



Australian Government
Attorney-General's Department

October 2016

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Joint supplementary submission of the Attorney-General's Department and Australian Federal Police to the Parliamentary Joint Committee on Intelligence and Security

Interaction of the proposed Post-Sentence Preventative Detention regime and Control Order regime

This submission is a joint submission of the Attorney-General's Department and the Australian Federal Police (AFP).

On 15 September 2016, the Attorney-General referred a number of specific issues to the Parliamentary Joint Committee on Intelligence and Security (the Committee) for consideration as part of its review of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (the Bill). One of those issues was the interaction between the regime proposed to be established under the Bill and the existing control order regime in Division 104 of the *Criminal Code Act 1995* (Cth).

The Attorney-General noted that because of the different procedural and threshold requirements that apply to the regimes, the Court which hears an application for a continuing detention order will not be able to make a control order in the alternative. This is due to the fact that currently control orders are issued by federal courts, while applications for a continuing detention order as proposed by the Bill are made to the Supreme Court of a state or territory, there are different applicants under each regime, and there are also different threshold requirements which must be met under the respective regimes.

Importantly, the Attorney-General's referral stated that detailed consideration of how the two regimes might better interact with each other could be deferred for consideration in the reviews of the control order regime by the Independent National Security Legislation Monitor in 2017 and by the Committee in 2018. The Attorney-General's Department and AFP fully support that approach.

The *Intelligence Services Act 2001* (Cth) requires the Committee to review, by March 2018, the operation, effectiveness and implications of control orders under Division 104 of the *Criminal Code*¹ The Committee may wish to consider whether there is a need to bring forward its review into the control order regime—perhaps to conclude by the end of 2017 - in order to inform integration between the proposed regime and the control order regime before the first application for a continuing detention order is before the court for consideration, which could occur in 2019.

Control orders and continuing detention orders - timing

On 13 October 2016, the Attorney-General provided a further letter to the Committee seeking the Committee's view on the discrete issue of whether a control order can be sought while an individual is still serving a sentence of imprisonment, with the conditions of the control order to apply upon release.

This reflects the reality that – until the broader issue of integration is addressed as discussed above – the AFP may have to run continuing detention order proceedings in a Supreme Court of a state or territory and the alternative control order proceedings, if required, in the Federal Court or Federal Magistrates Court. To manage risk appropriately, the AFP would need to ensure that the hearing for a confirmed control order is timed to coincide with the person's release or just prior to release.

The Attorney-General suggested there may be merit in the Committee considering whether there is a need to consider amendments to the control order regime to make it explicitly clear that a control order can be sought while an individual is in prison.

¹ Subparagraph 29(1)(bb)(iii) of the *Intelligence Services Act 2001*.

Currently, under Division 104 of the Criminal Code, an interim control order can be made against a person for the purpose of:

- a) protecting the public from a terrorist act;
- b) preventing the provision of support for or the facilitation of a terrorist act;
- c) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.²

A senior member of the Australian Federal Police may apply to an issuing court (the Federal Court of Australia, Family Court of Australia or Federal Circuit Court of Australia) for an interim control order to impose obligations, prohibitions and restrictions on a person for the purpose of protecting the public from a terrorist act; preventing the provision of support for or the facilitation of a terrorist act; and preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

The issuing court may make the interim control order if it is satisfied 'on the balance of probabilities' that the requirements outlined in paragraphs 104.4(1)(a) to 104.4(1)(c) of the Criminal Code have been met (one of the possible requirements is that the person was convicted of a terrorism offence) and that each of the obligations, prohibitions and restrictions imposed by the control order is 'reasonably necessary, and reasonably appropriate and adapted' to meet the purpose set out above. An interim control order does not begin to be in force until it is served personally on the person.³ In a situation where a person is in prison, an appropriate time for service is likely to be at the time of the person's release from imprisonment.⁴

Therefore, in a situation where a person is still in prison, it is likely to be possible for the AFP to seek an interim control order (based on the risk the person presents to the community upon release) with the obligations, prohibitions and restrictions to be imposed by the order only commencing when the person is served with the order upon release from prison. In the period between the interim control order being made and the person being served with the order upon his or her release from custody, the interim control order would not place any controls on the person. This would be a logical and sensible outcome given that the person's activities and associations are controlled by corrective services agencies during this period. However, as Division 104 is currently drafted, the AFP would not have certainty about whether this is the correct interpretation of the provisions in Division 104, as this is ultimately a matter for the presiding judicial officer.

Conclusion

The existing control order regime in Division 104 of the Criminal Code arguably allows for control orders to be sought and obtained over persons serving sentences of imprisonment. However, there may be logistical and practical challenges associated with obtaining such orders in cases where a continuing detention order is also being considered.

Division 104 of the Criminal Code does not explicitly allow an application for an interim control order to be made while someone is serving a sentence of imprisonment. In the interests of certainty, and for the

² *Criminal Code Act 1995* (Cth), section 104.1

³ *Criminal Code Act 1995* (Cth), paragraph 104.5(1)(d).

⁴ Under paragraph 104.5(1)(e) of the *Criminal Code Act*, an interim control order must be served on the person at least 48 hours before the day on which the person must attend court for the court to confirm the interim control order, declare the interim control order void or revoke the interim control order.

avoidance of doubt, it may be prudent to clarify in Division 104 that an interim control can be made while an individual is in prison and that the controls imposed by that order will not apply until the person is released from prison.

From the AFP and Attorney-General's Department perspective, clarity on this issue is critical. In practice, if a court does not make a continuing detention order on the basis that a control order would be the least restrictive option available to protect the community, the community would expect that the AFP can apply for a control order and that the process to do so is clear.