Parliamentary Joint Committee on Intelligence and Security

Review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020

Attorney-General's Department

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Question 1. Senator Keneally asked the following question:

Senator KENEALLY: But then why not, in the legislation, do as the INSLM recommended, that the conditions attached to an ESO should be the same as they are for a control order—the eligibility should be the same as it is for a control order? I've got the government's response right here, which is that the government supports this recommendation. What has happened between 2017 and now that has prompted the government to change its policy response?
Ms Nawaz: I'd go back to my previous answer. It's the operational experience that we've had. If I could be very precise, you're quite right: the ESO provisions are broader than the current conditions that are available under a control order. But the court is required to only impose a condition if that condition is reasonably necessary, appropriate and adapted. So there's a very strong test and safeguard in place for the court to make that decision.
Senator KENEALLY: With the greatest respect, that doesn't actually answer my question. You say 'operational experience'. Is that operational experience the mere fact that people that we thought we would be able to keep in jail under CDOs have not been able to continue to be detained?
Ms Nawaz: I'd have to take that on notice and consult with my colleagues at the AFP and Home Affairs about that, unless colleagues have anything to add.

The response to the senator's question is as follows:

The Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (the Bill) would provide that, in imposing an extended supervision order (ESO) on a terrorist offender, a State or Territory Supreme Court could impose any condition that it is satisfied is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from the unacceptable risk of the offender committing a serious Part 5.3 offence. The Bill would also provide that the standard of proof to which the Court must be satisfied before making an ESO would be the same as that for making a control order, being the 'balance of probabilities'.

These two features depart from recommendations of the Independent National Security Legislation Monitor (the Monitor). The Monitor recommended that the same controls be available for an ESO as a control order made under Division 104 of the *Criminal Code*, and that the standard of proof should be a 'high degree of probability' that the offender poses an unacceptable risk.

Conditions

The decision to depart from the Monitor's recommendation in relation to the conditions available has been informed by the Australian Federal Police's experience with the increased use of control orders for terrorist offenders following their release, the experience of state agencies with their equivalent schemes, and the need to ensure that orders can be tailored to the personal circumstances and the specific risk of each offender.

The AFP has found the finite controls that can be imposed under the control order scheme are inflexible in practice, and the current provisions can hinder the discretion of the court to tailor controls to address the particular risk posed by individuals and their unique circumstances.

The AFP has identified a need for improved flexibility in the conditions the court can impose to keep up with new technology, address the evidence of experts who may make recommendations outside of listed conditions, and adapt to the evolving nature of terrorism offending. This need for flexibility was contemplated and incorporated into the design of the ESO scheme.

The list of indicative conditions proposed in new section 105A.7B includes conditions which would assist managing the risk posed by high risk terrorist offenders on release which are not currently available under control orders. For instance, these include conditions prohibiting the offender from visiting 'specified classes' of areas and places and associating with 'specified classes' of individuals; conditions requiring an offender to attend and participate in treatment, rehabilitation or intervention programs; and conditions requiring an offender to undertake psychological or psychiatric assessment or counselling.

Similarly, the proposed availability of exemption conditions and reasonable directions conditions would allow for a level of flexibility in the day-to-day management of the order, which are not currently included in the conditions available for control orders. These mechanisms provide a framework on the face of the legislation for granting or refusing exemptions and impart authority for police to issue reasonable directions in relation to conditions. This acknowledges that it is not possible to forsee at the time of drafting conditions the many circumstances in which there may be a need to exercise flexibility.

For more information on issues identified by the AFP with the control order scheme, please refer to the AFP's submission, as well as the submission to the committee as part of the AFP Powers review.

In relation to state experience, the list of indicative conditions has been developed with reference to existing state schemes, and the kinds of conditions which agencies view as necessary to manage the risk posed by individual offenders on their release. State and Territory supervision orders adopt the approach of providing that a court may impose any conditions which it considers are appropriate, with a range of indicative conditions which may be regarded as appropriate. A number of state schemes go further by setting out specific conditions which are presumed to be included, unless the Court regards otherwise. For further detail on this, please refer to page 2 of Attachment B to the joint-agency submission of the Attorney-General's Department and the Department of Home Affairs.

Standard of proof

As noted in the joint-agency submission, the decision to depart from the Monitor's recommendation in relation to the standard of proof reflects the fact that these orders impose restrictions on an individual's personal liberties that fall short of custody. As such, this standard of proof is lower than the current standard of proof required for making a continuing detention order (CDO), which is a 'high degree of probability'.

The legal threshold relating to CDOs is high, noting the consequence of those orders is a person's continued detention. Applications for CDOs have previously been considered by the Department of Home Affairs on behalf of the Minister for Home Affairs but the legal threshold was deemed not to have been met and no application was made.

Should the standard of proof for ESOs be raised to that which applies to CDOs – being to a 'high degree of probability' – there may be similar challenges in the making of applications for ESOs.

The balance of probabilities is also consistent with the standard of proof that applies in control order proceedings (as well as other civil proceedings). Despite an alignment of the standard of proof, the legal threshold for the making of an ESO would still be a higher threshold than that which applies to a control order, in that the court must be satisfied that the offender poses an unacceptable risk of committing a serious Part 5.3 offence. This balances the need for the ESO scheme to protect the community, while recognising that ESOs are targeted at a cohort of persons who pose a higher level of risk to the community as compared to control orders.

The departure from the previous Monitor's recommendations does not signify that control orders and CDOs have not operated as intended. As the previous Monitor noted, there is currently a gap in the range of orders which may be sought, and an interoperability issue between the two orders in terms of the different courts which may make those orders. These issues will be addressed by ESOs, which are tailored to the specific risk that individual terrorist offenders may pose on their release, noting that this cohort may pose an increased risk compared to the broader cohort which may be the subject of a control order.

Question 2. Senator Keneally asked the following question:

Senator KENEALLY: I have a couple of other questions back to the bill. The Human Rights Commission pointed out, and I think the AFP confirmed, that it would be possible that a person could end up the subject of two post-release orders, at a state and federal level, but there's nothing in the statute that would prevent that from happening, which is, say, different to the fact that you can't be convicted of the same offence at a state and federal level. Is there any remedy that the Attorney-General's Department could consider in respect of ensuring that that doesn't happen?

Ms Nawaz: We're happy to take that on notice. You are quite right: it is possible that a person could be subject to orders in the Commonwealth level and in the state and territory. But what the courts are looking at is their future risk to the community. The eligibility for those orders could be quite different. That's how, in very narrow circumstances, that might occur. This is something we have thought about. This is something we think can be worked out at an implementation operational level with our colleagues in the states and territories, and that's how we were proposing to handle it. Was there anything in particular you were looking for?
Senator KENEALLY: The Human Rights Commission suggested that there be an amendment to the legislation to ensure that a person could not be subject to two post-release order regimes, one at a state and one at a Commonwealth level.
Ms Nawaz: We can take that on notice. There may be some constitutional limits about whether in a Commonwealth bill we can make decisions about other states and territories and what they're doing. But we can take it on notice for you.

The response to the senator's question is as follows:

In practice, a situation where an offender is subject to concurrent Commonwealth and state post-sentence orders is considered to be unlikely. These orders are sought with significant consultation and input from State and Territory agencies, including police and corrective services agencies. Commonwealth, State and Territory agencies are cognisant of the fact that if concurrent applications were progressed, both applications would be heard by the same State or Territory Supreme Court, and the risk that the Court would perceive or consider concurrent proceedings to be oppressive.

On this basis, the Bill does not provide that a person cannot be subject to a Commonwealth ESO and an equivalent state order at the same time. This is consistent with the existing control order and CDO provisions which also do not include a prohibition on concurrent state orders. This arrangement has not presented issues in the operation of those orders since they were introduced in 2005 and 2016 respectively.

There are also safeguards to ensure that this would not occur. In applying for a post-sentence order (including an ESO, if the Bill is passed), the AFP Minister must ensure that reasonable inquiries are made to ascertain any facts known to any Commonwealth law enforcement officer or intelligence or security officer that would reasonably be regarded as supporting a finding that the order should not be made, and to include that information in the application to the Court. The fact that a state order were already in existence and would be concurrent with a Commonwealth order could reasonably be regarded as being such a fact.

Further, in imposing conditions as part of an ESO, a Court would need to be satisfied that each condition was reasonably necessary, and reasonably appropriate and adapted to the purpose of protecting the community. This threshold is unlikely to be met in circumstances where an offender is already subject to conditions under a state order.