



Australian Government

Independent National Security Legislation Monitor

INSLM ANNUAL REPORT

The Hon Roger Gyles AO QC

2015–2016

INSLM Annual Report 2015–2016

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Australian Government

Independent National Security Legislation Monitor

THE HON ROGER GYLES AO QC

ONE NATIONAL CIRCUIT
BARTON ACT

5 October 2016

The Hon Malcolm Turnbull MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister,

INSLM Annual Report for 2015–16

I am pleased to attach my annual report for the period 1 July 2015 to 30 June 2016.

This report is unclassified and is suitable to be presented to each House of Parliament in accordance with s 29 of the *Independent National Security Legislation Monitor Act 2010* (Cth).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Roger Gyles', enclosed in a thin black rectangular border.

Roger Gyles AO QC
Independent National Security Legislation Monitor

Introduction

This is my second annual report to the Prime Minister as the Independent National Security Legislation Monitor (**INSLM**).

This annual report relates to the period between 1 July 2015 and 30 June 2016 (**Reporting Period**). A detailed description of the requirements for annual reports can be found at Appendix A.

Security Landscape

Domestic

The current National Terrorism Threat Advisory System was introduced on 26 November 2015. The System includes a scale of levels ('certain', 'expected', 'probable', 'possible', and 'not expected'). At the time of writing this annual report, the threat level was set at 'probable', consistent with the threat level of 'high' that was set under the previous National Terrorism Threat System on 12 September 2014. This threat level means there is credible intelligence indicating individuals or groups have both the intention and capability of conducting an attack in Australia.

Whilst the threat level was not raised during the Reporting Period, security agencies have reported that the nature of the threat faced by Australia is evolving, with an increased risk of low-level attacks conducted entirely by individuals or by small groups of people on 'soft targets' such as shopping centres and sporting events. These attacks can be carried out with minimal planning and within short timeframes. The perpetrators, who are younger, can now be radicalised online without any face-to-face contact.¹ Perpetrators are also becoming more careful with communications, utilising encryption methods to make detection more difficult. These factors have led law enforcement bodies to increasingly rely upon sensitive intelligence sources to identify persons of interest.²

The Australian Federal Police (**AFP**) advises that during the Reporting Period, 23 individuals were charged for a range of counter-terrorism and non-counter-terrorism offences as a result of 10 counter-terrorism operations. Charges were subsequently dropped against one individual. Of the 10 operations, one was in Brisbane, three were in Melbourne, and six were in Sydney. The majority of AFP investigations related to imminent onshore attack planning. However, several investigations related to suspected breaches of foreign incursions legislation.³

¹ Transcript of Proceedings, *Review into Terrorism Questioning and Detention Powers Public Hearing*, 19 August 2016, 26.

² Written confidential submission from the AFP to the INSLM, August 2016 (this information from the confidential submission was released with the AFP's consent).

³ *Ibid.*

As at 1 September 2015, ASIO were undertaking over 400 active, high-priority investigations. These investigations included 120 Australians overseas either fighting with, or supporting, Islamist extremist groups in Iraq and Syria, and approximately 170 people in Australia supporting Syrian and Iraqi extremist groups. At least 32 Australian foreign fighters have been killed in Iraq and Syria since the conflicts began as a result of their involvement in those conflicts.⁴

The flow of both foreign fighters and finance to overseas conflicts, and the return of foreign fighters to Australia, remain priority concerns of the AFP and the intelligence agencies.

External

The external terrorist landscape also remains challenging, and the environment continues to evolve. Islamist terrorism experienced a resurgence as a result of instability following the Arab Uprisings, commonly referred to as the 'Arab Springs'. The rise of Islamic State of Iraq and the Levant (**ISIL**), in particular, has transformed the terrorism threat to Australia and Australian interests globally. The terrorism threat is now more diverse than it has ever been, with a growing cast of organisations, networks, and individuals, intent on directing and inspiring violence against Australia's interests.

The narratives underpinning terrorism threats to Australia are also evolving, but retain a focus on violence and violent confrontation. In part, the extremist narrative told by jihadists and Islamist terrorists hinges on the claim that Islam has been under attack and that the Muslim world has been subjugated by the West, with the help of corrupt governments and regimes in Muslim countries. The remedy, they propose, is violent confrontation. They argue that local governments are traditionally too strong to topple, or have been backed by the West. To them, terrorism is therefore a justified approach, especially against the West, to stop it from supporting these governments. Al Qaeda's (**AQ's**) attacks on the United States (**US**) in September 2001 were framed in such a narrative.

A more recent thread to this narrative has been developed by ISIL. Its story leapfrogs AQ's; in its view, it has already established an idyllic caliphate which is destined to reign over the world by force. Any questioning of ISIL's narrative attracts accusations of apostasy, and for ISIL's supporters, warrants engaging in indiscriminate murder.

For over a decade, the threat sources were organisations under pressure, such as AQ, trying to conduct terrorism from afar. But the landscape of terrorism has changed markedly over the last five years, resulting in a paradigm shift. A real threat continues to be posed by organisations intent on conducting attacks against Australia and other Western targets from a distance. Some aim for spectacular or mass casualty attacks. However, ISIL and its supporters can reach into Western societies with minimal effort, to encourage, inspire, and even order attacks. It is content with low level or 'retail' terrorism. Sporadic flurries of attacks by pro-ISIL operatives, at times acting alone, have become a new norm and more are to be expected.

⁴ Transcript of Proceedings, above n 1, 25–26; Duncan Lewis, 'Australia's Current Security and Intelligence Operating Environment' (speech delivered at the Security in Government Conference 2015, Canberra, 1 September 2015).

Much of the threat picture is associated with the foreign fighter phenomenon. The influx of foreign extremists to the Syrian conflict has been unprecedented in scale over duration. Various figures suggest over 20,000 foreign fighters have joined the fight in under four years. Most have gravitated to extremist groups there, with ISIL taking the lion's share. Many of these foreign fighters maintain contacts in their respective homelands, often using encrypted online tools. They openly encourage and call for attacks by sympathisers in their home countries.

In addition to foreign fighters, there has been a rise in propaganda glorifying indiscriminate violence. Australia figures periodically in such propaganda, either directly or indirectly, as a desirable target. Here, online platforms have revolutionised radicalisation. 'Broadcast' media such as online magazines, videos, and postings to social media, amplify the threat by romanticising violence and goading others to conduct it. Narrower casting is also in evidence: small online communities of extremists have burgeoned on encrypted social media platforms with similar effect, often preying on young sympathisers to engage in violence.

Throughout the Reporting Period, these trends were apparent. There were over 25 attacks in the West or against Western interests, resulting in over 300 deaths. One of these attacks took place in Australia, with the shooting of Curtis Cheng, discussed further below. Disruptions of planned attacks in Australia continued apace. Since 2014, nine plots were disrupted, but four attacks succeeded. These figures eclipse those for the preceding 20 years, when no attacks succeeded and four plots were disrupted.

Attacks during the Reporting Period had symbolic, as well as concrete effects. The attack in Orlando in June 2016 was the largest Islamist terrorism attack in the US since the attacks of September 2001, killing 49 people. The November 2015 attacks in Paris killed over 130; the largest terrorism toll in decades. The Brussels bombings in March 2016 were the most significant terror attacks in Belgium's history. The Jakarta attack in January 2016 aimed at both local and foreign targets, raising fears of a return to anti-Western attacks of the early 2000s.

During the Reporting Period, ISIL came under more pressure than ever before, with a consequent degradation in its territorial control in Syria, Iraq, and Libya. Its provision of services has suffered, as has its income. As news of foreign fighters going to join ISIL waned, news of deaths in foreign fighter ranks began to rise. However, the frequency of attacks in ISIL's name across the globe has drawn attention away from ISIL's setbacks.

The scale of the foreign fighter cohort and ISIL's successful propaganda are enduring problems. Many foreign fighters could return to their countries of origin, and some will retain violent extremist ideas. ISIL's narrative, as well as the broader anti-Western narrative it is nestled in, will inspire and legitimise acts of terrorism by sympathisers for years to come.

Counter-terrorism measures globally will continue to evolve to respond to the evolving threat picture. Plot disruptions throughout the West are now at an unprecedented rate, yet attacks continue to occur. These attacks are mostly by sympathisers who operate in relative isolation from established cells, and who attempt to avoid detection by intelligence and law enforcement agencies through various means. Even so, attacks occurred in Europe despite the fact some perpetrators were known to authorities, including for their extremism.⁵

⁵ The foregoing analysis is based upon information received from intelligence sources.

Legislative Developments

During the Reporting Period, the following significant bills and acts dealing with national security issues were either introduced to, or enacted by, the Parliament:

- The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 was introduced into the House of Representatives on 24 June 2015 and referred to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) for inquiry and report. The PJCIS reported on the Bill on 4 September 2015.⁶ The Bill was also reviewed by the Parliamentary Joint Committee on Human Rights (**PJCHR**), which reported on it on 11 August 2015,⁷ and the Senate Standing Committee for the Scrutiny of Bills (**SSCSB**), which reported on the Bill on 16 March 2016.⁸

The Bill, which became the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth), was passed on 3 December 2015. The Act provides for the renunciation or revocation of the Australian citizenship of those who hold one or more foreign citizenships alongside their Australian citizenship, and engage in terrorism or foreign-fighting-related conduct.

When giving consideration to the Bill prior to its passing, the PJCIS made recommendations pertaining to the scope and application of the Bill (ie, to what forms of offences and conduct it applies), the administrative application of the Bill, and the Bill's application to children. The Committee recommended that subject to its other recommendations, the Bill be passed.⁹

When considering the Bill, the PJCHR suggested that several of the measures under the Bill were incompatible with human rights law, and that the revised statement of compatibility did not provide sufficient evidence to demonstrate that the proposed measures were compatible with human rights requirements. Some of the committee members also took the view that the deprivation of citizenship from those who endanger the security of Australia is desirable and will help keep Australians safe from terrorism.¹⁰

⁶ See, PJCIS, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015).

⁷ See, PJCHR, Parliament of Australia, *Twenty-Fifth Report of the 44th Parliament: Human Rights Scrutiny Report* (2015).

⁸ See, SSCSB, Parliament of Australia, *Fourth Report of 2016* (2016).

⁹ See, PJCIS, above n 6.

¹⁰ See, PJCHR, above n 7; Parliament of Australia, *Human Rights Scrutiny Report: Thirty-Sixth Report of the 44th Parliament* (2016).

- The Counter-Terrorism Legislation Amendment Bill (No 1) 2015 was introduced into the Parliament on 12 November 2015 and referred to the PJCIS for inquiry and report. The PJCIS reported on the Bill on 15 February 2016.¹¹ The Bill was also considered by the SSCSB,¹² and partly considered by the PJCHR, although it did not end up commenting on the Bill.¹³ The Bill lapsed on 17 April 2016 with the proroguing of Parliament. However, the Government has reintroduced the Bill to the current Parliament in the form of the Counter-Terrorism Legislation Amendment Bill (No 1) 2016.

The Bill seeks to make a number of amendments to acts and legislative provisions relating to counter-terrorism, including the control order regime under the Commonwealth *Criminal Code* (including by reducing the age at which control orders may be imposed on individuals, from 16 to 14 years), monitoring and warrant powers under the *Crimes Act 1914* (Cth), and the use of information with security implications under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

When considering the Bill, the PJCIS made a number of recommendations, including recommendations pertaining to applying for control orders, monitoring controlees, and altering the thresholds for other orders and offences. The Committee recommended that, subject to its other recommendations being implemented, the Bill be passed.¹⁴ While the Bill was also considered by the SSCSB, it ultimately left most matters for determination by the Senate as a whole.¹⁵ Consideration was given to the Bill as part of the context for my reports on the control order regime to be dealt with later.

- The Australian Crime Commission Amendment (National Policing Information) Bill 2015 was introduced to the Parliament on 3 December 2015. The Bill was reviewed and reported on by the Senate Standing Committee on Legal and Constitutional Affairs (**SSCLA**) on 10 March 2016,¹⁶ and by the SSCSB on 2 March 2016,¹⁷ and became the *Australian Crime Commission Amendment (National Policing Information) Act 2016* (Cth), with the Bill passed by both Houses of Parliament on 4 May 2016.

This Act merged the Australian Crime Commission, which performed a specialist investigative role within the Commonwealth, with CrimTrac, which delivered and maintained national information sharing solutions for Australian law enforcement bodies. The new agency, known as the Australian Criminal Intelligence Commission (**ACIC**) and headed by the former Chief Executive Officer of the Australian Crime Commission, Mr Chris Dawson APM, commenced operations on 1 July 2016.

¹¹ See, PJCIS, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (2016).

¹² See, SSCSB, Parliament of Australia, *Third Report of 2016* (2016).

¹³ See, PJCHR, Parliament of Australia, *Thirty–Second Report of the 44th Parliament: Human Rights Scrutiny Report* (2015).

¹⁴ See, PJCIS, above n 11.

¹⁵ See, SSCSB, above n 12.

¹⁶ See, SSCLA, Parliament of Australia, *Australian Crime Commission Amendment (National Policing Information) Bill 2015 and the Australian Crime Commission (National Policing Information Charges) Bill 2015* (2016).

¹⁷ See, SSCSB, above n 12.

- The Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015 was introduced to the Parliament on 26 November 2015. The Bill was reviewed by the SSCLA, with their report being released on 3 February 2016.¹⁸ It was also considered by the PJCHR in their report of 2 February 2016,¹⁹ as well as the SSCSB in their reports of 3 February 2016, 24 February 2016, and 2 March 2016.²⁰ The Bill passed both houses of Parliament on 23 February 2016 and became the *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Act 2016* (Cth).

Prior to its passing, the SSCLA recommended that the Bill be passed,²¹ while the SSCSB recommended that additional safeguards be included relating to the use and disclosure of personal information.²²

Of particular relevance to the INSLM is that the Act amended the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) to expand information sharing among law enforcement and intelligence organisations both domestically and internationally.²³

The following further bills, acts, and instruments, that relate to security and are within the purview of the *Independent National Security Legislation Monitor Act 2010* (Cth) (**INSLM Act**) were introduced to, enacted by, or otherwise considered by, Parliament during the Reporting Period:

- The Criminal Code Amendment (Harming Australians) Bill 2013 was introduced to Parliament in December 2013, to make amendments to the *Criminal Code* to make it an offence to harm Australians overseas from 1 October 2002. It also sought to make harming of Australians prior to 1 October 2002 an offence, where other criteria are met also. During the Reporting Period, this bill was considered by the SSCLA, which expressed concerns regarding the Bill's retrospective application, the breadth of offences it sought to create, and the practical difficulties incumbent in enforcing it. The Committee ultimately recommended that further consultation take place before the Bill undergo consideration by the Senate.²⁴ However, the Bill lapsed with the proroguing of Parliament.
- A number of instruments making declarations and expanding the scope of sanctions pursuant to the *Autonomous Sanctions Act 2011* (Cth) and the *Charter of the United Nations Act 1945* (Cth) were considered by the PJCHR after they came into force.²⁵ The instruments sought to designate and declare individuals subject to legislative sanctions and powers, expand the basis upon which the Minister for Foreign Affairs can designate individuals, and expand the basis upon which individuals' conduct may be prohibited or deemed criminal. The PJCHR did not provide a conclusive view on the instruments, recommending that further information be provided to verify that the process of designation is proportionate to the stated objectives.²⁶

¹⁸ See, SSCLA, Parliament of Australia, *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015* (2016).

¹⁹ See, PJCHR, Parliament of Australia, *Thirty-Third Report of the 44th Parliament* (2016).

²⁰ See, SSCSB, Parliament of Australia, above n 12; *First Report of 2016* (2016); *Second Report of 2016* (2016).

²¹ See, SSCLA, above n 18.

²² See, SSCSB, Parliament of Australia, *First Report of 2016* (2016); *Second Report of 2016* (2016).

²³ *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Act 2015* (Cth) sch 4.

²⁴ See, SSCLA, Parliament of Australia, *Criminal Code Amendment (Harming Australians) Bill 2013* (2016), 5–9.

²⁵ The relevant instruments are listed in Appendix B.

²⁶ See, PJCHR, above n 19, 24–25.

Other Significant Developments

In July 2015, the then Prime Minister launched the Council of Australian Governments' (COAG) counter-terrorism strategy.²⁷ The strategy established co-operative arrangements for agencies at all levels of government to combat terrorism. The strategy includes five limbs:

1. challenging violent extremist ideologies;
2. stopping people from becoming terrorists;
3. shaping the global environment;
4. disrupting terrorist activity within Australia; and
5. effective response and recovery.

Most relevant for the INSLM are limbs 4 and 5. The strategy makes clear that protecting lives is the first priority of governments and that government agencies will act to disrupt an attack over the gathering of evidence for a successful prosecution where both objectives cannot be achieved.

Arrangements relevant to the strategy include the National Disruption Group, which is an AFP-led body consisting of a number of government agencies working together to develop and execute plans to divert and disrupt terrorist activities, to ensure national security is maintained where prosecutions may not be an option.

Also key to disruption arrangements and measures in Australia are the Joint Counter-Terrorism Teams (JCTTs), located in each Australian capital city and comprising Commonwealth and jurisdictional law enforcement and intelligence bodies (eg, the AFP, State and Territory law enforcement bodies, and ASIO) working together to investigate and disrupt prospective terrorism through conventional arrest and prosecution methods, together with available preventative remedies. Each JCTT is overseen by two management bodies: the Operations Co-ordination Group, which is responsible for the administrative and operational management of counter-terrorism operations undertaken by JCTTs; and Joint Management Committees, which provide the strategic direction and management for JCTTs.

These teams are also assisted by the Terror Financing Investigations Unit (TFIU), and the Returning Terrorism Suspects Team (RTST). The TFIU is another multi-agency unit with objectives pertaining to the means by which terrorists seek out and obtain financial resources, while the RTST is an AFP body whose role is to develop reception plans for the return of suspected foreign fighters from overseas conflict zones.

The individual participants in these bodies, in particular ASIO and the various police forces, still retain their powers and roles independent of the bodies.

On 10 August 2015, the Minister for Justice, the Hon Michael Keenan MP, launched the Australian Intervention Support Hub. The Hub is facilitated by the Australian National University and Deakin University, and will undertake research in relation to countering violent extremism by identifying international best practice in countering such extremism, and working with community organisations to develop effective, community-oriented programs to support individuals at risk of radicalisation. The Hub is part of a broader initiative undertaken by the Government as part of its

²⁷ See, COAG, *Australia's Counter-Terrorism Strategy: Strengthening Our Resilience* (2015).

2016–17 Budget to counter violent extremism. Additional funding to the AFP to establish a Community Diversion and Monitoring Team to prevent Australians from travelling overseas to engage in conflict, as well as other revisions and expansions to the Government’s program for countering violent extremism, were also included in the 2016–17 Budget.²⁸

On 2 October 2015, Curtis Cheng, a civilian employee of the New South Wales (NSW) Police force, was shot and killed by Farhad Halil Mohammad Jabar at Parramatta Police Station. Jabar, a 15 year old boy with no previously known links to terrorism, was himself shot and killed by police officers at the police station. This event is an example of the aforementioned threat posed by low-level attacks reported by Australia’s security agencies.

On 17 and 18 November 2015, Australia co-chaired the first Counter-Terrorism Financing Summit in the Asia-Pacific region in Sydney. The summit brought together more than 150 leaders and experts in counter-terrorism financing and financial intelligence to support efforts to combat terrorism financing and other serious financial crime.²⁹ Australia also co-hosted the second Summit in Bali, Indonesia, in August 2016.³⁰

At its meeting of 1 April 2016, COAG agreed to the development of a nationally consistent post-sentence preventative detention scheme for high risk terrorist offenders.³¹ In part motivated by the nearing conclusion of custodial sentences for several individuals convicted of terrorism offences 10 years ago, the scheme will enable convicted terrorists to be kept in prison after their conviction-based sentence of imprisonment ends. The rationale of the scheme is to protect the community from individuals who pose a high risk of re-offending, or have a need for continued rehabilitation.³² The Commonwealth has drafted and introduced legislation to establish this scheme, following consultation with the States and Territories.³³ This is likely to be controversial and will require careful scrutiny.

On 21 April 2016, the Prime Minister released Australia’s cyber security strategy.³⁴ That strategy is relevant to counter-terrorism but no new legislation is foreshadowed in it.

²⁸ See, Department of Parliamentary Services, *Briefing Book: Key Issues for the 45th Parliament* (Commonwealth of Australia, 2016) 174.

²⁹ Michael Keenan, ‘Australia’s CVE Approach and Experience on Deradicalisation and Rehabilitation of Extremist Individuals’ (paper presented at Malaysia International Conference on Deradicalisation and Countering Violent Extremism, Kuala Lumpur, Malaysia, 25 January 2016).

³⁰ See, Australian Transaction Reports and Analysis Centre, *Counter-Terrorism Financing Summit 2016*, Australian Transaction Reports and Analysis Centre <<http://www.austrac.gov.au/about-us/international-engagement/counter-terrorism-financing-summit-2016>>.

³¹ See, COAG, ‘COAG Communique’ (1 April 2016).

³² The approach of this scheme is however to be contrasted against the scheme used by the United Kingdom, where to ensure public safety after a convicted individual’s imprisonment ends, the individual is required to comply with substantial notification and reporting requirements. The individual commits an offence if they fail to comply with the notification and reporting requirements imposed: see, *Counter-Terrorism Act 2008* (UK) pt 4.

³³ See, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth).

³⁴ See, Department of the Prime Minister and Cabinet, *Australia’s Cyber Security Strategy* (Commonwealth of Australia, 2016).

On 29 April 2016, the Government tabled the *Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* in Parliament. This report made a number of recommendations which the Government has indicated it will implement, including:

- overhauling secrecy and access provisions of relevant legislation to enable the Australian Transaction Reports and Analysis Centre and its partner agencies to share financial intelligence information in real-time;
- expanding police and border officials' powers to search and seize cash on suspicion of money laundering, terror financing, or other serious crimes, where there has been a breach of reporting requirements under relevant legislation; and
- establishing a working group to consider international developments in combatting terrorism financing, and considering the appropriateness of these developments for Australia.³⁵

The implementation of these measures will require consideration.

In May 2016, the NSW Parliament passed the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW). This Act enables the NSW Supreme Court or District Court, upon application from the Commissioner of the NSW Police, the NSW Office of Public Prosecutions, or the NSW Crime Commission, to issue a 'serious crime prevention order'.

The primary grounds for issuance of such an order is found in s 5 of the Act, with the key elements being in s 5(1)(b)(ii) and (c) (ie, the person has been involved in serious crime-related activity for which they have not been convicted, or the court is satisfied there are reasonable grounds to believe that the making of the order would protect the public). There does not appear to be any significant guidance or restriction in the Act for what requirements or restrictions may be imposed by a court issuing such an order, save for some basic limitations in s 6(2) protecting rights such as that against self-incrimination and legal professional privilege.

Whilst the Act does not appear to have an explicit focus on counter-terrorism, with most of the associated materials such as the Minister's second reading speech giving more attention to other areas of crime such as organised crime,³⁶ the expansive range of crimes these orders could cover clearly include terrorism-related activities.

³⁵ See, Michael Keenan, 'Strengthening AML/CTF Capability to Tackle New Threats' (Media Release, 29 April 2016).

³⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 March 2016, 60 (Troy Grant).

Also in May 2016, the NSW Parliament passed the *Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016* (NSW), which amended the *Terrorism (Police Powers) Act 2002* (NSW). The amendment establishes a new hybrid regime, combining elements of preventative detention with investigation processes (similar to that present in the United Kingdom), which sits alongside the preventative detention regime that was already in existence in NSW. Of particular note, the amendment establishes a new power for police in NSW to arrest, without a warrant, individuals as young as 14, if there are reasonable grounds for suspecting that:

- the person has committed a terrorist act;
- the person will commit a terrorist act;
- the person is or has been involved in preparing or planning for a terrorist act; or
- the person possesses a thing connected with the commission of, preparation for, or planning for, a terrorist act.³⁷

For all four of the criteria listed above, the relevant terrorist act must either have occurred within the 28 days preceding the arrest, or the arresting officer must have reasonable grounds to suspect that the terrorist act could occur at some time in the next 14 days, and the arresting officer must be satisfied that the detention resulting from the arrest will substantially assist in responding to, or preventing, the relevant terrorist act.³⁸ A person arrested under this power may be held for up to four days initially, or 14 days upon the issuance of a warrant by a judge acting pursuant to a specific appointment by the NSW Attorney-General, during which time the person may be subjected to questioning and normal investigation procedures.³⁹

These two NSW initiatives have provoked considerable controversy. There were no proposals for similar Commonwealth legislation at the time of writing this annual report.

Developments in Jurisprudence

Appendix C contains a discussion of some relevant cases decided and journal articles published during the Reporting Period.

³⁷ *Terrorism (Police Powers) Act 2002* (NSW) s 25B(1).

³⁸ *Terrorism (Police Powers) Act 2002* (NSW) s 25E(1).

³⁹ *Terrorism (Police Powers) Act 2002* (NSW) ss 25G, 25H, 25I.

Activities during the Reporting Period:

Reports

During the Reporting Period, reports were completed on three matters referred by Prime Minister Tony Abbott:

- A report concerning the impacts on journalists of s 35P of the *Australian Security and Intelligence organisation Act 1979* (Cth)(**ASIO Act**) was given to the Prime Minister on 21 October 2015 and tabled on 2 February 2016.⁴⁰ Section 35P is a secrecy provision relating to Australian Security Intelligence Organisation (**ASIO**) special intelligence operations. The report concluded that a secrecy provision is justified but identified problems with the section as drafted. Recommendations for amendments to cure the problems were made. The Government accepted and agreed to implement all of the recommendations in the report.
- The 2013 COAG Review of Counter-Terrorism Legislation had recommended additional safeguards be introduced to the Commonwealth *Criminal Code* control order regime. Some had not been introduced. I was to report as to whether those should be introduced. The report into additional safeguards in relation to the control order regime was delivered in two parts. The first part dealt with the advisability of introducing a system of ‘special advocates’ into the regime and was timed to assist the PJCIS complete its report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2015.⁴¹ The report considered that bill and concluded that if one aspect of it were passed, then a system of special advocates should be introduced. The report was given to the Prime Minister on 29 January 2016 and tabled on 5 February 2016. Part 2 of the report dealing with the remaining COAG recommendations was given to the Prime Minister on 13 April 2016 and tabled in Parliament on 5 May 2016.⁴² Some COAG recommendations were supported, and some were not.

At the time of writing this annual report, no response had been received from the Government in relation to my recommendations. However, the PJCIS adopted my recommendations concerning the creation of a system of special advocates.⁴³

- I completed a report into certain matters regarding the impact of amendments to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 on 2 May 2016. Due to the proroguing of Parliament on 17 April 2016, the report had not been tabled at the time of writing this annual report. However, I understand that the Prime Minister intends to table the report by 13 October 2016.

⁴⁰ See, Roger Gyles, *Report on the Impact on Journalists of Section 35P of the ASIO Act* (Commonwealth of Australia, 2015).

⁴¹ See, Roger Gyles, *Control Order Safeguards — (INSLM Report) Special Advocates and the Counter Terrorism Legislation Amendment Bill (No 1) 2015* (Commonwealth of Australia, 2016).

⁴² See, Roger Gyles, *Control Order Safeguards: Part 2* (Commonwealth of Australia, 2016).

⁴³ See, PJCIS, above n 11, 19–86.

In May 2016, I commenced a review of certain questioning and detention powers in relation to terrorism, focusing on those powers contained in div 3 of pt III of the ASIO Act, pt IC of the *Crimes Act 1914* (Cth), and the coercive questioning powers of the Australian Crime Commission (now the ACIC) under the *Australian Crime Commission Act 2002* (Cth).

In June 2016, I commenced a review of certain pieces of legislation and powers enacted to address perceived terrorist threats within, at, and beyond, Australia's borders. This will include a review of the changes made to legislation in connection with the terrorist threat posed by Australians who may travel to participate in conflicts abroad, with a focus on Australians proposing to travel to, or returning from, conflict zones in Iraq and Syria. Legislative features within the scope of this review will include:

1. offences relating to entering and remaining in 'declared areas' under div 119 of the *Commonwealth Criminal Code*;
2. the power of the Minister for Foreign Affairs to suspend travel documents of Australian nationals, and require the surrender of travel documents from foreign nationals in Australia, under s 22A of the *Passports Act 2005* (Cth), and s 15A of the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth), respectively;
3. the power of the Minister for Immigration to cancel visas under s 134B of the *Migration Act 1958* (Cth);
4. the requirements for people seeking to enter or exit Australia to provide evidence of their identity pursuant to ss 166, 170, and 175, of the *Migration Act 1958* (Cth);
5. the requirements for aircraft and ship operators to report details of passengers and crew under ss 245L, and 245LA, of the *Migration Act 1958* (Cth);
6. the powers of the Australian Border Force to detain persons for suspicion of committing certain offences, or for reasons related to national security or security of a foreign country, pursuant to ss 219ZJB and 219ZJCA of the *Customs Act 1901* (Cth);
7. the regimes for seizing bogus documents under pt 9 of the *Migration Act 1958* (Cth) and pt 3 div 1 of the *Australian Citizenship Act 2007* (Cth); and
8. the revocation of citizenship pursuant to ss 33AA, 35, and 35A, of the *Australian Citizenship Act 2007* (Cth).

Non-Reporting Activities:

In addition to the reporting activities discussed above, the following activities were undertaken by the Monitor and advisers during the Reporting Period:

- monitored proposals for changes to the counter-terrorism and national security legislation;
- monitored events that impinge upon the counter-terrorism and national security legislation;
- maintained the administrative and legal support arrangements for the office of the INSLM in consultation with relevant officers from the Department of the Prime Minister and Cabinet;
- met, liaised with, and received briefings from, interested people and groups inside and outside government, separately from any particular inquiry (particularly the responsible agencies and those having oversight of them: see, Appendix D);

- attended briefings from a number of government agencies in relation to various points affecting national security relevant to the INSLM role;
- attended a number of court hearings applying and testing the limits and application of security legislation;
- prepared for, and attended, Senate Estimates hearings on 19 October 2015 and 8 February 2016;
- attended a private hearing of the PJCIS for its inquiry into the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 on 1 February 2016;
- prepared briefing materials apart from any current review for matters within jurisdiction;
- arranged the restructuring and improvement of the INSLM website, from a page within the Department of the Prime Minister and Cabinet’s website, to a larger, independent website containing relevant information about the office, its functions, and documentation and reports related to INSLM reviews; and
- settled an indicative work plan for the future which, in summary, consists of:
 - completing the reviews commenced in May and June 2016 referred to above;
 - conducting a review of warrants available for use by the AFP and ASIO, and ASIO special intelligence operations;
 - conducting a review of pre and post-criminal processes, including disruption and prevention powers, preventative detention orders, stop and search powers, control orders, and potentially post-conviction detention orders;
 - conducting a review of ch 5 of the Commonwealth *Criminal Code*;
 - conducting a review of provisions of the *Crimes Act 1914* (Cth) relating to bail and non-parole periods;
 - conducting a review of pt 4 of the *Charter of the United Nations Act 1945* (Cth), and in particular, the legislation relating to the financing of terrorism;
 - conducting a review of matters related to cyber security, including access to metadata;
 - conducting a review of provisions related to the suspension and cessation of welfare payments of those connected, or suspected of being connected, with terrorism;
 - conducting a review of the provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth);
 - conducting a review of the Defence Force call out powers;
 - keeping a watching brief on the activities of law enforcement and security agencies as defined in s 6 of the INSLM Act in relation to terrorism and terrorism-related activity;
 - keeping a watching brief on the domestic and international security landscape; and

- keeping a watching brief on relevant legislative and administrative proposals relevant to counter-terrorism.

This is a formidable body of work, particularly for a part-time Monitor. The process of review of legislation may vary in detail from topic to topic, and from Monitor to Monitor, but there are certain fundamentals flowing from an evidence-based approach.

The administration of the relevant legislation by the responsible agency or agencies needs to be closely examined, including the experience of those affected by the legislation. A public announcement of the review with a call for submissions will normally be made; briefings by and the production and examination of information by the agencies will be received; consideration will be given to submissions received, often from a range of interested parties and bodies; evidence and argument will be taken in private and public hearings. Knowledge of the current terrorist threat is necessary. The history of the legislation under consideration and the commentary upon it must be understood. Actual or foreshadowed cognate State and Territory legislation needs to be considered together with relevant international instruments and experience.

Reviews of some topics are subject to a statutory time limit of 7 September 2017.⁴⁴

None of the topics of review are trivial and all require the balancing of security against individual and community rights and freedoms.

Completion of such a program in an acceptable timeframe will require more support than is presently available.

Office Management:

In November 2015, a Senior Adviser was at last appointed and commenced duty. He joined the seconded officer from the Australian Government Solicitor referred to in my last annual report. In December 2015 and March 2016 respectively, two advisers joined the staff (the latter of the two on secondment from another Commonwealth agency). In May 2016, the secondment of the officer of the Australian Government Solicitor concluded. In July 2016, the first of the aforementioned two advisers left my staff, and the secondment of the second of the two advisers will end on 31 October 2016.

The assistance of these additional advisers has increased the capacity to carry out the functions of the office. In particular, their assistance has increased the capacity to engage with relevant parties and remain abreast of developments related to Australia's counter-terrorism legislation generally. More work is needed in conjunction with the Attorney-General and the Department of the Prime Minister and Cabinet to develop the office of the INSLM to the point where it has the capacity to satisfactorily support the Monitor in carrying out the statutory duties and functions of the Monitor. An effective ongoing office is also necessary to ensure the seamless departure of one Monitor, and replacement with another so as to avoid the administrative problems that I encountered after my appointment that were outlined in my last annual report.

⁴⁴ See, INSLM Act s 6(1B).

Appendix A

Detailed Annual Report Requirements

Section 29 of the INSLM Act sets out the requirements for INSLM annual reports.

It provides that the INSLM must prepare and give to the Prime Minister a report (an annual report):

- relating to the performance of the functions set out in s 6(1)(a) and (b) of the INSLM Act; and
- containing such details relating to the performance of the function set out in s 6(1)(c) of the INSLM Act as the INSLM considers appropriate.

Section 6(1)(a)–(c) of the INSLM Act (the subject of the required annual report) provides as follows:

6 Functions of the Independent National Security Legislation Monitor

- (1) The Independent National Security Legislation Monitor has the following functions:
 - (a) to review, on his or her own initiative, the operation, effectiveness and implications of:
 - (i) Australia’s counter-terrorism and national security legislation; and
 - (ii) any other law of the Commonwealth to the extent that it relates to Australia’s counter-terrorism and national security legislation;
 - (b) to consider, on his or her own initiative, whether any legislation mentioned in paragraph (a):
 - (i) contains appropriate safeguards for protecting the rights of individuals; and
 - (ii) remains proportionate to any threat of terrorism or threat to national security, or both; and
 - (iii) remains necessary;
 - (c) if a matter relating to counter-terrorism or national security is referred to the Monitor by the Prime Minister—to report on the reference;

Section 4 of the INSLM Act defines as follows the term ‘counter-terrorism and national security legislation’:

counter-terrorism and national security legislation means the following provisions of Commonwealth law:

- (a) Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* and any other provision of that Act as far as it relates to that Division;
- (b) Part 4 of the *Charter of the United Nations Act 1945* and any other provision of that Act as far as it relates to that Part;
- (c) the following provisions of the *Crimes Act 1914*:
 - (i) Division 3A of Part IAA and any other provision of that Act as far as it relates to that Division;

- (ii) sections 15AA and 19AG and any other provision of that Act as far as it relates to those sections;
- (iii) Part IC, to the extent that the provisions of that Part relate to the investigation of terrorism offences (within the meaning of that Act), and any other provision of that Act as far as it relates to that Part;
- (d) Chapter 5 of the *Criminal Code* and any other provision of that Act as far as it relates to that Chapter;
- (e) Part IIIAAA of the *Defence Act 1903* and any other provision of that Act as far as it relates to that Part;
- (f) the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

Section 6(1)(a) and (b) sets out what have been referred to as the ‘standing’ functions of the INSLM, which in summary involve considering the effectiveness, appropriateness (including compliance with international obligations) and necessity of the ‘counter-terrorism and national security laws’; a term defined in s 4 of the INSLM Act and set out above. Section 6(1)(c) refers to the INSLM’s function of reporting on any reference from the Prime Minister.

The annual report must be given to the Prime Minister as soon as practicable after 30 June in each financial year and, in any event, by the following 31 December. By implication, the relevant reporting period for each annual report is the relevant financial year (ending on 30 June).

A declassified annual report must also be given to the Prime Minister, where appropriate. The Prime Minister must cause a copy of each annual report (or of the declassified annual report, where there is one) to be presented to each House of the Parliament within 15 sitting days of that House after the day on which the Prime Minister receives the report. This is the mechanism by which annual reports are required to be made public.

The standing functions of the INSLM, under s 6(1)(a) and (b) of the INSLM Act, are to review the counter-terrorism and national security legislation and any other law of the Commonwealth to the extent that it ‘relates to’ that legislation. Such other laws might, for example, encompass laws (such as migration and passport laws) governing border control action taken for security reasons, and telecommunications interception laws. Those functions need to be viewed in the context of the INSLM Act as a whole — for example, ss 3 and 7–10 all affect how these functions should be performed, according to the circumstances. The emphasis of the review function is on the practical operation of legislation (see, in particular s 9 of the INSLM Act). The INSLM Act also expressly envisages that an annual report may contain details relating to any matter referred by the Prime Minister to the INSLM.

Appendix B

Instruments Considered by the PJCHR

Below is a list of the instruments made under the *Autonomous Sanctions Act 2011* (Cth) and the *Charter of the United Nations Act 1945* (Cth) considered by the PJCHR during the Reporting Period. Each of these instruments did one of the following:

- designated and declared individuals subject to the autonomous sanctions regime under the *Autonomous Sanctions Act 2011* (Cth) and the *Autonomous Sanctions Regulations 2011* (Cth);
- designated individuals subject to the powers under the *Charter of the United Nations Act 1945* (Cth) by reference to a United Nations Security Council resolution or decision;
- expanded the basis on which the Minister for Foreign Affairs can designate an individual under the *Autonomous Sanctions Regulations 2011* (Cth);
- amended the basis on which a person is prohibited from making assets available to designated persons or expanded the basis on which a person will commit an offence if they make an asset available to a designated person; or
- expanded the definition of 'controlled asset' to enable the assets of a person acting on behalf of a designated person to be frozen.

Instruments:

- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 [F2013L00477];
- Charter of the United Nations Legislation Amendment Regulation 2013 (No. 1) [F2013L00791];
- Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2013 (No. 1) [F2013L00789];
- Charter of the United Nations (Sanctions – the Taliban) Regulation 2013 [F2013L00787];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 (No. 2) [F2013L00857];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) Amendment List 2013 [F2013L00884];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment List 2013 (No. 1) [F2013L01312];
- Autonomous Sanctions Amendment Regulation 2013 (No. 1) [F2013L01447];
- Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Amendment Regulation 2013 (No. 1) [F2013L01384];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Democratic People's Republic of Korea) Amendment List 2013 [F2013L02049];

- Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Amendment List 2014 (No.2) [F2014L00970];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2014 [F2014L01184];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe 2014 [F2014L00411];
- Autonomous Sanctions (Designated and Declared Persons Former Federal Republic of Yugoslavia) Amendment List 2014 [F2014L00694];
- Autonomous Sanctions Amendment (Ukraine) Regulation 2014 [F2014L00720];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) List 2014 [F2014L00745];
- Charter of the United Nations Legislation Amendment (Central African Republic and Yemen) Regulation 2014 [F2014L00539];
- Charter of the United Nations (Sanctions – Yemen) Regulation 2014 [F2014L00551];
- Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2014 (No. 2) [F2014L00568];
- Charter of the United Nations Legislation Amendment (Sanctions 2014 Measures No. 1) Regulations 2014 [F2014L01131];
- Charter of the United Nations Legislation Amendment (Sanctions 2014 – Measures No. 2) Regulation 2014 [F2014L01701];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Democratic People's Republic of Korea) Amendment List 2015 [F2015L00061];
- Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Amendment List 2015 (No. 1) [F2015L00224];
- Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2015 (No. 2) [F2015L00216];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment List 2015 (No. 1) [F2015L00227];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Libya) Amendment List 2015 (No. 1) [F2015L00215];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) Amendment List 2015 (No. 1) [F2015L00217];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2015 (No. 1) [F2015L00218];
- Charter of the United Nations (Sanctions – South Sudan) Regulation 2015 [F2015L01299]; and
- Charter of the United Nations (Dealing with Assets) Amendment (South Sudan) Regulation 2015 [F2015L01300].

Appendix C

Developments in Jurisprudence

Cases

During the Reporting Period, a number of court cases took place which engaged counter-terrorism legislation, and contributed to the jurisprudence in the field.

Mr Alqudsi was the subject of a number of cases throughout the Reporting Period. Mr Alqudsi was committed for trial for several offences against s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (**Foreign Incursions Act**), for allegedly providing services to several individuals to assist them to travel to Syria and engage in foreign hostilities.

In *Alqudsi v the Commonwealth* [2015] NSWSC 1222, Mr Alqudsi challenged the constitutional validity of s 7(1)(e) of the Foreign Incursions Act, notably arguing that s 7(1)(e) did not sufficiently pertain to the external affairs of the Commonwealth, and that s 7(1)(e) was not proportionate to the objects it sought to achieve. He accordingly claimed that the section's reliance upon the External Affairs Power (**EAP**)⁴⁵ for constitutional validity was flawed.

Justice Adamson rejected Mr Alqudsi's arguments, finding that s 7(1)(e), in prohibiting individuals from engaging in foreign hostilities and thus upholding the principles of sovereignty, equality of States, and non-intervention, sufficiently pertained to the Commonwealth's external affairs for the provision to rely upon the EAP for constitutional validity.⁴⁶ Her Honour further held that the issue of proportionality was not relevant to a finding of constitutional validity for this form of reliance upon the EAP.⁴⁷

Mr Alqudsi subsequently appealed from Adamson J's decision to the NSW Court of Appeal, in *Alqudsi v Commonwealth of Australia* [2015] NSWCA 351. The Court of Appeal upheld Adamson J's ruling as being correct, albeit pursuant to some disagreement with parts of Adamson J's reasoning.

While the Foreign Incursions Act was repealed in December 2014, there are provisions in the Commonwealth *Criminal Code* which prohibits the same forms of conduct in similar terms to s 7(1)(e).⁴⁸ Accordingly, it is likely that the findings of Adamson J and the Court of Appeal will be influential in the understanding and application of those *Criminal Code* provisions.

In *R v Alqudsi* [2015] NSWSC 1615, Mr Alqudsi challenged the validity of his indictment, on the basis that the Attorney-General's consent, provided to enable Mr Alqudsi's committal, referred to 'committal proceedings' (a phrase used by the *Criminal Procedure Act 1986* (NSW)), as opposed to 'commitment' (the term used in the Foreign Incursions Act under which the permission was required). Justice Adamson rejected this challenge on the basis that s 68 of the *Judiciary Act 1903* (Cth) makes applicable State laws (including those relevant for commitment for trial) to prosecutions for Commonwealth offences,⁴⁹ and so found that use of the term contained in the NSW legislation did not render the permission invalid.

⁴⁵ See, *Australian Constitution* s 51(xxix).

⁴⁶ See, [139].

⁴⁷ See, [130]–[132].

⁴⁸ See, *Criminal Code* ss 119.4, 119.5, 119.6, 119.7.

⁴⁹ See, [18]–[19].

In that case, Mr Alqudsi also challenged the validity of three search warrants issued in relation to his case, on the basis that:

1. the first page of each warrant issued under div 4 of the *Telecommunications (Interception and Access) Act 1979* (Cth) was not signed;
2. each of the aforementioned warrants effectively described the offences of which Mr Alqudsi was charged in the singular, rather than the plural (noting Mr Alqudsi was then charged with eight offences, rather than one); and
3. there were deficiencies in the signing of three warrants issued under s 3E of the *Crimes Act 1914* (Cth).

Justice Adamson rejected the first two challenges, noting that the legislation did not explicitly require the warrants to be signed, or for detailed descriptions of the offences to be provided in the warrant. Her Honour accordingly upheld the validity of the warrants on the basis that the Court was loathe to impose additional, unnecessary administrative requirements on warrants. In respect of the description of the offences, her Honour noted that the requirement is that the offence be identified in a conceptual sense, sufficient to determine if the offence is a ‘serious offence’; it is not necessary for the ‘factual ingredients’ of the offence to be stated.⁵⁰

Justice Adamson found that the deficiencies in the signing of the warrants issued under s 3E of the *Crimes Act 1914* (Cth) did not invalidate two of the three warrants, but invalidated the third. Of relevance to the third warrant for present purposes, her Honour found that due to the absence of a saving provision similar to those found in other regimes for search warrants (which provide that errors of form do not invalidate warrants), and the impositions on personal rights warrants permit, the search warrant should not be treated as being akin to other documents such as wills or deeds, where the error (which did not go to the substance of the document) could be treated as having no effect on validity.⁵¹

In November 2015, Mr Alqudsi sought an order from the NSW Supreme Court that his trial be heard by a judge alone, without a jury. This application eventually became the subject of *Alqudsi v the Queen* [2016] HCA 24, essentially questioning whether an order for a judge-only trial could be made pursuant to State legislation (in this case, s 132 of the *Criminal Procedure Act 1986* (NSW)), under s 68 of the *Judiciary Act 1903* (Cth) (which confers federal jurisdiction on State and Territory courts to try offences against laws of the Commonwealth using State and Territory procedures), consistently with s 80 of the *Constitution* (which provides that, *inter alia*, ‘[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury’).

The majority of the Full Court of the High Court (French CJ dissenting), consistently with previous case authority, held that pursuant to s 80 of the *Constitution*, all indictable offences against Commonwealth laws must be tried by a jury, and that State and Territory legislation enabling judge-only trials could not be applied to remove the requirement for a jury. This decision of the High Court is relevant in the counter-terrorism context, noting that most offences relating to terrorism (at least within the INSLM’s remit) are indictable offences against laws of the Commonwealth.

⁵⁰ [27].

⁵¹ [54]–[62].

Following these various challenges and rulings, the trial of Mr Alqudsi finally commenced on 22 June 2016 in the NSW Supreme Court. While the jury's verdict was not handed down until after the Reporting Period ended (ie, 12 July 2016), it is noted that he was found guilty of all seven of the charges he was indicted on, and on 1 September 2016, Mr Alqudsi was sentenced to serve eight years in prison, with a non-parole period of six years.

Throughout the Reporting Period, a number of minors were arrested and charged with terrorism offences against Commonwealth laws. For one, the initiating processes for a trial commenced during the Reporting Period, while at the time of writing this annual report, the others were awaiting trial. Some of those awaiting trial made bail applications during the Reporting Period.

On 1 June 2015, the Children's Court of Victoria, hearing the first ever instance of a minor being charged with offences against ss 101.4 and 101.6 of the Commonwealth *Criminal Code* in Victoria, held that 'exceptional circumstances' existed so as to refuse to hear the matter summarily, and instead raised the matter to a committal hearing pursuant to s 356 of the *Children, Youth and Families Act 2005* (Vic).⁵² This was predominantly on the basis that the Children's Court lacked adequate sentencing jurisdiction to deal justly with the accused minor, K.

K subsequently sought judicial review of the Children's Court's decision before the Victorian Supreme Court, submitting that the Children's Court erred in making this decision, particularly as K's alleged conduct represented relatively minor forms of the offences charged. Justice Forrest of the Supreme Court, noting the established principles that 'exceptional circumstances' must be assessed on a case by case basis, and that the inadequacy of the Children's Court's sentencing jurisdiction itself constitutes an exceptional circumstance sufficient to justify the uplifting of a matter, held that it was 'not only open to [the Children's Court] to conclude that the relevant exceptional circumstances existed, the circumstances... demanded that conclusion'.⁵³

In December 2015, K entered a plea of guilty to the offences charged, and K was subsequently arraigned in the Victorian County Court. At the time of writing this report, K was awaiting the result of a plea hearing which took place in September 2016.

Four other minors were charged with terrorism offences during the Reporting Period. Of those four, three sought, and two eventually obtained, bail.

For individuals charged with terrorism offences, there is a presumption against bail, and an onus on the accused to establish that there are exceptional circumstances warranting the granting of bail before bail may be granted.⁵⁴ The number of adults charged with terrorism offences that have been refused bail (including Ahmad Naizmand, discussed further below) demonstrates that this is a difficult onus to discharge. Yet a comparatively high proportion of minors have recently been granted bail (admittedly, only on appeal).

⁵² See, *K v Children's Court of Victoria* [2015] VSC 645.

⁵³ [35].

⁵⁴ *Crimes Act 1914* (Cth) s 15AA.

One minor who obtained bail was NK. NK was initially refused bail by the NSW Children’s Court after it found that exceptional circumstances did not exist. NK then made a further application for bail to the NSW Supreme Court, which found that exceptional circumstances did exist. In making this finding, the Court held that an accused’s youth in this context is one of many factors ‘to which a court must give consideration’.⁵⁵ In this connection, Hall J also noted that ‘depending on the evidence, in some cases the possible vulnerability of youth to adult persuasion or influence may be a relevant consideration in a determination as to whether exceptional circumstances... exist’,⁵⁶ and that in this case, the vulnerability arising from the youth of NK independently provided the basis for a finding of exceptional circumstances, despite other supportive evidence (including the ‘deleterious effects of detention’ posed by remand) being provided.⁵⁷

Similar reasoning was employed by the NSW Supreme Court in another bail application by a minor heard in January 2016. In this case,⁵⁸ one of the reasons for finding that exceptional circumstances existed was the effect of influential adults upon the applicant in view of his youth and impressionability.

Another case was heard in May 2016 by the NSW Children’s Court.⁵⁹ Bail was denied on the basis that exceptional circumstances were not demonstrated, despite the applicant’s youth. The presiding magistrate distinguished this case from those discussed above. In this case, the applicant was alleged to have acted alone in respect of the claimed offence, rather than being subject to the influence of adults.

Ahmad Naizmand (who was not a minor) was charged with an offence against s 104.27 of the Commonwealth *Criminal Code* for breaching a condition of the control order that he was subject to, by accessing certain forms of prohibited videos on the internet. He subsequently made an application for bail in June 2016.

The judgment of Harrison J, in finding that exceptional circumstances did not exist, measured the applicant’s circumstances, at least in part, by reference to others accused of terrorism offences, and not the population or individuals accused of criminal offences generally. Justice Harrison found that Mr Naizmand’s custodial conditions, harsh as they were, were not exceptional, as many individuals charged with terrorism offences were subject to similarly harsh treatment.⁶⁰

In *Gaughan v Causevic (No 2)* [2016] FCCA 1693, the AFP sought to confirm (subject to some variation) an interim control order previously imposed on Harun Causevic. After considering the relevant evidence, over opposition, Judge Hartnett confirmed the order, finding on the balance of probabilities that confirming the interim control order would substantially assist in preventing a terrorist act.⁶¹

⁵⁵ *R v NK* [2016] NSWSC 498, [34] (Hall J).

⁵⁶ [41].

⁵⁷ [48]–[49].

⁵⁸ This case cannot be discussed in depth for legal reasons.

⁵⁹ This case also cannot be discussed in depth for legal reasons.

⁶⁰ *R v Naizmand* [2016] NSWSC 836, [39]–[44] (Harrison J).

⁶¹ [175].

This was the first time the confirmation of an interim control order had been comprehensively challenged. A point at issue arose because the rules of evidence governing an application for an interim control order differ from those governing an application for confirmation. The upshot, at least in this case, was that significant portions of the evidence was ruled inadmissible. Judge Hartnett also examined the substantive provisions governing the basis for, and the content of, a control order. This case will be considered when the control order regime is further examined in due course pursuant to the INSLM Act.

On 10 March 2016, the High Court of Australia again revisited the issue of compulsory questioning of persons arguably involved in the criminal process.⁶² In this case, persons to be questioned were suspected of being involved in the commission of criminal offences, but not charged. The challenge to the questioning depended upon the construction of the Victorian *Independent Broad-Based Anti-Corruption Commission Act 2011*, rather than any constitutional question. The decisions in *X7 v Australian Crime Commission* (2013) 248 CLR 92, *Lee v the Queen* (2014) 253 CLR 455, and *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 320 ALR 448, were discussed and the challenge rejected as the principles discussed in these cases did not apply pre-charge.

Journals

Three journal articles relating to counter-terrorism and national security were published during the Reporting Period. Firstly, following the Government's announcement of its intention to introduce a post-sentence preventative detention regime, some of the implications of such a scheme were considered.⁶³ Secondly, the Commonwealth control order regime was critically analysed.⁶⁴ Thirdly, the scope and application of s 80.2C of the Commonwealth *Criminal Code* was examined.⁶⁵

⁶² See, *R v Independent Broad-Based Anti-Corruption Commissioner* [2016] HCA 8.

⁶³ See, Charisse Smith and Mark Nolan, 'Post-Sentence Continued Detention of High-Risk Terrorist Offenders in Australia' (2016) 40 *Criminal Law Journal* 163.

⁶⁴ See, Laura Bourke, 'Preventing Justice? A Principled Approach to the Commonwealth Control Order Regime' (2015) 40 *University of Western Australia Law Review* 306, 316, 319.

⁶⁵ See, Benjamin Brooks, 'Treason, Terrorism and Imprecision: Locating s 80.2C of the *Criminal Code* (Cth) in the Taxonomy of Crimes Against the State' (2016) 38 *Sydney Law Review* 121.

Appendix D

People and groups with whom the INSLM met during the Reporting Period

The INSLM met with following people and groups (in no particular order):

- representatives of the Law Council of Australia;
- representatives of the Attorney–General’s Department;
- representatives of the Commonwealth Director of Public Prosecutions;
- representatives of the Australian Security Intelligence Organisation;
- representatives of the Australian Federal Police;
- representatives of the Department of the Prime Minister and Cabinet;
- the Hon James Allsop AO QC, Chief Justice of the Federal Court of Australia;
- the Parliamentary Joint Committee on Intelligence and Security;
- representatives of the Department of Immigration and Border Protection;
- the Hon Margaret Stone, Inspector General of Intelligence and Security.

