

EXPLANATORY STATEMENT

Select Legislative Instrument 2017 No.

Issued by the authority of the Attorney-General

Criminal Code Act 1995

*Criminal Code Amendment (Control Orders—Legal Representation for Young People)
Regulations 2017*

Background

Section 5 of the *Criminal Code Act 1995* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. The Schedule to the Act sets out the Criminal Code (the Code).

Division 104 of the Code allows obligations, prohibitions and restrictions to be imposed by a control order on a person from 14 years of age for the purposes of protecting the public from a terrorist act, preventing the provision of support for or the facilitation of a terrorist act, and/or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

Subsections 104.28(4) to (5) of the Code require an issuing court to appoint a lawyer to act for a person aged at least 14 but under 18 (the young person) in relation to control order proceedings, other than *ex parte* proceedings for an interim control order or where the young person refused a lawyer previously appointed, where the young person does not have legal representation in those proceedings. Subsection 104.28(6) of the Code provides for the making of regulations to support the requirement to appoint a lawyer under subsection 104.28(4).

Purpose

The purpose of the *Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017* (the Instrument) is to amend the *Criminal Code Regulations 2002* (the Regulations) to insert an administrative framework to support the appointment of lawyers for young persons the subject of control order proceedings.

Explanation and effect of provisions

Details of the Instrument are set out in [Attachment A](#).

Consultation

Regulations to facilitate the appointment of legal representatives for young persons who are the subject of control order proceedings were drafted in consultation with the Australian Federal Police and state and territory Legal Aid Commissions.

The Attorney-General's Department wrote to the states and territories through the Legal Issues Working Group of the Australia-New Zealand Counter-Terrorism Committee on the proposed Regulations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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The Instrument, a Disallowable Legislative Instrument, is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Instrument

Division 104 of the Code authorises an issuing court to impose a control order on persons 14 years and older for the purposes of protecting the public from a terrorist act, preventing the provision of support for or the facilitation of a terrorist act, and/or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country. Safeguards provided by Division 104 of the Code include subsection 104.28, which requires an issuing court to appoint a lawyer for a young person (that is, a person aged at least 14 but under 18) for the purposes of certain proceedings in relation to the control order if the young person does not have legal representation.

The object of the Instrument is to provide an administrative framework to support the appointment of lawyers for young persons the subject of control order proceedings. Specifically, the Instrument provides that an issuing court may request that representation be provided by a legal aid body, with the Australian Federal Police (AFP) to facilitate contact between that legal aid body and the young person.

Human rights implications

The Instrument engages the following rights:

- Article 14, *International Covenant on Civil and Political Rights* (ICCPR)
- Article 12, *Convention on the Rights of the Child* (CROC), and
- Article 40, CROC.

Article 14, ICCPR

The Instrument engages and promotes the right to a fair trial, the right to minimum guarantees in criminal proceedings and in a suit at law and the presumption of innocence in Article 14 of the ICCPR.

Control orders under Division 104 of Part 5.3 of the Code have been a tool available to law enforcement since 2005.

Control orders are a protective mechanism and constitute an important element of Australia's counter-terrorism strategy. They provide the AFP with a means to request that a court impose obligations, prohibitions and restrictions (controls) on a person for the purpose of protecting

the public from a terrorist act. Law enforcement may have sufficient credible information or intelligence that an individual poses a threat to security to take action in relation to the person before they have gathered sufficient admissible evidence to support a criminal prosecution for terrorism or terrorism-related conduct. In these circumstances, control orders provide a mechanism to manage the threat. Use of a control order is therefore considered in conjunction with, and is complementary to, criminal prosecution, and allows a balance to be achieved between mitigating the risk to community safety and allowing criminal investigations to continue.

The Instrument engages and promotes this human right by ensuring an issuing court actively considers whether a young person is legally represented, and ensuring the AFP is required to take certain action to ensure the young person has the opportunity to obtain legal representation, including in circumstances where the young person does not have the resources to pay for those services.

The Instrument strengthens the existing safeguards in the Act and supports the implementation of recommendation 2 of the February 2016 advisory report of the Parliamentary Joint Committee on Intelligence and Security (the Committee) on the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2015*.

Article 12, CROC

The Instrument engages and promotes Article 12 of the CROC, which states that a child shall be provided the opportunity to be heard in any judicial proceedings affecting the child, either directly, or through a representative, in a manner consistent with the procedural rules of national law.

The administrative framework introduced by the Instrument promotes Article 12 of the CROC by ensuring that a lawyer is made available to represent a young person in control order proceedings, other than proceedings the issuing court has determined should be held *ex parte*, where the young person does not have legal representation. The young person will therefore be provided with the opportunity to be heard through a legal representative in any control order proceedings (other than *ex parte* proceedings for an interim control order or where the young person refused a lawyer previously appointed). It should be noted that the Instrument does not require the young person to accept the legal representation offered under the Instrument. The young person retains the right to select – and meet the costs associated with – a different source of legal representation.

Article 40, CROC

The Instrument also engages a child's right to a fair trial and minimum guarantees in criminal proceedings, as well as a child's right to be presumed innocent until proven guilty in Article 40 of the CROC.

The Instrument promotes Article 40 of the CROC and the young person's right to a fair trial by providing the administrative framework to facilitate the appointment of lawyers for young

persons subject to control order proceedings (other than proceedings the issuing court has determined should be held *ex parte*).

Conclusion

The Instrument is compatible with human rights and promotes the right to a fair trial, the right to minimum guarantees in criminal proceedings and in a suit at law, as well as the presumption of innocence. In addition, the Instrument promotes the young person's opportunity to be heard in judicial proceedings affecting the young person.

Details of the *Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017*

Clause 1 – Name

Clause 1 provides for the short title of the Instrument to be the *Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017*.

Clause 2 – Commencement

Subclause 2(1) provides for the commencement of each provision in the Instrument the day after the Instrument is registered.

Subclause 2(2) provides that information in Column 3 of the table included in subclause 2(1) may be edited and does not form part of the Instrument.

Clause 3 – Authority

This clause states that the Instrument is made under the *Criminal Code Act 1995*.

Clause 4 – Schedules

Each instrument specified in a Schedule to the Instrument is amended as set out in the applicable items in the Schedule. Any other item in a Schedule to this Instrument has effect according to its terms.

Schedule 1 – Amendments

Schedule 1 makes the following amendments to the *Criminal Code Regulations 2002*.

Item 1 – Regulation 3

Item 1 amends the definitions in Part 1 of the *Criminal Code Regulations 2002* by inserting the following definitions into regulation 3:

AFP member has the same meaning as in Part 5.3 of the Code.

chief executive officer has a different meaning for each jurisdiction as set out in regulation 3 and in accordance with the relevant structure and legislation in the particular state or territory.

control order has the same meaning as in Part 5.3 of the Code.

issuing court has the same meaning as in Part 5.3 of the Code.

lawyer has the same meaning as in Part 5.3 of the Code.

legal aid commission means an authority established by or under a law of a State or Territory for the purpose of providing legal assistance.

parent has a meaning affected by the Dictionary at the end of the Code.

Item 2 – Before regulation 4

Item 2 inserts a new Division into Part 2 of the *Criminal Code Regulations 2002*.

Division 1—Control orders

This item inserts a new heading ‘Division 1—Control orders’ before section 4. Division 1 has been inserted before the existing regulation in relation to preventative detention orders to ensure consistency with the order in which the provisions regarding ‘control orders’ and ‘preventative detention orders’ appear in the Code.

This item also inserts new sections 3A, 3B and 3C after the new heading.

New regulation 3A Legal representation for young people

New section 3A informs the reader that Division 1 of this Instrument provides for a lawyer to be appointed to act for a person who is at least 14 but under 18 (the young person). The appointment is for the purposes of acting for the young person in relation to certain control order proceedings as set out in subsection 104.28(6) of the Code.

New regulation 3B Court may request legal aid commission to arrange representative

New section 3B authorises an issuing court to request a legal aid commission to arrange the legal representation of the young person (the relevant legal aid commission).

This regulation is designed to ensure any young person the subject of control order proceedings, other than *ex parte* proceedings for an interim control order or where the young person refused a lawyer previously appointed, who does not already have legal representation has a reasonable opportunity to access a lawyer for the purposes of proceedings.

New regulation 3C AFP to inform relevant persons of request and contact details

New section 3C imposes certain obligations on the AFP. New subsections 3C(2), 3C(3) and 3C(5) are designed to ensure that, to the extent possible, the relevant legal aid commission, the young person, and the young person’s parent or guardian are made aware of the issuing court’s request for legal representation to be provided to the young person. This process is intended to ensure, so far as is reasonably practicable, that contact is made by one or both parties to discuss the particulars of the legal representation, thereby facilitating the young person’s access to that representation.

New subsection 3C(1) provides that the regulation only applies where the issuing court requests that a legal aid commission arrange legal representation of a young person for certain proceedings in relation to a control order.

New subsection 3C(2) imposes certain obligations on the AFP with respect to the relevant legal aid commission. New paragraph 3C(2)(a) requires either a member of the AFP or a legal representative of the AFP to inform the chief executive officer of the relevant legal aid commission in writing of the issuing court’s request. In addition, new paragraph 3C(2)(b) requires either an AFP member or a legal representative of the AFP to provide the relevant legal aid commission with the following information (if any) that the AFP member or a legal representative of the AFP has:

- (i) the young person’s name
- (ii) the young person’s residential address

- (iii) the young person's contact details, including a telephone number and an email address
- (iv) the young person's date of birth
- (v) the name, residential address and contact details of at least one parent or guardian of the young person, and
- (vi) if the young person requires assistance with communication—information about the assistance required.

A note to paragraph 3C(2)(b) provides that, for the purposes of subparagraph (b)(vi), a person may need assistance with communication because, for example, the young person is deaf or hearing impaired, is unable to read, has a mental impairment, or requires an interpreter.

Paragraph 3C(2)(b) only requires the AFP member or legal representative to provide the information to the extent that that member or legal representative already holds or has access to that information. It does not impose an obligation on the AFP member or legal representative to obtain and furnish the relevant legal aid commission with information not already held by the AFP.

As the AFP is an enforcement body and the disclosure of the young person's contact details to the relevant legal aid commission is a disclosure of personal information reasonably necessary for an enforcement related activity (in this case, the conduct of control order proceedings), the AFP member or legal representative will be required to make a written note of the disclosure, in accordance with Australian Privacy Principle 6.5.

New subsection 3C(3) imposes certain obligations on the AFP with respect to the young person.

New paragraph 3C(3)(a) requires an AFP member to inform the young person of the request made by the issuing court. New paragraph 3C(3)(b) requires an AFP member to give the young person sufficient information about the relevant legal aid commission to enable the young person to contact and, if necessary, attend the relevant legal aid commission. In addition, new paragraph 3C(3)(b) requires the AFP member to provide the young person with the following information (if any) that the AFP member has:

- (i) the name of the legal aid commission
- (ii) the legal aid commission's business address (not being a post box)
- (iii) the legal aid commission's contact details, including a telephone number and an email address, and
- (iv) any other information about the legal aid commission provided by the issuing court.

The overall effect of new paragraph 3C(3)(b) is that, provided the AFP member gives the young person sufficient information to contact and attend the legal aid commission, consistent with new paragraph 3C(2)(b), there is no obligation on the AFP member to obtain relevant information in addition to what the AFP already holds. Neither new paragraph 3C(3)(a) nor 3C(3)(b) requires the AFP member to provide the information in writing. However, the AFP member would make a written record of the conversation and the information provided.

New paragraph 3C(3)(c) imposes an obligation on the AFP, consistent with that in subsection 104.12(1)(c) of the Code, to ensure the young person understands the information provided to him or her.

New subsection 3C(4) notes that new subsection 3C(3) does not apply if the actions of the young person make it impracticable for the AFP member to comply with that subsection. For example, such actions could include the young person behaving violently towards the AFP member or otherwise acting to prevent the AFP member from conveying the information required to be conveyed under new subsection 3C(3).

In addition, new subsection 3C(5) imposes certain obligations on the AFP with respect to taking reasonable steps to inform at least one parent or guardian of the young person of the issuing court's request and give the parent or guardian the relevant legal aid commission's contact details.

This new subsection is designed to ensure that at least one parent or guardian of a young person subject to a control order is made aware that the issuing court has requested legal aid to provide a lawyer for the young person.

The term 'reasonable' is to be given its ordinary meaning and will be determined at the time of informing or attempting to inform. There may be instances where the AFP is unable to identify and/or locate a parent or guardian. For example, the young person could be estranged from his or her parents or guardians, or those individuals are unable to be contacted. The drafting of the provision acknowledges that the young person may not cooperate with authorities in seeking to identify his or her parents or guardians.

It is important that an inability to inform one of the young person's parents or guardians of the request and the relevant legal aid commission's contact details does not frustrate the provision of the legal representation. If an AFP member has taken reasonable steps to inform at least one parent or guardian of the young person of the relevant details, but was unsuccessful, an AFP member is not required to attempt to inform another parent or guardian. However, these amendments do not prevent an AFP member from doing so.

New subsection 3C(6) imposes a timeframe in which the AFP is required to comply with the requirements to inform the relevant legal aid commission, the young person and a parent or guardian of the young person imposed by new subsections 3C(2), (3) and (5). In particular, the AFP member or legal representative, as the case may be, must provide the information and comply with any other requirements in those subsections as soon as practicable after the issuing court decides to make the request and at least 48 hours before the next day when the court will conduct proceedings relating to the control order. This is designed to ensure the legal aid commission, the young person and the parent or guardian have sufficient time to make the necessary preparations for the next court date.

Division 2—Preventative detention orders

This item also inserts a new heading ‘Division 2—Preventative detention orders’ after new section 3C. As noted above, inserting the regulations in relation to control orders before the existing regulation relating to preventative detention orders ensures consistency with the order of the provisions relating to control orders and preventative detention orders in the Code.

Items 3, 4 and 5 – Division 3.1 (heading), Division 3.2 (heading) and Division 3.3 (heading)

These items amend Part 2 of the *Criminal Code Regulations 2002* by renumbering the Divisions within that Part so they commence with Division 1 of Part 2, consistent with standard numbering practice.

Item 3 repeals the current heading for ‘Division 3.1—Cross-border firearms trafficking’ and replaces it with the new heading ‘Division 1—Cross-border firearms trafficking’.

Item 4 repeals the heading ‘Division 3.2—Serious drugs and precursors’ and replaces it with the new heading ‘Division 2—Serious drugs and precursors’.

Item 5 repeals the heading ‘Division 3.3—Psychoactive substances’ and replaces it with the new heading ‘Division 3—Psychoactive substances’.

Item 6 – After Part 4

Part 5—Application and transitional provisions

Item 6 inserts a new heading ‘Part 5—Application and transitional provisions’ after Part 4 of the *Criminal Code Regulations 2002*.

7 Application of the *Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017*

This item also inserts new section 7, ‘Application of the *Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017*’, into new Part 5 of the *Criminal Code Regulations 2002*.

New section 7(1) provides guidance on the proceedings to which the amendments apply.

New section 7 is designed to ensure that the control order provisions in this instrument apply to any part of a proceeding relating to a control order made or requested on or after 30 November 2016 (the date on which the amendments to the Code commenced operation), regardless of when the proceedings commenced.

New subsection 7(1) provides that the amendments made by items 1 and 2 of Schedule 1 to the *Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017* – which relate to making a lawyer available to a young person for certain control order proceedings – apply in relation to the parts of a proceeding that occur after the commencement of that instrument if:

- (a) the proceeding commenced before or after the commencement of that instrument; and
- (b) the proceeding relates to a control order made on or after 30 November 2016; and

- (c) the control order was, or is, requested (however described) on or after 30 November 2016.

Accordingly, the effect of new subsection 7(1) is that the amendments made by items 1 and 2 will apply to any control order proceedings that occur after the commencement of that instrument.

New subsection 7(2) is an avoidance of doubt provision. It provides that the amendments made by items 1 and 2 apply regardless of when the conduct to which the request made by the issuing court relates occurred or occurs.

The note following subsection 7(2) acknowledges that the conduct of the young person that has led to the control order proceedings may have occurred before or after 30 November 2016.