

Submission by the
Commonwealth Ombudsman

**Parliamentary Joint Committee on
Intelligence and Security**

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

Submission by the Commonwealth Ombudsman, Michael Manthorpe PSM

October 2020

Introduction and summary

On 1 October 2020, the Parliamentary Joint Committee on Intelligence and Security commenced a review into the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020.

This submission outlines the role of the Office of the Commonwealth Ombudsman (the Office), details the Office's existing oversight functions relevant to this Bill, and considers the impact of the Bill on these oversight functions.

Our role

The purpose of the Office is to:

- provide assurance that Australian government entities and prescribed private sector organisations that the Office oversees act with integrity and treat people fairly, and
- influence enduring systemic improvement in public administration in Australia and the region.

We aim to achieve our purpose through the following objectives:

- Influencing Australian and Australian Capital Territory Government entities to improve public administration and complaint handling systems through public reports, recommendations and direct engagement.
- Providing an efficient, effective and accessible government complaint handling service.
- Undertaking oversight and assurance activities relating to the integrity of Australian Government entities, Australian Capital Territory Government entities and prescribed private sector organisations.
- Providing effective and impartial industry complaint handling services, and consumer information.
- Delivering capacity-building programs under the Australian Aid arrangements to support ombudsmen and allied integrity bodies to improve governance and accountability.

Oversight and assurance

The Office conducts compliance inspections and reviews of 22 law enforcement, integrity and regulatory agencies regarding their use of certain covert, intrusive and coercive powers. We engage with agencies, inspect relevant records and review agencies' policies and processes to assess their compliance with statutory requirements.

The covert nature of many of these powers means we are unlikely to receive complaints about their use, so our role in monitoring their use and reporting our findings is important in providing transparency to the Parliament and the public about whether agencies use their powers appropriately.

Currently, the Office oversees the following activities under Commonwealth legislation:

- telecommunications interceptions under Chapter 2 of the *Telecommunications Interception and Access Act 1979* (the TIA Act)
- preservation of and access to stored communications under Chapter 3 of the TIA Act
- access to telecommunications data under Chapter 4 of the TIA Act

- use of industry assistance powers under Part 15 of the *Telecommunications Act 1997*
- use of surveillance devices under the *Surveillance Devices Act 2004* (the SD Act)
- delayed notification search warrant activity under Part IAAA of the *Crimes Act 1914* (the Crimes Act)
- monitoring of compliance with control orders under Part IAAB of the Crimes Act
- conduct of controlled operations under Part IAB of the Crimes Act, and
- coercive examinations conducted under the *Fair Work Act 2009* and the *Building and Construction Industry (Improving Productivity) Act 2016*.

Oversight functions of Australia’s counter-terrorism framework

In relation to the powers created under Australia’s national security and counter-terrorism framework, the Office has a limited role in overseeing the Australian Federal Police’s (AFP) use of delayed notification search warrants, and powers under the TIA Act, the SD Act and the Crimes Act in monitoring compliance with control orders issued under Part 5.3 (terrorism) of the *Criminal Code Act 1995* (the Criminal Code). In addition, the AFP is required to notify the Office when it uses preventative detention order powers under Part 5.3 of the Criminal Code.

In conducting inspections of the above oversight functions, the Office has developed a methodology based on risk assessment, legislative requirements, and better practice standards in auditing. This includes assessing whether the AFP:

- properly applied for, and received the authority to engage in monitoring¹
- only engaged in authorised monitoring activities
- has appropriate processes for handling and disclosing obtained information
- met its obligations to notify and deliver material to our Office
- met its reporting obligations, and
- was transparent with our Office and the relevant Minister.

Impact of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 on our oversight of counter-terrorism activities

The Bill would introduce a new regime of counter-terrorism powers by establishing an extended supervision order (ESO) scheme. The ESO scheme aims to enable close supervision of high-risk terrorist offenders who are released into the community at the end of their custodial sentence.²

Similar to the control order regime available on application to federal courts under Part 5.3 of the Criminal Code, the ESO scheme would enable State and Territory supreme courts to impose restrictions, prohibitions and obligations on terrorist offenders which are proportionate to the level of risk their release is assessed as posing to the community. As such, the ESO scheme aims to provide supreme courts with post-sentence options that mitigate the risk posed by an

¹ This does not include reviewing the merits of the decision of a Magistrate, eligible Judge or nominated AAT member to issue a warrant.

² Commonwealth, *Parliamentary Debates*, House of Representatives, 3 September 2020, 6477 (Christian Porter, Attorney-General)

individual that are less severe and more adaptable and tailored than the continuing detention order regime available under Part 5.3 of the Criminal Code.

Like the control order and continuing detention order regimes, the Bill does not propose a direct oversight function for our Office in relation to the ESO scheme.

However, alongside the proposed ESO scheme, the Bill would extend the AFP's scope to use pre-existing covert and intrusive powers which the Office oversees under the TIA Act, the SD Act and the Crimes Act to include the following purposes:

- monitoring compliance with an ESO or interim supervision order (ISO) via a Part 5.3 warrant
- informing a decision about whether to apply for an ESO or continuing detention order.

The Bill would also extend the AFP's obligations to notify the Office when it has used these powers and provide relevant material under:

- section 49A of the SD Act,
- section 59B of the TIA Act, and
- section 3ZZTE of the Crimes Act.

In assessing the AFP's compliance when using the powers proposed under the Bill, the Office would likely use similar processes, methodology and reporting to those it uses when reviewing the AFP's use of powers for monitoring compliance with control orders.

The Bill would amend section 61 of the SD Act and section 103B of the TIA Act to enable the Minister to exclude information about Part 5.3 of the Criminal Code from the Office's statutory reports. The above provisions were originally enacted in relation to control order information and the Bill proposes to amend them to refer more generally to Part 5.3 information. We consider these provisions are inconsistent with the Ombudsman's role as an independent and impartial office, both in practice and in perception.³ The Office routinely consults with agencies to identify whether a draft report contains operationally sensitive material that should be removed or amended before it is published. We suggest the Committee consider whether these provisions should be revised or removed.

The Bill would also extend the Office's role in the oversight framework proposed under the Telecommunications Legislation Amendment (International Production Orders) Bill 2020 (IPO Bill) to include:

- overseeing relevant Part 5.3 IPO agency activity, and
- receiving notifications and relevant material relating to international production orders issued on the basis of Part 5.3 supervisory orders.

While the ESO scheme would impose more tailored supervisory conditions when compared to continuing detention orders, ESOs would still be restrictive in nature and impose prohibitions, limitations or obligations. In turn, the Office welcomes the inclusion of independent oversight and assurance arrangements in the Bill, and notes the role proposed for it in the Bill to oversee

³ The Office previously highlighted its disagreement with the inclusion of a similar provision at subsection 317ZRB(7) of the *Telecommunications Act 1997*, which enables the Minister to delete certain information from the Office's reports about inspections of agencies' use of industry assistance powers. In his July 2020 report, *A report concerning the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and related matters*, the Independent National Security Legislation Monitor recommended (Recommendation 29) that provision be repealed.

warrants obtained by law enforcement agencies in monitoring compliance with control orders issued under Part 5.3 of the Criminal Code.

We expect the narrow applicability of the ESO scheme to result in a marginal increase in the AFP's use of powers under the TIA Act, SD Act, and Crimes Act and, therefore, a similar increase in the number of records subject to our oversight under those regimes.