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AFP

AUSTRALIAN FEDERAL POLICE



Parliamentary Joint Committee on Intelligence and Security

Inquiry into AFP Powers

(Division 3A Part IAA of the Crimes Act 1914 and Divisions 104 and 105 of the Criminal Code)

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Submission by the
Australian Federal Police

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Introduction

1. The commencement of specific counter terrorism laws in 2005 recognised the limitations of traditional policing powers in addressing the unique nature of the terrorism threat environment. It was acknowledged that, to focus on the prevention of terrorist attacks, law enforcement may be required to transition to overt action at an earlier stage of an investigation than other crime types.
2. These actions were needed to disrupt both terrorist attacks and attack planning so that law enforcement could take action to protect the community from harm. This has meant the introduction of robust powers that allow police to intervene early where strong intelligence indicates a national security risk, but where there may be insufficient evidence at that point in time to support criminal charges.
3. The AFP has relied significantly on the broad suite of powers in the counter terrorism legislative framework, particularly the control order scheme. This submission reflects the AFP's operational experience with the powers subject to the Committee's review in addressing the ongoing threat of terrorism.

The changing threat environment

4. Australia's terrorism landscape is continually evolving. The primary threat to Australia in 2005 was from large-scale operations by substantial, organised terrorism networks. Numerous western countries experienced mass casualty attacks, including coordinated suicide bombings in the UK and Spain.
5. The rise of the Islamic State (IS) and increased ease of online radicalisation changed the threat environment significantly in 2014. The threat shifted from large-scale operations to smaller-scale 'lone-actor' style attacks. During this period, the National Terrorism Threat Level was raised to PROBABLE, as credible intelligence indicated that individuals or groups possessed the intent and ability to conduct an attack onshore.
6. Since this elevation of the Threat Level, 110 people have been charged as a result of 51 counter terrorism related operations. Authorities have responded to seven domestic terrorist attacks. There have also been 18 major counter terrorism disruption operations in relation to potential or imminent attack planning within Australia, with two disruptions relating to individuals alleged to support extreme right wing ideology.
7. It is evident that Australian law enforcement respond to a diverse range of terrorist threats. Operational experience shows persons of interest can mobilise from a planning stage to execution quickly and in isolation from known extremists, giving law enforcement minimal opportunity to gather evidence before needing to intervene to prevent harm to the Australian public. In 2017, we saw a sophisticated domestic attack plan against Australia's aviation industry, which was directed by an offshore senior Islamic State member.

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8. Since the Committee's 2017 inquiry into AFP Powers, the terrorism environment continues to increase in complexity. While the National Threat Level has remained at PROBABLE, ongoing challenges to law enforcement include the demise of the IS territorial caliphate and the need to investigate and prepare for the possible return of foreign fighters; continued investigations into domestic attack planning; the aftermath of the March 2019 Christchurch attack - the first mass-casualty terrorist attack by an Australian right-wing terrorist; the increased threat of right-wing terrorism; the role of technology in propagating violent extremist ideologies; and the heightened need to address the reintegration and continuing risks associated with the release of convicted high risk terrorist offenders completing their head sentence.
9. Recent operational experience indicates an emerging trend of extremists exploiting the public fear associated with the COVID-19 pandemic to target certain racial and ethnic groups. These groups seek to spread disinformation, incite violence, intimidate targets, promote their ideology and recruit new members. They continue to seek to take advantage of increased isolation, unemployment, family stress and financial hardships to recruit individuals vulnerable to online radicalisation.
10. This changing threat environment highlights the importance of continuing to review counter terrorism powers and offences to ensure the legislative framework remains fit for purpose in a dynamic threat environment. Protecting Australians from the threat of terrorism continues to be the AFP's highest priority.
11. The powers under review continue to be required to ensure the safety of the community. The AFP considers they strike an appropriate balance between ensuring the safety of the community with imposing restrictions on individual freedoms only when absolutely necessary.

Control Orders

12. Control orders remain a necessary legislative mechanism for managing individuals who present a significant terrorism risk to the Australian community. The AFP Commissioner can apply, with the consent of the Minister for Home Affairs, to the Federal Court for a control order for one or more of a number of purposes, namely:
 - to protect the public from a terrorist act or to prevent the provision of support for a terrorist act; or
 - where the person has received or provided training to a terrorist organisation, or
 - where the person has been convicted of a terrorism offence, or
 - where the person has engaged in hostile activity in a foreign country or is suspected of facilitating or providing support for such activity.
13. Conditions imposed by a control order may include curfews, electronic monitoring, restrictions on the use of telecommunications devices, and regular reporting to police.

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14. The release of terrorist offenders and other persons posing a threat to the community has seen the AFP with State and Territory partners manage 10 individuals on control orders since 2019. Since 2014, when the National Threat Level was raised to PROBABLE, the AFP has applied for and been granted thirteen interim control order applications, eight of which were later confirmed. A number of interim and confirmation applications are still awaiting consideration by the court.
15. The resourcing required to make an application for a control order is significant, however the order can only be imposed for up to 12 months. In addition, the resourcing required to monitor control orders is having a significant impact on the AFP and its Commonwealth and State and Territory partners.
16. The increased experience and use of these orders has identified a number of challenges to law enforcement in applying for, monitoring and enforcing the orders.
17. This experience has informed the development of Extended Supervision Orders (ESOs) as part of the High Risk Terrorist Offenders (HRTTO) scheme, on which the AFP has been working closely with the Department of Home Affairs and the Attorney-General's Department.
18. While orders under the HRTTO scheme are within the jurisdiction of State or Territory Supreme Court, control orders are made by the Federal Court. The introduction of ESOs will address interoperability issues between the two schemes, enabling a State or Territory Supreme Court to make an ESO as a less restrictive alternative to continuing detention, which can be imposed for up to three years. Currently, the AFP must apply to a Federal Court for a control order where continuing detention is not ordered to address the risks posed by a terrorist offender at the completion of their sentence. The AFP's experience with control orders has informed the development of the ESO scheme to ensure controls available under the ESO scheme are effective in managing the risk posed by convicted terrorist offenders.
19. Many of the conditions proposed for ESOs would have equal protective, preventative and operational utility in the control order scheme. In particular, ESOs will include an improved suite of conditions available to the court and improved mechanisms for managing exemptions for and variations to conditions imposed by the court.

Controls available

20. Since control orders were introduced in 2005, the conditions available remain substantially the same, however, management of the enduring risk posed by terrorist offenders, as well as those who pose a risk to the public of committing a terrorist act, has become increasingly complex. Conditions should be capable of being tailored to manage the risk to the community in a wide variety of circumstances.
21. The current list of twelve available controls limits the capacity for a judicial officer to tailor controls to the particular threat posed by each individual subject to a control order. Further, the controls are limited in their range. The AFP has observed that there are areas of risk (including based on previously identified behaviour) that cannot be controlled or managed by a control order because there is no applicable obligation, prohibition or restriction available in Division 104.

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22. A broad range of persons are potentially eligible for a control order, including persons who may not have a history of terrorist offending but nevertheless pose a risk to the public of committing a terrorist act or providing support for a terrorist act, those who may have provided or received training by a terrorist organisation, and those convicted of a terrorism related offence. Once a court has found a person meets the requisite 'risk' threshold, the court must then turn to whether it is satisfied that each of the proposed conditions is reasonably necessary, and reasonably appropriate and adapted to mitigate and manage that specific risk. The limited controls available therefore reduce the scope for judicial discretion in determining what is reasonably appropriate and adapted to mitigate that risk.

Management of conditions

23. Improvements could also be considered to the aspects of the scheme that deal with the day to day management of control orders. AFP experience has demonstrated that the control order scheme is not sufficiently flexible to accommodate for variables in a subjects daily life. For example, division 104 does not currently contemplate the ability of AFP officers to provide an individual who is subject to a control order with a temporary exemption to a condition, even where there is no identified risk to the community in providing a specific exemption. In practice, the AFP has had to rely on informal exemptions from time to time for the order to be functional.

For example, an individual seeks an exemption to a condition not to breach curfew when they have been asked to work on a night shift on a particular night a week. AFP consider it would not appear to increase risk to the community to allow an exemption from their curfew for this purpose, but there is no legislative certainty to allow for this to occur.

24. Additionally, the types of associations that can be prohibited under a control order are limited. For example an order cannot totally prohibit all contact by an individual with close family members even though doing so may pose a risk.

25. There is also currently no mechanism for police to vary an interim control order if the subject of the order does not consent. There is also no ability to add to the controls until after the order is confirmed. Even though the AFP could seek to amend controls at the confirmation stage, we cannot add an obligation, prohibition or restriction. Further, confirmation proceedings may be delayed by several months following the imposition of the interim order, resulting in significant delay where additional conditions may be needed because of a change in circumstances or an increase in the risk the subject poses to the community. These restrictions reduce the flexibility of the scheme, and do not acknowledge that a respondent may, for example, experience a change in residential, education or employment arrangements while on an interim order, which can be up to several months, or the entire 12 months if not confirmed.

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Service of documents

Application

26. The current provisions also include procedural requirements that could be improved. For example, the requirement for the application documents to be served on the subject pursuant to section 104.12A(2)(ii). This provision could inadvertently require the service of relevant extremist material to the subject of the control order application. This can currently only be prevented if the material would pose a risk to public safety, despite the fact that such material, if provided to the subject, could lead to a risk of offending (or re-offending). Possession of this material by the subject would also make it difficult for investigators to ascertain whether they are subsequently in breach of their order by possessing the material, and, if the person is incarcerated at the time of application, it could be distributed to other prisoners. The lack of alternative options for serving this kind of information in an application compounds this issue.

Service of orders

27. In addition, in practice Division 104 contains a duplicative requirement, obliging the AFP to serve the ICO application twice: before applying for the interim order and after electing to confirm the order (but before confirmation has occurred).

Enhanced procedural efficiencies

Timing of contested control order applications

28. The AFP has noted courts have expressed difficulty reconciling the 'as soon as practicable' requirement in section 104.5(1A) with the requirement to afford procedural fairness to the respondent. Courts have also noted the absence of provisions in the control order framework for case management hearings. A more consistent approach would be beneficial, with greater specificity in terms of the respondent's role in proceedings.

29. Courts have critiqued the restrictions in the legislation on their ability to 'case manage' as appropriate in the circumstances, as there are no case management hearing requirements, nor any timetabling or other procedural provisions.

Confirming the terms of a control order

30. The current process for confirming the terms of a control order is unnecessarily complicated and requires the court to make another order and repeat its satisfaction with the matters listed in 104.16 (which has already occurred at the interim stage). AFP notes there are other, similar Federal Court processes, which do not contain the same complexities.

The need for clarification of provisions where a hearing is not ex parte

31. Inconsistencies with standard court processes create complications for the applicants, respondents and judges presiding over control order applications. The legislation was drafted with the assumption that an interim control order hearing will always proceed on an *ex parte* basis, however in practice the AFP will only apply to the court to proceed *ex parte* in circumstances which provide additional or specific

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justification for it, allowing the respondent (or their representative) to be party to proceedings to engage in relation to issues in dispute as appropriate. This has meant the respondent is often present in proceedings, even though the legislation does not provide for it, and results in inconsistency in the approach taken by different courts in relation to the role of respondents in these hearings, with some respondents being afforded more opportunity than others to make submissions.

32. This issue does not arise in relation to the ESO applications as proposed in the ESO Bill. Interim supervision orders will only be made where ESO proceedings are underway, following a hearing, and are not subject to confirmation.

Continuing Detention Orders

33. Under the HRTO scheme, the Minister for Home Affairs may apply to a State/Territory Supreme Court for a continuing detention order (CDO) against an eligible offender. The AFP provides assistance to the Department of Home Affairs by providing relevant information in relation to eligible offenders to advise the Minister as to whether to apply for a CDO. The AFP must also consider alternative treatment options should an application for a CDO not be applied for by the Minister or pursued by the Department.
34. A State or Territory Supreme Court may make a CDO against an eligible offender, but only if satisfied the offender poses unacceptable risk of committing a serious Part 5.3 Criminal Code offence if released into the community, and there is no less restrictive measure that would manage this risk. The legislation currently states a control order is a less restrictive measure in these circumstances.
35. This has proven to be a high threshold to meet, and resulted in the AFP applying for control orders in respect of eight HRTO eligible offenders who were released following expiry of their head sentence since 2019.

Stop, Search and Seize Powers

36. The stop, search and seize powers under Division 3A of the *Crimes Act 1914* ensure law enforcement are able to effectively respond where there is no prior indication of a terrorist attack. They form part of the suite of emergency police powers in State, Territory and Commonwealth law, ensuring police can respond consistently and effectively to incidents in any state or territory.
37. To date, the Commonwealth stop, search and seize powers have not been used since their introduction in December 2005. Fortunately, to date the AFP has not been required to respond to any terrorist-related attacks in a Commonwealth place. This is not an indication of a lack of utility of these powers. The stop, search and seizure powers fill a gap in state and territory emergency legislative framework, ensuring police can respond immediately in the event of a terrorist threat to, or incident within, a Commonwealth place.
38. Though the section 3UEA emergency entry powers are not restricted to Commonwealth places, they are limited to circumstances where it is necessary to

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enter premises without the authority of a search warrant to prevent a thing being used in connection with a terrorism offence and there is a serious and imminent threat to a person's life, health or safety. The AFP continues to consider that this power is appropriate given the extreme circumstances contemplated for its use.

39. To date, the AFP has not needed to use this power. Operational circumstances have allowed the AFP to obtain a search warrant or, where urgent, apply for the warrant through the section 3R application process. The section 3UEA power is restricted to circumstances where the immediacy of the threat is such that there is no alternative beyond an immediate response.
40. It was anticipated during their development that the Division 3A powers would be used in a limited range of circumstances. That these powers have not been required is a reflection of the AFP and partner agencies' strategic efforts to effectively disrupt terrorism attacks and planning.
41. These powers will be critical in the event law enforcement is required to respond to a terrorist emergency. Circumstances may arise requiring immediate response to a terrorism threat or incident within a Commonwealth place, or an emergency situation requiring entry to respond to a serious and imminent threat of harm with no time to obtain a warrant.

Preventative Detention Orders

42. Preventative detention orders (PDOs) recognise the enduring threat of terrorism and need for Australian law enforcement to counter imminent and severe national security threats with little warning. The provisions are contained within Division 105 of the Criminal Code and allow for a person to be taken into custody and detained for a short period of time in order to prevent a potentially catastrophic attack or preserve vital evidence in the aftermath of an attack.
43. These orders play a critical preventative role in Australia's response to terrorism that traditional policing powers cannot sufficiently respond to. The AFP recognises that these are extraordinary powers, not to be used in place of criminal prosecution.
44. This is reflected in our judicious use of the regimes. Since the introduction of the legislation in 2005, the AFP has not used the Commonwealth PDO scheme. The Joint Counter Terrorism Teams (JCTTs) have, however, relied on complementary State-based equivalent powers on four occasions in 2014 and 2015.

Conclusion

45. The AFP's paramount priority is the protection of human life. We endeavour, with our partner agencies, to use the available suite of legislative measures to ensure the ongoing safety of the Australian community.