Australian Government

Attorney-General's Department

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Responses to questions from the Acting Independent National Security Legislation Monitor (INSLM)

Responses to questions regarding: Division 3A of Part 1AA *Crimes Act 1914* (stop, search & seize powers)

Background

On 27 September 2005, the Council of Australian Governments (COAG) considered 'the evolving security environment in the context of the terrorist attacks in London in July 2005' and 'agreed that there is a clear case for Australia's counter-terrorism laws to be strengthened'. The stop, search and seize powers under Division 3A of Part 1AA of the *Crimes Act 1914* were developed in response to COAG.[1] The COAG communique noted:

> State and Territory leaders agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days and stop, question and search powers in areas such as transport hubs and places of mass gatherings. COAG noted that most States and Territories already had or had announced stop, question and search powers.

Division 3A of Part 1AA provides police with powers to stop, search and question in relation to terrorist acts in Commonwealth places and prescribed security zones. Importantly, as noted by the communique, the Commonwealth's stop, search and seize powers are complementary to State powers which provide for similar measures to be undertaken in respect of certain target areas and events for the purposes of responding to, or preventing, a terrorist act.

Division 3A was amended by the *National Security Legislation Amendment Act 2010* which inserted section 3UEA. Section 3UEA states that a police officer may enter premises if the police officer suspects on reasonable grounds that:

- it is necessary to exercise a search and seizure powers in order to prevent a thing on the premises being used in connection with a terrorism offence, and
- it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.

These powers are not limited in their application to only Commonwealth places or prescribed security zones. Rather, they are intended to be emergency powers used only in instances where it is impractical to obtain a warrant prior to seizing material that is to be used in connection with a terrorism offence.

The Council of Australian Governments reviewed Commonwealth Anti-Terrorism Legislation in 2013 (the COAG Review). Division 3A of the Part 1AA was part of this review.

COAG Review did not recommend any changes to the stop and search powers in sections 3UC and 3UD, or in relation to the making of a prescribed security zone under section 3UJ. However, in respect of State and Territory search, entry and seizure powers, COAG Review recommended regular reporting on the use of these powers (Recommendation 47).[2]

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[1] Division 3A of Part 1AA of the *Crimes Act 1914* was inserted by the *Anti-Terrorism Act (No. 2) 2005*.

[2] In relation to State and Territory search, entry and seizure powers, the COAG Review also recommended:

In respect of the emergency entry to premises without a warrant power under section 3UEA, the COAG Review noted the emergency nature of these special powers and that its necessity was justified in the terrorism context. However, the COAG Review did recommend that the use of these powers be annually reported to the Commonwealth Parliament. COAG later considered this unnecessary given the safeguards and accountability mechanisms that the AFP is already subject to (including the role of the Commonwealth Ombudsman).

The powers under Division 3A (except the requirement to serve seizure notices under section 3UF) will sunset after 7 September 2018.

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

Division 3A allows police officers to stop, question, search and seize items from an individual where:

- the police officer suspects on reasonable grounds that the person in a Commonwealth place might have just committed, might be committing or might be about to commit, a terrorist act, or
- the person is in a Commonwealth place in a prescribed security zone.

These powers are targeted at safeguarding Commonwealth places, such as airports, defence establishments, departmental premises and court buildings, from terrorist acts. In response to potential terrorist threats, or following the event of a terrorist act, these powers allow police to effectively prevent, or respond to, terrorism. The gravity of the consequences of an attack on places of national significance, or in places of mass gathering, provides a basis for the exercise of these special powers. The parameters of the exercise of these powers are clearly defined in law and persist only for the duration of the perceived threat. The powers under Division 3A sit alongside state and territory powers that provide for stop, question and search powers in transport hubs and places of mass gathering.

As the attack in Westminster in March 2017 has demonstrated, places of mass gathering, and places of Federal or Commonwealth significance, continue to be targets for terrorist activity. In these circumstances, it is appropriate that in Commonwealth places, police should have the ability to exercise stop, search and seize powers in order to swiftly prevent, or respond to, terrorist acts.

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

The legislative framework in Division 3A provides important safeguards to prevent the arbitrary exercise or abuse of the stop, search and seize powers.

For example, in exercising search powers under section 3UD, a police officer must not use more force than necessary or subject the person to greater indignity than is reasonable and necessary in order to conduct the search (subsection 3UD(2)).

- that various jurisdictions amendment their search, entry and seizure powers to reflect a greater degree of judicial oversight (Recommendation 45), and
- that various privative clauses in the current legislation be removed (Recommendation 46).

In relation to the seizure of items, section 3UF provides for the serving of a seizure notice on the owner of the seized item (or the person from whom the item is seized), and allows the owner of the item the opportunity to have it returned to them.

Furthermore, the Commonwealth Ombudsman may investigate any non-compliance by police officers with the procedures in Division 3A, including:

- using more force or subjecting the person to greater indignity than is reasonable and necessary in order to conduct the search
- restricting the search to non-invasive frisk and ordinary searches
- unnecessarily damaging property
- notification of owners about seized property and returning it within a reasonable time, and
- limiting the stopping to finding out the name of the person, their residential details, evidence of identity and their reason for being in the particular Commonwealth place.

The COAG Review did not consider the police powers under Division 3A to be arbitrary or disproportionate:

> …the Committee's view, is a simple one: the powers themselves are not arbitrary. A precondition to their exercise is that the person be in a 'prescribed security zone', or a Commonwealth place where a police officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act. In both instances, the powers entrusted to the police require a connection to a perceived terrorist threat.[3]

(a) For example, what procedures are in place to guide the exercise by the Attorney General of the powers in Div 3A (Subdiv C)?

(i) Insofar as such procedures are written, please provide copies

The Attorney-General can only declare a Commonwealth place to be a prescribed security zone where he or she considers that it would assist:

- in preventing a terrorist act occurring, or
- in responding to a terrorist act that has occurred.

Broadly, these requirements restrict the use of the declaration power to exceptional circumstances, such as emergencies. Accordingly, in scenarios where the making of a declaration would be appropriate, it is likely that the Attorney-General would be acting on the advice of law enforcement and intelligence agencies, whose responsibility it is to monitor and respond to terrorist threats. It is likely that an application for a declaration would be undertaken in accordance with established ministerial processes, with the Attorney-General's Department drafting the declaration with high level involvement from the AFP.

There have been no prescribed security zone declarations made under section 3UJ.

In order to make a prescribed security zone declaration under either paragraph 3UJ(1)(a) or 3UJ(1)(b), it is likely that existing national security architecture would be relied upon to inform the Attorney-General's decision. For instance, law enforcement agencies and security agencies, and bodies such as the National

[3] Council of Australian Governments Review of Counter-Terrorism Legislation (2013), p. 84.

Threat Assessment Centre (NTAC) may be involved in determining the likelihood of a terrorist act occurring, or what responses may be appropriate in the aftermath of a terrorist act.

Given the prescribed security zone declaration operates for a limited period of time, and is made swiftly in exceptional scenarios, involving national security agencies who are routinely called provide national security assessments and advice, it is likely that existing processes may be leveraged from to guide the Attorney-General in making a declaration under section 3UJ.

(ii) Insofar as such procedures include training to officers who advise/assist the Attorney General in relation to the exercise of these powers, please provide details of the regularity of that training, how many officers have undertaken the training to date, and copies of any relevant training material.

Training is provided to state, territory and Commonwealth police on the exercise of powers under Division 3A. However, no specific training is provided to police officers outlining how to advise or assist the Attorney-General in making a declaration for a prescribed security zone.

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

There is no perceived ambiguity in the test in paragraph 3UB(1)(a). Police already have suspicion-based powers in various contexts. For example, in relation to terrorism police powers, thresholds such as 'suspects on reasonable grounds' are commonly referenced, including in the application for an interim control order under Division 104 of the *Criminal Code* and in the application for, and the making of, a preventative detention order (PDO) under Division 105 of the *Criminal Code*.

Similarly, the use of the term 'might' requires police to undertake the type of qualitative risk assessments they routinely make in determining risk. Furthermore, the assessment of when a person 'might' have just committed a terrorist act or 'might' be about to commit a terrorist act is not dissimilar to other thresholds referenced in Australia's counter-terrorism framework, such as the recently amended threshold for the making of a PDO which requires an assessment of whether a terrorist act is 'capable of being carried out, and *could* occur, within the next 14 days' (see subsection 105.4(5)).

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

The department does not consider it necessary for there to be an additional step involving the consideration by more senior officers prior to the use of the stop, search and seize powers.

The stop, search and seize powers in Division 3A were modelled on Division 4 of Part II of the *Australian Federal Police Act 1979* (AFP Act). That Division relates to stop, question, search and seizure powers available to certain police officers, including AFP members, carrying out protective service functions. The exercise of those powers is not contingent upon authorisation by a more senior police officer.

Furthermore, for the stop, search and seize powers to be effective, police must be able to apply them swiftly to mitigate terrorist threats. The urgent application of these powers is highlighted by the thresholds required

for their use. That is, the stop, search and seize powers relate to circumstances in a Commonwealth place where:

- a police officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit, a terrorist act, or
- the Attorney-General has declared a prescribed security zone for the purpose of preventing a terrorist act occurring or in responding to a terrorist act that has occurred.

The additional layer of authorisation by a senior police officer may delay the ability of police officers to swiftly respond to, and combat, a terrorist act.

5) Is the test in s 3UJ clear, unambiguous, and fit for purpose?

The department considers that the test for the declaration of a Commonwealth place to be a prescribed security zone is clear, unambiguous and fit for purpose. The declaration is clearly targeted at two distinct scenarios under which providing police officers stop, search and seize powers would be effective in mitigating a terrorist threat – to prevent a terrorist act, and to respond to a terrorist act.

The test also provides the Attorney-General with ability to allow police officers to exercise the powers they need to effectively prevent or respond to a terrorist act, while still requiring that he or she reach a minimum satisfaction of mind that such a declaration and resulting use of the stop, search and seize powers is necessary.

(a) What (if any) concerns or implications arise from the different language of s 3UJ(1) (cf s.3UJ(4))?

The department does not consider that an adverse implication arises from the different language used to make a declaration with the criteria for revoking a declaration. Subsection 3UJ(4) clearly identifies and corresponds to the two grounds on which the Attorney-General can make a declaration for a prescribed security zone under subsection 3UJ(1). Paragraphs 3UJ(4)(a) and (b) require that the Attorney-General must revoke the declaration where he or she is satisfied that the grounds for making a declaration under subsection 3UJ(1) no longer exists. That is, the Attorney-General must revoke a prescribed security zone declaration where either the perceived terrorist threat under paragraph 3UJ(1)(a) has been sufficiently mitigated, or the appropriate response to a terrorist act has been carried out under paragraph 3UJ(1)(b).

6) What mechanisms or procedures are in place to assess the level of security threat on which a prescribed security zone declaration made under s 3UJ(1) is based?

As noted in Question 2, it is likely that the existing national security architecture will be leveraged upon to guide the making of a prescribed security zone declaration under subsection 3UJ(1).

Accordingly, in order to prevent a terrorist act occurring or to appropriately respond to a terrorist act that has occurred, it is likely that the Attorney-General will act on the advice provided by law enforcement and intelligence agencies, whose responsibility it is to monitor and respond to terrorist threats. National security agencies routinely provide information regarding the security environment, and specific security threats, to Government agencies and Ministers. As noted above, assessments provided by law enforcement and intelligence agencies, are likely to play an important role in informing the decision of the Attorney-General to make a declaration under paragraph 3UJ(1)(a) and 3UJ(1)(b).

These existing processes may be leveraged for the purpose of assessing the need for a prescribed security zone declaration under subsection 3UJ(1).

(a) What mechanisms or procedures are in place to assess the level of the security threat on which revocation of a prescribed security zone declaration under s 3UJ(4) might occur?

A prescribed security zone declaration is likely only in response to exceptional circumstances, such as emergencies. Law enforcement and intelligence agencies maintain a continuous focus on areas of high security concern (such as prescribed security zones). It is anticipated that if conditions arise which cause agencies to form the view that the grounds for making a declaration under subsection 3UJ(1) are no longer satisfied, advice will be provided to the Attorney-General notifying him or her of this view. The existing national security architecture, identified in Question 2, would be leveraged upon to assist the Attorney-General in determining the level of security threat, and whether this would necessitate the revocation of a prescribed security zone declaration.

(b) In what type(s) of scenarios is it envisaged that a prescribed security zone declaration will be made under s 3UJ(1)?

In order to declare a prescribed security zone under paragraph 3UJ(1)(a), there would be information that a terrorist act is being planned. For instance, where there is information suggesting that a terrorist act may occur in a Commonwealth place, such as an airport, a prescribed security zone declaration may be made to provide police with the stop, search and seize powers under Division 3A to allow a terrorist threat to be mitigated.

In order to declare a prescribed security zone under paragraph 3UJ(1)(b), a terrorist act would need to have occurred. For instance, where a terrorist act has occurred in a Commonwealth place, such as an airport, a prescribed security zone declaration would enable police to use stop, search and seize items in the relevant zone. This may assist in enabling police to apprehend persons responsible for the terrorist act, or to investigate the terrorist act (including preserving evidence relating to the terrorist act).

(c) In such scenarios, what would need to occur for the Minister to revoke the declaration?

A prescribed security zone declaration is made where one of the grounds under subsection 3UJ(1) is made out. Where the Attorney-General can no longer be satisfied that one of grounds under which a prescribed security zone declaration can be made out, the Attorney-General must revoke the declaration.

For instance, a declaration which has been made under paragraph 3UJ(1)(a), may be revoked where police have successfully mitigated a planned terrorist act in relation to the Commonwealth place over which a declaration has been made.

Similarly, a declaration which has been made under paragraph 3UJ(1)(b), may be revoked where police consider that they have effectively responded to a terrorist act that has occurred. This could include having apprehended the persons responsible for the terrorist act.

Under either scenario, the circumstances which the Attorney-General would have to be satisfied of under subsection 3UJ(1) are no longer present, thereby requiring the revoking of the declaration in accordance with subsection 3UJ(4).

7) **Is the expiry of 28 days for a prescribed security zone declaration reasonable and appropriate? If so, why?**

   (a) **What (if any) concerns or implications arise if the expiry date was reduced to 14 days?**

The duration of a prescribed security zone declaration is no longer than 28 days. Given the positive requirement on the Attorney-General to revoke a declaration where the relevant ground under subsection 3UJ(1) is no longer satisfied, declarations will last no longer than necessary to mitigate against the terrorist threat.

A reduction of the period for which a declaration is in force to 14 days may prove insufficient for the purposes of mitigating the terrorist threat. If the Attorney-General were required to make a further declaration for another 14 days, this may cause a delay which prevents police from acting swiftly to prevent, or respond to, terrorist acts.

The COAG Review noted that while there may be merit to reducing the period for which a prescribed security zone declaration is in force, 'at this stage, [it] is cautious about recommending any such change in the absence of any evidence to suggest the 28 day period is unreasonable'.[4]

   (b) **What mechanisms or procedures are in place to ensure that the Minister proactively considers whether it is necessary for a prescribed security zone to remain in force or whether it should be revoked?**

A prescribed security zone declaration is likely to be made only in response to exceptional circumstances, such as emergencies. In such areas of high security concern, law enforcement and intelligence agencies will maintain a strong interest and focus.

The Attorney-General has a positive obligation to revoke a declaration where the conditions for the declaration under subsection 3UJ(1) are no longer satisfied. It is likely that existing national security architecture including specific advice provided by law enforcement and security agencies would be relied upon by the Attorney-General to support a decision to either maintain a prescribed security zone declaration, or to revoke it.

[4] Council of Australian Governments Review of Counter-Terrorism Legislation (2013), p. 84.

Responses to questions regarding: Offences relating to entering and remaining in 'declared areas' under sections 119.2 and 119.3 of the *Criminal Code* (declared areas)

1) **In that DFAT has the lead role in providing support to the Foreign Minister in relation to the declaration of an area, further to the *Protocol for declaring an area in a foreign country where a listed terrorist organisation is engaging in a hostile activity under the Criminal Code Act 1995*, does the Department have involvement further to the statement of reason nomination by the National Threat Assessment Centre of ASIO in the support to the Minister for Foreign Affairs by DFAT in relation to the declaration of an area pursuant to s 119.3?**

As outlined in the Protocol, in addition to receiving the Statement of Reasons from the National Threat Assessment Centre (NTAC), the Department scrutinises the Statement of Reasons, and prepares the draft legislative instrument for the Minister for Foreign Affairs' consideration. The Department then prepares a submission to the Attorney-General advising that, in the Department's view, the threshold for declaration is satisfied by the information set out in the Statement of Reasons, and recommending he or she write to the Minister for Foreign Affairs, advising that it would be open to him or her to make a declaration under section 119.2 of the *Criminal Code*, and attaching a copy of the declaration. It is open to the Department to obtain legal advice as to whether the Statement of Reasons is sufficient to satisfy the legislative threshold before or after providing the submission to the Attorney-General.

If the Minister for Foreign Affairs declares an area and signs the legislative instrument, the legislative instrument is provided back to the Department. The Department lodges the instrument and its explanatory statement for registration on the Federal Register of Legislative Instruments as soon as practicable after it is signed. Any further involvement outside the Protocol would relate to supporting the Attorney-General as required.

The Department updates the Australian National Security website to reflect that the declaration has been made and to include a map of the declared area, and prepare pamphlets about the particular declared area.

In addition, the Department liaises with other Commonwealth Departments to facilitate communication with individuals who may be affected by the declaration. This includes working with the Department of Immigration and Border Protection to develop a communication strategy to ensure individuals about to undertake travel to locations from which the declared area may be accessed are aware that it is a criminal offence to enter or remain in the declared area.

2) **What is the operational process by which the multi-agency body, the Australian Counter-Terrorism Centre, identifies areas that may be suitable for declaration further to the *Protocol for declaring an area in a foreign country where a listed terrorist organisation is engaging in a hostile activity under the Criminal Code Act 1995*?**

In order to identify areas that may be suitable for declaration under section 119.3 of the *Criminal Code*, the Centre for Counter-Terrorism Coordination (CCTC) hosts meetings with relevant Commonwealth agencies to consider and discuss suitable areas for possible declaration. The coordination of key agencies to collect and

provide relevant information and intelligence for inclusion in a Statement of Reasons in support of a possible declaration, as well as any sensitivities relevant to the proposed declaration, are also discussed at such meetings.

Where there is agreement that an area should be considered for declaration, NTAC prepares a supporting Statement of Reasons for consideration by relevant agencies. The settled Statement of Reasons is provided to the Department for consideration prior to consideration by the Attorney-General and, ultimately, the Minister for Foreign Affairs.

3) To what extent does the Department receive and coordinate information from other agencies for the purposes of the investigation of a s 119.2 offence?

The Attorney-General's Department is responsible for the Division 119 of the *Criminal Code*, including the underpinning policy. However, the Department does not participate in investigations in relation to possible contraventions of section 119.2 of the *Criminal Code*.

The Department is responsible for seeking the consent of the Attorney-General in relation to prosecutions for offences contrary to section 119.2 of the *Criminal Code*. The Department liaises with the Commonwealth Director of Public Prosecutions and other Commonwealth agencies, including the Australian Federal Police and the Department of Foreign Affairs and Trade, when preparing submissions seeking the Attorney-General's consent to a prosecution against section 119.2.

The Australian Federal Police is the Commonwealth agency responsible for the investigation of possible contraventions against section 119.2 of the *Criminal Code*.

4) How many requests for consent under s 119.11 have been made to the Attorney-General?

(a) What information is (or would be) presented to the Attorney-General in requesting consent?

Section 119.11 of the *Criminal Code* provides that proceedings for the commitment of a person for an offence against Division 119 of the *Criminal Code*, including proceedings against a person as an accessory after the fact for an offence against Division 119, cannot commence without the written consent of the Attorney-General. The now repealed *Crimes (Foreign Incursions and Recruitment) Act 1978* contained a similar requirement.

As at 3 May 2017, the Attorney-General's consent has been sought in relation to proceedings for offences against Division 119 on 12 occasions. While a number of these matters included more than one offence contrary to Division 119, only one request included an offence against section 119.2.

When seeking the Attorney-General's consent, a detailed description of the evidence that will be relied upon during any prosecution is provided.

The *Criminal Code* does not require the Attorney-General to be satisfied of any particular criteria before consenting to a prosecution. Matters other than the available evidence that the Attorney-General may wish to consider when deciding whether to consent to a prosecution include any implications for Australia's international relations and national security.

Response to questions regarding: Divisions 104 and 105 of the *Criminal Code*, including the interoperability of the control order regime and the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016*

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

Section 104.1 of the *Criminal Code* provides that a control order can be issued by a court for the purpose of protecting the public from a terrorist act, or preventing the provision of support for of the facilitation of a terrorist act or engagement in a hostile activity in a foreign country.

As of April 2017, the control order regime has been used six times, four of which have been in the past three years. None of the persons subject to a control order were charged or prosecuted with committing a terrorist offence while subject to an order. From this perspective, the control order regime has been effective in achieving its objectives. However, more broadly, experience from recent cases has demonstrated that aspects of the regime may be refined or clarified. These issues are discussed more fully in response to the questions below.

2) **Do control orders remain a necessary counter-terrorism measure, in view of new terrorism offences that apply regardless of whether a terrorist act has actually occurred in Australia, special arrangements under the Crimes Act for terrorism offences regarding bail applications and non-parole periods in sentencing (ss 15AA and 19AG, respectively), and the new continuing detention regime under Div 105A of the *Criminal Code*?**

The control order regime is one of a number of measures in Australia's counter-terrorism legislative framework which are designed to protect the community from terrorist acts. In circumstances where there is enough evidence to formally charge and prosecute a person, this will be the preferred option over seeking the imposition of a control order. Where a person is charged and prosecuted for a terrorism offence, the provisions relating to bail and non-parole periods will apply.[5] The new continuing detention order (CDO) regime, which commences on 7 June 2017, may also apply to a person where they are serving a sentence of imprisonment for a terrorism offence (subject to the criteria listed in 105A.3(1)).

Where there is not enough evidence to charge and prosecute a person, the control order regime provides a necessary and useful measure to prevent or reduce the risk that the person poses to the community. A control order can be made by the court based on a lower threshold than that which is required to convict a

[5] Refer to sections 15AA and 19AG of the *Crimes Act 1914*.

person for a terrorist offence.[6] A control order can also be issued at a lower threshold than that required for the making of a continuing detention order.[7]

3) Where in the range of available legislative measures does the Department consider control orders sit in terms of the restrictions they impose?

Different measures are for different purposes, and the restrictions imposed by a measure seek to facilitate the achievement of the measure's purpose. For example, a person may be arrested without a warrant for a terrorism offence or an offence of advocating terrorism under section 3WA of the *Crimes Act 1914* for the purpose of investigating whether that person should be charged with the offence. To achieve this, arrest under section 3WA involves detaining the person in accordance with Part IC of the *Crimes Act 1914*. In contrast, a person may be made the subject of obligations, prohibitions and restrictions (that do not involve detention) under a control order to achieve one of the purposes listed in section 104.1 of the *Criminal Code*, including protecting the public from a terrorist act.

Noting the above, the control order provisions would likely sit somewhere in the middle in terms of the severity of the restrictions they impose. Under subsection 104.5(3) of the *Criminal Code*, the court can impose a number of restrictions on a person subject to a control order, including restrictions on the person being at specified places, communicating or associating with individuals, or carrying out specified activities. A control order cannot impose a period of extended detention in custody and, as such, it would sit lower in terms of the severity of restrictions than a term of imprisonment for a terrorism offence or detention under a continuing detention order.

4) What impact (if any) has the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (by applying the regime to persons who have engaged in hostile activities abroad) had on the appraisal of control orders as a counter-terrorism measure?

The amendments made by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* make the control order regime more appropriate and adapted to the current threat environment. The amendments allow law enforcement to seek, and the court to impose, a control order on a person where that person has engaged in a foreign fighting activity and poses a threat to the community. Subparagraph 104.2(2)(b)(ii) authorises a senior AFP member to seek the Attorney-General's consent where the member suspects on reasonable grounds that the person has engaged in a hostile activity in a foreign country (subject to the other criteria in section 104.2). Subparagraph 104.4(1)(c)(iv) correspondingly allows the court to make an interim control order if satisfied on the balance of probabilities that the person has engaged in a hostile activity in a foreign country (subject to the other criteria in section 104.4). However, no control order has been sought using the expanded threshold.

[6] To make a control order the court must be satisfied on the balance of probabilities of the criteria in subsection 104.4 of the Criminal Code.

[7] To make a continuing detention order the court must be satisfied to a 'high degree of probability' of the criteria in paragraph 105A.7(1)(b) of the Criminal Code.

5) Is the control order regime appropriate and adapted to dealing with high risk terrorist offenders?

Where a high risk terrorist offender poses an unacceptable risk to the community of committing a serious terrorism offence if released from prison at the end of the sentence, the most appropriate measure to deal with this risk is under the new scheme of CDOs. Under this scheme the court may, subject to safeguards including annual review, order the continuing detention of a terrorist offender who poses an unacceptable risk of committing a serious terrorism offence if released into the community. The court must be satisfied that the continuing detention of the offender is the least restrictive measure to prevent the risk posed by the offender.

Where a high risk terrorist offender is released from prison, either because the Attorney-General did not apply for a CDO (as less restrictive measures would be more appropriate to manage the offender) or because the court decided not to issue a CDO, the obligations, prohibitions and restrictions that can be imposed under a control order are appropriate to deal with the risk posed.[8] However, the INSLM may wish to consider whether it is also appropriate for more restrictive measures to be made available under a control order where a CDO application has been dismissed by the court. For example, under some state-based extended supervision orders for serious sex offenders, courts can impose requirements on where a person can live and when and how that person may leave their place of residence.[9]

The INSLM may wish to give consideration to the duration of control orders. Some state-based control order regimes for serious and organised crime allow control orders to be in place for much longer period of time. For example, a control order under Victoria's *Criminal Organisations Control Act 2012* can last for up to 3 years.

6) What are the merits of requiring the Attorney-General's consent before an application for an interim control order be made?

The role of the Attorney-General in the control order regime is to provide an extra level of scrutiny of applications for interim control orders. The Attorney-General's consent to an interim control order request can be given subject to certain changes to the draft interim order requested. As first law officer, and with national security responsibilities, the Attorney-General is able to provide an informed view on what measures are appropriate and adapted.

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

Interim and confirmed control order proceedings are intended to essentially operate as a single proceeding. The interim proceeding ensures controls can be placed on a person of security concern as soon as possible (likely in the absence of the person). More detailed consideration of the imposition of a control order follows once the person had been made aware of the of the interim control order and had a chance to prepare their case.

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[8] Amendments were introduced by the *Counter Terrorism Legislation Amendment Act (No. 1) 2016* to clarify that control orders can be made in relation to persons convicted of terrorist offences.

[9] See, for example, *Serious Sex Offenders (Detention and Supervision) Act 2009* s 17.

Accordingly, in a confirmation proceeding it is appropriate that the court should be able to consider all of the information that was before it during an interim proceeding, including the interim control order request.

8) 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?

Under the control order regime an interim control order cannot be varied. This is because when the provisions were originally introduced it was anticipated that the confirmation proceeding would follow soon after the interim control order was made. If the conditions in an interim control order needed to be varied the changes could be made in the confirmation process. Any subsequent variations could be made using the variation provisions under Subdivision E or F of Division 104 of the *Criminal Code*.

However, experience to date has shown that the confirmation proceeding can occur many months after the interim control order is made. This means that if the obligations, prohibitions or restrictions in an interim control order are no longer appropriate there is no way to vary those conditions. For example, if there is a requirement in the control order that the person remain at their home between specified times, and the person decides to move home.

One possible option to address this issue is to allow courts to vary an interim control order. Allowing the variation of an interim control order would address any issues that arise where the obligations, prohibitions or restrictions are no longer fit for purpose. On the other hand, and in light of the intended application of the provisions, it may be more appropriate to provide a timeframe for when the court should hold a confirmation proceeding. This would allow any measures imposed by an interim control order that are no longer fit for purpose to be varied. Any timeframe should balance the need to allow both parties time to prepare their cases with the need for certainty around the imposition of a confirmed control order.

9) Should there be any modification to the application of the rules of evidence in confirmation proceedings?

As outlined in response to question 7), in a confirmation proceeding the court should be able to consider all of the information that it considered in the interim proceeding (plus any further evidence submitted to the court). This would reflect the intention that the interim proceeding and the confirmation proceeding should effectively operate as one proceeding. This approach would allow the court to make an informed judgement on whether to confirm, vary or revoke the interim control order, or to declare it void.

A tension with the current operation of the provisions arises because, in accordance with paragraph 104.14(3)(a), the court is required to consider the original request before deciding whether to confirm an interim control order. A confirmation proceeding is not an interlocutory proceeding and the hearsay rule applies, meaning that hearsay cannot be relied on as evidence in the proceeding. However, an interim control order proceeding is an interlocutory proceeding for the purposes of the *Evidence Act 1995* and is therefore not subject to the hearsay rule, meaning that hearsay can be used in a request for an interim control order.[10]

[10] Hearsay should be allowed in an interim control order application to respond to often fast developing threats; there may not be time to convert the information into admissible evidence.

The INSLM may wish to consider whether it is appropriate to allow the court to consider the content of the interim control order request even if it does contain hearsay evidence, on the condition that the court be able to give whatever weight it considers appropriate to the request.

10) Is it appropriate for the Federal Circuit Court to remain authorised to make control orders?

An issuing court for a control order should be one that is easily accessible and able to deal with complex matters.

The Federal Circuit Court provides flexibility to ensure ready access to an issuing authority at a range of locations, including at short notice. Removing the Federal Circuit Court as an issuing court would limit the geographic locations for making applications and could delay consideration of a control order application, resulting in ongoing risk to the community.

11) Would there be merit in considering the authorisation of the Supreme Court of a state or territory to make control orders, or orders of a similar nature, when seized of an application for a continuing detention order under Div 105A of the *Criminal Code*?

There would be merit in considering the authorisation of the Supreme Court of a state or territory to make control orders in a continuing detention order proceeding. As noted in the report of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) on the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016*, there is an inherent duplication of effort in applying for an interim control order in a different court where an application for a CDO is unsuccessful. There is also both a financial and time cost in running two separate proceedings, including on the courts, the Government and the offender.

The main issue with the operation of the two schemes is that the Supreme Court cannot make a control order where it decides not to make a continuing detention order (CDO) under the HRTO scheme.[11] This means that if the court concludes that an offender poses no risk, or an unacceptable risk to the community if released but that this risk can be managed by measures other than continued detention, a separate application needs to be made by a senior member of the Australian Federal Police (AFP) in the Federal Court or Federal Circuit Court for a control order.[12]

Allowing the Supreme Court to make an order 'in the alternative' to a CDO would address the current duplication issue. However, consideration would also need to be given to other issues, such as the legal threshold that would apply to making such orders, how sensitive information would be protected in light of the recently introduced special advocates scheme for control orders, and whether the Attorney-General would need to make an application for the making of the order.

[11] New subsection 105A.7(1) requires the court to be satisfied that there is no less restrictive measure that would be effective in preventing the risk to the community posed by the offender. An example of a less restrictive measure is a control order.
[12] Amendments were made under the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* to clarify that a control order can be made in relation to a person even where that person is currently detained in custody – see item 1C of Schedule 1 of the Act.

12) In view of other detention powers under the Crimes Act and state and territory legislation, the preventative detention regime under state and territory legislation, and the potential introduction of investigative detention regimes in the various states and territories, is the preventative detention regime under Div 105 of the *Criminal Code* necessary?

The Commonwealth preventative detention order regime provides police, including members of the Australian Federal Police, with a useful and necessary measure to detain a person to prevent an imminent terrorist act occurring, or to preserve evidence of or relating to a recent terrorist act.

In April 2016 COAG agreed, in-principle, to the NSW model for pre-charge detention for terrorism suspects. The Department will need to give further consideration to how such pre-charge detention schemes might interact with the Commonwealth's preventative detention regime. However, without knowing the precise nature of an agreed model, it is difficult to determine that the Commonwealth preventative detention regime is no longer required.

13) Should the courts be involved in the making of preventative detention orders?

(a) Should the making of preventative detention orders be subject to greater judicial oversight?

The preventative detention order regime is not a punitive measure and, as such, the courts should not be involved in the making of preventative detention orders under the *Criminal Code*.

There are already a number of safeguards built into the regime, so it is also not necessary to have a further layer of judicial oversight. For example, section 105.33 of the *Criminal Code* requires that the person detained under a preventative detention order be treated with humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment. Section 105.45 makes it an offence for anyone to contravene the safeguards. Contravention of the safeguards carries a penalty of imprisonment for up to two years.

(b) 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?

If police want to question a person who is the subject of a preventative detention order for the purposes of an investigation, the police may remove the 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*.

The main purpose of the preventative detention order regime is to remove persons suspected of being connected with an imminent terrorist act from being at large in the community. This can be contrasted to detaining a person under Part IC of the *Crimes Act 1914* for the purpose of investigating a person in relation to an offence. Part IC contains safeguards that strike an appropriate balance between the power of the police and the rights of the suspect. If questioning were permitted under a preventative detention order then consideration would need to be given to what purpose the preventative detention order regime would then have and how it would relate to Part IC.

Responses to additional issues

Control orders – proposed repeal of Division 104

In the joint submission of legal academics,[13] it is proposed that control orders should be repealed and a regime of extended supervision orders be introduced to supplement the courts' ability to make continuing detention orders in proceedings under Division 105A. If control orders are not repealed, the joint submission proposes that paragraphs 104.4(1)(c)(ii), (iii), (v), (vi) and (vii) of the *Criminal Code* should be repealed as, instead of relying on one of these limbs to make a control order, the person could be arrested and prosecuted for a preparatory terrorism offence.

The existence of preparatory terrorism offences does not make it appropriate to repeal the control order regime. To be convicted of a terrorism offence the court must be satisfied beyond a reasonable doubt that the elements of the offence have been satisfied. This is a higher threshold than that required for the imposition of a control order, for which the threshold is the balance of probabilities.

The limited use of these orders also does not indicate that the control order regime should be repealed.[14] Where there is sufficient evidence to prosecute a person for a terrorism offence, including a preparatory offence, this will be the preferred option over seeking a control order. There are currently 41 prosecutions on foot for terrorism offences. Where there is insufficient evidence to support a prosecution, the control order regime provides an appropriate and useful measure to address the risk posed to the community by a person.

It is not appropriate to repeal paragraphs 104.4(1)(c)(ii), (iii), (v), (vi) and (vii) as doing so would reduce the effectiveness of the control order regime in circumstances where there is insufficient evidence to support a prosecution for a preparatory offence, but sufficient evidence to seek the imposition of a control order.

Monitoring of Control Orders

The Law Council of Australia (LCA) has recommended a number of changes to the legislation relating to the monitoring of control orders. The department's position on these issues remains the same as that it submitted to the PJCIS for its review of the Counter-Terrorism Legislation Amendment Bill (No 1) 2015.

In particular, the LCA recommends that sections 3ZZOA and 3ZZOB of the *Crimes Act 1914* be amended to require that there be a 'reasonable suspicion' that a control order is not being complied with or that the individual is engaged in terrorist related activity. This amendment would undermine the purpose of the warrants, which is to enhance the preventative aspect of control orders by ensuring agencies can effectively monitor compliance with the conditions imposed by control orders without the need to wait until conditions

[13] Dr Jessie Blackbourn, Professor Andrew Lynch, Dr Nicole McGarrity, Dr Tamara Tulich, and Profession George Williams AO.
[14] Since 2014 four control orders have been made by the courts.

have been breached. As noted in its report, the PJCIS considered that a threshold of 'reasonable suspicion' would substantially reduce the utility of the monitoring scheme.[15]

The LCA also recommends that the B-Party warrant provisions in the *Telecommunications (Interception and Access) Act 1979* should be subject to scrutiny by the INSLM with a view to determining their utility, necessity and appropriateness. B-party warrants can be issued to monitor compliance with a control order under the Act if a control order is in force in relation to another person, the particular person is likely to communicate with the other person using the service, and information that would like be obtained would be likely to substantially assist in determining whether the control order is being complied with (*et al*). B-Party warrants assist interception agencies to counter measures adopted by persons of interest to evade telecommunications interception, such as adopting and discarding multiple telecommunications services.

B-Party control order monitoring warrants are subject to additional safeguards compared to other telecommunications services warrants under section 46. An issuing authority must not issue a B-Party warrant where a control order is in force in relation to another person unless he or she is satisfied that the agency has exhausted all other practicable methods, or it would not otherwise be possible to intercept a telecommunications service used or likely to be used by the person subject to the control order.

The PJCIS considered the safeguards applying to B-Party monitoring warrants, along with the Law Council's concerns about B-Party warrants during its review of the Counter-Terrorism Legislation Amendment Bill (No 1) 2015. The PJCIS concluded that that the safeguards surrounding the issuing of telecommunications interception control order warrants were appropriate and proportionate in light of the objectives and rationale for the legislation. The PJCIS's final report provides as follows:

> The power to intercept communications is vital to ensuring compliance with certain conditions that may be imposed under a control order such as restrictions or prohibitions on communicating or associating with specified individuals, accessing or using specified telecommunications or technology, and carrying out specified activities, can be effectively monitored.[16]

Criminal standard for control orders

In its submission the LCA recommends that a control order should be confirmed on the basis of the criminal standard. Using the criminal standard, that is, beyond reasonable doubt, would be inappropriate in the control order regime. If the AFP had evidence to meet the criminal standard threshold then AFP officers would arrest and charge a person for an offence, rather than seek the imposition of a control order. Raising the threshold for confirming a control to a criminal standard would defeat the purpose of the control order regime.

Special Advocates

The *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (CTLA Act) provided for the creation of a special advocate regime in control order proceedings. The special advocate will represent the interests of

[15] PJCIS Report, para 3.87.
[16] PJCIS Report, para 3.134.

persons subject to a control order proceeding where the subject and their legal representative have been excluded from hearing or seeing sensitive national security information. The special advocate amendments in the CTLA Act have a delayed commencement of up to 12 months to enable supporting regulations and administrative arrangements to be established.

The Government is in the process of developing special advocate regulations and will close consideration to the recommendations of the Law Council.

Delegation of the Attorney-General's authority to consent to a prosecution for a foreign incursions or recruitment offence

Subsection 119.11(1) of the *Criminal Code* authorises the Attorney-General to provide written consent to the institution of proceedings for offences contrary to Division 119 of the *Criminal Code*. A similar provision was included in the now repealed *Crimes (Foreign Incursions and Recruitment) Act 1978* (subsection 10(1)).

Neither the *Criminal Code* nor the *Crimes (Foreign Incursions and Recruitment) Act* included an express power to delegate this function. However, the Attorney-General may delegate the power in subsection 119.11(1) of the *Criminal Code* or subsection 10(1) of the *Crimes (Foreign Incursions and Recruitment) Act* by virtue of the general delegation power in section 17 of the *Law Officers Act 1964*. Subsection 17(1) of the *Law Officers Act* enables the Attorney-General to delegate powers and functions under the laws of the Commonwealth to the Solicitor-General while subsection 17(2) enables the Attorney-General to delegate such powers and functions to the Secretary of the Attorney-General's Department or to other persons holding or performing the duties an office specified in the instrument of delegation. This would include the ability to delegate the power to other identified officers within the Attorney-General's Department or persons holding other identified offices within the portfolio.

In addition, the power in subsection 6(4) of the *Director of Public Prosecutions Act 1983* would enable the Attorney-General to authorise the Director to perform the consent function (through a notice in the Gazette).

To date, the Attorney-General has neither delegated nor authorised the performance of the consent function in relation to prosecutions for foreign incursions and recruitment offences under Division 119 of the *Criminal Code* or the *Crimes (Foreign Incursions and Recruitment) Act*.