



AFP

AUSTRALIAN FEDERAL POLICE



Independent National Security Legislation Monitor

2017 Statutory Deadline
Review

(Review of Stop, Search
and Seize Powers;
Declared Areas; and
Control Orders and
Preventative Detention
Orders)

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Submission by the
Australian Federal Police

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Introduction

The introduction of a number of specialised counter-terrorism laws in 2005 recognised the limitations of the criminal justice framework in dealing with the unique and unpredictable nature of the terrorist threat, and the potentially catastrophic consequences of a terrorist attack on the Australian community.

2. In particular, the laws recognised that the dynamic nature of the terrorist threat environment meant that preventative measures were necessary, as well as traditional criminal justice processes.
3. The focus on prevention of terrorist attacks means that police may need to move to overt action quickly in order to disrupt terrorist attacks or terrorist attack planning. Early overt action can mean that, while there is strong intelligence to indicate that a person poses a continuing terrorist threat, insufficient evidence is available to support charging people with an offence.
4. The current counter-terrorism legislative framework is necessary to combat the ongoing threat of, in particular, wide-scale organised terrorist attacks. However, the changing threat environment in Australia will continue to test the limits of the current framework.

The current threat environment

5. In 2005, the terrorist threat in Australia came primarily from large-scale operations involving substantial, organised networks. Laws were crafted to address this threat. While it is necessary to remain vigilant against the threat of a large-scale terrorist attack, it is important that counter-terrorism laws also address new and emerging threats.
6. The landscape of terrorism has changed. A number of factors have led to this change, including:
 - i. Changes in technology, including the advent of the internet as a tool for radicalisation;
 - ii. Increasing globalisation;
 - iii. The increase in Australians going offshore to join conflicts in Syria and Iraq.
7. In recent years, in Australia and globally, there has been an increase in terrorism from lone actors or small groups intending to carry out smaller, low capability attacks. This has meant a significant decrease in the amount of time spent planning many terrorist attacks; a lone actor can move from intention to action within days or even hours.
8. On 12 September 2014, the National Terrorism Threat Level was raised to 'probable'. This means that credible intelligence, assessed by Australian security agencies, indicates that individuals or groups continue to possess the intent and ability to conduct a terrorist attack in Australia.

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9. Since the elevation of the Threat Level, there have been four attacks, as well as a number of major terrorism disruption operations in response to potential attack planning in Australia.

Stop, Search and Seize Powers

10. The stop, search and seize powers under Division 3A of the *Crimes Act 1914* (the Crimes Act) are part of a suite of stop, search and seize powers in State and Commonwealth law which ensures police are able to exercise the powers in terrorism investigations in every part of each state and territory.

11. The powers under Division 3A (with the exception of section 3UEA, which is discussed separately below) can only be used in relation to persons in a Commonwealth place, which significantly narrows the geographical ambit of the powers.

12. To date, the Commonwealth component of this national suite of preventative powers has not been used. This is because, since these powers were introduced in December 2005, the AFP has not had any specific need to use these powers within a Commonwealth place. Given the narrow jurisdictional remit of the powers, and given that they are to be used only in very limited circumstances, the AFP would not anticipate frequent usage of these powers.

13. Despite the narrow geographical application of these powers, the powers are necessary to ensure that police are able to exercise powers in terrorism investigations in every part of each state and territory.

14. Division 3A also enables an emergency entry power (section 3UEA), which is not limited to Commonwealth places. This power is nonetheless very limited in its application. The power can be utilised only where it is necessary to enter premises without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.

15. In all other instances - where investigators have sufficient warning of a terrorism plot prior to it being carried out - the AFP must obtain search warrants, including telephone warrants under section 3R. In all investigations, the AFP plans for possible contingencies, and the use of powers under section 3UEA is always considered in case matters escalate more quickly than expected. However, to date, the AFP has not been faced with a situation requiring the use of the power under section 3UEA, and the power has not been used.

16. The fact the powers have not been used to date is not an indication that the powers are unnecessary. The AFP is acutely aware these powers are designed to be used only in a very particular set of circumstances. To date, those circumstances have not arisen, and the AFP and partner agencies have been able to disrupt terrorist attacks and planning without recourse to emergency powers.

17. These powers are of critical importance, enabling the AFP to act immediately in the event of a terrorist threat to, or terrorism incident within, a Commonwealth place, or an emergency situation requiring entry where there is a serious and imminent threat of harm, and no time to obtain a warrant.

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Declared Areas

18. The 'declared area' offence forms part of a suite of legislative measures designed to deter Australians from travelling to areas where terrorist organisations are engaged in hostile activity. The offence recognises that people who enter, or remain in, a declared area put their own personal safety at risk. It also ensures Australia is able to manage the terrorist threat posed if we experience widespread return of Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas.

19. To date, there have been no prosecutions for 'declared area' offences under section 119.2 of the Criminal Code. It would be premature to discuss potential legislative, evidentiary and procedural issues with these offences.

20. However, notwithstanding the 2014 changes to the *Foreign Evidence Act 1994* which simplified processes for adducing foreign evidence in terrorism-related cases, obtaining foreign evidence remains a challenge. This is particularly the case where the evidence is being sought from a conflict zone which may not have a fully operational government in place.

21. The AFP continues to work with the Attorney-General's Department and government partners to consider options to address challenges in obtaining foreign evidence.

Control Orders

22. In the AFP's experience, control orders are an effective tool for managing persons who present a significant terrorism risk.

23. However, operational experience has demonstrated that the current process is complex and resource intensive. A number of procedural issues create complications for both applicants and respondents to control orders. In particular:

- i. There is no ability under the current legislation to amend the conditions of an interim control order. Under paragraph 104.14(7)(b) when a control order is confirmed, the order can be varied by *removing* a condition at the time of confirmation. The Criminal Code does not permit it to be varied by *amending* the condition, for example where a respondent needs to amend particulars in order to facilitate a change of residential, educational or employment arrangements.
- ii. It is not clear the extent to which the Federal Court Rules apply to control order proceedings, and there are instances where the Rules appear to be in conflict with the procedures articulated for control orders in the Criminal Code. For example, there is uncertainty about whether evidence should be led by affidavit or in person, and whether the respondent is required to comply with rules regarding notices to admit and agreed statements of facts.
- iii. The full civil rules of evidence do not apply to interim control order proceedings, but do apply to confirmation proceedings. This is problematic because:

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- At confirmation stage, the court is required under sub-section 104.13(3) to consider the material put forward in the interim proceedings; but as the court cannot take into account information not in admissible form, the exact status of this material in the confirmation proceedings is unclear. This creates a tension for the court.
- Control orders are a preventative measure designed to protect the community where there is strong intelligence to suggest that the person poses a risk. Intelligence is not evidence and there are sensitivities around putting intelligence material into evidentiary form.

24. The AFP suggests that a streamlining of processes, and a clarification of rules and processes, would assist both applicants and respondents, and could be accomplished without reducing appropriate oversight or transparency.

25. In particular, consistent application of the rules of evidence across the interim and confirmation stage would assist. Given the nature of material ordinarily relied upon in assessing the necessity of a control order, the AFP would support streamlining the system to allow a final order to be made on the same evidential basis as an interim order, together with additional evidence (or any other material the court consider relevant) to demonstrate that the risk is ongoing and that continued controls are necessary and appropriate.

Conclusion

26. The current suite of counter-terrorism laws was put in force to address the growing risk of terrorism. In passing the laws, the Parliament acknowledged that the threat was a significant one and required a specially framed, and particularly robust, legislative response. The threat of terrorism continues to be at an elevated level and has become more complex, agile and fast-paced.

27. Advances in technology; increasing globalisation; changing modes of attack; and a significant upswing in the operational pace of counter-terrorism investigations, impact law enforcement's ability to address the threat of terrorism. Counter-terrorism laws must continue to be considered to ensure that they remain appropriate to address the threat of terrorism.

28. The AFP remains mindful of the need to preserve the rights and freedoms of Australians. It is also necessary to be vigilant to the changing face of terror and to protect the safety and security of Australia and its people.

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