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

Legal Aid NSW
Submission to the
Parliamentary Joint Committee
on Intelligence and Security.

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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act* 1979 (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW provides state-wide criminal law services through the in-house Criminal Law Division and private practitioners. The Criminal Law Division services cover the full range of criminal matters before the Local Courts, District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia.

The **High Risk Offender Unit** (**HROU**) is a specialist team within the Criminal Law Division. The Unit provides advice and representation to offenders subject to applications by the NSW Attorney General for post-sentence detention or supervision under the *Crimes (High Risk Offenders) Act 2006* (NSW), *Terrorism (High Risk Offenders) Act 2017* (NSW), as well as to Commonwealth offenders subject to applications for post-sentence terrorism orders under Div. 105A *Criminal Code Act 1995* (Cth) (**the Code**) and applications for control orders pursuant to Div. 104 of the Code.

The HROU works closely with the **Commonwealth Crimes Unit**, a specialist unit within the Criminal Law Division which represents people charged with Commonwealth offences, including terrorism related offences and offenders convicted of terrorism related offences who are refused parole or are about to have their parole revoked.

Legal Aid NSW welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security's Review of the *Counter-Terrorism and Other Legislation Amendment Bill 2023*. Should you require any further information, please contact:

Senior Legal Project Officer, Legal Aid NSW

1. Introduction

Legal Aid NSW has provided advice and representation in post-sentence order matters since the introduction of the *Crimes (High Risk Offenders) Act 2006* (NSW) (**CHRO Act**) in 2006. In 2019, in response to growth in the use and resource demand of state based post-sentence orders, Legal Aid NSW established the HROU as a separate business unit and specialist practice within the Criminal Law Division.

The HROU is a multidisciplinary team comprising a Solicitor in Charge, two Senior Managing Solicitors, four Senior Solicitors, a senior social worker, an Office Manager, paralegal and Legal Support Officer.

Solicitors in the HROU advise and appear in applications made by the State of NSW for post-sentence extended supervision orders (**ESO**) or continuing detention orders (**CDO**) under the CHRO Act and the *Terrorism (High Risk Offenders) Act 2017* (NSW) (**THRO Act**).

Legal Aid NSW is also funded by the Commonwealth Attorney General's Department (**AGD**) to advise and appear in proceedings under Div. 104 and post-sentence orders (**PSO**) pursuant to Div. 105A of the Code. This includes applications for ESO, CDO and Control Orders (**CO**).

In 2021 solicitors from the HROU appeared on behalf of the first respondent to an application in NSW under Div. 105A. In 2022 we contributed to the Independent National Security Legislation Monitor's Review into Div. 105A (**INSLM Review**). Most recently, we made a submission to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) review of Div. 105A.

The extensive experience and expertise of HRO Unit solicitors appearing in both state and Commonwealth high risk offender proceedings informs this submission.

2. Scope of submission

The *Counter-Terrorism and Other Legislation Amendment Bill 2023* **(the Bill)** seeks to amend three broad areas of counter-terrorism legislation within the Code and the *Crimes Act 1914* (Cth) – stop search and seizure powers within Div. 3A of the Crimes Act; the control order (**CO**) regime within Div. 104 of the Code; and the preventative detention order (**PDO**) regime within Div. 105 of the Code.

Legal Aid NSW does not support any expansion of the control order regime. In our view, there is **less need for Div. 104 than ever before**. Legal Aid NSW strongly urges a review of the ongoing utility of the control order regime post-the enactment of the ESO regime. Legal Aid NSW does not support a step towards duplicitous legislative regimes across multiple jurisdictions.

This submission focuses on the proposed amendments to Div. 104, however, we also **oppose extension of the stop, search and seizure powers** in Div. 3A of the Crimes Act. We note the Parliamentary Joint Committee on Human Rights (**PJCHR**) has previously concluded that these provisions do not contain sufficient safeguards to constitute a proportionate limit on rights.[1] In the absence of evidence that the vast range of existing police powers are insufficient to mitigate the risk of terrorism *despite* the recent reduction in threat level, there is no legitimate justification for further expansion of these powers.

Legal Aid NSW provides no submission in relation to the amendments to the PDO scheme, however we endorse the comments made by the Senate Standing Committee for the Scrutiny of Bills (**Senate Standing Committee**) and the PJCHR in that regard.[2]

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[1] Including review of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*. Parliamentary Joint Committee on Human Rights, Report 14 (28 October 2014), pp. 3-69; Report 19 (3 March 2015), p. 112; and Report 30 (10 November 2015), pp. 82–101.

[2] Senate Standing Committee for the Scrutiny of Bills, Counter-Terrorism and Other Legislation Amendment Bill 2023, *Scrutiny Digest 10 of 2023*; [2023] AUSStaCSBSD 149 (**Senate Scrutiny Report**); Parliamentary Joint Committee on Human Rights, Scrutiny Committee Report 9 of 2023 [2023] AUPJCHR 86 (**PJCHR Scrutiny Report**) at [1.10]. Available: Report 9 of 2023 – Parliament of Australia (aph.gov.au)

3. Opposition to extension and expansion of the CO regime

Legal Aid NSW **opposes** the proposed extension of the existing CO regime for 3 years and any expansion of current provisions and police powers because:

- **Decreased threat level:** Australia's terrorism threat level has been downgraded for the first time since 2014.[3] No evidence is offered as to why, despite this reduced threat environment, expansion of the regime is suddenly warranted.

- **Existing effectiveness – expansion unnecessary:** According to the Australian Federal Police (**AFP**), there have been no instances in Australia of CO subjects committing substantive terrorism offences while an order (under the existing provisions) was in force. The AFP has publicly submitted that this "*indicates that COs are effective*".[4]

- **Interrelationship with other Division 105A orders under review:** A review into the operation and effectiveness of post-sentence orders under Div. 105A, and recommendations made by the Independent National Security Legislation Monitor (**INSLM**), is currently underway. The PJCIS Review will bear directly on an assessment of the ongoing scope and necessity of COs.

- **Human Rights concerns:** Since introduction in 2005, Div. 104 has been extended several times. The PJCHR has previously found that the measures were likely to be incompatible with a range of human rights. Despite the Bill containing some safeguard measures, the PJCHR has concluded that the proposed extension of these coercive powers continues to raise human rights concerns.[5]

- **Risk of abuse of process:** the Bill allows for the same curtailment of individual rights against those who do not meet the eligibility criteria of an ESO, or those who do meet the eligibility criteria but do not meet the risk threshold. This would enable the CO regime to be deployed as an auxiliary response to a failed ESO application.

Legal Aid NSW would **support extension** of the CO regime for a period of **no more than 12 months** with **no change to the current legislative provisions.** This would enable the

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[3] PJCHR Scrutiny Report at [1.10].
[4] Australian Federal Police Response to INSLM's Questions (February 2022), Submission #15 to the INSLM Review of Div. 105A *Criminal Code* (**AFP INSLM Submission**) at [43]. Available: https://www.inslm.gov.au/sites/default/files/2022-03/15-australian-federal-police.pdf
[5] Above n. 3.

PJCIS to conclude its review into Div. 105A (**current PJCIS Div. 105A review**), and for consideration of the ongoing necessity of COs. Whilst we would, in principle, support a small number of the proposed amendments which strengthen protections for persons subject to COs, such proposed safeguards are limited. We do not support a piecemeal amendment to Div. 104 and any amendments that precede the current PJCIS Div. 105A review and the publication of further detail of the evidentiary foundation of the Bill.

3.1 Insufficient evidence base

Legal Aid NSW **endorses the concerns raised by the Senate Standing Committee** in relation to the extension of the control order regime, particularly in relation to there being no specific information to support the case for expansion of the CO regime.

Upon enactment of the ESO regime, the AGD and Department of Home Affairs (**Home Affairs**) confirmed that the additional conditions available pursuant to an ESO recognised that *an offender who is eligible for an ESO may be considered a higher risk than a person subject to a control order*".[6] There is no explanation for alteration of that position.

Expansion of conditions

The proposed 'alignment' of the conditions of an ESO and the obligations, prohibitions or restrictions (to be renamed 'conditions') broadens the scope of conditions available pursuant to a CO. The additional proposed conditions can be summarised as follows:

1. Conditions relating to the forfeiture of passports and restrictions on applying for travel documents or name changes;

2. Association and communication prohibitions on "*classes* of individuals" or "individuals determined by a *specified authority*";

3. A prohibition in engagement with training or education without prior permission;

4. Compliance with any reasonable direction given by a specified authority;

5. The provision of specified information to a specified authority;

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[6] Submission 5, Attorney-General's Department and Department of Home Affairs, *Submission to the review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020*, Parliamentary Joint Committee on Intelligence and Security, para [33], p. 8.

6. The requirement to allow visits at any time for the purpose of ensuring compliance with a curfew condition;

7. Require the facilitation of access to electronic equipment and data; and

8. The provision of a **schedule** *"setting out the person's proposed movements for a specified period and comply with that schedule during the period"*.

Concerningly, the Bill also contains a proposed condition allowing an order that requires a person to: *"attend and participate in treatment, rehabilitation or intervention programs or activities; undertake psychological or psychiatric assessment or counselling"* along with a requirement to *"attend and participate in interviews and assessments"* as specified or directed. It also requires a subject consent to the disclosure of the results of the interviews and assessments to a "specified authority", defined vaguely at s. 100.1 of the Code as a police officer, or class of police officer or any person deemed appropriate by the Court.[7]

The proposed conditions contained in ss 104.5A(1)(n)-(p) of the Bill (described above) are a significant expansion upon the current s. 104.5(3)(l) which requires a person participate in specified *counselling or education* only **with consent**.[8] There is no evidence or research base to suggest that forcing persons not convicted of a criminal offence to participate in education or treatment will result in disengagement from any perceived "extremist" views. The proposal is also antithetical to rehabilitation because the imposition of such a condition is directed only to the prescribed purpose of Div. 104, with the paramount consideration being protection of the community rather than any express object of the rehabilitation of a person.[9]

Further, there is no detail as to what *treatment, rehabilitation* and *intervention programs* and *assessments* are envisaged. Experience with ESO orders and corresponding orders under the THRO Act in NSW dictates that assessments and intervention aimed at countering-violent extremism and the like are delivered at centralised Community Corrections NSW offices across the State. Community Corrections deals with all *offenders* subject to court-ordered supervision in the community. To require attendance of persons with no criminal conviction

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[7] See proposed s. 104.5A(1)(n)-(p).
[8] S. 104.5(6) of the Code.
[9] It is noted that the INSLM has recommended that the rehabilitation and reintegration of subjects of a post-sentence order be an express object of Division 105A.

at such locations creates a risk of bringing an individual unnecessarily within the criminal milieu.

Erosion of right to silence

We are very concerned that there are no safeguards proposed regarding the use that can be made of information compulsorily disclosed. It is not difficult to envisage information disclosed by a person participating in this compulsory "education" or "treatment" being used in pre-charge intelligence-gathering, or where a brief has been refused by the Commonwealth Director of Public Prosecutions or a charge has been withdrawn. This creates an invidious circumstance where a person risks breach of a CO, punishable by imprisonment, if they seek to exercise their **fundamental right to silence**.

The above circumstance is a real possibility in circumstances where the AGD, Home Affairs and the AFP have acknowledged the use of COs in the pre-prosecution context:

> *The availability of control orders, demonstrated by their more frequent application in recent times, continues to be necessary and of high utility…in instances where there is not enough evidence to reach the threshold of a criminal offence.*[10]

The capacity of this amendment to erode the right to silence is reason, in and of itself, for a rejection of the proposed expansion of such conditions. Protection of such a fundamental right has not been considered as part of the enactment of this Bill.

Under the ESO regime, sections 105A.6(5A) and 105A.18D restrict use of information contained in court-ordered assessments to proceedings pursuant to Divs. 104 and 105A and prohibit use of that information in criminal proceedings. If compulsory participation conditions are pursued in COs despite concerns about the right to silence, there must be more robust safeguards around the use of information: Any direction to attend assessments and intervention pursuant to a Div. 104 order in pre-charge circumstances must include a similar, if not more robust, safeguard.

Same order – different tests

The effect of the Bill, generally, is that a **substantially lower bar applies to impose the same conditions** pursuant to a control order.

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[10] Submission 4, Department of Home Affairs, Attorney-General's Department and the AFP, *Joint-agency submission – PJCIS Review of the police stop, search and seizure powers, the control order regime and the preventative detention order regime (Review of AFP Powers)*, Parliamentary Committee on Intelligence and Security, 4 September 2020, p. 8.

Before imposing a condition pursuant to an ESO, the Court must be satisfied that the condition is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from the *unacceptable risk that the offender poses of committing a serious terrorism offence.*[11]

Pursuant to s. 104.4, a Court must only be satisfied on the balance of probabilities that each of the obligations, prohibitions, and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of:

i. protecting the public from a terrorist act; or
ii. preventing the provision of support for or the facilitation of a terrorist act; or
iii. preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

Considering the broader scope of the operation of the CO regime, and its differing purposes (discussed below at 3.3, p. 15), the fact that an analogous provision exists within Div. 105A is not a sufficient justification for its expansion.

No evidence Division 104 is ineffective

The Explanatory Memorandum to the Bill and previous publications of the Australian Government do not support the expansion of Div. 104. The weight of available material favours an inference that the scheme is achieving its aim in its current form.

In its submission to the INSLM in 2022, the AFP said:

> *The AFP has applied for and obtained a number of control orders since the inception of the scheme. While a number of offenders subject to control orders have been charged with breaching their orders,* ***there have been no instances in Australia of control order subjects committing substantive terrorism offences while an order was in force.*** *The lack of substantive terrorism offences being committed in Australia by control order subjects (as opposed to, offending by breaching the conditions of the control order)* ***indicates that control orders are effective.***[12]

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[11] S. 105A.7B(1)
[12] Above n 4, p. 10.

Similarly, in the Explanatory Memorandum to the current Bill, it was noted that in reference to the existing Div. 104:

> *The **control order regime achieves the legitimate objective of protecting Australia's national security interests**, including preventing terrorist acts.*[13]

The direction of the Senate Standing Committee to the Australian Government asking for detail of an evidentiary base to the proposed amendments, should be afforded significant weight.

PJCIS 2021 Review of Police Powers

The Bill seeks to implement various recommendations of the PJCIS 2021 *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime* (**Police Powers Review**).[14] The Bill seeks to implement Recommendation 7 of that Review providing for the extension of the CO regime for a three year period and Recommendation 10 providing for the alignment of the conditions imposed by an CO with that of a ESO.[15]

With respect to both Recommendations, we note that the Police Powers Review offered no justification for streamlining and elevating the conditions available pursuant to a CO, other than an aim of "*modernising*" the CO suite of conditions. In a submission to that review, the Law Council of Australia highlighted the lack of evidence about risk to the community resulting from any perceived inadequacy of the current conditions available pursuant to a CO.[16] No effort has been made to address this concern.

Recommendation 10 of the Police Powers Review to align the conditions available pursuant to the CO regime with the suite of conditions proposed (and consequently enacted) under the ESO regime, was ultimately not endorsed when the legislation was extended for 12 months in December 2022.

The Police Powers Review also recommended that the Australian Government undertake "...*a review of the conditions that could be imposed as part of a control order, and report back*

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[13] The Parliament of the Commonwealth of Australia, House of Representatives, *Counter-Terrorism and Other Legislation Bill 2023*, Explanatory Memorandum, para 29.
[14] 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*, (October 2021) (**2021 PJCIS Police Powers Review**).
[15] Ibid, Recommendations 7 and 10, p xv.
[16] Submission 10, Law Council of Australia, *Review of Australian Federal Police Powers*, 2021 Police Powers Review, 17 September 2020.

to the PJCIS by July 2022."[17] No such review has occurred, and there has been no stated commitment by the AGD to conduct a review.

The PJCIS's recommendation for review is all the more pressing now given the altered terrorism climate. Since publication of the Police Powers Review, the terrorist threat level has been downgraded and its characterisation has evolved, whilst the Div. 105A ESO regime has come into force and has been utilised. A review into the ESO regime is also currently underway.

Reduction in threat level

There is a significant difference between a National Terrorism Threat Level of PROBABLE (existing up until 28 November 2022, including when the 2021 PJCIS Review occurred) and the current threat level of POSSIBLE.

A **'probable'** threat level is defined as the availability of 'credible intelligence assessed by Australia's security agencies indicating that *individuals and groups have the intent and capability to conduct a terrorist act* in Australia'.[18]

A **'possible'** threat level is defined as 'the existence of credible evidence that, while Australia is a *possible* target of terrorists, there is *limited intention* or *capability* to conduct an attack.[19]

The Explanatory Memorandum to the legislation enacting the ESO provisions in 2021 noted the following:

> *In the current security environment, having a range of tools to combat the evolving nature of the threat posed by terrorism is vital. Experience overseas has demonstrated the continuing threat posed by extremists…*[20]

As noted by the Senate Standing Committee, it is difficult to envisage that the terrorism threat level will ever be downgraded one step further to 'non-existent'. The same can be said for the existence of the risk of terrorist activity. No suite of conditions will extinguish risk in its entirety, particularly given the forward-looking nature of its assessment. There must be a careful balance between legitimate national-security interests and an erosion of fundamental individual rights.

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[17] Above n 14, Recommendation 11, para 3.76.
[18] See nationalsecurity.gov.au.
[19] Ibid.
[20] Above n. 13, para [8].

Nevertheless, and despite the above Recommendations of the PJCIS not being adhered to, the Australian Government has sought to introduce this Bill to not only extend the CO regime sunset date for a lengthy period, rather *significantly expand* it, without foundation and without the benefit of a detailed review of Div. 104 and the outcome of the review of Div.105A.

The downgrading of the threat level to 'possible' elevates the need for the Australian Government to clearly justify the appropriateness of expanded counter-terrorism measures, particularly as it relates to the convicted terrorists due for release in the near future.

3.2 Interrelationship with other Part 5.3 orders

Part 5.3 of the *Criminal Code* establishes three kinds of orders: COs under Div. 104; PDOs under Div. 105; and post sentence orders, including ESOs and CDOs under Div. 105A. All respond to risk of the commission of a terrorist act, and they **should not be considered discretely, in isolation**. This is recognised by s. 105A.7(1)(c) of the Code in that a Court, when considering the imposition of a CDO, *must* be satisfied that no less restrictive measure would be effective in preventing the unacceptable risk. That is, whether an ESO or CO would be an effective alternative. The proposed 'alignment' of ESOs and COs leaves only one appreciable less restrictive alternative available for consideration.

As the INSLM observed, the interaction of the various orders provided for in Part 5.3 is "*plainly relevant to questions of proportion and necessity of other protective orders*".[21] As noted in the Explanatory Memorandum to the ESO Bill:

> *"Control orders (which are sought in the Federal or Federal Circuit Court) would remain available as a tool to manage offenders who do not meet the eligibility criteria or threshold for an ESO or CDO as well as individuals who pose a risk but have not been convicted of an offence."*[22]

Legal Aid NSW is concerned about the timing and content of the proposed amendments to Div. 104 in circumstances where a review of Div. 105A is underway, and when a number of eligible Div. 105A offenders are due for imminent release. It is a reasonable possibility that the PJCIS will make recommendations as to the content and structure of the ESO regime,

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[21] Report of the 4th Independent National Security Legislation Monitor, Review into Division 105A (and related provisions) of the *Criminal Code Act 1995* (Cth) (3 March 2023) (**INSLM Report**) at [337].
[22] Above n 21, para [6].

including the effectiveness or otherwise of the current suite of conditions available pursuant to an ESO. If the Australian Government intends to "streamline" ESOs and COs, then the current review of Div. 105A must conclude, and, if necessary, a suite of changes to Div. 104 and Div. 105A should be considered holistically.

3.3 Different purpose of Control Orders

While the CO and ESO regimes overlap, fundamental differences between their purpose and effect has always been accepted. Some of the relevant differences recognised include:

- Control orders operate for shorter periods than an ESO and can be made urgently where there are urgent considerations. They are designed to protect the public from terrorist (or related) acts occurring in the **short to medium term**.[23]

- Control orders provide a report-based prohibition scheme, such as the *Child Protection (Offender Registration) Act 2000* (NSW), imposing a range of strict prohibitions and notification requirements. Defendants are closely monitored by authorities and are required to notify authorities of relevant information as it changes. In contrast, ESOs operate under an active supervision model (often over and above the intensity of supervision during parole) requiring extensive pre-approval and permission from a specified authority.

- The test for the issue of an ESO is more onerous than that required for the making of a control order.[24] This reflects the fact that ESOs can be made for up to 3 years, and that they can only be applied for against a convicted terrorist offender who has already served a sentence of imprisonment. It is also a reflection of the extraordinary curtailment of the rights and freedoms imposed on an individual.

The AGD has previously acknowledged that the ESO regime is targeted at persons who pose a higher risk to the community as compared to those eligible for control orders.[25] In the current hierarchy, which acknowledges those differing purposes, the ESO regime provides a stepping-stone between a CDO and a CO. If the CO regime is aligned with the ESO regime such that there is no difference between the practical operation of such regimes, there is a

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[23] Above n 21, para [56], p.20.
[24] Ibid, para [353], p.107.
[25] Above n. 6.

real question about **what work an ESO regime will do.** The proposed amendments diminish the necessary delineation of the purpose of the differing orders.

3.4 Breach rates under current Control Order provisions and lack of rehabilitative purpose

No case example has been provided to demonstrate the shortcomings in the 'conditions' available pursuant to a CO, or that the current monitoring capabilities are ineffectual in capturing breaches of orders – whether innocuous or not. Conversely, the AFP has acknowledged that:

> *"The nature of the conditions (prohibitions and restrictions) comprising a typical control order have the effect of making it possible to contravene a control order through conduct that normally would not constitute an offence, let alone a terrorism offence."*[26]

And at [45]:

> *"Since July 2020, the AFP has charged a number of individuals for contravening their control orders. The AFP experience is approximately 70% of individuals subject to control orders are arrested and charged for contraventions."*[27]

Annexure A contains a table of prosecutions for breaches of control orders. As indicated by the AFP, none of those matters relate to a breach founded in terrorism-related offending. Only one of those breaches had a link to any form of extremist material. In fact, no breach of control orders has otherwise constituted a breach of criminal law.

If breaches of orders can be readily captured (including for technical breach conduct), and there is no evidence to show how the proposed legislative amendments will increase effectiveness, expansion of the CO regime cannot be said to be necessary or proportionate.

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[26] Above n. 4, para [44].
[27] Ibid at para [45].

4. Recommendation: need for statutory safeguards against misuse of the Control Order Regime

If COs are to remain a part of the suite of counter-terrorism measures, **legislative safeguards restricting applications under Div. 104 as a "fall back" or "alternative" to a Div. 105A application should be implemented.** Such protections are necessary to prevent the potential for abuse of process and in circumstances where the extraordinary nature of the power is readily acknowledged by the Government.[28]

There is no current or proposed safeguard in place preventing concurrent or cumulative harassment by multiple jurisdictions. The fact that a CO cannot be in place whilst a PSO is in place is not sufficient protection, because *proceedings* can be concurrent, and a CO can be cumulative upon the expiry of an ESO (or CDO).

4.1 Use of Control Orders against post-sentence eligible offenders – no bar to harassment of multiple proceedings

The present state of legislation leaves open the potential for the AFP Minister to pursue a CDO, then an ESO, and a CO against a single individual (each as a successive "fall back" position), with concurrent or a substantial duplication of proceedings in the Supreme Court and Federal Court. This affects not only an individual's rights and welfare, but also the resourcing needs of legal services representing defendants to such litigation. This is an issue about which Legal Aid NSW has expressed repeated concern. [29]

We have reviewed 15 control order proceedings between 2018 and 2023 and identified that **60% would have been eligible for an ESO order** (9 of 15) had the ESO regime been in force at the relevant time.

In his review of Div. 105A, the INSLM considered the interrelationship and overlap between COs and ESOs. While concluding that the CO regime did not (of itself) render ESOs disproportionate or unnecessary, the INSLM observed that COs were "*always intended to be*

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[28] The Hon Mark Dreyfus MP, Attorney-General, the Counter-Terrorism and Other Legislation Amendment Bill 2023, Second Reading Speech, *House of Representatives Hansard*, 10 August 2023, p.2.

[29] Legal Aid NSW, Submission 18 to the INSLM Review into the Operation and Effectiveness of Div. 105A *Criminal Code*. Available: https://www.inslm.gov.au/sites/default/files/2022-06/legal-aid-nsw-submission.pdf; Legal Aid NSW, Submission 9 to the PJCIS Review into Div 105A, Available: https://www.aph.gov.au/DocumentStore.ashx?id=30bcf627-a4ba-4155-b24a-bacbdc997bac&subId=744624

shorter term and respond to factors of immediacy. ESOs deal with convicted terrorist offenders."[30] The INLSM acknowledged that the CDO and CO regimes gave rise to applicants initiating separate concurrent proceedings, applying different tests for the same offender. This is not, as the INSLM noted, in the interests of the applicants, the courts or the offender.[31]

Similarly, the PJCIS noted the financial and time-cost of multiple proceedings due to the duplication in effort required.[32] Whilst these concerns were raised prior to the enactment of the ESO regime, they remain equally apposite.

Positions of the Commonwealth about the use to be made of COs post-sentence

In a joint submission to the INSLM Review in January 2022, the AGD and Home Affairs stated:

> *"The HRTO regime now provides for CDOs as well as ESOs. Control orders remain as a risk mitigation measure, including for the management of individuals of counter-terrorism interest <u>who in their current circumstances would not be eligible for a post-sentence</u> (CDOs or ESOs)."*[33] (Emphasis added).

In a supplementary submission to the INSLM Review in October 2022, the AGD acknowledged the INSLM's comments during Public Hearings that ESOs, as opposed to COs, should be the preferred management option for convicted offenders upon release from a custodial sentence. However, the AGD expressed the view that, following the introduction of the ESO scheme, control orders should remain as a risk mitigation measure, "*including for the management of individuals of counter-terrorism interest who in their current circumstances* ***would not be eligible for a PSO.***"[34]

In relation to the possibility of COs being sought against individuals who were also eligible for post-sentence orders, the AGD said:

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[30] Above n. 21, para [358], p. 109.
[31] Commonwealth of Australia, Independent National Security Legislation Monitor, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detentions Orders*, September 2017, para [9.25], p. 71.
[32] Above n. 4.
[33] Joint Submission, Attorney General's Department (Cth) and Department of Home Affairs, Submission # 8 to the INSLM Review of Div. 105A *Criminal Code* (**Joint Cth Department Submission**) at [136]. Available: https://www.inslm.gov.au/sites/default/files/2022-03/08-joint-submission-agd-and-dha.pdf
[34] Attorney General's Department (Cth), (October 2022), Supplementary Submission # 21 to the INSLM Review of Div. 105A *Criminal Code* (**AGD Supp Submission**) available: https://www.inslm.gov.au/sites/default/files/2022-10/21-attorney-general%27s-department-supplementary-submission.pdf

> *"Control orders remain necessary for both PSO eligible and PSO ineligible offenders. However, in the PSO regime, the AFP would only consider a control order in exceptional circumstances. For example, where an offender is sentenced to time served and released, and it is not possible to apply for an ISO or ESO* (Emphasis added)."[35]

The AFP has also indicated on a number of previous occasions that the interoperability of Div. 104 and Div. 105A is not a matter of concern, given the way in which it is intended that the schemes will be applied:

1. In evidence to the INSLM, Mr Ian McCartney of the AFP said the following:

   > *"I would like to assure you that in practice there is no overlap between the schemes. Where an individual is eligible for an ESO, an ESO will be considered. Control orders will only be sought where the individual is not eligible for an ESO. The individual is otherwise eligible for an ESO but is either sentenced to a time served or released early, meaning they are technically not eligible at that point an ESO can be considered and, of course, unconvicted individuals who nevertheless pose a threat risk to the community."*[36]

   Mr McCartney then answered in the affirmative when asked by the INSLM whether the only orders considered for a person in custody are a CDO or ESO.[37]

2. The AFP's oral evidence supplemented its written submission to the INSLM:

   > *"The ESO Act has now addressed this gap and lack of interoperability between the control order regime and CDO regime by establishing an extended supervision order ESO scheme in Division 105A of the Criminal Code. Importantly, an ESO can now be considered by the Supreme Court as a less restrictive alternative to a CDO in determining a CDO application. This will largely avoid the need for the AFP to make a parallel ICO application in the Federal Court in relation to the same offender who is the subject of CDO proceedings. While the AFP does not rule out the possibility that there may be*

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[35] AGD submission to the INSLM p.15.
[36] Public Hearing Day 3, 21 November 2022, INSLM Review into the Division 105A of the *Criminal Code Act 1995* (Cth), Transcript of Proceedings, pp. 195-196.
[37] Ibid.

> *exceptional cases in which it is appropriate for parallel ESO and ICO applications to be made, the AFP would not contemplate that course being pursued in every available case.'*[38]

The difficulty with the approach indicated by the AGD and AFP is that what is considered "exceptional" is not defined and provides no certainty of application. Terrorism offending is innately variable and atypical in its nature. Despite expressing the view that COs would only be sought in "exceptional circumstances", there is no legislative restriction or safeguard to ensure such restraint. This is of particular concern in light of the number of eligible Div. 105A offenders due for release before the end of 2023 – a very short time away.[39]

Limit on the ability of courts to prevent duplication

Courts are limited in their ability to prevent and monitor undue leverage of legislation and duplicity of issues in other jurisdictions, particularly where PSO proceedings and CO proceedings are heard in different courts, creating an information gap and lack of ability to streamline case management, or make complementary orders.

Whilst Divs. 104 and 105A require the filing of any other existing post-sentence or control orders, or outcomes of proceedings to the applicable Court, the legislation does not go further in preventing concurrent litigation. It is also noted that in its review of the ESO regime, the PJCIS recommended that not only should a Court be required to consider whether the person is subject to a supervision order, but **also consider the cumulative impact of multiple Cth and State post-sentence orders, including the risk of oppression.** [40] This recommendation has yet to be implemented.

Potential for COs to be used to circumvent the ESO requirements in pending releases

At the time of writing, to Legal Aid NSW's knowledge, no application for a Div. 105A order have been made in relation to any eligible offender due for release in 2023, despite the total term in each matter being less than 3 months away. If the proposed amendments are enacted, it is a reasonable possibility that the amended CO regime will be used as a "fast-tracked" and "backdoor" way of imposing ESO-like conditions upon an eligible Div. 105A offender upon release, without the onus of satisfying the rigorous requirements necessary for imposition of an ESO. For example:

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[38] Above n. 4, p. 8 para 37.
[39] Above n. 32, Attachment A. NB. *Mohamed Al Maouie's total term expires on 22/12/2023 as a result of a successful appeal and there has been one additional offender added to this list as a result of a successful appeal. Therefore there are currently 6 eligible offenders due for release before the end of 2023 in New South Wales.*
[40] Above n. 14, Recommendation 1 p. 53.

1. No requirement to satisfy the court that the defendant is an unacceptable risk of committing a serious Part 5.3 offence and that the conditions address such a risk.

2. Pursuant s. 105A.5(2A) to the AFP Minister *must* make reasonable enquiries as to why a post-sentence order should *not* be made and *must* disclose that information to the court and defendant.

Further, unlike Div. 104, Div. 105A contains a number of provisions allowing for the expert assessment of the defendant regarding his or her risk.

Conversely, an interim CO can be made on an *ex parte* basis. A Court must find, based on the statement of facts contained in the applicant's affidavit on the *balance of probabilities* that the respondent is eligible within s. 104.4(1)(c). That subsection contains a series of paths to eligibility – from the simple fact of conviction of an offence "relating to terrorism" or engagement in "hostile activity" in a foreign country, to satisfaction that making the order in relation to the respondent would *substantially assist* in preventing the provision of support for a terrorist act despite no prior offending.

Once satisfied of s 104.4(1)(c), the Court must be satisfied pursuant to s 104.4(1)(d) that each of the proposed obligations, prohibitions, and restrictions (or "conditions" as it is proposed) are reasonably necessary, reasonably appropriate and adapted.

Applying that scenario to an eligible Div. 105A offender, given that s 104.4(1)(c) is automatically satisfied, a Court would only have to be satisfied on the balance of probabilities that the "conditions" are reasonably adapted and necessary to either protect the public or prevent one of the events contained 104.4(1)(d).

This process bypasses a threshold of unacceptability of risk, whilst still imposing the same ESO-like suite of conditions upon a respondent.

4.2 Potential for NSW post-sentence orders in addition

If an eligible Commonwealth terrorist offender is also serving a sentence of imprisonment for any indictable offence in New South Wales (e.g. an unrelated offence of larceny), in addition to the possibility of either a CDO, ESO or CO (or both), he or she may also be subject to an

application for post-sentence orders under the THRO Act. In considering the possibility, the INSLM observed "*there is an anomaly in this.*"[41]

While there may currently be policy agreement between Commonwealth and State and Territory authorities about precedence between available post-sentence orders, there is no legislative safeguard to prevent harassment by multiple prosecutions about the same issue.

4.3 Case Studies – risk of multiple proceedings

The below examples[42] show that Legal Aid NSW's clients are in an extraordinary position, susceptible to a suite of concurrent curtailment provisions available to both the Commonwealth and State Governments. If the proposed amendments to streamline ESO and CO conditions are enacted as proposed without corresponding safeguards restricting their interoperability, prejudice to defendants will only be heightened, with significant resource implications for defendants to such litigation.

Case study A

Client A is eligible for a post-sentence order pursuant to Div. 105A of the Code. Client A was publicly identified by the Home Affairs as an eligible offender in early 2022.

Client A's total sentence expiry is imminent (at the time of writing). The following scenarios could arise prior to the expiration of Client A's total sentence:

1. **Release without a PSO or CO**, however a CO remains an available option going-forward, post-release.

2. **An application for an interim ESO or CDO is determined and imposed.** If that approach is taken, it will be at great cost and resource to the defendant and its legal representatives because of the very late timing of the application.

3. **An interim CO is applied for with the consent of the AFP Minister and imposed prior to Client A's release.** The application for an interim CO in the Federal Court **could also occur concurrent to proceedings instituted for a Div. 105A** order in the Supreme Court. Any CO would come into force if the application for a PSO is unsuccessful – a fallback position.

[41] INSLM Report at [75].
[42] Anonymised examples of current Legal Aid NSW clients.

Case Study B

Client B is eligible for an order pursuant to Div. 104 and Div. 105A of the Code, and the THRO Act.

Client B is serving a sentence for a Part 5.3 offence, the total term of which expires within 12 months.

Client B is also serving a wholly concurrent sentence for a NSW indictable offence that expires prior to the Commonwealth Offence.

Client B could be dealt with in the following ways:

1. **Release without a Cth or NSW PSO or CO.**

2. **A CDO or an ESO is imposed prior to release.**

3. **An application for an interim CO is imposed prior to release, again, potentially concurrently** with proceedings for a Cth or NSW PSO.

4. **An application for a CDO or ESO pursuant to the THRO Act is made prior to the expiry of the State sentence.** If such an application fails, Client B is **still eligible for a Div 105A order and a CO.** In fact, there is no safeguard preventing the application for a CO whilst proceedings are on foot under both the Code and the THRO Act. Whilst Client B cannot be subject to more than one order, Client B can still be subject to concurrent proceedings in more than one jurisdiction. This creates an extraordinary resource burden on a defendant and its legal representatives.

4. Conclusion

Legal Aid NSW endorses the legitimacy of preventing acts of terrorism in all forms.

However, **Legal Aid NSW is concerned that the proposed expansion may lead to erosion of individual rights and freedoms, particularly in relation to (but not limited to) individuals who have not been convicted of a criminal offence.**

The CO regime already allows for a significant restriction of the personal liberty of persons not convicted of any criminal offence, and on those persons who have completed their sentence for terrorism-related offending. The Australian Government should not, or at least be very slow to, enact legislation that further compromises individual liberty in this regard. A sunset provision is a further recognition of the extraordinary nature of the powers contained in Div. 104.

Legal Aid NSW **does not support** the *Counter-Terrorism and Other Legislation Amendment Bill 2023*. Legal Aid NSW recommends the sunset date for the CO regime contained in ss 104.32(1) and (2) be amended to **7 December 2024** and the PCJIS conduct an inquiry into the ongoing utility of Div. 104 generally and the interrelationship with Div. 105A of the Code, with the benefit of a concluded inquiry into Div. 105A of the Code.

Annexure A: Table of control order breaches

Case	Basis for control order	Nature of the breach	Sentence imposed
R v Biber [2023] NSWDC 292	Conviction for a foreign incursion offence committed in 2013, contrary to s(6)(1)(a) of the Crimes (*Foreign Incursions and Recruitment) Act 1978*. (now contained in Part 5.3 Criminal Code) ***NB. Eligible for an ESO if in force at the time.***	Failure to notify the AFP of his paid work, namely a Facebook business to import, advertise and sell counterfeit handbags. Business was undertaken because of the limited financial means of himself and his family.	Sentenced to a two-year Community Corrections Order, including 250 hours of community service and an 8-month overnight curfew.
R v Adam Mathew Brookman [2023] VCC 97	Convicted of performing services in support or promotion of a foreign incursion offence: *7(1)(e) of the Crimes (Foreign Incursions and Recruitment) Act 1978* (now contained in Part 5.3 Criminal Code) Travel to Syria in 2014 to support Chechnyan combatants ***NB. Eligible for an ESO if in force at the time.***	- Turned off YouTube History in contravention of an order not to delete data. No suggestion of deletion of any material related to terrorism. - Accessed Tik Tok, Instagram, Twitter, Facebook and Reddit without prior approval. No suggestion of any use related to terrorism. - Use of electronic media to access electronic media portraying firearms, ammunition, an execution, virtual reality games and pornography. No allegation the material was terrorism-related. - Set a passcode for approved mobile in September 2021, provided password when requested in November. Breached because did not voluntarily disclose password earlier.	Imprisonment of 1 year and 6 months with a NPP of 1 year and 3 months.
R (Cth) v Dakkak [2022] NSWDC 181	Mr. Dakkak was convicted of two offences of associating with a terrorist organisation contrary to s 102.8 of the *Criminal Code Act 1995*.	Dakkak breached the CO by way of downloading four MP3 files that "*appeared to contain Islamic sermons*". The court noted at para [19] ***"There is no suggestion that the offender has committed***	Imprisonment of 1 year and 8 months with a NPP of 1 year and 3 months concluding on 15 April 2022.

Case	Basis for control order	Nature of the breach	Sentence Imposed
	Sentence imposed 2 July 2019.	***any act which imperils any person, or that he did anything which might assist a terrorist organisation****, such as to give money to an organisation which might assist that organisation supporting a terrorist organisation.* ***The offender's failing was in accessing material which he was prevented from accessing by the ICO.*** *Whether that was because he was studying his religion, or whether he was doing it purposefully to instil radical beliefs in himself, is not at all clear. However, it is clear that he did not comply with the ICO."*	
R v Namoa Unreported, District Court of NSW, Hanley J, 19 November 2021	Convicted of doing acts in preparation for, or planning, a terrorist act, contrary to ss 11.5(1) and 101.6(1) of the Code. ***NB. Eligible for an ESO if in force at the time.***	Permitted her husband to use her prescribed mobile phone and attempted to cause another person to send her a message on a platform she was not allowed to access. Low-range and no connection to terrorist activity.	Not reported.
Regina (Cth) v Naizmand [2017] NSWDC 4	Mr Naizmand communicated with a close-knit group of men about shared extremist ideology and support for Islamic State.	Six contraventions in 2016 for accessing videos on YouTube advocating terrorist attacks and propaganda or promotional material for Islamic State.	Imprisonment for 4 years imprisonment with a non-parole period of 3 years.
R v MO (No 1) [2016] NSWDC 144	Unclear	Use of a mobile phone and a public telephone without approval. No discussion related to terrorism - discussions considered 'trivial'.	Imprisonment for two years with a non-parole period of 18 months.

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