

UNCLASSIFIED

INSLM Statutory Deadline Review AFP response to INSLM request for information

This response is unclassified. However, a number of documents provided in support of the response are classified, so are provided to the INSLM as a classified attachment and are not available for public disclosure.

Stop, search and seize powers under Div 3A of Pt IAA of the Crimes Act

1) How many terrorist investigations have there been since the powers in Div 3A came into effect on 14 December 2005?

There has been a marked upswing in investigations in recent years. Active investigations have increased three fold between September 2014 and April 2017.

a. What if any stop, search and seize powers have been used in these investigations?

A suite of complementary stop, search and seize powers exist in State and Commonwealth law to ensure police are able to exercise powers in terrorism investigations in each state and territory. Powers used in each investigation will depend on the particular facts and circumstances of the investigation. The powers under Division 3A have not been used in these investigations, as circumstances have not arisen which would enliven these powers.

b. Could the stop, search and seize powers in Div 3A have been used in these investigations?

No. The powers in Division 3A are designed to address particular circumstances, which have not yet arisen.

As discussed in the AFP's public submission, the powers under Division 3A (with the exception of section 3UEA) can only be used in relation to persons in a Commonwealth place, which significantly narrows the geographical ambit of the powers. To date, since these powers were introduced in December 2005, the AFP has not had any specific need to use these powers within a Commonwealth place.

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. In all other instances, the AFP must obtain search warrants. To date, the AFP has not been faced with a situation requiring the use of the power under section 3UEA hence the power has not been used.

UNCLASSIFIED

UNCLASSIFIED

c. If so, why were these powers not used?

As discussed above, the AFP has not yet responded to a factual scenario which required the use of Division 3A stop, search and seize powers.

2) Are the powers in Div 3A a proportionate response to the current terrorist threat? If so, why?

As discussed in the AFP's public submission, 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.

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.

3) What procedures are in place to prevent the powers in Div 3A from being subject to arbitrary exercise and abuse?

a. For example, what procedures are in place to guide the exercise by a police officer of the powers in Div 3A (subdiv B)?

- i. Insofar as such procedures are written, please provide copies.**
- ii. Insofar as such procedures include training, please provide details of the regularity of that training, to whom it is directed, how many officers have undertaken the training to date, and copies of any relevant training material.**

All AFP recruits are given extensive training on how to carry out ordinary searches of persons, frisk searches, vehicle searches and searches of premises. This includes training on the rights of the person being searched, the occupier etc.

In-service AFP members complete their Operational Safety Assessment annually. Amongst other things, this process is designed to assess a member's knowledge of powers (including searches).

The AFP has strict procedures governing the handling of all seized property. Inappropriate departures from these procedures may constitute a breach of AFP professional standards and be dealt with under Part V of the *Australian Federal Police Act 1979*.

UNCLASSIFIED

UNCLASSIFIED

Additionally, AFP's Counter Terrorism investigators (as well as other relevant employees and special members) are provided with a Pocketbook Guide for Counter Terrorism Investigations. This Guide sets out key Commonwealth powers available to police in Australian-based counter terrorism operations. The Guide clearly articulates protections and safeguards, including their specific application in a counter-terrorism context.

The AFP's record keeping and internal reporting procedures also serve to prevent powers from being abused or exercised arbitrarily. These processes are detailed at Question Five (below).

The Pocketbook Guide, additional training material and internal procedural documents are provided to the INSLM as a classified attachment.

4) Are police officers who may exercise the powers in Div 3A given comprehensive training as to their obligations under the Commonwealth, State and Territory anti-discrimination legislation?

- a. If so, please provide details of the regularity of that training, to whom it is directed, how many officers have undertaken the training to date, and copies of any relevant training material.**

All AFP members are provided training on human rights in policing as part of the Operational Safety and Protection training.

Pursuant to Commissioner's Order 2 (attached – unclassified), all appointees of AFP are bound by the AFP Core Values, which include fairness (being impartial and equitable) and respect (treating ourselves and all others with consideration), and the AFP Code of Conduct, which states that 'an AFP appointee must act with fairness, reasonableness, courtesy and respect, and without discrimination or harassment, in the course of AFP duties'. Adherence to the Code of Conduct and Core Values is fundamental to complying with the professional standards of the AFP.

5) What procedures are in place to ensure records are kept in relation to the exercise of the powers in Div 3A?

The AFP has recording and reporting requirements for all investigations, including counter-terrorism investigations. There are procedures in place specifically for recording the use of Division 3A powers; recording mechanisms are in accordance with the AFP recording and reporting requirements across all investigation types.

UNCLASSIFIED

UNCLASSIFIED

a. Insofar as such procedures are written, please provide copies.

AFP has recording and reporting requirements for all investigations, including counter-terrorism investigations. The AFP Investigations Doctrine outlines the importance of complete and accurate investigative records.

6) Is there any perceived ambiguity in the test in s 3UB(1)(a) for instance, the terms "might" and "suspect on reasonable grounds"?

The AFP does not perceive there to be ambiguity in the section 3UB(1)(a) test. This paragraph states a police officer may exercise the powers under this subdivision in relation to a person if the person is in a Commonwealth place (other than a prescribed security zone) and the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit, a terrorist act.

The threshold here requires the police officer to consider the possibility that something 'might' be occurring, and have reasonable grounds to suspect that state of affairs. The word 'might' as used in this test is in accordance with the fact that 'suspicion' is a lower threshold than 'belief', and does not require the police officer to be certain that the specified state of affairs does actually exist.

There is a substantial body of case law addressing the concept of 'reasonable suspicion' / 'suspects on reasonable grounds', which assists in interpreting the application of this threshold. For example, *George v Rockett* 1990 170 CLR 104; *R v Rondo* (2001) NSWCCA 540.

7) What (if any) concerns or implications arise if the test in s 3UB was subject to an additional step involving consideration by more senior officer(s)?

The AFP anticipates that, if used, the powers in Division 3A are likely to be used by first responders in an attack about which the AFP had little or no forewarning. The powers would need to be exercised very quickly for them to be of benefit in preventing an attack, or responding to an attack on a Commonwealth place. The introduction of an additional step requiring consideration by a more senior officer would delay the response, and therefore the effectiveness of these powers, would be significantly reduced.

8) What training and procedures are in place regarding the exercise of powers to conduct body searched under s 3UD?

a. Does any such training address issues such as conduction body searches in private and/or by an officer of the same sex?

UNCLASSIFIED

UNCLASSIFIED

- b. Please provide details of the regularity of that training, to whom it is directed, how many officers have undertaken the training to date, and copies of any relevant training material.**

As discussed above, and articulated in internal training documents (attached – classified) all AFP members receive training on appropriate conduct of searches including the rights of the person searched.

9) What information is published in annual reports or other sources about the exercise of similar powers to those in Div 3A?

- a. What (if any) concerns or implications arise if the AFP was to publish information about the exercise of the powers in Div 3A (such as the quarterly statistical information published by the UK Home Office about the use of police powers under terrorism legislation)?**

The AFP does not provide detailed external reporting on specific instances of the exercise of policing powers, and is concerned that detailed public reporting may create operational sensitivities, prejudice ongoing investigations or create a significant impost on resources. The AFP would be happy to comply with any additional oversights which do not impact adversely on operational matters, noting that the AFP is already subject to oversight from ACLEI and the Commonwealth Ombudsman, who are able to scrutinise the AFP's use of powers.

UNCLASSIFIED

UNCLASSIFIED

Declared Areas under ss 119.2 and 119.3 of the Criminal Code

1) What have been the operational challenges, if any, to the AFP in obtaining evidence to charge and prosecute individuals as to a s 119.2 offence?

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.

However, as discussed in the AFP's public submission, 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.

2) What have been the outcomes of s 119.2 investigations by the AFP? Have there been investigations which have not resulted in communications to the CDPP?

There are a number of ongoing investigations which may lead to charges under section 119.2. Investigations are not necessarily communicated to the CDPP in the early stages, particularly where a determination is made at an early stage that the AFP does not have sufficient information to proceed with the matter.

3) In investigations, has there been evidence as to the legitimate purpose exceptions expressed in sub-s (3) as to the person who entered a s 119.3 declared area in a foreign country?

As there have been no prosecutions under section 119.2, it would be speculative to assume that any particular exception may be raised in defence of such a charge.

4) What is (or would be) the involvement of the AFP, if any, in producing information to specifically support a request to the Attorney General for consent to prosecute a s 119.2 offence?

Consent to prosecute is sought by the CDPP, who work with the Attorney-General's Department to brief the Attorney-General and seek his or her consent to the prosecution. The AFP may provide views to the CDPP and/or AGD in the course of those discussions, but the CDPP has primary responsibility for seeking consent, based on the information in the brief of evidence provided by the AFP to support the charge.

5) To what extent does ASIO receive and coordinate information from other agencies for the purpose of the investigation of a s 119.2 offence?

UNCLASSIFIED

UNCLASSIFIED

Please refer this question to ASIO.

6) If the AFP receives information (including from media reports) that a person as defined in s 119.2(3) may have entered a s 119.3 declared area, what investigation occurs in that regard?

The AFP obtains information from a range of sources. Any credible information which comes to the attention of the AFP, by any means, is evaluated in line with AFP's ordinary processes.

UNCLASSIFIED

UNCLASSIFIED

Control Orders and Preventative Detention Orders under Divs 104 and 105 of the Criminal Code

1) How effective has the control order regime been in achieving the objects of Div 104 (as stated in s 104.1 of the Criminal Code)?

In the AFP's experience, control orders are an effective tool for mitigating and managing the risk of planning, preparing, engaging or facilitating a terrorist act, certain individuals may present.

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. These are discussed in detail in the AFP's public submission to the INSLM.

2) In view of this experience, what are the features of control orders that the AFP considers to be of primary benefit?

Control orders are an effective preventative measure to protect the community where there is strong intelligence to suggest that the person poses an unacceptable risk to the safety of the public. The effectiveness of particular controls will depend on the nature of the identified risk.

However, speaking in general terms, monitoring of controlees' movements, limited internet access and prohibition on associations between specified individuals can assist in limiting avenues for ongoing radicalisation and can disrupt attack planning.

3) Does the AFP have any comment on the scope of the obligations, prohibitions and restrictions that the court may impose on a person pursuant to a control order?

It is imperative the range of prohibitions and restrictions available under the control order regime be broad enough to reflect the whole range of terrorism attack types and styles that law enforcement need to disrupt now and in the future.

Since the introduction of control orders, the terrorism threat environment has continually transformed. Police and intelligence agencies are continually reassessing the type of attack (including level of planning, coordination, mode of attack and target) that is likely. The controls necessary to prevent one attack type may not be as useful in mitigating a different threat type.

A non-exhaustive list of prohibitions and restrictions may assist the court to effectively mitigate the broad spectrum of threats which may be encountered and accommodate future changes in the counter terrorism threat environment.

UNCLASSIFIED

UNCLASSIFIED

4) Since the INSLM's second annual report, in respect of how many operations has the AFP considered applying for a control order (including those in which an application for an order has been made) (see 11.5 of the INSLM's second annual report)?

Since the second Annual report of INSLM Mr Brett Walker in 2012, the CT operating environment has changed considerably. Control orders and preventative detention orders are considered by investigators as possible options for disruption in all CT investigations. However, in the majority of cases, other avenues have ultimately been pursued, for reasons outlined at 4) below.

5) Where an application for a control order was considered, but not made, what were the factors that were of significance in deciding not to make an application?

While each case is decided on its own unique facts and circumstances, broadly speaking, considerations which have weighed in favour of *not* seeking a control order include:

- the AFP or other agencies have been able to mitigate the risk through other mechanisms;
- there is not enough information or evidence sufficient to meet the required threshold to obtain an interim control order; or
- the individual has been arrested and charged with an offence;
- the individual was otherwise detained or outside the jurisdiction.

6) Where an application was made, what were the features of those cases that distinguished them from cases where an application was considered but not ultimately made?

While each case is decided on its own unique facts and circumstances, broadly speaking, considerations which have weighed in favour of seeking a control order include:

- the individual presented an unacceptable risk;
- although implicated and suspected of a number of offences, there was insufficient admissible evidence to support a charge;
- there was sufficient information to meet the required threshold to obtain an interim control order;
- there was no more effective or efficient way of monitoring or modifying their behaviour;

AFP considers these and any other relevant factors in assessing whether or not to seek a control order.

7) Has the AFP considered applying for a successive control order?

The AFP has considered, but ultimately not applied for, successive control orders.

UNCLASSIFIED

UNCLASSIFIED

a) If yes, what factors were of significance in deciding not to make that application

The AFP gave serious consideration to a successive control order in one matter; however the AFP ultimately determined that there was no evidential basis to apply for a successive control order.

8) In view of the AFP's practical experience with confirming control orders, what suggestions (if any) does the AFP have regarding the provisions of Div 104 relating to confirmation proceedings?

As discussed in the AFP's public submission, operational experience has demonstrated that the current process is complex and resource intensive. A number of procedural issues, articulated in detail in the submission, create complications for both applicants and respondents to control orders.

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.

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.

9) Do the existing provisions of Div 104 require any revision on account of the fact that confirmation proceedings often do not take place until months after the interim control order is made?

The preferred outcome would be a streamlining of processes to allow the delay between interim and confirmation proceedings to be reduced.

If the current model for control orders remains substantially the same, the capacity to vary the conditions of an interim control order would be beneficial, given the practical time delays between the issuing of an interim control order and confirmation proceedings.

10) Should consideration be given to making modifications to the application of the rules of evidence to such proceedings and, if so, what modifications would in the view of AFP be necessary?

As outlined above, and in the AFP's public submission, consistent application of the rules of evidence across the interim and confirmation stage would assist.

UNCLASSIFIED

UNCLASSIFIED

11) What role should the initial request for a control order have in the subsequent confirmation proceedings?

In the AFP's view, it is appropriate that, in a confirmation proceeding, the court should be able to consider all of the information before it in the interim proceeding, including the interim control order request.

12) What impact, if any, has the CTLA (Foreign Fighters) Act 2014 had on the appraisal of control orders as a CT measure?

The expansion of the regime means that control orders are an available tool in a greater range of investigations. Noting that many of the individuals to which this broadened category would apply remain overseas, there has not at this stage been a measurable impact arising from the Foreign Fighters legislation.

13) To what extent is the AFP involved in applications for preventative detention orders under state and territory legislation?

The Joint Counter-Terrorism Taskforce (JCTT) model allows law enforcement to utilise the best tools available in any particular investigation, whether they be state/territory or Commonwealth. As a taskforce, including both Commonwealth and State law enforcement, the JCTTs consider the full suite of available options when determining how to proceed with any particular matter. Decisions are made jointly between Commonwealth and relevant state/territory law enforcement.

a) to what extent (if at all) does the availability of orders under state and territory legislation impact upon the AFP's consideration of applying for control orders under Division 104?

State/territory PDOs and Commonwealth control orders serve different purposes and are designed to address different types of terrorism threats. The JCTTs consider what legislative tools, if any, are most appropriate on a case by case basis.

14) Would lifting the prohibition on questioning a person subject to a preventative detention order improve the effectiveness of the regime as a counter-terrorism measure?

The inability to conduct voluntary questioning of persons detained under a PDO is a limitation on the utility of PDOs. However, the preventative detention order regime is primarily a disruption mechanism, to detain persons suspected of being connected with an imminent terrorist act. If necessary, police may remove a person from detention under the preventative detention order and rely on the arrest and questioning provisions under section 3WA and Part IC of the *Crimes Act 1914*.

UNCLASSIFIED