (5)** PSO applications have been made by the AFP Minister in respect of **three (3)** individuals, and **four (4)** PSOs (**two (2)** CDOs, **two (2)** ESOs) have been granted by the court, with a further application currently before the court. While the Division 104 Control Order framework was utilised to manage risk in the community until ESOs commenced in December 2021, these numbers demonstrate the relatively low number of PSO matters to date. The AFP plays a key role in this consideration, and our observation is that the HRTO regime is being used proportionately and judiciously. Further, as the HRTO regime is relatively new, the AFP considers there may be benefit in deferring judgement on its utility in order to understand its effect and full functionality against the risk it was designed to address.
51. If CDOs are repealed, the AFP would have a key role in ensuring that those individuals who pose the highest risk, who may have otherwise been managed in continued detention for a period, are managed in the community on an ESO.

CDOs and ESOs

52. Division 105A is designed to address the full spectrum of risk posed by an individual released after serving a sentence of imprisonment for specified terrorism offences. The options available in Division 105A ensure the orders are nuanced, proportionate and tailored to the individual, on a case-by-case basis.
53. CDOs address the higher end of the risk spectrum where the risk posed by an individual cannot be managed through a less restrictive order. In order to make a CDO, the court must be satisfied to a high degree of probability that an offender poses an unacceptable risk of committing a serious Part 5.3 offence.
54. ESOs were introduced in 2021 as a less restrictive alternative to CDOs. ESOs can be tailored to address different levels of risk where the court retains discretion to impose conditions tailored to the circumstances of an individual. This is intended to ensure that the conditions imposed on the

² <https://www.inslm.gov.au/sites/default/files/2023-03/hrto-report-4th-inslm.PDF>

offender are proportionate to the risk the individual poses to the community and are not unnecessarily onerous for the individual.

55. In order to make an ESO, the court must be satisfied on the balance of probabilities, that an offender poses an unacceptable risk of committing a serious Part 5.3 offence.
56. The court must also be satisfied on the balance of probabilities that each of the proposed conditions to be included in the ESO, and the combined effect of all the conditions, are reasonably necessary, appropriate and adapted for the purpose of protecting the community from the risk of the offender committing a serious Part 5.3 offence.
57. The higher level of restriction to an individual's freedom imposed by a CDO is recognised in the higher threshold that must be satisfied in order for a CDO to be made as compared to an ESO. That is, a 'high degree of probability' for CDOs and a 'balance of probabilities' standard for ESOs.

Potential Consequences of Repealing CDOs

53. As discussed above, CDOs may only be granted in cases where the court is satisfied that the unacceptable risk posed by an individual cannot be effectively managed in the community under an ESO or Control Order. If CDOs are repealed, law enforcement will need to rely on ESOs, and in very limited circumstances Control Orders, to manage the risk posed by an individual in the community. This may expose the community to a level of risk of harm which may not be able to be mitigated to an acceptable standard.

Interaction with the Control Order Framework (Division 104)

54. The AFP is responsible for applying for Control Orders in the Federal Court.
55. Since the CDO scheme commenced in June 2017 and till 15 June 2023, **20** Control Orders have been issued for **15** individuals. Of this number **nine (9)** offenders, have been arrested and charged for a breach or contravention of Control Orders. However, since ESOs commenced in December 2021, Control Orders have not been sought for PSO eligible offenders.
56. As explained at paragraph 8, not all offenders convicted of a terrorism offence will be eligible for a PSO. As such, Control Orders remain a necessary tool to address any identified risks posed by individuals who have been convicted of a non-PSO-eligible terrorism offence, but nevertheless pose a terrorism-related risk that needs to be managed in the community.
57. In the 2021 report on the Review of AFP counter-terrorism powers, the PJICIS recommended that the conditions available as part of the Control Order scheme is aligned with those available under ESOs.³ The conditions available under a Control Order are limited while ESOs provide greater flexibility to tailor conditions to the risk and individual circumstances of an offender.
58. The response to this recommendation is currently under consideration by the Government. Consistent with our previous public submission on this issue, from an operational perspective the AFP sees significant benefit in aligning Control Order and ESO conditions. This will ensure that both schemes are equally capable of addressing the evolving nature of the terrorism threat, and

³https://www.afp.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ReviewofAFPpowers/Report

recognise that each matter is unique. This is particularly relevant in the current terrorism threat environment, where Control Orders are a key preventative mechanism to divert and disrupt terrorism activity and address the risks posed by extremism online, and the increasingly targeted approaching of young people who are more susceptible to potential radicalisation. It is also one of the mechanisms available to manage the return of Australians from IDP camps in Syria, who may not be charged with offending but who may nonetheless present a risk to the community.

Conclusion

59. The HRTO regime is relatively new in the Australian counter-terrorism environment. As a result, its practical effect will take some time to manifest and understand.
60. Meanwhile, from an operational law enforcement perspective, on the few cases to date, the AFP considers that the current Division 105A assists agencies to address the risk posed to the community by the HRTO cohort.
61. The AFP looks forward to engaging further with the Committee on this review.