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PO Box 6500
Canberra ACT 2600
Tel: +61 2 6271 5111
Fax: +61 2 6271 5414
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The Hon Julia Gillard MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

The preparation of an annual report by this office is required by section 29 of the *Independent National Security Legislation Monitor Act 2010* (Cth) ("the Act"). As required by subsection 29(2A) of the Act, if I consider that the annual report contains information of the kind referred to in subsection 29(3) of the Act I must prepare a version of the annual report which does not contain that information (a declassified annual report).

I present herewith a declassified annual report for the period 1 July 2011 to 30 June 2012. It is suitable to be laid before both Houses of Parliament.

Yours sincerely

[Signature]

Bret Walker
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CHAPTER I
REVIEW APPROACH AND SUMMARY

The main object of the work of the INSLM described in this Report has been the review of the extraordinary powers contained in Australia’s CT Laws.1 Another topic to which priority has been given during the period covered by this Report is the definition of terrorism, which in the CT Laws comprises the statutory meaning of “terrorist act” stipulated in sec 100.1 of the Criminal Code Act 1995 (Cth) (“Code”).

The nature of the review required under the Independent National Security Legislation Monitor Act 2010 (Cth) ("2010 Act"), and the way it has been conducted during the period covered by this Report, also permit attention to the full range of matters required under the 2010 Act. At the outset of this Report, the following statements are made about those outcomes.

Under para 6(1)(a) of the 2010 Act, the INSLM has the function of reviewing “the operation, the effectiveness and implications” of the CT Laws and other related legislation of the Commonwealth. As well, there is the function of considering, under para 6(1)(b) of the 2010 Act, whether the CT Laws and other relevant legislation contain “appropriate safeguards for protecting the rights of individuals”, remain “proportionate to any threat of terrorism or threat to national security, or both, and remain “necessary”.

Another specific function, under para 6(1)(d), is “to assess whether [the CT Laws are] being used for matters unrelated to terrorism and national security”.

In discharging these functions, the INSLM “must have regard to ... Australia’s obligations under international agreements ... including ... human rights obligations ... counter-terrorism obligations; and ... international security obligations ... “: para 8(a) of the 2010 Act.

Regard must also be had to federal arrangements “to ensure a national approach to countering terrorism”: para 8(b) of the 2010 Act.

The extraordinary powers concentrated on during the period which is the subject of this Report have been reviewed in accordance with the description of the INSLM’s

1 Being those listed in Appendix 1 of the INSLM’s First Annual Report.
functions provided in paras 6(1)(a) and (b) of the 2010 Act. A summary of the conclusions and opinions which have resulted from that review is set out below.

Along with other more detailed matters, those conclusions and opinions have produced recommendations recorded throughout the Report that follows. Extracted from the expression of reasons explaining why they have been made, all recommendations are listed in Appendix A.

The examination during the period covered by this Report of the use being made by the relevant authorities and officials of Australia’s CT Laws has revealed nothing adverse under para 6(1)(d) of the 2010 Act. That is, the assessment of the INSLM is that the CT Laws are not being used for matters unrelated to terrorism and national security.

The examination during the period covered by this Report of operations under the CT Laws does not reveal any material shortcoming in the “arrangements ... to ensure a national approach to countering terrorism”, as required to be considered under para 8(b) of the 2010 Act.

The method of review during the period covered by this Report has included hearings under subsec 21(1) of the 2010 Act. They have all been held in private by direction of the INSLM, and some portions of all those hearings have included operationally sensitive information within the meaning given by sec 4 for the purposes of para 21(2)(b) of the 2010 Act (which compels a private hearing for such evidence). The conduct of those private hearings involved a deal of discussion and debate with the officers of the departments and agencies in question. I was impressed by and am grateful for their earnest and co-operative participation in this important phase of the work covered by this Report.

A continuing requirement for the work during the period covered by this Report has been the pursuit of the impossible aim of keeping up to date with reading the scholarly and other publications in the field. Space and time forbid anything like a complete description of that Sisyphean task. A much truncated record of important sources is found in Appendix B.

Apart from their own publications, a number of distinguished scholars in this country have provided the review with the great advantage of specific submissions directed to this review. I wish to record my appreciation and gratitude for their assistance. The lack of specific citation in the reasons that follow does not mean those submissions have not formed an important part of the considerations for this review. They have.

The hearings, agencies, persons and submissions that have contributed to this review, and other attendances by the office of the INSLM, are set out in Appendix C.

The review requirements noted above deriving from sec 6 of the 2010 Act were described and paraphrased in Chapter I of the INSLM’s First Annual Report.
For present purposes, they may conveniently be understood as involving consideration of the effectiveness, appropriateness (including compliance with international obligations) and necessity of the CT Laws. Without intending to depart from the terms of the 2010 Act, and for convenience, the comments that follow address the questions whether the particular aspects of the CT Laws under consideration are effective, appropriate and necessary.

The extraordinary powers in question are ASIO questioning warrants and questioning and detention warrants, control orders and preventative detention orders. That is to list them in increasing order of gravity. They are considered in this Report, respectively, in Chapters IV, V, II and III.

Something should be said about the concept of necessity in relation to the CT Laws including these extraordinary powers. The approach taken in the review covered by this Report does not take that concept literally. Obviously, society in general and contemporary Australia in particular could exist and continue in recognizable form without these powers. After all, there are laws against murder and resources to investigate and prosecute cases of murder.

The issue whether the CT Laws and, this year, the extraordinary powers are necessary has been approached by borrowing from familiar common law and constitutional use of the notion of that which is “reasonably necessary”. There is an unsatisfactory vagueness to the relation between that concept and proportionality, which is also an express requirement for consideration by the INSLM. Be that as it may, the attempt has been made to balance expediency, practicability, the calibration of means to the gravity of terrorism and the content of values, rights and principles – especially concerning liberty – all of which constitute relevant factors for the inquiry in question. In the end, the approach to the question of necessity has been to test whether the relevant parts of the CT Laws grant powers and set limits on them in ways that advance the securing of public benefits not otherwise obtainable.

There is considerable scope for evaluative assessment and consequential differences of opinion about the nature of such benefits and the likelihood of their being secured by these or other means.

The reasons for the conclusions and recommendations conveyed by this Report seek to explain how the concept of appropriateness has been approached. In particular, it is intended that emphasis be given to the separate but concordant streams of common law liberty and international human rights treaty obligations. As to the latter, the approach sought to be followed for the purposes of this Report is that the CT Laws should comply with those obligations.

As to the concept of effectiveness, it can be said that Australia is most fortunate to lack the means of rigorous empirical examination. Mercifully, we have not
suffered terrorist violence in this country during the period under review covered by this Report. So the data for analysis are not there.

On the other hand, as described below, there have been successful investigations and prosecution of terrorist offences, all of them at stages that constitute very successful prevention.

The first summary observation from the review covered by this Report, therefore, is that the agencies and their officers (principally, the AFP, ASIO and the DPP) have carried out their duties and functions under the CT Laws. They have been effective, in the sense that terrorist offences resulting in actual violence have not occurred. They have also been effective in the sense that prosecutions have been well conducted, with (as it happens) convictions secured.

It should not be regarded as a logical extension of that observation that the CT Laws themselves are effective. A more realistic statement is that Australia's agencies, working within the CT Laws, have been effective.\(^2\)

As appears from the reasoning especially in Chapter II below, investigation and particularly surveillance carried out under the authority of other laws apart from the CT Laws themselves emerge as by far the most effective powers in preventing terrorism. Examination of the operations of the relevant Commonwealth agencies in the review covered by this Report compels the following statement. The most effective laws for the prevention and investigation of terrorist offences are those which appropriate funds for investigation and surveillance, and those which regulate the propriety of those activities.

On the basis of these approaches to the review covered by this Report, the following summary can be made of its conclusions. It should be read mindful that the details of and reasons for these conclusions are to be found in the Chapters that follow.

Chapter II concludes that control orders in their present form are not effective, not appropriate and not necessary. It suggests that they may be effective, would be appropriate and might be regarded as necessary in the case of persons already convicted of terrorist offences whose dangerousness at the expiry of their sentences of imprisonment can be shown.

Chapter III concludes the preventative detention orders are not effective, not appropriate and not necessary. They should simply be abolished.

Chapter IV concludes that questioning warrants are sufficiently effective to be appropriate, and in a relevant sense necessary. Further, it suggests they might be

\(^2\) It should be understood that the absence of terrorist violence actually occurring in Australia is not a complete or fair measure of effectiveness on the part of Australia's agencies. There is an explicit international or global dimension to the task of countering terrorism. Importantly, it would be quite wrong to treat the commission of terrorist violence in Australia as necessarily involving any shortcoming on the part of those agencies or any of its officers.
more readily available than the legislation currently provides. It rejects the criticism that questioning warrants are an unjustified infringement of liberty.

Chapter V concludes that questioning and detention warrants are an unnecessary extension of questioning warrants. But the reasoning for that conclusion does not suggest detention for the purposes of questioning is wrong. Rather, it is appropriately and proportionately comprehended within the CT Laws provisions for questioning warrants.

Chapter VI proposes improvements to Australia’s definition of terrorism. The current requirement for the separate proof of a political, religious or ideological motivation in order that a person be guilty of a terrorist offence is not effective, not appropriate and not necessary. Indeed, it may be counter-productive.

The support I have received for all the work on the review covered by this Report, and the contribution to this Report itself, from my Adviser, Teneille Elliott, have been of the first order. I am very grateful.
II.1 Introduction

Apart from the provisions of Divs 100-103 in Part 5.3 of the Criminal Code ("Code") that create and define terrorist offences, reviewed in Ch VII of the INSLM's First Annual Report,³ the provisions of Div 104 of Part 5.3 of the Code concerning control orders ("COs") are perhaps the most striking part of the CT Laws. They are striking because of their provision for restraints on personal liberty without there being any criminal conviction or even charge. They may superficially resemble the familiar bail jurisdiction of criminal courts, but fundamentally differ on this account. That is, although a CO is founded on the connexion of the person against whom it is sought with the commission of a terrorist offence, there need not be any pending charge or any charge ever at all. COs are therefore radically different from remand in custody or conditional bail, which are judicial powers available only because a trial of pending charges is in prospect.

The CO provisions, by contrast, make the power to restrain personal liberty in a wide variety of ways available if the court is satisfied of conditions fundamentally different from the basis of a criminal conviction. The pre-requisites are that the court is satisfied on the balance of probabilities that:-

• making the CO would substantially assist in preventing a terrorist act

  OR

• the person against whom the CO is sought has provided training to, or received training from a listed terrorist organisation⁴

  AND

• the proposed terms of the CO are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.⁵

³ at pp 49-59
⁴ para 104.4(1)(c) of the Code
⁵ para 104.4(1)(d) of the Code
As noted in the reasoning for the High Court decision of *Thomas v Mowbray*, COs do nonetheless have historical precedents and analogues. It would be wrong to regard them as entirely novel or culturally alien introductions to Australian law.

Because COs do not require the established safeguards of a criminal trial according to law and because they may be very restrictive in their effect on a person’s way of life – personally, socially and occupationally – it is critical that these provisions be scrutinized.

### II.2 Elements of CO provisions

The prerequisite provisions for COs paraphrased above (being paras 104.4(1)(c) and (d) of the Code) continue as the governing content of the CO scheme. In particular, they govern the jurisdiction of the court if the AFP seeks to “confirm” an interim CO.

There is one small but important weakness in the scheme for the confirmation of an interim CO or the revocation or variation of a CO following confirmation. Generally, the provisions governing such applications clearly and very properly impose the burden of proof and persuasion on the authorities. Thus, an interim CO cannot be confirmed and a CO may be revoked if the court “is not satisfied as mentioned in paragraph 104.4(1)(c)” or “is not satisfied as mentioned in paragraph 104.4(1)(d).” These provisions avoid any presumption of continuance of a CO, a critical matter given the usual *ex parte* hearing of the initial application (discussed below).

It follows that the language of subsec 104.14(6) of the Code is unsatisfactory, when it authorizes the court to declare an interim CO “void if the court is satisfied that, at the time of making the order, there were no grounds on which to make the order”. It would be better if the arguable interpretation of this provision to the effect that it is for the person affected by an interim CO (granted *ex parte*) to show that complete negative (ie, “… no grounds …”) were clearly prevented. It is appreciated that this is a relatively minor point, given the clear terms of the power to revoke if the court is not satisfied by the authorities seeking to confirm an interim CO of the prerequisites at that later time.

**Recommendation II/1:** If COs are to be retained in general, the onus of showing that grounds exist and, if challenged, that they existed when a CO was first made, should clearly be imposed on the authorities applying for confirmation of an interim CO.

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6 (2007) 233 CLR 307
7 cf INSLM’s First Annual Report at pp 47-49
8 subsec 104.14(7) and para 104.16(1)(a) of the Code, also subsec 104.20(1) in relation to revocation or variation.
9 paras 104.14(7)(a) and (b), paras 104.20(1)(a) and (b)
10 Hence subsec 104.14(6) should be amended to more closely resemble eg subsec 104.14(7).
CHAPTER II CONTROL ORDERS

Next, the ex parte nature of the initial application for a CO, in itself acceptable, could be better safeguarded. Any orders made ex parte, ie in the absence of the affected party (otherwise than by that party’s choice after notification of an opportunity to appear and oppose), require familiar procedural duties of fairness to be observed. First, there is a common law duty, that has not been excluded by the Code and ought be understood, pursuant to the principle of legality, as accompanying these drastic powers, for the applicant ex parte to inform the court of “all facts material to the determination of his right to that [order]”, to the point of “[supplying] the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application”.

Second, there is a general law principle that orders made ex parte should not be continued in force beyond the first opportunity a person adversely affected by them has to answer the application in court, unless the court is then satisfied by the applicant that it should continue. Otherwise, obviously, the initial ex parte nature of the application would unjustifiably reverse the onus of proof. Placing the onus of proof on the person (especially an official) who invokes judicial power against another person is a fundamental aspect of just laws.

A proper safeguard is expressed in the CO provisions by ensuring that the court can require “further information” before completing its consideration on an application for a CO. Some caution is warranted about the breadth of that salutary power for the court to give truly judicial consideration to applications for COs. First, the initial and ex parte application can be supported by hearsay evidence if its source is shown. The effect of that facility will be to reduce the ability of the court by its own questions testing the cogency of material adduced in support of the application.

One sensible if instinctive reaction to such hearsay could well be to reject the application. In terms familiar to judicial process, such evidence would not be strong enough to justify an order with drastic consequences being made ex parte. No real comfort should be drawn from that possibility. The experience narrated below shows that the only applications to date proceeded on evidence to which some may have so responded, but not the judicial officers who actually considered those applications.

Second, and very importantly, from the very beginning of the CO process some information is authorized to be kept secret from and not disclosed to the court –

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12 paras 104.4(1)(b), 104.7(1)(b) of the Code
13 subsec 104.28A(1) of the Code and sec 75 of the Evidence Act 1995 (Cth)
and, indeed, beforehand to the Attorney-General whose written consent is the foundation of any CO application. This is “information … likely to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (“NSI Act”), as well as related and probably overlapping categories such as material attracting public interest immunity. This sequestration of relevant information is not necessarily a bad thing, given the well established common law power to exclude such material from compulsory disclosure in litigation. But that jurisdiction, which is part of the principled opposition to “Let justice be done, though the heavens fall”, has two key features that are absent from the CO scheme.

The jurisdiction is exercised so as to prevent the secret material being used in the proceedings. But the secret information in the CO provisions provides support for the grounds upon which an application is initiated.

The other feature is a resistance to immunity from disclosure if the court – with its power to scrutinize the claim for immunity – determines the material should be available to the affected person, say an accused, because it could assist him or her, say in his or her defence. The CO provisions would not give the court access to or power to scrutinize such secret information.

Again, a sensible if instinctive reaction by a court could be to reject substantive applications for COs for which such shadowy support was claimed in this untestable way. So far, there is no practical experience to test whether that optimism is more theoretical than real.

(The potentially critical issues arising in relation to the use of secret material, the NSI Act and public interest immunity with respect to the CT Laws generally and COs and PDOs in particular, will be a major theme for the next year’s tasks to be undertaken by the INSLM.)

In order to conform COs to general principles of justice in accordance with the principle of legality, in the context of drastic ex parte orders, the CO provisions should require the court’s initial consideration expressly to include a presumption that no order should be made ex parte unless unacceptable risks of a terrorist offence occurring would arise or persist in the event that the respondent were first given notice of the application before any order could be made.

**Recommendation II/2:** If COs are to be retained in general, the prerequisites for making an interim CO, including on an urgent basis, should include satisfaction that proceeding ex parte is reasonably necessary in order to avoid an unacceptable risk of a terrorist offence being committed were the respondent to be notified before a CO is granted.

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14 subsecs 104.2(3A), 104.12A(3) and 104.23(3A)
15 Hence subsecs 104.4(1) and 104.7(1) of the Code should be supplemented accordingly.
There are other matters of detailed language in the CO provisions which could be improved, so as to render clear and strong the onus of proof to be borne by the applicant authorities. In the pivotal sec 104.4 of the Code, a slightly puzzling overlap should be eliminated that presently appears from the language that the court “need not” include in a CO a term sought by the AFP if the court is not satisfied it is “reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act”. Those words “need not” might be argued to suggest the possibility of including terms notwithstanding the prerequisite required by para 104.4(1)(d) is not made out. That would be a self-defeating and unfortunate reading and therefore unlikely, but it is better that such matters be clear beyond argument.

In relation to urgent interim COs made by electronic means, the CO provisions appropriately impose an assumption “unless the contrary is proved” that the CO “was not duly made” – but only when the form of order is not produced in evidence in the proceedings in question.\(^\text{16}\) This is all very well in that rather abstruse possibility (how would it come about that the existence or terms of a CO would arise in proceedings without the Commonwealth authorities proving it?). But as an express provision it may raise an unfortunate implication that an ex parte interim CO should be treated on its first return to the court as one presumed to continue. Again, there is reason to be confident a court would not so construe the Code, but any such argument should be scotched by clear provisions.

**Recommendation II/3:** If COs are to be retained in general, the provisions governing confirmation hearings should expressly impose, perhaps by a presumption, the onus on the AFP to show the CO should continue in force.\(^\text{17}\)

### II.3 COs and preventative detention orders

The immediate context in the Code of the CO provisions is the adjacent Div 105 of Part 5.3 concerning preventative detention orders (“PDOs”). Issues specific to PDOs are dealt with in Chapter III of this Report. They are not easily separated topics, not least because the evident policy of the provisions for both COs and PDOs is the same anticipatory, pre-emptive or preventive approach. Essentially, COs and PDOs are presented in the Code as standing apart from the usual ways that wrongdoers can be restrained, including in custody by force of law. Usually, convicted ie proven wrongdoers may be imprisoned or subject to bond conditions, and alleged wrongdoers awaiting trial may be remanded in custody or subject to bail conditions. COs and PDOs do not fit this orthodox criminal pattern.

\(^{16}\) sec 104.11 of the Code  
\(^{17}\) Hence sec 104.14 of the Code should be supplemented, and amended in the case of subsec (4) accordingly.
However, and crucially, COs and PDOs do depend on a connexion between persons proposed to be subject to them and criminal wrongdoing by those persons. The relation of COs and PDOs to ordinary criminal process is therefore uncomfortably close.

Another aspect of the relation between COs and PDOs themselves is that the more effective COs are to prevent terrorist activity, the harder it becomes to justify PDOs as a proportionate response to the threat of terrorist activity. And proportionality is a critical quality to be considered, given the real difference between detention under a PDO and observance of a CO. The House of Lords recognized a similar relation in the course of finding earlier United Kingdom legislation for preventive detention to be wrongly discriminatory, in A v Secretary of State. It had been argued that if the relevant terrorist threat could be addressed by measures short of infringing the right to personal liberty by authorizing indefinite detention (as were available for UK nationals), then the indefinite detention authorized for foreign nationals was disproportionate (and discriminatory). Lord Bingham of Cornhill, with whom Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earls Ferry, Baroness Hale of Richmond and Lord Carswell agreed, illustrated his Lordship’s conclusion by reference to bail conditions that resembled what could be imposed by a CO in Australia:

... it seems reasonable to assume that those suspected international terrorists who are UK nationals are not simply ignored by the authorities. When ... one of the appellants, was released from prison ... on bail ... it was on condition (among other things) that he wear an electronic monitoring tag at all times; that he remain at his premises at all times; that he telephone a named security company five times each day at specified times; that he permit the company to install monitoring equipment at his premises; that he limit entry to his premises to his family, his solicitor, his medical attendants and other approved persons; that he make no contact with any other person; that he have on his premises no computer equipment, mobile telephone or other electronic communication device; that he cancel the existing telephone link to his premises; and that he install a dedicated telephone link permitting contact only with the security company. The appellants suggested that conditions of this kind, strictly enforced, would effectively inhibit terrorist activity. It is hard to see why this would not be so.

There may, of course, be concerns about the proportionality of COs imposed in such swingeing terms, amounting to house arrest and near incommunicado.

18 Thomas v Mowbray at 233 CLR at 356-357 [116]-[121] per Gummow & Crennan JJ
19 [2005] 2 AC 68
20 at [2005] 2 AC 104 [31](5)
21 at [2005] 2 AC 106-107 [35]
The House of Lords decision in A remains an important milestone in the common law world, marking judicial disapproval of detention outside ordinary criminal processes for suspected terrorists. But the legislation that attracted the Law Lords’ disapproval in that case was very different from the system of Australian COs and PDOs. That difference will be elaborated in Chapter III of this Report concerning PDOs. In summary, PDOs are definite and short, while the measures disapproved in A were indefinite and potentially therefore of long duration.

II.4 Process of review

Study of international law and practice, consideration of a number of sharply focussed submissions received by the INSLM and comparison of the CO provisions of the Criminal Code with the law concerning the arrest, questioning, charging, remanding or bailing, and prosecution of terrorist suspects have been the principal approach to produce this part of this Report. The copiousness and variety of these materials have rendered anything like a full scholarly apparatus in the text that follows, quite inappropriate if not impossible. A general comment made in the INSLM’s First Annual Report\(^{22}\) can be repeated with feeling in this Report. Published writings – legal, political, polemical and cross-disciplinary – ranging from most scholarly to merely propagandist have continued to occupy a great deal of reading time for the INSLM. I am very grateful for the marshalling and pointedness of some of the submissions received, including by the selection and focus on worthy current scholarship and argument. With few exceptions, there will not be individual citation of the sources of this assistance which, it is hoped, has improved the capacity of the INSLM to report on the CT Laws.

At the outset of the last year’s review of COs, detailed examination has been made of everything in all the files relating to the only two COs ever made and the other cases where serious consideration was given to seeking COs although no applications were eventually made. In this Report, conclusions reached from that exercise in relation to the files on COs precede closer scrutiny of the provisions of Div 104 of Part 5.3 of the Criminal Code.

II.5 COs issued and COs considered but not sought

The INSLM has reviewed the files for every operation where the AFP gave consideration\(^{23}\) to applying for a CO, including the two COs that were applied for and issued. More detail of this examination is to be found in classified Appendix CA, which should not be contained in the declassified Annual Report because it is operationally sensitive information and information that might

\(^{22}\) at pp 2-3

\(^{23}\) By consideration, it is meant that something more than theoretical consideration must have been given such that official action was taken to document and progress the application.
prejudice the performance by a law enforcement or security agency of its functions. Evidence was obtained by the INSLM at private hearings from AFP officers and others concerning the usefulness of COs. Those records, too, contain throughout references to operationally sensitive information and information that might prejudice the performance by law enforcement or security agency of its functions, if they were published.

The INSLM can say for publication that the AFP has given consideration to COs in relation to 25 individuals. Of these 25 individuals, the AFP applied for COs against 2 individuals. COs were considered and/or applied for in the following circumstances:

- post-conviction (2)
- post-acquittal (1)
- following withdrawal of criminal charges (1)
- during a criminal trial against the contingency of acquittal (6)
- where insufficient evidence existed to prosecute for terrorist offences (10)
- during a criminal investigation before charges had been brought (5)

It is clear that the AFP has devoted very substantial efforts and resources to considering COs. On the basis of the AFP files and discussions with officers at private hearings, the INSLM does not criticize decisions not to proceed with COs. It is not for the INSLM to review the use of resources by the AFP. It is proper, however, to rate the importance and contribution of properly funded and resourced surveillance and investigation efforts in relation to suspected terrorist offences much more highly than resort to COs. In terms of the effectiveness to be reviewed by the INSLM, surveillance and investigation seem to have been effective; COs have been ineffective.

II.6 COs issued in Australia: Jack Thomas and David Hicks

There have been only two COs issued under Div 104 of the Code. The first CO issued was against Joseph ("Jack") Thomas and the second was issued against David Hicks. Disclosure of my unconnected brief for Hicks was made in the INSLM’s First Annual Report at p 48.
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one to be confirmed. There have been no COs sought or issued since the expiry of Hicks’ CO. The INSLM’s review this year has found no evidence that Australia was made appreciably safer by the existence of the two COs issued. It follows that neither CO was reasonably necessary for the protection of the public from a terrorist act. A discussion of these cases follows.

II.6.1 CO case 1: Jack Thomas

The following provides a chronology of the criminal prosecution of Jack Thomas, the control order proceedings against him and his constitutional challenge to Div 104 of the Code.

Chronology of Thomas’ criminal prosecution

Thomas I

On 18 November 2004, Thomas was charged with the following terrorism offences and non-terrorism offences. Terrorism charges: intentionally receiving funds from a terrorist organisation: subsec 102.6(1) of the Code and two counts of intentionally providing support to a terrorist organisation: subsec 102.7(1) of the Code. Non-terrorism charge: possessing a falsified passport: para 9A(1)(e) of the Passports Act 1938 (Cth).

On 26 February 2006, Thomas was found guilty by a Victorian Supreme Court jury of intentionally receiving funds from a terrorist organisation and of possessing a false passport. Thomas was acquitted of the two counts of providing support to a terrorist organisation. On 18 August 2006, the Court of Appeal upheld an appeal by Thomas and quashed the convictions on the basis that the admissions Thomas made in Pakistan were involuntary and the trial judge should have ruled the evidence inadmissible.

Thomas gave a television interview which aired on 27 February 2006 in which he discussed his involvement with the Taliban and Al Qa’ida. On 20 December 2006, Unusually, in the case of Thomas the interim CO had a prolonged life of 12 months to allow Thomas’ constitutional challenge to Div 104 of the Code to be resolved prior to any confirmation hearing. This is compared to the normal process whereby a confirmation hearing will be held as soon as reasonably practicable due to the requirement of combined para 104.5(1)(e) and subsec (1A) that a confirmation hearing be set as soon as practicable, but at least 72 hours after the order is made. In Thomas’ case the parties agreed to the interim CO having an extended duration of 12 months so that the constitutional challenge could be resolved before the confirmation hearing.

See DPP (Cth) v Thomas [2006] VSC 120 (31 March 2006) (Cummins J) for verdict and sentencing.

R v Thomas [2006] VSCA 165 (18 August 2006) (Maxwell P, Buchanan and Vincent JJA). Thomas’ admissions were found not to be voluntary because he could not effectively exercise his right to silence as he did not have a free choice to speak or remain silent: see esp at [91]-[94].

This aired during his first trial, between the verdict being handed down on 26 February 2006 and sentencing on 31 March 2006. This fresh evidence not available at his original trial was used by the prosecution in his re-trial.
the Court of Appeal directed that Thomas be re-tried on the two counts on which he was convicted and remitted Thomas’ case to the Supreme Court for re-trial, for reasons including the circumstances appearing in light of that interview.

**Thomas II**

At re-trial, Thomas was charged with the terrorism offence of intentionally receiving funds from a terrorist organisation: subsec 102.6(1) of the Code and the non-terrorism offence of possessing a falsified passport: para 9A(1)(e) of the Passports Act 1938 (Cth). On 23 October 2008, he was acquitted of the terrorism offence and found guilty of the non-terrorism offence. He was sentenced to nine months imprisonment for the non-terrorism offence but was immediately released on a recognizance release order.32

**Chronology of Thomas’ CO case**

Shortly after the Court of Appeal upheld Thomas’ appeal and quashed his convictions, the AFP had sought an interim CO against Thomas.33 On 27 August 2006 following an *ex parte* hearing, Mowbray FM granted an interim CO against Thomas.

**Grounds for finding that the order would substantially assist in preventing a terrorist act and that Thomas had received training from a listed terrorist organisation**

Federal Magistrate Mowbray was satisfied on the balance of probabilities that both grounds for making a CO were established, namely, that the CO would substantially assist in preventing a terrorist act and Thomas had received training from a listed terrorist organisation (Al Qa’ida).34 In finding that Thomas had trained with a listed terrorist organisation, his Honour relied on Thomas’ admission that he received training with Al Qa’ida in 2001, including weapons training involving the use of explosives and automatic weapons.35 In finding that the CO would substantially assist in preventing a terrorist act, His Honour relied on the AFP’s uncontested evidence that Thomas had not revoked his sympathies for Al Qa’ida and could be a “sleeper agent”. The AFP asserted:

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32 As he only had five days remaining of his sentence once his 265 days of pre-sentence detention had been taken into account. The recognizance order required Thomas to be of good behaviour for the remaining 5 days of his sentence and to pay a recognizance amount of $1000: *R v Thomas* [2008] VSC 620 (29 October 2008), Curtain J.

33 The Court of Appeal quashed Thomas’ conviction on 18 August 2006. The Attorney-General gave his written consent to the request for an interim CO on 24 August 2006. The *ex parte* hearing for the interim CO was held on 26 August 2006 and the interim CO was made on 27 August 2006.

34 para 104.4(1)(c) of the Code

35 Al Qa’ida was (and continues to be) a listed terrorist organisation under sec 4A of the Criminal Code Regulations 2002 (Cth), made under the Code.
... Al Qa’ida has demonstrated that since 2000 it has sought to achieve a capability to seek out and develop converts to integrate into western countries including Australia. This particularly includes western converts who are likely to receive less scrutiny from security agencies. They could then be used as an Al Qa’ida resource to facilitate or carry out a terrorist attack at any time in the future.36

His Honour accepted the AFP’s grounds, stating:

I accept substantially the views of the applicant on the untested evidence that has been presented to the Court. It seems to me that on this evidence there are good reasons to believe that the respondent having received training with Al Qa’ida is now an available resource that can be tapped to assist commit terrorist acts on behalf of Al Qa’ida or related terrorist cells. Training has provided him with a capability to execute or assist in the execution – directly or indirectly – of terrorist acts.37

His Honour found that Thomas was vulnerable to exploitation because of his extremist links and that aspiring terrorists were likely to seek him out for his skills and experience to help guide them in their own terrorist activities.38 The fact that Thomas had trained with Al Qa’ida formed the basis of his Honour’s finding that issuing the order would substantially assist in preventing a terrorist act. This finding has been subject to criticism. First, there was no evidence presented alleging Thomas had engaged in any activities or associations after his return to Australia that would suggest any proposed or possible terrorist activity on his behalf.39

Second, the AFP’s assertion that Thomas may be a sleeper agent for Al Qa’ida who could be called on in the future to commit terrorist acts appears to be quite speculative. Experience concerning sleeper agents suggests they are generally people who are supposedly not known ever to have been arrested or to have been the subject of security agency concern. Thomas was therefore an unlikely sleeper agent given his highly publicized criminal trial and retrial pending at the time the CO was made.40

The admissibility of Thomas’ admissions

A major difficulty with his Honour’s decision to issue the CO against Thomas relates to the evidence relied on by his Honour in finding the threshold for the issuing of a CO had been met. This difficulty arises because of the application

37 at 165 Aust Crim R 38 [42], 40 [59]
38 at 165 Aust Crim R 38 [43]-[44], 40 [60]-[61]
39 Criminal charges were not laid until 18 months after his return to Australia.
40 Andrew Lynch, “Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law” (2008) 8 Commonwealth Law Journal 159-185; 167
of varying standards of proof in criminal and civil proceedings. These different standards of proof were apparently (albeit problematically) understood and applied in the proceedings against Thomas so as to render evidence ruled inadmissible in criminal proceedings against him to be admissible in the CO proceedings.

His Honour acknowledged that much of the evidence on which he made his decision to issue the CO involved admissions by Thomas, including the record of interview between the AFP and Thomas conducted in Pakistan on 8 March 2003. As discussed above, Thomas had his original conviction quashed on appeal by the Court of Appeal (of the Victorian Supreme Court) on the basis that the confession in this record of interview was involuntary and should not have been admitted. While the evidence was inadmissible in criminal proceedings his Honour emphasized that an interim CO proceeding is an interlocutory civil case and found the evidence admissible in accordance with the Evidence Act 1995 (Cth). This has been criticised as an example of forum shopping by the AFP to avoid the procedural requirements of the criminal law.

The use of a CO immediately following Thomas’ successful appeal and the quashing of his initial conviction is a worrying real life example of how COs can provide an alternative means to restrict a person’s liberty where a prosecution fails but the authorities continue to believe the acquitted (or not convicted) defendant poses a threat to national security. The case of Thomas illustrates the ability to use COs in addition to the normal trial process and as a “second attempt” at restraining a person’s liberty where there has been a criminal trial but no conviction. The AFP has considered applying for COs in respect of a number of individuals who have been, or may be, acquitted.

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41 R v Thomas (2006) 14 VR 475. On appeal the admissions were held to be involuntary and should not have been admitted. During the trial, Cummins J found that admissions made by Thomas while detained in Pakistan were admissible: DPP (Cth) v Thomas (Ruling No 3) [2006] VSC 243 (Ruling made on 7 November 2005 and published on 7 April 2006).

42 subsec 104.28A(1) of the Code provides that an interim CO proceeding is a civil interlocutory proceeding for all purposes, including for the purpose of sec 75 of the Evidence Act 1995 (Cth) (under sec 75, in an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source).

43 at 165 Aust Crim R 34 [11]-[12]

44 See Andrew Lynch, “Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law” (2008) 8 Commonwealth Law Journal 159-185; 168


46 Of the COs considered to date, consideration of a CO during a criminal trial in case of acquittal is the second most common category.
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The terms of the interim CO as reasonably necessary and reasonably appropriate and adapted to protecting the public from a terrorist act

His Honour acknowledged that an interim CO in the terms sought by the AFP “would amount to significant limitations on the respondent’s freedom” but nonetheless found all but two of the terms to be reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. His Honour recognized that he was under an obligation to take into account the impact of the terms of the order on Thomas’ financial and personal circumstances but stated he did not “have much evidence about the respondent’s personal circumstances.” In his reasons for judgement, his Honour did not give any more specific reasons why he considered the terms of the interim CO to be reasonably necessary etc but instead stated he was satisfied in the main for the reasons given by the AFP in attachments to the request for the Attorney-General’s consent to request an interim CO. There is no further elaboration on the content of these attachments or their evidential value. His Honour concluded without further explanation:-

The controls set out in the interim control order which I propose to make will protect the public and substantially assist in preventing a terrorist act. Without these controls the respondent’s knowledge and skills could provide a potential resource for the planning or preparation of a terrorist act.

His Honour did provide reasons for his decision to reject one obligation and to amend another. His Honour rejected an obligation to attend religious and psychological counselling on the basis that there was no evidence justifying the counselling was reasonably necessary etc for the purpose of protecting the public from a terrorist act. His Honour also did not accept the reasonableness of an obligation not to communicate or associate with a list of people contained in a 300 page schedule and ordered this list be reduced. In reaching this view, he was particularly conscious of the significant penalty (5 years imprisonment) that could be imposed for a breach of a term of the CO.

47 at 165 Aust Crim R 39 [50]
48 the test set out in para 104.4(1)(d) of the Code
49 subsec 104.4(2) of the Code
50 at 165 Aust Crim R 38-39 [48]-[49]. As the hearing was held ex parte Thomas did not have an opportunity to be present or legally represented at the hearing or to contest the AFP’s evidence.
51 at 165 Aust Crim R 39 [51]
52 at 165 Aust Crim R 40 [62]
53 at 165 Aust Crim R 39 [52]-[55]. It therefore did not meet the test in para 104.4(1)(d) of the Code.
54 at 165 Aust Crim R 39 [57]-[58]. The requirement not to communicate with or associate with certain individuals was reduced to a maximum of 50 individuals listed by the Department of Foreign Affairs and Trade or any individual known to Thomas to be a member of a listed/specified terrorist organisation. 19 terrorist organisations were listed in Sch 3 of the interim CO.
Restrictions, obligations and prohibitions imposed on Thomas under the interim CO

The interim CO imposed the following obligations, prohibitions and restrictions on Thomas under subsec 104.5(3) of the Code.

- an obligation to remain at his residence in Williamstown between midnight and 5:00am each day, unless he informed the AFP of a change of address;
- an obligation to report to one of 3 Victoria police stations 3 times a week (every Monday, Wednesday and Saturday any time between 9 am and 9 pm);
- an obligation to have his finger prints taken by the Victoria Police;
- a prohibition on leaving Australia except with the prior written permission of the AFP;
- a prohibition on carrying out specified activities: a) accessing etc documents regarding the manufacture or detonation of explosives, weapons and/or combat skills, b) possessing etc explosives and c) communicating to any person knowledge connected with, or likely to facilitate, terrorist acts or names and contact details of persons known to Thomas to be associated with a listed terrorist organisation;
- a prohibition on communicating with certain named individuals, individuals listed by the Department of Foreign Affairs and Trade pursuant to Part 4 of the Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002 (Cth), or any individual known to Thomas to be a member of a listed or specified terrorist organisation;
- a prohibition on accessing or using specified forms of telecommunications, including a prohibition of using any mobile or fixed telephone or Voice Over Internet Protocol service, any internet service provider account or e-mail account not approved in writing by the AFP, a prohibition on using any public telephone except in the case of an emergency and a prohibition on using any satellite telephone service; and
- a prohibition on possessing etc any firearm or ammunition.\(^{55}\)

Extended duration of the interim CO and subsequent enforceable undertaking

Following the issuing of the interim CO, Thomas applied to the High Court to quash the order on the ground that Div 104 of the Code is unconstitutional. Thomas was unsuccessful in the High Court, and the interim CO remained in force over the

\(^{55}\) Mowbray FM ordered pursuant to subsec 104.5(3) of the Code that an interim CO be made in relation to Thomas in the terms set out in sch 1 to the judgement.
At the conclusion of the judicial process and at the time the interim CO expired, Thomas agreed to enter into an enforceable undertaking in lieu of the AFP seeking either a renewed interim CO or confirmation of the existing CO. Thomas was released from detention on 29 October 2008 and no subsequent CO has been sought in relation to him.

**Challenge to the constitutional validity of Div 104 of the Code**

Thomas challenged the validity of Div 104 of the Code on two points. First, that Div 104 was not supported by an express or implied source of legislative power under the Constitution and secondly, that it was incompatible with the separation of powers and infringed the limits of judicial power under Ch III of the Constitution. By a 5 to 2 majority, the High Court upheld the provisions as constitutional. Most significantly for the INSLM, the CO provisions survived a challenge to the effect that, even if generally within the legislative competence of the Commonwealth, they infringed upon the limits of judicial power by requiring courts to engage in an exercise at odds with the nature of judicial power.

As noted in the INSLM’s First Annual Report, the fact that the CO provisions survived constitutional challenge by no means concludes the INSLM’s inquiry concerning them. In particular, the INSLM has given weight to the consideration by Hayne J of the difficulties he regarded as insurmountable in the judicial enforcement of the CO provisions. While Hayne J dissented on the point in question, the INSLM (with great respect) considers the reasoning of his Honour has much policy cogency in evaluating the appropriateness of these provisions, unaffected by its minority status on the constitutionality question. The decision of the High Court in *Thomas v Mowbray*, and its implications for COs, are discussed later in this chapter.

**II.6.2 CO case 2: David Hicks**

**Chronology of Hicks’ US military tribunal case**

The second CO issued under Div 104 of the Code, and the only one to be confirmed, was the CO against David Hicks. Hicks was controversially tried by a US Military

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56 Mowbray FM originally ordered that a confirmation hearing for the interim CO be listed for 1 September 2006, in accordance with the requirement of combined para 104.5(1)(e) and subsec (1A) of the Code which requires a confirmation hearing be set as soon as practicable, but at least 72 hours after the order is made. However, the parties agreed to the interim CO having an extended duration of 12 months so that the constitutional challenge could be resolved before the confirmation hearing.

57 Thomas signed the undertaking at the Federal Magistrates Court on 23 August 2007.

58 Thomas was released on a recognizance order following his conviction for a non-terrorism offence at his retrial.

59 *Thomas v Mowbray* (2007) 233 CLR 307
Commission. On 26 March 2007 he (also controversially) pleaded guilty to the charge of intentionally providing material support to Al Qa’ida. Hicks was sentenced to 7 years imprisonment and later transferred into Australian custody under a bilateral agreement with the United States. He was repatriated to Australia to serve the 9 months remaining on his sentence in Yatala Labour Prison, South Australia.

**Chronology of Hicks’ CO**

**Interim CO**

On 20 December 2007, the AFP applied to Federal Magistrate Donald for an interim CO against Hicks. On 21 December 2007, his Honour granted the interim CO. The interim CO was served on Hicks on 21 December 2007, prior to his release from Yatala prison on 29 December 2007.

The scheme of Div 104 of the Code provides that initial applications for interim COs will normally be dealt with on an *ex parte* basis so that the application is made in the absence of the respondent against whom the CO is sought (as was the case with Thomas). However, Hicks was given advance notice of the interim CO proceeding and his legal representatives appeared on the application for the interim CO, although Hicks did not contest the application for the interim CO.

**Grounds for finding that the order would substantially assist in preventing a terrorist act and that Hicks had received training from a listed terrorist organisation**

His Honour was satisfied on the balance of probabilities that both grounds for making a CO were established, namely, that the CO would substantially assist in preventing a terrorist act and Hicks had received training from a listed terrorist organisation. His Honour was satisfied that the evidence established that Hicks had trained with Lashkar-e-Tayyiba and Al Qa’ida. In determining whether the CO would substantially assist in preventing a terrorist act, his Honour admitted to doubts about whether the order would substantially assist in the prevention of a terrorist act given “the absence of any indication in the evidence... [Hicks] had at any time made any threat towards Australia or the Australian community.”

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60 A listed terrorist organisation under the *Criminal Code Regulations 2002* (Cth).
61 *Jabbour v Hicks* [2007] FMCA 2139
62 *Jabbour v Hicks* [2008] FMCA 178 [3]
63 para 104.41(c) of the Code
64 Both of which were (and continue to be) listed terrorist organisations under the *Criminal Code Regulations 2002* (Cth). The fact that these became listed after the dates on which Hicks trained with them was held by his Honour to be irrelevant to whether Hicks met the threshold of subpara 104.41(c)(ii) of the Code, that he received training from a terrorist organisation: [2007] FMCA 2139 [32].
65 [2008] FMCA 2139 [26]
Afghanistan,\textsuperscript{66} coupled with the evidence of the training he received from terrorist organisations, supported a finding that the CO would substantially assist in the prevention of a terrorist act:-

When the expressed views of the Respondent are coupled with the capacity to engage in such [terrorist] activities, I am satisfied on the balance of probabilities that there is a risk of the Respondent either participating in a terrorist act or training others for that purpose. It then follows, having regard to the control order sought, that such order in the terms contemplated would substantially assist in preventing such an act.\textsuperscript{67}

For Hicks it had been contended that the letters and the views expressed in them were several years old and written before Hicks was captured and detained in prison. His Honour rejected this, stating that he was required to act on the basis of evidence he did have, and Hicks had not given evidence that the letters did not reflect his current views.\textsuperscript{68} His Honour did not give any more specific reasons why these letters supported a finding that the order would, at the time it was made, substantially assist in the prevention of a terrorist act in Australia.

His Honour noted the AFP’s submission that the CO against Hicks should be made “even if there is a reasonably small chance of such a terrorist act occurring, nevertheless a control order could substantially assist in preventing such [an] act.”\textsuperscript{69} The thinness of the evidence supporting the CO as being necessary etc to substantially assist in preventing a terrorist act suggests that this approach to judging the risk posed by Hicks, and the necessity for control, was adopted by his Honour.

\textit{Restrictions, obligations and prohibitions imposed on Hicks under the interim CO}

The interim CO imposed the following obligations, prohibitions and restrictions on Hicks under subsec 104.5(3) of the Code:-

- an obligation to remain at his residence between midnight and 6:00am each day, unless he informed the AFP of a change of address;
- an obligation to report to a member of the South Australia police at a police station directed by the AFP 3 times a week (every Monday, Wednesday and Saturday any time between 8 am and midnight);
- an obligation to have his finger prints taken by the South Australia Police;
- a prohibition on leaving Australia except with the prior written permission of the AFP;

\textsuperscript{66} In the letters referred to in the judgement, Hicks speaks of being a practising Muslim who has military experience and needs to protect Islam from non-believers.

\textsuperscript{67} [2008] FMCA 2139 [31]

\textsuperscript{68} [2008] FMCA 2139 [30]

\textsuperscript{69} [2008] FMCA 2139 [25]
- a prohibition on carrying out specified activities: a) accessing, producing etc documents regarding explosives, weapons, combat skills and military tactics, b) possessing, acquiring or manufacturing explosives c) communicating to any person knowledge connected with, or likely to facilitate, terrorist acts or the names and contact details of persons known to Hicks to be associated with a terrorist organisation;
- a prohibition on communicating with any individual known to Hicks to be a member of a terrorist organisation;
- a prohibition on accessing or using specified forms of telecommunications, including a prohibition on using any mobile or fixed telephone or Voice Over Internet Protocol service, any internet service provider account or e-mail account not approved in writing by the AFP (only a pre-paid mobile phone could be approved by the AFP), a prohibition on using any public telephone except in the case of an emergency and a prohibition on using any satellite telephone service; and
- a prohibition on possessing or using any firearm, ammunition or explosive devices.\textsuperscript{70}

\textit{The terms of the interim CO as reasonably necessary and reasonably appropriate and adapted to protect the public from a terrorist act}

His Honour made the interim CO against Hicks in the exact terms sought by the AFP after finding them to be reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.\textsuperscript{71} His Honour noted that he was required under subsec 104.4(2) of the Code to take into account the impact of the terms of the CO on Hicks' financial and personal circumstances but stated he was “hampered in these interim proceedings by not having any evidence either from or produced on behalf of the Respondent.”\textsuperscript{72} Notwithstanding the lack of evidence of Hicks' personal and financial circumstances, his Honour repeatedly stated there was no evidence before him of the impact each term would have on Hicks such that it would dissuade him from making the order in the terms sought.\textsuperscript{73} It is not clear how his Honour made an assessment of the impact on Hicks’ personal and financial circumstances when there was no evidence about those matters of any material detail before him on this point – and the applicant bore the onus of proof.

\textsuperscript{70} Donald FM ordered pursuant to subsec 104.5(3) of the Code that an interim CO be made in relation to Hicks in the terms set out at sch 1 to the judgement.

\textsuperscript{71} The test set out in para 104.4(1)(d) of the Code.

\textsuperscript{72} [2008] FMCA 2139 [34]. Given the legislation contemplates that interim CO proceedings are intended to be held ex parte, there would not normally be an opportunity for such evidence to be presented as the respondent will not be aware of the proceedings.

\textsuperscript{73} eg [2008] FMCA 2139 [41], [47]
In considering the curfew obligation sought by the AFP, his Honour was conscious of the impact on Hicks’ freedom of movement. While Hicks, through his legal representatives, objected to the frequency of reporting as being unduly onerous, his Honour held that as Hicks did not place any evidence on his own behalf before the Court of the impact the requirement would have on him, the only evidence the Court could take into account was that produced by the AFP.  

In his summary of the grounds on which the order was made, his Honour found the terms imposed on Hicks were reasonably necessary, appropriate and adapted for the purposes of protecting the public from a terrorist act on the basis that:-

3. The [terrorist] training...provided Mr Hicks with the capability to execute plans for terrorist acts or to provide instruction to others in this regard.

4. The fact that Mr Hicks has trained in LeT and Al-Qa’ida training camps, and associated with senior Al-Qa’ida figures in Afghanistan may lead aspirant and current extremists to seek out his skills and experiences to guide them in achieving their potentially extremist objectives.

5. The controls will protect the public and assist Mr Hicks to reintegrate into the community and adapt back into the Australian society and culture. Without these controls, Mr Hicks could be exploited or manipulated by terrorist groups. Due to his knowledge and skills, he is a potential resource for the planning or preparation of a terrorist act.

His Honour did not confine his reasoning to the risk posed by Hicks himself initiating a terrorist act but was also concerned with controlling the risk of other people seeking out and exploiting Hicks. Similar reasoning was used in relation to Thomas where the emphasis was on the ability for other people to use Thomas for their own terrorist objectives. This reasoning apparently proceeds on the dubious basis that once a person has trained with a terrorist organisation that person will always meet the requirements for a CO as they will, by reason of their training, always have a capability to execute plans for terrorist acts or to provide instruction to others in this regard. It would not appear to matter, on this approach, how long ago such training was undertaken or how current the supposed skills were. And it bears repetition that in the case of an interim CO where an ex parte hearing is the normal procedure, there is no ability for the person to provide evidence against the assumption that they pose a threat because they have trained with a terrorist organisation.

**Confirmed CO**

A confirmation hearing was held on 18 February 2008. On 19 February 2008, the interim CO against Hicks was confirmed by Federal Magistrate Donald for the
same reasons as those set out in the interim CO judgement. The interim CO was confirmed with the minor variations sought by the AFP (enabling Hicks to move interstate and reducing the curfew to four hours). The CO was also varied in response to a request by Hicks’ legal representatives that the requirement to report to a police station three times a week be removed. Although opposed by the AFP, his Honour reduced the reporting requirement to two days a week in recognition that the AFP had the means to monitor Hicks’ location. His Honour was not willing to reduce the reporting further because the evidence given by the AFP did not allow him to assess the exact means of how such monitoring would be undertaken or if it was completely reliable.

In finding that Hicks met the threshold for the issuing of the CO and that the terms of the CO were reasonably necessary etc his Honour was critical that Hicks chose not to provide evidence to the court, despite being under no obligation to do so:-

7. I again note that the Respondent has not sought to produce evidence to these proceedings. He has not asked to give evidence himself. It must be clearly understood that the Court can only make decisions based upon evidence presented to it and that each party has had opportunity to properly present its case. The Respondent could have, for example, given evidence to the Court that the evidence produced by the Applicant was false; that it did not correctly convey the impression currently drawn by the Court from it; that his views had changed; that he did not represent a risk to the Australian community; that the current conditions impacted adversely upon him; or that there was any other means by which the concerns of the Australian Federal Police could be addressed. He did not. Again, this means that the Court only has the evidence relied upon by the Applicant and the evidence of the Applicant elicited in the course of cross-examination by those representing the Respondent.

...

45. The Respondent has not placed any evidence on his own behalf before the Court. He has had the opportunity to attend this Court and provide evidence that such a condition is unnecessary, that he is not threat to the community and also as to the impact such a requirement would have upon him. He has not done so. The Court must make its Orders based upon the evidence actually before it which, at this time, consists only of the evidence produced by the Applicant.

The confirmed CO against Hicks expired on 21 December 2008. No subsequent CO has been sought in regards to Hicks.

76 Jabbour v Hicks [2008] FMCA 178
II.7 COs and detention

While a CO does not involve detention in prison, a CO can impose a curfew requirement on a person requiring a person to confine him or herself to a specific location for the duration of the curfew period\(^\text{77}\) (placing him or her under a kind of house arrest). In the UK, the House of Lords considered the degree of deprivation of liberty that a curfew under a CO can impose before it falls foul of the right to liberty, rather than narrowing the focus to include only those circumstances where a person is in state custody.\(^\text{78}\)

Australian experience, as described above, certainly does not display any such functional equivalence of restraint under a CO and detention in custody. Nor does our experience justify complacency about that point being reached in some future case.

II.8 Relationship of COs with investigation and prosecution

It is worth considering the relationship of COs with the prosecution stream. Our international obligations, including 1373\(^\text{79}\), clearly set criminalization and punishment as the primary response to terrorism. COs can operate as an alternative to, or adjunct to, the prosecution of terrorist suspects. A CO can be pursued in lieu of prosecution or following prosecution. A CO may be pursued in lieu of a prosecution where the CDPP has advised there is no reasonable prospect of conviction. A CO can be pursued following a conviction being set aside on appeal, acquittal, withdrawal of charges, nolle prosequi or a permanent stay of proceedings. A CO may also be pursued as an adjunct to prosecution eg following conviction, incarceration and unsuccessful rehabilitation.

It should be a matter of concern that COs can be imposed on a terrorist suspect without following the normal criminal law process of arrest, charge and prosecution. As a matter of principle and policy, restraints on the liberty of a person charged and pending trial should be a question of remand or bail and nothing else. Were it otherwise, the bail system for all offences should in principle be called into question, which is not on any sensible agenda.

As with PDOs, COs are not an investigative tool and using a CO against someone pre-charge can have a negative impact on the investigation. In the final report of the UK Independent Reviewer on the UK CO regime, David Anderson QC concluded

\(^{77}\) para 104.5(3)(c) of the Code

\(^{78}\) The House of Lords decided a CO imposing an 18 hour curfew infringed the right to liberty (Secretary of State for the Home Department v JJ [2007] UKHL 45, Secretary of State for the Home Department v E and S [2007] UKHL 47) while a CO imposing a 14 hour curfew did not (Secretary of State for the Home Department v MB and AF [2007] UKHL 46). These rulings apply to curfew obligations under TPIMs.

that COs “were not effective as an aid to the investigation and prosecution of terrorist crime”\(^{80}\) and “did not prove a useful source of evidence for criminal prosecutions”.\(^{81}\) The TPIM measures which replaced COs do not operate sufficiently differently from the previous CO regime so as to overcome these problems. Like the Australian CO regime, the new UK TPIM regime does not require restrictions to be aimed at assisting further investigations or the collection of evidence.\(^{82}\) Given the types of restrictions that can be imposed under a TPIM or CO it is not clear how practically these orders could aid the investigation and prosecution of terrorist offences, or provide evidence for use in a criminal trial.

The UK Government’s Review into the previous CO regime found the CO regime to be “neither a long term nor an adequate alternative to prosecution, which remains the priority.”\(^{83}\) The Review found that any new regime would need certain essential features, including a priority for prosecution of people engaged in terrorist activity. The Review recommended that while CO type restrictions are in place against a person every effort must continue to be made to gather evidence and prosecute, with a need to constantly engage prosecutors in this process. The Review recommended that any restrictions imposed under a new system be required to facilitate further investigations as well as serving a preventive purpose (although no such requirement for furthering investigations was subsequently placed on TPIMs).\(^{84}\)

Lord MacDonald QC (a former DPP) provided independent oversight of the UK Government’s Review and produced his own report highlighting the negative impact the CO regime had on criminal investigations and prosecutions.\(^{85}\) Lord MacDonald found that the evidence obtained by the Review “plainly demonstrated” that the CO regime acted as an impediment to prosecution because the controls imposed on a terrorist suspect prevent the person from undertaking activities that “apt to result in the discovery of evidence fit for prosecution, conviction and

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\(^{80}\) David Anderson QC, Independent Reviewer of Terrorism Legislation, *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005*, March 2012, p 42. The Independent Reviewer found this to be a consequence of the fact that controlees are persons against whom the police have already confirmed there is not enough evidence to support a prosecution and will generally not choose to commit terrorist offences while subject to conditions which allow authorities a good opportunity to observe any such offences being committed.

\(^{81}\) *Control Orders in 2011*... pp 6, 33 and 41. The Independent Reviewer reported that (i) not a single former controlee has been successfully prosecuted for a terrorist offence, (ii) at least eight former controlees were arrested on suspicion of terrorism offences but not subsequently charged and (iii) only one former controlee was charged with a terrorism offence, with the offending conduct occurring prior to the CO and the charges not resulting in conviction.

\(^{82}\) Notwithstanding that the “I” stands for investigation.

\(^{83}\) *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, January 2011, Cm 8004, p 41

\(^{84}\) Cm 8004, p 39-42

\(^{85}\) *Review of Counter-Terrorism and Security Powers, A Report by Lord MacDonald of River Glaven QC*, January 2011, Cm 8003
imprisonment.”\textsuperscript{86} Lord MacDonald observed that if terrorist suspects are placed on COs in the earliest stages of their conspiracy the restrictions imposed under the COs can prevent the police from collecting the evidence necessary to prosecute. This means that instead of prosecution and conviction followed by lengthy imprisonment those people will continue to be free in the community (albeit subject to the conditions of a CO).\textsuperscript{87}

The argument that COs are necessary because police and intelligence agencies lack the resources for the surveillance of suspects is unconvincing. A CO cannot be used as a money saving alternative to surveillance. For one thing, some surveillance will be necessary to check compliance with the restrictions imposed by a CO. It would be unsafe fantasy to assume that a controlee will acquire with that status a docile attachment to perfect law abiding behaviour justifying such trust as to dispense with that precaution.

The cost of surveillance may exceed the costs of obtaining a CO, but surveillance surely promises better value for money. The INSLM’s mandate excludes the allocation of resources, but the continued resort to surveillance and other intelligence activities in contrast to the isolated two only COs probably supports that intuition.

As the UK Review acknowledged, it is surveillance that is important in the evidence gathering process and can lead directly to police being able to prosecute and convict a suspected person.\textsuperscript{88}

Furthermore, surveillance of a person to ensure compliance with a CO is not as useful surveillance given that it is much less likely to provide agencies with material to support a prosecution. As the UK Independent Reviewer found in relation to the CO system “it was unproductive in terms of evidence usable in the criminal process, since controlled persons were aware of being watched in a way that subjects of covert surveillance may not be.”\textsuperscript{89}

The notion of a CO being sought for individuals who have been acquitted raises acute questions of legality. Can we tolerate laws to restrain someone’s liberty because people in authority think the individual may well have done something a jury has found them not guilty of having done? Should the difference in the standard of proof – beyond reasonable doubt for conviction, on the balance of probabilities for a CO – encourage such tolerance?

\textsuperscript{86} Cm 8003, p 9

\textsuperscript{87} Cm 8003, p 9. Lord MacDonald pointed to Operation Overt as an operation where this outcome could have been assumed had the plotters been subject to a CO early in their conspiracy. Operation Overt involved more than a year of covert surveillance by police and security agencies in order to gather sufficient admissible material for a prosecution.

\textsuperscript{88} Cm 8004, p 38

\textsuperscript{89} Control Orders in 2011… p 18
While only one CO has been considered (and an interim CO made) in relation to a person who has been acquitted of terrorism offences, the AFP has given consideration in a number of cases to applying for a CO against the contingency of an acquittal. More worrying from a rule of law perspective is that COs can be imposed on an individual who has been acquitted of a terrorism offence, on the basis of the same evidence and the same conduct for which the person was acquitted, as the case of Jack Thomas demonstrates.

II.9 Ability to detect and prosecute at an early stage of offending

The effectiveness, appropriateness and necessity of COs is reduced by the ability of police to detect and prosecute at an early stage of offending. The UK CO regime (on which the Australian regime is modelled) was said to be necessary because of a lack of express terrorism offence provisions under UK criminal law at the time of introduction. This is now largely a historical problem for both the UK and Australia.  

The effectiveness, appropriateness and necessity of COs are all reduced or made less likely if it is feasible that comparatively early in the course of offending a person may be charged with a terrorism offence. Australia’s inchoate or precursor terrorism offences under the Code are striking in that they criminalise conduct at a much earlier point than has traditionally been the case. In *Lodhi v R*, Spigelman CJ described the criminal responsibility in these offences thus:-

> Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of

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90 Another reason advanced for the necessity of the UK CO regime and its replacement TPIM regime is the inadmissibility of intercept material as evidence in UK criminal proceedings under sec 17 of the *Regulation of Investigatory Powers Act 2000* (UK). There is an exception to the statutory bar on the use of intercept material in legal proceedings in relation to TPIM proceedings or any proceedings arising out of such proceedings: subsecs 18(1) and (2). The same exception applied to COs. As Australia permits the use of intercept evidence in criminal proceedings this justification does not apply in relation to Australia’s CO regime.

Despite the claim that COs and TPIMs are necessary because intercept material cannot be admitted in criminal trials, a review conducted by independent senior counsel (commissioned by the UK Home Office) found that of the 9 current and former CO cases he examined, the ability to use intercepted material in evidence would not have enabled a criminal prosecution to be brought in any of the cases studied. He concluded this was because it would not have been of sufficient evidential value to bring charges (4 cases) or because use of the intercepted material as evidence would have caused wider damage to national security (eg revealing ongoing investigations or revealing sensitive capabilities) greater than the potential gains offered by prosecution in those cases (5 cases). See *Privy Council Review of Intercept Evidence*, January 2008, Cm 7324 para 58.

91 For a discussion of the preparatory offences in the Code, see MacDonald and Williams, (2007) 16(1) *Griffith Law Review* at 33-36.
terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, eg well before an agreement has been reached for a conspiracy charge.  

It is an offence punishable by life imprisonment for a person to do “any act in preparation for, or planning, a terrorist act”. A person commits an offence even if the terrorist act does not occur, or the person’s act is not done in relation to a specific terrorist act or is done in relation to one or more terrorist acts. Of the 22 people convicted of terrorism offences in Australia to date, 10 have been convicted for conspiring to do an act in preparation for, or planning a terrorist act. Experience with Australia’s terrorism offences shows that courts are prepared to hand down lengthy sentences of imprisonment to those convicted of preparatory terrorism offences even where “the enterprise was interrupted at a relatively early stage of its implementation”.

The statutory prerequisites for making a CO are expressed very differently from the usual grounds considered adequate properly to charge a suspected person. The preventive character of COs drives that difference. Nonetheless, the required satisfaction that the proposed CO “is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act” is virtually bound in all imaginable circumstances to involve a real apprehension based on available evidence that the respondent is set on a course that, but for the terms of the proposed CO, would result in a terrorist offence being committed by the respondent.

In this manner, the kind and cogency of evidence in support of an application for a CO converges very closely to the kind and cogency of evidence to justify the laying of charges so as to commence a prosecution. In particular, the availability, peculiar to terrorism, of precursor or inchoate offences earlier in the development of violent intentions and actions than ordinary conspiracy offences, renders this convergence practically complete. Nothing was obtained in private hearings investigating these issues suggesting to the contrary.

92 Lodhi v R [2006] NSWCCA 121 per Spigelman CJ at [66]
93 subsec 101.6(1) of the Code
94 subsec 101.6(2) of the Code
95 contrary to sec 11.5 and subsec 101.6(1) of the Code
96 R v Elomar [2010] NSWSC 10 per Whealy J at [57-58] commenting on the convictions in relation to Operation Pendennis. Khaled Cheikho, Abdul Rakib Hasan, Mohammad Ali Elomar, Moustafa Cheikho and Mohammad Omar Jamal were found guilty of conspiring to do acts in preparation for, or planning, a terrorist act and received sentences between 27 and 23 years with non-parole periods of between 20.25 to 17.25 years.
97 para 104.4(1)(d) of the Code
98 This is how these provisions should be read and applied, given orthodox observance of the approach to proof in light of the principles classically stated in Briginshaw v Briginshaw (1939) 60 CLR 336 esp per Dixon J at 361-363. The comments above about the cases of Thomas and Hicks are intended to question those courts’ application of that principle.
This practical possibility of early prosecution, therefore, in accordance with Australia’s strong commitment to countering terrorism by the criminal law and its processes, attenuates the policy justification (such as it is) for the non-criminal power to make COs.

II.10 Training as a threshold for a CO

COs were said to be necessary to preventively deal with those people who had trained with a terrorist organisation before it was a criminal offence to do so. As it is now a criminal offence to provide training to, or receive training from, a terrorist organisation this is largely a historical problem and cannot be said to justify the current CO regime.  

II.11 Categories for the putative use of COs

Insufficient evidence to prosecute

The INSLM has been told that the most serious category of people for whom a CO could be sought is for those individuals who cannot be prosecuted because there is insufficient evidence to support a prosecution. The belief that there is not enough evidence could be an intuitive belief by the police that there is a case although it is not supported by enough evidence. It could also be a belief by the police that there is sufficient evidence, being a view disagreed with by the CDPP, with the proper result that there will not be a prosecution.

This is not a justification for COs. Australia is committed internationally to prosecute terrorism offences, meaning in appropriate cases. Nationally, the rule of law requires that the possibility that someone has committed a criminal offence produces consideration of prosecution and nothing else in terms of official action to restrain that person’s liberty. In order for Australia to be a “free and confident society” a person must be prosecuted according to the rule of law or the principle of legality. This ensures there is not a class of people for whom the requirement for a conviction beyond a reasonable doubt is removed.

There is no proper need for another route to official restraints on a person’s liberty where the case against a person may be arguable considered weak. Authorities can deal with people who fall into this category in the same way they deal with other suspected crimes, including serious crimes like conspiracy to murder or rob banks, by either prosecuting or continuing to investigate until there is sufficient evidence to prosecute. Meanwhile, surveillance may continue where appropriate.

99 Section 102.5 of the Code makes it offence punishable by up to 25 years imprisonment to train with a terrorist organisation.

100 Thomas v Mowbray (2007) 233 CLR 307 per Gummow and Crennan JJ at [61]
CHAPTER II CONTROL ORDERS

The UK courts held there was an obligation on the Home Secretary to keep the possibility of prosecution under constant review in relation to COs.\(^{101}\) The UK Independent Reviewer noted that it is acknowledged on all sides that COs are a second-best solution for use only when criminal prosecution is out of the question. The INSLM agrees with the following observations by the UK Independent Reviewer:-

The imprisonment of a dangerous terrorist protects the public more effectively – and more economically - than the restrictions imposed by a control order or TPIM. Furthermore, significant restrictions on the freedom of the subject are more palatable from a civil liberties standpoint if they are imposed on the basis of proof, as opposed to mere suspicion, of guilt. It is right that all reasonable steps should be taken to ensure that prosecution, if feasible, can occur.\(^{102}\)

In his review of the UK’s CO provisions, Lord MacDonald reviewed the requirement under the CO regime for police to make regular assessments of the state of the evidence against the controlees and found this scrutiny to be inadequate. He also noted the very large difference between a requirement regularly to assess the evidence and actually setting out to build a criminal case against a person.\(^{103}\)

The UK Review recommended that the new TPIM system place police under a strengthened legal duty to ensure that the person’s conduct is kept under continued review with a view to bringing a prosecution and to inform the Home Secretary about the ongoing prospects for prosecution.\(^{104}\) However, the only new duty imposed under the TPIM regime is a statutory duty on the police to report back to the Secretary on the ongoing review of the investigation into the individual’s conduct.

Under the UK CO and TPIM regimes, before making a CO/TPIM the Home Secretary must consider whether “there is evidence available that could realistically be used for the purposes of prosecuting the individual for an offence relating to terrorism.”\(^{105}\) Once a CO/TPIM notice is served, the chief of the relevant police service must ensure that the investigation into the individual’s conduct (with a view to prosecuting them for a terrorism offence) is kept under review throughout the period the CO/TPIM notice is in force. Where appropriate he or she

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101 SSHD v E [2007] UKHL 47 and SSHD v E and S [2007] EWCA Civ 459 cited by David Anderson QC, Independent Reviewer of Terrorism Legislation, Control Orders in 2011...p 31. The same principle applies to the TPIM scheme. See discussion below on the new provisions introduced into the TPIM legislation which expand on this duty.

102 Control Orders in 2011... p 31

103 Cm 8003, p 10

104 Cm 8004, p 42

105 subsec 8(2) of the Prevention of Terrorism Act 2005 (UK) and subsec 10(2) of the Terrorism Prevention and Investigation Measures Act 2011 (UK)
must consult with the relevant prosecuting authority in carrying out the review. The only change under the new TPIM system is the introduction of a statutory duty on the chief police officer to report back to the Home Secretary on the ongoing review.

There is no historical or current policy justification for COs as a means of investigating terrorist offences. There should not be a system apart from the criminal stream for cases where investigation is proceeding but has not yet achieved evidence adequate to arrest, charge and remand in custody a suspect. It is very clear from scrutiny of all the files where applications for COs were considered (but not made) that the Australian system has not taken that erroneous approach, in practice.

**Sufficient but too sensitive evidence to prosecute**

The most difficult category of people for whom COs are said to be needed is where on the basis of intelligence, which may also include enough evidence, there is ample justification to believe a terrorist offence has been committed and the individual would be prosecuted but for the existence of legitimate sensitivity concerns. Such concerns may involve the compromise of sensitive capabilities or human sources, or the information may have been provided by foreign partners for intelligence purposes only (prohibiting its use in court). The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ("NSI Act") may not be able to overcome the sensitivity concerns without unduly interfering with fair trial and other ICCPR rights and there may be no realistic prospect that position will change.

Emphasis needs to be given to the fact that COs are preventive in nature. COs are aimed at future conduct, no doubt with a reference to past conduct but not so as to be punitive. There is a venerable tradition of civil administration of justice restraints on liberty because of apprehensions about propensities indicated by past conduct. These allow restrictions and controls on a person without prior conviction for a criminal offence because of the danger they pose to the community or to an individual, eg AVOs and peace bonds.

There is nonetheless a philosophical problem with this use of power to restrict liberty because of misconduct apprehended in the future. This has a quasi-punitive effect even if it is preventively applied on the basis of propensity. This is not punishment for the conduct proved on the application for the order but rather a preventive measure to stop predicted future conduct. Australia being a "free and

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106 sec 8 of the *Prevention of Terrorism Act 2005* (UK) and sec 10 of the *Terrorism Prevention and Investigation Measures Act 2011* (UK)

107 para 10(5)(b) of the *Terrorism Prevention and Investigation Measures Act 2011* (UK). There was no equivalent duty under the CO regime.

108 The NSI Act and its potentially profound implications for fair trial of alleged terrorism offenders are on the agenda for the next annual report.
confident society” did not hitherto have laws materially more serious than AVOs for that kind of control.109

There is a stark contrast between the restraints on liberty that an AVO or peace bond imposes and the terms of a CO. An AVO or peace bond generally prohibit a person owning weapons, committing certain prohibited conduct (conduct which would in any case constitute a breach of the criminal law), contacting a person they have harassed or going near their home, school or workplace.110 A CO on the other hand can require a person not to leave their home and abide by a curfew, wear a tracking device and report to a police station at specified times. A CO can also prohibit a person from accessing the internet or phone, from undertaking work or study, or contacting or associating with certain people (not being only an apprehended victim, but rather more in the nature of apprehended co-offenders).111 (It may be noted that Canada does have peace bonds for terrorist suspects that more closely align with CO conditions.112)

While an AVO may be ordered on the basis of past criminal conduct that has not been prosecuted, it is not seen as an alternative to criminal charges the way COs are. It is bad enough that there is an unsatisfactory relationship between prosecuting for threat to harm and AVOs. We should not compound that on a much graver level with COs in the counter-terrorism context. The trend of Fardon type orders, peace bonds and AVOs may be said to be a trend but they are a trend to be resisted lest they contradict the fundamental character of the administration of criminal justice.113

Judicial decision that prosecution unavailable

Where the evidence against the individual is strong, but has been gained from secret intelligence which cannot be used in a criminal trial, it is worth considering

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109 See Appendix D for a description of the AVO legislation in Victoria. Under the Victorian AVO legislation, an order can only be made if a person has committed “prohibited behaviour” defined as assault, sexual assault, harassment, property damage or interference, or making a serious threat: sec 5 of the Personal Safety Intervention Orders Act 2010 (Vic). A serious threat is (a) a threat to kill, within the meaning of section 20 of the Crimes Act 1958 (Vic) or (b) a threat to inflict serious injury, within the meaning of section 21 of the Crimes Act: sec 9 of the Personal Safety Intervention Orders Act.

110 See for example the conditions that may be imposed under sec 67 of the Personal Safety Intervention Orders Act 2010.

111 For the full range of obligations, prohibitions and restrictions a court may impose under a CO see subsec 104.5(3) of the Code.

112 Canada has special peace bonds for terrorist suspects that allow for conditions more closely aligned to COs (eg a requirement to remain in a certain area, abide by a curfew or wear a monitoring device). These can be imposed on a person without charge or conviction for a terrorist offence as well as post-conviction. See Appendix E for further information on the Canadian peace bond provisions.

113 In Fardon v Attorney-General (Qld) (2004) 223 CLR 575 the High Court upheld a scheme allowing for the continued detention of convicted serious sexual offenders after expiry of their sentence where there is an “unacceptable risk” of the prisoner committing a serious sexual offence in the future.
whether the law could be improved by confining COs to cases where the issuing authority is satisfied that the case is one appropriate to have been prosecuted but for (a) a legitimate sensitivity beyond the capacity of the NSI Act to remedy and (b) beyond the capacity or demonstrated likelihood of the suspect mitigating eg by making admissions. This is one way, perhaps, of proportioning the expedient to the exigent by clearly identifying the category of people who would be prosecuted but for these reasons.

A major objection to this is that judicial power simply should not be involved in assessing the merits of a prospective prosecution, apart from (the administrative) task of committals for trial, and ruling on permanent stays of hopeless cases. The judiciary otherwise cannot be required to rule on whether there should be a prosecution as this is a role properly for the executive. Prosecutorial decisions “cannot be shared with the trial judge without placing in jeopardy the essential independence of that office in the adversary system”. Such a role is outside the legitimate scope of the judicial function and would interfere with the true function of the courts to “ensure that an accused person receives the fairest possible trial in all the circumstances”. In our adversarial system, the responsibilities and powers of the judiciary do not extend to investigating the facts and determining the evidence to be led.

A second objection is that there should be no circumstance rendering it attractive to the authorities to talk up the difficulties of prosecuting, or to narrow their investigations to gather only intelligence that would fall into the exception and not further attempt to collect admissible evidence. The Israeli experience with administrative detention shows how the requirement that an order only be imposed if a criminal prosecution is not possible can have the perverse effect of providing an incentive to authorities to claim that the intelligence sources and methods could never be revealed in a criminal trial even with the NSI Act. It also demonstrates the dangers of administrative controls on a person’s liberties justified on the basis that if tried according to the rule of law a person may not be

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116 “It is the parties who determine the area of dispute and the evidence presented in that dispute. Decisions as to the evidence to be called and as to the course of cross examination determine the factual account on which the jury must reach its verdict. And it must be expected that that evidentiary account will, on occasions, differ from the underlying facts…Thus in any given case, the way in which the case is conducted may affect its outcome. The forensic contest in a criminal trial is whether the guilt has been proved beyond reasonable doubt. That contest occurs in a context in which the jury is free to disbelieve all or any of the evidence or, more pertinently, not to be satisfied as to the truth of matters the burden of proving which, almost invariably, rests on the prosecution.” Dietrich v R (1992) 177 CLR 292 per Gaudron J at 370.
117 An administrative detention order may only be imposed if it is the sole means available to detain the person, meaning criminal prosecution must not be practically available. In deciding whether to confirm a detention order the court may rely on hearsay and other evidence if it is deemed reliable, even if that evidence would ordinarily be inadmissible in criminal proceedings.
found guilty. The Israeli Supreme Court rejected the idea that criminal trials would be a more proportionate and less rights restrictive alternative to detention, stating that criminal trials would be impossible "because of the absence of sufficient admissible evidence or the impossibility of revealing privileged sources" and "may not provide a satisfactory outcome".\(^\text{118}\)

In his report on the UK CO regime, Lord MacDonald recommended that COs and their replacement should only be available in circumstances where "in the view of the Director of Public Prosecutions, a criminal investigation into that individual is … justified". In particular, Lord Macdonald took this view because of the potential for the controls to make prosecution more difficult and the reality that "controlees become warehoused far beyond the harsh scrutiny of due process and, in consequence, some terrorist activity undoubtedly remains unpunished by the criminal law".\(^\text{119}\) Lord MacDonald's recommendation was not adopted by the UK Government in the design of the new TPIM regime because COs were seen as necessary on public safety grounds in precisely those circumstances where there was no reasonable prospect of conviction. In agreeing with the Government's approach, the UK Independent Reviewer pointed to the imposition of COs on men who had been acquitted of terrorism offences as being illustrative of the "inability of the criminal justice system to provide public protection in all cases".\(^\text{120}\)

The INSLM does not agree with the UK Independent Reviewer's approach that this represents a failure of the criminal justice system to protect the public. The prosecution cannot be guaranteed a conviction in every case. A criminal justice system such as Australia's, which operates within the rule of law, is not going to have a one hundred percent conviction rate. The role of juries probably ensures that will be so and for excellent reasons.

We do not say for other serious crimes that because the person may be acquitted we will not try them and instead we will subject them to a CO. This would not be accepted as reasonable or necessary to address other serious crimes and it should not be accepted in relation to terrorism.

In commenting on Australia's provision for the imposition of a CO in response to the failed criminal prosecution of Jack Thomas, Kent Roach has noted Australia as being a country "prepared to use the less restrained alternative of administrative detention if criminal law does not produce the desired result".\(^\text{121}\) That view is harsh but fair.

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\(^{119}\) Cm 8003 p 10

\(^{120}\) Control Orders in 2011... p 33. The Independent Reviewer considered the Government's approach to be correct and drew attention to the previous Independent Reviewer's findings that where charging standards of the prosecution service were met, prosecution was always pursued.

\(^{121}\) Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* 2011 Chapter 3, p 123
Fortunately, Australia has no experience of cases within this putative category. That history and the nature of the category show it is and should remain a rare exception. As such, it cannot provide the necessary firm foundation in policy and principle for the CO system.

II.12 Persons already convicted of a terrorist offence

The further category of people in relation to whom the availability of COs might be considered is those already convicted of a terrorist offence. COs could be used as a punitive as well as preventive consequence for convicted terrorists to prevent recidivism in the same way that Fardon type legislation operates for those convicted of serious sex offences. COs could be used for convicted terrorists in circumstances where countering violent extremism ("CVE") and rehabilitation efforts have failed.

Before such a CO could be issued, propensity would need to be shown in relation to like offences for which he or she has been convicted (to the standard of beyond a reasonable doubt), and his or her current dangerousness would have to be assessed, permissibly on the balance of probabilities. This approach fits within the orthodox penological theory of parole and addresses the concerns expressed by sentencing judges about the lack of successful rehabilitation prospects of convicted terrorists – as well as the difficulty of making predictions immediately after conviction of future propensities at the expiry of long sentences.

Proof of terrorist crime plus proven dangerousness would be much less disturbing of the principle of legality than the latter without the former. And susceptibility to this future supplement to sentence could be seen as fitting the deserts of terrorist convicts. Their established guilt of offences with the defining characteristics of terrorism, including its motivations, amounts to a badge of dangerousness to society.  

II.13 Efficacy of COs as a preventive mechanism

It is the operational efforts to surveille an individual and collect evidence that matter above all else. The conditions imposed on a person under a CO must be reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. Australia has not had experience with COs against recalcitrant individuals who refused to obey the terms of the

CO against them. The deterrent effect of a CO largely depends on the person’s willingness to respect a court order. It is unlikely that a terrorist who is willing to commit suicide in his terrorist act will be deterred by a CO. A CO cannot be guaranteed to prevent a person from committing a terrorist offence, just as AVOs cannot in relation to serious harm to people (including murder).\textsuperscript{123}

The UK experience with people absconding while on COs presents a compelling example of the ineffectiveness of COs. In considering the preventive value of a CO with reference to the UK’s experience with them, the UK Independent Reviewer questioned whether COs had effects “going beyond temporary containment and disruption” and noted the difficulty in assessing which restrictions were the most effective in preventing terrorism and what the causative role of any specific measure was.\textsuperscript{124} The UK experience with COs showed that it was commonplace for large numbers of small breaches to occur as well as serious breaches such as absconding.\textsuperscript{125} In discussing the lack of enforceability of COs, the UK Independent Reviewer stated that prosecutions would not be brought until a substantial number of breaches had been committed and noted the lack of any successful prosecutions, including the acquittal of a controlee who had absconded.\textsuperscript{126}

Again fortunately, Australia lacks any real experience of degrees of compliance with COs. That provides no ground to believe that they have any demonstrated efficacy as a preventive mechanism.

\textbf{II.14 Reasons of Hayne J in \textit{Thomas v Mowbray}}

The constitutional validity of the CO legislation has been upheld. This does not foreclose the possibility of an adverse opinion on the part of the INSLM concerning any of the effectiveness, appropriateness (including compliance with international obligations) and necessity of the CT Laws in this regard. What follows must not be understood as canvassing the correctness – let alone authority – of the decision of the High Court of Australia in \textit{Thomas v Mowbray}.\textsuperscript{127}

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{123} In November 2012, the Victorian Government introduced a Bill into Parliament to increase the penalty for breach of a family violence intervention order from a summary offence punishable by 2 years imprisonment, to an indictable offence punishable by 5 years imprisonment: \textit{Justice Legislation Amendment (Family Violence and other Matters Bill) 2012} (VIC). Although Victoria Police Deputy Commissioner Tim Cartwright has commented on the difficulty of successfully prosecuting for breach of an order and Victoria police figures show that in the last three years nearly 12,000 crimes were committed while an intervention order was in place. They include a murder, five attempted murders, 74 sexual assaults, 88 abductions, 261 weapons offences and 27 arson offences. http://www.abc.net.au/worldtoday/content/2012/s3606656.htm
\item \textsuperscript{124} Control Orders in 2011 … p 74
\item \textsuperscript{125} The experience in the UK with their previous CO regime was such that successful prosecutions for breaching a CO proved notoriously difficult: Control Orders in 2011… p 44
\item \textsuperscript{126} Control Orders in 2011 … pp 43-45
\item \textsuperscript{127} (2007) 233 CLR 307
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One of the central issues in *Thomas v Mowbray* concerned the engagement of the judicial power of the Commonwealth in proceedings and decisions about COs. Was the exercise required by the statute inconsistent with the various strictures understood to apply to judicial power? In the course of giving his Honour’s affirmative answer to that question, Hayne J stated conclusions about and characterizations of the CO legislation and its implications which, with great respect, have much assisted in giving focus to the INSLM’s concerns. The fact that his Honour was in dissent on what may be called the constitutional evaluative assessment that decided this issue as a matter of law detracts in no way from the force of those observations.

They commence by Hayne J describing the question raised by the CO test (ie “reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public”128) as “not a question that is to be decided by the application of legal norms that are identified in the legislation”.129 This is further elaborated by his Honour’s description of the state of affairs that would constitute a “matter” able to be decided by exercise of the judicial power, as showing “a controversy between parties about whether past action or inaction accorded with identified legal standards”.130 That state of affairs contrasted, his Honour noted, with the case “if the decisions whether or when to exercise the power that is given [to a federal court] are not governed or bounded by a ‘defined or definable, ascertained or ascertainable’ standard”.131 Application of these principles led to Hayne J’s conclusion that the CO legislation, that is the criterion or prerequisite noted above, “does not call for the judicial formulation of standards of conduct or behaviour ... does not direct attention to whether an identified person is likely to offend against the criminal law if released from prison ... “.132

By contrast, Hayne J implied, the threshold requirement for a CO has the following character:-

> It is a criterion that seeks to require federal courts to decide whether and how a particular order against a named person will achieve or tend to achieve a future consequence: by contributing to whatever may be the steps taken by the Executive, through police, security, and other agencies, to protect the public from a terrorist act. It is a criterion that would require a federal court to consider future consequences the occurrence of which depends on work done

128 para 104.4(1)(d) of the Code
129 at 233 CLR 447-448 [406]
130 at 233 CLR 467 [473]
131 at 233 CLR 468 [474], quoting *R v Spicer; ex parte Australian Builders’ Labourers’ Federation* (1957) 100 CLR 277 at 291 per Dixon CJ.
132 at 233 CLR 468-469 [476], citing *Fardon*
by police and intelligence services that is not known and cannot be known or predicted by the court.\textsuperscript{133}

... a court which is asked to make an order under the impugned provisions is necessarily left to decide the case according to nothing more definite than its prognostication about the order’s achieving, or tending to the achievement of, “the purpose of protecting the public from a terrorist act”.\textsuperscript{134}

His Honour then turned to the nature of the adjudications called for by the CO provisions. Again, it is no objection to the persuasive force of these observations that a majority of the court regarded them as appropriate for – even, better done by – the exercise of judicial power. Excepting that outcome of the constitutional legal argument, in terms of policy, the following observations by Hayne J have continued resonance:-

... Even assuming that a particular threat is well defined (and much more often than not in the case of threats of terrorist acts, it will not) the utility of making an order to restrain a person in one or more of the ways specified in s 104.5(3), and in particular the tendency of such an order to secure public protection, cannot be assessed without knowing what other measures are being taken to guard against the threat. Knowing what other measures are being taken to guard against the threat may be seen as a matter for evidence that would prove the measures that have, or have not, been taken to thwart the threat that is under consideration. But it is the evaluative judgment that the criterion requires to be made by the court asked to make a control order that is a judgment ill-fitted to judicial determination.\textsuperscript{135}

... As Kitto J pointed out in the \textit{Communist Party Case}\textsuperscript{136}:

“This Court has always recognized that the Parliament and the Executive are equipped, \textit{as judges cannot be}, to decide whether a measure will in practical result contribute to the defence of the country, and that such a question must of necessity be left to those organs of government to decide.” (Emphasis added)

The subject-matter of the particular power given to federal courts by s 104.4 (the power to make orders for the purpose of protecting the public from a terrorist act) is public protection. That is a subject which is quintessentially for the Parliament and the Executive to consider and it is for those branches of

\textsuperscript{133} at 233 CLR 469 [476]
\textsuperscript{134} at 233 CLR 474 [499]
\textsuperscript{135} at 233 CLR 474 [502]
\textsuperscript{136} \textit{Australian Communist Party v The Commonwealth} (1951) 83 CLR 1 at 272
government to decide what steps are to be taken to achieve that purpose. It is not for the judicature to establish criteria that will decide those questions.\textsuperscript{137}

In particular, Hayne J drew to attention matters which, in the view of the INSLM, found some reflection in the unsatisfactory aspects of the CO proceedings in both the Thomas and Hicks cases. They also highlight potential problems arising under the NSI Act, to be considered in next year’s annual report:-

The Executive’s decisions about what steps can or should be taken to protect the public from a terrorist act will often be affected by intelligence and other material of a kind not readily made available in courts which, at least as a general rule, transact their business in public on the basis that the parties to the litigation know what evidence is led and what arguments are advanced.

Difficulties that are presented for courts by reference to intelligence material are well illustrated by the decision of the House of Lords in\textit{A v Secretary of State for the Home Department} … . The majority of the House formed its conclusions about whether “there was an emergency threatening the life of the nation”… upon its examination of only some of the material that had been placed before the relevant administrative decision-maker: by reference to only the “public” as distinct from the “closed” material. Thus, although the question was one in which it was “open to the judiciary to examine the nature of the situation that has been identified by government as constituting the emergency, and to scrutinise the submission by the Attorney General that for the appellants to be deprived of their fundamental right to liberty does not exceed what is ‘strictly required’ by the situation which it has identified” … that task was undertaken by reference to only so much of the available material as the Executive chose to make public.

The desirability of keeping intelligence material secret is self-evident. Often it will be essential. But the problem presented by the use of intelligence material is more deep-rooted than any question of preserving secrecy. Even if taking steps to secure the continuing secrecy of intelligence material is, or can be made, consistent with the generally open and adversarial nature of litigation in the courts, it is the nature of the material to be considered that presents issues of a kind not suited to judicial determination. In particular, by its very nature, intelligence material will often require evaluative judgments to be made about the weight to be given to diffuse, fragmentary and even conflicting pieces of intelligence. Those are judgments of a kind very different from those ordinarily made by courts.

For the most part courts are concerned to decide between conflicting accounts of past events. When courts are required to predict the future, as they are in some cases, the prediction will usually be assisted by, and determined having

\textsuperscript{137} at 233 CLR 475 [504]
regard to, expert evidence of a kind that the competing parties to the litigation can be expected to adduce if the point in issue is challenged. Intelligence information, gathered by government agencies, presents radically different problems. Rarely, if ever, would it be information about which expert evidence, independent of the relevant government agency, could be adduced. In cases where it could not be tested in that way (and such cases would be the norm rather than the exception) the court, and any party against whose interests the information was to be provided, would be left with little practical choice except to act upon the view that was proffered by the relevant agency.

These difficulties are important, but not just because any solutions to them may not sit easily with common forms of curial procedure. They are important because, to the extent that federal courts are left with no practical choice except to act upon a view proffered by the Executive, the appearance of institutional impartiality and the maintenance of public confidence in the courts are both damaged …. To that extent, “[t]he judiciary is apt to be seen as but an arm of the executive which implements the will of the legislature” ... . These are signs or symptoms of a more deep-seated problem. The difficulties that have been mentioned both emerge from and reveal a fundamental feature of the impugned provisions: that a decision about what is necessary or desirable for public protection is confided to the judicial branch of government.

There is a second consequence that follows from the observation that the defence of the nation is particularly the concern of the Executive. It is for that arm of government to decide what is necessary for public protection. To achieve that end the Executive may well wish to intercept and prevent certain conduct before it occurs. But absent specific statutory authority, the Executive may not lawfully detain or restrain persons. If the conduct that is to be intercepted or restrained would, if undertaken, be contrary to law, legislation empowering a court to grant orders restraining a person from undertaking that conduct would be an orthodox and unremarkable conferral of jurisdiction. What sets the present legislation apart is that it seeks to give to the courts the decision of what is necessary to protect the public and, for the reasons earlier given, offers the courts no standard by which to decide that question.

An important and revealing contrast may be drawn between the provisions now under consideration and certain provisions of the Canadian Criminal Code ... (particularly s 83.3 of that Code) which are directed to the same general end. The Canadian provisions hinge about conclusions reached by a “peace officer”. If that officer “believes on reasonable grounds that a terrorist activity will be carried out” and “suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity” the officer may, with the consent of the Attorney General of Canada, lay an information before a judge ... . The issue that is then presented for judicial determination is
whether the judge is “satisfied by the evidence adduced that the peace officer has reasonable grounds for the suspicion” … . That is an issue of a kind that courts deal with frequently. It requires consideration and evaluation of what the relevant official puts forward as the grounds upon which the impugned decision has been made. It does not require, as the provisions now in issue do, the court to decide for itself what is necessary or desirable for protection of the public.\textsuperscript{138}

None of these difficulties is dispelled by the reasoning of the majority. Rather, and with commendable confidence in the Australian judiciary, the outcome opposite to that favoured by Hayne J involved acceptance of the difficulty of the judicial task when a judge is required to determine drastic consequences on the basis of predicted conduct.

And none of these difficulties arises when the ordinary criminal processes are applied. Even the executive and diplomatic embarrassments in relation to sensitive intelligence can be accommodated in a fair trial process.\textsuperscript{139}

\section*{II.15 Conclusion}

The flaws and problems of the CO provisions discussed above are most evident and pressing in cases where COs are proposed to be made against persons before charge and trial, after trial and acquittal or who will never be tried. On experience to date in Australia, and consideration of the different but comparable experience in the UK,\textsuperscript{140} there is a vanishingly small category of such cases, in any event.

Even if by misfortune those numbers were to increase appreciably, the proper response need not and should not involve COs in their present form. Instead, the twofold strategy obtaining elsewhere in the social control of crime should govern. First, investigate, arrest, charge, remand in custody or bail, sentence in the event of conviction, with parole conditions as appropriate. Second, and sometimes alternatively, conduct surveillance and other investigation with sufficient resources and vigour to decide whether the evidence justifies arrest and charge. (And, meantime, surveille as intelligence priorities justify.)

\textsuperscript{138} at 233 CLR 476-479 [508]-[514], his Honour’s emphasis, citations omitted

\textsuperscript{139} Leaving open questions of the merits of the NSI Act.

\textsuperscript{140} A significant difference is the general unavailability of intercepted electronic communications as evidence against persons accused of terrorist offences, in the United Kingdom. In Australia, such evidence is prime material in all prosecution cases to date. The cultural, social and political explanations for this huge difference are too large and elusive for the INSLM to explore. It is an open question whether the United Kingdom position against the use of intercept evidence has any foundation in privacy or civil liberties concerns, rather than the preference of the so-called intelligence community to keep “their” material away from judicial eyes.
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On the other hand, the dangerous and outrageous social transgression constituted by proven terrorist crime presents ample justification for COs against terrorist convicts where they can be shown to present what may be called unacceptable risks if they were free of all restraint upon release when their sentences of imprisonment expire.

**Recommendation II/4:** The provisions of Div 104 of Part 5.3 of the Code should be repealed. Consideration should be given to replacing them with *Fardon* type provisions authorizing COs against terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness.
CHAPTER III
PREVENTATIVE DETENTION ORDERS

III.1 Introduction

There is, simply, no actual experience of any kind to draw on when reporting on the CT Laws’ innovation which is the preventative detention order ("PDO"). None has been made. No-one has seriously considered seeking a PDO, according to an exhaustive review of all relevant files.

This must raise serious doubts about the effectiveness, appropriateness and necessity of the PDO provisions. These doubts do not lessen upon consideration of these provisions as policy and in principle.

Like COs, PDOs are not enhancements of the crucial capacity of the intelligence and police agencies to detect and investigate terrorist offences. To the contrary, if anything, within their narrow sphere of potential operation, PDOs would rather impede investigation by way of questioning.

The combination of non-criminal detention, a lack of contribution to CT investigation and the complete lack of any occasion so far considered appropriate for their use is enough to undermine any claim that PDOs constitute a proportionate interference with liberty.

The process by which the review of the PDO provisions occurred threw up a range of opinions about them, especially in response to the suggestion that these provisions are fairly ugly legislation, with no real utility and a proven lack of users. That range of opinion included no enthusiastic support for the provisions. A major theme explored in preparing this chapter of this Report has been, to put it bluntly, the nagging question whether they are worth the trouble.\textsuperscript{141}

\textsuperscript{141} I acknowledge the stimulation in conducting this review of PDOs provided by the exposition in and questions raised by Dr Claire Macken’s Counter-terrorism and the Detention of Suspected Terrorists – Preventive Detention and International Human Rights Law 2011.
III.2 Elements of PDO provisions

The legislative scheme for PDOs is found in Div 105 of Part 5.3 of the Code.\(^{142}\) All of the States and Territories have enacted PDO legislation designed to complement the Commonwealth scheme.\(^{143}\) The State and Territory PDO provisions extend the permissible detention time to 14 days (compared to 48 hours under the Commonwealth scheme).\(^{144}\)

The AFP’s submission to the INSLM described PDOs as:-

[Preventative measures, aimed at protecting the public from potentially catastrophic harm by removing a person (or persons) from the prospect of supporting or participating in a terrorist attack. Preventative detention orders can also prevent persons from destroying evidence following a terrorist incident; evidence which may be crucial to ensuring that the perpetrators are brought to justice.\(^{145}\)]

It is hard to reconcile this description with practical experience. Since the Commonwealth legislation came into effect on 15 December 2005, the AFP has not advanced beyond giving preliminary consideration to a PDO.

Parliament intended that a PDO be sought “in relation to people who pose an imminent terrorist threat risk to the community or who may destroy evidence of a terrorist act”.\(^{146}\) PDOs were said to be necessary to empower police to act to prevent terrorist acts from occurring]\(^{147}\). However, no examples were given in support of this view and no reasons were given for why the existing powers of arrest etc. were not sufficient.\(^{148}\) As the Law Council of Australia submitted to the INSLM “the

\(^{142}\) Division 105 of the Code commenced on 15 December 2005 and will expire on 16 December 2015: sec 105.53.

\(^{143}\) Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT); Terrorism (Police Powers) Act 2002 (NSW) (Part 2A); Terrorism (Emergency Powers) Act 2003 (NT); Terrorism (Preventative Detention) Act 2005 (QLD); Terrorism (Preventative Detention) Act 2005 (SA); Terrorism (Preventative Detention) Act 2005 (TAS); Terrorism (Community Protection) Act 2003 (VIC) (Part 2A) and Terrorism (Preventative Detention) Act 2006 (WA). Div 105 of the Code as well as the State and Territory PDO legislation is currently the subject of review by the Council of Australian Governments. The COAG Review of Counter-Terrorism Legislation is expected to provide a written report to COAG by February 2013.


\(^{145}\) AFP, Submission to the INSLM, 19 July 2012, para 31.

\(^{146}\) Anti-Terrorism Bill (No 2) 2005 (Cth) Explanatory Memorandum, p 15

\(^{147}\) See Hon John Howard (Prime Minister), Counter-Terrorism Laws Strengthened, Media Release, Canberra, 8 September 2005.

\(^{148}\) No discussion can be found in either the Explanatory Memorandum accompanying the Bill or in the Parliamentary Debates.
need for PDOs was not demonstrated at the time of their introduction and remains unclear, particularly when regard is had to the range of other powers available to take a preventive approach to terrorist activity.”\textsuperscript{149} The Centre for Excellence in Policing Studies submitted to the INSLM that abolishing the PDO provisions “would appear unlikely to leave a gaping hole in Australian anti-terrorism law.”\textsuperscript{150}

There are limited analogies in similar countries of a power to detain preventively without arrest or charge.\textsuperscript{151} Past experience of democracies with preventive detention regimes against declared “enemies” during war time and suspected terrorists points immediately to the dangers of preventive action. The internment of over one hundred thousand people of Japanese descent in the United States during World War II\textsuperscript{152} and the United Kingdom’s internment of hundreds of suspected IRA members without trial in the 1970s are now recognized by both Governments as policy failures.\textsuperscript{153} Not a single person interned by the United States Government was convicted of sabotage and the Government later apologised and provided reparations to those affected by the policy. The United Kingdom Government has acknowledged its actions resulted in increased sympathy for the IRA and aided its recruitment efforts.\textsuperscript{154} It is highly doubtful that these preventive measures had any positive effect on the safety and security of the populace, or increased national security. It may be, however, that some perceptions or delusions were fostered in ways that some may have thought expedient at the time.

This raises a red flag against the appropriateness of Australia’s PDO regime from a civil liberties perspective. Its essential elements are at odds with our normal approach to even the most reprehensible crimes. As Gummow J held in \textit{Fardon},

\textsuperscript{149} Law Council of Australia, \textit{Submission to the INSLM}, 10 September 2012, para 185
\textsuperscript{150} CEPS, \textit{Submission to the INSLM}, 14 September 2012, p 27
\textsuperscript{151} The United States material witness laws provide for the detention of a material witness in a criminal proceeding without a need for the detainee to be suspected of any wrongdoing. Powers to preventatively detain without charge on the basis of national security concerns are found in the laws of Israel, Malaysia and Singapore.
\textsuperscript{152} Seventy thousand of which were American citizens. See David Cole “Security and Freedom – Are the Governments’ Efforts to Deal with Terrorism Violative of Our Freedoms?” \textit{Canada-United States Law Journal} 29 (2003): 339-349, 347
\textsuperscript{153} The UK internment law gave authorities the power to indefinitely detain suspected terrorists without trial. Suspects arrested under the law who were not charged or released within 48 hours were taken to internment camps where they could be held indefinitely without trial.
concern is with the deprivation of liberty without adjudication of guilt rather than with the further question whether the deprivation is for a punitive purpose”.155

The elements of PDOs, it thus emerges, provoke widely held concerns about their exceptional interference with personal liberty. The question is whether there is a case for their existence to meet genuinely exceptional needs in countering terrorism.

### III.3 Application process and criteria

The AFP may apply for a PDO for the purpose of preventing an imminent terrorist act from occurring or to prevent the destruction of evidence of, or relating to, a recent terrorist act. Applications for initial PDOs are made by an AFP member to an issuing authority (a senior AFP member)156 and can be in force for up to 24 hours from the time the person was first taken into custody.157 Applications for continued PDOs are made by AFP members to an issuing authority158 and can be in force for up to 48 hours from the time the person was first taken into custody.159

To request a PDO, an AFP officer must be satisfied that there are “reasonable grounds to suspect” that the person:

- will engage in a terrorist act
  
  OR
  
- possesses a thing connected with the preparation for, or the engagement of a person in, a terrorist act;
  
  OR
  
- has done an act in preparation for, or planning, a terrorist act
  
  AND
  
- making the PDO would substantially assist in preventing an imminent terrorist act from occurring in the next 14 days
  
  AND

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155 *Fardon v Attorney-General (Qld) (2004) 223 CLR 575 per Gummow J at 612-613 [81]*

156 Subsection 100.1(1) of the Code defines issuing authority for initial PDOs to mean a senior AFP member.

157 An initial PDO must not exceed 24 hours: subsec 105.8(5) of the Code.

158 Subsection 100.1(1) of the Code defines issuing authority for continued PDOs to mean a person appointed under sec 105.2, which sets out the requirements for a person to be appointed as an issuing authority by the Minister. Appointment is limited to current and former members of the judiciary and the current President or Deputy President of the Administrative Appeals Tribunal.

159 A continued PDO must not exceed 48 hours from the time the person was first taken into custody: subsec 105.12(5) of the Code.
detaining the person for the period of the PDO is reasonably necessary to substantially assist in preventing the terrorist act from occurring.  

An AFP officer can also apply for a PDO if he or she is satisfied that:-

- a terrorist act has occurred in the last 28 days

AND

- it is necessary to detain the person to preserve evidence of, or relating to, the terrorist act

AND

- detaining the person for the period of the PDO is reasonably necessary to preserve the evidence.

A PDO cannot be applied for, or made, in relation to a person who is under 16 years of age while special rules apply for any person under 18 years of age.

In recognition that these are extraordinary powers, the threshold for obtaining a PDO is set very high and involves a complex application process. While it is admirable that the legislation includes such a high threshold for the grant of a PDO, the complexity of the provisions dealing with PDOs brings into question the efficacy of these laws.

### III.4 Reasonable grounds to suspect as a threshold

The wording of para 105.4(4)(a) that “there are reasonable grounds to suspect that the subject” meets one of the requirements in subparas 105.4(4)(a)(i)-(iii) includes a single objective requirement (the existence of reasonable grounds for suspicion) rather than dual subjective and objective requirements (the existence of an actual suspicion on the part of the decision-maker, which is held on reasonable grounds).

Accordingly, para 105.4(4)(a) does not require the AFP officer who applies for the PDO, or an issuing authority who makes the PDO, to form his or her own subjective suspicion about the matters in subparas 105.4(4)(a)(i)-(iii), provided he or she is satisfied of the existence of reasonable grounds to support a suspicion.

The Attorney-General’s Department (“AGD”) has explained the single, objective element in para 105.4(4)(a) as being compatible with the circumstance of urgency in which the PDO regime is designed to operate and “avoids the need for the decision maker to take the additional step of forming his or her own (subjective)
suspicion” about the matters set out in subparas 105.4(4)(a)(i)-(iii).\(^{163}\) AGD explained this provision as accommodating the fact that the relevant decision makers “may base their decisions on information provided by other persons supporting the decision making process” for example, information provided by the AFP applicant and not their own direct operational involvement in the matter. As the AFP applicant would need to show reasonable grounds for the existence of the suspicion there is no reason why both the AFP applicant and the decision-maker should not be required to form his or her own subjective suspicion on the basis of the grounds given by the applicant.

Similarly, the combined effect of subsecs 105.4(4) and (5) is that the AFP applicant or issuing authority must be satisfied as to the existence of an expectation that a terrorist act will occur in the next 14 days but the provision does not identify the person who must form the requisite expectation. AGD has explained this as accommodating the dual possibilities that an AFP officer may make an application on the basis of information provided to him or her by other officials who hold the requisite expectation, or on the basis of a personally held expectation as a result of direct operational involvement.\(^{164}\) As the AFP applicant would need to show reasonable grounds for the satisfaction there is no reason why both the AFP applicant and the decision-maker should not be required to form his or her own subjective belief on the basis of the grounds given by the applicant.

Contrary to the approach taken in the PDO regime, the requirement for a dual subjective and objective requirement is found in all Commonwealth, State and Territory arrest provisions. At the Commonwealth level, a police officer may arrest a person if the police officer “believes on reasonable grounds” that the person has committed or is committing an offence.\(^{165}\) In New South Wales, a police officer may arrest a person if the police officer “suspects on reasonable grounds” that the person has committed or is committing an offence.\(^{166}\) In Queensland, a police officer may arrest a person “the police officer reasonably suspects” has committed or is committing an offence.\(^{167}\) The formula adopted for arrest is superior to that used for PDOs. It requires a police officer to actually form his or her own belief that the person has committed or is committing an offence and not just that there exist reasonable grounds to suspect this. Requiring an official actually to believe, as well as requiring his or her grounds to be reasonable in the opinion of a reviewing court, is an important combination safeguard against the arbitrary detention of a person.

**Recommendation III/1:** If PDOs are to be retained in general, the threshold tests for them should require both the AFP applicant and issuing authority to hold an

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163 Attorney-General’s Department, *Response to matters taken on notice*, 5 October 2002, p 2
164 AGD Response ... p 4
165 subsec 3W(1) of the *Crimes Act 1914* (Cth)
166 subsec 99(2) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)
167 subsec 365(1) of the *Police Powers and Responsibilities Act 2000* (QLD)
actual belief as to the prerequisite matters as well as the grounds for that belief being reasonable.168

III.5 Definition of imminent threat

A criterion for applying for and making a PDO is that a terrorist act must have occurred within the last 28 days or the terrorist act must be imminent. In order to meet the threshold that a terrorist act is imminent, a police officer must attest that a terrorist act is imminent and is expected to occur “in any event” at some time within the next 14 days.169 The inclusion of the imminence requirement is designed to create a high threshold for applying for and making a PDO. The question arises whether this requirement is set in terms that are unrealistic – requiring a spurious certainty about the timing of uncertain events.

The degree of precision in respect of the 14 day timeframe in para 105.4(5)(b) limits the efficacy of the PDO regime. Practically, it is impossible to guarantee that an event will occur. A police officer simply cannot attest that a terrorist act is expected to occur within a fortnight irrespective of any intervening event. The AFP shares this concern, submitting that:-

Despite credible intelligence that a terrorist act is imminent, the ability to predict in advance the precise timeframe in which the act may happen may be particularly challenging. It is not clear what a court would expect in relation to evidence given by the AFP that the terrorist act is expected to occur within 14 days.170

The expression “in any event” is not limited to events which are reasonably likely to occur. It includes both those events which are not likely to occur and any that could occur. In order to make this provision work, so to speak, there could well be, consciously or unconsciously, a tendency to strain the meaning of these words. Thus, such an approach might regard it as adequate to say that something is confidently expected to occur in the next fortnight, that is, to apply a modified version of a test of reasonable likelihood.

As AGD has acknowledged, the 14-day figure was not determined according to any extrinsic substantiation. Rather, it reflects a policy intention to ensure that the imminence requirement is applied in a way that retains the preventive and non-punitive nature of PDOs.171 While a fixed-term requirement for a time period is commendable from a civil rights perspective, the requirement to prove that it will occur “in any event” in that time frame raises the acute problem of forcing a police

168 Hence para 105.4(4)(a) of the Code should be amended eg to read “suspects on reasonable grounds” rather than “reasonable grounds to suspect”.
169 subsec 105.4(5) of the Code
170 AFP, Additional submission to the INSLM, 16 August 2012, para 9
171 AGD Response ... p 3
officer to attest to something they have no way of knowing. It could also prevent applications for PDOs because the threshold cannot practically be met.

It would be better if it were simply necessary to be satisfied of a sufficient possibility of the terrorist act occurring sufficiently soon so as to justify the drastic infringement of personal liberty sought to be imposed by the PDO. This is a proportionality test of sorts. It should prevent PDOs straying into the zone of arbitrary detention within the meaning of Art 9(1) of ICCPR.

**Recommendation III/2:** If PDOs are to be retained in general, the imminence test should be replaced with a requirement that the AFP applicant and issuing authority are each satisfied that there is a sufficient possibility of the terrorist act occurring sufficiently soon so as to justify the restraints imposed by the PDO.\(^{172}\)

### III.6 Threshold for necessity to preserve evidence

For a PDO to be issued to preserve evidence of a recent terrorist act it must be “necessary” to detain the person to preserve the evidence and the detention period must be “reasonably necessary” to achieve this purpose.\(^{173}\) To satisfy that first necessity requirement a police officer or issuing officer must be satisfied that if the person is not detained the evidence will not be preserved. This requires more than a satisfaction that there is an unacceptably high risk of the evidence not being preserved, or that the evidence probably will not be preserved. It requires satisfaction that the destruction, loss etc of the evidence will occur.

This is a threshold that, like the imminence requirement, would be extremely difficult to meet. The first necessity requirement differs from the second reasonable necessity requirement (that the period of detention be reasonably necessary). These are undesirable discrepancies in the legislation, detracting from the appropriate and practical consistency and clarity in the threshold requirements.

**Recommendation III/3:** If PDOs are to be retained in general, the necessity requirement in para 105.4(6)(b) should be amended to require that it be "reasonably necessary to detain the subject to preserve evidence of, or relating to, the terrorist act".

### III.7 Adequacy of pre-existing general powers of arrest etc

There has been no material or argument demonstrating that the traditional criminal justice response to the prevention and prosecution of serious crime through arrest, charge and remand is ill-suited or ill-equipped to deal with terrorism. Nor has this review shown that the traditional methods used by police to collect and preserve evidence, eg search warrants, do not suffice for

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172 Hence para 105.4(5)(b) of the Code should be amended accordingly.
173 paras 105.4(6)(b) and (c) of the Code
CHAPTER III PREVENTATIVE DETENTION ORDERS

the investigation and prosecution of terrorist suspects. There is, by now, enough experience in Australia of police operations in the detection and investigation, and support for prosecution, of terrorist offences. There is therefore substantial weight to be given to the lack of a demonstrated functional purpose for PDOs as a matter of practical experience.

The power to detain a person who has been arrested but not charged is not novel. Powers of pre-charge detention are common with police in Australia having the power to arrest a person suspected of terrorism and to detain them for questioning before charge (for up to 8 days under Commonwealth law). In the United Kingdom, police have the power to detain a person arrested on suspicion of terrorism for up to 14 days. Under French law, a person suspected to have committed, or attempted to commit, a terrorist offence can be held in pre-charge detention for a maximum of 6 days.174

The difference between such powers and the PDO power is that a person must first meet the threshold for arrest before detention can occur and detention is for the purpose of questioning the person and collecting evidence with a view to charge.

Powers of arrest in Australia are now contained in legislation at the Federal and State level. The statutory powers of arrest across the majority of Australian jurisdictions reflect the common law reasonable suspicion threshold. Legislation in the Australian Capital Territory, New South Wales, Queensland, South Australia and Western Australia require the arresting officer to "suspect" on reasonable grounds that the person has committed, or is committing, an offence.175

Commonwealth, Northern Territory, Tasmanian and Victorian legislation adopt the statutory reasonable belief threshold, requiring the arresting officer to “believe” on reasonable grounds that the person has committed, or is committing, an offence.176

The criteria for arresting a person are so similar to the criteria for a PDO as to doubt the usefulness of PDOs at all. While belief and suspicion are different states of mind, the difference between suspecting on reasonable grounds (PDO threshold) and believing on reasonable grounds (Commonwealth arrest threshold) is not very great. “When a statute prescribes that there must be reasonable grounds for a state of mind – including suspicion and belief - it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person”.177

174 For a comparative law study of pre-charge detention laws see Liberty, Terrorism Pre-Charge Detention Comparative Law Study, July 2010.
176 sec 3W of the Crimes Act 1914 (Cth), sec 441 of the Criminal Code Act (NT) sec 35 of the Police Offences Act 1935 (Tas) and sec 459 of the Crimes Act 1958 (Vic)
177 George v Rockett (1990)170 CLR 104 at 112
A police officer may arrest a person for a Commonwealth terrorism offence if he or she believes on reasonable grounds that the person has committed, or is committing, the offence and that proceeding by summons against the person would not achieve the purposes of ensuring the appearance of the person in court, preventing the continuation of the offence or another offence, preventing the concealment, destruction or fabrication of evidence relating to the offence or preventing the harassment or interference with a person who may be required to give evidence in respect of the offence.178 The resemblance of these factors of those required for PDOs is obvious.

The arrest provisions in the Crimes Act apply to the investigation of Commonwealth terrorism offences.179 All State and Territory police officers can exercise the powers of arrest under the Crimes Act, including members of the Joint Counter Terrorism Teams.180 State and Territory police officers can also be sworn in as special members of the AFP, allowing them to exercise powers exclusively available to AFP members and to use these powers cross jurisdictionally.181

When arrested in accordance with Commonwealth, State or Territory arrest powers, a person can be detained and questioned without charge for the relevant investigation period set out in the legislation. Police then have the option of proceeding with charges against the person and once charged a person will likely be remanded into custody pending trial. There is a presumption against the granting of bail to a person charged with, or convicted of, a terrorism offence unless exceptional circumstances justifying bail can be established.182 The onus is on the accused to prove the exceptional circumstances. The application of this presumption against bail in terrorism trials to date demonstrates the extreme unlikelihood of a person charged with a terrorism offence being released on bail (in almost all cases the accused will be detained for the protection of the community).

The ability for police to meet the arrest threshold for a suspected terrorist is enhanced by the early stage of offending that is captured by Australia’s terrorism laws. The wide reaching inchoate and preparatory offences which apply under the Code mean a person can commit a criminal offence in the very early stages

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178 subparas 3W(1)(b)(i)-(vi) of the Crimes Act
179 eg suspects in Operation Pendennis were arrested and charged with Criminal Code terrorism offences using the relevant powers and thresholds under the Crimes Act.
180 “The AFP, state and territory police services and other government agencies work cooperatively to conduct coordinated counter-terrorism investigations. These relationships are institutionalised through a Joint Counter-Terrorism Team (JCTT) mechanism and comprise police officers from the AFP, the relevant state or territory police service and ASIO. JCTTs conduct terrorism-related investigations focusing on preventive operations and are governed by nationally consistent frameworks for the strategic management of counter-terrorism operations.” Australian Government, Counter Terrorism White Paper, 2010, para 6.3.1.
181 AFP, Additional submission to the INSLM, 16 August 2012, paras 12 and 13
182 Paragraph 15AA(2)(a) of the Crimes Act sets out a presumption against the granting of bail to a person charged with, or convicted of, a terrorism offence.
of planning a terrorist act (eg before a target is chosen or weapons acquired).\textsuperscript{183} The ability to detain a person through the normal arrest processes long before he or she actually commits a violent terrorist act is calculated to achieve the same preventive purpose of the PDO regime without side-stepping normal criminal justice processes.\textsuperscript{184}

A decision to arrest a person does not presuppose the police have sufficient evidence completely to prove charges at the time of arrest nor will the facts which reasonably ground a belief or suspicion for the purposes of arrest necessarily justify the bringing of a charge. If there are facts which can reasonably ground a suspicion that a person meets the threshold requirements for a PDO then in all likelihood there will be facts which can reasonably ground a belief that a person has committed a terrorist offence and is eligible for arrest.

The UK Government’s Review considered the need for pre-charge detention and questioning powers for terrorism suspects. The Review found that to pre-empt a terrorist incident it can be necessary for police to arrest at an earlier point than with other ordinary criminal investigations and arrest may occur before sufficient admissible evidence has been gathered to bring a charge.\textsuperscript{185}

The criteria for issuing a PDO include the commission of terrorism offences. To meet the threshold for a PDO, a police officer must have reasonable grounds to suspect the person will (a) engage in a terrorist act, or (b) has done an act in preparation for, or planning, a terrorist act or (c) possesses a thing connected with the preparation or engagement of a person in a terrorist act.\textsuperscript{186} Given a police officer may arrest a person they believe on reasonable grounds to have committed a terrorist offence it is hard to imagine a case where an officer could meet the PDO threshold but not the threshold for arrest.

The AFP has expressed concern that it would be difficult to work within the PDO framework in urgent circumstances. This is a sensible concern, given the practical challenges of the PDO provisions as discussed above. But we lack any real life experience with PDOs and it is difficult to assess the practical operation of the legislation. PDOs were introduced into the Code to address a situation where immediate action was required to prevent a terrorist act. It was intended that the application of the PDO power would allow police to react rapidly in time critical situations to disrupt terrorist activity and prevent terrorist acts from occurring.

\textsuperscript{183} Descriptions of matters for which some defendants have been convicted and sentenced are summarized in Appendix 14 of the INSLM’s First Annual Report. These cases demonstrate the ability for authorities to interrupt terrorist planning at an early stage and to successfully prosecute those involved for serious terrorism offences (and attain lengthy prison sentences).

\textsuperscript{184} The UK Government has acknowledged that the introduction of acts preparatory to terrorism provides more options for police and prosecutors in deciding on a “charging strategy” and can decrease the need for lengthy pre-charge detention. Cm 8004 pp 7-14.

\textsuperscript{185} Cm 8004 pp 7-8

\textsuperscript{186} subparas 105.4(4)(a)(i)-(iii) of the Code
PDOs were also intended to enable police to take swift action to prevent evidence of a recent terrorist act from being destroyed and consequently to facilitate perpetrators being brought to justice.\textsuperscript{187}

The significant safeguards and formality surrounding PDOs would engage police manpower at the very time of imminent threat. Drafting an application for a PDO is a resource intensive activity that may divert police resources during a time critical period of investigative activity. It could be impractical for police who are intimately involved with an operation to be drafting an application for a PDO instead of arresting suspects and gathering evidence for a prosecution.

Unlike a PDO, an arrest can be made by a single police officer exercising his or her powers anywhere and at any time, without the need for formal paperwork or approval processes. The decision to arrest is one a police officer makes on a regular basis and there is no reason to believe the power of arrest could not be exercised to prevent terrorism offences in the same way it is exercised to prevent the commission of other serious crimes. As discussed above, the power to arrest terrorist suspects is more readily available due to the existence of preparatory and inchoate offences for terrorism.

Discussion with AFP officers at a private hearing strongly suggested that “in a real, practical urgent sense” the ability to arrest a person is a more efficient and effective process for dealing with imminent terrorist threats than the complex and time consuming process of a PDO.

\textbf{III.8 Prohibition on questioning under a PDO}

A powerful argument against the efficacy of PDOs is that they effectively take a person out of the investigation. The inability to question a person detained under a PDO for law enforcement or intelligence purposes renders them useless as an investigative tool. A police officer is expressly prohibited from questioning a person while he or she is detained under a PDO.\textsuperscript{188} ASIO officers are also expressly prohibited from questioning a person while the person is being detained under a PDO.\textsuperscript{189} This is a complete and automatic statutory bar on all communication between police or intelligence officers and a person detained under a PDO and applies even where the detained person volunteers to cooperate and answer questions or provide information that may assist in preventing a terrorist act.

\begin{itemize}
\item \textsuperscript{187} AFP, \textit{Additional submission to the INSLM}, 16 August 2012, paras 32-33
\item \textsuperscript{188} subsec 105.42(1) of the Crimes Act. A detained person must not be questioned by a police officer except for the purposes of determining their identity, ensuring their safety and well-being, or allowing the police officer to comply with the requirements of Div 105 in relation to the person’s detention.
\item \textsuperscript{189} subsec 105.42(2) of the Crimes Act. However, given it is possible for the person to be released from detention for the purpose of questioning under an ASIO questioning warrant, this provision should be read in conjunction with sec 105.25 which enables an AFP officer to make all necessary arrangements for a detained person to be dealt with in accordance with an ASIO warrant.
\end{itemize}
CHAPTER III PREVENTATIVE DETENTION ORDERS

The mandatory bar on questioning means the imposition of a PDO could have a detrimental effect on the prevention of terrorist acts by preventing the voluntary sharing of information with police and intelligence agencies.

Detention for the purposes of a PDO is not intended to allow police and intelligence agencies with an opportunity to collect information from the person to assist with their inquiries and further their understanding of a terrorist plot. Where the police consider it would be useful to question a person they will need to consider whether the person can be arrested and questioned under the Crimes Act. Where ASIO considers it would be useful to question a person then a questioning, or questioning and detention warrant, under Div 3 of Part III of the ASIO Act would need to be sought. This prohibition on questioning was seen as necessary to ensure safeguards relating to the questioning of suspects in other legislation, such as Part IC of the Crimes Act, are not defeated because the person is the subject of a PDO. The Explanatory Memorandum explains the prohibition on questioning as follows:-

The rationale for this process is that detention in itself is a factor that can impact on the reliability of answers to questions. Given the purpose of the preventive detention regime is to prevent a terrorist act and to preserve evidence, and the police and ASIO questioning time was recently modified to extend questioning for terrorism investigations, it follows that the existing procedures for questioning should be used. These procedures contain safeguards in relation to the questioning of persons, including persons who are under arrest or are protected suspects.190

When the PDO provisions were introduced into Parliament, the then Attorney-General, the Hon Philip Ruddock, acknowledged the support that existed in Parliament for a person subject to a PDO to be questioned (subject to normal safeguards). He stated this was not the subject of COAG agreement but would be examined by the Government with a view to discussion at the following COAG meeting.191 Despite this, Div 105 of the Code was never amended to permit the questioning of a person under a PDO.

The problems that arise from this prohibition on questioning from a policing and intelligence gathering perspective cannot be overstated. As Clive Walker has noted in relation to the UK experience with pre-charge detention of terrorist suspects, intelligence gathering and disruption are important objectives of pre-
CHAPTER III PREVENTATIVE DETENTION ORDERS

charge detention and questioning.\textsuperscript{192} Questioning a person will not always elicit information. It can be difficult to extract information from a person with strong motivations or who has had anti-interrogation training. A person may choose to exercise their right to remain silent. However, this does not outweigh the benefits of having questioning available.\textsuperscript{193}

If someone is subject to a PDO they will no doubt hold information of great interest to the police and intelligence agencies. Without the ability to question a person who is detained under a PDO, the opportunity to gain valuable information and further lines of inquiry is lost. Police and intelligence agencies cannot obtain information to further their criminal or security investigations or admissible evidence to put before the court in a criminal trial.

By preventing any discussion with a person detained under a PDO the detained person does not have the opportunity to provide potentially exculpatory evidence which could not only assist police and intelligence agencies in refocussing their investigations but more importantly it could result in the rescission of the PDO. This reflects the principle that it is proper and only fair that a police officer question a person who has been arrested as such questioning is reasonably necessary to confirm or dispel the beliefs the police have about the person.

The AFP supports the need to allow questioning of a person detained under a PDO, submitting that:-

There may be situations in which a person detained under a preventative detention order may be willing to assist police with their inquiries. However, the legislation would appear to preclude this. If questioning during detention was permitted, it could elicit important information which could better direct police resources in preventing a terrorist attack, or could assist police to determine whether the continued detention of the person is necessary (ensuring that persons are only detained for the minimum amount of time). The AFP suggests that consideration be given to allowing the questioning of detained persons on a voluntary basis, principally for intelligence purposes to allow response measures to mitigate risk to the public. Should incriminating information be provided during questioning for intelligence purposes, the subject would be cautioned and subject to the protections in Part 1C of the Commonwealth Crimes Act 1914. The right to silence would be preserved as participation in initial questioning process would be voluntary.\textsuperscript{194}

\textsuperscript{192} Clive Walker, Terrorism and the Law 2011, p 153. Prof Walker supports this view by reference to the low ratio of ensuing criminal charges where arrests are made for terrorism compared to arrests for ordinary crimes. For charging rates see pp 150-151 where he cites the former Independent Reviewer of Terrorism Legislation, Lord Carlile, who reported a charging rate of 31% for terrorism related arrests compared to 43% for normal arrests over the period 2001-2007.

\textsuperscript{193} For a discussion on the objects of interviews and the difficulties of interviewing terrorist suspects see Clive Walker, Terrorism and the Law 2011, p 174.

\textsuperscript{194} AFP, Submission to the INSLM, 19 July 2012, para 45
In considering the need for the UK pre-charge detention and questioning powers, the UK Government Review found that the requirement for extended pre-charge detention for terrorist suspects is based on the different nature of terrorism investigations, including the considerable time and resources involved in post-arrest evidence gathering. The fact that substantial evidence gathering often takes place after arrest was also highlighted.\(^{195}\) Australia’s pre-charge detention and questioning powers for terrorism offences have been modified to meet these requirements. As highlighted in the Explanatory Memorandum for the PDO provisions, as part of its anti-terrorism law response, Parliament modified the Crimes Act pre-charge questioning provisions to extend questioning for terrorism investigations.

The need to question a person can be dealt with by using the pre-charge questioning powers already available for someone who is on the same path as a PDO. Traditionally the common law prohibited police from detaining an arrested person solely for the purpose of questioning.\(^{196}\) However, the Commonwealth, as well as each State and Territory, have since legislated to provide police with the power to hold an arrested person (pre-charge) for a reasonable time for the purpose of questioning. These pre-charge questioning powers provide officers with the flexibility to have certain times discounted from the maximum questioning and detention period where this is reasonably necessary for operational purposes. These powers come with accompanying rights and safeguards for individuals being questioned.\(^{197}\)

### III.9 Time limits for detention: PDOs and arrest provisions compared

A person can only be detained under a PDO for a maximum of 48 hours.\(^{198}\) The pre-charge questioning and detention powers in relation to a person arrested for a Commonwealth terrorism offence enable the arrested person to be detained for

\(^{195}\) Cm 8004 pp 7-8

\(^{196}\) *Williams v The Queen* (1986) 161 CLR 278

\(^{197}\) See Appendix F for a full list of police powers of questioning post-arrest and pre-charge.

\(^{198}\) subsec 105.14(6) of the Code. This may be extended to up to 14 days under the complementary State and Territory PDO laws. The 48 hour limit for Commonwealth PDO powers and the 14 day limit for State and Territory PDO powers is a difference for which no worthy explanation can be given. It reflects badly on the commitment to the principle of legality and standards of decent wielding of official power, in those responsible for the difference. (It should not be assumed they are only those who advised, drafted and enacted the State and Territory provisions.) If 48 hours is an appropriate maximum when enacted by the Commonwealth, it should have been so for the States and Territories. All are bound by ICCPR. And the Commonwealth has the power through sec 109 of the *Constitution* to prevent concurrent State legislation with which it disagrees from valid operation. And the Commonwealth has direct power under sec 122 of the *Constitution* to make laws for the Territories. It thus appears the Commonwealth is content with this position. It should not be.
questioning in relation to a terrorism offence for an “investigation period” of up to 24 hours.\textsuperscript{199} The actual period of detention may be longer as there is the ability for certain periods of time to be counted as “dead time” during a person’s detention.\textsuperscript{200} In calculating the “investigation period” police can automatically disregard any reasonable time during which questioning of the person is suspended or delayed for one or more of the prescribed purposes eg allowing the person time to rest or speak with a lawyer.\textsuperscript{201} Such time will not count towards the maximum time period allowed for questioning and detention.

Police may also discount from the “investigation period” any time specified by a magistrate. If a person is arrested for a terrorism offence and an investigation is being conducted into whether the person committed the offence, or another terrorism offence, an investigating official may apply to a magistrate to disregard any reasonable time during which the questioning of the person is suspended or delayed.\textsuperscript{202} Such time will be specified and will not count towards the maximum time period allowed for questioning and detention. The application must include the reasons why an investigating official believes the period should be specified. The legislation includes examples of the sorts of scenarios which may give rise to a belief by the investigating official that the period should be specified. These take into account the operational difficulties and added complexities involved in terrorism investigations:-

- the need to collate and analyse information relevant to the investigation from sources other than the questioning of the person (including, for example, information obtained from a place outside Australia);
- the need to allow authorities in or outside Australia (other than authorities in an organisation of which the investigating official is part) time to collect information relevant to the investigation on the request of the investigation official; and
- the fact the investigating official has requested the collection of information relevant to the investigation from a place outside Australia that is in a different time zone and where translation was necessary to make such a request.\textsuperscript{203}

\textsuperscript{199} The initial period of investigation cannot be more than 4 hours: para 23DB(5)(b) of the Crimes Act (with the exception of a person who is under 18, an Aboriginal person or a Torres Strait Islander, for whom a limit of 2 hours applies: para 23DB(5)(a)). This can be extended by a Magistrate any number of times but the total period of extension cannot be more than 20 hours: subsec 23DF(7).

\textsuperscript{200} secs 23DB-23DD of the Crimes Act

\textsuperscript{201} subsec 23DB(9) of the Crimes Act

\textsuperscript{202} An application may be made under subsec 23DC(2) of the Crimes Act. Para 23DB(9)(m) enables time specified by a magistrate under sec 23DD to be discounted from the “investigation period” so long as the suspension or delay in the questioning is reasonable. Subsec 23DB(11) provides that no more than 7 days may be disregarded under para 23DB(9)(m).

\textsuperscript{203} subparas 23DC(4)(e)(i)-(iv) of the Crimes Act
Both the automatic periods of time a police officer may discount from the investigation period and any time specified by a magistrate will count as “dead time” and will extend the total period of remand. When the investigation period of 24 hours is added to the maximum of 7 days that may be specified, the period of permissible detention for a person arrested for a terrorism offence is up to 8 days.\(^{204}\)

The extended pre-charge arrest and questioning powers for terrorism offences available under the Crimes Act address the issues said to give rise to the need for PDOs and allow the collection of evidence while safeguarding individual rights eg to be cautioned. The ability to rely on extended pre-charge detention powers instead of PDOs can be demonstrated through the UK experience where in lieu of preventive detention there is a reliance on extended pre-charge detention and questioning powers for terrorism offences. These powers allow for a greater period of detention for terrorism offences (14 days) than for non-terrorism offences (4 days).\(^{205}\) While the person is detained under the UK provisions they may be questioned and anything said by the person may be used as evidence against them in any subsequent criminal proceedings. The normal rights that apply for an arrested person eg to be cautioned and to remain silent apply to a person detained under the UK provisions.

Given the AFP’s acceptance that it is an unlikely class of people who could be subject to a PDO but not arrested, the power to detain and question a person arrested for a terrorism offence appears to be a good substitute for PDOs. As can be shown by the UK experience, and in the drafting of Part 1C of the Crimes Act, the power to detain a person and to question them for a reasonable period is specifically tailored to address the same issues that are said to give rise to the need for a PDO while ensuring the rights of the accused eg to be cautioned etc are maintained in accordance with normal rule of law principles. While 14 days may not be necessary for pre-charge questioning in Australia, the UK experience shows how pre-charge detention and questioning powers can operate in Australia as an alternative to PDOs.

The UK Government has repeatedly rejected claims that their pre-charge detention and questioning powers may be used for preventive purposes but has acknowledged the preventive impact such detention may have:

\(^{204}\) The 7 day cap on the amount of time that may be specified as not counting towards the “investigation period” in subsec 23DB(11) of the Crimes Act was introduced following the case of Dr Mohamed Haneef. Dr Haneef was arrested and held under the Crimes Act for twelve days as no cap on “dead time” existed at the time of his arrest and detention. The Clarke Inquiry was critical of the lack of a cap on dead time and recommended a cap of no more than 7 days be introduced: Report of the Inquiry into the Case of Dr Mohamed Haneef, The Hon John Clarke QC, 2008, p 249.

\(^{205}\) Section 41 and Sch 8 of the Terrorism Act 2000 (UK) provide that a person can be detained for a maximum pre-charge detention period of 14 days. Compared to a maximum period of 4 days detention which applies to persons arrested for a non-terrorism offence under secs 41-44 of the Police and Criminal Evidence Act 1984 (UK).
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The characterisation of arrest and detention of terrorist suspects being carried out solely as a “preventative” measure is misleading. While an arrest may have a preventative or disruptive effect on a terrorist or network of terrorists, and while this may be the impetus for executing arrests in the first instance, the legislation does not allow continued detention on this basis. Once a person has been arrested, their continued detention can only be authorised on the grounds that it is necessary to obtain, examine or analyse evidence or information with the aim of obtaining evidence. The purpose of the extended detention time is to secure sufficient admissible evidence for use in criminal proceedings, where the nature of suspicion against a person has necessitated an arrest at a point at which such evidence was not available to the authorities.  

The UK Government has stated that to amend the grounds for pre-charge detention to include “prevention” in the statutory grounds for detention “would not be permissible” under Art 5(1) (the right to liberty and security) of the European Convention on Human Rights. This may be compared with a near equivalent international obligation of Australia under Art 9(1) of ICCPR, prohibiting arbitrary detention. It should not be assumed that preventive detention could never be a proportionate response to the threat of terrorism, if it were a practical addition to powers deficient to prevent terrorism. Rather, in the case of Australia’s PDO provisions, on analysis they yield very little if anything that adds to the capacity of ordinary arrest powers in this regard.

III.10 Police powers: stop and search powers, search warrants and the ability to seize evidence

Other established police powers can be used to take preventive action to protect the community against terrorist threats, including those which are imminent or have recently occurred. Apart from the ability to arrest a person, the police have the power to stop and search persons, vehicles and premises and can seize evidence relating to a terrorist act, items which would present a danger to a person, or which could be used in connection with a terrorism offence. These powers can be exercised by warrant or without warrant in urgent circumstances. The threshold for the exercise of these powers is suspicion on reasonable grounds. Where the threshold for detaining a person under a PDO is met because he or she is in possession of a thing connected with a terrorist act or because it is necessary to preserve evidence of a recent terrorist act, the threshold for police to search

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207 Cm 6920 p7
and seize could also be met and would authorize police to take possession of the thing or evidence.

Police have various powers available to them to assist in the collection of evidence of a crime, with search warrants being the primary tool for this. Division 2 of Part IAA of the Crimes Act sets out search and seizure powers, including the primary Commonwealth search warrant provision in sec 3E which applies to all offences against Commonwealth law. An issuing officer can issue a sec 3E warrant to search premises and persons if satisfied by information on oath that there are reasonable grounds for suspecting that there is, or will be in the next 72 hours, evidential material on the premises or in the possession of the person. An application for a sec 3E search warrant can be made by telephone in urgent situations. A warrant authorizes a police officer to seize anything found in the course of the search that he or she believes on reasonable grounds to be evidential material of an offence to which the warrant relates (or another indictable offence) and seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence.

Division 3 of Part IAA of the Crimes Act includes a power to stop and search a conveyance without warrant in emergency situations. A police officer can exercise this power where he or she suspects on reasonable grounds that a thing relevant to an indictable offence is in or on a conveyance, it is necessary to exercise the power to prevent the thing being concealed, lost or destroyed and it is necessary to exercise the power without the authority of a search warrant due to the serious and urgent circumstances. A police officer can seize the thing if found along with any other thing relevant to an indictable or summary offence where he or she suspects on reasonable grounds that it is necessary to seize the thing to prevent its concealment, loss or destruction and to do so is necessary without a warrant because the circumstances are serious and urgent.

In addition to the police powers which apply for all Commonwealth offences, Div 3A of Part IAA of the Crimes Act sets out police powers in relation to terrorist acts and terrorism offences. These powers can only be exercised in a Commonwealth place or a prescribed security zone. The Attorney-General may declare a prescribed security zone if he or she considers that a declaration would assist in a) preventing a terrorist act occurring or b) responding to a terrorist act that has occurred. These powers are designed to operate in the same situations as PDOs and provide a flexible and efficient approach for law enforcement to take preventive action.

208 sec 3R of the Crimes Act
209 sec 3F of the Crimes Act
210 sec 3T of the Crimes Act
211 subsec 3T(1) of the Crimes Act
212 subsecs 3T(2) and (3) of the Crimes Act
213 subsec 3UJ(1) of the Crimes Act
against terrorist threats and to preserve evidence of recent terrorist acts. A police officer has the power to stop and search persons and vehicles for the purpose of searching for terrorism related items. In exercising these powers, a police officer can seize any terrorism related item or a serious offence related item (including evidence of, or relating to, a terrorist act).

A police officer has the power to enter premises without warrant in an emergency. A police officer may enter premises without a warrant if the police officer suspects on reasonable grounds that to do so is necessary to prevent a thing on the premises from being used in connection with a terrorism offence and it is necessary to do without warrant because there is a serious and imminent threat to a person’s life, health or safety. The police officer may search for and seize the thing connected with the terrorism offence.

If in the course of searching the premises the police find another thing they suspect on reasonable grounds to be relevant to an indictable or summary offence they may secure the premises pending the obtaining of a warrant under Part IAA. A police officer may seize any other thing or do anything to make the premises safe where he or she suspects on reasonable grounds that it is necessary to protect a person’s life, health or safety and it is necessary to exercise the power without the authority of a warrant due to the serious and urgent circumstances.

In summary, like the powers of arrest, these other ancillary police powers do not appear deficient as tools to detect, investigate and also prevent terrorist offending. The review showed no evidence of, or argument based on realistic scenarios about, cases where the AFP would be powerless under ordinary laws but would be beneficially empowered under the PDO provisions.

**III.11 PDOs for non-suspects**

A PDO can order the detention of a person who is not a threat to national security and who is not suspected of any criminal wrongdoing. It may be that they were simply in the wrong place at the wrong time eg an innocent bystander who witnesses a terrorist act. The detention of an innocent person who poses no risk of harm to society for the purpose of preserving evidence does not conform to the traditional notions of preventive detention. Preventive detention is traditionally limited to situations where there is reason to believe that an individual left

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214 subsec 3UD(1) of the Crimes Act
215 sec 3UE of the Crimes Act
216 sec 3UEA of the Crimes Act
217 subsec 3UEA(1) of the Crimes Act
218 subsec 3UEA(2) of the Crimes Act
219 subsec 3UEA(3) of the Crimes Act
220 subsec 3UEA(5) of the Crimes Act
free poses some serious danger. An individual charged with a crime can only be denied bail and detained pending resolution of the charges against them if there is objective evidence they will abscond or pose a serious risk to the safety of the community. As David Cole has stated “the sine qua non for preventative detention is objective evidence establishing that the individual to be detained poses a risk that warrants preventing”. 221

A person should not be detained solely on the basis of their having some evidence of a terrorist act. The PDO provisions do not even require that the evidence be material evidence, just that it be evidence. The situation where an innocent bystander with no guilty knowledge of or involvement in a terrorist act has such crucial evidence that their detention is necessary to preserve the evidence is an unlikely one, bordering on the fantastic. Such an unlikely situation could be dealt with by normal police powers to search and seize evidence (search warrants are readily available to the police on a reasonable suspicion basis). The arrest provisions in the Crimes Act will adequately capture a situation where an accomplice to a terrorist act has evidence of the terrorist act and their detention is necessary to preserve that evidence. The arrest provisions under the Crimes Act provide police with the power to arrest a person where a police officer believes on reasonable grounds that the person has committed or is committing an offence and their arrest is necessary to prevent the concealment, loss or destruction of evidence relating to the offence. 222 And questioning warrants under the ASIO Act, considered in Chapter IV of this Report, are made to measure for this situation.

III.12 PDOs for suspects

A PDO provides police with the power to detain a witness, or more accurately in terms of the Australian legislation, someone who must be detained to preserve evidence, on the basis of a threshold that may arguably if only very slightly be lower than the usual threshold for arrest. 223 This raises the unsavoury possibility that police can choose not to arrest a person (and afford them the rights of an arrested person) and instead obtain a PDO against a suspect. An individual’s proximity to a crime may make him both witness and suspect, particularly in the early stages of an investigation. This is particularly worrying in light of the American experience with their material witness laws.

The material witness provisions in the United States Code allow for the detention of a material witness in federal criminal proceedings, supposedly and ostensibly, where it may become impracticable to secure the witness’ attendance at the

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222 subpara 3W(1)(b)(iii) of the Crimes Act
223 see III.7 above
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proceeding by subpoenaing him or her. There has been widespread documented abuse of the laws with individuals being detained for lengthy periods as a witness and in many cases, either not called on to give evidence at all or subsequently being charged with the offence so that they go from being detained as a witness to being arrested as an accused in the same proceeding. Material witness provisions have created the opportunity for pretextual detention under the lower material witness standard in place of arrest as a criminal suspect. There is evidence that material witness warrants are being used to detain a criminal suspect while authorities gather evidence sufficient to establish probable cause.

224 18 U.S.C. 3144 "If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure". Similar provisions exist in most if not all US states: see Congressional Research Service Report RS22259, Arrest and Detention of Material Witnesses and the USA PATRIOT and Terrorism Reauthorization Act (September 8, 2005). The US does not have a preventative detention regime allowing authorities to detain a person without charge. Such a regime would most likely be contrary to the United States Constitution. See discussion in Stacey Studnicki and John Apol "Witness Detention and Intimidation: The History and Future of Material Witness Law", St John's Law Review, 76 (3), pp.522-523 (2002).

225 "The [material witness] statute does not specify how long a witness may be incarcerated before being presented in a criminal proceeding or released....One-third of the seventy post-September 11 material witnesses we identified were incarcerated for at least 2 months. Some endured imprisonment for more than 5 months, and one witness spent more than a year in prison." Human Rights Watch and American Civil Liberties Union, "Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11" in Human Rights Watch Vol. 17, No 2(G) June 2005, p 3. See also David Cole "Fighting Terrorism – Not the Constitution", The Responsive Community 12(1) Winter 2001/02, 48-55 for a discussion of due process and detention of suspected terrorists .

226 "The Justice Department has ultimately brought criminal charges against twenty-nine of the material witnesses, accusing seven of terrorism-related crimes, and brought immigration charges against at least twenty-eight. From our review of court documents, it appears that in many of these cases, the charges have been based on evidence and statements the government has obtained after the material witness was arrested – either from interrogations of the witness himself or from investigations into other sources. The Justice Department has also used evidence it obtained from interviewing the witnesses before their arrest and when agents searched their property. In at least fifteen of these cases, the witness never testified before a grand jury, and the government filed the criminal charges only when a court indicated it would release the witness because of the government’s delays in bringing the witness before the grand jury." Human Rights Watch and American Civil Liberties Union, "Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11" in Human Rights Watch Vol 17, No 2(G) June 2005, p33.

227 The US Supreme Court has ruled that once a person is arrested, unless extraordinary circumstances exist, criminal charges must be filed within 48 hours: County of Riverside v McLaughlin 500 US 44 (1991).
to arrest the witness\textsuperscript{228} or as a preventive detention measure to imprison those considered by authorities to be a danger to society.\textsuperscript{229}

**III.13 Conclusion**

There is no demonstrated necessity for these extraordinary powers, particularly in light of the ability to arrest, charge and prosecute people suspected of involvement in terrorism. No concrete and practical examples of when a PDO would be necessary to protect the public from a terrorist act because police could not meet the threshold to arrest, charge and remand a person for a terrorism offence have been provided or imagined.

Police should instead rely on their established powers to take action against suspected criminals through the arrest, charge, prosecution and lengthy incarceration of suspected terrorists. This traditional law enforcement approach operates in accordance with fair trial and due process rights and is undoubtedly more effective as a preventive tool. The best possible outcome from a policing perspective is to prosecute individuals involved in terrorism. The prosecution, conviction and incarceration of such people will protect the public for a far greater period of time, with lengthy incarceration unquestionably more effective as a preventive strategy than detention for a maximum of 2 days under a PDO (or 14 days under a State or Territory PDO).

**Recommendation III/4:** The provisions of Div 105 of Part 5.3 of the Code should be repealed.

\textsuperscript{228} As noted in Congressional Research Service Report RS22259, *Arrest and Detention of Material Witnesses and the USA PATRIOT and Terrorism Reauthorization Act* (September 8, 2005), Footnote 9, those subject to arrest under the federal material witness statute have included Terry Nichols (subsequently convicted for complicity in the Oklahoma City bombing), Jose Padilla (subsequently transferred to military custody as an “enemy combatant”), and Brandon Mayfield (whose fingerprint was erroneously thought to match one linked to the Madrid train bombing).

CHAPTER IV
ASIO QUESTIONING WARRANTS

IV.1 Process of review

This year the INSLM has reviewed the powers to compel answers to questioning under Div 3 of Part III of the Australian Security Intelligence Organisation Act 1979 (Cth) (“ASIO Act”). There have been no questioning, or questioning and detention, warrants issued under Div 3 of Part III of the ASIO Act during this reporting period.230

All the files for every questioning warrant (“QW”) were obtained and studied. The grounds for seeking the QWs were considered, the transcripts of the questioning were read and the mandatory reports on the assistance obtained from the questioning were scrutinized.

In some cases, it was possible to compare the material obtained under a particular QW with the evidence later used in prosecution of certain of the persons against whom QWs were issued and executed. In summary, it can be said that no crucial evidence used in a prosecution was obtained, or obtained only, from the use of QWs.

More detail of this exhaustive examination of every actual use of QWs is to be found in classified Appendix CB, which should not be contained in the declassified Annual Report because it is operationally sensitive information and information that might prejudice the performance by a law enforcement or security agency of its functions.231

Evidence was obtained by the INSLM at private hearings from ASIO officers and others concerning the usefulness of information obtained by way of QWs. The nature of prerequisites for their issue and safeguards during and after their execution were also the subject of discussion and testing in those private hearings. Those records, too, contain throughout references to operationally sensitive information and information that might prejudice the performance by law enforcement or security agency of its functions, if they were published.

230 See Appendix G for the number of warrants issued annually under Div 3 of Part III since the powers came into effect.

231 subsec 29(2A), para 29(3)(a) and subpara 29(3)(b)(ii) of the 2010 Act
CHAPTER IV ASIO QUESTIONING WARRANTS

IV.2 General conclusions

The power to compel persons to attend and answer questions concerning the suspected wrongdoing of others is not unique to ASIO. All three arms of constitutional government in Australia have such powers. Some such power could be seen as essential for the existence and operation of the Houses of Parliament.\footnote{Egan v Willis (1998) 195 CLR 424 at 447 [31], 451-452 [42], 454 [52]}

The power of the courts of law to compel the attendance of witnesses and to compel them to answer questions and to produce documents is understood by everyone. Compulsory questioning and effective detention while it is carried out is an everyday part of civil and criminal justice systems and serves the administration of justice.

Australian parliaments have also authorized executive agencies and non-judicial officials to exercise such powers. Investigatory bodies at the Commonwealth and State level have powers to this effect, including the Australian Crime Commission, the Australian Securities and Investments Commission, the Independent Commission Against Corruption and the New South Wales Crime Commission. Criminal offences are committed by failure to attend, remain or answer questions as directed. Royal Commissions are virtually defined as statutory forums in which the executive government (albeit through impartial temporary officers) exercises the salutary power of addressing specific grievances or mischiefs by asking questions and compelling answers from the innocent and knowledgeable, as well as from the less innocent.

All crimes with which the CT Laws are concerned constitute or involve “federally relevant criminal activity”, and are thus within the purview of the Australian Crime Commission, which has at the core of its reason for existence the capacity to obtain information by means including compulsory questioning. QWs, providing for questioning by ASIO officers, are special in that ASIO officers play this part. QWs are not so special, on the other hand, insofar as they provide for the compulsory answering of official questioning.

Probably all of the QWs issued and executed have been directed against persons of interest, meaning suspected, in relation to terrorism offences. None of the cases could fairly be seen as the questioning of a person who was regarded as an innocent bystander or a person whose assistance had no possible connexion with their own possible wrongdoing. Actual experience of QWs, therefore, has not really tested these provisions in their possible application to such persons.

It should be emphasized, however, that the extension of the power conveyed by QWs to innocent persons without involvement in terrorist offences is not unique or even remarkable in the realm of official powers to compel answers to questioning. Long established procedures in relation to insolvent corporations have required innocent persons to lend their co-operation to the investigation of facts,
in the public interest. The more recent statutory powers including those noted above equally permit such powers to be used to compel answers from persons against whom no suspicion exists.

The actual experience of QWs thus does not show any abuse in the nature of too many persons uninvolved in terrorist offences being compelled to answer too many questions. But the obvious potential for such persons to provide assistance means the QW power should remain available for such cases.

There is no objection in principle to such compulsory powers of questioning given the need to counter terrorism, the frequently conspiratorial character of terrorist activity and the requirement for cogent evidence. Modern concepts of privacy and traditional preferences to be left alone by the government are properly given great weight as values of our kind of society. But they cannot sensibly outweigh an official power to question people about suspected terrorism.

The complete review of all QW files by the INSLM revealed compliance by ASIO and the other relevant officers of the Commonwealth with all statutory requirements including safeguards regulating the issue, execution and reporting of QWs and their use. (A venial shortcoming in relation to the timeliness of the first reports on the earliest QWs, discussed below, does not detract from the integrity of the process.)

The efficacy of the QW provisions and their worth as an intelligence collection tool has been established through review of the files and discussions with relevant agencies. Questioning under QWs has played a role in informing intelligence assessments and progressing terrorism investigations. It should be emphasized that ASIO is an intelligence agency, not an investigation bureau for law enforcement such as police detectives are.

The distinction between intelligence and evidence, but also the unstable overlap between them, means that it would be wrong to criticize the nature of the QWs powers or their actual use on the simple ground that they have not produced much if any admissible material for prosecutions. Conversely, they should continue to be scrutinized, particularly as to the products of their actual use, for the practical assistance they lend (or not) to the prevention, detection and eventual prosecution of terrorist offences.

Some amendments to the existing safeguards are justified to improve the efficacy of QWs. Recommendations to this end, and the reasons for them, follow.
IV.3 Last resort requirement for QWs

The safeguards for QWs are impressive.\(^\text{233}\) Consideration of the circumstances in which the rather sparing resort to QWs has been had by ASIO suggests one of these safeguards may be excessive. Requiring a QW to be available only as a last resort where relying on other methods of intelligence collection “would be ineffective” \(^\text{234}\) appears, as a matter of language, commendably stringent. It raises practical difficulties if it were to be observed literally: often the only genuine way to vouch for this categorical state of affairs would be the actual experience of unsuccessfully using all other methods, in circumstances where those attempts could seriously spoil the prospects of obtaining useful intelligence under a QW. The last resort prerequisite, expressed as it is, could be an unrealistic safeguard.

In order to be satisfied of this prerequisite the Attorney-General would need evidence from ASIO that it had assessed all other methods of intelligence collection to be ineffective. In order to make this assessment, ASIO would usually have to use, or at least attempt to use, some of those methods. The requirement that ASIO must first attempt to collect the intelligence through other means but fail to do so, raises an acute issue about the effectiveness of QWs. A time critical operation may require a QW to be sought where there is insufficient time to establish that relying on other methods of intelligence collection would be ineffective.

Study of the actual files of issued QWs does not allay this concern. There are two problems, tending in conflicting directions. First, the impracticality of showing that other methods would be ineffective, as opposed to would probably be ineffective, or may be ineffective, can be seen to produce a formulaic assertion by officers rather than demonstration. Second, cases where the early rather than late confrontation by official questioning of a person with a possible relevant involvement in possible terrorist offences would be beneficial in the public interest are most unlikely to be eligible for use of QWs.

The last resort prerequisite is a safeguard of which the Attorney-General must be satisfied but not the judicial officer who is the issuing authority.\(^\text{235}\) However, another prerequisite, that “there are reasonable grounds for believing that issuing the warrant ... will substantially assist the collection of intelligence that is important in relation to a terrorism offence” is one of which both the Attorney-General and the issuing authority must be satisfied.\(^\text{236}\) The justification in policy for this difference between the responsibility of the Attorney-General alone for the last resort prerequisite and the shared responsibility of the Attorney-General and the issuing authority for the more substantive prerequisite is elusive. Discussion of this issue at private hearings did not succeed in capturing it. There is no good

\(^{233}\) See the provisions discussed in Ch IV of the INSLM’s First Annual Report at pp 27-30.

\(^{234}\) para 34D(4)(b) of the ASIO Act

\(^{235}\) para 34D(4)(b) and subsec 34E(1) of the ASIO Act

\(^{236}\) paras 34D(4)(a) and 34E(1)(b) of the ASIO Act
reason why the issuing authority should not also be required to be satisfied of the last resort requirement. It is appropriate for a judicial officer to consider both prerequisites and to be satisfied that they have been met.

Consideration of the files recording actual resort to QWs, and discussion in private hearings, have cast great doubt on the cogency of a policy that questioning powers should be available only as a power of truly last resort. Their usefulness and effectiveness would likely be enhanced if they were to be available at the earlier stages of an investigation. The need to establish that other methods of intelligence collection have proven to be ineffective limits both their use and effectiveness as an investigative tool. Furthermore, it is not as if the obligation to answer questions, with accompanying obligations of attendance and secrecy, are clearly more intrusive than other accepted (and acceptable) powers available to ASIO.

The special warrant powers available to ASIO under Div 2 Part III of the ASIO Act are not powers of last resort even though they permit intrusions into personal liberty (including the right to be left alone) on a par with, or even more substantial than, compulsory questioning: eg search warrants for homes and computers. For ASIO to obtain a warrant to search premises the Attorney-General must be “satisfied that there are reasonable grounds for believing that access by [ASIO] to records or other things on particular premises [or to data held in a particular computer] will substantially assist the collection of intelligence … in respect of a matter that is important in relation to security”.  

The important powers available to ASIO to use listening and tracking devices and to inspect the mail require (amongst other things) the Attorney-General to be satisfied that such action by ASIO “will, or is likely to, assist [ASIO] in carrying out its function of obtaining intelligence relevant to security”. As well, Parliament has authorized the Director-General of ASIO to issue warrants of the kinds permitted under eg secs 25, 25A, 26, 26B and 27 of the ASIO Act in cases of emergency while awaiting the decision of the Attorney-General for the issue of such a warrant. That emergency power explicitly recognizes, as is obvious from the nature of matters of security, the serious possibility of cases where timely intervention is required more quickly than Ministerial consideration would permit. That case is stipulated to be when the Director-General is “satisfied … that, if the action to be authorized by the warrant does not commence before a warrant can be issued and made available by the Minister [ie the Attorney-General], security will be, or is likely to be, seriously prejudiced”, amongst other things.

These provisions more sensibly address the impossibility of absolutes and the exigencies that may arise in cases of security. They are accordingly better adapted

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237 subsecs 25(2) and 25A(2) of the ASIO Act  
238 paras 26(3)(b), 26B(2)(b) and 27(2)(b) of the ASIO Act  
239 para 29(1)(d) of the ASIO Act
CHAPTER IV ASIO QUESTIONING WARRANTS

for the appropriate regulation of large and intrusive intelligence-gathering powers. They provide powerful support for a similar approach in the case of QWs.

The Attorney-General’s Guidelines also provide a safeguard for ensuring the appropriate use of QWs. The Attorney-General’s Guidelines are given by the Attorney-General to the Director-General under subsecs 8A(1) and 8A(2) of the ASIO Act and are to be observed by ASIO in the performance of its functions. The Guidelines require ASIO to have regard to the proportionality and intrusiveness of its methods of obtaining information. Any means used for obtaining information must be (a) proportionate to the gravity of the threat posed and the probability of its occurrence, (b) use as little intrusion into individual privacy as is possible and (c) wherever possible the least intrusive techniques of information collection should be used before more intrusive techniques (where a threat is assessed as likely to develop quickly, a greater degree of intrusion may be justified). The written statement of procedures required in relation to QWs by the Director-General of ASIO is consistent with these Guidelines, and is a prerequisite for the issue of a QW.

These Guidelines and statement of procedures constitute formidable and reassuring prerequisites for the issue and control of the execution of QWs. They are an appropriate reflection of the gravity of the power sought to be exerted against individuals in the public interest by way of QWs. A theme of the last year’s investigation of these matters by the INSLM has been the question whether these and the other safeguards noted above are more window-dressing than substance. The clear conclusion has been reached that, so far as can be assessed from all of the actual use of the QW powers, these protections of individual liberty by close control of executive power have operated, operated in substance and operated well.

So long as all these other safeguards remain, in order to enhance the efficacy of the QW power the last resort prerequisite should be substantially changed. In place of its last resort character, there should be a requirement of reasonableness and the checking device of the Director-General, the Attorney-General and the issuing authority all being required to make the evaluative assessment that the power should be invoked.

Historically, there are understandable social and cultural grounds for disliking compulsory questioning. The elaborate safeguards and prerequisites for QWs, as originally enacted, reflect that healthy resistance to official intrusion by way of interrogation of individuals. In light of experience recorded in the files inspected by the INSLM, and further consideration of how these matters stand in relation to other forms of compulsory questioning and intrusive search powers, it is

240 Attorney-General’s Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence) para 10.4

241 sec 34C and para 34D(4)(c) of the ASIO Act
appropriate on a fair balance of security and liberty to omit the striking but inappropriate last resort prerequisite.

That does not mean there should be no explicit requirement to consider other techniques for gathering intelligence when the question of issuing a QW arises. The recommendation that follows is intended to accommodate these various considerations.

A precedent for the drafting contained in the recommendation that follows is contained in the Australian Crime Commission Act 2002 (Cth), which imposes a prerequisite for the issue of a summons for a person to appear for an examination, to the effect that it is “reasonable in all the circumstances” to do so.242 The “circumstances” in the case of the QW power for ASIO will include, of course, the explicit proportionality requirements imposed by the Attorney-General’s Guidelines and the Director-General’s written statement of procedures.

Recommendation IV/1: The issuing authority as well as the Attorney-General should be required to consider all the prerequisites for the issue of QWs, rather than the issuing authority taking the consent of the Attorney-General as conclusive of some of them.243 The last resort requirement for QWs should be repealed and replaced with a prerequisite that QWs can only be sought and issued where the Attorney-General and issuing authority are “satisfied that it is reasonable in all the circumstances, including consideration whether other methods of collecting that intelligence would likely be as effective”.244

IV.4 Time limits for questioning where an interpreter is used

The ideal period for effective questioning, from the point of view of those wanting answers, will always depend on the individual circumstances. But the rule of law and the need to avoid arbitrary detention in breach of Art 9 para 1 of ICCPR require limits to be set regardless of questioners’ individual preferences in particular cases. In their nature, time limits for questioning must be stipulated by precise periods of hours or days. While it is appropriate to impose bright-line limits on powers of this kind, one aspect of such clarity is an appearance or sometimes reality of arbitrariness. (That is another kind of arbitrariness than the nefarious quality prohibited by Art 9 para 1 of ICCPR. It is the beneficial quality of predictability and clarity that is lent by the arbitrary expiry of a time limit according to clock or calendar.)

A person may be questioned under a QW for an initial period of 8 hours which can be extended with the permission of the prescribed authority to 16 hours, then

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242 subsec 28(1A) of the Australian Crime Commission Act 2002

243 Hence subsec 34E(1) of the ASIO Act should more closely mirror subsec 34D(4).

244 Hence paras 34D(4)(b) and 34E(1)(b) should be amended to read, to the recommended effect, the same as each other.
finally extendable to 24 hours. In cases where an interpreter is present at any time during questioning, the corresponding periods are 24, 32 and 40 hours (with a 48 hour limit). There is a special limit of 2 hours for continuous periods of questioning for people aged between 16 and 18 years.

An automatic doubling of the permissible questioning period in all cases where an interpreter is present at any time – however long – while a person is questioned is not reasonably necessary. The use of an interpreter, with the accompanying translation process, will almost always result in a time delay during questioning and a lengthened questioning period. However, a one size fits all approach to assessing how much of a time delay is not appropriate or sensible.

The current automatic doubling of time that applies in all cases where an interpreter is present does not ensure the additional time is reasonably attributable to the use of an interpreter. As the Australian Human Rights Commission stated “[t]his is irrespective of how long the interpreter is present, whether questioning has been conducted through them and whether their presence has facilitated or impeded the questioning process”.  

Other questioning regimes do not contain provisions that significantly extend the period of time a person can be detained for questioning on the basis of an interpreter being used, with particular reference to police questioning powers. A person suspected of a terrorism offence can be arrested and questioned without charge under Part 1C of the Crimes Act. A person may have a right to an interpreter during questioning but there is no extension of the maximum questioning and detention period (the investigation period) on the basis of an interpreter being used. However, certain times are to be disregarded in calculating the investigation period and include periods where questioning was delayed or suspended for such time as was reasonable to accommodate the use of an interpreter. The AFP may also apply to a Magistrate to extend the investigation period if the further detention of the person is necessary to obtain evidence or complete their investigation, provided the investigation into the offence is being conducted properly and without delay. There is no reason why the Magistrate could not take into account any

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245 subsecs 34R(1)(2) and (6) of the ASIO Act
246 subsec 34R(9) and (11) of the ASIO Act
247 subpara 34ZE(6)(b)(ii) of the ASIO Act
248 subsec 34R(8) of the ASIO Act
249 Australian Human Rights Commission, Submission to the INSLM, 14 Sept 2012, para 26
250 Law Council of Australia, Submission to the INSLM, 10 Sept 2012, paras 65-66 and Human Rights Law Centre, Submission to the INSLM, 10 Sept 2012, para 18
251 sec 23N of the Crimes Act
252 paras 23DB(9)(b) and (c) of the Crimes Act
253 subsec 23DF(2) of the Crimes Act
reasonable delays in questioning caused by the use of an interpreter in determining whether to grant such an extension.

The scheme under the *Crimes Act* does allow for an extension of time to accommodate delays that can be shown to be both reasonable and attributable to the use of an interpreter. This is done explicitly through the automatic discount from the maximum detention time and also through the application of the discretionary power a Magistrate has to extend the investigation period. This flexible approach, where the Magistrate is required to consider both the reasonableness of the period and its attribution to the use of an interpreter, serves as a useful model for the QW provisions.

An appropriate safeguard should apply requiring the prescribed authority to be satisfied on reasonable grounds that any extension of time is no more than could reasonably be attributable to the use of a foreign language. The onus must be on ASIO to demonstrate what additional time is necessary due to the use of an interpreter in each particular case.\textsuperscript{254} The time delay actually caused by the use of an interpreter should be monitored by the prescribed authority to ensure any extended period of questioning remains necessary.

The requirement for the prescribed authority to be satisfied that the extended questioning time is reasonable should operate as an additional safeguard to complement the statutory maximum period. It is appropriate to retain the upper limits on the period by which questioning can be extended.\textsuperscript{255}

It was submitted to the INSLM that the focus should not be on the permitted duration of questioning but whether there are sufficient safeguards to protect against abuse.\textsuperscript{256} There is value in focussing not just on the statutory time limits but also on the safeguards that exist to ensure those time limits are applied in a way that is reasonable and reflects the purpose of the provisions. The considerable safeguards on the treatment of persons questioned under QWs, especially the involvement of the Inspector-General of Intelligence and Security, constitute best practice according to a general review of international standards. Nothing untoward has been discovered by the INSLM in relation to any of the actual questioning under QWs, so far as concerns oppressive or other unlawful or improper conduct. The panoply of provisions in the ASIO Act to this end\textsuperscript{257} is on its face impressive, and according to experience so far, effective.

In the INSLM’s First Annual Report concern was expressed about the length of permitted compulsory questioning under QWs.\textsuperscript{258} Review of all the files recording

\textsuperscript{254} Law Council of Australia, *Submission to the INSLM*, 10 Sept 2012, para 62
\textsuperscript{255} Australian Human Rights Commission, *Submission to the INSLM*, 14 Sept 2012, para 27
\textsuperscript{256} CEPS, *Submission to the INSLM*, 14 Sept 2012, p 9
\textsuperscript{257} eg para 34K(1)(e), secs 34P and 34Q, subsec 34R(5) and sec 34T
\textsuperscript{258} pp 31 and 32
the actual use of QWs certainly does not suggest those time limits are too short for effective questioning. Neither did it suggest the stipulated limits are clearly too long. The potential maximum length of time, being a continuous period of 168 hours, should remain of concern to legislators and the public. However, given the gravity of realistic possibilities in the search for intelligence about threats to security from the commission of terrorist offences, it would not be reasonable to conclude that these time limits should be appreciably shortened. Questions about this limit should nonetheless continue to be asked.

**Recommendation IV/2:** The QW provisions should be amended to include a requirement that the prescribed authority must be satisfied on reasonable grounds that any extension of time granted on account of the use of an interpreter is no more than could reasonably be attributable to the use of the interpreter during questioning given the circumstances of the individual case. 259

### IV.5 Use of force for the purposes of a QW

An issue raised in the INSLM’s First Annual Report is whether the provisions regulating the use of official force for QWs sufficiently restrict the use of lethal force. 260 The implications raised last year have been discussed in private hearings, including with officers of the AFP. As a result of those discussions, considerations of other submissions and reflection on the matter in the broader framework of officially sanctioned use of force against individuals, there remains a concern that the permitted use of lethal force in enforcing a QW does not sufficiently clearly require the reasonable apprehension of danger to life or limb. 261

At common law, a police officer exercising a lawful power of arrest may use such force as is reasonably necessary in order to make the arrest or prevent the escape of the person from custody. The statutory definitions across Australian jurisdictions generally adopt the reasonably necessary common law test. 262 What amounts to reasonable force is a question of fact that depends upon the circumstances of the particular case including the nature of the resistance put up by the person being arrested. Reasonable force has been described as that degree of force which is not excessive but is fair, proper, and reasonably necessary in the circumstances. At common law a person is entitled to use reasonable force in self-
defence or to protect another person where there is actual danger or a reasonable apprehension of immediate danger.\textsuperscript{263}

That it is permissible to do something likely to cause the death of a person if the officer believes on reasonable grounds that it is necessary to protect life or to prevent serious injury to another person (including the officer) is unexceptionable. This overlaps with the modern law of self-defence and defence of others.\textsuperscript{264}

However, coupling that with a requirement that the officer believe there is no alternative way of taking a person into custody is disturbing and does not add anything of weight to a belief that the action was necessary to protect life (etc).\textsuperscript{265}

The idea that lethal force can be used because there is no alternative way to take a person into custody is reminiscent of the horrible clichê that still has connexion to reality in some countries, of "shot while trying to escape". This extra component of a test for the lawfulness of an official killing serves no useful purpose, but rather distracts from the simple one of saving another or defending oneself. It should not be available to assist in distorting the life-protection justification for the use of lethal force to a licence to kill reasonably suspected terrorists.

For the application of lethal force to be permitted, an officer must believe on reasonable grounds that doing that thing is necessary to protect against danger to life or limb. The question could be considered not in terms of the escape itself, but of the future danger posed by the person if he or she were to escape. If the person escaping is a suspected terrorist who has indicated his or her willingness at some indefinite time and in some indefinite circumstances to detonate a bomb, would the act of shooting the person be considered necessary and reasonable to protect life or to prevent serious injury to another person? There is no immediacy requirement in the legislation that would prevent such an interpretation.

In practice this provision is unlikely to be interpreted by officers as permitting the use of lethal force to prevent the escape of a person where there is no immediate danger to life or limb. AFP officers are not permitted to use lethal force on the basis that there is no other way to take a person into custody. Commissioner’s Order 3 ("CO 3") regulates the use of reasonable force by AFP officers.\textsuperscript{266} Officers must comply with CO 3 in the performance of their functions, including exercising their powers under the ASIO Act. Officers are trained to apply the policies in CO 3, including the lethal force policy.

CO 3 defines reasonable force as “the minimum force necessary and reasonable in the circumstances of a particular incident.” Excessive force is “force beyond that

\textsuperscript{263} McClelland v Symons [1951] VLR 157 and Goss v Nicholas [1960] Tas SR 133
\textsuperscript{265} See subpara 34V(3)(b)(ii) of the ASIO Act; subsec 32C(2)(b)(ii) of the Crimes Act, which governs the use of force in making an arrest, sets out similar terms.
\textsuperscript{266} CO 3 is reproduced in full at Appendix H.
which is considered reasonably necessary in the circumstances of any particular incident including...more force than is needed.”

The use of lethal force policy is as follows:-

6.1 Lethal force is an option of last resort and should only be used when reasonably necessary in the following circumstances:
- in self-defence from the immediate threat of death or serious injury
- in defence of others against whom there is an immediate threat of death or serious injury
- only when less extreme means are insufficient to achieve these objectives.

6.2 An appointee who considers using lethal force to be reasonably necessary must:
- act appropriately and in proportion to the seriousness of the circumstances
- minimise damage or injury to other people with a view to preserving human life.

Firearms may only be used in accordance with the lethal force policy and where practicable before using a firearm an AFP officer must identify themselves as police officer, give a clear oral warning of their intention to use a firearm and ensure there is sufficient time for the warning to be complied with before using the firearm, unless they believe on reasonable grounds this would:
- unduly place themselves at risk of serious injury or death
- create a risk of serious injury or death to other people
- be clearly inappropriate or pointless given the circumstances of the incident.

Any use of lethal force will be subject to internal investigation. It was submitted that there is no penalty for contravening, or attempting to contravene, subsec 34V(1) of the ASIO Act (through the application of force outside the permissible limits, or by treating the person with indignity).

It is correct that there is no specific offence under the ASIO Act for such conduct but there are not normally specific offences for the application of force in making in arrest outside the permissible limits. The excessive use of force may result in criminal charges under the general criminal law eg assault. Where an officer subjects a person to

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267 para 5.5 of CO 3
268 paras 8.5 and 8.7 of CO 3
269 paras 13.5 and 13.6 of CO 3. A complaint may be made about the use of force (including non-lethal force) in relation to QWs in accordance with Part V of the Australian Federal Police Act 1979 (Cth).
270 NSW Council for Civil Liberties, Submission to the INSLM, Oct 2012, p 6
271 Eg there is no specific offence for an AFP officer to use force outside the permissible limits for the use of force under sec 34ZC of the Crimes Act (use of force in making an arrest).
greater indignity than is necessary and reasonable, an offence under subsec 34T(2) of the ASIO Act (inhumane treatment) may have been committed.

The requirement in subpara 34V(3)(b)(ii) of the ASIO Act that there be no alternative way of taking a person into custody should be removed. If this second limb of the test for the use of lethal force in relation to a person attempting to escape custody were removed, para 34V(3)(b) would be redundant. The test to apply in all circumstances, including where a person is escaping custody, would be covered by para 34V(3)(a).

**Recommendation IV/3:** The requirement in subpara 34V(3)(b)(ii) of the ASIO Act that there be no alternative way of taking a person into custody should be removed.

### IV.6 Parity of penalties in relation to QW safeguards

In the INSLM’s First Annual Report a question was raised about the appropriateness of the disparity between the length of imprisonment for offences against secrecy obligations, and offences of deliberate contravention of safeguards, in relation to QWs.\(^\text{273}\)

The secrecy provisions relating to QWs are elaborate and criminally sanctioned. Strict liability and recklessness apply in relation to an offence against the secrecy provisions.\(^\text{274}\) Any disclosure made in breach of these provisions is a criminal offence punishable by 5 years imprisonment.\(^\text{275}\) In contrast, the criminal offences for deliberate contravention of safeguards in relation to QWs are only punishable by only 2 years imprisonment.\(^\text{276}\) A person who is subject to a QW must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment.\(^\text{277}\) This reflects the right to freedom from cruel, inhuman or degrading treatment contained in Art 7 of the ICCPR. Given the gravity of the offending conduct, the penalty of 2 years imprisonment for the deliberate contravention of this safeguard, compared to 5 years imprisonment for breach of a secrecy provision, is either insufficient or disproportionately small.\(^\text{278}\)

It is necessary to ensure strict compliance with the safeguards, and for the law to appear to declare the importance of that goal. People may be subject to QWs who are not wrongdoers. It is not to the point than an offending official may be subject

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\(^{272}\) as required by subsec 34V(2) of the ASIO Act.  
\(^{273}\) INSLM’s First Annual Report, Issue 19  
\(^{274}\) subsec 34ZS(3) of the ASIO Act  
\(^{275}\) sec 34ZS of the ASIO Act  
\(^{276}\) sec 34ZF of the ASIO Act  
\(^{277}\) subsec 34T(2) of the ASIO Act  
\(^{278}\) subsec 34ZF(4) of the ASIO Act
to other charges which would carry heavier sentences: the question is whether the penalty for these particular offences is adequate.

The Human Rights Law Centre and Australian Lawyers for Human Rights highlighted the need to consider Australia’s international human rights obligations in determining the appropriate penalty for contravening safeguards in relation to QWs.\textsuperscript{279} Australia’s counter terrorism obligations under 1373 must be performed in a way that is consistent with Australia’s international human rights obligations.\textsuperscript{280} No good reason appears why the national security concerns justify 5 years imprisonment for the secrecy offences in relation to QWs while the fundamental human rights concerns justify only 2 years imprisonment for the offences for contravening safeguards in relation to QWs. There should be symbolic parity between the penalties for these offences.

**Recommendation IV/4:** The length of imprisonment for offences of deliberate contravention of safeguards in relation to QWs should be amended to be at parity with the length of imprisonment for offences against secrecy obligations in relation to QWs.

### IV.7 Severity of penalty for secrecy offences

The attention turned to these penalties raises the further question whether the length of imprisonment of 5 years for breaching secrecy obligations in relation to QWs is too severe.

Generally, secrecy provisions in relation to compulsory questioning by other investigatory bodies have penalties of 1 year imprisonment, with some including a harm element. A person who is compelled to give evidence to the Australian Crime Commission cannot disclose any information about the summons to appear or any information connected with it. There is no harm element for this offence and the penalty is 1 year imprisonment.\textsuperscript{281} It is an offence punishable by 1 year imprisonment for a person who is compelled to give evidence to the NSW Crime Commission, or Independent Commission Against Corruption, to disclose any information about the summons to appear if the disclosure is likely to prejudice the investigation to which it relates (the harm element).\textsuperscript{282}

The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* sets a benchmark of 2 years imprisonment as the appropriate penalty for

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\textsuperscript{280} See Appendix 11 of the INSLM’s First Annual Report on the need to comply with international human rights obligations in countering terrorism.

\textsuperscript{281} subsec 29B(1) of the *Australian Crime Commission Act 2002* (Cth)

\textsuperscript{282} subsecs 29A(1) of the *New South Wales Crime Commission Act 1985* (NSW) and 114(1) of the *Independent Commission Against Corruption Act 1988* (NSW)
breach of a confidentiality requirement. The Guide states that “[p]enalties should be framed to maximise consistency with penalties for existing offences of a similar kind or of similar seriousness. Penalties within a given legislative regime should reflect the relative seriousness of the offences within that scheme.” 283

The unauthorized disclosure of QW information carries a heavier sentence than the 2 other secrecy offences under the ASIO Act which have penalties of 2 years imprisonment. 284 A comparison with other secrecy provisions for the protection of national security information shows 2 years is the widely applied penalty. Secrecy offences for the unauthorized disclosure of information a person has acquired by reason of being an officer or contractor of a security or intelligence agency carry sentences of 2 years imprisonment. 285 Secrecy offences under the NSI Act for the unauthorized disclosure of national security sensitive information carry sentences of 2 years imprisonment. 286 Given the nature of the information protected by these provisions it is hard to see how the release of that information would cause less significant prejudice to national security, including the detection and prevention of terrorist activity, than would the release of information about a QW.

General secrecy offences relating to the unauthorized disclosure of national security sensitive information have penalties between 2 and 7 years imprisonment. It is an offence under sec 79 of the Crimes Act (official secrets) to disclose certain security and defence information as well as any information which by its nature, or the circumstances of its communication, a person ought to know should not be disclosed. Where the disclosure is made with an intention to prejudice the security or defence of the Commonwealth the penalty is 7 years imprisonment. 287 Where the disclosure is made without an intention to cause such harm the penalty is 2 years imprisonment. 288

The secrecy offences in relation to QWs under the ASIO Act do not include an explicit harm element. There is no requirement to prove the person intended to cause harm or that the unauthorized disclosure is likely to prejudice ASIO


284 Subsection 18(2) of the ASIO Act makes it an offence for a person to make an unauthorized disclosure of any information her or she has acquired by reason of being an officer or contractor of ASIO and sec 81 of the ASIO Act makes it an offence for an Administrative Appeals Tribunal member or officer to make an unauthorized disclosure of any information he or she has acquired for the purposes of the ASIO Act (the ATT is responsible for reviewing ASIO security assessments and have access to ASIO information in performing this role).

285 Eg subsec 18(2) of the ASIO Act applies to ASIO employees or contractors and subsecs 39(1), 39A(1) and 40(1) of the Intelligence Services Act 2001 (Cth) which apply respectively to ASIS, DIGO and DSD employees or contractors.

286 secs 40-46 of the NSI Act

287 subsec 79(1) of the Crimes Act

288 subsec 79(1) of the Crimes Act
investigations or involve the release of national security classified information. A person commits an offence if at any time before a warrant expires he or she discloses any information indicating the fact that the warrant has been issued. A person commits an offence if at any time in the 2 years following the expiry of the warrant, he or she discloses information that is “operational information” defined to mean any “information that the Organisation [ASIO] has or had”. Where the person who commits the offence was the subject of the warrant or their lawyer, the fault element of strict liability applies to whether the disclosure was of “operational information”, otherwise the fault element of recklessness applies. The absence of a harm element and the application of the fault elements of strict liability and recklessness support the conclusion that these offences do not warrant a higher penalty than 2 years imprisonment.

**Recommendation IV/5:** The length of imprisonment for offences against secrecy obligations in relation to QWs should be reduced to 2 years.

### IV.8 Offence of destroying etc evidence

A relatively minor issue is whether the provisions for enforcing the obligation to produce records or things under a QW should specifically extend to include the deliberate destruction of, or tampering with, the material requested. If only out of more abundant caution, express provision should provide for an offence of destroying or tampering with evidence, given that such action would frustrate the obligation to produce. The offence of failing to produce a record or thing should include the wilful destruction of a record or thing as well as tampering with a record or thing with the intent to prevent it from being produced, or from being produced in a legible form.

**Recommendation IV/6:** The offence of failing to produce a record or thing should be amended to include the wilful destruction of a record or thing as well as tampering with a record or thing with the intent to prevent it from being produced, or from being produced in a legible form.

289 See subsec 34ZS(1)(c)(i) of the ASIO Act. It is also an offence to disclose any fact relating to the content of the warrant or to the questioning or detention of the person under the warrant, or operational information: subsecs 34ZS(1)(c)(i) and (ii) of the ASIO Act.

290 subsecs 34ZS(2) and (5) of the ASIO Act

291 subsec 34ZS(3) of the ASIO Act

292 subsecs 34L(6) and (7) of the ASIO Act. This issue was raised in the INSLM’s First Annual Report, Issue 18.

293 See the offence of destroying documents or things in sec 23 of the *Royal Commissions Act 1923* (NSW).
IV.9 Abrogation of the privilege against self-incrimination and use immunity

The QW provisions of the ASIO Act, as explained below, compel a person to answer questions even if the answers may tend to incriminate the person. The only protection substituted for that abrogation of privilege is the prohibition against use of such answers against the person. How do these provisions measure up with Australia’s international human rights obligations? The following part of this Report seeks to address this crucial issue. No recommendation is made for any change to the ASIO Act in light of the INSLM’s consideration of it.

The privilege against self-incrimination is a long standing common law right that protects a person from being compelled to incriminate him or herself directly and from providing information which may result in the discovery of incriminatory evidence. The privilege against self-incrimination can be abrogated by Parliament.

The privilege has also been abrogated in relation to the compulsory questioning powers of a number of investigatory bodies, including ACC, ICAC, ASIC and NSWCC.

It is a generally accepted policy that where, by statute, compulsory questioning powers abrogate the privilege against self-incrimination, a use immunity should apply to any incriminatory evidence given. (It is not necessary to delve into the different question whether the Constitution would require some such protection in order to achieve the requisite fairness in the exercise of the judicial power of the Commonwealth.) These use immunity provisions usually provide protection against the direct use of answers as evidence in criminal proceedings against the person (direct use immunity) while still permitting derivative use of the evidence (no derivative use immunity). This is the situation in regards to compulsory questioning by ASIO and other investigatory bodies such as the ACC, ICAC, ASIC and NSWCC.

A limited use immunity of the kind described above exists for answers given under a QW. While the direct use immunity prevents the direct use of the answers as evidence in criminal proceedings (other than for an offence against the same provision), it does not prevent their derivative use. ASIO and other agencies with whom ASIO is authorized to communicate the information, such as prosecutors and police, may be provided investigative leads by this evidence. These leads and any resulting evidence may not have been obtained, or the significance of evidence may not have been appreciated, but for the evidence of the witness.

294 Sorby v R (1983)152 CLR 281 at 310 per Mason, Wilson and Dawson JJ
295 subsec 34L(8) of the ASIO Act
296 subsec 34L(9) of the ASIO Act
The question arises whether these provisions are consistent with Australia’s international human rights obligations, particularly Art 14 of the ICCPR which stipulates the elements of a fair trial in criminal proceedings. There is a non-derogable right to be presumed innocent until proven guilty under Art 14(2) of the ICCPR. Art 14(3)(g) of the ICCPR provides that the accused in criminal proceedings shall be entitled to the right “not to be compelled to testify against himself or herself, or to confess guilt”. In its General Comment on Art 14, the UN Human Rights Committee stated:

Subparagraph 3(g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of articles 7 [freedom from torture or cruel, inhuman or degrading treatment or punishment] and article 10, paragraph 1 [persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the person], should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

There has been no direct comment by the UN Human Rights Committee on the relationship between ICCPR and derivative use immunity. It has been argued that the Human Rights Committee’s use of the term “wholly” indicates that Art 14 of the ICCPR not only prohibits use immunity but also derivative use immunity. Although this view deserves respect (especially as it is consistent with the judgement of Warren CJ in the Supreme Court of Victoria, discussed below), it should not be preferred. The emphatic and comprehensive position conveyed by the phrase “wholly unacceptable” is readily understandable as the norm to be observed against forcing persons to provide, themselves, evidence that incriminates them. The HRC’s reference to torture in this context also helps explain its use of this strong language. The spectacle to be avoided is the tender of a person’s compelled (as opposed to volunteered) own words against himself or herself.

The decision of the European Court of Human Rights in Saunders v United Kingdom which has been cited to oppose derivative use concerned the direct use of compelled answers given by the accused himself at an earlier administrative hearing. It thus did not address the issue of derivative use. Furthermore, the provisions of Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which governed in that case, are framed in the language of the presumption of innocence (like Art 14(2) of ICCPR) rather than the

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297 UN Human Rights Committee, General Comment 13, General Comment No 23 (13/04/84), para 14
299 (1996) 23 EHRR 313
wording in question. The consideration of the privilege against self-incrimination was therefore concerned with an implied right not expressly governed by the treaty: a consequence being that it was not an absolute, and required to be balanced against “the general interests of the community.”

The ECHR described the right not to incriminate oneself as being primarily concerned with respecting the will of an accused person to remain silent. It found the right not to incriminate oneself was not absolute and “does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.” In Australia a court can order that a forensic procedure eg DNA test be carried out on a suspect where there are reasonable grounds to believe the suspect has committed a prescribed offence and the procedure might produce evidence tending to confirm or disprove that the suspect has committed the offence. The evidence is admissible against the person in their criminal trial.

The notion of incriminating material that “has an existence independent of the will of the suspect” may not provide the most stable or plain basis for detecting compliance or not with Art 14(3)(g) of ICCPR. However, a person’s own words are capable of being regarded as produced by the person’s will – and so the vice of compelled answers being used as evidence could be seen to lie in the coercion of a person’s will to utter words which could be tendered at trial against himself or herself. The modern abhorrence of torture may be plausibly explained, at least in part, by its use to extract confessions.

Seem this way, a different case as a matter of policy and merit can be seen where a person’s compelled answers are not themselves used as evidence, but rather help to direct, shape or expedite investigation and the eventual marshalling of prosecution evidence. Details of locations and travel, transactions and dealings, and the identity or conduct of others who may be co-offenders or witnesses may be compelled, without being tendered in evidence against the accused who was forced to supply them by such answers. If searches, enquiries, interviews and other investigations made as a consequence of such details compelled to be supplied by the accused themselves yield probative material of the accused’s guilt, the spectacle is quite different from that of his or her own words being used in evidence against him or her.

On the other hand, the so-called right to silence has literally been infringed by any such use of a person’s compelled words. It would be contrary to the ordinary appreciation of its normative importance for the silence to be permitted only

300 Brown v Stott [2003] 1 AC 681 at 704, 706 per Lord Bingham of Cornhill
301 23 EHRR 313, [69]
302 eg the Crimes (Forensic Procedures) Act 2000 (NSW)
inside a courtroom and not previously in the police station. The whole point of the substantive character of the common law privilege against self-incrimination is the immunity it provides against compulsion to answer any question which even indirectly could eventually assist in demonstrating criminal liability.

There is a policy judgement to be made whether the usual form of legislation in Australia, of which the ASIO Act is one example, has breached Art 14(3)(g) of ICCPR by permitting derivative use. The INSLM's assessment, with some misgivings, would be that derivative use of answers compelled by statutory provisions that abrogate the privilege against self-incrimination but grant a use immunity does not infringe that international obligation.

Put shortly, the international obligation guarantees an accused person's entitlement “[n]ot to be compelled to testify against himself or to confess guilt”. The former could be read as referring to giving self-incriminating evidence in or for the trial process itself. The latter could be read as referring to statements that amount to an admission of all the elements that render conduct criminal. If so read, these provisions do not forbid requiring persons of interest to answer questions designed to advance investigation of wrongdoing in which they may be involved, so long as the answers are not used at trial and so long as the answers do not make out the case against the person.

Clearly, this is a contestable approach. Among other weaknesses, the power to compel answers on condition that they fall short – perhaps only just – of proving guilt on their own is disturbingly artificial. But on the other hand, there is an air of unreality in claiming that no information or response of any kind can be compelled by law to be given or made by persons of interest; important matters such as one’s own name and perhaps telephone number(s) could not be required if that were the case.303

In reaching the tentative assessment that Art 14(3)(g) of ICCPR is not breached by the lack of a derivative use immunity, some weight has been given to the practical difficulty of ascertaining when derivative use can be seen to have been made of compelled answers. If derivative use were prohibited, as some very respectable views insist it should be, an important if adjectival issue in trials of terrorist offences would frequently arise that does not presently concern the courts. That issue would involve tracing the arguable consequences of investigators knowing the content of a suspect’s compelled answers into all the later ramifications of the investigation. If the answers produced a better and more intelligent focus on a previously neglected area for inquiry, is everything later discovered in that area the illicit product of derivative use? Does the forced inculpation by one suspect of another render the later voluntary confession of that other suspect inadmissible against the first, as the illicit product of derivative use of him or her being designated as a source of such evidence by the first suspect, now the accused?

303 cf Brown v Stott at [2003] 1 AC 705-706
If the law and Australia’s international obligations permitted it, it would be better for such issues not to become integral to trials of terrorist offences.

There is recent Australian case-law, at first instance, that is authority against the view reached by the INSLM.

In a case before the Supreme Court of Victoria concerning compulsory questioning powers to investigate organized crime, Warren CJ held that the statutory use immunity must be interpreted as extending also to derivative use immunity for it to be compatible with subsec 24(1) (right to a fair trial) and para 25(2)(k) (right not to be compelled to testify against oneself or to confess guilt) of the Charter of Human Rights and Responsibilities Act 2006 (Vic). On the approach of other jurisdictions, her Honour noted:-

The approach to the right to a fair hearing and the right against self-incrimination in other jurisdictions is not uniform. Some jurisdictions require a derivative use immunity for consistency with rights (Canada and the United States); others do not (South Africa and Hong Kong). Others are yet to adopt a clear position (International Covenant on Civil and Political Rights and Europe).

Her Honour held that a form of derivative use immunity must be extended to a witness who was compelled to answer questions under the Major Crime (Investigative Powers) Act 2004 (Vic). Her Honour interpreted the immunity provision in subsec 39(3) of the Act as prohibiting the derivative use of evidence obtained pursuant to compelled testimony unless that evidence was discoverable through alternative means. Her Honour found that derivative use immunity would apply where the evidence elicited from the interrogation could not have been obtained, or the significance of which could not have been appreciated, but for the evidence of the witness.

Her Honour’s approach prevents the use of derivative evidence that was found solely by reasons of answers given to compelled testimony and recognises that absolute derivative use immunity, as it exists as part of the privilege against self-incrimination at common law, would be unrealistic.

The heart of Warren CJ’s conclusion of the necessary proportionality assessment of the putative derivative use immunity in that case was her Honour’s holding as to evidence that “could have been discovered without such [ie compelled] testimony” and evidence that “would, or would probably, have been discovered even without the testimony”. That approach would “prevent a person being compelled to

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305 24 VR 438 [97]. Warren CJ’s footnote notes that the ECHR in Saunders "did not express any opinion on the issue of derivative use immunity in relation to compulsory questioning".
306 Warren CJ cited the Supreme Court of Canada’s approach in this regard, from R v S(R J) [1995] 2 SCR 3.
307 24 VR 445-448 [129]-[143],451-452[156]-[160]
incriminate themselves from their own testimony in circumstances where the evidence could only have been discovered as a result of that testimony”.  

In reaching this decision her Honour found no distinction could meaningfully be drawn between the harm that may flow from incriminating evidence provided directly and incriminating evidence derived from such evidence, and that Parliament could not have understood to have been enacting legislation that “would provide a ‘back-door’ to prosecuting authorities to use compelled incriminating testimony against the testifier”.  

Her Honour also found the abrogation of the privilege against self-incrimination “limits the right to a fair hearing and the right not to testify against oneself because it requires people to testify against themselves and then fails to protect them from derivative use of their testimony”.  

It is not hard to imagine the impact a broad derivative use immunity may have on the investigation and prosecution of terrorist offences. Both legal and social concerns are aroused by the problems encountered with derivative use immunity when evidence cannot be admitted because it is “fruit of the poisoned tree” eg where a person answers questions under compulsion then claims immunity against evidence acquired later in the investigation where their compelled evidence was only one of several avenues available to obtain that evidence.

Given the textual congruence between para 25(2)(k) of the Charter of Human Rights and Responsibilities Act upon which Warren CJ was deciding and subpara 14(3)(g) of ICCPR upon which the INSLM must report, there is considerable hesitation in reaching a conclusion concerning the lack of derivative use immunity in these ASIO Act provisions different from that implied by the decision and reasons of Warren CJ concerning the Victorian Major Crimes (Investigative Powers) Act. Nonetheless, the matters of policy discussed above and the legislative practice and foreign authority discussed below combine to justify the opinion of the INSLM that these provisions do not breach Australia's obligations under subpara 14(3)(g) of ICCPR.

One should be slow to regard the evidently pondered 2008 amendment to sec 128 of the Evidence Act 1995 (Cth) and enactment of sec 128A in the same Act as legislative infringement by Australia of the entitlements Australia is obliged to honour under subpara 14(3)(g) of ICCPR. That is not to dismiss the notion of internationally unlawful conduct so recently by Australia in such a fundamental aspect of fair trial process, but rather to require such a serious matter to be demonstrated by convincing argument.

308  24 VR 451[157]-[158]
309  24 VR 437[95]
310  24 VR 448 [143]
These provisions, on their face, accord with a policy of granting derivative use immunity. They do so by prohibiting the use against a person of “evidence of any information, document or thing obtained as a direct result or indirect consequence of the relevant person having disclosed that information” under the compulsion in question. So far so good. But eg subsec 128A(1) excludes from this protection information disclosed by a court order under the *Proceeds of Crime Act 2002* (Cth), which is addressed below. Parliament has not legislated, in this regard, in comprehensive or absolute terms for derivative use immunity. Another example is the exclusion by subsec 128A(9) from the prohibition of information disclosed by a pre-existing document annexed or exhibited to the person when complying with the relevant disclosure order: a case where it is quite likely that the fact and terms of the annexing or exhibiting could connect a person with a document, a fact or a circumstance, and may well attract attention which would otherwise not have been aroused. Again, Parliament has not legislated in absolute terms.

The exclusion from the selective derivative use immunity granted by these *Evidence Act* provisions of disclosures under compulsion of the *Proceeds of Crime Act* evokes the provisions of eg secs 39A, 196 and 197 of that Act, which do not have any derivative use immunity. For present purposes, these particularities in current Australian Commonwealth legislative approaches manifest an approach of legislative responses to particular circumstances. That is rather a hallmark of proportionality than otherwise.

In the course of Warren CJ’s reasons in the *Major Crimes (Investigative Powers) Act* case, two important decisions of the Hong Kong Court of Final Appeal were, it appears, distinguished by her Honour. The significance of them311 lies in the verbatim replication of subpara 14(3)(g) of ICCPR in para 11(2)(g) of the Hong Kong *Bill of Rights Ordinance*. With respect, her Honour’s explanation of this distinguishing, which was part of the reasons for declining to follow the same approach as had been taken in Hong Kong when considering the position in Victoria, proceeded on grounds subtly located in the nature of the Victorian Charter method of scrutiny rather than in explanation of any error or misstep by the court in Hong Kong.

The nature of the issues addressed in quasi-ICCPR terms, applicable to the INSLM’s task in Australia, in 2001 and 2008 in Hong Kong has recently been spelled out by another decision of the Hong Kong Court of Final Appeal. The unanimous bench in *A v Commissioner of Independent Commission Against Corruption*312 included Lord Hoffmann as the Non-Permanent Judge. His Lordship and Ma CJ agreed in the reasons of Ribeiro PJ (who delivered the leading judgement in *Lee Ming Tee*). They include the following persuasive observations concerning derivative use immunity.

312 [2012] HKCFA 79
Reflecting the common law component of its legal tradition, Hong Kong legislative practice has resembled Australia’s in regulating the admissibility and use that can be made of compelled self-incriminatory information, by a “common pattern” of derivative use immunity.\(^{313}\) His Lordship stated:-

77. Such statutes generally do not seek to prohibit and do not have the effect of prohibiting “derivative use” of the compelled answers. Thus, there is usually no prohibition against using the compulsorily obtained answers to develop new lines of inquiry; to identify sources of independent evidence; to assist in formulating applications for search warrants; and so forth. Such derivative use of the compelled answers does not raise any issue concerning self-incrimination or admissibility since it is use which does not involve any attempt to adduce the answers in evidence in any curial setting. The law has always drawn a distinction between (inadmissible) compelled answers themselves and (admissible) derivative evidence independently developed from indications contained in the compelled answers.

The citation of authority by his Lordship for this passage was the speech of Lord Hoffmann in a case concerning the regulation of pollution by waste dumping.\(^{314}\)

The reasons of Ribeiro PJ in \textit{A v Commissioner of ICAC} record reliance by the appellant on provisions of the Hong Kong Bill of Rights including entitlement to a presumption of innocence until proof of guilt (identical with para 14(2) of ICCPR) rather than on the Hong Kong of subpara 14(3)(g) of ICCPR with which the INSLM is concerned. This fact, however, does not render this recent decision and the reasons for it irrelevant to the present issue. Mr Justice Ribeiro commended the appellant’s approach as one taken “for good reason”\(^{315}\), and proceeded to explain by a comparison the “nature and reach of the constitutional protection” given by the guarantees in question.\(^{316}\) His Lordship described the protection given by the subpara 14(3)(g) ICCPR equivalent as “plainly on a much narrower scope than the privilege at common law”, the latter representing “the general entitlement of every citizen ‘to tell another person to mind his own business’”.\(^{317}\) The importance of the guarantee “is that it entrenches the privilege against any statutory attempt to compel a person to give evidence and answer questions at his own criminal trial”.

In recording that the appellant did not argue against derivative use, Ribeiro PJ described that position as “unsurprising” in the face of the authority of \textit{Lee Ming Tee} and \textit{Koon Wing Yee}. His Lordship commented:-

\(^{313}\) [2012] HKCFA 79 [75], [76]
\(^{314}\) \textit{R v Hertfordshire County Council; ex parte Green Environmental Industries Ltd} [2000] 2 AC 412 at 421
\(^{315}\) [2012] HKCFA 79 [109]
\(^{316}\) [2012] HKCFA 79 [110]-[118]
\(^{317}\) Citing \textit{R v Director of Serious Fraud Office; ex parte Smith} [1993] AC 1 at 30 per Lord Mustill
CHAPTER IV ASIO QUESTIONING WARRANTS

The compulsory answers might of course be put to derivative use. The Commissioner believes that they may yield information of assistance in the current investigation of the named suspect. It is no doubt possible that lines of inquiry which the information opens up could lead to other persons, conceivably even the appellant, becoming suspects.

The other two members of the Court of Final Appeal, Bokhary and Chan PJJ, specifically regarded derivative use as "plainly necessary and a rational and proportionate response to such necessity" holding that "[t]here would be no point at all to … the abrogation of a privilege against self-incrimination … if derivative use cannot be made of material compelled …". In relation to another provision considered by Ribeiro PJ permitting forensic use of compelled answers in cross-examination of inconsistent testimony (a form of direct use), his Lordship adopted a similar utilitarian approach:-

... I conclude that the challenged measures are proportionate. If a person could respond to a section 14 notice [ie the compulsory answer provision] and then give a contradictory version of facts when testifying in court without the prosecution being permitted to draw the Court’s attention to the earlier inconsistency, subjects would hardly need to take the investigation seriously. The use of the compelled declaration or statement permitted by section 20(a) [ie the use in cross-examination] is therefore no more than a necessary adjunct to the effective investigation of corruption. It represents a fair balance between the public interest in realising the legitimate aim of suppressing corruption and protection of the fundamental rights of the individual.

The authorities discussed above, and other authorities discussed in them, show a wide range of social evils aimed at by the legislation under scrutiny in those cases: drunk driving, toxic waste pollution, corruption and organized crime. On any view, it is comfortably within the legislative choice and discretion of Parliament to regard terrorism as deserving of even more rigorous methods of investigation for the purposes of prevention and prosecution. On no reasonable view could terrorism be regarded as justifying a lesser capacity to obtain information for those purposes.

Compliance with ICCPR, which should be the preferred view, is one thing. It is another thing whether the grave step of abrogating the common law privilege against self-incrimination without granting derivative use immunity should be taken, as a matter of choice. The dangers of terrorism, the typically deliberate secrecy of terrorist plots and the established resort to compelled answers to official questioning to combat organized crime, corporate misdeeds and specific matters of public concern (such as in a Royal Commission) combine, in the opinion

318 [2012] HKCFA 79 [38]
319 [2012] HKCFA 79 [130]
of the INSLM, to support a clear conclusion. The QW powers in the ASIO Act are appropriate notwithstanding the abolition of privilege against self-incrimination.

IV.10 Post-charge questioning under a QW

Although, as concluded above, it is appropriate for the QW provisions to compel incriminating answers (with use immunity), it is a very different spectacle that would be presented by an accused person being compelled to incriminate himself or herself under a QW, after he or she has been charged – the point at which a suspect becomes an accused. To exert executive force against an accused person to compel answers incriminating him or her of the very matters for which he or she is facing trial before the judicial power, constitutes a fundamental challenge to the capacity of the judicial power to ensure a fair trial. It would be a mockery of the standard trial judge’s direction to a jury that the accused is under no requirement to give evidence, if simultaneously a statute purported to require the accused to give answers that may be either tendered against the accused at the trial or may lead to other damaging material being tendered at the trial.

The grant of use immunity goes some way to mitigating that completely unacceptable prospect. But the lack of derivative use immunity leaves open the possibility of answers being compelled to questions in such a way as to arm a prosecution with information, insights and warnings about what might be called loosely the defence “case”. That would be of potential great advantage to a prosecution even without the tender of any such answers directly against the accused.

In the case of Hammond the High Court had to decide whether Mr Hammond could be compelled to answer questions before a Royal Commission when he had been charged with a criminal offence, in circumstances where the questioning was expected to go directly to matters related to the offence. The High Court concluded that a person who has been charged with a criminal offence cannot be exposed to compulsory questioning in circumstances where it would be likely to prejudice their fair trial. All members of the High Court agreed that Mr Hammond should not be questioned until the end of his criminal trial. Deane J described the situation of someone who has been charged and committed to trial being subject to compulsory questioning about the factual basis of the criminal charge as follows:

...it is fundamental to the administration of criminal justice that a person who is the subject of pending criminal proceedings in a court of law should not be subjected to having his part in the matter involved in those criminal proceedings made the subject of a parallel inquisitorial inquiry by an administrative tribunal with powers to compel the giving of evidence and the

321 Hammond v R (1982) 152 CLR 188
production of documents which largely correspond (and some extent, exceed) the powers of the criminal court. 322

Similarly, Gibbs CJ (with whom Mason J agreed) held:-

Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. ... It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence. 323

Subsequent cases have interpreted *Hammond* as allowing compulsory questioning of individuals who have been charged with a criminal offence provided the risk posed to a fair trial by derivative use of the information obtained in the course of the compulsory questioning can be adequately addressed. The test applied by courts requires the prejudice to a fair trial to be practical. The fact that a person is required to answer questions and disclose their defence is not sufficient to interfere with his or her fair trial in circumstances where derivative use immunity and confidentiality orders are in force and the information is not disclosed to the prosecution authorities. 324

The Australian Crime Commission’s power to compel charged individuals to answer questions has been upheld on the basis that, given the use immunity provided by subsec 30(5) and the confidentiality provisions in subsec 25A(9) and sec 29A of the ACC Act, “designed to protect the fairness of trials of persons who have been or may be charged with an offence, it is clear that the ACC Act operates to protect the fairness and integrity of extant trials by preserving them from the effect of its qualification of the ‘right to silence’.” 325 In *CB & MP*, the Court of Criminal Appeal (of the Supreme Court of New South Wales) held that the making of a non-disclosure order in relation to the examination “effectively immunised [the examinee] from any direct or derivative use of the contents of his examination in his pending criminal trial.” 326 At the heart of the reasoning for the Court of McClellan CJ at CL is the following resolution of fair trial values and statutory powers to gather information:-

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322 at 152 CLR 206
323 at 152 CLR 198
324 *R v Seller & McCarthy* [2012] NSWSC 934 [203]
325 *R v CB, MP v R* [2011] NSWCCA 264 per McClellan CJ at CL [97] (with whom Buddin and Johnson JJ agreed)
326 *R v CB, MP v R* [2011] NSWCCA 264 per McClellan CJ at CL [110] (with whom Buddin and Johnson JJ agreed)
Provided the knowledge of the proceedings in the Commission are adequately protected an accused person’s entitlement to a fair trial in accordance with the adversarial process will be ensured. The situation is no different whether at the time of the Commission hearing a charge has not been laid or the criminal process has commenced. The right to a fair trial will only be compromised if information relevant to a person’s defence in any form, including any derivative information, is available to the prosecution.\footnote{327} Special leave to appeal to the High Court was refused in \textit{CB \& MP} for reasons that expressly referred to this passage as indicating the case could not provide “an appropriate occasion to reconsider what was said in \textit{Hammond} \ldots\textit{and Sorby}”\footnote{328}. For the purposes of strictly legal argument and judicial reasoning, to which the INSLM is not confined although they provide a sound foundation for opinions on these topics, the reasons for the refusal of special leave to appeal to the High Court should not be treated as authoritative (leaving aside the erstwhile practice of dealing with criminal appeals, with full reasoning, upon the special leave application). Some judges and counsel prefer not to cite them at all.

Nonetheless, these are current and highly relevant expressions of judicial opinion that ought carry great weight in assessing whether the lack of derivative use immunity renders these ASIO Act QW provisions in breach of Australia’s obligations under Art 14(3)(g) of ICCPR. They are even more pointed in their relevance to the question whether the fair trial values required by secs 71 and 80 of the \textit{Constitution}, and guaranteed by Art 14(1) of ICCPR, countenance the exercise of power under provisions such as the QW powers in the ASIO Act to compel accused persons, after charge, to answer questions about their alleged crimes. The practical and circumstantial approach to that question mandated by the High Court and these Supreme Court applications of current doctrine compels the answer that such powers may be exercised consistently with fair trial values only if stringent safeguards are imposed and observed.

It could be that these ASIO Act QW provisions either impliedly, therefore, do not permit questioning after charge, or are invalid to the extent they purport to do so. Such an important limit on executive power authorized by legislation should not be left to argument and decision in the High Court.

It should be clear on the face of the statute whether a person who has been charged can be subject to compulsory questioning. It is unacceptable to leave this question open. It may be that cases in the High Court in the near future will consider \textit{Hammond} and \textit{Sorby}, in such a way as to declare the law in Australia with respect to this aspect of a fair trial. Meanwhile, the QW provisions should

\footnote{327} [2011] NSWCCA 264 [111]
\footnote{328} [2012] HCA Trans 162. I was senior counsel for MP in the Court of Criminal Appeal and the High Court.
be amended to make clear that a person who has been charged with a criminal offence cannot be subject to questioning until the end of their criminal trial.

Recommendation IV/7: The QW provisions should be amended to make clear that a person who has been charged with a criminal offence cannot be subject to questioning until the end of their criminal trial.\(^\text{329}\)  

### IV.11 Reports to the Attorney-General on QW outcomes

The Director-General of ASIO is under a statutory obligation to provide a written report to the Attorney-General, in the case of each QW issued, describing the extent to which questioning under the warrant assisted ASIO in carrying out its functions.\(^\text{330}\) This statutory reporting requirement is for the purposes of accounting for the exercise of the questioning powers and providing an understanding ultimately by the legislators and specifically by the Attorney-General, of the usefulness of these powers. The theory of such an accountability mechanism includes the facility it provides Parliament to make a decision whether to continue to have these powers. This makes it a very significant safeguard both in constitutional and political terms.

The INSLM has reviewed the statutory reports for each of the 16 QWs issued to date and has identified two areas in need of improvement by ASIO.

First, in the case of some QWs there has been an unacceptable delay in providing the Attorney-General with the report on the QW outcomes. This was an issue identified by the former Inspector-General of Intelligence and Security, who recommended an amendment to the ASIO Act to require ASIO to provide the reports on the utility of QWs to the Attorney-General within 90 days.\(^\text{331}\) This recommendation was made following 2 reports being provided more than a year after execution of the warrants. As the IGIS noted, while there is a statutory requirement for ASIO to report to the Attorney-General on the outcome of every warrant issued to it, there is no mandatory timeframe for the provision of such reports except in relation to telecommunications interception warrants, which must be provided within three months of the expiry or revocation of the warrant.\(^\text{332}\)

Clearly, a year is too long a delay between the end of questioning under a warrant and reporting to the Attorney-General on the utility of the questioning. In order for the QW reports to operate as an effective safeguard, reports should be provided to the Attorney-General no later than 90 days after the execution of the QW unless

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\(^{329}\) Hence sec 34L of the ASIO Act should be amended, perhaps by insertion of another exception to subsec 34L(2), to provide for the case of questions going to matters connected with allegations made in pending charges against the person, including in relation to the person's defence to them.

\(^{330}\) sec 34ZH of the ASIO Act

\(^{331}\) IGIS Annual Report 2004-2005, p 19

\(^{332}\) subsec 17(1) of the Telecommunications (Interception and Access) Act 1979 (Cth)
exceptional circumstances justify an extension. Following the early experience with lengthy delays, there has been a great improvement in the timeframe for reporting. ASIO now reports in a timely manner and within 90 days in most cases.

The introduction of a mandatory maximum is not necessary. The steps taken by ASIO to meet the 90 day maximum preferred by the IGIS seem likely to continue for future QWs.

Second, the INSLM believes the reports provided to the Attorney-General to date reflect an underselling by ASIO of the intelligence value of questioning under QWs. The usefulness of the reporting as an accountability mechanism depends on the quality of the reporting. It is every bit as serious not to report the usefulness of a QW as to overestimate that quality.

Examples of what may be called excessively bland reports were discussed with officers of ASIO in private hearings. Without revealing matters which should not be published, it is possible to generalize about a desirable improvement in this important retrospective safeguard.

The 16 QW reports to date reflect an overly demanding view of the intelligence dividends of the questioning. They addressed the question “Did the individual provide new intelligence directly related to a terrorism offence?”, but neglected significant aspects of the overall usefulness of the questioning and intelligence gained. In some cases, the concept of intelligence has been conflated with the different if overlapping one of evidence so that where no evidence in relation to a terrorism offence was obtained through questioning, the questioning was said not to have produced any intelligence in relation to terrorism offences.

The distinction between intelligence and evidence in this respect is of crucial importance. The fact that intelligence gained through questioning could never be tendered in evidence in a court has no necessary detrimental impact on the intelligence benefits of that material. Reports need to reflect a more holistic view of the usefulness of questioning under QWs. Reports should not be limited to recording whether an individual provided information which pertained directly to the commission of a terrorism offence, provided evidence of a terrorism offence. To fulfil their statutory function, reports need to include an assessment of the overall intelligence value of the questioning in informing intelligence assessments, progressing terrorism investigations and assisting ASIO in carrying out its functions, which include providing leads for future terrorism investigations or identifying security threats. Additional guidance and information should be provided to officers involved in the preparation of QW reports to ensure the reports capture the intelligence gathered and the usefulness of that intelligence in relation to terrorism investigations and the performance of ASIO’s functions.
On first reading, some of the reports did not support a view that the QWs had produced valuable intelligence in relation to terrorism offences. However, discussions with ASIO officers in private hearings showed these reports to have been misleading by pessimistically underestimating the significance of the information received and the intelligence gained. At the request of the INSLM, ASIO officers reconsidered several QW reports and provided better versions to the INSLM on the intelligence value of the QWs. In hindsight and applying the correct test for reporting on the intelligence value of a QW, ASIO was able to show the significance of the intelligence gained.

**Recommendation IV/8:** ASIO should provide additional guidance and information to those officers involved in the preparation of QW reports to ensure the reports include a full assessment of the overall intelligence value of the information obtained through the use of QWs.
CHAPTER V
ASIO QUESTIONING AND DETENTION WARRANTS

V.1 Introduction and general principles

The provisions of Subdiv C in Div 3 Part III of the ASIO Act concern a special form of warrant, the questioning and detention warrant ("QDW"). In the main, aspects of the QDW powers that call for review by the INSLM are the same as for QWs. The considerations, conclusions and recommendations set out in Chapter IV in relation to QWs apply as well to QDWs.

However, as their name announces, the power immediately to detain persons under QDWs, at the outset, distinguishes them from QWs. This distinguishing aspect of the QDW power is obviously very important. It may or may not be expedient and useful from the point of view of ASIO discharging its functions. It is certainly a drastic interference with personal liberty and freedom.

In general terms, fundamental considerations raised by statutory powers to detain a person include ethical, social and political engagement in favour of personal liberty, as well as Australian constitutional doctrine focussed on the nature of judicial power. In this Report, review of some of the issues involved in these considerations is found in Chapter III concerning preventative detention orders. It is worth repeating in the present context the warning of Gummow J in Fardon v Attorney General (Qld)\textsuperscript{333}, after his Honour had noted the accepted propriety of remand in custody “to ensure availability to be dealt with by exercise of the judicial power”:

\begin{quote}
But detention by reason of apprehended conduct, even by judicial determination on a quia timet basis, is of a different character and is at odds with
\end{quote}

\textsuperscript{333} (2004) 223 CLR 575 at 613 [84]
with the central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct.\textsuperscript{334}

So far as concerns Australia’s international human rights obligations, to the forefront is the prohibition against “arbitrary detention” imposed by para 9(1) of ICCPR. Defining with convincing clarity the qualities that render detention “arbitrary” within the meaning of this fundamental guarantee has yet to be achieved. This Report will not succeed where others have failed. The review by the INSLM is, however, adequately framed by two attributes of statutory powers to detain a person (outside criminal processes of remand before trial and sentences of imprisonment after conviction). The first is that they be stipulated in tolerably clear terms. That is well met in the case of these ASIO Act QDW powers.

The second attribute of such a power that is not arbitrary is that it can be seen to be a proportionate response to a legitimate governmental concern on behalf of the society in question. Obvious examples outside the realm of crime include quarantine imposed on infectious but innocent sufferers of disease and detention pending deportation of persons without any legal entitlement to remain in Australia. Applied to the case of the QDW powers in the ASIO Act, the question is whether the authorization of detention at the very outset of the process, when the person is served with a warrant, is proportionate to the circumstances of risk with which these provisions are concerned.

In turn, answering that question requires consideration of the adequacy and reasonableness of resort to or reliance on other less drastic expedients than immediate detention authorized in advance of the first official contact with the person to be questioned. The scheme in the ASIO Act for both QWs and QDWs was described in the INSLM’s First Annual Report.\textsuperscript{335}

### V.2 Detention under a QDW

The safeguard pre-requisite for the issuing of a QDW requires the Attorney-General to be satisfied of the reasonable grounds for believing that if not immediately taken into custody and detained, the person may alert a person involved in a terrorism offence that the offence is being investigated, may not appear, or may destroy, damage or alter a record or thing the person may be requested to produce under the warrant.\textsuperscript{336}

\begin{footnotesize}
\textsuperscript{334} Justice Gummow was referring to the classical (if now too broad) proposition in \textit{Chu Kheng Lim v Minister for Immigration} (1992) 176 CLR 1 at 27-28 per Brennan, Deane & Dawson JJ, to the effect that “the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt”. See also \textit{Kruger v Commonwealth} (1997) 190 CLR 1 at 161-162 per Gummow J.

\textsuperscript{335} Ch IV esp at pp 34-35

\textsuperscript{336} para 34F(4)(d) of the ASIO Act
\end{footnotesize}
The issuing authority is not authorized to consider this question in issuing the warrant; it is solely a matter for the Attorney-General. That aspect of the safeguard prerequisite is further considered below.

The Attorney-General need be satisfied of only one of these grounds. As noted in the INSLM’s First Annual Report, in the nature of things and in the circumstances of counter-terrorism powers, these are not overly demanding prerequisites. Especially if they were to remain for decision by a member of the Executive, rather than by the judicial (or retired judicial) issuing authority, they are inappropriately slight as prerequisites for the exercise of such a drastic power.

A QDW authorizes a person to be taken into custody immediately by a police officer, brought before a prescribed authority immediately for questioning and detained until the statutory time limits for questioning under warrant expire (but no longer than 7 days). It is this feature of the QDW, being the immediate detention of the person, upon service of the warrant, that distinguishes a QDW from a QW. It is also a feature which raises real doubt whether it can be justified as a proportionate response to the risks of tipping off a person involved in terrorism, failure to attend or destroying or tampering with evidence.

V.3 Detention under a QW

QWs permit a person to be detained after attendance for questioning and until the statutory time limits have been reached. The prescribed authority has the power to give directions relating to the detention of a person who is before them for questioning under warrant. At any time when a person is before a prescribed authority for questioning under a QW, the prescribed authority may give a direction that the person be detained. A prescribed authority may only give a direction to detain, or further detain a person, if there are reasonable grounds for believing that if the person is not detained: the person may alert another person involved in a terrorism offence of the investigation, the person may not appear, or the person may destroy, damage or alter a record or thing the person has been or may be requested to produce under the warrant. These mirror the grounds on which a QDW may be issued. Importantly, a direction by the prescribed authority must not result in the person’s detention being arranged by a person who is not a

337 para 34F(4)(d) cf subsec 34G(1) of the ASIO Act
338 Ch IV at pp 34-35
339 subsecs 34G(3) and (4) of the ASIO Act
340 Paragraphs 34K(1)(a)-(c) of the ASIO Act provide the prescribed authority with the power to give a direction regarding the detention or further detention of a person, as well as arrangements for the person’s detention. Paragraph 34K(1)(g) empowers the prescribed authority to direct release from detention.
341 subsec 34K(4) of the ASIO Act
342 para 34F(4)(d) of the ASIO Act
A police officer may also take a person into custody and bring him or her before the prescribed authority for questioning under a QW if the person fails to appear before a prescribed authority as required by the warrant or as directed by the prescribed authority.44

Other restrictions can be placed on a person against whom a QW is sought or issued. As soon as the Attorney-General’s consent to request a QW is sought, a person can be required to surrender their passport and be prohibited from leaving Australia, with a penalty of 5 years imprisonment for failure to do so.45 Once a QW is issued, the passport is retained by authorities and the prohibition on travel is in place for as long as the warrant is in force.46 This is separate from the power of the Minister for Foreign Affairs to cancel the passport of a person who is considered a threat to national security, although this power may be exercised in relation to a person against whom a QW is sought or issued.47

It is thus plain to demonstration that it is only detention at the outset, when the warrant is served, that distinguishes a QDW from a QW. Unfortunately, as a corollary of that difference, the relevant provisions of the ASIO Act allocate to the Attorney-General and not to the issuing authority the critical risk assessment which empowers authorization of that immediate detention. The contrast with the position under QWs, where only the prescribed authority – who can confidently be expected to act judicially in this regard – is empowered to direct detention, on exactly the same kind of risk assessment, cannot be justified on any grounds that show proportionality in this peculiar aspect of QDWs.

The feature, on the other hand, of QWs that strongly tends to show that QDWs are a disproportionate response to these risks is the capacity of a QW to call for the person to appear before the prescribed authority for questioning under the warrant “immediately after” notification of the issue of the warrant (which will usually be upon service).48 This lawful imposition of an obligation for the person to attend immediately at the specified place for questioning is complemented by the provisions authorizing the use of force to bring a person before a prescribed authority for questioning under a warrant.49 That power is over and above the power to take a person into custody under a QDW or if a prescribed authority has authorized that step upon a failure of a person to appear as required by a QW.50
The power to authorize the issue of a QW calling for immediate attendance for questioning, as opposed to attendance at some later specified time, does not depend on a risk assessment such as that noted above. No doubt, on ordinary administrative law principles, a relevant consideration for the Attorney-General and an issuing authority will be whether such expedition (“immediately …”) is appropriate in light of circumstances such as apprehensions about tipping off, destroying or tampering with evidence or failing to attend. It follows that the provisions of the ASIO Act other than those permitting the issue of QDWs already sufficiently and reasonably accommodate these risks.

In practice, service of a QW requiring immediate attendance for questioning thereby opens the possibility for the police officer or officers involved to exert reasonable force if there is resistance to or unwillingness concerning compliance with the legal obligation, by the person served with the QW. It is difficult to see why further provision, as seen in the QDW powers, is necessary let alone proportionate as a response to these risks.

Unlike the QDW provisions, which involve prediction and anticipation, these QW provisions posit the exerting of force – the functional equivalent of custody or detention – on actual experience of the unco-operative or adverse reaction of the person served with a QW.

V.4 Pre-emptive detention for questioning by other investigatory bodies

There are some examples in Australian law where a person who is required to attend before specific investigatory bodies may be detained without first failing to appear. 351 If an examiner of the Australian Crime Commission considers a person who is to be served with a summons to appear is likely to abscond or attempt to abscond, is attempting or likely to attempt to evade service of the summons, or is likely to or has failed to attend or answer questions or produce documents then the examiner may apply to a court for a warrant for the apprehension of the person. 352 The court may release the person on bail with such conditions as he or she thinks necessary to ensure their appearance or may order their continued detention to ensure their appearance. 353

The NSW Crime Commission can order arrest before a person fails to appear as well as require immediate attendance when served with a summons to appear. A summons may require the immediate attendance of a person before the Commission if the member who issues the summons believes on reasonable

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351 see eg sec 31 of the Australian Crime Commission Act 2002 (Cth) and sec 66 of the Coroners Act 2009 (NSW)

352 subsec 31(1) of the Australian Crime Commission Act 2002 (Cth)

353 subsec 31(3) of the Australian Crime Commission Act 2002 (Cth)
grounds that delay in attendance might result in the commission of an offence, the escape of an offender, the loss or destruction of evidence or serious prejudice to the conduct of an investigation.354 If a person served with a summons to appear fails to attend as required the Commissioner may issue a warrant for their arrest.355

If the Commissioner is satisfied that a person who has been served with a summons to appear has made a representation that the person intends not to appear at the hearing as required by the summons, and that it is in the public interest that the person be compelled to do so to avoid serious prejudice to the conduct of an investigation, the Commissioner may issue a warrant for the arrest of the person.356 A warrant may be issued even though the time named in the summons for the person to attend has not yet passed.357 The warrant authorizes the arrest of the witness and his or her being promptly brought before the Commission and detained for that purpose until released by order of the Commissioner.358 The definition of 'representation' includes an express or implied representation, or a representation to be inferred from conduct, or a representation not intended by its maker to be communicated to or seen by another person, or a representation that for any reason is not communicated.359

It follows from the discussion above concerning the comparison of the present QW and QDW provisions in this regard, that in the view of the INSLM the New South Wales Crime Commission provisions explained above are somewhat superior to those giving powers to the Australian Crime Commission, also noted above. On the other hand, the INSLM has not received information of actual cases suggesting either abuse or untoward consequences of resort by the Australian Crime Commission to its powers that so closely resemble ASIO’s QDW powers. Nor, for that matter, has any information or submission suggested that the better model (in the INSLM’s view) of powers available to the New South Wales Crime Commission has unreasonably or inefficiently caused damage to the integrity or efficacy of any investigation by that body.

354 subsecs 16(1) and 16(1A) of the New South Wales Crime Commission Act 1985 (NSW)
355 subsec 18AA(1) of the New South Wales Crime Commission Act 1985 (NSW)
356 subsec 18AA(2) of the New South Wales Crime Commission Act 1985 (NSW)
357 subsec 18AA(4) of the New South Wales Crime Commission Act 1985 (NSW)
358 subsec 18AA(5) of the New South Wales Crime Commission Act 1985 (NSW)
359 subsec 18AA(9) of the New South Wales Crime Commission Act 1985 (NSW)
V.5 Conclusions and recommendations

There have been no QDWs issued since the provisions came into effect on 22 July 2003. No QDWs have been considered or sought during that time.\(^{360}\)

The INSLM has not received any submissions that QDW powers have not been exercised because of any deficiency in the legislation eg because the thresholds were too high or the application process too burdensome. The threat level posed by terrorism has not changed during the past decade so as to alleviate the need for QDW powers as perceived when they were enacted.

While non-use of the provisions in a decade does not automatically lead to the conclusion that they are not necessary it does lend weight to the INSLM’s view that QDWs are not at all necessary as less restrictive alternatives exist to achieve the same purpose.

That long non-use also refreshes concerns well expressed shortly after enactment of the QDW powers, by Dr Greg Carne now of the University of Western Australia. His thesis was the constitutional doubts attending the legislation. Beyond that legal issue, however, his words have continued resonance for the INSLM’s task of reviewing the QDW powers’ appropriateness in the first place and their continuing necessity:

> Following the tragedies of September 11 and Bali and exposure of al Qaeda and associates’ manifesto of schematically targeting *en masse* innocent persons, it is obvious that enhanced intelligence-gathering and analysis are essential to the defence of democratic societies and their institutions and practices. However, the choice of methods must both reinforce and reflect critical rule of law principles such as restraint, accountability, proportionality, necessity and due process, which are embedded in the institutions and practices of commonly accepted notions of liberal democratic representative and participatory democracy. Such modest but basal comments arising from a written constitution founded on a system of common law deserve present reflection.

Published in 2004,\(^ {361}\) these words should continue as the proper constant challenge to these extraordinary powers. They have informed the INSLM’s approach.

The INSLM asked agencies and departments to give evidence demonstrating why QDWs are necessary. No scenario, hypothetical or real, was shown that would require the use of a QDW where no other alternatives existed to achieve the same purpose. The power to arrest and question without charge for a broad range of preparatory and inchoate offences, the power to order the surrender of passports

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\(^{360}\) There has been no consideration given to QDWs that has advanced beyond preliminary operational consideration eg no warrant documents have been drafted or legal advice sought.

\(^{361}\) “Detaining Questions or Compromising Constitutionality?: The *ASIO Legislation Amendment (Terrorism) Act 2003 (Cth)*”, (2004) 27 UNSWLJ 524 at 577-588
and prohibit a person from leaving Australia and the existing powers of detention or forcibly compelled immediate attendance under QWs all provide less restrictive alternatives to QDWs.

This conclusion is probably not enough to regard the QDW provisions as a contravention by Australia of its international human rights obligation under Art 9(1) of ICCPR. If the existence of adequate alternatives were the worst that could be found against the QDW powers, then one view might be that the powers were redundant rather than (internationally) unlawful. But the reservation to the Attorney-General rather than to the issuing authority, instead or as well, of the risk assessment on which the power depends does tip the QDW powers over or too close to the line set by Art 9(1) of ICCPR.

QDWs are therefore not a justifiable further intrusion on personal liberty.

**Recommendation V/1:** The provisions of Subdiv C in Div 3 of Part III of the ASIO Act should be repealed.

It would be an improvement in the flexibility of the QW provisions, in place of the present QDW provisions if they were repealed, for powers like the NSW provisions described above to be available. They would enable the detention of a person in circumstances where he or she is served with the warrant and the serving officer has reason to believe by anything said or done by the person that there is a serious possibility the person intends not to comply with the warrant. They would also permit an issuing or prescribed authority to authorize detention after service but before the stipulated time for attendance in cases where that necessity appears from the circumstances including the person’s own words or conduct.

The serving officer should have the power to arrest the person and to bring him or her promptly before the prescribed authority and to detain him or her for that purpose. The power of arrest must be limited to a police officer.362 Once before the prescribed authority, the person can be dealt with using the prescribed authority’s existing powers to detain and regulate the detention of a person who is the subject of a QW.

This approach provides a detention power narrower in scope then the power that currently exists for individuals to be subject to a potential 7 day detention on the basis of the Attorney-General alone being satisfied of one of the three existing grounds for detention under a QDW. The proposed approach recognizes the legitimate need of ASIO to ensure the attendance of a person for questioning while balancing the rights of individuals not to be unnecessarily detained on a preemptive basis.

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362 As there is no legislative requirement for a QW to be served by a police officer the amendment will need to specify that only a police officer has authority to exercise the power of arrest.
Recommendation V/2: The QW provisions should be amended to permit arrest if the police officer serving the warrant believes on reasonable grounds from anything said or done by the person served that there is a serious possibility that he or she intends not to comply with the warrant, and also to permit the prescribed authority to direct detention after service of a QW but before the time specified in it for attendance if it appears on reasonable grounds that there is an unacceptable risk of the person tipping off another involved in terrorism, failing to attend or destroying or tampering with evidence.\(^{363}\)

\(^{363}\) Hence subsec 34K(1) of the ASIO Act should extend the powers under paras (a), (b) and (c) to the period after issue of a QW including before first attendance is required, in terms drawing on sec 18AA of the New South Wales Crime Commission Act 1985 (NSW).
VI.1 Australia’s statutory definition

As noted in the INSLM’s First Annual Report, the Australian approach in the CT Laws to the long vexed question how to define terrorism has particular features. The specific provisions of the Criminal Code Act 1995 (Cth) (“Code”) represent a serious and commendable attempt to achieve comprehensiveness and precision. It reads as follows:

100.1 Definitions

(1) In this Part:

...terrorist act means an action or threat of action where:

(a) the action falls within subsection (2) and does not fall within subsection (3); and

(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

(c) the action is done or the threat is made with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

(ii) intimidating the public or a section of the public.

...

(2) Action falls within this subsection if it:

(a) causes serious harm that is physical harm to a person; or

(b) causes serious damage to property; or

(c) causes a person’s death; or
(d) endangers a person's life, other than the life of the person taking the action; or

(e) creates a serious risk to the health or safety of the public or a section of the public; or

(f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

   (i) an information system; or
   (ii) a telecommunications system; or
   (iii) a financial system; or
   (iv) a system used for the delivery of essential government services; or
   (v) a system used for, or by, an essential public utility; or
   (vi) a system used for, or by, a transport system.

(3) Action falls within this subsection if it:

   (a) is advocacy, protest, dissent or industrial action; and
   (b) is not intended:

       (i) to cause serious harm that is physical harm to a person; or
       (ii) to cause a person's death; or
       (iii) to endanger the life of a person, other than the person taking the action; or
       (iv) to create a serious risk to the health or safety of the public or a section of the public.

(4) In this Division:

   (a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and
   (b) a reference to the public includes a reference to the public of a country other than Australia.

The first intentional element of the offence, which may be called motivation, is distinct from the second intentional element of the offence, which may be called purpose. The purpose required by para (c) of the definition in subsec 100.1(1) is that the person's purpose in committing the offence is to coerce or influence by intimidation a government (including a foreign government), or to intimidate the public or a section of it.

The principal focus of the review of this issue for this Report is Australia's definition of terrorism requiring the prosecution to prove a person's motivation for
committing a terrorist act. The person’s motivation must be the advancement of a political, religious or ideological cause as stipulated in para (b) of the definition in subsec 100.1(1) of the Code: “the action is done or the threat is made with the intention of advancing a political, religious or ideological cause”.

As will be noted below, it is not an original observation that the purposes of coercing etc a government or intimidating the public are inherently political or broadly social phenomena. Anyone carrying out conduct for those purposes can fairly be taken to be responsible for that political or broadly social character of their criminal conduct. Given that, as the word “terrorism” has always essentially conveyed, intimidation is the defining intentional element of terrorist offences, why should a statutory definition go beyond that purpose?

More pointedly, given the fundamental importance in a pluralist secular society such as Australia of freedoms of political opinion and speech and of religion, is it appropriate for the motivation element to remain in the Australian definition? The purpose element of intention directs attention to the effect of intimidation, which is the social evil of terrorism. The motivation element of intention, however, adds the reason for a person setting out to intimidate others. 364

As discussed below, no reasons are acceptable for the violent extremism producing intimidation of governments or the public, being a generalized colloquial understanding of terrorism. And this review did not discover anyone who considered that apparently motiveless sociopathic acts of terrorism should fall outside a statutory definition because no political or religious motivation could be proved.

VI.2  UK origins of Australia’s definition

Australia’s definition of terrorist act in the Code is modelled on the UK definition of terrorism in sec 1 of the Terrorism Act 2000 (UK) (“TA 2000”) although it adopts only some parts of the UK definition. 365 Subsection 1(3) of the TA 2000 provides that where terrorist action involves firearms or explosives, it does not have to be designed to influence the government or to intimidate the public to be terrorism. This aspect of the UK definition was not adopted in the Australian definition.

A review of the UK definition of terrorism was undertaken by Lord Lloyd in 1996. The current UK definition in the TA 2000 is the result of recommendations in Lord


365 sec 1 of the TA 2000 is reproduced at Appendix I.
Prior to the TA 2000, terrorism was defined in the UK as “the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.” Lord Lloyd did not consider this definition to include a broad political motive and was concerned that it was “limited to political ends” and might not encompass terrorist acts committed by “single issue or religious fanatics.” The INSLM questions whether the expression “political” would not include religious or issue motivated individuals.

The concern held by Lord Lloyd that the law must clearly define a terrorist act as having a political motive led him to recommend a revised definition. This revised definition, which has since been adopted in the TA 2000, was derived from the definition used by the FBI for operational purposes. The FBI definition was as follows:

The use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public or any section of the public, in order to promote political, social or ideological objectives.

The FBI definition differs from US statutory definitions as terrorism is defined in US law without reference to any political or religious motive. Such a reference would likely be challenged under the First Amendment. The current statutory definitions of international and domestic terrorism in the United States Code have only one intention element, being the intent to intimidate the public or influence the government through violent means. There is no additional intention element of motivation.

The FBI antecedent, via the UK TA 2000, of Australia’s motivation element can be seen as a workable description for operational law enforcement purposes of the kind of crime and criminal in question. It was not devised or used for the purpose of defining elements of a criminal offence requiring to be proved by the

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367 subsec 20(1) of the *Prevention of Terrorism (Temporary Provisions) Act 1989* (UK)
368 See Lord Lloyd of Berwick, Cm 3420 1996, p 25. The Explanatory Notes to the *Terrorism Act 2000* state that the definition of terrorism in sec 1 “adopts a wider definition, recognizing that terrorism may have religious or ideological as well as political motivation”.
369 Cm 3420, pp 25-26
370 See 18 USC § 2331 which states the terrorist act must:

\[ ...
(B) appear to be intended—
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping;
\]
prosecution. The contrast between this FBI usage and the US criminal definition noted above is instructive.

VI.3 Report of the Sheller Committee

The Report of the Security Legislation Review Committee, chaired by the Hon Simon Sheller AO QC, ("The Sheller Report") gave only cursory attention to the issue of motivation as an element of the Australian definition of terrorist act and accepted the need for para (b) of the offence without any detailed consideration. The Committee did not provide reasons for why it was not persuade by the arguments put forward for removing the motivation element in submissions by the Attorney-General's Department ("AGD") and the Commonwealth Director of Public Prosecutions ("CDPP"). The Committee was primarily concerned with ensuring that Australia’s definition of terrorist act stigmatized political actions rather than actions motivated by non-political reasons such as revenge. It was on this basis that the Sheller Report accepted the need for para (b) of Australia’s definition of terrorist act.

The Sheller Committee found para (b) of the definition reflects both a publically understood quality of terrorism and the definition of terrorism which State and Territory Governments had agreed to in referring their powers to the Commonwealth. The Sheller Committee emphasized that the terrorism offences under the Code are designed to supplement other existing criminal laws and para (b) is necessary as a "specific and narrowing provision in defining the scope of the 'terrorist act.’” Unfortunately, the Committee did not consider Australia’s international obligations to criminalize terrorism regardless of motivation or the potential implications for rights guaranteed under ICCPR.

VI.4 Compliance with international obligations

Australia’s enactment of CT Laws has been carried out to comply with what Australia accepts unequivocally to be the binding nature of Security Council Resolution 1373 adopted on 28th September 2001 (“1373”). In accordance with para (2)(e) of 1373, all States shall ensure that terrorist acts are established as serious criminal offences in domestic law with punishment duly reflecting their seriousness. States are required to have laws prohibiting the financing, planning, perpetration or support of terrorist acts.

Australia’s wholehearted implementation of 1373 is demonstrated by the extended geographical jurisdiction (category D) which Australia has applied to terrorism

372 The AGD and CDPP submissions are discussed later in this Chapter.
374 See Chapter III of the INSLM’s First Annual Report.
offences under Part 5.3 of the Code.\textsuperscript{375} Category D extended geographical jurisdiction is the furthest extension of jurisdiction that can be applied to a law of the Commonwealth. It extends criminal liability for Australian terrorism offences to conduct by a person with no connection to Australia, where that conduct and the results of it do not occur in Australia eg a person commits an offence punishable by life imprisonment if the person engages in a terrorist act regardless of whether the person, the conduct, or the result of the conduct, has any connection to Australia.\textsuperscript{376} This surely conforms to the requirement under para 2(e) of 1373 that Australia ensure any person perpetrating a terrorist act is treated as committing a serious crime and punishable as such under domestic law.

There is no agreed definition of terrorist act at the international level. 1373 does not define terrorist act.\textsuperscript{377} It is necessary to look to other aspects of the UN’s counter-terrorism work for guidance on interpreting what acts should be criminalized pursuant to 1373. Importantly, in interpreting Australia’s obligations under 1373 it is necessary to do so in a way that is consistent with Australia’s international human rights obligations.\textsuperscript{378}

Security Council Resolution 1566 ("1566"), adopted under Chapter VII of the Charter of the United Nations Act 1945 (Cth), called on all states to prosecute or extradite terrorists and to take steps to ensure terrorism is prevented and punished. Unlike 1373, 1566 provides some guidance on the definition of terrorism as a criminal act:-

\textit{Recalls} that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.\textsuperscript{379}

Comparative international law and experience shows that while some countries include motivation as an element in the definition of terrorism, both the UN

\textsuperscript{375} sec 15.4 of the Code provides that Australia has jurisdiction to prosecute these offences a) whether or not the conduct constituting the alleged offence occurs in Australia; and b) whether or not the result of the conduct constituting the alleged offence occurs in Australia.

\textsuperscript{376} subsec 101.1(2) of the Code applies extended geographical jurisdiction category D to an offence against subsec 101.1(1) of the Code.

\textsuperscript{377} For the full text of 1373 see Appendix 8 of the INSLM’s First Annual Report.

\textsuperscript{378} See Appendix 11 of the INSLM’s First Annual Report for a selection of UN statements on the need to comply with international human rights obligations in countering terrorism.

\textsuperscript{379} Security Council Resolution 1566, para 3
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and the majority of countries do not include motivation in their definitions. By including motivation as an element, Australia’s definition runs counter to the large volume of UN conventions, resolutions and Committee comments which all condemn terrorist acts as criminal regardless of motivation. None of the 13 UN sectoral treaties on terrorism include a requirement for a religious, political or ideological motivation. These treaties are concerned with penalizing harm caused for the purpose of terrifying the public or coercing a government without regard to the motives that may have influenced the person to commit such acts. The International Convention for the Suppression of the Financing of Terrorism (New York, 1999), Art 2(1) provides that:

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. [Emphasis added]

While the sectoral treaties are silent on motive, other sources of international law explicitly reject any relevance of motive in defining terrorism for the purposes of criminal law. In 1566, quoted above, the Security Council condemned “all acts of terrorism irrespective of their motivation.” The Security Council has reaffirmed this approach in subsequent resolutions stating that “any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed.”

The General Assembly also takes this approach by recognizing that where an act is intended to provoke a state of terror in the general public, a group of persons, or particular persons for political purposes, such an act is “in any circumstances

380 The definitions contained in UN counter-terrorism instruments and the criminal laws of the United States, Norway, France, Germany and Spain include intention but not motive as an element. The United Kingdom, New Zealand and South Africa have used religious etc. motive as an element of their criminal law definition of terrorist act. The Canadian Criminal Code requires motive if the terrorist act is not covered by any of the listed terrorist conventions. For further discussion of the different approaches by national legislators see Kai Ambos, Amicus Curiae Brief submitted to the Appeals Chamber of the Special Tribunal for Lebanon regarding case STL-11-01/I para 3.2

381 See Appendix J for the list of the 13 UN sectoral conventions on terrorism.

382 Security Council Resolution 1566 (8 October 2004), para 1

unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them."\textsuperscript{384} Similarly, the United Nations Human Rights Council and Commission on Human Rights have both condemned terrorism as criminal and unjustifiable regardless of motivation.\textsuperscript{385}

There is an argument advanced by some scholars that the motivation element plays a role in distinguishing terrorism from selfish extortion and it is appropriate socially to mark the difference between those who are acting out of mercenary greed and those who are motivated by a political, religious or ideological cause.\textsuperscript{386} These scholars acknowledge that international law requires States to have appropriate laws to deal with terrorism but consider a motivation element necessary for such laws to be specifically aimed at terrorism.

Contrary to this view but in accordance with the views of the INSLM and the general approach of the UN, the former Special Rapporteur, Martin Scheinin, reiterated in his model definition of terrorism that acts of terrorism are under no circumstances justifiable and that motivation is not a conceptual requirement of a definition of terrorism.\textsuperscript{387}

### VI.5 Motive as an element of an offence

"Central to the concept of criminality are the notion[s] of individual culpability and the criminal intention for one’s actions."\textsuperscript{388} The orthodox view of motive in domestic and international criminal law is that it is usually irrelevant to criminal responsibility and culpability. Motive will frequently be part of the prosecution’s narrative in a criminal trial and evidence of motive may be introduced by the prosecution as evidence of other facts. While motive may be powerful evidence in a criminal trial it is not generally a separate element of an offence.

The requirement to prove religious motive in terrorism offences comes too close to pursuing a case against a religion. That is, the individual who is accused must be shown to have a religious belief, which involves proving that his or her beliefs match what is also proved to be the content or doctrines of a particular religion.

\textsuperscript{384} General Assembly Resolutions 49/60 (1994) A/RES/49/60 and 65/34 (2010), A/RES/65/34
\textsuperscript{387} Martin Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ten areas of best practices in countering terrorism, A/HRC/16/51, para 27.
\textsuperscript{388} Australian Law Reform Commission, Principled Regulation: Federal Civil and Administrative Penalties in Australia Final Report (2003) 2.9
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Then, in order to prove that the religious belief is the “cause” motivating that individual, proof must be offered of the sincerity and zeal of him or her as a religious believer. There is nothing in Australia’s statutory definition permitting the court to avoid those forensic examinations and adjudications.  

No other comparable offence in Australian law can be found that requires a person’s motivation, religious or otherwise, to be proved as an element of the offence.

From a practical perspective, the removal of motivation as an element may well have little or no impact on the scope of evidence as it could still be relevant to the proof of the purpose. Illustrations in terms of any particular religion might be thought invidious, not least for the reasons discussed below. However, all actual cases in Australia to date have involved Islam. Reading the records of those trials, and discussions with judicial officers, counsel and solicitors involved in them emphatically confirm that removing the motivation element by no means removes the presence of religion in the fraught context of a criminal trial.

That is not to say that the difference between motivation as an element of the offence and motive as the subject matter of evidence could have no effect on how religious matters may be considered in terrorist trials. Proof of statements couched in zealously religious or pious terms may well continue to be good evidence of the nefarious purpose of the accused. Typically, hostile and hateful statements against persons described in terms conveying their status as infidels or heretics will go a long way to proof of an intent to intimidate that section of the public or a government identified with such people – the purpose that makes an offence a terrorist offence.

On the other hand, that entirely proper use of religious matters in proof of a terrorist offence does not involve proof of any identified body of doctrine let alone sincere belief by the accused.

The analogy with other kinds of crime tends against the inclusion of motivation as an element of terrorist offending. It is the intimidating violence that infringes or threatens to infringe the paramount right to life and its associated social values. A bombing death, put simply, is not worse if suffered at the hands of an Islamist, nor better if suffered at the hands of an extortionist. Intimidation to achieve withdrawal of troops from Muslim territory is not worse than intimidation to exact private revenge.

389 In Canada, an interpretive clause was added to their definition of terrorist activity to make clear that religious or political thought itself is not an offence where it does not involve terrorist action. See Criminal Code (Canada) subsec 83.01(1.1).

390 Of course, purpose is a frequent element of a crime. Its distinguishing feature is usually the externally manifested intended outcome of conduct, whereas motivation may be seen as the internal impelling factors for conduct. In a fraud offence, say, the intent to obtain an advantage is a purpose element; greed or poverty are irrelevant motives, however strong their evidentiary effect may be to prove the purpose of intending to obtain an advantage.
The combination of the weight of international law and the criminal treatment of motive therefore casts great doubt on the merits of retaining the motivation element for terrorist offences.

VI.6 Compliance with ICCPR

Australia’s obligations under 1373 must be met in a way that complies with Australia’s international human rights obligations, including ICCPR. The Sheller Committee received submissions from AGD and CDPP on the potential discriminatory impact of the motivation element but did not engage with this issue.

The importance of ICCPR was noted in the INSLM’s First Annual Report. The present concern focuses on Arts 18 and 19 (freedoms of thought, conscience and religion, and of expression) and Arts 26 and 27 (equality before the law without discrimination, and rights of ethnic, religious or linguistic minorities). Article 4 regulates the extreme case of derogation, in terms that deny any possible derogation from Art 18 (which includes the freedom of religion). There is no prospect of Australia derogating from ICCPR given the condition in Art 4 of a "public emergency which threatens the life of the nation" – and no presently understood terrorist threat comes anywhere near that state of affairs. But the extreme test of derogation underlines the importance of religious freedom because even such an emergency cannot justify derogating from it.

Freedom of religion under ICCPR is, in common with other rights, by no means absolute. It may be limited by laws that “are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”. It is not apparent how these permissible limitations could extend to rendering a sincere religious motivation an element of a criminal offence.

These rights guaranteed under ICCPR are brought into question by Australia’s definition requiring the prosecution to prove, for example, sincere Muslim

391 Chapter III pp 18-24

392 In considering whether the inclusion of a motive element in the Canadian definition was unconstitutional the Court of Appeal for Ontario recognized that individuals who share some of the same religious beliefs as terrorists may refrain from expressing this for fear of being identified with the terrorists. The Appeals Court did not find the motive element unconstitutional, holding this chilling effect was not the result of the legislation but it was the terrorists themselves who created the chill. Per Doherty, Moldaver and Cronk JJA in R v Khawaja 2010 ONCA 862 at [135]. This case was appealed to the Canadian Supreme Court who unanimously dismissed the appeal and held the motive clause in the Canadian definition to be constitutional: R v Khawaja 2012 SCC 69. The Supreme Court upheld the Court of Appeal’s decision that the motive clause did not, in purpose or effect, violate subsec 2(b) (right to free expression) of the Canadian Charter of Rights and Freedoms. McLachlin CJ (LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ concurring) at [65]-[84]. The Court stated that “criminal liability should not be based on a person’s political, religious or ideological views” but found the motive clause “allows for the non-violent expression of political, religious or ideological views.” Per McLachlin CJ (LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ concurring) at [83].
motivation. The problem is not alleviated by the prosecution adducing material that the accused is motivated by a perverted form of religion. The State should not have any role in lending official efforts to distinguish between orthodox and unorthodox, approved and unapproved, religion. It should only be conduct that the state is concerned with regardless of motivation, sincere or otherwise, orthodox or otherwise, heretic or otherwise.

The history of terrorism trials in this country has involved religion, namely Islam, or as some may perhaps prefer, perversions of Islam. One does not need to go so far as detecting inappropriate police profiling of certain minorities, to have strong concerns about investigating and prosecuting a person partly on the basis of his or her religious etc beliefs. By including motivation as an element of terrorist offences, it is these beliefs about which police are required to collect evidence as part of their investigations into whether someone is committing, or has committed, a terrorist offence. By having a motivation element, police are required to collect evidence about a suspect’s religious or political beliefs to determine the person’s motivation for committing a terrorist act. This requires police to make decisions on a person’s religious or political beliefs and how these influenced their criminal conduct.

Religion may play a part in many people’s conduct but neither professed or general beliefs in religious matters are grounds for prosecution or a relevant defence. It is routine that a judicial admonition will be given to the jury explaining that such beliefs may supply a statement of motive but it neither contributes to, nor tells against, guilt. This is not the case for terrorism offences, where the jury must be satisfied beyond a reasonable doubt that the accused was motivated by their religious etc beliefs. Where the jury is not satisfied of the accused’s motivation then para (b) of the definition of terrorist act will not be proved and an acquittal must follow.

The advantage of not having motive as an element of the offence is that the judge will instruct the jury, most likely at the beginning of a trial and again at the end, that they are not to regard the religion itself as nefarious. The jury will be instructed that they are not to regard the profession of a religious belief as a mark of criminality and they are to concentrate on the intimidation or coercion questions for which the material is being put to them.

VI.7 An unnecessary and counter-productive burden of proof

A pragmatic reason for change is the unnecessary burden placed on the prosecution and law enforcement agencies to prove the motivation element. In its submission to the Sheller Committee, AGD noted the unwarranted complication introduced by para (b) of the definition:–
... if the prosecution is able to establish that the act is done or the threat is made the intention of coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or intimidating the public or a section of the public, then the motive for the act should be irrelevant. The requirement to prove the reason behind this conduct adds a level of complication that appears to be unwarranted.  

Even in cases where there is an abundance of telephone intercept material that is the accuseds’ own words there will probably still be the question of the sincerity or significance of statements indicating motivation. It would be an unsatisfactory situation if the current motivation element is the cause of acquittals for terrorism offences due to a failure to prove sincere political or religious motive beyond a reasonable doubt. 

Where the act is in the nature of a terrorist act (as defined in para (c) of the definition) the CDPP noted in its submission to the Sheller Committee:-

...there seems little sense in specifically dealing with the case as a terrorist offence where there is an ideological or religious cause but not if there is only a desire for revenge. Both should be covered by the legislation. Of course it will still be necessary in order to prove the offence that the defendant had the intention of coercing or influencing by intimidation a Government or intimidating the public or a section of the public.

The CDPP also noted “it is not in the public interest for a person to avoid criminal liability by showing that their acts were motivated by something other than politics, religion or ideology.” In agreeing with this, AGD stated the requirement to prove motive “seems to be at odds with the common law principles that motive is a distinct and largely irrelevant consideration for the criminality of an act.”

As noted above, there has been practical experience in Australia where there was evidence that the accused was motivated by a religious cause but also evidence of their motivation for revenge.

A sound policy reason for removing the motivation element from Australia’s definition is to avoid glamorizing the accused and his or her “cause”. Alleged

393 Submission by the Attorney-General’s Department to the Sheller Committee, February 2006, p 12
394 In the case of R v Mallah [2005] NSWSC 317 it was unclear whether the accused was motivated by revenge at the government officials who had cancelled his passport or by religious motivation. Speaking of the accused’s acquittal in respect of 2 counts of terrorism offences, Wood CJ found that the jury were not satisfied beyond reasonable doubt of one or other of the elements which the Crown had to establish to meet the definition of “terrorist act” in the Code at [26].
395 Submission by the Commonwealth Director of Public Prosecutions to the Sheller Committee, January 2006, p 9
396 Submission by the Commonwealth Director of Public Prosecutions to the Sheller Committee, January 2006, p 9
397 Submission by the Attorney-General’s Department to the Sheller Committee, February 2006, p 12
terrorists should not be given the opportunity to claim they committed their murderous act for a noble cause eg that they were killing for God. Australia is required under international law to criminalize all forms of terrorism “regardless” of motivation. Where a person intends that their conduct terrify the public or coerce or influence a government it should be of no concern to the criminal law whether the person was motivated by the prospect of divine reward or personal revenge.

Regrettably, the vicious bombast comprising the recorded words of terrorists making threats includes their boasts of sacrificial courage (as they see it) to the point of suicide. Under the present law, that is evidence of motivation, which the prosecution must prove. By so doing, of course, the possibility arises that a terrorist who survived to face a possibility of a long term of imprisonment will embrace that fate as a substitute martyrdom. Retaining the element of motivation could thus help them achieve their sought after martyr status. As Kent Roach has observed, the motive requirement could provide an accused “with a possible platform to politicise the trial process by offering extensive evidence about the true meaning of often ambiguous religious and political beliefs.”

Recommendation VI/1: Motivation should be removed as an element of the defined term “terrorist act” in the Code.

VI.8 Inclusion of hostage taking in Australia’s definition

The increasing phenomenon of hostage-taking committed in the context of terrorist activities has been noted by the General Assembly, the Security Council and the Human Rights Council. For example, UN Security Council Resolution 1989 recognized the increased use of kidnapping and hostage taking as a means by which terrorist groups are raising funds and coercing governments:

Expressing concern at the increase in incidents of kidnapping and hostage-taking by terrorist groups with the aim of raising funds, or gaining political concessions, and expressing the need for this issue to be addressed.

Hostage taking is expressly included in a number of the sectoral conventions on terrorism. In 2011, the Human Rights Council held a panel meeting on the issue of human rights in the context of action taken to address terrorist hostage-

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399 Hence in sec 100.1 of the Code, definition of “terrorist act”, para (b) should be deleted.
The Panel noted that hostage taking is a crime under international law and is a significant violation of the right to life and physical integrity. The Hostages Convention reflects a consensus amongst the international community against hostage-taking and the preamble to the Convention reaffirms the rights to life, liberty and security of everyone, as set out in the *Universal Declaration of Human Rights* and the ICCPR. The Panel reiterated the importance of the ratification and implementation of the Hostages Convention and other international instruments addressing the fight against terrorism. Reference was also made to the obligations on States to criminalize and punish hostage taking and other terrorist acts.

Australia has given effect to the Hostages Convention and the Convention on Crimes against Internationally Protected Persons through the *Crimes (Hostages) Act 1989* (Cth) and *Crimes (Internationally Protected Persons) Act 1976* (Cth). These Acts make hostage taking a serious crime punishable by up to life imprisonment. To commit the offence of hostage taking or kidnapping under these Acts it is not necessary to physically harm or threaten to harm a person. Detaining a person and threatening to continue to detain a person is the conduct required to commit the offence.

There are also specific hostage taking offences under the Code. These criminalize the taking of UN personnel hostage as well as hostage taking when committed as a war crime. Like the offences discussed above, the Code offences do not require the hostage to be harmed in order for the offence to have been committed. The Code provides separate offences for hostage taking and harming a person. For example, taking a UN person hostage is a separate offence to causing harm to a UN person.

The former Special Rapporteur stressed the importance of criminalizing hostage taking for terrorist purposes and included hostage-taking as a terrorist act within his model definition of terrorism. Under his proposed definition any action that “constituted the intentional taking of hostages” would be terrorism where it was done with the intention of terrifying the public or compelling a government or international organization.

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404 A/HRC/18/29, para 11.

405 See subsec 8(2) of the *Crimes (Hostages) Act 1989* (Cth) and subsec 8(1) of the *Crimes (Internationally Protected Persons) Act 1976* (Cth).

406 See sec 7 of the *Crimes (Hostages) Act 1989* (Cth) and para 8(7)(a) of the *Crimes (Internationally Protected Persons) Act 1976* (Cth) for the definitions of hostage taking and kidnapping under those acts.

407 Secs 71.9 and 71.6 of the Code

As noted in the INSLM’s First Annual Report, the Australian definition of terrorist act does not expressly include kidnapping or hostage taking as acts within the scope of the definition. It could be argued that hostage taking falls within the types of action that constitute terrorist acts in subsec 100.1(2) on the basis that all hostage taking involves a threat of physical harm. However, it would improve the definition to expressly include hostage taking as an additional action in subsec 100.1(2). This would make clear that such action is treated as a terrorist act in its own right under Australian law, recognising the right to liberty and security of person in Art 9 of ICCPR and according with international practice.

**Recommendation VI/2:** Hostage taking should be expressly included in Australia’s definition of “terrorist act” in the Code.

### VI.9 Excluding armed conflict from Australia’s definition

It is important to maintain the distinction between the legal framework governing terrorism committed during peace-time or outside of armed conflict and the legal framework governing terrorist type acts committed in armed conflict. For this reason, violence committed in the context of an armed conflict should be excluded from Australia’s definition of “terrorist act”, leaving it to be dealt with by the international humanitarian law (“IHL”) and international criminal law frameworks.

IHL regulates the conduct of combatants in armed conflict and deems certain acts of violence lawful and others unlawful. This contrasts with the definition of terrorist act under the Code where any act of violence designated as a terrorist act under Australian law is always unlawful.

IHL provides incentives to parties in an armed conflict to comply with the laws of war since compliance is rewarded with, for example, prisoner of war and combatants’ immunity status. Under IHL a person lawfully taking part in hostilities is entitled to combatants’ immunity from prosecution for lawful acts of war and must not be punished for taking part in the hostilities on capture. If a person lawfully taking part in hostilities were to be classified as a terrorist for the purposes of domestic criminal law this would allow prosecution by the opponent for conduct specifically authorized by IHL.

Australia’s definition of terrorist act does not recognize combatant’s immunity and potentially includes as unlawful action taken by parties to an armed conflict where that action is lawful under IHL. If Non-State parties to an armed conflict are not covered by IHL and know that if defeated they will be subject to severe criminal penalties for terrorism (rather than amnesties and social reintegration) they will
not have an incentive to abide by IHL. It then makes sense for them to fight in any way possible to avoid defeat without regard for IHL principles.\textsuperscript{409}

In armed conflicts those who commit terrorist type acts may be prosecuted for war crimes and crimes against humanity either in national courts or international tribunals. Most terrorist type acts are already covered by IHL which prohibits direct and deliberate attacks against civilians, including a war crime of spreading terror among a civilian population.\textsuperscript{410} IHL also prohibits indiscriminate and disproportionate attacks that may be expected to cause incidental loss of civilian life or damage to civilian objects and has additional rules protecting dams, electricity stations etc.\textsuperscript{411} These are all acts that would generally be classified as terrorist if committed outside armed conflict and indeed are defined as such under Australian law.

Australia should not criminalize acts that are lawful under IHL as terrorist under Australian law. Australia's international obligations under 1373 do not extend to prohibiting acts which are recognized as lawful under IHL. Lawful violent acts committed by State or Non-State actors should be excluded from the scope of Australia's definition of terrorist act to prevent it from interfering with the "carefully constructed parameters of permissible violence in IHL".\textsuperscript{412} Australia's definition should also exclude unlawful acts of violence already regulated as unlawful under IHL. This would allow the unlawful conduct to be punished in accordance with the already existing international law framework.

The explicit IHL carve out found in the Canadian Criminal Code provides an excellent model. This would acknowledge the proper boundary between prosecution for terrorist acts under the Code and prosecution for crimes covered by IHL, with the latter being the appropriate avenue for those persons engaged in an armed conflict. Terrorist activity under sec 83.01 of the Canadian Criminal Code:-

\textit{...does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a}


\textsuperscript{410} Prosecutor v Galic ICTY-98-29-T (5 December 2003)


state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law. 413

**Recommendation VI.3:** Acts committed during an armed conflict governed by international law should be excluded from the definition of “terrorist act” in the Code.

**VI.10 The former UN Special Rapporteur’s report on Australia’s definition**

The Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism operates under the UN Human Rights Council and considers states’ compliance with international human rights obligations in countering terrorism. The first Special Rapporteur, Martin Scheinin, raised some issues with Australia’s definition of terrorist act which the INSLM has considered. 414

The former Special Rapporteur stated that Australia’s definition goes beyond physical acts of violence and drew attention to sub paras 100.1(3)(b)(iii) and (iv) of the Code. 415 This is a misreading of Australia’s exclusion provision. Australia’s definition is world best for its exclusion from the definition of terrorist act the type of action described as “advocacy, protest, dissent or industrial action” which is not intended to cause danger to life or limb. 416 As noted in the INSLM’s First Annual Report, comparative law research shows this to be a superior aspect of Australia’s definition and a commendable effort to remove legitimate political dissent from the definition of terrorist act.

The former Special Rapporteur stated that Australia’s definition goes beyond the Security Council’s characterization of terrorism by including acts not defined in the international conventions and protocols relating to terrorism, drawing attention to paras 100.1(2)(b),(d),(e) and (f) of the Code, 417 in particular raising a concern that paras 100.12(b) and (f) define a terrorist act to include action which causes serious damage to property or seriously interferes with etc electronic systems. The risk of this overreach is mitigated by the link to subsec 100.1(3). This link excludes such action from being a terrorist act where it is done in the course of advocacy, protest, dissent or industrial action and not intended to cause danger to life or limb.

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413 For a discussion of the armed conflict exception under the Canadian Criminal Code see *R v Kwawaja* 2010 ONCA 862 per Doherty, Moldaver and Cronk JJJA at [152]-[169].


415 A/HRC/4/26/Add3 para 15(a)

416 Para 100.1(3)(b) of the Code

417 A/HRC/4/26/Add3 para 15(b)
As to the former Special Rapporteur’s concern that paras 100.1(2)(d) and (e) of the definition should not make it a terrorist act to endanger a person’s life or create a serious risk to public health and safety, it is difficult to perceive any degree of overreach. There is most certainly merit in ensuring acts intended by terrorists to endanger lives and create risks to public health fall within the definition of “terrorist act”.

The former Special Rapporteur was also critical of Australia’s definition for including not just action but also a threat of action under subsec 101.1(1) of the Code. There is no policy difficulty with criminalizing threats. It is a good thing for separate offences committed by the threat of violence to exist alongside offences committed by acts of violence. The Sheller Report recommended that threat of action be a separate terrorist offence.

This approach of separating offences so that threats of violence and actual violence are separate criminal offences is taken in the Code and in Australian State and Territory criminal laws. For example, Div 71 of the Code sets out offences of violence and threats of violence against UN personnel. Separate from being guilty of an offence if a person commits any of the offences under Div 71, a person is guilty of an offence if he or she threatens to commit any of the offences under Div 71 where that threat is made with an intention to compel any other person to do or omit to do an act by making the threat. At the State level, separate offences exist for threats of harm and the commission of the harm. For example, sec 302 of the Criminal Code Act 1899 (Qld) makes it an offence to commit murder while sec 308 also makes it an offence to threaten to murder.

418 SA/HRC/4/26/Add3 para 17
419 Sheller Report, recommendation 8 (discussed in chapter 6 of the Sheller Report)
420 See eg Criminal Code Act 1899 (Qld)
421 The penalty provisions for offences where the person has carried out the violence are more severe than those applicable where the offence is one of threatening to commit the act of violence. The difference in penalties varies for the type of threat and violent action. The offence of murdering a UN person is punishable by a maximum penalty of life imprisonment: sec 71.2 while the offence of threatening to murder a UN person is punishable by a maximum penalty of 10 years imprisonment: subsec 71.12 (a).
APPENDIX A

LIST OF RECOMMENDATIONS

Chapter II

Recommendation II/1: If COs are to be retained in general, the onus of showing that grounds exist and, if challenged, that they existed when a CO was first made, should clearly be imposed on the authorities applying for confirmation of an interim CO. 422

Recommendation II/2: If COs are to be retained in general, the prerequisites for making an interim CO, including on an urgent basis, should include satisfaction that proceeding ex parte is reasonably necessary in order to avoid an unacceptable risk of a terrorist offence being committed were the respondent to be notified before a CO is granted. 423

Recommendation II/3: If COs are to be retained in general, the provisions governing confirmation hearings should expressly impose, perhaps by a presumption, the onus on the AFP to show the CO should continue in force. 424

Recommendation II/4: The provisions of Div 104 of Part 5.3 of the Code should be repealed. Consideration should be given to replacing them with Fardon type provisions authorizing COs against terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness.

Chapter III

Recommendation III/1: If PDOs are to be retained in general, the threshold tests for them should require both the AFP applicant and issuing authority to hold an actual belief as to the prerequisite matters as well as the grounds for that belief being reasonable. 425

Recommendation III/2: If PDOs are to be retained in general, the imminence test should be replaced with a requirement that the AFP applicant and issuing authority

422 Hence subsec 104.14(6) should be amended to more closely resemble eg subsec 104.14(7).
423 Hence subsecs 104.4(1) and 104.7(1) of the Code should be supplemented accordingly.
424 Hence sec 104.14 of the Code should be supplemented, and amended in the case of subsec (4) accordingly.
425 Hence para 105.4(4)(a) of the Code should be amended eg to read "suspects on reasonable grounds" rather than "reasonable grounds to suspect".
are each satisfied that there is a sufficient possibility of the terrorist act occurring sufficiently soon so as to justify the restraints imposed by the PDO. 426

**Recommendation III/3:** If PDOs are to be retained in general, the necessity requirement in para 105.4(6)(b) should be amended to require that it be "reasonably necessary to detain the subject to preserve evidence of, or relating to, the terrorist act".

**Recommendation III/4:** The provisions of Div 105 of Part 5.3 of the Code should be repealed.

**Chapter IV**

**Recommendation IV/1:** The issuing authority as well as the Attorney-General should be required to consider all the prerequisites for the issue of QWs, rather than the issuing authority taking the consent of the Attorney-General as conclusive of some of them. 427 The last resort requirement for QWs should be repealed and replaced with a prerequisite that QWs can only be sought and issued where the Attorney-General and issuing authority are "satisfied that it is reasonable in all the circumstances, including consideration whether other methods of collecting that intelligence would likely be as effective". 428

**Recommendation IV/2:** The QW provisions should be amended to include a requirement that the prescribed authority must be satisfied on reasonable grounds that any extension of time granted on account of the use of an interpreter is no more than could reasonably be attributable to the use of the interpreter during questioning given the circumstances of the individual case. 429

**Recommendation IV/3:** The requirement in subpara 34V(3)(b)(ii) of the ASIO Act that there be no alternative way of taking a person into custody should be removed.

**Recommendation IV/4:** The length of imprisonment for offences of deliberate contravention of safeguards in relation to QWs should be amended to be at parity with the length of imprisonment for offences against secrecy obligations in relation to QWs.

**Recommendation IV/5:** The length of imprisonment for offences against secrecy obligations in relation to QWs should be reduced to 2 years.

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426 Hence para 105.4(5)(b) of the Code should be amended accordingly.
427 Hence subsec 34E(1) of the ASIO Act should more closely mirror subsec 34D(4).
428 Hence paras 34D(4)(b) and 34E(1)(b) should be amended to read, to the recommended effect, the same as each other.
429 Hence the provisions of subsec 34R(10) of the ASIO Act should be amended so as to add a requirement that the prescribed authority be satisfied that the questioning will continue beyond one of the relevant "totals" only to the extent necessary to accommodate the need for translation from one language to another.
**APPENDIX A**

**Recommendation IV/6:** The offence of failing to produce a record or thing should be amended to include the wilful destruction of a record or thing as well as tampering with a record or thing with the intent to prevent it from being produced, or from being produced in a legible form.

**Recommendation IV/7:** The QW provisions should be amended to make clear that a person who has been charged with a criminal offence cannot be subject to questioning until the end of their criminal trial.\(^{430}\)

**Recommendation IV/8:** ASIO should provide additional guidance and information to those officers involved in the preparation of QW reports to ensure the reports include a full assessment of the overall intelligence value of the information obtained through the use of QWs.

**Chapter V**

**Recommendation V/1:** The provisions of Subdiv C in Div 3 of Part III of the ASIO Act should be repealed.

**Recommendation V/2:** The QW provisions should be amended to permit arrest if the police officer serving the warrant believes on reasonable grounds from anything said or done by the person served that there is a serious possibility that he or she intends not to comply with the warrant, and also to permit the prescribed authority to direct detention after service of a QW but before the time specified in it for attendance if it appears on reasonable grounds that there is an unacceptable risk of the person tipping off another involved in terrorism, failing to attend or destroying or tampering with evidence.\(^{431}\)

**Chapter VI**

**Recommendation VI/1:** Motivation should be removed as an element of the defined term “terrorist act” in the Code.\(^{432}\)

**Recommendation VI/2:** Hostage taking should be expressly included in Australia’s definition of “terrorist act” in the Code.

**Recommendation VI.3:** Acts committed during an armed conflict governed by international law should be excluded from the definition of “terrorist act” in the Code.

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\(^{430}\) Hence sec 34L of the ASIO Act should be amended, perhaps by insertion of another exception to subsec 34L(2), to provide for the case of questions going to matters connected with allegations made in pending charges against the person, including in relation to the person’s defence to them.

\(^{431}\) Hence subsec 34K(1) of the ASIO Act should extend the powers under paras (a), (b) and (c) to the period after issue of a QW including before first attendance is required, in terms drawing on sec 18AA of the New South Wales Crime Commission Act 1985 (NSW).

\(^{432}\) Hence in sec 100.1 of the Code, definition of “terrorist act”, para (b) should be deleted.
APPENDIX B

BIBLIOGRAPHY


Charles Kurzman, *The Missing Martyrs: Why there are so few Muslim Terrorists*, Oxford University Press (2011)


APPENDIX B

Ben Saul, Defining Terrorism in International Law, Oxford University Press (2006)
Rosalyn Higgins and Maurice Flory (eds), Terrorism and International Law, Routledge (1997)
APPENDIX C
CONSULTATION AND SUBMISSIONS

This year, the INSLM held hearings under the 2010 Act for the purposes of considering the legislative provisions for questioning warrants and questioning and detention warrants in Div 3 of Part III of the ASIO Act and control orders and preventative detention orders in Divs 104-105 of Part 5.3 of the Code.

The INSLM may direct that any hearings under subsec 21(1) are to be held in private and must give such a direction for any time during which a person is giving evidence that discloses operationally sensitive information. All hearings held this year were conducted in private. Witnesses were summoned under subsec 22(1) of the 2010 Act to attend and give evidence at the hearings. All witnesses were officers of relevant Commonwealth departments and agencies. In accordance with subsec 21(4) of the 2010 Act, a record was made of each hearing. A number of departments and agencies also made written submissions to the INSLM.

The INSLM advertised for public submissions through a one month national advertising campaign calling for submissions to the INSLM’s review. Information about the review was published on the INSLM’s website. The INSLM wrote to Federal, State and Territory Governments and political parties, academics, civil society, solicitors and counsel inviting their views as part of the review process. The INSLM received 16 written submissions.

Persons consulted

Australian Government
Australian Federal Police
Australian Defence Force
Australian Security Intelligence Organisation
Commonwealth Attorney-General’s Department
Commonwealth Director of Public Prosecutions
Department of Defence
Department of Foreign Affairs and Trade
Department of the Prime Minister and Cabinet
Dr Vivienne Thom, Inspector-General of Intelligence and Security
Dr Margot McCarthy, National Security Adviser
Non-Government

Prof David Cole, Georgetown University

Mr Ben Emmerson QC, UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism

The Human Rights Commission of Malaysia (SUHAKAM)

Iraqi Ministry of Justice officials

Dr Ben Saul, University of Sydney

Prof Martin Scheinin, Former UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism

Prof Clive Walker, Special Adviser to Mr David Anderson QC, Independent Reviewer of Terrorism Legislation

The Hon. Anthony Whealy QC

Events attended

Participated in the UN High Commissioner for Refugees Expert Roundtable on National Security Assessments, 3 May 2012

Public speech on The Independent National Security Legislation Monitor delivered at the Australian National University, 30 May 2012

Discussant at the NSW Law Society Thought Leadership Rule of Law Series, 17 September 2012

Speech delivered to the International Malaysia Law Conference on Counter-Terrorism, Human Rights and the Rule of Law, 27 September 2012

Discussant at the NSW Bar Association and Gilbert + Tobin Centre of Public Law seminar

The reshaping of control orders in the United Kingdom: Time for a fairer go, Australia, 12 December 2012

Participated in the International Association of Constitutional Law: Constitutional Responses to Terrorism Research Group Workshop, States of Surveillance: Counter-Terrorism and Comparative Constitutionalism, University of New South Wales, 13–14 December 2012
Submissions received

1. Gilbert + Tobin Centre of Public Law, Prof George Williams, Ms Nicola McGarrity and Ms Lisa Burton (Submission on ASIO Powers)
2. Gilbert + Tobin Centre of Public Law, Prof George Williams, Prof Andrew Lynch, Ms Tamara Tulich, Ms Rebecca Welsh and Ms Lisa Burton (Submission on control orders and preventative detention orders)
3. Law Council of Australia
4. Law Council of Australia – Supplementary submission
5. Humanist Society of Victoria
6. Human Rights Law Centre
7. Civil Liberties Australia
8. Castan Centre for Human Rights
9. International Commission of Jurists (Australia)
10. Dr Sarah Sorial
11. Australian Human Rights Commission
12. Centre of Excellence in Policing and Security
13. Australian Lawyers for Human Rights
14. Dr Ben Saul (Submission on ASIO powers)
15. Dr Ben Saul (Submission on counter-terrorism legislation)
16. NSW Council for Civil Liberties
APPENDIX D

AVO LEGISLATION IN VICTORIA
(PERSONAL SAFETY INTERVENTION ORDERS)

The Personal Safety Intervention Orders Act 2010 (VIC) provides a civil process for the court to make a personal safety intervention order (“order”) to protect an individual from a risk of serious harm. The purpose of the legislation is “to protect the safety of victims of assault, sexual assault, harassment, property damage or interference with property, stalking and serious threats.”

A magistrate may make an order where they are satisfied on the balance of probabilities that a respondent (the person against whom the order will be made) has committed “prohibited behaviour”, there is a high likelihood of that behaviour continuing and the order is necessary to protect a person from serious harm. They are designed for violent disputes and a person can apply for an order if they have been assaulted, sexually assaulted, harassed, threatened or stalked by a person, or if another person has continually damaged their property.

Before an order can be made, a person must commit “prohibited behaviour”. Prohibited behaviour is defined as assault, sexual assault, harassment, property damage or interference or making a serious threat. Prohibited behaviour is defined in such a way that if someone has committed prohibited behaviour towards a person then they will have committed a criminal offence. For example, a “serious threat” is defined as (a) a threat to kill, within the meaning of sec 20 of the Crimes Act 1958 or (b) a threat to inflict serious injury, within the meaning of sec 21 of the Crimes Act.

The court may make an order if satisfied on the balance of probabilities that the respondent has committed prohibited behaviour against the affected person and he or she is likely to continue to do so or do so again, and the respondent’s prohibited behaviour would cause a reasonable person to fear for his or her safety; or the respondent has stalked the affected person and is likely to continue to do so or do so again. The court may only make the order if it is appropriate in all the circumstances of the case to do so.

433  sec 1 of the Personal Safety Intervention Orders Act 2010 (VIC)
434  sec 5 of the Personal Safety Intervention Orders Act 2010 (VIC)
435  sec 9 of the Personal Safety Intervention Orders Act 2010 (VIC)
436  subsec 61(1) the Personal Safety Intervention Orders Act 2010 (VIC). Note that an order cannot be made if the affected person and the respondent are related as there are separate family violence intervention orders that apply to domestic violence: para 61(1)(b).
A court may include in an order any conditions that appear to the court necessary or desirable in the circumstances. A non-exhaustive list of the types of conditions that may be included in an order include: prohibiting the respondent from committing any of the prohibited behaviours, holding a firearms licence or owning a weapon, contacting the affected person or going anywhere near their home, school or workplace.\(^{437}\)

There is no maximum amount of time an order can remain in force against an adult respondent.\(^{438}\) In determining the length of a time an order will be in force, the court must take into account any assessment by the affected person or applicant of the level and duration of the risk to the affected person from the respondent and may also take into account any matters raised by the respondent that are relevant to the duration of the order.\(^{439}\)

It is a criminal offence punishable by imprisonment for up to 2 years to contravene an order.\(^{440}\) If a police officer believes on reasonable grounds that a person has contravened an order then the person may be arrested and detained without warrant.\(^{441}\)

\(^{437}\) sec 67 of the Personal Safety Intervention Orders Act 2010 (VIC)
\(^{438}\) Where the respondent is a child an order cannot be in force for more than 12 months unless exceptional circumstances exist: sec 78 of the Personal Safety Intervention Orders Act 2010 (VIC).
\(^{439}\) sec 77 of the Personal Safety Intervention Orders Act 2010 (VIC)
\(^{440}\) sec 100 of the Personal Safety Intervention Orders Act 2010 (VIC)
\(^{441}\) sec 101 of the Personal Safety Intervention Orders Act 2010 (VIC)
APPENDIX E

PEACE BONDS UNDER THE CANADIAN CRIMINAL CODE

A peace bond is a court order that requires the person to “keep the peace” for a certain amount of time and obey any conditions ordered. There are ordinary peace bonds to protect a specified individual from harm and special peace bonds directed at preventing harm to the general community. These special peace bonds can be made against people who are suspected of certain serious crimes or who have been convicted of such crimes. Under the Canadian Criminal Code peace bonds are termed “sureties to keep the peace” and their operation is described below.

**Ordinary peace bonds to protect a specified individual from harm**

A peace bond can be ordered by the court under sec 810 of the Canadian Criminal Code. The court can order a peace bond against a person if an applicant has reason to fear for the personal safety of themselves or their family, or fear damage to their property from another person. The court can only make the order if satisfied that there are reasonable grounds for the fears held by the applicant.

The court can order that the defendant enter into a recognizance (with or without sureties) to keep the peace and be of good behaviour for any period that does not exceed twelve months. The court can order the defendant to comply with such other reasonable conditions as set out in the recognizance as the court considers desirable for securing the good conduct of the defendant. A non-exhaustive list of conditions that may be imposed reflect those that can be imposed under Australian AVOs and include requirements that a person be of good behaviour and not commit any crimes, not contact the applicant or go within a certain distance of their home, school or work and not possess firearms.

It is a criminal offence punishable by up to 2 years imprisonment to contravene a condition of a sec 810 peace bond. The court also has the power to commit the defendant to prison for a term not exceeding twelve months if he or she fails or refuses to enter into the recognizance.

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442 subsec 810(1) of the *Criminal Code*
443 subsec 810(3) of the *Criminal Code*
444 para 810(3)(a) of the *Criminal Code*
445 A non-exhaustive list of conditions that could be applied are set out in subsecs 810(3.1) and (3.2).
446 sec 811 of the *Criminal Code*
447 para 810(3)(b) of the *Criminal Code*
Peace bonds to prevent the commission of an organized crime or terrorism offence, or an offence of intimidating a criminal justice system official

Peace bonds can be ordered under sec 810.01 of the Canadian Criminal Code to prevent the commission of an organized crime or terrorism offence or an offence of intimidating a criminal justice system official under sec 423.1.448

A person (the informant) who fears on reasonable grounds that another person will commit an offence under sec 423.1, a criminal organization offence or a terrorism offence may with the consent of the Attorney-General, apply for a peace bond.449 If the court is satisfied by the evidence adduced that the informant has reasonable grounds to fear that the person will commit an offence under section 423.1, a criminal organization offence or a terrorism offence, the court may order that the defendant enter into a recognizance to keep the peace and be of good behaviour for a period of not more than 12 months.450 However, if the person has previously been convicted of one of the offences in subsec 810.01(1) the duration of the order can be extended to 2 years.451

The court may include any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant, including conditions that require the defendant:-

- to participate in a treatment program;
- to wear an electronic monitoring device (but only if the Attorney-General makes the request);
- to remain within a specified geographic area unless written permission to leave that area is obtained from the judge;
- to return to and remain at their place of residence at specified times;
- to abstain from the consumption of drugs, except in accordance with a medical prescription, of alcohol or of any other intoxicating substance; and
- to surrender firearms and other weapons.452

It is a criminal offence punishable by up to 2 years imprisonment to contravene a condition of a sec 810.01 peace bond.453 The court also has the power to commit the defendant to prison for a term not exceeding twelve months if he or she fails or refuses to enter into the recognizance.454

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448 An offence under subsec 423.1 includes conduct aimed at intimidating a justice system official to impede them in their duties or to impede the administration of justice, or to prevent a journalist from getting information about a criminal organization to the public.

449 subsec 810.01(1) of the Criminal Code

450 subsec 810.01 (3) of the Criminal Code

451 subsec 810.01 (3.1) of the Criminal Code

452 subsecs 810.01 (4.1) and (5) of the Criminal Code

453 sec 811 of the Criminal Code

454 subsec 810.01 (4) of the Criminal Code
Canadian peace bond provisions as de facto control orders

The Canadian Government extended the use of the regular peace bond provision to suspected terrorists as part of an anti-terrorism legislative reform package in 2001. The peace bonds for terrorist suspects (sec 810.01) was not subject to the 2007 sunset clause that applied to other powers introduced in the same package. The 2001 reform package also established a regime for preventative detention, with preventative arrest powers operating in Canada from 2001-2007, when they were allowed to sunset. The Canadian Government is currently seeking to reinstate the preventive arrest regime that had allowed for a person to be arrested without charge then placed on recognizances such as the ones available under secs 810 and 810.01. The preventative arrest provisions were never used during the 6 years they were in force. Kent Roach has recognized such powers have “the potential to morph into a de facto control order regime because judges can impose peace bonds for up to one year on those subject to preventive arrest”.

Peace bonds have been used against suspected terrorists in Canada following a stay of their criminal proceedings. Qayyum Abdul Jamal, Ahmad Mustafa Ghany and Ibrahim Aboud were each charged with terrorism offences under the Canadian Criminal Code (participating in a terrorist group as well as training for terrorist purposes). Some of the charges were later withdrawn and a stay of proceedings was ordered in respect of the remaining charges. Each of the three men agreed to a sec 810.01 peace bond which included conditions of not associating with co-accused, surrendering their passports, abiding by a curfew and not possessing any firearm or explosive substance. The Crown agreed that in signing the peace bonds the men were not admitting to any wrongdoing. It is troubling that where charges are withdrawn or stayed, peace bonds of this kind are pursued, particularly where the individual must agree to a peace bond as a pre-condition for the stay of proceedings. Jamal described the resolution of the criminal proceedings against him and the decision to enter into a peace bond as follows: “[o]ne of the charges... was withdrawn and the other was resolved by a peace bond”.

455  see sec 810.01 of the Criminal Code
456  Kent Roach, “Counter-Terrorism In and Outside Canada and In and Outside the Anti-Terrorism Act” Review of Constitutional Studies (2012) 16(2), 243-264; 251-252
457  The charges were suspended with the Crown having an option to reinstate them within one year with new evidence. However, no charges were reinstated within the period.
458  Jamal v. First Student Canada 2009 HRTO 2083 [7] (this was an anti-discrimination case brought by Jamal against his former employer who was alleged to have terminated Jamal’s employment on the basis of the criminal proceedings and peace bond). Jamal was charged with several terrorism offences and incarcerated for 17 months before his release on a peace bond. He was never convicted of a terrorism offence.
APPENDIX F

POLICE POWERS OF QUESTIONING POST-ARREST AND PRE-CHARGE

Commonwealth

Pre-charge questioning of suspects and arrested persons

Part 1C of the Crimes Act provides for the pre-charge detention of persons arrested under sec 3W of the Act for the purpose of furthering police investigations.\(^{459}\) Part 1C provides for the detention of arrested persons. It also imposes obligations on police officers in relation to arrested persons and ‘protected suspects’.\(^{460}\) Division 2 of Part 1C is divided into two subdivisions, subdiv A deals with non-terrorism offences and subdiv B deals with terrorism offences.

Non-terrorism offences

A person arrested for a non-terrorism offence may, while arrested for that offence, be detained for the purpose of investigating whether the person committed the offence and/or committed another Commonwealth offence an investigating official reasonably suspects the person has committed. The “investigation period” during which the person may be detained must be reasonable having regard to all the circumstances and cannot exceed 4 hours.\(^{461}\) A magistrate may extend the period to 8 hours (this may be done once only).\(^{462}\) Any reasonable period of time when questioning is suspended or delayed for one of the listed reasons eg to allow an


\(^{460}\) A person is a ‘protected suspect’ for the purposes of Part 1C if the person is in the company of an investigating official for the purpose of being questioned about a Commonwealth offence but the person has not been arrested for the offence where any one or more of the following applies: a) the official believes there is sufficient evidence to establish that the person committed the offence, b) the official would not allow the person to leave if the person wished to do so, c) the official has given the person reasonable grounds for believing the person would not be allowed to leave if he or she wished to do so: subsec 23B(2).

\(^{461}\) para 23C(4)(b). This period is reduced to 2 hours for an Aboriginal or Torres Strait Islander or a person under 18 years: para 23C(4)(a). The number and complexity of matters being investigated is the only factor that must be considered in determining whether the period is reasonable: subsec 23C(5). No other factors are listed.

\(^{462}\) sec 23DA. The magistrate must be satisfied of the factors in subsec 23DA(2) before extending the period.
arrested person to communicate with their lawyer do not count towards the “investigation period” and will extend the total period of remand.463

**Terrorism offences**

A person arrested for a terrorism offence may, while arrested for that offence, be detained for the purpose of investigating whether the person committed the offence and/or committed another Commonwealth offence an investigating official reasonably suspects the person has committed. The “investigation period” during which the person may be detained must be reasonable having regard to all the circumstances and cannot exceed **4 hours**.464 A magistrate may extend the period any number of times to a total of **20 hours**, extending the period to a total of **24 hours**.465 Any reasonable period of time when questioning is suspended or delayed for one of the listed reasons eg to allow an arrested person to communicate with their lawyer do not count towards the “investigation period” and will extend the total period of remand.466 If a person is arrested for a terrorism offence and an investigation is being conducted into whether the person committed the offence or another terrorism offence, an investigating official may apply to a magistrate to disregard any reasonable time during which the questioning of the person is suspended or delayed.467 When the investigation period of 24 hours is added to the maximum of **7 days** that may be specified, the period of permissible detention for a person arrested for a terrorism offence is up to **8 days**.468

Division 3 of Part 1C sets out the obligations of investigating officials in relation to people under arrest and protected suspects. A person must be treated with humanity and with respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment.469 The investigating official must, before starting

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463 subsec 23C(7)
464 subsec 23DB(5)(b). This period is reduced to 2 hours for an Aboriginal or Torres Strait Islander or a person under 18 years: para 23DB(5)(a). The number and complexity of matters being investigated is the only factor that must be considered in determining whether the period is reasonable: subsec 23DB(6). No other factors are listed.
465 sec 23DF(7). The magistrate must be satisfied of the factors in subsec 23DF(2) before extending the period.
466 subsec 23DB(9)
467 An application may be made under subsec 23DC(2). Para 23DB(9)(m) enables time specified by a magistrate under sec 23DD to be discounted from the “investigation period” so long as the suspension or delay in the questioning is reasonable. Subsec 23DB(11) provides that no more than 7 days may be disregarded under para 23DB(9)(m).
468 The 7 day cap on the amount of time that may be specified as not counting towards the “investigation period” in subsec 23DB(11) of the Crimes Act was introduced following the case of Dr Mohamed Haneef. Dr Haneef was arrested and held under the Crimes Act for twelve days as no cap on “dead time” existed at the time of his arrest and detention. The Clarke Inquiry was critical of the lack of a cap on dead time and recommended a cap of no more than 7 days be introduced. Report of the Inquiry into the Case of Dr Mohamed Haneef, The Hon, John Clarke QC, 2008, p 249.
469 sec 23Q
to question a person, caution them that they do not have to say or do anything, but that anything they do say or do may be used in evidence. 470

The official must inform the person that they are a) entitled to contact a relative or friend to notify them of their whereabouts and b) entitled to contact a lawyer and have the right to arrange for the lawyer to be present during questioning. The investigating official must make arrangements for these communications and in the case of any communication with a lawyer, must as far as practicable allow the person to communicate in circumstances where the communication will not be overhead. Any questioning must be deferred for a reasonable time to enable the communication and, where the person so elects, to enable the lawyer to attend the questioning. 471

If a person who is being questioned as a suspect (whether under arrest or not) makes a confession or admission to an investigating official, that confession/admission is inadmissible as evidence against the person in proceedings for any Commonwealth offence unless the questioning of the person and anything said by the person during questioning was tape recorded. 472 The burden on the prosecution to prove a confession/admission was voluntary remains as does the discretion of the judiciary to exclude unfairly, illegally or improperly obtained evidence. 473

**Australian Capital Territory**

**Pre-charge questioning of suspects and arrested persons**

Section 187 of the *Crimes Act 1900* (ACT) applies the provisions relating to questioning under Part 1C of the *Crimes Act 1914* (Cth).

**New South Wales**

**Pre-charge questioning after arrest**

Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) provides for the period of time a person under arrest may be detained by a police officer to enable the investigation of the person's involvement in the commission

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470 sec 23F. The giving of this caution and any response must, where practicable, be tape recorded: sec 23U.

The right to remain silent is not affected by Part 1C: sec 23S.

471 sec 23G. The right to communicate with a friend/relative and/or lawyer can only be denied in very limited circumstances and in the case of a lawyer, there must be exceptional circumstances, senior officer approval and the offer and arrangement of alternative legal representation: sec 23L.

472 sec 23V. Note that where it is not reasonably practicable to tape record, other measures must be taken as set out in para 23V(1)(b). A person must be provided with a copy of the tape recording (and if one is prepared, transcript) without charge within 7 days of the making of the recording: subsec 23V(2). A court may still admit evidence where sec 23V was not complied with, but only in certain circumstances: subsecs 23V(5)-(7).

473 secs 23Q and 23S
of an offence and provides for the rights of the person so detained.\textsuperscript{474} The powers in Part 9 expressly authorise the detention of a person who is under arrest for such a period regardless of any requirement imposed by law to bring the person before a judicial or authorised officer without delay or within a specified period.\textsuperscript{475}

Where a person consents to accompany police to the station to assist them with their inquiries that person may be under arrest for the purposes of Part 9 and would be entitled to the protections afforded by it.\textsuperscript{476} A person ceases to be under arrest for the purposes of Part 9 if the person is remanded in respect of the offence (so that the provisions do not apply post-charge).\textsuperscript{477}

A police officer may detain a person under arrest for the “investigation period” provided for by sec 115, for the purpose of investigating whether the person committed the offence for which they are under arrest and if while the person is detained the police officer forms a reasonable suspicion about the person’s involvement in another offence, they may also detain the person for the purposes of investigating the person’s involvement in that other offence. The investigation period must be “reasonable having regard to all the circumstances”. In determining a reasonable time, “all the relevant circumstances of the particular case must be taken into account”.\textsuperscript{478}

In any event, the investigation period cannot exceed \textbf{4 hours} unless that period is extended by a detention warrant issued by an authorised officer (e.g. a magistrate).\textsuperscript{479} A detention warrant may extend the maximum investigation period by up to \textbf{8 hours} and it cannot be extended more than once.\textsuperscript{480} The authorising officer must be satisfied of certain matters before issuing a detention warrant\textsuperscript{481} and the person’s lawyer may make representations to the authorising officer about the application.\textsuperscript{482} Time out periods apply so that certain times are to be disregarded in calculating the investigation period. These include the time required

\begin{itemize}
\item Part 9 does not confer a power to arrest. For powers relating to arrest see Part 8.
\item A person is deemed to be under arrest for the purposes of Part 9 if the person is in the company of a police officer for the purpose of participating in an investigative procedure and the police officer a) believes there is sufficient evidence to establish that the person has committed an offence that is the subject of the investigation, or b) the police officer would arrest the person if they attempted to leave, or c) the police officer has given the person reasonable grounds to believe the person would not be allowed to leave if they wished to do so: subsec 110(2).
\item A detention warrant may extend the maximum investigation period by up to 8 hours and it cannot be extended more than once. The authorising officer must be satisfied of certain matters before issuing a detention warrant and the person’s lawyer may make representations to the authorising officer about the application. Time out periods apply so that certain times are to be disregarded in calculating the investigation period. These include the time required
\end{itemize}

\textsuperscript{474} sec 109 – Objects of Part
\textsuperscript{475} sec 109 – Objects of Part
\textsuperscript{476} sec 109 – Objects of Part
\textsuperscript{477} sec 109 – Objects of Part
\textsuperscript{478} sec 109 – Objects of Part
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\textsuperscript{482} sec 109 – Objects of Part
for the person to consult with a lawyer or friend or the time reasonably required to carry out charging procedures in respect of that person.\textsuperscript{483}

Division 3 of Part 9 sets out the safeguards relating to persons in custody for questioning. As soon as practicable after a person comes into custody, the police officer with responsibility for the person detained must, orally and in writing, caution the person that they do not have to say or do anything but that anything they say or do may be used in evidence.\textsuperscript{484}

The police officer must inform the person of their right to communicate with a friend, relative etc and a lawyer of the person’s choice and to invite these people to attend the place of detention.\textsuperscript{485} The police officer must, as soon as practicable, allow the person reasonable facilities to communicate with the nominated persons where the communication will not be overhead.\textsuperscript{486} If the nominated persons attend the place of detention, the police officer must provide reasonable facilities for the arrested person to communicate with them in private.\textsuperscript{487} The police officer must defer for a reasonable period (but no more than 2 hours) any investigative procedure to enable the arrested person to consult with the friend, lawyer etc.\textsuperscript{488} If the arrested person requests, their lawyer must be allowed to be present during any investigative procedure and to give advice to the person.\textsuperscript{489} Anything said by the lawyer during any such investigative procedure must be recorded and form part of the formal record of the investigation.\textsuperscript{490}

**Northern Territory**

**Pre-charge questioning after arrest**

Division 6 of Part VII of the *Police Administration Act* (NT) governs the questioning and detention of a person who has been taken into lawful custody (arrested).

A person who is taken into lawful custody must be brought before a justice or court as soon as is practicable, however, this is subject to the power of a police officer to continue to hold a person in custody to enable the person to be questioned or investigations to be carried out to obtain evidence of or in relation to an offence the police officer believes on reasonable grounds involves the

\begin{itemize}
\item \textsuperscript{483} sec 117
\item \textsuperscript{484} para 122(1)(a)
\item \textsuperscript{485} subsec 123(1)
\item \textsuperscript{486} subsec 123(2)
\item \textsuperscript{487} subsec 123(4)
\item \textsuperscript{488} subs secs 123(3) and (7)
\item \textsuperscript{489} subsec 123(5)
\item \textsuperscript{490} subsec 123(6)
\end{itemize}
A person cannot be granted bail while so detained, whether or not they have been charged with an offence.\textsuperscript{492}

A police officer may continue to hold a person for the purpose of questioning the person or for enabling investigations to be carried out to obtain evidence of or in relation to a) the offence in respect of which the person was taken into custody (but only if it is an offence with a maximum penalty of imprisonment for any period) or b) an offence which is not the offence in respect of which the person was taken into custody (but only if it is an offence with a maximum penalty of imprisonment for 5 years or more).\textsuperscript{493}

In determining what is a reasonable period for the purposes of holding the person for questioning, the justice or court before whom the person is brought, or the question raised, must, so far as is relevant, take into account the factors listed in the legislation. However, this does not limit the discretion of the justice or the court from taking into account other factors.\textsuperscript{494} There is no statutory maximum period of time a person can be held in custody for questioning.

Before any questioning commences, the investigating police officer must give a caution to the person in custody that they do "not have to say anything but that anything the person does say or do may be given in evidence."\textsuperscript{495} The officer must inform the person of their right to communicate with a friend or relative and to inform them of the person's whereabouts. The officer must defer questioning for a reasonable period and provide facilities for the communication.\textsuperscript{496} Both the caution and offer of facilities to communicate must be electronically recorded.\textsuperscript{497} There is no requirement to inform the person of their right to contact a lawyer.

Evidence of a confession or admission made to a police officer by a person suspected of having committed a relevant offence is not admissible as part of the prosecution case unless a) where the confession/admission was made before the commencement of questioning, the substance of the confession/admission was confirmed by the person and that confirmation was electronically recorded or where the confession/admission was made during questioning, the questioning

\textsuperscript{491} subsecs 137(1) and (2). This is regardless of whether it is the offence for which the person was taken into custody or whether the offence was committed in the Northern Territory.

\textsuperscript{492} subsec 127(2)

\textsuperscript{493} subsec 137(3)

\textsuperscript{494} see sec 138 for full list of factors

\textsuperscript{495} subsec 140(a)

\textsuperscript{496} subsec 140(b). Unless the exceptional circumstances in subsec 140(c) or (d) exist, the police officer must defer questioning until the person has had an opportunity to communicate with their chosen person: sec 140.

\textsuperscript{497} sec 141. This must be done if practicable and must include the giving of the information by the police officer and the person’s responses if any.
and anything said by the person was electronically recorded and the electronic recording is available to be tendered into evidence.\textsuperscript{498}

\textbf{Queensland}

\textbf{Pre-charge questioning after arrest}

Chapter 15 of the \textit{Police Powers and Responsibilities Act 2000} (Qld) provides for the period of time a person under arrest may be detained by a police officer to enable the investigation of the person's involvement in the commission of an indictable offence and provides for the rights of the person so detained. Part 2 of Chapter 15 applies to a person who is lawfully arrested for an indictable offence, including if the person is arrested under subsec 365(2),\textsuperscript{499} or is in lawful custody for a charge of an offence that has not been decided, or is serving a prison sentence.\textsuperscript{500}

A police officer may detain a person under arrest for a reasonable time to investigate or question the person about any indictable offence the person is suspected of having committed, whether or not that is the offence for which the person is in custody.\textsuperscript{501} Section 404 sets out those factors which must be taken into account in deciding what a reasonable time to detain a person for questioning is. If a person decides not to answer questions or not to continue answering questions then continuing the detention period may not be reasonable unless it is necessary to carry out further investigations or unless the person consents to, or is required by another authority, to participate in an investigative procedure.\textsuperscript{502}

The person must not be detained for questioning for more than 8 hours unless the detention period is extended.\textsuperscript{503} During the 8 hours the person may be questioned for not more than 4 hours.\textsuperscript{504} A police officer may apply for an order

\textsuperscript{498} sec 142. This is subject to sec 143 which provides a discretionary power to the court to admit certain evidence where the requirements of the Div have not been met if satisfied of certain matters. The investigating officer must inform the person they are entitled to a copy of the electronic recording on request and must provide this free of charge within 7 days after the request: subsec 142(2). If a transcript of the recording is prepared by police, they must cause a copy of the transcript to be given to the person or their lawyer within 7 days after the request: para 142(2)(d).

\textsuperscript{499} sec 365 provides for arrest without warrant. Subsec(2) provides that it is "lawful for a police officer, without warrant, to arrest a person the police reasonably suspects has committed or is committing an indictable offence, for questioning the person about the offence, or investigating the offence, under chapter 15."

\textsuperscript{500} sec 398

\textsuperscript{501} subsec 403(1)

\textsuperscript{502} subsec 404(2)

\textsuperscript{503} subsecs 403(2)

\textsuperscript{504} subsecs 403(2) and (4). The time out period may be more than 4 hours.
extending the detention period.\textsuperscript{505} The magistrate or justice of the peace may extend the detention period but only if satisfied it is necessary for one or more of the specified reasons, the investigation is being conducted properly and without unreasonable delay and the person or their lawyer has been given an opportunity to make submissions about the application.\textsuperscript{506} The order may authorize the questioning, or further questioning of the person for a reasonable time (but not more than \textbf{8 hours}) and must include the time the justice or magistrate considers should be allowed as time out.\textsuperscript{507} There is no statutory limit on the number of extensions which may be granted. There is no statutory maximum for the amount of time that is reasonable for a person to be detained under these provisions.

Part 3 of Chapter 15 sets out safeguards for ensuring the rights of persons questioned for indictable offences and is not limited to a person who is under arrest. Part 3 of Chapter 15 applies to a person who has been arrested and a suspect who is not arrested “if the person is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence.”\textsuperscript{508} Nothing in Part 3 of Chapter 15 prevents a person from voluntarily “helping a police officer by making a statement or answering questions relating to the matter for which the person is charged after a proceeding for the offence has been started.”\textsuperscript{509}

A police officer must, before questioning the person, caution the person in the way required under the responsibilities code, although this does not need to be in writing.\textsuperscript{506} Before a police officer starts to question a person for an indictable offence, they must inform the person of their right to contact a friend or relative and a lawyer of their choice. The police officer must delay the questioning for a reasonable time to allow the person to contact the friend/relative and lawyer and where relevant, to travel to the place of detention and consult with them there.\textsuperscript{510}

The police officer must as soon as practicable, provide reasonable facilities for the person to speak to the friend/relative and lawyer. Where reasonably practicable, the police officer must allow the person to speak to the lawyer in circumstances where they will not be overhead. If the arrested person chooses to have another

\textsuperscript{505} subsec 405(1) This application is to be made to a magistrate or justice of the peace: subsec 405(2) but must be made to a magistrate if the total questioning period since the detention began will, if extended, be more than 12 hours: subsec 405(3).

\textsuperscript{506} subsec 406(1)

\textsuperscript{507} subsec 406(2). Only a magistrate can authorise questioning of a person for a period that would extend the total questioning period since the detention began to more than 12 hours: subsec 406(3).

\textsuperscript{508} subsec 415(1)

\textsuperscript{509} subsec 417(1)

\textsuperscript{510} sec 431

\textsuperscript{511} sec 418. Unless special circumstances exist, a delay of more than 2 hours may be unreasonable: subsec 418(6). Div 3 sets out special requirements for questioning Aboriginal and Torres Strait Islanders, children and those with impaired capacity or who are intoxicated.
person present during questioning, the police officer must allow the other person to be present and give advice during questioning.\footnote{512}{sec 419. The person may be excluded from the questioning if the police officer considers they are unreasonably interfering with the questioning: subsec 419(3). The rules for exclusion are set out in secs 424-426.}

There are requirements for the electronic recording of questioning but courts have a discretionary power to admit a record of questioning, or of a confession or admission, into evidence where these requirements were not complied with.\footnote{513}{Div 7, secs 436-439. The court may only admit the evidence if, “having regard to the nature of and the reasons for the noncompliance and any other relevant matters, the court is satisfied, in the special circumstances of the case, admission of the evidence would be in the interests of justice”: subsec 439(2).}

\section*{South Australia}

\subsection*{Pre-charge questioning of suspects and arrested persons}

Part 17 of the \textit{Summary Offences Act 1953} (SA) sets out obligations to record interviews with suspects (whether or not the person has been arrested). Part 18 sets out powers of arrest, including the detention of an arrested person and rights on arrest.

\subsection*{Interviewing suspects, including arrested persons}

An investigating officer who suspects or has reasonable grounds to suspect a person of having committed an indictable offence and who proposes to interview the suspect\footnote{514}{Interview includes a conversation, part of a conversation or a series of conversations: sec 74C. If the suspicion, or a reasonable ground for suspicion, arises during the course of an interview then the officer’s obligations under subsec 74D(1) arise at that point and apply to the interview from that point: subsec 74D(2).} must comply with obligations to record that interview.\footnote{515}{Where reasonably practicable, this must be a video recording. There is also provision for an audio recording where video recording not reasonably practicable. Where neither video nor audio is reasonably practicable, there are strict requirements set out in detail for the recording of the interview: subsec 74D(1) A suspect must be provided with a copy, on request and payment of the prescribed fee, of the audio from an interview: subsec 74D(6).}

In proceedings for an indictable offence, evidence of an interview between an investigating officer and the defendant is inadmissible against the defendant unless the officer complied with Part 17 although the court has a discretionary power to admit the evidence if satisfied that it is in the interests of justice to require the admission of the evidence despite noncompliance.\footnote{516}{See sec 74E. Note also subsec 74E(2) which requires that in a jury trial, the non-compliance must be brought to the attention of the jury and an appropriate warning must be given to the jury in view of it.}
Post-arrest questioning and detention

A person who is apprehended without warrant must be immediately delivered into the custody of the police officer in charge of the nearest police station.\(^{517}\) However, where a person is apprehended without warrant on suspicion of having committed a serious offence, a police officer may for the purposes of investigating the suspected offence a) detain the person, prior to delivering him or her into custody at the nearest police station, for so long as may be necessary to complete the investigation of the suspected offence, or for the prescribed period, whichever is less and b) may take that person during the course of detention to places connected with the suspected offence.\(^{518}\) The prescribed period is 4 hours from the time of apprehension or such longer period (not exceeding 8 hours) as may be authorized by a magistrate.\(^{519}\)

Section 79A sets out the rights of a person on arrest.\(^{520}\) The arrested person is entitled to make a telephone call to a relative or friend to inform them of their whereabouts.\(^{521}\) Where the person is apprehended on suspicion of having committed an offence (as opposed to being about to commit an offence etc) then the person is entitled to have a lawyer, friend or relative present during any interrogation or investigation to which the person is subjected while in custody.\(^{522}\) While in custody the person is entitled to refrain from answering any question unless required to do so by law.\(^{523}\)

A police officer must as soon as practicable after the apprehension of a person inform them of their rights in subsec 79A(1) and must caution the person by warning them that anything that he or she may say may be taken down and used in evidence.\(^{524}\)

\(^{517}\) subsec 78(1)
\(^{518}\) subsec 78(2). Serious offence means an indictable offence or an offence punishable by imprisonment for 2 years or more: subsec 78(6).
\(^{519}\) subsec 78(6). Note the prescribed period does not include any delays occasioned by arranging for a lawyer or other person to be present during the investigation and the time it would have reasonably taken to convey the person from the place of apprehension to the nearest police station. The application to the magistrate for an extension to the prescribed period but set out the grounds for the application: subsec 78(4) There are no legislative grounds the magistrate must take into account in deciding whether to authorize the extension and there is no right for the person or their lawyer to make submissions to the magistrate on the application.
\(^{520}\) These rights apply where a person is apprehended by a police officer with or without a warrant. Special rules apply to persons under 18 years: subsec 79A(1a).
\(^{521}\) para 79A(1)(a)The phone call is to be in the presence of the police officer. The police officer may decline the contact with a friend or relative, however, there is no provision to deny the person access to a lawyer: subsec 79A(2).
\(^{522}\) subpara 79A(1)(b)(i).
\(^{523}\) subpara 79A(1)(b)(iii). This is a statutory form of the common law right to silence.
\(^{524}\) subsec 79A(3)
Tasmania

Pre-charge questioning after arrest

The Criminal Law (Detention and Interrogation) Act 1995 (TAS) sets out the powers and protections for the detention and questioning of persons lawfully arrested. Every person taken into custody must be brought before a magistrate or a justice as soon as practicable after being taken into custody.525 However, a person who has been taken into custody may be detained by a police officer for a reasonable time after being taken into custody for the purposes of questioning the person, or carrying out investigations in which the person participates, in order to determine their involvement, if any, in relation to an offence.526

There is a non-exhaustive list of factors that must be taken into account in determining what constitutes a reasonable time.527 There is no statutory maximum amount of time that a person can be held in custody for the purposes of questioning or investigation.

Before any questioning or investigation may commence, the police officer conducting the investigation must inform the person in custody of their right to communicate with a friend or relative to inform them of the person's whereabouts as well the right to communicate with a lawyer.528 Where the person chooses to communicate with these people, the police officer must defer the questioning and investigation for a time that is reasonable in the circumstances to enable the person to make, or attempt to make, the communication.529 The police officer must as soon as practicable enable the person to make the communication with a friend/relative/lawyer and must allow the person to communicate with a lawyer in circumstances in which as far as practicable the communication will not be

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525 subsec 4(1). Note that a person is in custody if he or she is under lawful arrest by warrant or under a provision of any Act: subsec 3(2). A suspect who is in custody but not under arrest will not be due the protections under the Act. See R v Reid and Swan [2000] TASSC 36 where the suspects were in de facto custody, that is, in law each was free to leave the police station but would have been arrested if they tried to do so. Slicer J left it undecided whether the protections of the Act applied to suspects in such de facto custody.

526 para 4(2)(a)

527 subsec 4(4)

528 subsec 6(1). However, if the person is 18 years or over, the police officer may deny the person in custody the right to communicate with a friend, relative or lawyer in certain circumstances for a period not exceeding 4 hours: subsec 6(3). For example, having regard to the safety of others, the questioning is so urgent that it should not be delayed: para 6(3)(b). The police officer may apply to a magistrate to deny the person in custody the right to communicate for a further period: subsec 6(4). If the magistrate is satisfied that there are reasonable grounds for doing so, they may make an order authorising the police officer to continue to deny the person contact with any or all of these people (friend, relative, lawyer) for such period as is specified in the order: subsec 6(6). There is no statutory maximum on the period during which a magistrate may deny the person the right to communicate, including with their lawyer.

529 subsec 6(2)
overhead. Section 9 specifies that certain other rights (the right to remain silent etc) are not affected. Although there is no requirement that a person be cautioned (informed of the right to silence and the ability for police to use evidence against them) before being interviewed.

Victoria

Pre-charge questioning after arrest

The Crimes Act 1958 (VIC) sets out the powers for police to detain a person already in lawful custody for questioning. If a person suspected of having committed an offence is in custody for that offence, an investigating official may, within a “reasonable time” inform the person and of the circumstances of that offence and question the person or carry out investigations in which the person participates in order to determine the involvement of the person in that offence. There is a non-exhaustive list of factors that may be considered in determining what constitutes a “reasonable time.” While it must be a “reasonable time” the Act does not set a maximum time limit a person can be detained for questioning.

Before any questioning or investigation begins, an investigating official must inform the person in custody that he or she does not have to say or do anything but that anything the person does say or do may be given in evidence. The person has a right to communicate with a friend/relative and lawyer and questioning must be deferred for a reasonable period to allow this communication. The communication with a lawyer must be in circumstances where as far as practicable the communication will not be overheard.

Recording of confessions and admissions

Evidence of a confession or admission made to police by a person who was suspected or ought reasonably to have been suspected of having committed an offence is inadmissible against the person in proceedings for an indictable offence unless it was recorded (regardless of whether the suspect was under arrest at

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530 subsec 6(7)
531 subsec 9(a). This includes the right of a person suspected of having committed an offence to refuse to answer questions or to participate in investigations except where required to do so by Tasmanian law or under a Commonwealth Act.
532 subsec 464A(2)
533 subsec 464A(4)
534 subsec 464A(3). The right to remain silent is not affected by the act: sec 464J.
535 subsec 464C(1). The questioning does not need to be deferred if the officer believes on reasonable grounds that the questioning is so urgent for the safety of others or the communication would result in the escape of an accomplice or the fabrication or destruction of evidence: paras 464C(1) (c) and (d).
536 para 464C(2)(b)
the time). The court has a discretionary power to admit the evidence where recording requirements were not met if the person seeking to adduce the evidence satisfies the court on the balance of probabilities that the circumstances are exceptional and justify the reception of the evidence.

**Western Australia**

**Pre-charge questioning of suspects and arrested persons**

The *Criminal Investigation Act 2006* (WA) sets out different police obligations and rights of suspects depending on whether a suspect has or has not been arrested.

**Interviewing suspects not under arrest**

Part 11 of the *Criminal Investigation Act 2006* (WA) sets out rights and obligations in relation to interviewing suspects who are not under arrest. There is no requirement to record the interview but evidence of an admission made by a suspect during questioning can only be admitted against the person in proceedings for an indictable offence if it was recorded. There is no requirement under Part 11 to caution a suspect that he or she does not have to participate in an interview and that the evidence obtained in an interview can be used against them.

**Detention and questioning after arrest**

Part 12 of the *Criminal Investigation Act 2006* (WA) sets out police powers of arrest. It also provides for the rights of arrested persons. An arrested person is entitled to be cautioned before being interviewed as a suspect. The person must

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537 subsec 464H(1)
538 subsec 464H(2)
539 A suspect is defined in sec 115 as “a person suspected of having committed an offence, whether or not he or she has been charged with the offence.”
540 If the suspect is a child charged with an indictable offence or an adult charged with an indictable offence that cannot be dealt with summarily, evidence of any admission by the suspect at interview is not admissible at trial unless the evidence is an audiovisual recording of the admission: subsec 118(2)-(3). If there is no audiovisual recording, the evidence is only admissible if the prosecution proves on the balance of probabilities that there is a reasonable excuse for its absence or if the court uses its discretionary power under sec 155 to admit the evidence: para 118(3)(b). Note that the requirement in para 118(3)(b) “does not apply to an admission by a person made before there were reasonable grounds to suspect that he or she had committed the offence.” Subsec 118(4).
541 For powers of arrest see sec 128.
542 Div 5 of Part 12 – dealing with arrested people.
543 para 138(2)(b)
be given a reasonable opportunity to contact a friend or relative to inform that person of his or her whereabouts and to communicate with a lawyer.  

The rights and obligations in relation to the detention of arrested suspects under Div 5 of Part 12 apply to a person who is under arrest “under section 128, or another written law, on suspicion of having committed an offence but who has not been arrested under an arrest warrant.” A police officer may detain an arrested suspect after the suspect is arrested for the purposes of a) investigating any offence suspected of having been committed by the suspect, b) interviewing the suspect in relation to any offence that the suspect is suspected to have committed and c) deciding whether or not to charge the suspect with an offence. The detention of an arrested suspect must be for one of these purposes and only for a period that is reasonable having regard to the mandatory list of factors. The detention of an arrested suspect must not exceed 6 hours from the arrest of the person unless authorized. At any time during the 6 hours immediately following the suspect’s arrest an officer involved in investigating the offence may apply to a senior officer for an authorization for further detention. The senior officer may authorize the detention of the suspect for a further period of not more than 6 hours if the officer is satisfied that further period is justified (an authorization under this section can only be given once).

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544 paras 137(3)(c) and 138(2)(c). Although a police officer may refuse the arrested person their right to communicate with a person (including a lawyer if the communication would result in an accomplice taking steps to avoid being charged, evidence tampering or a person’s safety being endangered): subsec 138(4).

545 subsec 139(1) definition of ‘arrested suspect’ for the purposes of sect 139.

546 paras 139(2)(b)-(d). The detained suspect must be detained in the company of an officer not in lock up or place of confinement unless the circumstances make it impracticable to do so: subsec 139(3).

547 subsec 140(2). Sec 141 lists the factors that must be taken into account in determining a reasonable period of detention.

548 subsec 140(3)

549 para 140(4)(a). A senior officer means a police officer who is a sergeant or a rank more senior than sergeant. If a person has been arrested by a public officer – another public officer prescribed as a senior officer in relation to that officer and who is not involved in the investigation of any offence that the suspect is suspected of having committed: subsec 140(1).

550 para 140(4)(b). The senior officer must give reasons for the authorization but there are no statutory factors that may or must be considered: subsec 140(5). No senior officer can give another authorization under para 140(4)(b).
At any time during the further period authorized by a senior officer or by a magistrate under subsec 140(6), an officer investigating the offence may, with the approval of a senior officer, apply to a magistrate for an authorization to detain the suspect for a further period of not more than **8 hours**.\(^{551}\) The magistrate can only authorize further detention if satisfied that detention for the further period is justified.\(^{552}\) An application may be made, and an authorization may be given, under subsec 140(6) on more than one occasion.\(^{553}\) There is no statutory maximum period of time a person can be detained.

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\(^{551}\) subsec 140(6)

\(^{552}\) para 140(6)(b). The magistrate must give reasons for the authorization but there are no statutory factors that may or must be considered: subsec 140(7).

\(^{553}\) para 140(8). Note that any subsequent applications must be made during a period of further detention already authorized by a magistrate under para 140(6)(b).
## APPENDIX G

WARRANTS ISSUED UNDER DIVISION 3 OF PART III OF THE AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION ACT 1979

<table>
<thead>
<tr>
<th>Year</th>
<th>Questioning Warrant</th>
<th>Questioning and Detention Warrant</th>
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</thead>
<tbody>
<tr>
<td>2011–12</td>
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<td>0</td>
</tr>
<tr>
<td>2010–11</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2009–10</td>
<td>1</td>
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<tr>
<td>2003–04</td>
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</tbody>
</table>
APPENDIX H

THE AFP COMMISSIONER'S ORDER ON OPERATIONAL SAFETY (CO3)

I, Tony William Negus, Commissioner of the Australian Federal Police, in the exercise of my powers under:

- sections 37, 38 and 69C of the Australian Federal Police Act 1979 (Cth)
- regulation 33 of the Australian Federal Police Regulations 1979 (Cth)

issue this Commissioner’s Order 3 within the terms set out in the following text and in any attachments to it.

This Order may be cited as Commissioner’s Order 3.

This Order takes effect from its publication on the AFP intranet.

T W Negus
1st day of June 2012

1. Disclosure and compliance

This document is classified For Official Use Only and is intended for internal AFP use.

Disclosing any content must comply with Commonwealth law and the AFP National Guideline on the disclosure of information.

Compliance

This instrument is part of the AFP’s professional standards framework. The AFP Commissioner’s Order on Professional Standards (CO2) outlines the expectations for appointees to adhere to the requirements of the framework. Inappropriate departures from the provisions of this instrument may constitute a breach of AFP professional standards and be dealt with under Part V of the Australian Federal Police Act 1979 (Cth).
2. Acronyms

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFP</td>
<td>Australian Federal Police</td>
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<tr>
<td>APC</td>
<td>Airport Police Commander</td>
</tr>
<tr>
<td>CEW</td>
<td>Conducted energy weapons</td>
</tr>
<tr>
<td>COSP</td>
<td>Coordinator Operational Safety and Protection</td>
</tr>
<tr>
<td>CPO</td>
<td>Chief Police Officer</td>
</tr>
<tr>
<td>FIAT</td>
<td>Firearms Identification and Armoury Team</td>
</tr>
<tr>
<td>NM</td>
<td>National Manager</td>
</tr>
<tr>
<td>OSA</td>
<td>Operational Safety Assessment</td>
</tr>
<tr>
<td>OSC</td>
<td>Operational Safety Committee</td>
</tr>
<tr>
<td>OST</td>
<td>Operational Safety Trainer</td>
</tr>
<tr>
<td>PFC</td>
<td>Police Forward Commander</td>
</tr>
<tr>
<td>POMS</td>
<td>Public Order Management Situation</td>
</tr>
</tbody>
</table>

3. Definitions

**Appointee** – is defined in s. 4 of the *Australian Federal Police Act 1979* (Cth) (the Act).

**Ammunition** – means approved ammunition for standard issue and specialist firearms.

**Armourer** – is a person appointed by the Commissioner to be a member of the AFP FIAT.

**Baton** – means an impact weapon of a type approved by the Commissioner for AFP use.

**Child or young person** – means a person who is younger than 18.

**Committee** – means the Operational Safety Committee.

**Conducted energy weapon** – means a device that, by design, delivers an electrical charge with the intention of incapacitating the subject.

**Death or serious injury associated with police contact** – is defined in the *AFP Commissioner’s Order on Professional Standards (CO2).*

**Detention facility** – means a watch-house, immigration detention facilities, remand centre, lock-up, holding room or other place used to detain a person in lawful custody.
Equipment – means any item of equipment issued by the AFP as covered by this Order, including batons, handcuffs, oleoresin capsicum canisters, shields, holsters, firearms and munitions.

Equipment Registrar – means a person appointed by Commissioner under this Order.

Extended range chemical munitions – means an approved irritant, inflammatory spray or chemical device fired from an approved specialist firearm.

Extended range impact weapon – means approved less lethal ammunition fired from an approved specialist firearm.

Impact weapon – means a baton, shield or extended range impact weapon.

Handcuffs and other restraints – means implements approved by the Commissioner to restrain a person’s hands and/or feet and spit masks to protect officers.

Less lethal ammunition – means approved ammunition discharged from an official firearm that is highly unlikely to cause death or serious injury when correctly applied.

Lethal force – means force that is likely to cause death or serious injury.

Less lethal force – means a force option which is highly unlikely to cause death or serious injury when properly applied.

Munitions – means approved ammunition, conducted energy weapon (CEW) cartridges, chemical canisters or pyrotechnics that can be discharged from a firearm, specialist firearm, CEW, pyrotechnics or chemical weapon delivery system, including hand held canisters.

Official firearm – means standard issue firearms and specialist firearms.

Operational Safety Committee – means the group responsible for advice on training, administration and policy issues regarding AFP use of force which may include representatives from Learning and Development, Workplace Health and Safety, Operations and other AFP areas.

Operational Safety Trainer – means a person qualified to train in operational safety who is appointed to the position in accordance with this Order.

Police Forward Commander – means the senior officer in command of AFP resources and personnel at the scene of an event or incident.
Public Order Management Situation – means gatherings of persons displaying a common purpose to:
- harm persons or damage property
- use violence
- threaten, intimidate or harass persons
- a breach of the peace.

Reasonable force – is the minimum force necessary and reasonable in the circumstances of a particular incident.

Routine procedure – in relation to a detention facility means:
- escort holds
- compliant handcuffing
- compliant search of a person.

Sensitive region – means an area of a person’s body where:
- the skin is especially sensitive (e.g. groin, neck, face, female breast, etc.)
- contact by anyone other than a medically qualified person would cause unnecessary discomfort or indignity.

Serious injury – is defined in the AFP Commissioner’s Order on Professional Standards (CO2).

Specialist firearm – is any non-standard issue firearm approved by the Commissioner.

Specialist team – means a team whose members have successfully completed approved specialist competencies and are recognised by the Committee as a Specialist team.

Standard issue firearm – means a handgun of a type and model approved by the Commissioner to be normally issued to qualified appointees.

Unauthorised discharge – means discharging an official firearm whether or not used to deploy less lethal munitions, or discharging a CEW contrary to this Order. This excludes any discharge where an appointee is training under the supervision of an operational safety trainer and the discharge occurs downrange without endangering any person.

Use – in relation to a:
- firearm, CEW or chemical agent means:
  - drawing
  - aiming
  - discharging
• baton means:
  – raising with the intention to strike or gain compliance
  – striking a person with the baton
• shield means striking a person with any part of the shield.

4. Introduction

4.1 This Order gives effect to the AFP policy on using reasonable force. It is designed to ensure that the AFP operates to de-escalate potential conflict situations within an AFP approved operational safety model.

4.2 This Order specifically applies to appointees whose roles and duties require them to:
  • handle munitions or equipment
  • prevent an act likely to injure an appointee or another person
  • use or potentially use force
  • train or certify persons in use of force
  • monitor and report on use of force.

5. Operational Safety Policy

5.1 Any use of force against another person by an AFP appointee in the course of their duties must be in accordance with this Order.

5.2 Using reasonable force underpins all AFP conflict management strategies, training and the AFP's use of force model.

5.3 Appointees may use force in the course of their duties for a range of purposes, including:
  • defending himself or herself or another person
  • protecting property from unlawful appropriation, damage or interference
  • preventing criminal trespass to any land or premises
  • effecting an arrest
  • where authorised by a law.

5.4 The principles of negotiation and conflict de-escalation are always emphasised as the first consideration prior to using physical force. The AFP considers the safety of AFP appointees and members of the public to be of paramount importance.
5.5 Excessive force is force beyond that which is considered reasonably necessary in the circumstances of any particular incident including:
- any force when none is needed
- more force than is needed
- any force or level of force continuing after the necessity for it has ended
- knowingly wrongful use of force.

5.6 The AFP Operational Safety Policy will be implemented by:
- establishing and maintaining appropriate competency standards
- accrediting trainers
- qualifying and re-qualifying appointees in use of force and operational safety
- maintaining appropriate reporting mechanisms and management structures for use of force training, monitoring and improvement.

5.7 The AFP will appropriately train all appointees who are required by this Order to maintain a use of force qualification, and in the case of specialist teams, to their requisite specialist qualification.

5.8 Appointees must, unless exempted by this Order, maintain their operational safety qualification. The AFP will, within operational requirements, provide opportunities to maintain operational safety skills between re-certification processes.

5.9 Where operational planning identifies a potential need to use force (e.g. to execute forced entry search warrants or arrest warrants, intercept a vehicle etc.) AFP operational risk management practices must be used to assess and treat identified risks. Appointees must consult AFP specialist teams if the risk levels are assessed as being:
- critical
- high
- significant
- medium.

5.10 When effecting an arrest, an AFP appointee must not:
- use more force than is reasonable and necessary to make the arrest or prevent escape of the person after arrest
- do anything likely to cause death or serious injury unless it is reasonably necessary to protect themselves or others from death or serious injury.
6. Use of lethal force policy

6.1 Lethal force is an option of last resort and should only be used when reasonably necessary in the following circumstances:

- in self-defence from the immediate threat of death or serious injury
- in defence of others against whom there is an immediate threat of death or serious injury
- only when less extreme means are insufficient to achieve these objectives.

6.2 An appointee who considers using lethal force to be reasonably necessary must:

- act appropriately and in proportion to the seriousness of the circumstances
- minimise damage or injury to other people with a view to preserving human life.

6.3 Appointees who use lethal force or who are present when lethal force is used must ensure that, as soon as practicable, all necessary assistance and medical aid is rendered to any injured or affected person.

6.4 Appointees present at a location where lethal force has been used must secure and treat the area as a crime scene.

7. Using AFP issued equipment

7.1 Equipment issued to appointees in accordance with this Order must only be used in the performance of their duties as permitted by relevant legislation and governance.

7.2 Appointees must only carry and use equipment that has been approved by the Chair of the Operational Safety Committee (OSC) on advice from the committee.

7.3 AFP equipment must only be used by qualified appointees in accordance with any specific restrictions as outlined in this Order, or by the Chair of the OSC and within AFP approved training.

8. Firearms and munitions

8.1 Appointees must only use official firearms in the course of their duty.

8.2 Appointees must carry their standard issue firearm in the 'actioned' condition.

8.3 Before discharging a firearm appointees must consider alternative courses of action in line with their training, including negotiation, withdrawal and other use of force options.

8.4 Firearms must only be used by qualified appointees in accordance with this order and AFP delivered training.
**Discharging firearms – lethal munitions**

8.5 Appointees may only discharge a firearm using approved ammunition:
- against another person in accordance with the use of lethal force policy
- when training under the direct supervision of an operational safety trainer
- to destroy injured or dangerous animals in accordance with relevant state, territory or local legislation.

8.6 Firing warning shots is not authorised under this Order.

8.7 Where practicable, and before firing an official firearm against a person, appointees must:
- identify themselves as police or federal officer (see also 8.8 below)
- give a clear oral warning of their intention to use a firearm
- ensure there is sufficient time for the warning to be complied with before using the firearm, unless they believe on reasonable grounds this would:
  - unduly place themselves at risk of serious injury or death
  - create a risk of serious injury or death to other people
  - be clearly inappropriate or pointless given the circumstances of the incident.

8.8 Prior to firing an official firearm on duty, Protective Service Officers must, where practicable, identify themselves as a ‘federal officer’ to indicate their AFP status. In situations not involving using lethal force, they must identify themselves as ‘AFP Protective Service Officers’.

**9. Conducted energy weapons**

9.1 Conducted energy weapons (CEWs) must only be used by qualified appointees in accordance with AFP approved training.

9.2 An appointee may only use a CEW against another person where they believe on reasonable grounds that its use is necessary to:
- defend themselves or others from the imminent threat of physical injury in circumstances where protection cannot be afforded less forcefully
- resolve an incident where a person is acting in a manner likely to injure themselves and the incident cannot be resolved less forcefully
- deter attacking animals.

9.3 Where practicable and before discharging a CEW on duty, appointees must:
- identify themselves as police or a federal officer
- give a clear oral warning of their intention to use a CEW
• ensure there is sufficient time for the warning to be complied with before using the CEW, unless they believe on reasonable grounds this would:
  – unduly place him or herself at risk of injury
  – create a risk of injury to other people or
  – be clearly inappropriate or pointless given the circumstances of the incident.

**CEW safety procedures**

9.4 AFP appointees must not be offered voluntary exposure to CEWs in a training environment unless approved by the Chair of the OSC on advice from the Committee.

9.5 Conducted energy weapon probes must only be removed from a person by a person trained to do so and according to their CEW training.

9.6 If CEW probes are lodged in a sensitive region of a person, the appointee must seek assistance from a medical practitioner or ambulance officer to remove them.

9.7 Appointees must handle and dispose of CEW probes fired at a person as if they are biological hazards and in accordance with CEW training.

**10. Batons**

10.1 Batons must only be used in accordance with AFP training and only when reasonably necessary in the following circumstances:
  • in self-defence or defence of another from the threat of injury
  • for appropriate use in crowd control.

**11. Handcuffs and other restraints**

11.1 Appointees must only use handcuffs and other approved restraints including spit masks in accordance with AFP training when they believe on reasonable grounds that their use is necessary to restrain a person in lawful custody.

11.2 Appointees must only apply handcuffs, restraints or spit masks in a detention facility environment or when transporting persons in custody, after considering whether it would be appropriate to do so. Considerations may include whether the person in custody:
  • is violent or has a demeanour giving rise to a fear of violence
  • has attempted or is likely to attempt to escape
  • needs to be escorted with other detainees
  • needs to be prevented from injuring themselves or another person
  • should be restrained to prevent losing, concealing or destroying evidence
  • threatens to expel a bodily fluid or has done so.
Handcuffing children or young people

11.3 Appointees must not handcuff a child or young person unless they believe on reasonable grounds it is essential to safely transport or protect the welfare and/or security of a child or any other person.

11.4 Considerations may include those identified in s. 11.2 above.

12. Chemical agents

12.1 Appointees may only use chemical agents against another person where they believe on reasonable grounds that their use is necessary to:

• defend themselves or others from physical injury in circumstances where protection cannot be afforded less forcefully
• arrest a person whom they believe, on reasonable grounds, poses a threat of physical violence and the arrest cannot be effected less forcefully
• resolve an incident where a person is acting in a manner likely to injure themselves and the incident cannot be resolved less forcefully
• to deter attacking animals.

12.2 When an appointee uses a chemical agent against another person, he or she shall ensure that the person receives, as soon as practicable, adequate medical attention or de-contamination treatment.

13. Reporting use of force

13.1 Appointees who use force must, as soon as practicable, submit an AFP Operational Safety Use of Force Report, including full details of the force used and circumstances in which it was applied. This report must be completed after every incident, including a public order management situation where the appointee used:

• a firearm
• a baton
• a shield
• a chemical agent
• a conducted energy weapon
• a pyrotechnic device
• a compliance or restraint hold, strike, kick or other operational safety application
• handcuffs
• a police dog or horse to apply force
• force to enter a building, vehicle, vessel, or other secured area to search, seize or arrest.
13.2 This section does not apply to verbal commands in the absence of other use of force options.

13.3 Appointees deployed to a detention facility need not submit an AFP Operational Safety Use of Force Report if the force applied was:
- a compliance or restraint hold, application of handcuffs, restraints or spit hoods
- a compliant routine procedure and
- recorded on audio and video recording equipment.

13.4 The Operational Safety Use of Force Report must be submitted to the relevant team leader or coordinator for dissemination to the Committee.

13.5 On receipt of the report, the team leader or coordinator must review it and address any issues arising from the use of force, including any reporting obligations under the AFP Commissioner’s Order on Professional Standards (CO2).

**Occurrences requiring notification**

13.6 AFP Professional Standards must be notified of any of the following reportable occurrences:
- death or serious injury associated with police contact
- any discharge of lethal munitions from a specialist or standard issue firearm against a person
- any unauthorised discharge of:
  - a firearm
  - a conducted energy weapon
  - less lethal munitions.

**Workplace Health and Safety reporting**

13.7 Within the AFP, in addition to requisite use of force reporting, all incidents that cause or might have caused injury or illness must be reported in accordance with the AFP workplace incident reporting framework.

**14. Munitions and equipment storage**

14.1 Appointees are responsible for the security of munitions and equipment issued to them.

14.2 Appointees must, before ceasing duty, store their standard issue firearm in an unloaded condition in fixed firearms storage facilities in AFP premises.
14.3 Appointees must, when unloading their standard issue firearm before ceasing duty or loading it before starting duty, use a purpose-built unloading bay or approved portable unloading device, if available.

14.4 Appointees entering a detention facility may store their firearm in an ‘actioned’ condition in a secure and lockable container if they retain the only key.

14.5 Where appointees share a short-term storage container, one will be the nominated key-holder and will control access.

**Storage away from AFP premises or establishments**

14.6 Appointees storing their firearms away from fixed storage facilities in AFP premises must store them in the following condition:
- in an unloaded condition
- separately from ammunition secured elsewhere
- using an approved unloading station (where available) or other approved unloading device.

14.7 If fixed firearm storage facilities in AFP premises are not available, an Assistant Commissioner or Commander may approve that an AFP appointee may store their firearm in an approved AFP firearms safe at another location.

14.8 Appointees who cannot access approved fixed storage facilities must, if residing in commercial premises, store their firearm in:
- a room safe if the firearm's recoil spring is removed and secured in another location, or
- an approved portable firearms safe, appropriately secured in a room controlled by a sworn appointee, or
- a firearms storage briefcase approved by the OSC.

**15. Munitions management**

15.1 Appointees must only be issued with a firearm of the same model and calibre that they are formally qualified to use under this Order.

15.2 The Armoury Registrar, Deputy Armoury Registrars and Equipment Registrars must maintain registers and conduct stock-takes in accordance with this Order and in accordance with any directions given by the AFP Security and/or Audit Committees.

**Armoury Registrar**

15.3 The Commissioner will authorise an appointee to be an Armoury Registrar.

15.4 The Armoury Registrar must:
• authorise the purchasing of official firearms and munitions approved by the Committee
• control and record the distribution of munitions to AFP members geographically within the ACT
• appoint Deputy Armoury Registrars as required.

**Equipment Registrars**

15.5 Office managers or APCs must appoint Equipment Registrars to:

• control and record the distribution of firearms and munitions throughout the relevant Office
• purchase approved equipment
• control and record equipment distribution throughout the relevant office.

**16. Carrying munitions and equipment**

16.1 Appointees must only carry or use munitions and equipment that they are qualified to use in accordance with AFP training. This section does not apply to appointees performing duties:

• as a member of the Firearms Identification and Armoury team
• in their role as an Operational Safety Trainer (OST)
• at approved firing ranges under direct supervision of a qualified OST
• in Forensic and Data Centres in accordance with their duties
• in the contracted equipment/clothing store when handling equipment as part of their direct duties.

16.2 Appointees must carry all issued munitions and equipment while on operational duty, unless:

• a variation is approved under this Order as outlined in s. 34 below
• the Chair of the OSC has approved relevant operating guidelines that are held by the management function and specifically detail circumstances where all issued munitions need not be carried
• they are unlikely to interact with the public or exercise police powers
• prohibited by a law or other section of this Order
• transporting or handling munitions or equipment which are:
  • used for training
  • miscellaneous property
  • exhibits.
Detention facilities

16.3 When entering a detention facility, appointees carrying munitions or equipment must notify a person in authority at the facility and comply with their procedures (including storing munitions or equipment).

16.4 Appointees must not carry munitions or equipment in a detention facility area where cells are situated.

16.5 Sections 16.3 and 16.4 do not apply to appointees responding to a public order management situation within a detention facility.

17. Transporting munitions and equipment

17.1 When sending munitions or equipment to another AFP area, appointees must lodge them in an approved security container with the relevant registrar or the contracted equipment/clothing store for dispatch.

17.2 The section above does not apply to transfers by hand within an AFP operational area, but the appointee making the transfer must still inform the appropriate registrar(s) or the contracted equipment/clothing store.

On aircraft

17.3 Before carrying or possessing a weapon on an aircraft, appointees must have written approval from both the Office of Transport Security within the Department of Infrastructure and the Civil Aviation Safety Authority.

17.4 Appointees who need to transport weapons, munitions or accoutrements when travelling by air must comply with operational travel instructions for checking in firearms and munitions.

17.5 Appointees must carry a copy of the relevant carrier’s approval when travelling by air.

18. Lost munitions and equipment

18.1 Appointees must immediately report any loss of munitions or equipment to:
   • their team leader
   • the relevant registrar.

18.2 Registrars who either:
   • are notified of a lost or stolen firearm
   • become aware of a missing firearm during a stocktake
must, as soon as possible:
• ensure the missing firearm’s details are added to the AFP gun licensing database
• officially report the firearm as lost or stolen to all other Australian police services.
• notify Professional Standards
• notify AFP Security.

19. Returning munitions and equipment
19.1 Appointees must officially return munitions or equipment when they either:
• are no longer qualified to use them
• no longer require them for their current operational duties.
19.2 Appointees transferring to another geographical AFP operational area must:
• surrender all munitions to the issuing registrar and equipment to the contracted equipment/clothing store
• reapply for munitions and equipment in the new area, as required.

20. Handling munitions and equipment
20.1 Appointees must only be issued with, or seek to be issued with, munitions and equipment they are qualified to use.

Handling, using and carrying munitions
20.2 AFP appointees must only handle munitions in accordance with:
• this Order
• any other relevant AFP National Guideline
• Australian legislation.
• 20.3 AFP issued munitions and equipment (e.g. firearms, chemical agents, batons, conducted energy weapons or handcuffs) must only be carried in the holster, scabbard or pouch type approved by the Committee.

Firearm modification or repair
20.4 Firearms must only be serviced, altered, modified or repaired by an AFP armourer and in accordance with manufacturer recommendations. Armourers must record the service history for each firearm in SAP.
20.5 Alterations or modifications of firearms must be approved by the armoury registrar excepting that:

- approved custom grips may be fitted by an operational safety trainer
- approved locking devices may be fitted by appointees with current Operational Safety Use of Force qualifications
- nominated minor routine maintenance and repair may be done by properly qualified appointees authorised by the Armoury Registrar.

21. Surrendering munitions

21.1 For any period of sick leave or absence exceeding 90 days, appointees must temporarily surrender their qualification, munitions and equipment to their team leader. The team leader must notify the relevant national or operations armoury, and the Chair of the Committee through COSP.

21.2 The team leader must secure any surrendered items in accordance with this Order.

21.3 The qualification and munitions will be returned to the appointee after considering the appointee’s status and re-qualification needs in line with this Order and governance on leave management. Approval must be given by either:

- the Chief Police Officer (CPO)
- their National Manager (NM)
- their Airport Police Commander (APC)
- their Manager.

Revocation

21.4 An Operational Safety Use of Force qualification is valid for one year, but may be suspended at any time by any of the following people:

- the Commissioner
- a Deputy Commissioner
- the Chief Operating Officer
- the CPO
- an NM
- a Manager
- an APC.

21.5 The Principal Medical Advisor, the Principal Psychologist, or the Coordinator Operational Safety and Protection (COSP) may request, in writing, the suspension of a qualification.
21.6 An appointee must immediately inform their Manager, APC, NM, or the CPO if they are subject to any of the following:

- an interim domestic violence protection order
- a domestic violence protection order
- a restraining order
- any court order relating to possessing an official or private firearm
- any other reason which may affect their fitness for duty.

21.7 Once advised, the relevant Manager, APC, NM or the CPO must consider the situation and, where appropriate, ensure the appointee surrenders their qualification, munitions and equipment to the relevant registrar and/or the contracted equipment/clothing store.

21.8 A qualification is automatically revoked if an AFP appointee is either:

- suspended from duty
- considered by their Manager, APC, NM or the CPO to be unfit to hold or use munitions and equipment.

21.9 An appointee whose qualification is suspended must return all munitions and equipment to the relevant registrar and/or the contracted equipment/clothing store immediately when the suspension comes into effect.

21.10 The relevant Manager, APC, NM or the CPO must notify the COSP of any suspension or withdrawal of a suspension. The COSP must notify:

- the relevant national or operations armoury or firearms registrar
- the team leader of Operational Safety and Police Practice
- the operational safety trainer(s), if relevant
- any other area responsible for issuing firearms in the relevant office.

21.11 If a suspension is withdrawn and the qualification has not expired, the relevant Manager, APC, NM or the CPO may authorise the return of the qualification, munitions and/or equipment to the appointee.

22. The Operational Safety Committee

22.1 The Operational Safety Committee (the Committee) is the governing body for all operational safety training, administration and related policy issues including managing exemptions and registering variation instruments under this Order.

22.2 The Coordinator Operational Safety and Protection and the Team Leader of Operational Safety and Police Practice will respond to internal or external enquiries regarding AFP operational safety use of force training and policy on behalf of the Committee.
22.3 The Committee is chaired by the National Manager Human Resources, who can certify trainers and revoke certification. The Committee Chair, having regard to Committee advice, has delegation to approve:
- suitability and use of equipment, munitions and firearms
- governance subordinate to this order
- additional competencies
- the training curriculum.

23. Training

23.1 Only qualified and authorised Operational Safety Trainers (OSTs) can train or assess persons in:
- specialist training (e.g. Police Tactical Group, Specialist Support Team, Close Personal Protection or Immediate Action Rapid Deployment)
- Air Security Officer training
- public order techniques and operational strategies
- any other area determined by the Committee as requiring specialist competencies or relevant operational experience.

23.2 Operational safety training and competency assessments must comply with this Order and be delivered by accredited OSTs according to recognised competency standards and the law.

Appointing Operational Safety Trainers

23.3 A request to certify an appointee as an OST must be first endorsed by the relevant functional manager before being forwarded to the OSC secretariat. The COSP will provide advice to the Chair of the OSC on certification taking into account functional advice, competency assessment and operational need. The Chair may certify an appointee:
- as an OST if they have achieved or can demonstrate the approved AFP operational safety training competencies
- to deliver specific elements of operational safety training.

23.4 Certified OSTs may train appointees only in a competency for which the OST is qualified.

23.5 OST accreditation is valid for 2 years. It must be reissued via recognition of current competency and meeting any requirements or policies on operational safety trainer management made by the COSP. If a trainer does not deliver recorded operational safety training for 2 years, the trainer’s accreditation is automatically revoked.
23.6 It is the joint responsibility of L&D, functions and business areas to make available sufficient accredited operational safety trainers to train and assess other appointees in operational safety for operational needs.

23.7 To maintain trainer quality and disseminate best practice, including newly endorsed techniques and training practices, the Committee Chair will authorise the COSP or a delegate to quality assure practices, including those of specialist teams, at least every 2 years.

23.8 The Committee Chair may suspend or revoke certification as an operational safety trainer or to deliver specific elements of operational safety training.

23.9 An OST who has their use of force qualifications revoked under section 21.4, 21.5 or 21.8, will also cease to be a qualified OST. Application to reinstate their qualification must be made to the COSP for consideration prior to being referred to the Chair of the Committee for re-instatement.

Specialists and weapons training

23.10 Operational safety training and assessment in standard and specialist weapons, munitions and equipment must only be conducted by operational safety trainers with relevant competencies specified by the Committee Chair on recommendation from COSP.

23.11 Operational Safety Trainers authorised by the COSP may use and train in specialist weapons, equipment and munitions in the course of their official training duties.

23.12 The Coordinator FIAT may authorise FIAT employees to test, discharge and train staff in weapons, equipment and munitions in the course of their FIAT’s duties.

Training registers

23.13 The COSP must maintain a training register recording appointees:

- certified as operational safety trainers
- certified to deliver and assess elements of operational safety training.

Appointees in training

23.14 Appointees undergoing training may carry and use any relevant munitions or equipment for training purposes.

23.15 Appointees training under the direct supervision of a qualified OST need not report using approved firearms and munitions for training.

23.16 Unsafe incidents must still be reported as per s. 13.7 above.

23.17 An OST may recommend to the COSP (in writing) that an appointee requires additional training, and the COSP may suspend the appointee’s qualification
pending further training. If this occurs the relevant team leader or coordinator must be notified by the COSP.

24. Assessment

24.1 Operational Safety Trainers must assess appointees' use of firearms, batons, handcuffs, conducted energy weapons and chemical agents.

24.2 All assessment activities must be subject to recognised current competency assessment processes and completed within 60 days of commencing the Operational Safety Assessment (OSA). This time period does not apply to recruits or lateral entrants.

24.3 Assessment processes for recruits and lateral entrants must be completed in the initial recruit training period before attestation.

24.4 Appointees must complete the relevant AFP form to obtain medical clearance from AFP Medical Services prior to participating in any OSA.

24.5 Appointees who cannot recertify due to injury, illness, or another medical condition must notify AFP Medical Services using the AFP form. AFP Medical Services must then determine whether the appointee is exempt.

24.6 Appointees who are permanently medically exempt will be referred to the National Manager Human Resources for decision as to whether their sworn status should be maintained.

24.7 The National Manager Human Resources may, on advice from the Principal Medical Officer and other relevant areas revoke a member’s sworn status if that appointee is, over an extended period or permanently unable to complete an OSA and be deployed operationally.

Operational Safety Assessment (OSA)

24.8 The official OSA comprises of the following assessment items:

- knowledge of this Order, relevant powers, legislation and the AFP Operational Safety Principles Model
- a Firearms Handling Assessment with the appointee's relevant AFP issued firearm
- the Official Firearms Qualifying Assessment with the appointee's current issue firearm and holster
- use and maintenance of all of the appointee's issued AFP equipment
- holistic scenario assessments that emphasises the use of presence, communication, negotiation and conflict de-escalation, focussing on the cognitive reasons for choosing use of force options.
24.9 Appointees who practice or train while their operational safety permit is valid are not subject to the formal assessment requirements of an Operational Safety Re-Certification.

24.10 Appointees must only use munitions approved and issued to them by the Armoury Registrar or a Deputy Registrar.

24.11 Appointees must only use a holster from the approved holster register and as used in their AFP Official Firearms Qualifying Assessment. Appointees may qualify with several holsters if required by their duties.

**Expiration of Operational Safety qualification**

24.12 An Operational Safety Use of Force training or re-certification program completed by an AFP appointee is valid for one year from certification or re-certification.

24.13 If an appointee’s qualification has expired, the appointee must return munitions and equipment and stand down from operational duty.

24.14 Appointees commencing an OSA before their current qualification expires must successfully complete all elements of the OSA to maintain or renew that qualification.

**25. Qualifications**

25.1 An OST may issue qualifications for particular items of munitions or equipment when an AFP appointee has met the appropriate training and assessment criteria relevant to their operational requirements. The qualification must display the:

- classification of the relevant firearm, holster, munitions or equipment
- name of the relevant AFP appointee
- date of issue
- expiry date.

25.2 Appointees must maintain their competencies in all aspects of use of force while certified.

25.3 Local management teams should encourage appointees with valid Operational Safety Use of Force qualifications to maintain their competencies between re-qualification processes, particularly in firearms loading and unloading procedures and marksmanship.

25.4 Team leaders should negotiate regular training with their operational staff and record it in their Performance Development Agreements.
25.5 Managers and their staff should advise their OSTs of any skill areas they should focus their training on.

26. Specialist teams

26.1 Specialist Teams are full or part time teams that are equipped with specialist equipment, capabilities and training and who have been approved by the Chair on advice from the Committee. They may be required in certain circumstances including:

- for planned operations where the threat and risk of violence is considered high enough to warrant specialist skills, munitions and/or tactics
- where the Police Forward Commander (PFC) considers a Specialist Team is warranted, for incidents such as:
  - forced entry search warrants
  - execution of arrest warrants
  - high risk vehicle intercepts
  - public order management situations
  - dealing with armed or violent offenders.

26.2 Written approval to use a Specialist Team must include any specific limitations to the deployment and an indication of when the approval will lapse.

26.3 When approval in writing is not possible due to operational requirements, oral approval may be given. In such cases the PFC must record the decision (including time and date) in their official diary or via the AFP radio network.

Approval considerations

26.4 Operational police deployment should be evaluated with a risk assessment (using the AFP National Guideline on risk management) to ascertain the risk levels, particularly for physical harm to any person. These levels are:

- critical
- high
- significant
- medium
- low.

26.5 Before approving the use of a specialist team, approvers should consider:

- the context of the police operation
- the level of risk to appointees and members of the public (see s. 26.4 above)
- deploying trained police negotiators to maximise the possibility of a non-violent resolution of an incident. The preferred option for the resolution of
any incident is negotiation, and non-violent means should be used whenever possible before resorting to use of force.

- the extent that existing capability can resolve the situation or operation
- what reduction in risk to appointees and the public would result from using specialist team capabilities
- any other relevant risk management plan or strategy in place from time to time.

27. Use of force – specialist teams

27.1 Any use of force by specialist teams must be consistent with the use of force policy, in particular the requirement for AFP appointees to use minimum reasonable force.

27.2 Specialist firearms, munitions and equipment, including less lethal munitions, may only be used by a specialist team when:

- the team’s deployment has been approved
- resolving the incident or operation at hand in a way consistent with the minimum reasonable use of force and Work Health and Safety principles.

28. Specialist equipment, tactics and munitions

28.1 All use of specialist equipment, tactics and munitions must be in accordance with this order and in accordance with AFP endorsed and delivered training.

Carriage of specialist munitions, firearms and equipment

28.2 Specialist team members may only carry and use specialist munitions, firearms and equipment when deployed as part of a specialist team, for operational and training purposes.

Police Tactical Group

28.3 The use of specialist tactics, munitions, and skills are subject to approval by:

- the Police Tactical Group Commander, once approved by the Police Forward Commander (PFC), or
- the Specialist Response Group Commander prior to their deployment.

Specialist Support Team

28.4 The use of specialist tactics, munitions, and skills are subject to the approval of the Specialist Support Team Leader in consultation with Specialist Policing Teams, once approved by the PFC.
28.5 The process to seek authorisation to use a Specialist Support Team is outlined in the *AFP Practical Guide on Outcome One tactical operations responses*.

### 29. Discharging a firearm – less lethal munitions

29.1 Less lethal ammunition, including extended range chemical munitions may only be used by a qualified member of an AFP specialist team to:

- disperse a crowd for the purposes of protecting any person(s) from physical injury
- protect property from unlawful appropriation, damage or interference
- resolve an incident where a person is acting in a manner likely to seriously injure themselves and the incident cannot be resolved less forcefully
- deter attacking animals.

29.2 Per s. 13.6 above, an unauthorised discharge involving less lethal munitions is a reportable occurrence and must be reported.

29.3 Less lethal ammunition must only be used by qualified appointees in accordance with AFP endorsed and delivered training.

### 30. Extended range impact weapons

30.1 Extended range impact weapons must only be used when reasonably necessary in the following circumstances:

- in self-defence from the threat of serious injury
- in defence of others against whom there is a threat of serious injury
- to resolve an incident where a person is acting in a manner likely to seriously injure themselves and the incident cannot be resolved less forcefully
- to protect property from unlawful appropriation, damage or interference where such appropriation, damage or interference may impact on the safe resolution of an incident
- to deter attacking animals.

### 31. Long range audio devices

31.1 A qualified member of a Police Tactical Group, Specialist Support Team or Police Negotiation Team may use a long range audio device against a person operationally or whilst undergoing training under the direct supervision of a suitably qualified AFP endorsed specialist instructor.
31.2 When deployed operationally a long range audio device may be used where it is believed on reasonable grounds their use is necessary to:
  • assist with the resolution of a negotiated surrender
  • deny offenders access to an area or section of a stronghold or premises.

32. Public order management

32.1 Any use of force in a public order management situation (POMS) must be consistent with the use of force policy and in particular the requirement for AFP appointees to use minimum force.

32.2 Appointees in a POMS must consider all options to de-escalate potential conflict consistent with AFP use of force training and, under this Order, may be subject to:
  • authorised use of less lethal munitions
  • modified reporting mechanisms of the use of force report form if approved by the PFC.

32.3 The Police Forward Commander (PFC) must, before authorising use of less than lethal munitions, first consider and exhaust or reject these options:
  • issuing of directions to disperse
  • use of police negotiators
  • use of shield dispersal techniques.

32.4 Appointees may only carry and use approved less than lethal munitions in a POMS:
  • with prior approval of the Commander Specialist Response Group, and
  • with the PFC’s specific authorisation, and
  • if qualified to use them, and
  • when part of an AFP specialist team.

33. Reporting – specialist teams

33.1 The Police Forward Commander (PFC) who approves the use of a specialist team and munitions must, within 3 working days of finalising the operation, submit a report to the Committee which states:
  • the reasons for utilising a specialist team
  • the reasons for authorising any less lethal munitions
  • the dates and times any munitions were used
  • the dates and times the team(s) were deployed
  • any other relevant information the PFC deems appropriate at the time.
33.2 The PFC may, in consultation with Manager Professional Standards, authorise submitting a single Operational Safety Use of Force Report covering one or more:
- weapons or firearms being drawn
- weapons being raised toward any person
- firearms being aimed at any person.

33.3 The use of force report must:
- identify the appointees involved
- detail the force used and its circumstances.

**Reporting and public order management situations**

33.4 Appointees who use an impact weapon to strike a person or who discharges any less lethal munitions must, for each separate incident and as soon as practicable:
- notify the PFC via the relevant team leader and advise if any injury occurred
- submit an Operational Safety Use of Force Report.

**34. Variation from this Order**

34.1 Appointees may lawfully vary from this Order only under the Commissioner’s explicit direction as sanctioned from the process in this section.

**Application for variation**

34.2 An appointee (individual variation), coordinator or Manager responsible for a class of AFP appointees (class variation) may apply in writing to the Committee to deviate from any part of this Order.

34.3 The application must initially be sent to, and considered by, the relevant National Manager or the Chief Police Officer (CPO) after consultation with the Coordinator Operational Safety and Protection.

34.4 The National Manager or CPO will forward any supported applications to the OSC.

34.5 Applications must set out the variation:
- background
- circumstances
- reasons
- Order provisions affected
- duration
- scope.

34.6 Each exemption must not exceed 2 years, but may be renewed if resubmitted.
34.7 Applicants must use these templates found in AFP Forms:
- CO3 variation application (individual)
- CO3 variation application (class).

**Approval process**

34.8 Endorsed applications for variation should be forwarded to the Committee.

34.9 The Committee must consider all applications. The Chair may refer an instrument of variation to the Commissioner for decision with a recommendation.

34.10 The Commissioner may either not approve the application or grant any variation in full or in part in the form of a variation instrument.

**Variation instruments**

34.11 The variation instrument must specify the extent and application of the variation from this Order.

34.12 The Committee Secretariat must retain a copy of all variation instruments issued and record them in a register.

35. Other instructions and guidelines

35.1 Appointees must not create or issue any guidelines, orders, directions or instructions that conflict with this order.

**36. References**

- *Australian Federal Police Act 1979* (Cth)
- *Australian Federal Police Regulations 1979* (Cth)
- *AFP Commissioner’s Order on Professional Standards* (CO2)
- *AFP Practical Guide on Outcome One tactical operations responses*
APPENDIX I

SECTION 1 OF THE TERRORISM ACT 2000 (UK)

1 Terrorism: interpretation.

(1) In this Act “terrorism” means the use or threat of action where—.

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

(2) Action falls within this subsection if it—

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1) (b) is satisfied.

(4) In this section—

(a) “action” includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.
APPENDIX J
UN SECTORAL CONVENTIONS ON TERRORISM

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963)