

CHAPTER 4

CONTROL ORDERS

Introduction

4.1 This chapter will outline the key provisions and issues raised in relation to Schedule 4 of the Bill, which seeks to introduce a regime of ‘control orders’ to authorise the overt close monitoring of terrorist suspects.

Outline of the control order regime

4.2 Item 24 of Schedule 4 inserts new Division 104 into the Criminal Code to authorise the issue of control orders for the express purpose of protecting the public from terrorist attack.¹ The scheme provides for four types of control orders:

- interim control orders;
- urgent interim orders (electronic);
- urgent interim order (in person); and
- confirmed control orders.²

4.3 An interim control order may be requested by a senior member of the AFP, but the written consent of the Commonwealth Attorney-General must be obtained before the application is made.³ In urgent circumstances, a senior AFP member may apply directly to the Court for an urgent interim control order.⁴ The application may be by electronic means or in person.⁵ If an urgent interim control order is sought and made, the Attorney-General's consent to the order must be obtained within 4 hours of the order being made.⁶

Grounds for application

4.4 The AFP may only seek the Attorney-General's consent if the AFP member:

- considers on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act; or
- suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation.⁷

1 Proposed section 104.1.

2 Proposed sections 104.4, 104.7, 104.9 and 104.12.

3 Proposed section 104.2.

4 Proposed sections 104.6 and 104.8.

5 Proposed sections 104.6 and 104.8.

6 Proposed section 104.10.

7 Proposed section 104.2.

4.5 For the reasons explained below, the senior AFP member will also have to be satisfied that a court would find that the order being sought is reasonably necessary to protect the public from a terrorist act (see paragraphs 4.8 to 4.9 below).

4.6 In seeking the Attorney-General's consent, the member must provide the Attorney-General with a draft request that includes:

- a draft of the interim control order to be requested;
- a statement of facts relating to why the order should be made;
- a statement of any facts that the member is aware of as to why the order should not be made;
- an explanation as to why each of the obligations, prohibitions and restrictions being sought should be imposed on the person concerned;
- a statement of any facts that the member is aware of as to why any of the obligations, prohibitions and restrictions being sought should not be imposed;
- the outcomes and particulars of all previous requests for interim control orders (including the outcomes of the hearings to confirm the orders);
- the outcomes and particulars of all previous requests for applications for revocations of control orders made in respect of the person;
- the outcomes and particulars of all previous requests for applications for preventative detention orders in respect of the person, including information, if any, the member has about any periods for which the person has been detained under State preventative detention law; and
- any information the members have about the person's age.⁸

The Attorney General's consent may be made subject to changes being made to the draft request, including the draft interim control order.⁹

Court procedure

4.7 A control order may be issued by the Federal Court, the Family Court of Australia or the Federal Magistrates Court.¹⁰ The Bill provides that the Court in question may make the order if the senior AFP member has requested it in accordance with above requirements and the court has received and considered any further information required by the court.¹¹

4.8 To make the order, the Court must be satisfied on the balance of probabilities that:

- making of the order would substantially assist in preventing a terrorist act; or

8 Proposed section 104.2.

9 Proposed subsection 104.2(4).

10 See Item 11 of Schedule 4 and proposed sections 104.4, 104.7, 104.9 and 104.14.

11 Proposed paras. 104.4(1)(a) and (b).

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- the person to be subjected to the order has been trained by, or provided training to, a listed terrorist organisation.¹²

4.9 The Court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions or restrictions to be imposed on the person is 'reasonably necessary' and 'reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act'.¹³

4.10 In making that determination, the Court must take into account the impact of each proposed obligation, prohibition and restriction on the person's circumstances, including the person's financial and personal circumstances.¹⁴ The Bill expressly provides the Court with the discretion not to include an obligation, prohibition or restriction if the Court is not satisfied that a term of the order sought by the AFP is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.¹⁵

4.11 If the Court makes an interim control order, that order must, among other things, specify the period during which the confirmed control order is to be in force (which must not be more than 12 months from the date that the interim order is made). The interim order must also specify the day on which the court will determine whether to confirm, vary, declare void or revoke the interim control order.¹⁶ Proposed subsection 104.5(2) clarifies that, while the period of a confirmed order cannot be more than 12 months, there is no prohibition on the making of successive control orders in relation to the same person.

Notification of interim order and summary of grounds

4.12 Proposed section 104.12 requires that, as soon as practicable after the Court issues an interim order, a copy of the order and a summary of grounds on which it was made must be served on the person subject to the order. The order must be served on the person at least 48 hours before the day specified in the order as the day of the confirmation hearing.¹⁷

4.13 The following must also be explained by the AFP to the person concerned at the time of service of the above-mentioned documents: the effect of the order; the right of their lawyer to collect a copy of the order and summary of grounds; the procedure by which the interim order is to be confirmed by the court; and the right of the person to apply for a revocation or variation of a confirmed order.¹⁸

12 Proposed para. 104.4(1)(c).

13 Proposed para. 104.4(1)(d).

14 Proposed subsection 104.4(2).

15 Proposed subsection 104.4(3).

16 Proposed paras. 104.5(1)(e) and (f).

17 Proposed subsection 104.12(1).

18 Proposed sections 104.12 and 104.13.

Confirmation of interim control order

4.14 The Bill limits the persons who may appear at a subsequent *inter partes* hearing to confirm the control order to:

- the senior AFP member who requested the order;
- one or more other AFP members;
- the person who is the subject of the order;
- one or more representatives of the person;
- the Queensland Public Interest Monitor if the person is a Queensland resident or if the interim order was made in Queensland.¹⁹

At the confirmation hearing, the Court may confirm the interim control order if satisfied at the time of the hearing of the requirements of proposed paragraph 104(1)(c) and (d) (as outlined at paragraphs 4.8 – 4.10 above). Alternatively, the Court may:

- declare the order void if satisfied that there were no grounds on which to make the order;²⁰
- revoke the interim order if the Court is not satisfied that the order would substantially assist in preventing a terrorist act or is not satisfied that the person has provided training to or received training from a listed terrorist organisation;²¹ or
- confirm, but vary the order by removing one or more obligations, prohibitions or restrictions if satisfied that one of the grounds mentioned in paragraph 4.8 above exists, but that the obligations, prohibitions or restrictions concerned are not reasonably necessary or reasonably appropriate and adapted for the purpose of protecting the public from terrorist act.²²

The Court has the discretion to confirm an interim control order without variation, if the subject of the order does not appear in court and the court is satisfied, on the balance of probabilities, that the interim order was properly served on the person.²³

Scope of control order restrictions

4.15 Proposed section 104.5(3) provides that a control order may impose any or all of the following restrictions:

- a prohibition or restriction on the person being at specified areas or places;

19 Proposed subsection 104.14(1).

20 Proposed subsection 104.14(6).

21 Proposed para. 104.4(1)(c).

22 Proposed para. 104.4.1(d).

23 Proposed subsection 104.14(4).

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- a prohibition or restriction on the person leaving Australia;
 - a requirement that the person remain at specified premises between specified times each day or on specified days;
 - a requirement that the person wear a tracking device;
 - a prohibition or restriction on the person communicating or associating with specified individuals;
 - a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet);
 - a prohibition or restriction on the person possessing or using specified articles or substances;
 - a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
 - a requirement that the person report to specified persons at specified times and places;
 - a requirement that the person allow himself or herself to be photographed and/or fingerprinted (but only to ensure compliance with the order – see proposed section 104.22);
 - a requirement that the person participates in specified counselling or education (but only if the person consents under proposed subsection 104.5(6)).

Minors

4.16 A control order cannot be requested, made or confirmed in relation to a person who is under 16 years of age.²⁴ A confirmed order cannot be made for a period longer than 3 months if the issuing court is satisfied that the person is between 16 and 18 years of age.²⁵ There is no prohibition on making successive control orders in relation to a person who is between 16 and 18 years of age.²⁶

Key issues

4.17 Concerns were raised that the procedures governing *ex parte* interim control orders are inconsistent with the principles of natural justice and procedural fairness. That is, the Bill allows a court to impose an interim control order without giving the person concerned an opportunity to be heard.

4.18 Other key concerns included the following:

24 Proposed subsection 104.28(1).

25 Proposed subsection 104.28(2).

26 Proposed subsection 104.28(3).

- The breadth of the threshold for issuing control orders. Concerns were expressed as to whether the proposed criteria would ensure that the least restrictive means to achieve the purposes is employed. Concerns were also raised over the retrospective application of control orders to people who have trained with a listed terrorist organisation, but before the organisation was listed as a terrorist organisation and before training with it was a criminal offence.
- The adequacy of procedures to ensure a fair hearing. Concerns here included: the potential for persons to receive little prior notice of a confirmation hearing; restrictions on access to evidence upon which the order is based; the inability to call witnesses; and the absence of any right to be provided with a detailed set of reasons for the decision to issue a control order. Also raised was the need to clarify the rules of evidence that would govern applications for interim and confirmed control orders.
- The imposition of a criminal offence for any breach of a control order. Concerns were raised over the proportionality of criminalising such conduct irrespective of whether or not the breach related in some way to the preparation or commission of a terrorism act.

Thresholds

4.19 The breadth of the threshold for issuing interim and confirmed control orders was the subject of critical comment. For example, the Queensland Law Society and Queensland Bar Association argued that the first test of whether the order would substantially assist in preventing a terrorist act does not require the Court to consider whether the person to be subjected to the order is in any way involved in a possible terrorist attack:

For example, would it be sufficient that a young person fits the profile of someone susceptible to being involved in such activities? Thus a control order can be made when there is no evidence of any planned attack and on the simple basis that on the balance of probabilities, at some time in the future there will be an attack.²⁷

4.20 They also argued that proposed section 104.4 allows an order to be made if, on the balance of probabilities, the proposed subject of the order has provided or received training to or from a listed terrorist organisation even if the order is not necessary to prevent a terrorist act.²⁸ In their view, the test is further confused by the requirement under proposed paragraph 104.4 (1)(d) for the Court to be satisfied that the obligation, prohibitions and restrictions are reasonably necessary, appropriate and adapted for the purpose of protecting the public from a terrorist act:

It would seem that, when the training ground is relied upon, the Court can only consider the risk to the public in fashioning the terms of the control

27 *Submission 222*, p. 13.

28 *Submission 222*, p. 12.

order. Otherwise it must make the control order. Also, the Court can rely on training received many years beforehand.²⁹

4.21 Section 101.2 of the Criminal Code makes it an offence to knowingly or recklessly provide or receive training where the training is connected with preparation for the engagement of a person in, or assistance in a terrorist act. By contrast, training for the purpose of Division 104 of the Bill is not defined. Australian Lawyers for Human Rights argued that:

Training may include a person who receives religious training from such an organisation but the person trained is not directly involved in specific training about violence or a terrorist act. The provision does not contemplate a person who has received non-violent training but presents no risk in terms of committing a terrorist act. No risk may be posed by the person who is misled (naively or otherwise) into training but realised its nature and left the training immediately. The control measures arguably allow for an inference to be made that because the person has received training the public will necessarily need to be protected.³⁰

Reasonable necessity and proportionality of restrictions

4.22 The Department pointed to the Bill's requirement that the Court take into account the impact of the restriction, prohibition or obligation on the individual. This, it argued, would provide a sufficient discretion to ensure that the terms of any control order are proportionate and do not violate fundamental human rights.³¹

4.23 The issue of proportionality was raised by the ACT Human Rights Commissioner, who has noted the following concern of the Council of Europe's Commissioner for Human Rights:

Control orders are intended to substitute the ordinary criminal justice system with a parallel system run by the executive ... What is essential is that the measures themselves are proportionate to the threat, objective in their criteria, respectful of all applicable rights and, on each individual application, justified on relevant, objective, and not purely racial or religious grounds.³²

4.24 HREOC considered that, as with preventative detention orders, a stricter proportionality test is appropriate for control orders. HREOC stated a clear preference for including an explicit requirement in the Bill that the issuing Court consider whether there are less restrictive means of achieving the relevant purpose (that is,

29 *Submission 222*, p. 12.

30 *Submission 139*, p. 12.

31 *Supplementary Submission 290A*, p. 5.

32 Council of Europe, Office of the Commissioner for Human Rights, Report by Mr Alvaro Gil Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4-12 November 2004, 8 June 2005, pp. 10-12, reported in advice of the ACT Human Rights Commissioner, 19 October 2005, p. 12.

protect the public from a terrorist act).³³ A stricter proportionality test will, in HREOC's view, reflect the exceptional nature of a control order and provide an appropriate counterweight to the Bill's existing tests (which can be relatively easily satisfied).³⁴

Retrospectivity

4.25 Witnesses also raised concerns about the retrospective aspect of the Bill. An argument here was that there is an inherent unfairness in imposing 'sanctions' on a person for conduct which may have taken place many years before and before an organisation was listed:

As it stands the provision may be criticised because it effectively punishes a person retrospectively for an act ... which was not illegal at the time of commission and the person poses no current risk.³⁵

Right to a fair hearing

4.26 Many witnesses raised concerns about the procedures for issuing interim and confirmed control orders. It was argued that:

- a criminal standard of proof and the minimum guarantees that exist in criminal trials should apply; or
- the requirements that apply in civil and public law matters to ensure a fair hearing should apply.

4.27 The Department advised that it considered that:

The making of a control order does not equate to a determination of a criminal charge or of the rights and obligations in a suit at law of the person subject to the order.³⁶

4.28 On this view, articles 14.1 and 14.3 of the ICCPR are not engaged by the procedure for issuing a control order. These require that a person is entitled to a fair and public hearing before an impartial and independent court.

4.29 On the question of ensuring parties to control order proceedings enjoyed 'equality of arms', the Department advised that challenges to legality of a control order will be heard by a court both before the control order is confirmed and later when it may be in force. The Bill contains no restriction on the conduct of these proceedings (except in so far as national security may be at risk). It also provides that the person subject to an order may also seek revocation of the order once it is confirmed.³⁷

33 *Submission 158*, p. 24.

34 *Submission 158*, p. 8.

35 Australian Lawyers for Human Rights, *Submission 139*, p. 12.

36 *Supplementary Submission 290A*, p. 5.

37 *Supplementary Submission 290A*, p. 5.

4.30 There are a number of aspects to proceedings for control orders which appear to fall short of the basic requirement of a fair hearing (in civil matters or criminal) and which could be rectified without disrupting the overall aim or effectiveness of the scheme. The committee notes in this regard the advice of the AFP that it did not mind how significant the safeguards are in this legislation so long as its operational capacity was not unduly hindered.³⁸

4.31 The features of the procedure which attract particular comment are as follows:

- the requirement for *ex parte* proceedings in all cases of interim control orders;³⁹
- the lack of any time limit on interim orders obtained *ex parte* and the possibility of only 48 hours notice being given in respect of a hearing to confirm an interim order;⁴⁰
- the lack of an express right to call witnesses;⁴¹
- the possibility of reliance on hearsay evidence to obtain a control order;
- restrictions on the right to reasons and the evidence that is available.⁴²

Ex parte hearings

4.32 The Bill provides for *ex parte* hearings in respect of all applications for a control order. It does not reserve *ex parte* hearings only for those cases which require a degree of urgency. This has been criticised as unnecessary and disproportionate. Professors Charlesworth and Byrne suggested, for example, that:

As is currently done for domestic violence orders, an interim order could be made at an *inter partes* application (unless there is good reason to make an *ex parte* application), and then a date set for a final *inter partes* hearing to confirm the orders.⁴³

4.33 Submitters agreed that *ex parte* hearings may be appropriate in some circumstance; for example, where there are grounds for believing that a person would abscond if he or she had notice of an intended order.⁴⁴ It has been pointed out that control orders were introduced in the UK in response to a House of Lords' judgment that rejected indefinite detention of non nationals as discriminatory and a violation of

38 Deputy Commissioner Lawler, *Committee Hansard*, 17 November 2005, p. 2.

39 Proposed section 104.4.

40 Proposed section 104.4

41 Proposed section 104.14.

42 Proposed subsection 104.13(2).

43 *Submission 206*, p. 13.

44 Human Rights Office, *Submission 154*, p. 11; Professor Charlesworth, Professor Byrne, Ms Mackinnon, *Submission 206*, p.4, p. 13.

the fundamental right to liberty.⁴⁵ The UK Parliamentary Joint Committee on Human Rights has criticised the lack of an adversarial procedure before control orders are issued, but this issue has yet to be tested before the UK courts. This process will involve an assessment of the UK provisions against the standards of the *Human Rights Act 1998* (UK).⁴⁶

Time limits and notice of hearing

4.34 There is no limit to the period in which an interim control order may be in force. The Bill does provide that the order must be confirmed at a subsequent hearing, which must be held within 12 months of the date on which the interim order was issued. Witnesses have highlighted the distinction between the Bill and provisions for an interim control order under the *Terrorism Act 2000* (UK), which limits the period of an interim order to 7 days.

4.35 The Department advised that a specific time limit had not been included in the Bill as it is normal to leave it to the discretion of the Court to determine the hearing date.⁴⁷ The Department put the view that imposing a time limit may unnecessarily limit the court. However, it agreed that a requirement of 'as soon as practicable' may be a workable qualification.⁴⁸ This would indicate to the Court the importance of expediting the hearing.

4.36 Concerns were also raised over the requirement to serve the order at least 48 hours before the day set for the confirmation hearings. The concern here was that this may leave open the possibility of insufficient notice and may result in an unnecessary interference with the right to a fair hearing. It is presumably for these reasons that a notice period of three days has been held to be insufficient under the European Convention on Human Rights.⁴⁹ It has been suggested that comprehension of the order and its implications is likely to be more difficult for people with limited literacy levels or who do not read the English language. Similar concerns have been raised in relation to domestic violence orders by the Victorian Law Reform Commission.⁵⁰

45 See *A (FC) and other (FC) v Secretary of State for the Home Department* [2004] UKHL 56 at para 95. The Court in that case rejected a government claim that indefinite detention of a non national was justified. The Court acknowledged the threat of terrorism, but rejected the UK's derogation from the European Convention on Human Rights on the grounds that the UK is not at war and does not face a 'public emergency that threatens the life of the nation'.

46 Lauterpacht Centre for International Law, *Submission 240*, p. 2. See also Joint Committee on Human Rights, *Prevention of Terrorism Bill*, Tenth Report of Session 2004-05, HL Paper 68; HC 334, p. 5 available at www.publications.parliament.uk/pa/jt200405/jselect/jtrights/68/68.pf

47 *Committee Hansard*, 18 November, p. 31

48 *Committee Hansard*, 18 November, p. 31

49 *Rada Cavanilles v Spain* RJD 1990-VIII 3242 referred to in *Submission 154*, p. 13.

50 *Submission 154*, p. 13; see also Victorian Law Reform Commission, *Review of Family Violence Laws*, 2004.

No right to call witnesses

4.37 As noted above, proposed subsection 104.14(1) limits the persons who may appear at a subsequent *inter partes* hearing to confirm the control order.⁵¹

4.38 It was argued that these limitations on who may adduce evidence and make submissions will have an adverse impact on the ability of the subject of the order to have real and effective access to the Court. That is, the principal of 'equality of arms' requires an adequate and proper opportunity for the respondent to challenge and question witnesses against him or her.

Rules of evidence

4.39 Concerns were raised during the hearings over the application of the *Evidence Act 1995* (Cth) (the Evidence Act) to proceedings concerning applications for control orders, and over the possible reliance on hearsay evidence to obtain a control order. As noted earlier, a difference of opinion emerged during the hearings about whether subsequent hearings to confirm, vary or revoke a control order were interlocutory or would be treated as trial proceedings for the purpose of the Evidence Act.⁵²

4.40 The Department advised the Committee that an *ex parte* application for an interim control order would be regarded as interlocutory proceedings for the purposes of the Evidence Act. Confirmation hearings would be regarded as 'proceedings in a federal court' for the purposes of that Act. Accordingly, subsection 4(1) of that Act would mean that its provisions would apply to both applications for interim control orders and confirmation hearings.⁵³

4.41 It is possible that hearsay evidence could be relied on in hearings for the issue of an interim control orders and in confirmation hearings. As a general rule, hearsay evidence is inadmissible in trial proceedings. However, there are a number of exceptions that could apply resulting in hearsay being accepted.⁵⁴ Section 75 of the Evidence Act also provides that the hearsay rule does not apply to 'interlocutory proceedings' if the party adducing evidence also adduces evidence of its source.

4.42 During the hearings, it was suggested that the Bill could be amended to clarify that hearsay evidence is not receivable in proceedings to confirm a control order.⁵⁵ The Department agreed that the exclusion of hearsay evidence would not present the Department with any difficulty.

51 Proposed subsection 104.14(1).

52 See, for example, *Committee Hansard*, 17 November 2005, p. 82.

53 Attorney General Department, *Submission 290*, p. 2.

54 Evidence Act, Division 1 to 3, Part 3.2.

55 See discussion, *Committee Hansard*, 18 November 2005, p. 28.

Restriction on right to reasons and access to evidence

4.43 As noted in Chapter 3, submitters and witnesses argued that a full statement of reasons was critical to exercising the right to challenge a control order (and a preventative detention order). Mr Bret Walker SC expressed the view the current provisions provide no guarantee that the summarised information would reflect all the grounds upon which the issuing authority had granted the order. It was noted that:

- information in relation to facts is provided to the issuing authority without the need for the information or the facts to be admissible evidence;
- the issuing authority can require further information and is required to exercise independent consideration of the facts;
- orders are not required to set out the grounds on which the order is made;
- information additional and perhaps different to information originally thought to constitute reasonable grounds may be the actual basis for the order;
- summarising the grounds is left to the AFP and not the issuing authority; and
- the judgement about and omission of information likely to prejudice national security is made by the police.⁵⁶

4.44 The committee was advised that:

Without any need for alarmist or inappropriate slurs against members of the AFP or lawyers advising them, it is easy to see that in practice the contexts of a critical document, viz the summary of the grounds to be served on the person against whom an order has been made, may well not accurately represent the real reason why the order was made.⁵⁷

4.45 Mr Walker stressed to the Committee the importance of practising lawyers being confident of the grounds upon which their client has been subjected to the order in order to advise them properly. Additionally, judicial proceedings for review of orders require evidence rather than warrant style 'information'. This makes it essential that the statement be a full statement of grounds produced by the issuing authority itself and any redactions or omission for national security reasons be the result of the independent and recorded decision of an issuing Court.⁵⁸

4.46 This view was shared by the Queensland Law Society and Queensland Bar Association.⁵⁹

4.47 During hearings, the Committee explored with witnesses the possibility of expanding the obligation to require the material upon which the order is based being

⁵⁶ Mr Bret Walker SC, *Submission 194*, p. 3.

⁵⁷ *Submission 194*, p. 3.

⁵⁸ *Submission 194*, p. 3.

⁵⁹ *Submission 222*, p. 21.

given to the person subject to the order.⁶⁰ HREOC argued that, if a summary of grounds - rather than full reasons - is to be retained, the Bill should specify that the summary must be prepared by the issuing authority as opposed to an AFP officer. Mr Walker SC also suggested that the provision of the ADJR Act would be an appropriate model. It provides for the provision of a statement of reasons, including the material which provides the basis for the decision in question.⁶¹

Extent of restrictions

4.48 Many witnesses expressed their concern about the extent of restrictions capable of being imposed under a control order:

The terms of control orders may include restrictions and prohibitions on a person's movements, activities, work, travel, communication (eg telephone and internet), association, possession or use of certain articles or substances, and requirements to report to specified persons and places, submit to counselling, home detention, and being photographed and fingerprinted, and use of electronic tracking devices. These restrictions are much more extensive than those available under current State and Territory legislation governing apprehended violence orders. They infringe human rights under the ICCPR by restricting travel (freedom of movement – article 12(1)) and by imposing tagging devices (privacy and reputation - article 17(1)). By limiting membership of groups or associations control orders can restrict both the right to association (article 22) and the right to freedom of religion (article 18). They can also restrict access to information and limit internet use, which can be in breach of the right to freedom of expression (article 19 (2)). Control orders subjecting the person to house arrest also engage the right to liberty in article 9.⁶²

4.49 Concerns were raised that restrictions under a control order could prove more onerous than imposition of a criminal penalty, especially where those restrictions are imposed over a lengthy period of time. The Bill does not make any distinction between control orders that impose less onerous restrictions and those that impose restrictions which might be regarded as 'higher end' sanctions. A particular concern here was that prohibitions and restrictions that impose home detention or place severe restrictions on freedom of movement could be characterised as a deprivation of liberty without trial.

4.50 The committee is aware that Ben Emmerson QC, a leading UK human rights barrister, has opined that UK control orders which impose significant deprivations of liberty and other severe restrictions are liable to be classified as criminal penalties and,

60 *Committee Hansard*, 14 November 2005, p. 71.

61 *Committee Hansard*, 17 November 2005, p. 84.

62 ACT Human Rights Commissioner, *Submission 154*, p. 11.

thereby, attract the right to fair trial under Article 6 of the European Convention on Human Rights.⁶³

4.51 The ACT Human Rights Office argued that the Bill's penalty of 5 years imprisonment for the breach of a control order supports the interpretation of these orders as 'criminal' rather than 'civil' in nature for the purpose of human rights protection. The Office noted that the House of Lords has held that, in assessing anti-social behaviour orders (which are similar in nature, but less onerous):

there are good reasons, in the interests of fairness, for applying a higher criminal standard to these orders where allegations are made of a criminal or quasi criminal conduct which, if proved, would have serious consequences for the person against whom they were made.⁶⁴

No limitation on the number of successive control orders

4.52 The Bill provides that a control order may be made for up to 12 months and may be repeated without limit against the same person.⁶⁵ Witnesses pointed out that this contrasts with the limits imposed on control orders issued under equivalent UK laws. The UK laws provide that control orders may be made for up to 12 months at a time, except those which impose 'house arrest'. The latter are limited to 6 months duration. The renewal of 'house arrest' orders is limited to a maximum period of 6 months on each occasion.

The Committee's view

4.53 The committee acknowledges the significant level of concern raised in submissions and evidence with respect to the Bill's provision's relating to control orders, particularly those relating to the need for strong procedural safeguards. At the same time, the committee must have regard to the fact that the purpose of the proposed regime is to protect the community and is the result of exceptional circumstances.

4.54 After careful consideration, the committee agrees that there is a need to strengthen the safeguards governing control orders. In reaching this view, it noted the above-mentioned advice from the Australian Federal Police that it had no difficulty with the inclusion of additional safeguards which would not unduly undermine their operational capacity to respond to the terrorist threat.

4.55 In light of the above, the committee makes the following recommendations.

63 Emmerson, B, *The Prevention of Terrorism Act: Legal Opinion* (2005) available at www.statewatch.org; in A Chong et al, *Laws For Insecurity? A report on the Federal Government's proposed counter-terrorism measures*, 23 September 2005, referred to in *Submission 142*, p. 14.

64 See, for instance, *Clingham v Royal Borough of Kensington and Chelsea* [2003] 1 AC 787.

65 Proposed para. 104.4(1)(d) and subsection 104.4(2).

Recommendation 19

4.56 The committee recommends that proposed sections 104.2, 104.4, 104.7-9 and 104.14 be amended to include a requirement that the AFP officer, the Attorney General and the issuing Court each be satisfied that the application and making of the control order and the terms in which it is sought and issued is the least restrictive means of achieving the purpose of the order.

Recommendation 20

4.57 The committee recommends that proposed section 104.5 be amended to require that the day of the hearing to confirm, vary or revoke the order must be set as soon as is reasonably practicable after the making of the order.

Recommendation 21

4.58 The committee recommends that proposed section 104.12 be amended to require police officers to arrange access to a detainee by a lawyer and an interpreter, as necessary, in cases where there are reasonable grounds to believe that the detainee is unable to understand fully the effect of control order because of an inadequate knowledge of the English language or a mental or physical disability.

Recommendation 22

4.59 The committee recommends that the Bill be amended to prohibit reliance on hearsay evidence in a proceeding for the grant of continued control order.

Recommendation 23

4.60 The committee recommends that proposed section 104.12 be amended to provide that the detainee shall be provided with a copy of the order and the reasons for the decision, including the materials on which the order is based, subject to any redactions or omissions made by the issuing authority on the basis that disclosure of the information concerned is 'likely to prejudice on national security' (as defined in the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)*)

Recommendation 24

4.61 The committee recommends that proposed section 104.29 be amended to require the Attorney-General to report to the Parliament on control orders on a six monthly basis.

Recommendation 25

4.62 The committee recommends that the Bill be amended by inserting an express requirement for a public and independent 5 year review of the operation of Division 104, adopting the same mechanism and similar terms to that provided by section 4 of the *Security Legislation Amendment (Terrorism) Act 2002 (Cth)*, which established the Sheller Committee.

Recommendation 26

4.63 The committee recommends that proposed section 104.32 be amended to provide a sunset period of five years.