Australian Human Rights Commission

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

Supplementary submission to the Parliamentary Joint Committee on Intelligence and Security

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1 Introduction

1. The Australian Human Rights Commission makes this supplementary submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in relation to its Review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth) (the Bill) introduced by the Australian Government.

2. This supplementary submission is made in response to an invitation by the PJCIS on 7 June 2021 to comment on a joint supplementary submission by the Attorney-General's Department and the Department of Home Affairs dated May 2021 (Joint Departmental Submission).

3. This supplementary submission, and particularly the references to the continued existence of control orders, should be read together with the Commission's primary submission dated 29 October 2020. As noted in that submission, while the Commission opposes the Bill in its current form, it supports the introduction of an extended supervision order (ESO) regime, subject to two key provisos. First, any federal ESO regime should be in the form recommended by the third Independent National Security Legislation Monitor (INSLM), and the regime proposed by the Bill should be amended in a number of ways that would ensure it remains consistent with Australia's human rights obligations. Secondly, if an ESO regime is introduced, the existing control order regime should be repealed.

2 Summary

4. The Joint Departmental Submission describes two proposed Government amendments to the Bill. It does not appear that formal amendments have yet been made public. As such, the Commission's submissions are based on the description of the proposed amendments in the Joint Departmental Submission. It may be that the Commission has more to say about the amendments when a copy of them becomes available and the detail can be analysed.

5. In broad terms, the proposed amendments would provide that:

   - ESOs and control orders can commence, and be enforceable, while a person is in immigration detention

- when a Court is considering whether there are less restrictive alternatives to a continuing detention order (CDO), it may only consider the availability of ESOs or control orders.

6. The Commission agrees in principle with the first proposed amendment, but considers that there would need to be two additional safeguards included in the legislation.

7. First, the Court should be notified if it is expected that a relevant order will commence while the person is in immigration detention. This would allow the Court to assess whether, in light of the detention of the person, the order is still necessary to protect the community and, if so, to tailor the conditions of the order to the circumstances of immigration detention.

8. Secondly, it should be made clear in the legislation that a person cannot be found to be in breach of an ESO or a control order because they are unable to comply with a condition by reason of being in immigration detention. This risk may arise if an order made in relation to a non-citizen commences while they are in the community and they subsequently have their visa cancelled.

9. The Commission does not agree with the second proposed amendment and submits that it should not be made. As described, the second amendment would significantly weaken one of the important safeguards in the CDO regime which is designed to ensure that it does not result in arbitrary detention. It is a fundamental principle of international law that any restriction on relevant human rights must be no greater than is reasonable, necessary and proportionate to achieve a legitimate end such as the protection of the community. It is vital, therefore, that any system of administrative detention include active consideration of whether there are *any* less restrictive alternatives, not merely *some* less restrictive alternatives, that would achieve the legislative purpose.

3 Recommendations

10. The Commission makes the following recommendations.

Recommendation 1

The Commission recommends that if an applicant for a control order or an extended supervision order anticipates that the order will commence while the person subject to the order is in immigration

detention, the applicant should be required to notify the Court of that fact at the time of making the application so that:

(a) the Court can assess whether this alleviates the need for the control order or extended supervision order to be made

(b) any conditions imposed by the control order or extended supervision order are appropriate.

Recommendation 2

The Commission recommends that if the Bill is amended to provide that an extended supervision order or a control order can be enforceable against a person in immigration detention, the legislation should provide that:

(a) a person will not commit an offence under s 104.27 of the Criminal Code if the person cannot comply with an obligation, prohibition or restriction imposed by a control order by reason of being in immigration detention

(b) a person will not commit an offence under proposed s 105A.18A in the Bill if the person cannot comply with a condition imposed by an extended supervision order by reason of being in immigration detention.

Recommendation 3

The Commission recommends that the second proposed amendment in the Joint Departmental Submission not be made.

4 Proposed amendments

4.1 Enforcement of ESOs and control orders in immigration detention

11. The first proposed amendment in the Joint Departmental Submission is described in the following way:

> [The amendment would provide that] in all circumstances, extended supervision orders (ESOs) and control orders can commence where a person is in immigration detention, and ensure that the conditions of the orders remain enforceable against an offender who is in immigration detention.

12. The Criminal Code currently provides that an interim control order may be made in relation to a person who is detained in custody but does not commence until the person is released from custody.[1]

13. The Bill proposes to introduce a further set of provisions to avoid overlap between the operation of a control order and an ESO. The Bill anticipates that a control order could be sought while a person is in custody or subject to an ESO. The control order would not begin to be in force at that time.[2] This would mean that the person would not simultaneously be subject to two sets of Commonwealth obligations. The control order would only begin to be in force after the person was released from custody and was 'in the community' without an ESO being in force.[3]

14. The Bill also provides that an ESO 'is suspended during the period that the offender is detained in custody'.[4] An offender is not required to comply with a condition in an ESO while it is suspended.[5]

15. The Joint Departmental Submission suggests that there is ambiguity about the phrase 'in custody' and that it could also apply to immigration detention. This appears to be supported by the parts of the Bill that contrast being 'in custody' with being 'in the community'.

16. The purpose of the first proposed amendment is to ensure that if a non-citizen is in prison for an offence, has their visa cancelled (for example, on character grounds) and is taken directly from prison to a place of immigration detention, they are no longer considered to be 'in custody' and any control order or ESO made in relation to that person can commence and be enforceable.

17. The Joint Departmental Submission says that it may be appropriate for some conditions imposed by a control order or an ESO to come into force while the person is in immigration detention. For example, a control order may contain the following kinds of conditions:

    - 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).[6]

18. The Commission agrees that the Court should have the discretion to impose these kinds of restrictions on a person while they are in immigration detention if the restrictions are necessary to protect the

community from an unacceptable risk of a terrorism offence being committed. The necessity for such restrictions would need to take into account all of the circumstances, including the fact that the person was in detention and not in the community.

19. For that reason, the Commission recommends that the applicant for the relevant order (the senior AFP member in the case of a control order,[7] or the AFP Minister in the case of an ESO)[8] be required to notify the Court if they anticipate that the order will commence while the person subject to the order is in immigration detention. This would allow the Court to:

    - take this fact into account in assessing whether it is necessary for a control order or an ESO to be made—it may be that the fact that the person is in immigration detention is sufficient to mitigate any relevant risks to the community, rendering an ESO or control order a disproportionate restriction on the individual's rights
    - impose only conditions that the person in immigration detention is able to comply with—this issue is considered in more detail below.

20. If the Commission's recommendations in its primary submission in relation to the Bill were adopted:

    - these conditions would be imposed only through an ESO, as the control order provisions would be repealed; and
    - the conditions that could be imposed pursuant to an ESO would, as recommended by the third INSLM, be limited to those currently available in respect of control orders.

21. The targeting of restrictions to demonstrated risk posed by particular individuals is a more appropriate course than that proposed, for example, in the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (Cth), which is currently before the Senate and would permit blanket bans on identified items such as mobile phones.

22. There are other considerations to be taken into account if the first amendment proposed in the Joint Departmental Submission is made to the Bill. A significant consideration is that some of the other conditions that can currently be made pursuant to a control order would be difficult or impossible to comply with if a person is in immigration detention. For example, a control order can contain:

- a requirement that the person remain at specified premises at particular times, but for no more than 12 hours within any 24 hours (a curfew requirement). A person in immigration detention would not be able to comply with such a requirement because:
    - if the specified premises are a place in the community, the condition could not be complied with at all
    - if the specified premises are a place of immigration detention, it would be contrary to the 12-hour limit
- a requirement that the person report to specified persons at specified times and places—typically, this is an order that the person report to a police station at particular times on particular days
- a requirement to participate in specified counselling or education.[9]

23. A person commits an offence if they contravene a control order or contravene a condition of an ESO.[10]

24. The Joint Departmental Submission seems to suggest that any inappropriate conditions could be removed or modified, either by:
    - the person who is subject to the review making an application to the Court for a variation
    - the AFP Commissioner (in the case of control orders) or the AFP Minister (in the case of an ESO) making an application to the Court for a variation
    - the Court amending or revoking an ESO as part of its annual review of conditions.

25. However, these processes necessarily take time and will not be effective to protect a person from a breach of the relevant order while an application for a variation is on foot.

26. There therefore needs to be a process to ensure that inappropriate conditions are not imposed in the first place if it is anticipated that the person will be taken straight from prison to immigration detention (Recommendation 1), and that inappropriate conditions do not result in a breach that could not be avoided—for example, if an order is in force in relation to a non-citizen in the community who subsequently has their visa cancelled (Recommendation 2).

27. There may be some question about whether a person has in fact committed an offence if the conduct is not voluntary or if there was no

intention to breach a condition of an order.[11] That is, it may be possible for a person to show that a physical or fault element of the relevant offence has not been made out if they have been prevented from complying with a control order or ESO—eg, because they are being detained.

28. However, if the scope of operation of control orders and ESOs is to be extended to circumstances where a person is in immigration detention, the Commission considers it is appropriate for the legislation to make clear that it is not an offence to contravene a condition of a control order or an ESO if the person could not comply with the condition because the person was in immigration detention.

4.2 Less restrictive alternatives to a continuing detention order

29. The second proposed amendment in the Joint Departmental Submission is described in the following way:

> [The amendment would provide that] ESOs and control orders are the only measures to be considered by a state or territory Supreme Court when deciding whether there is a 'less restrictive measure' to a continuing detention order (CDO) that would be effective in preventing the unacceptable risk posed by an offender.

30. If this amendment were made, a Court hearing an application for a CDO would only be required to consider the availability of ESOs and control orders, and would no longer be required to consider whether other less restrictive alternatives would be effective in preventing the risk posed by the offender. In fact, it appears that the Court would not even be *permitted* to consider other less restrictive alternatives that would be effective in preventing risk.

31. This amendment would bring about a fundamental change to the CDO regime and would be inconsistent with Australia's international human rights obligations to ensure that administrative detention of this nature is not arbitrary.

32. The most recent General Comment by the United Nations Human Rights Committee on arbitrary detention deals specifically with the requirements of 'security detention', including administrative continuing detention regimes:

> To the extent that States parties impose security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, *the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures*, and that burden increases with the length of the detention.[12]
>
> (emphasis added)

33. The continuing detention regime for high-risk terrorist offenders is an extraordinary regime. It permits the continued detention of a person after they have served a sentence of imprisonment and would ordinarily be released into the community. One of the key aspects of the regime, designed to ensure that it would be consistent with human rights, is the requirement that the Court first form a view that there are no other less restrictive measures that could achieve the protective purpose of the legislation. When the regime was first proposed, this requirement was described by the Government as an 'important safeguard'.[13] When the current Bill was introduced late last year, the Government reiterated that this safeguard was one of a number included in the regime 'to ensure that detention is not arbitrary' and that the regime would 'address the considerations set out by the United Nations Human Rights Committee'.[14]

34. In particular, the Government emphasised that detention would be 'a last resort where no less restrictive measure (such as a control order, or an ESO once introduced) would be sufficient to manage the risk posed by a high-risk terrorist offender' (emphasis added).[15] It was clear, even as recently as September 2020 when the Explanatory Memorandum for the Bill was circulated, that control orders and ESOs were merely examples of potentially less restrictive measures and not the only measures that may need to be considered.

35. The only relevant thing that has happened since then is that the CDO regime has been used for the first time and an offender has asked the Court to take into account other measures which he submitted would be effective in preventing risk.[16] Specifically, at [17] the Joint Departmental Submission seemed to express concern that the Court

might take into account '*any* measure or action (or combination of measures or actions) that it deems less restrictive, which may allow for consideration of measures which are not specifically designed to manage the risk posed by high risk terrorist offenders to the Australian community' (emphasis in original).

36. This is not a sufficient basis to weaken one of the safeguards carefully and deliberately included in the statutory scheme. Ensuring that a Court gives active consideration to any less restrictive measure that would have the *effect* of preventing the relevant risk—whether or not the measure in question is characterised explicitly as a 'counter-terrorism measure'—means that the Court is able to identify the most appropriate response in the particular circumstances of a case before it.

37. It may be that in the circumstances of a particular case, the Court considers that an ESO is more likely to be effective in preventing risk than other alternatives such as visa cancellation and removal from Australia. However, preventing the Court from even considering those less restrictive alternatives to a control order or ESO would fetter the Court from fulfilling a legitimate function consistently with international human rights law—namely, to identify the most appropriate risk-prevention response in respect of an individual whom the Government considers poses a threat to the Australian community, while impinging no more than is necessary on that individual's human rights.

38. In response to the specific matters raised in the Joint Departmental Submission at [19]:

- It is no part of the threshold test in s 105A.7(1)(b) to ask whether an offender may be 'managed effectively' in the community.
- If the Bill is passed in its current form, the Court would have the discretion to impose a broad range of conditions as part of an ESO. However, there are other measures that may reduce or eliminate risk that a Court at present may be required to take into account but that could not be made a condition of an ESO. For example, a Court making an ESO would not be able to include a condition that a person's visa be cancelled with the result that they are taken into immigration detention, or that the person be removed from Australia.

- The final dot point says that the Court could exercise a residual discretion not to make a CDO if the statutory criteria had been satisfied but the Court nevertheless considered that a CDO should not be made. The suggestion seems to be that if the Court thought that there was a way of preventing risk other than through a control order or ESO it could take this into account as part of its residual discretion. Two points should be made in relation to this submission:
    - First, if the submission is that other alternatives can and should be taken into account as a matter of discretion, it is unclear why those alternatives should not be taken into account as part of the statutory test.
    - Secondly, it is highly unlikely that any residual discretion would be approached in the way suggested. In the only case to have considered the CDO regime to date, the Court said:

        > No case was drawn to my attention in which a court has declined to make a CDO on discretionary grounds when the statutory criteria have been satisfied. I do not need to ponder the circumstances in which that might properly occur. Suffice to say, this is not such a case.[17]

39. This is not the only safeguard in the HRTO regime that the Government has proposed to weaken. As noted in the Commission's primary submission at [156], the Bill also proposes to wind back the protection of 'use immunity' in relation to compulsory assessments by an independent expert. That too had previously been described by the Government as an 'important safeguard' to protect human rights.[18] The Commission is concerned about the erosion of these safeguards after the regime has been legislated and at a point when it has started to be used.

40. The legislation should continue to require the Court to consider all available alternative measures put forward by the parties that may reasonably meet the test of being effective in preventing the risk posed by the offender. Removing all but two potential measures as mandatory considerations significantly undermines the integrity of the regime.

Endnotes

[1] Criminal Code, s 104.5(1)(d)(ii).
[2] Proposed ss 104.5(1D)–(1F), 104.15(4)–(6) and 104.17A.
[3] Proposed ss 104.5(1E)(b)(ii) and (1F), and 104.15(5)(b)(ii) and (6).
[4] Proposed s 105A.18C(2).
[5] Proposed s 105A.18C(4).
[6] Criminal Code, s 104.5(3)(e) and (f).
[7] Criminal Code, s 104.3.
[8] Proposed s 105A.5(1).
[9] Criminal Code, s 104.5(3)(c), (i) and (l).
[10] Criminal Code, s 104.27; proposed s 105A.18A.
[11] Criminal Code, ss 4.2 (physical element: voluntariness) and 5.2 (fault element: intention).
[12] United Nations Human Rights Committee, *General comment No. 35: Article 9 (Liberty and security of person)*, 16 December 2014, UN Doc CCPR/C/GC/35, at [15].
[13] Revised Explanatory Memorandum, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, at [104].
[14] Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, Statement of Compatibility with Human Rights at [53].
[15] Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, Statement of Compatibility with Human Rights at [52].
[16] *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [337]–[345], [357]–[358] and [466]–[469].
[17] *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [473].
[18] Revised Explanatory Memorandum, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth), at [104].