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www.inslm.gov.au
18 November 2022

The Hon Mark Dreyfus KC MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General,


This report is unclassified and suitable to be laid before both Houses of Parliament.

Yours sincerely

Grant Donaldson SC
Independent National Security Legislation Monitor
Contents

OVERVIEW 4
THE PAST YEAR 7
LOOKING FORWARD 20
OTHER ACTIVITIES 21
LEGISLATIVE DEVELOPMENTS 23
GOVERNMENT CONSIDERATION OF INSLM RECOMMENDATIONS DURING THE REPORTING PERIOD 26
ANNEXURE A – COUNTER-TERRORISM AND NATIONAL SECURITY PROSECUTIONS 29
OVERVIEW


2. Sections 6(1)(a) and (b) (broadly) require the INSLM to review the operation, effectiveness and implications of Australia’s counter-terrorism and national security legislation, and other laws of the Commonwealth that relate to them. In doing this, the INSLM is to consider whether such laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to any threat of terrorism or threat to national security, and remain necessary.

3. On 2 March 2021, I announced a review into the operation of Part 3 Division 1 (which includes section 22) of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (NSI Act) as it applies in the ‘Alan Johns’ matter (Alan Johns matter).

4. On 17 June 2022, my report of that review was delivered to the Attorney-General and on 28 July 2022, the report was tabled in Parliament. On the same day, the Attorney-General referred to me the whole of the NSI Act for review. This review must be completed by 31 October 2023.

5. While this review was announced just outside the reporting period, and fuller details will be set out in next year’s annual report, I understand that the Government’s request for me to review the entire NSI Act was, in large part, prompted by recent matters in which the NSI Act had been invoked, and my report into section 22 of the NSI Act.

6. I welcome a review of the whole of the NSI Act. Prior to the Attorney General’s reference, I had foreshadowed undertaking such a review on my own motion but indicated that such a review would best be undertaken while the central provisions of the NSI Act were not before courts and ‘the subject
of intense discord.’ Following the plea of guilty and subsequent conviction of Witness K on 18 June 2021, the Attorney-General’s decision to discontinue the proceedings against Bernard Collaery on 7 July 2022 and the end of hearings in relation to the Ben Roberts-Smith matters, it is now opportune to scrutinise the whole of the NSI Act. There is a great deal of material that my staff and I will have to consider for this review and although work had been undertaken even prior to the Attorney General’s reference, much of the relevant material was not then available to me.

7. As with every INSLM review, the review of the NSI Act will require a detailed examination of the whole of the Act, its legislative history and context, its practical contemporary operation and its compatibility with Australia’s national security objectives.

8. In June 2021, I formally announced the review into Division 105A of the Criminal Code Act 1995 (Cth) (Criminal Code) and any other provision of the Code as far as it relates to that Division. The provisions of Division 105A are customarily described as embodying the ‘High Risk Terrorist Offenders (HRTO)/Post-Sentence Order (PSO) scheme’. This review must be completed as soon as possible after 7 December 2021. As I outline below, although there have been a number of frustrating, though unavoidable delays, this report is now well-advanced.

9. In the middle months of 2021, various State governments announced travel restrictions due to outbreaks of COVID-19. I reside in Western Australia and the continued postponement of border openings impacted my work as INSLM. It was announced on 13 December 2021 that Western Australia would fully open its borders to people vaccinated against COVID on 5 February 2022. That proposed re-opening was subsequently delayed until 3 March 2022.

10. INSLM reviews require public engagement, conferral with people and consideration of often very sensitive material. Much conferral can only be done in person due to the nature of these issues.

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11. In my time as INSLM, I have followed the practice of accessing and perusing sensitive information in secure locations, in particular in my office in Canberra. Due largely to COVID-19 related travel restrictions I commenced dealing with some domestic and international stakeholders remotely, through secure channels and accessed some sensitive material in Perth.

12. Members of my office in Canberra continued to engage with stakeholders (including regular meetings with government officers), review sensitive material and support me remotely while I progressed these reviews as much as practicable.

13. My report into the Alan Johns matter could not be completed until several private hearings and confidential meetings took place and highly sensitive material accessed. These meetings were conducted face-to-face, across several locations in Australia. Although many were conducted prior to COVID-19 related travel restrictions others were not and could not be concluded until these restrictions were lifted in March 2022.

14. My review into Division 105A of the Criminal Code and related provisions has required significant in-person engagement with State Governments and operational agencies, including visits to various facilities. Again, many of these investigations and conferrals could not occur until interstate travel was possible.

15. The INSLM role cannot be performed alone. Throughout the reporting period, I have received invaluable support from the 3 full-time staff of the INSLM office; a Principal Adviser (Mark Mooney), an Executive Officer and an Adviser. I have also been assisted in the HRTO review by counsel and solicitors assisting.

16. The total budget for 2021-22 was $1.107m.

17. As in previous years, AGD has also made available office space and corporate support such as IT, payroll and security. I am grateful to the Secretary, Katherine Jones PSM, for her assistance.
THE PAST YEAR

Review of section 22 of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) as it applies in the ‘Alan Johns’ matter (a pseudonym)

18. As noted, on 2 March 2021, I announced my review into the operation of Part 3 Division 1 of the NSI Act as it applies in the Alan Johns matter. My report has now been tabled and is available on the INSLM website for all to read. The Alan Johns prosecution involved unprecedented secrecy.

19. All appearances were in closed court and all orders that resulted in this unprecedented secrecy were suppressed. The orders that closed courts and suppressed publication of orders and sentencing remarks were posted to the INSLM website on 2 March 2021. These orders had not, prior to this, been publicly disclosed.

20. In the course of the review information concerning the Alan Johns prosecution were published on the INSLM website. This was done with the co-operation of Commonwealth officers involved.

21. On 8 June 2021, I published a more detailed account of Alan Johns’ offending. This account significantly expanded on the information that had previously been disclosed. This too followed very productive discussions with relevant Commonwealth officers and a realisation that more could be disclosed publicly.

22. Further to this, during the course of the review I formed the view that the great majority of the sentencing remarks of the judge who sentenced Alan Johns could be published. A redacted version of the sentencing remarks, in a form that relevant Commonwealth officers were content to have published, were prepared, though their publication could only occur by order of the ACT Supreme Court. These redacted remarks were provided to the Attorney-General’s Department (AGD) in June 2021. I understand that the current Attorney-General has provided them to the Court with the advice that the Attorney-General considers that their publication would not prejudice national security.
Review of Division 105A of the *Criminal Code Act 1995* (Cth)

23. Division 105A of the *Criminal Code* is customarily described as embodying the ‘High Risk Terrorist Offenders (HRT0)/Post-Sentence Order (PSO) scheme’. It is in Part 5.3 of the *Criminal Code*.

24. Part 5.3 creates three kinds of orders. These are control orders (Division 104), preventative detention orders (Division 105) and post-sentence orders (Division 105A). All respond to the risk of the commission of terrorism offences by a person if not subject to restraint. These terrorism offences are (largely) in Part 5.3 of the Criminal Code.

25. The control order regime was introduced in December 2005. It is a means by which a court, on application of the Australian Federal Police, can order, often significant, restrictions on a person’s liberty for the purpose of protecting the public from terrorism. A person can be the subject of a control order even if not convicted of a terrorism or terrorism-related offence. In the reporting period, one interim control order was applied for, and 6 control orders were confirmed. In comparison, between 1 July 2020 and 30 June 2021, 6 interim control orders were made and 7 control orders were confirmed.

26. The preventative detention order regime was also introduced in December 2005. It enables orders to be made that a person to be detained for a short period in order to prevent a terrorist act that is capable of being carried out, and could occur, within 14 days; or to preserve evidence of, or relating to, a recent terrorist act. Preventative detention orders serve quite a different purpose to a control order and post-sentence orders. They operate only in urgent circumstances, and in the face of imminent threat or risk of a terrorist act. As at 30 June 2022, no PDO has ever been made.

27. Division 105A overlaps with the control order and preventative detention order regimes. Although Division 105A is the primary focus on the review, it must be understood in its place, along with the control order and preventative detention order regimes.
28. Division 105A was substantially amended on 9 December 2021. Prior to this amendment, and since it was introduced in 2016, the Division provided only for continuing detention orders. The Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021 (Cth) amended Division 105A by adding the extended supervision order. The continuing detention order and the extended supervision order are together the post sentence orders.

29. Post-sentence orders can only be made in respect of people convicted of certain terrorist offences and who were, immediately prior to the order, imprisoned serving a sentence for that conviction. The effect of a continuing detention order is that a person who has served their sentence, and who would otherwise be released, remains “detained in custody in a prison” for the period of the order. The effect of an extended supervision order is that such a person will be released from detention but subject to certain conditions.

30. Division 105A steers a course through the interface of human rights obligations to which Australia adheres, requirements reflected in the Constitution, deeply rooted precepts of common law and the threat that terrorism offending poses to the Australian community and communities elsewhere. The course steered is necessarily a compromise and must be carefully considered.

31. Between 1 July 2021 and 30 June 2022; one continuing detention order was made and one continuing detention order was affirmed following review. No extended supervision orders have been made.

32. The first continuing detention order was made by the Supreme Court of Victoria in relation to Abdul Nacer Benbrika on 24 December 2020. Following review, on 21 April 2022 the Supreme Court of Victoria affirmed Mr Benbrika’s continuing detention order. It will cease on 23 December 2023.

33. As I explained in last year’s annual report, when this review was announced on 16 June 2021, section 6(1C) of the INSLM Act required it to be completed by 7 December 2021. On 6 July 2021, I wrote to the then Attorney-General requesting an amendment to the INSLM Act to extend this reporting
The reasons for this extension were set out in last year’s annual report. The *INSLM Act* was amended on 2 September 2021, such that my report into Division 105A and related provisions of the Criminal Code is due as soon as practicable after 7 December 2021. Work on this review continued during the reporting period, including meetings with relevant Commonwealth, State and international stakeholders. My office has also observed proceedings and I continue to review relevant material relating to Division 105A’s operation. The review is well-advanced and following the last set of public set of hearings (outlined below), I expect that the review will be near completion.

34. The issues that I am examining include:

- Whether Division 105A, and in particular the continuing detention order regime, is proportionate to the threat of terrorism.
- Whether Division 105A, and in particular the continuing detention order regime, is consistent with Australia’s human rights obligations, relevantly various Articles of the *International Covenant on Civil and Political Rights*.
- Whether the ‘gateway’ into the post-sentence order regime is too broad.
- The interaction of Division 105A with Divisions 104 and 105.
- Whether the relevant expert process in Division 105A is appropriate.
- The capacity of those involved in the processes of Division 105A to make assessments of the risk terrorist offending.
- Whether any risk to be assessed should be of violence or extremist violence rather than the commission of “serious Part 5.3 offences”.

35. It is salutary to understand that, although the number of people convicted of terrorism or terrorism-related offences who are nearing the end of their sentences is increasing, this cohort is small. The experience in Australia and internationally is that the numbers of those convicted of acts of violent extremism is minute when compared to those convicted of acts of violence. It is salutary too, and my review of Division 105A will detail, the different means, used in countries that share common traditions to ours, of addressing the risks of violent extremism. 
Public hearings and submissions

36. A public hearing as part of my review of Division 105A was held in Canberra on 22 and 23 June 2022. I had initially intended that representatives of the various branches of executive government involved would appear then. After the election of the current government in May 2022, I scheduled a further hearing for August. I then deferred the public hearing again until November 2022 to allow for current government changes to settle and supplementary government submissions to be provided.

37. I have already received significant assistance from stakeholder agencies to assist an understanding of the operation of Division 105A and I will receive more. I have also received enormous assistance from various State government agencies that administer post sentence order regimes dealing with ‘dangerous offenders’ and ‘dangerous sexual offenders.

38. As is often the case with INSLM reviews, I have been greatly assisted by many thorough and thoughtful written submissions and appearances at public and private hearings. In particular, representatives of the Australian Human Rights Commission, the NSW Council for Civil Liberties and Sydney Institute of Criminology (jointly), the Islamic Council of Victoria, the Law Council of Australia and Legal Aid NSW were generous with their time at the first public hearing, as were Joshua Andrews, Peta Lowe, Professor Mark Nolan, Dr Kristy Campion and Professor Adrian Cherney.

Review of the NSI Act

39. As noted above, shortly after the end of the reporting period to which this annual report relates, the Attorney-General referred to me the whole of the NSI Act for review.

40. This will be a complex review and there are many laws in other jurisdictions, and a great deal of practice involving these issues elsewhere that is very different to the NSI Act and its operation. Some differences and the complexity of these matters are highlighted in a recently decided matter dealing with issues similar to those that can arise with the NSI Act. In SDCV v Director-General of Security [2022] HCA 32, the High Court upheld a decision to cancel a person’s visa on character grounds pursuant to section 501(3) of the Migration Act 1958. The decision was based on an adverse security
assessment certified by the Director-General of Security. The person applied to the Administrative Appeals Tribunal for review of the decision. At this review, the ASIO Minister certified that disclosure of some information relating to the decision would prejudice the security of Australia. The Tribunal was provided with this information but it was not disclosed to the person or their lawyers. The ASIO Minister also issued a certificate that had the effect that that part of the hearing dealing with the information was required to be held in the absence of the person and their lawyers. In handing down its decision on review to cancel the person’s visa, the AAT prepared open and closed reasons. The closed reasons addressed matters in the closed session. The Tribunal’s open reasons recorded that it was unable to form a view on whether the visa cancellation decision was justified based on the evidence led in the open session, but that, based on the classified evidence dealt with in the closed reasons, it had concluded that the visa cancellation decision was justified.

41. I expect that it would trouble many that a decision to deport a person from Australia can be made based on evidence of which the person and their legal advisers are unaware and where that evidence was not even tested on their behalf by an independent counsel. Troubling or not, these are the kinds of difficult issues that will arise in the review of the NSI Act.

**Review of the EFI Act**

42. Section 6(1B) of the INSLM Act requires that the INSLM commence a statutory review, as soon as practicable after 29 June 2021, into: Division 82 (sabotage), Part 5.2 (espionage and related offences) and Part 5.6 (secrecy of information) of the Criminal Code.

43. These laws were introduced in the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) (EFI Act). The Act ‘modernises’ a range of espionage and secrecy offences, introduced new offences against sabotage of public infrastructure, created offences for acts of foreign interference, introduced an offence of theft of trade secrets (to counter economic espionage) and a new aggravated offence for providing false or misleading information during a security clearance process.

44. These laws are part of Australia’s response to increasing foreign interference and espionage by foreign intelligence services and, to a degree,
non-state actors. The move to prosecution for espionage, as opposed to traditional counter-intelligence measures, represents a significant policy shift.

45. The review of the EFI Act will be formally announced in due course, though work on it has commenced and continues. My office has observed hearings in Victoria in the prosecution of Di Sanh Duong. Mr Duong had allegedly engaged in conduct contrary to section 92.4 of the Criminal Code with the intention of preparing for, or planning, intentional foreign interference (contrary to section 92.2(2) of the Criminal Code).

46. My office and I have also received operational briefings from relevant agencies on the use of these new provisions in the Criminal Code. These matters are complex and the espionage and foreign interference threat in Australia will not abate in the medium term at least.

Judicial reference to previous INSLM Reports

47. In Alexander v Minister for Home Affairs [2022] HCA 19 the High Court declared a 'citizenship-stripping provision' invalid as it reposed in executive government the exclusively judicial function of adjudging and punishing criminal guilt.

48. In so doing, the High Court majority cited a 2019 INSLM Report into the operation, effectiveness and implications of the citizenship cessation provisions, including section 33AA. The majority observed at [90] and [91]:

"[90] … The INSLM Report stated that the "main focus" of these laws was involvement with the Islamic State, although they were not so limited. The INSLM Report considered that Australia’s counter-terrorism framework required a range of mechanisms, and that "[i]n some, possibly rare cases, citizenship cessation reduces the risk of a terrorist act being undertaken by that person in Australia"

2 Section 36B of the Australian Citizenship Act 2007 (Cth) empowered the Minister for Home Affairs to determine that a person ceases to be an Australian citizen if satisfied, among other matters, that the person engaged in certain proscribed conduct, including engaging in foreign incursions and recruitment, which demonstrated that the person had repudiated his or her allegiance to Australia.

[91] However, the INSLM Report concluded that the citizenship cessation provisions, including s 33AA, lacked necessity, proportionality and proper protections for individual rights. The INSLM Report further identified, in addition to the risk of de facto or temporary statelessness, a denial of due process. While s 36D affords a citizen the due process of a criminal trial before the Minister’s discretion arises, a significant feature of s 36B is that it operates without due process at all.”

49. Judicial attention to the 2019 INSLM Report came as part of the Court’s consideration of sections 36A and 36D of the Citizenship Act. The High Court (and other courts’) consideration of INSLM reports demonstrates the value of the INSLM’s post-enactment, close legislative scrutiny role.

50. In Minister for Home Affairs v Benbrika [2021] HCA 4at [98] Justice Gageler noted:

“Because the burden of restrictions on liberty imposed in pursuit of national security are likely to fall on a few for the benefit of many, political constraints on the exercise of legislative power cannot be presumed to limit the design of legislation enacted in the interests of national security in a manner that is protective of individual liberty to the extent entailed by the constitutional commitment of separated judicial power to institutions immunised from the political processes. Through the legislative establishment of the Office of the Independent National Security Legislation Monitor, provision has been made for independent review and reporting on the effectiveness and implications of Div 105A, including by reference to its impact on "the rights of individuals". The Parliamentary Joint Committee on Intelligence and Security is also required to review Div 105A. Neither the Independent National Security Legislation Monitor nor the Parliamentary Joint Committee on Intelligence and Security has yet reported on Div 105A.” [references omitted]

51. A particular strength of the INSLM role is the focus on the practical operation of legislation. This focus is assisted by public and private hearings, submissions of civil society stakeholders and by consulting with agencies that are involved in implementing Australia’s counter-terrorism and national security legislation. The unique role and ‘vantage point’ of the INSLM, hopefully lends itself to analysis that is useful not only to the community but to courts, Parliament and executive government.
The threat of terrorism and threat to national security

52. For this report, I am required to consider whether Australia’s counter-terrorism and national security laws contain appropriate safeguards for protecting the rights of individuals, are proportionate to the threat of terrorism and the threat to national security, and whether they remain necessary. An understanding of the national security and counter-terrorism outlook is essential to these assessments.

53. Following are various matters relevant to the national security and counter-terrorism outlook that underpin the INSLM reviews that have been progressed in the past year. I am grateful to the Office of National Intelligence for their assistance in providing information for this part of the report.

National Terrorism Threat level

54. The current National Terrorism Threat level remains at ‘PROBABLE’. This threat level has not changed since November 2015. This means that there is credible intelligence indicating individuals or groups have both the intention and capability of conducting an attack in Australia.

Domestic threats

55. Since this last change, 150 people have been charged as a result of 77 counter-terrorism operations around Australia. There have been 11 attacks and 21 major counter-terrorism disruption operations in response to potential or imminent attack planning in Australia. Two of these were confirmed as being related to Ideologically-Motivated Violent Extremism (IMVE). During the reporting period, one incident resulted in terrorism-related charges. The matter is before a court.

56. Australian security agencies have uniformly advised that a threat from terrorism persists, but that its nature continues to change. The most likely manifestation of this threat is a low-level attack conducted by an individual acting alone, possibly targeting crowded spaces. The rise of protest groups, expressing a range of grievances informed partly by conspiracy theories and

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4 ASIO Annual Threat Assessment, delivered by Director-General of Security Mike Burgess, 9 February 2022.
anti-government sentiment, could inform targeting. Following the most common pattern, such an attack may involve little planning and involve use of a knife or vehicle.

57. The risk of a more complex or large-scale attack is present. Terrorist groups and their followers may still try to conduct mass casualty attacks where their networks and resources allow. Notably, during the reporting period, senior Australian security officials have publicly addressed a growing threat from IMVE groups, specifically violent racist and nationalist entities. This continues a trend identified here since 2019 and also observed internationally.

58. Those extremists, generally motivated by perceived social and economic hardships, may be harder to identify and have posed new challenges for law enforcement. Additionally, Australian security agencies have expressed concern about an apparent rise in online radicalisation, including among children. COVID lockdowns and isolation, resulting in increased internet usage, may have exacerbated this trend.

59. Religiously-Motivated Violent Extremists (RMVE) remain a concern for Australian security agencies. While the fall of Islamic State in Iraq and the Levant’s (ISIL) Middle East ‘caliphate’ in 2019 seemingly reduced the appeal of travelling to join a violent Islamist cause, the impacts of this territorial conflict linger and the group’s global network remains active and capable.

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5 Ideologically-Motivated Violent Extremism is a term coined in 2021 by Australian security agencies to describe the use of violence by individuals or groups in order to achieve political goals or express social grievances. Religiously-Motivated Violent Extremism encompasses violence used in furtherance of a religious doctrine or belief system, including by Islamist and jihadist groups such as ISIL and Al Qaida. While these descriptors are imperfect, I adopt them for ease of consistency with whole-of-government language.

6 Parliamentary Joint Committee on Intelligence and Security, Interim Report Inquiry into Extremist Movements and Radicalism in Australia, 31 March 2022.
60. Since 2012, around 230 Australians (or former Australians) have travelled to Syria or Iraq to fight with or support violent extremist groups involved in the conflict, including ISIL. Around 50 have returned to Australia, with most returning prior to 2016.

61. Currently, some 65 Australians or former Australians, including children, are thought to remain in the region. Exact numbers are difficult to independently verify; many are in internally displaced persons camps or otherwise detained.

62. Media reports (October 2022) suggest that the Australian Government is preparing to repatriate more than 20 women and children from Syrian detention camps. Some countries have already completed repatriations including: France; the Netherlands; Finland; Germany and the USA. There are undoubtably risks involved but as noted elsewhere in this report, Australia has a vast suite of counter-terrorism laws and its agencies are well resourced to manage the risks.

External threats

63. Globally, threats from terrorism continue to adapt and evolve, often exploiting new and escalating conflicts. During the reporting period, the Australian Government listed/re-listed fifteen terrorist organisations under the Criminal Code, including Hizballah (listed 10 December 2021), the National Socialist Order (listed 18 February 2022) and Hamas (listed 4 March 2022).

64. While ISIL no longer maintain control over a coherent area of territory, its many regional networks and franchises are effective in spreading its influence and conducting attacks. This decentralisation has helped the group to withstand the death, in February 2022, of its leader Abu Ibrahim Al Qurayshi, in a United States operation.

65. Fluctuating counter-terrorism pressure in Iraq and Syria has allowed both ISIL and Al Qaida (AQ) to retain a presence and consolidate their operations across the Middle East. Terrorist cells in Southeast Asia, while for the most part suppressed by local authorities, remain active and engaged with other parts of their respective global networks.
66. Africa has become a more fertile ground for recruitment due in part to high rates of youth unemployment and socioeconomic disadvantage. Extremists have, in a number of contexts, inflamed ethnic and religious division to their advantage. Around half of ISIL’s global network is now based in Africa. Its franchise in the Democratic Republic of the Congo has sponsored violent campaigns in Uganda and Nigeria, and an affiliate in Mozambique continues to wage a bloody insurgency in an area traversed by Australian mining firms.

67. AQ, meanwhile, draws much of the funding for its attacks from Al Shabaab’s predations in Somalia, which likely sustains cells across Africa, the Middle East and into South Asia. It has substantially enlarged its safe haven in the north of Mali. This allows it to plot attacks reaching not only to the country’s capital but across the Sahel and into coastal states that were previously unaffected by terrorism and where Australian interests are also present.

68. In many of these contexts, the cumulative impact of fiscal downturns in the wake of COVID and poor returns from agriculture (likely due to climate change) has strained governments’ ability to respond to the threat of terrorism. The inability to extend government services and resources and the emergence of effectively ‘ungoverned’ spaces have weakened public confidence and democratic legitimacy and fuelled radicalisation.

69. The global impacts of worsening climate change have created concerns of a growing relationship between climate changes and terrorism. Concerns include terrorist attacks spurred by direct ecological and economic impacts of climate change and other attacks inspired by extremist climate-influenced ideologies like ‘eco-fascism’.7

70. The Coalition troop withdrawal from Afghanistan last year, and the subsequent consolidation of Taliban control there, has benefited AQ. Though the extent of Taliban complicity remains unclear, the presence in Kabul of AQ’s senior leader, Ayman Al Zawahiri – killed in a US strike in July 2022 – underscores a long association. Decreased counter-terrorism pressure in the country overall has also allowed ISIL affiliates to thrive.

7 See, e.g., the ‘Special Issue on Climate Change and Terrorism’, Volume 34, Issue 5 of the Journal Terrorism and Political Violence (2022).
71. The war in Ukraine has generated concerns that ideologically, politically and religiously motivated extremists might access resources, develop contacts and acquire combat experience. Despite some evidence of especially Russian-backed IMVE groups operating in the theatre, there is, to date, little evidence of a significant flow of extremist foreign fighters to Ukraine, including from Australia.

72. Restrictions on travel as a result of COVID, and the cost of international travel, affects the ability of terrorists to project their influence and conduct operations beyond established strongholds. None-the-less RMVE groups continue to exploit porous borders in many of their areas of influence.

73. In light of these travel constraints and a widespread reliance on online communication throughout the pandemic, there has been an increase in radicalisation via the internet. Vulnerable and isolated individuals engage with violent extremist materials. Conspiracies around the nature and origin of COVID, adding to more perennial obsessions, have likely fed into this, providing a potential gateway to extremist propaganda. The proliferation of extremist content is especially clear on social media. Terrorist networks of all types have recognised the medium’s relative lack of checks and balances. Its (largely young, and anonymous) membership offer opportunities for communication and recruitment. ISIL, in particular, has developed a sophisticated media apparatus that produces sophisticated video and other content targeted at vulnerable youth.

74. Both IMVE and RMVE groups have also migrated to more permissive, encrypted platforms, where extremist plans and products may be more freely shared. I am advised that security agencies are becoming more adept at disrupting terrorists’ virtual communications.

75. The greatest terrorist challenge remains the actions of small groups or lone actors, often at the periphery of extremist networks, who may not be officially directed.

Foreign Interference

76. In recent years, intelligence agencies have warned that foreign interference activity against Australia’s interests has reached levels not seen since the Cold War. These activities are aimed at undermining Australia’s national
security, system of government and sovereignty. As noted above, the EFI Act and the new provisions of the Criminal Code is a response to this.

77. These provisions of the Criminal Code address conduct which goes beyond the public and transparent actions of foreign states seeking to have input into matters of importance to them. Having regard to the briefings that I have received from relevant agencies, the gravity of the threat to Australia’s national interest from espionage and foreign interference\(^8\) is enormous.

78. In ASIO’s 2021-22 annual report, Director-General Mike Burgess wrote that ‘Espionage and foreign interference has supplanted terrorism as our no.1 concern’. The Director-General indicated that multiple foreign governments are seeking to undermine Australian sovereignty, by harassing diaspora communities and attempting to shape political and business decisions against Australian interests.

**LOOKING FORWARD**

79. In the remainder of my term I will complete my review of Division 105A of the Criminal Code, the review into the entirety of the NSI Act and continue work on the EFI review.

80. This year marks the twentieth anniversary of the terrorist attacks in Bali.

81. As is often noted, prior to the attacks in the United States on 11 September 2001 Australia had no Commonwealth counter-terrorism laws. As at 25 July 2022, 100 people have been convicted of terrorism offences in Australia since the first Commonwealth counter-terrorism laws were enacted in 2001.

82. There is little reason to think that the growth in Australia’s national security and counter-terrorism legislation will cease. It is critical that what is a vast and expanding body of laws be subject to review, which is adequately resourced.

\(^8\) Foreign interference occurs when activities are carried out by, or on behalf of a foreign actor, which are coercive, covert, deceptive or corrupting and are contrary to Australia’s sovereignty, values and national interests.
83. Terrorism and national security offences are in many respects a unique subset of criminal laws. There are relatively few Commonwealth criminal laws and the Commonwealth has resources and capacities that far exceed those of any State or Territory government. The extraordinary capacities of ASIO for instance dwarf anything that can be applied to criminal law enforcement by a State or Territory. The great departments and agencies of the Commonwealth can apply extraordinary policy strength and resources to burrowing down every perceived lacuna in the already vast body of national security and counter-terrorism laws.

84. This concentration should be accompanied by the reminder that Australia’s counter-terrorism and national security laws, and offending against them, is a minute part of the harm done to the Australian community through crime. This vast concentration should always be tempered by concern that it does not compromise addressing other greater harms. The question posed by Bret Walker AO SC in the inaugural INSLM Annual Report remains:

> Lives lost by domestic murders are just as valuable as those lost by terrorism. The governmental and social resources deployed to deter, prevent and respond to domestic murders are dwarfed by those devoted to counter-terrorism. We do not sacrifice civil liberties because of the evil of domestic murders. Have they been too much infringed in confronting the scourge of terrorism?

**OTHER ACTIVITIES**

85. Public and official engagement continues to be critical to the reportable activities of the INSLM. This engagement engenders public understanding and hopefully confidence in the role.

86. As foreshadowed in my previous annual report, much engagement had to be conducted remotely due to ongoing issues caused by the COVID pandemic. Some key meetings and events were able to be held in person, thanks in large part to the flexibility and resourcefulness of stakeholders and INSLM staff. Public hearings for the HRTO review were held in person and simultaneously live-streamed, with a significant number of viewers tuning in remotely.

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Indeed, live-streaming has made attending my hearings more accessible to the Australian public and international stakeholders. The uptake in virtual communication prompted by an era of remote-working, has made it easier to engage with various stakeholders across dispersed locations.

87. During the reporting period, my office and I have engaged with a range of academic and other experts in the UK and Ireland, in respect of INSLM Reviews. This includes discussion with counterparts in Ireland on the establishment of a national security oversight body in Ireland, based in part on the INSLM role in Australia and the UK Independent Reviewer.

Amendments to the INSLM Act

88. Amendments were made to the INSLM Act through the Independent National Security Legislation Monitor Amendment Act 2021 (Cth) (INSLM Amendment Act). The INSLM Amendment Act was passed on 1 December 2021 and received Royal Assent on 8 December 2021. In last year’s report, I outlined the substance of the amendments.

89. The provisions in the INSLM Amendment Act represent the most significant changes to the INSLM Act since that Act commenced in 2011 and were developed by my office and Government to modernise the Act, providing flexibility in the INSLM’s review and reporting mechanisms and formalising administrative arrangements that had emerged in the decade of the Act’s operation.

90. One important change clarified reporting arrangements for the various sources of my reviews (own initiative, statutory or referrals). The rate of statutory or referred reviews has grown steadily, compared to own initiative reviews, but there had been no explicit way for an INSLM to report on those former reviews. My report into section 22 of the NSI Act as it applies in the Alan Johns matter was the first special report (a new reporting mechanism).

91. I also welcome the formal legal protections now afforded to my staff. While since the first INSLM there have been ‘staff of the INSLM’, the legal protections that applied to the INSLM did not extend to the full-time staff assisting the INSLM. Those protections are essential and an important
independence mechanism. That has now been rectified, my staff so designated and indeed, the protections have already been used to necessary effect.

92. The INSLM Act now also provides for the INSLM to be appointed on a full-time or part-time basis. This is a significant change.

## LEGISLATIVE DEVELOPMENTS

93. During the reporting period there were eight significant pieces of legislation dealing with national security issues enacted by Parliament. I thank AGD, the Department of Home Affairs and the Australian Federal Police (AFP) for their assistance in providing information for this part of the report.

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Changes</th>
<th>Date of Royal Assent</th>
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<tbody>
<tr>
<td><em>National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Act 2022</em></td>
<td>The Act modifies the legislative framework governing the National Intelligence Community by amending the <em>Intelligence Services Act 2001</em>, the <em>Inspector-General of Intelligence and Security Act 1986</em>, the <em>Criminal Code Act 1995</em> (Criminal Code), the <em>Crimes Act 1914</em>, the <em>Office of National Intelligence Act 2018</em>, the <em>Australian Security Intelligence Organisation Act 1979</em>, and the <em>Telecommunications (Interception and Access) Act 1979</em> to address operational challenges facing the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service, the Australian Signals Directorate, the Australian Geospatial-Intelligence Organisation, the Defence Intelligence Organisation and the Office of National Intelligence.</td>
<td>1 April 2022</td>
</tr>
<tr>
<td>Act</td>
<td>Legislation</td>
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<tr>
<td>Security Legislation Amendment (Critical Infrastructure Protection) Act 2022</td>
<td>The Act amends the Security of Critical Infrastructure Act 2018 to introduce further cyber security obligations for the critical infrastructure assets of the highest criticality—known as systems of national significance (SONS). Responsible entities for SONS can now be required to comply with certain cyber security obligations – including developing and implementing a cyber-incident response plan, conducting cyber security exercises with the Australian Signals Directorate, providing systems information to the Australia Signals Directorate and completing vulnerability assessments. The Act also creates an obligation for responsible entities to establish, maintain and comply with a risk management program—which considers material risks to an asset’s operations including, but not limited to, cyber security risks.</td>
<td>1 April 2022</td>
</tr>
<tr>
<td>Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021</td>
<td>The Act amends the Criminal Code to create an ESO scheme to provide that terrorist offenders who are released into the community at the end of their custodial sentences are subject to supervision, conditions and obligations where they pose an unacceptable risk to the community. The ESO scheme complements the existing CDO scheme, as outlined above in this report and as examined in detail</td>
<td>8 December 2021</td>
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in my upcoming report into Division 105A and related provisions.

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<thead>
<tr>
<th>Act Title</th>
<th>Description</th>
<th>Date</th>
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<tbody>
<tr>
<td>Independent National Security Legislation Monitor Amendment Act 2021</td>
<td>The Act amends the Independent National Security Legislation Monitor Act to provide for the INSLM to report on own initiative inquiries in standalone reports, clarifies the reporting arrangements for the INSLM following statutory reviews or referrals from the PJCIS, and provides a framework for the engagement of staff to assist the INSLM, as outlined above in this report.</td>
<td>8 December 2021</td>
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</table>

The Act further introduces mandatory cyber incident reporting, expands the requirement for provision of information to the Register of critical infrastructure assets and provides for government assistance to relevant entities for critical infrastructure sector assets in response to significant cyber-attacks that impact on Australia’s critical infrastructure assets. | 2 December 2021    |
| Surveillance Legislation Amendment (Identify and Disrupt) Act 2021 | The Act amends the Surveillance Devices Act 2004 and Telecommunications (Interception and Access) Act 1979 to introduce new law enforcement powers for AFP and the Australian Criminal Intelligence Commission to combat online serious crime. | 3 September 2021   |
| Counter Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Act 2021 | The Act amends the Criminal Code and the Crimes Act 1914 to ensure the continuation of counter-terrorism powers which were due to sunset on 7 September 2021, including the declared area provisions (Division 119 of the | 2 September 2021   |
| **Foreign Intelligence Legislation Amendment Act 2021** | The Act amends the *Telecommunications (Interception and Access) Act 1979* and the *Australian Security Intelligence Organisation Act 1979* to update the foreign communications warrant provisions to provide that the inadvertent interception of domestic communications is unlawful, provided domestic communications (other than those revealing a significant risk to life) are destroyed once identified. The Act also allows the collection of foreign intelligence on Australians who are acting for, or on behalf of, a foreign power. | 2 September 2021 |

**GOVERNMENT CONSIDERATION OF INSLM RECOMMENDATIONS DURING THE REPORTING PERIOD**

Recommendations made in the 2021-22 period

94. My report into the operation of Part 3 Division 1 (which includes section 22) of the NSI Act as it applies in the Alan Johns matter was delivered to the Attorney-General on 17 June 2022.

95. In short, my recommendations arising from my report into that matter are as follows:
• Where closed court orders are sought from any court under s 22 [of the NSI Act], the Attorney-General be required to make submissions to the court to explain why such orders are appropriate and should be made having regard to the object of the NSI Act and the deeply rooted common law tradition of the open court.

• That s 22 of the NSI Act be amended to express that, where closed court orders are sought under s 22, the court has power to appoint a contradictor to make submissions to the court on such orders.
  o Alternatively, that s 22 of the NSI Act be amended to express that, where any orders are sought under s 22, the court has power to appoint a contradictor to make submissions to the court on such orders.

• That orders made under s 22 of the NSI Act be made publicly available.

• That s 47 of the NSI Act be amended to add to the matters to be included in the annual report:
  o Within the year, the federal criminal proceedings in which orders were made pursuant to s 22 of the NSI Act.
  o Within the year, the federal criminal proceedings in which a judicial officer required the appointment of a contradictor before making or refusing to make an order pursuant to s 22 of the NSI Act.
  o In the event that these earlier matters cannot be detailed because of orders of a court, the number of federal criminal proceedings where such orders have been made.
  o Within the year, the federal criminal proceedings in which orders that had in earlier years been made pursuant to s 22 of the NSI Act ceased to operate.
  o The total number of federal criminal proceedings in which orders pursuant to s 22 of the NSI Act continued to operate.

• That, where closed court orders are sought from any court under s 22, the Attorney-General be required to seek that reasons be given.

96. The detailed context and background to these recommendations are detailed in my report. I understand that the Government is quickly moving
to address these recommendations and I thank Government for its prompt attention.

**Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021**

97. On 3 September 2020, the Government introduced the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020. The Bill was passed on 22 November 2021 and received Royal Assent on 8 December 2021.

98. This legislation implemented the Government’s response to recommendations of the INSLM and the PJCIS to amend Division 105A of the Criminal Code to create an ESO scheme. The scheme provides that terrorist offenders who are released into the community at the end of their custodial sentences are subject to supervision, conditions and obligations where they pose an unacceptable risk to the community.

99. As has been mentioned earlier in this report, the ESO scheme forms part of Division 105A and as such is being scrutinised in detail as part of my review into that Division.

**Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and related matters**

100. I understand the Government is considering the recommendations in the INSLM’s report on the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (TOLA Act) and related matters.

101. The PJCIS was also required to review the operation of the amendments made by the TOLA Act under section 29 of the *Intelligence Services Act 2001* (Cth). The PJCIS tabled their response on 22 December 2021. I am advised that the Government is considering the PJCIS’ findings in conjunction with the INSLM’s recommendations and will respond in due course, however, it has now been over two years since my predecessor delivered his report to Government, without response.
ANNEXURE A – COUNTER-TERRORISM AND NATIONAL SECURITY PROSECUTIONS

Brief summaries of the reportable terrorism and national security convictions are set out in the table below. I am grateful for the assistance of the Office of Commonwealth Director of Public Prosecutions (CDPP) in providing information for this part of the report.

I also draw particular attention to the following decisions:

- *R v Uweinat* [2021] NSWSC 1256 (the first conviction of advocating the doing of a terrorist act under s 80.2(C)(1) of the Criminal Code).
- *R v Shoma* (No 2) [2021] VSC 797 (Momena Shoma pled guilty to engaging in a terrorist act and being a member of a terrorist organisation. These offences occurred while Ms Shoma was serving a 42-year sentence for her previous conviction of engaging in a terrorist attack. Her new total effective sentence is 48 years’ imprisonment with a non-parole period of 36 years – the longest sentence for any individual convicted of a terrorism offence in Australia).

<table>
<thead>
<tr>
<th>No.</th>
<th>Accused</th>
<th>Charges</th>
<th>Sentence Decision</th>
<th>Sentence</th>
</tr>
</thead>
</table>
| 1.  | Chan Han Choi    | Section 27(1) of the *Charter of the United Nations Act 1945* (Cth) – Contravene a United Nations sanction enforcement law  
Section 16(1) of the *Autonomous Sanctions Act 2011* (Cth) – Contravene a sanction law | 23 July 2021     | 3 years and 6 months’ imprisonment.  
Sentence had already expired at the time of sentencing, taking into consideration time spent on remand, so no non-parole period was fixed. |
| 2.  | Ali Al-Talebi    | Sections 11.1, 11.2A and 102.7(1) of the Criminal Code– Jointly attempt to provide support or resources to a terrorist organisation | 28 August 2017   | 12 years’ imprisonment, with a non-parole period of 9 years.  
[On 25 August 2021, the NSW Court of |
3. **Omarjan Azari**  

| Sections 11.1 and 102.6(1) of the Criminal Code – Attempt to make funds available to a terrorist organisation  
| Section 101.6(1) of the Criminal Code – Do act in preparation for, or planning, a terrorist act  
| Additional offences taken into account on a 16BA schedule:  
| Sections 11.1 and 102.6(1) of the Criminal Code – Attempt to make funds available to a terrorist organisation  
| Sections 11.1 and 102.6(1) of the Criminal Code – Attempt to make funds available to a terrorist organisation | 29 March 2019 | 18 years’ imprisonment, with a non-parole period of 13 years and 6 months.  
[On 25 August 2021, the NSW Court of Criminal Appeal granted leave to the offender to appeal against his sentence but dismissed the appeal.]  
[On 16 March 2022, the High Court of Australia dismissed the offender’s application for special leave to appeal from the decision of the NSW Court of Criminal Appeal.] |
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<tr>
<th></th>
<th>Name</th>
<th>Offences</th>
<th>Date</th>
<th>Sentence</th>
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</table>
| 4. | Mustafa Dirani | Sections 11.5 and 101.6(1) of the Criminal Code—Conspiracy to do an act in preparation for, or planning, a terrorist act | 9 August 2019 | 28 years’ imprisonment with a non-parole period of 21 years.  
[On 27 August 2021, the New South Wales Court of Criminal Appeal granted leave for the offender to appeal his conviction, allowed the appeal, quashed the conviction and ordered a new trial.] |
<p>| 5. | Hanifi Halis Samed Eriklioglu Ertunc Eriklioglu | Sections 11.5 and 101.6(1) of the Criminal Code—Conspiracy to do an act in preparation for, or planning, a terrorist act | 7 September 2021 | 10 years’ imprisonment, with a non-parole period of 7 years and 6 months. |
| 6. | Khaled Temssah | Section 119.4(1) of the Criminal Code—Do an act in preparation for an incursion into a foreign country for the purpose of engaging in hostile activities | 15 September 2021 | 4 years and 9 months’ imprisonment, with a non-parole period of 3 years and 9 months. |
| 7. | Youssef Uweinat | Section 102.3(1) of the Criminal Code—Membership of a terrorist organisation | 11 October 2021 | 3 years and 11 months’ imprisonment, with a non-parole period of 2 years and 11 months. |
| 8. | Isaac El Matari | Section 101.6(1) of the Criminal Code—Do an act in preparation for, | 11 October 2021 | 7 years and 4 months’ imprisonment, with a non-parole period of 5 years and 6 months. |</p>
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<tr>
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<th>or planning, a terrorist act</th>
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<td>Section 119.4(1) of the Criminal Code – Do an act in preparation for an incursion into a foreign country for the purpose of engaging in hostile activities</td>
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<td>Additional offence taken into account on a 16BA schedule:</td>
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<td>Section 102.3(1) of the Criminal Code – Membership of a terrorist organisation</td>
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<td>9.</td>
<td>Nowroz Amin</td>
<td>Section 101.6(1) of the Criminal Code—Do an act in preparation for, or planning, a terrorist act</td>
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<td>Sections 11.1 of the Criminal Code and 233BAA(5) of the Customs Act 1901 (Cth) – Attempt to intentionally export goods comprising material that advocated the doing of a terrorist act</td>
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<td>11 October 2021</td>
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<td>5 years and 4 months’ imprisonment, with a non-parole period of 4 years.</td>
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<td>10.</td>
<td>Talal Alameddine</td>
<td>Section 101.4(2) of the Criminal Code—Possess a thing connected to a terrorist act</td>
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<td>18 May 2018</td>
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<td>14 years’ imprisonment, with a non-parole period of 10 years and 6 months.</td>
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<td>[On 27 April 2020, the</td>
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<td>Section 51(1A) of the Firearms Act 1996 (NSW) – Supply a pistol to another person</td>
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<td>Additional offences taken into account under s 32 of the Crimes (Sentencing Procedure Act 1999 (NSW)):</td>
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<td>NSW Court of Criminal Appeal granted the offender leave to appeal, allowed the appeal and quashed the first instance sentence of 17 years and 8 months’ imprisonment with a non-parole period of 13 years and 6 months.</td>
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<td>The Court re-sentenced the offender to 14 years’ imprisonment, with a non-parole period of 10 years and 6 months.</td>
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<td>[On 15 November 2021, the High Court of Australia dismissed the offender’s application for special leave to appeal from the decision of the NSW Court of Criminal Appeal.]</td>
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<p>| 11. B.B. Section 27(1) of the Charter of the United Nations Act 1945 (Cth) – Contravene a UN sanction enforcement law | 24 November 2021 | 2 years’ imprisonment, to be served by way of 6 months of home detention and an intensive correction order. |</p>
<table>
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<tr>
<th></th>
<th>Name</th>
<th>Offences</th>
<th>Date</th>
<th>Sentence</th>
</tr>
</thead>
</table>
|12.| Alo-Bridget Namoa     | Sections 11.1 and 104.27 of the Criminal Code— Attempt to contravene a control order  
    |                      | Sections 11.1 and 104.27 of the Criminal Code— Attempt to contravene a control order  
    |                      | Sections 11.1 and 104.27 of the Criminal Code— Attempt to contravene a control order  
    |                      | 29 November 2021                                                       | 1 year and 4 months’ imprisonment, with a non-parole period of 1 year. |
    |                      | Section 102.3(1) of the Criminal Code— Membership of a terrorist organisation  
    |                      | 3 December 2021                                                        | 10 years’ imprisonment, partially cumulative on existing sentence of 42 years. New total effective sentence of 48 years, with a non-parole period of 36 years. |
|14.| Adam Atwani           | Section 102.8(1) of the Criminal Code— Associating with terrorist organisations  
    |                      | 17 December 2021                                                       | 10 months and 20 days’ imprisonment, with a non-parole period of 8 months and 2 days. |
|15.| Hamza Abbas           | Sections 11.5 and 101.6(1) of the Criminal Code— Conspiracy to do an act in preparation for, or planning, a terrorist act  
    |                      | 19 November 2019                                                       | 22 years’ imprisonment, with a non-parole period of 16 years and 6 months.  
<pre><code>|                      | [On 29 March 2022, the Victorian Court of Appeal refused the application for leave to appeal.] |
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<table>
<thead>
<tr>
<th></th>
<th>Name</th>
<th>Offense</th>
<th>Date</th>
<th>Sentence Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>16.</td>
<td>Radwan Dakkak</td>
<td>Section 104.27 of the Criminal Code—Contravene a control order</td>
<td>11 April 2022</td>
<td>1 year and 8 months’ imprisonment, with a non-parole period of 1 year and 3 months.</td>
</tr>
<tr>
<td>17.</td>
<td>Ahmad Naizmand</td>
<td>Section 104.27 of the Criminal Code—Contravene a control order</td>
<td>6 June 2022</td>
<td>1 year and 4 months’ imprisonment, with a non-parole period of 11 months and 19 days.</td>
</tr>
<tr>
<td>18.</td>
<td>Hadashah Sa’adat Khan</td>
<td>Section 102.7(1) of the Criminal Code—Provide support or resources to a terrorist organisation</td>
<td>6 June 2022</td>
<td>2 years and 6 months’ imprisonment, with a non-parole period of 1 year and 11 months.</td>
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