



**Australian Government**  
**Department of Home Affairs**



# Joint-agency submission - Review of the police stop, search and seizure powers, the control order regime and the preventative detention order regime (Review of AFP Powers)

Parliamentary Joint Committee on Intelligence and Security

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# Introduction

The Attorney-General's Department (AGD), the Australian Federal Police (AFP) and the Department of Home Affairs (Home Affairs) welcome the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) review of the police stop, search and seizure powers within Division 3A of Part IAA of the *Crimes Act 1914* (the Crimes Act), the control order regime under Division 104 of the *Criminal Code Act 1995* (the Criminal Code) and the Preventative Detention Order (PDO) regime within Division 105 of the Criminal Code (Review of AFP Powers).

This submission sets out the history and policy justification for these measures, underpinned by the current and emerging domestic threat context. An international comparison with likeminded countries (in the [Appendix](#)) demonstrates that Australia's terrorism prevention laws are broadly consistent with those of comparable countries facing similar threats. The Australian Government's position remains that these provisions are necessary as part of the suite of legislative measures designed to respond to the current terrorism threat. Home Affairs consulted with the Australian Security Intelligence Organisation (ASIO) on this submission.

## History of the provisions

The Australian Government introduced these powers via the *Anti-Terrorism Act (No. 2) 2005*, which received Royal Assent on 14 December 2005. This followed the July 2005 London terrorist attacks, which highlighted gaps in existing Australian legislation to combat the evolving terrorism threat and demonstrated the need for domestic preventative measures to enable security and law enforcement agencies to disrupt terrorist plots before the point of attack. The provisions were initially due to sunset on 15 December 2015, which was amended to 7 September 2018 and subsequently to 7 September 2021.

The provisions have been reviewed a number of times since their introduction in 2005, including most recently in 2018 by the PJCIS. In its report, tabled on 1 March 2018, the PJCIS recommended that the provisions continue for a further three years. This followed the 2017 review of the provisions by the Independent National Security Legislation Monitor (INSLM), who recommended that, subject to a number of amendments, the provisions be continued for a further five years.

## Current threat environment

Australia's national terrorism threat level is PROBABLE, meaning credible intelligence, assessed to indicate a plausible scenario, indicates an intention and capability to conduct a terrorist attack in Australia. The threat level has been elevated since September 2014, during which there have been seven terrorist attacks on Australian soil, and law enforcement and security agencies have disrupted a further 18 potential or imminent terrorist attacks. These figures demonstrate that Australia and Australians are and will continue to be viewed as targets by those who wish to do harm, and the persistence of the domestic terrorism threat.

Australia's response to the terrorism threat has been challenged by the increasingly diverse nature of attacks. The shift from primarily large-scale complex plots by organised networks to small-scale lone actor attacks encouraged by the online proliferation of Islamic State (IS) propaganda has reduced the time available to detect and disrupt plots. However, the disrupted plot to bomb an international flight from Sydney Airport in July 2017 (Operation SILVES) demonstrates the threat from large-scale and complex attack planning has not abated. This unpredictable environment further emphasises the need for law enforcement to have a full range of capabilities to respond appropriately and proportionately to the specific threat, without which, the consequences may be significant loss of life.

Current developments in the threat landscape necessitate the continued availability of a full suite of counter-terrorism measures to disrupt potential attacks and manage the ongoing threat posed by individuals. The subjects of counter-terrorism investigations vary in age, gender and ethnicity. Although the principal source of the terrorism threat remains Sunni Islamist extremism emanating from small groups and individuals inspired or directed by overseas groups, including IS and al-Qaida, the threat from the extreme right wing in Australia has increased in recent years, with groups more cohesive and organised than before.

The growing cohort of released terrorist offenders also poses a potential threat to the Australian community. As at 24 July 2020, 86 individuals have been convicted of and sentenced for Commonwealth terrorism offences. Of these individuals, 45 were sentenced in the last three years, with a further 13 offenders due to be released into the Australian community following the expiry of their custodial sentences between 2020 and 2025. Experiences of other likeminded countries indicates the severity of this risk - in particular, the 2019 London Bridge and 2020 Streatham attackers in the United Kingdom (UK) were previously convicted terrorist offenders who had been released into the community. There is an enduring risk posed by post-sentence offenders and a continued need for appropriate prevention and risk management measures.

# Division 3A of Part IAA of the Crimes Act

## Legislative context

Division 3A of Part IAA of the Crimes Act enables a police officer to exercise the powers in Subdivision B in relation to a person if:

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

Under Subdivision B, a police officer may:

- request the person provide the officer with the person's name, residential address and reason for being in that particular Commonwealth place, and evidence of the person's identity (section 3UC);
- conduct a search for a terrorism related item, being an ordinary search or frisk search of a person, a search of any thing that is under the person's immediate control, a search of any vehicle that is operated or occupied by the person, or a search of any thing that the person has brought into the Commonwealth place – and stop and detain the person for the purpose of conducting the search (section 3UD);
- seize a thing if the officer finds, in the course of a search conducted under section 3UD, that the thing is a terrorism related item or a serious offence related item (section 3UE); or
- enter premises if the officer suspects on reasonable grounds that it is necessary to search the premises for and seize a thing that is on the premises in order to prevent it from being used in connection with a terrorism offence, and that it is necessary to do so without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety (section 3UEA).

Under Subdivision C, a police officer may apply to the AFP Minister for a declaration that a Commonwealth place be prescribed as a security zone (section 3UI). The AFP Minister may declare a Commonwealth place to be a prescribed security zone if he or she considers that a declaration would assist in preventing a terrorist act occurring, or in responding to a terrorist act that has occurred (section 3UJ).

A declaration ceases to have effect at the end of 28 days after it is made, unless revoked by the Minister. The Minister must revoke a declaration if satisfied that (where the declaration was made to assist in preventing a terrorist act from occurring) there is no longer a terrorism threat that justifies the declaration being continued, or that (where the declaration was made to assist in responding to a terrorist act that has occurred) the declaration is no longer required.

Section 3UJA sets out the requirement that after the exercise of powers under Subdivision B by AFP police officers in relation an incident, the AFP Commissioner must give a report to the Minister, the Independent National Security Legislation Monitor (INSLM) and the PJCIS.

## Ongoing necessity

The introduction of Division 3A was founded upon the need for a full suite of preventative and emergency powers in response to a rapidly changing threat environment. This need continues in the current threat environment, with plots likely to materialise with little forewarning, and a heightened risk of terrorism at places within Commonwealth jurisdictions, notably airports. The potentially catastrophic consequences of a terrorist attack on places of national significance, or in places of mass gathering, provides a proper basis for the continued existence of these unique powers.

In 2002, the Council of Australian Governments (COAG) agreed to a national framework to combat terrorism. It was recognised that national terrorism laws and cooperation between all jurisdictions were required to meet the new challenges posed by terrorism. Division 3A provides for a set of nationally consistent counter-terrorism powers that apply to every Commonwealth place regardless of the State or Territory in

which it is located, and is exercisable by Federal, State and Territory police officers. While State and Territory laws also provide police with special counter-terrorism powers, the specific provisions differ between jurisdictions. Division 3A ensures that police officers located at Commonwealth places have access to powers which are familiar and well-understood—a critically important feature in the context of emergency situations in which police are expected to act immediately.

To date, the measures within Division 3A have not been used. The fact that these powers have not been used does not negate their necessity; rather, it reflects the fact that Australia’s security and law enforcement agencies have, to date, been able to detect and disrupt terrorist plots before they eventuated at target locations. It also reflects the integrity of law enforcement through the judicious application of available powers, consistent with the intention that these powers would be used only in imminent threat situations where immediate action is necessary and there is not enough evidence, at that point in time, to identify and arrest a suspect. In such emergency circumstances, the use of these powers will assist police to investigate and identify the source and nature of the threat.

## International context

The unpredictability and often limited forewarning of terrorist attacks globally has influenced the approach of likeminded countries towards emergency response powers relating to an imminent or ongoing attack.

In 2012 the UK introduced powers to enable the stop and search of a person, and seizure of evidence, in a public place if a police officer reasonably suspects the person to be a terrorist<sup>1</sup>. Since commencement of these provisions in 2011, 6,489 persons were stopped and searched by the Metropolitan Police Service, with 589 occurring between June 2019 and June 2020. Consequently, 445 persons were arrested following the searches, with 51 arrests being made in the 2019-2020 reporting period.<sup>2</sup>

UK legislation also provides for the equivalent of ‘prescribed security zone’ powers, which have greater scope and lower thresholds<sup>3</sup> than those set out in the Australian Crimes Act.<sup>4</sup> This power has been used once since its enactment following the Parsons Green Attack on 15 September 2017. The use of the power in the prescribed zone led to 128 stop and searches and resulted in four arrests.<sup>5</sup>

New Zealand legislation permits stop and search of a person in a public place if the police officer has reasonable grounds to believe that the person has evidentiary material relating to certain offences,<sup>6</sup> such as a terrorist offence.<sup>7</sup> While not specific to terrorism offences, United States legislation provides for stop and search where there is a particularised and objective basis for suspecting the individual is engaged in or about to engage in criminal activity.<sup>8</sup>

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<sup>1</sup> *Terrorism Act 2000* (UK) s43, 43A.

<sup>2</sup> *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, annual tables* (Report, 11 June 2020) S.02 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/891123/operation-police-powers-terrorism-mar2020-annual-tables.xlsx](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891123/operation-police-powers-terrorism-mar2020-annual-tables.xlsx)>.

<sup>3</sup> *Terrorism Act 2000* (UK) s47A.

<sup>4</sup> *Terrorism Act 2000* (UK) s47A.

<sup>5</sup> *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search* (Report, 11 June 2020) 20 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/891341/police-powers-terrorism-mar2020-hosb1520.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891341/police-powers-terrorism-mar2020-hosb1520.pdf)>.

<sup>6</sup> *Search and Surveillance Act 2012* (NZ) ss16-17.

<sup>7</sup> See *Terrorism Suppression Act 2002* (NZ) s6A; the offence of terrorism carries a maximum penalty of life imprisonment, meeting the eligibility requirement for *Search and Surveillance Act 2012* (NZ) ss16-17.

<sup>8</sup> *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *United States v. Singh*, 415 F.3d 288, 294 (2d Cir. 2005).

# Control orders – Division 104 of the Criminal Code

## Legislative context

A control order under Division 104 of the Criminal Code is a court order that imposes conditions on a person to protect the public from a terrorist act or prevent the support or facilitation of a terrorist act.

Subdivision B of Division 104 sets out that a senior AFP member must seek the written consent of the AFP Minister before requesting an interim control order from an issuing court (the Federal Court of Australia or Federal Circuit Court). The member may only seek the Minister's consent to request an interim control order in relation to a person if the member suspects on reasonable grounds:

- that the order would substantially assist in preventing a terrorist act;
- that the person has trained with a listed terrorist organisation, engaged in a hostile activity in a foreign country, been convicted in Australia of a terrorism offence, or been convicted in a foreign country for conduct that, if engaged in Australia would constitute a terrorism offence;
- that the order would substantially assist in preventing the provision of support for or facilitation of a terrorist act; or
- that the person has provided support for or facilitated the engagement in a hostile activity in a foreign country.

The issuing court may make the interim control order if it is satisfied of these grounds on the balance of probabilities. Under section 104.5, the court may impose a range of obligations, prohibitions and restrictions on the person by means of the order. These comprise:

- prohibitions or restrictions on being at specified areas or places, and on leaving Australia;
- requirements to remain at specified premises between specified times, and to wear a tracking device;
- prohibitions or restrictions on communicating or associating with specified individuals, accessing or using specified forms of telecommunication or other technology, possessing or using specified articles or substances, and carrying out specified activities; and
- requirements to report to specified persons at specified times and places, to allow themselves to be photographed or allow impressions of fingerprints to be taken, and participate in specified counselling or education.

The court must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed by the order is reasonably necessary, appropriate and adapted, for the purpose of:

- protecting the public from a terrorist act;
- preventing the provision of support for, or the facilitation of, a terrorist act; or
- preventing the provision of support, for or the facilitation of, the engagement in a hostile activity in a foreign country.

Under Subdivision C, a senior AFP member may request an issuing court to make an interim control order without first obtaining the Minister's consent, if this is necessary due to urgent circumstances. If the Minister's consent is not sought within eight hours of the interim control order being made, the order immediately ceases to be in force.

An interim control order does not come into force until it has been served personally, or (if the person is detained in custody) the person has been released from custody. The order must specify the period for which it is to be in force – this can be no longer than 12 months, or three months if the person is 14 to 17 years of age. The order must also specify a date on which the person will attend the issuing court for the court to either confirm the interim order (with or without variation), declare the order to be void, or revoke the order.

Under Subdivision E, a person who is subject to a confirmed control order may apply to an issuing court for the court to revoke or vary the order. While a confirmed control order is in force, the AFP Commissioner must apply to an issuing court for the order to be revoked if satisfied that the grounds on which the order was confirmed have ceased to exist, or apply for certain obligations, prohibitions or restrictions to be removed if satisfied that they should no longer be imposed on the person. The AFP Commissioner may also apply to an issuing court for additional obligations, prohibitions or restrictions to be added to a confirmed control order.

Subdivision G sets out the offence of contravening a control order (section 104.27) and offences relating to tracking devices (section 104.27A), which both carry a maximum sentence of five years' imprisonment.

## Use of the provisions

Since the National Threat Level was raised to PROBABLE in September 2014, 13 interim control orders have been made, of which eight have been confirmed. Of these, eight have been made in respect of terrorism related offenders following their release from custody after they served their head sentence. One was imposed on a subject who was released following an acquittal of a terrorism conviction.

Since June 2019, the AFP has applied for nine control orders, of which eight have been issued and five have subsequently been confirmed. One application is currently before the court. Seven control orders relate to individuals who have been released from custody after serving their head sentence for terrorism offences. These orders are being used to restrict the activities and monitor the actions of offenders following their release. The control order which is currently before the court relates to an individual who is due for release from custody at the end of August after serving their head sentence for terrorism offences.

## Ongoing necessity

Control orders form part of the comprehensive suite of powers required within the context of the current, dynamic terrorism threat environment, as a medium to long-term risk mitigation measure for persons of counter-terrorism interest in the community. The availability of control orders, demonstrated by their more frequent application in recent times, continues to be necessary and of high utility in both the pre-prosecution and post-sentence context in dealing with individuals who pose a significant terrorism risk to the community, and in instances where there is not enough evidence to reach the threshold for a criminal offence.

### *Interaction between control orders and Extended Supervision Orders*

In 2017 the INSLM made recommendations to address the interoperability between control orders and Continuing Detention Orders (CDOs) through the creation of Extended Supervision Orders (ESOs). The PJCIS endorsed the INSLM's recommendations in its 2018 review of the control order regime, which was accepted by the Government in its response to the PJCIS review. Subject to receiving support from States and Territories, the Government intends to introduce legislation to establish ESOs in 2020.

ESOs have been specifically designed to target a narrower cohort of individuals compared to those to whom the control order scheme is intended to apply. ESOs will form part of the High Risk Terrorist Offenders (HRTTO) regime established under Division 105A of the Criminal Code, and will provide a less restrictive alternative to CDOs to manage the unacceptable risk posed by eligible offenders post-sentence. State or Territory Supreme Courts will be able to make an ESO, upon application by the AFP Minister on a HRTTO-eligible offender at the end of their custodial sentence. A court may make an ESO on the basis of admissible evidence that the offender poses an unacceptable risk of committing a serious Part 5.3 terrorism offence if released into the community. An ESO will impose a range of conditions on a person for the period that the order is in force. Contravention of those conditions is an offence.

Once ESOs are established, the HRTTO regime is intended to be the primary tool for managing high risk terrorist offenders at the end of their custodial sentence. Applications for post-sentence orders for any particular offender will be a considered decision by the AFP Minister based on all information presented as to the risk that offender is likely to pose. It is ultimately a decision for the Court whether to make an order and what conditions to include.

The control order scheme is available for a broader cohort of individuals to help prevent a terrorist act, as well as managing the risk posed by persons who have been involved in certain terrorism activities or

convicted of terrorism offences in Australia or overseas. Convicted offenders cannot be subject to orders under both an ESO and a control order at the same time.

Following recent and heightened use of control orders, the AFP has identified a number of practical issues regarding procedural efficiency and tailoring conditions according to the risk posed by the individual. Development of the proposed ESO scheme has also identified potential enhancements to the control order scheme. Home Affairs is working with the AFP to explore these issues, to ensure the control order scheme remains effective and proceedings are efficient for all parties involved.

## International context

The UK, Canada and New Zealand all have legislated schemes which allow for the imposition of conditions on persons of counter-terrorism interest as a means of addressing the risk posed by those individuals.

For example, the UK implemented the *Terrorism Prevention and Investigation Measures Act 2011* (TPIM Act), which permits UK authorities to impose almost identical restrictions to Australian legislation on an individual suspected of preparing to commit terrorism offences.<sup>9</sup> As of June 2019, there were six orders in force under the TPIM Act.<sup>10</sup>

Canada's Criminal Code allows for 'terrorism peace bonds' to be imposed on individuals where it is considered necessary to prevent the commission of terrorism offences.<sup>11</sup> These restrictions may prohibit an individual from possessing certain weapons, restrict movements to certain parts of Canada or confiscate their passport.<sup>12</sup> The Public Prosecution Services of Canada provided the Attorney-General of Canada consent to file 18 applications for terrorism peace bonds between 2015 and 2019.<sup>13</sup>

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<sup>9</sup> *Terrorism Prevention and Investigation Measures Act 2011* (UK) ss2-3, Sch 1.

<sup>10</sup> Grahame Allen and Esme Kirk-Wade, *Terrorism in Great Britain: the statistics* (Briefing Paper, No. CBP7613, 26 March 2020) 27-28 <<https://commonslibrary.parliament.uk/research-briefings/cbp-7613/>>.

<sup>11</sup> Criminal Code, RSC, 1985, C-46, s83.3.

<sup>12</sup> Criminal Code, RSC, 1985, C-46, s83.3.

<sup>13</sup> Public Prosecution Service of Canada, *Annual Report 2018-2019* (Report, 28 June 2019) <[https://www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2018\\_2019/index.html](https://www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2018_2019/index.html)>; Public Prosecution Service of Canada, *Annual Report 2017-2018* (Report, 29 June 2018) <[https://www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2017\\_2018/index.html](https://www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2017_2018/index.html)>; Public Prosecution Service of Canada, *Annual Report 2016-2017* (Report, 30 June 2017) <[https://www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2016\\_2017/index.html](https://www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2016_2017/index.html)>; Public Prosecution Service of Canada, *Annual Report 2015-2016* (Report, 30 June 2016) <[https://www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2015\\_2016/index.html](https://www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2015_2016/index.html)>.

# Preventative detention orders – Division 105 of the Criminal Code

## Legislative context

The purpose of preventative detention orders (PDOs) under Division 105 of the Criminal Code is to allow a person to be detained and taken into custody for a short period of time to either prevent a terrorist act from being carried out, or preserve evidence of a recent terrorist act. Under Subdivision B of Division 105, a senior AFP member may make an initial PDO with regard to a person if satisfied that:

- there are reasonable grounds to suspect that the person will engage in a terrorist act, possesses a thing that is connected with the preparation for, or the engagement of a person with, a terrorist act, or has done an act in preparation for, or planning, a terrorist act;
- making the order would substantially assist in preventing a terrorist act occurring; and
- detaining the person for the specified period is reasonably necessary to assist in preventing a terrorist act occurring.

The senior AFP member must be satisfied that there are reasonable grounds to suspect the terrorist act is capable of being carried out and could occur within the next 14 days,

A senior AFP member may also make an initial PDO with regard to a person if satisfied that:

- a terrorist act has occurred within the last 28 days;
- it is reasonably necessary to detain the person to preserve evidence of, or relating to, the terrorist act; and
- detaining the person for the specified period is reasonably necessary to assist in preserving evidence of, or relating to, the terrorist act.

A senior AFP member may only make an initial PDO on application by an AFP member who is satisfied of the criteria for the order to be made. The PDO must specify the period for which the person is to be detained, which must not exceed 24 hours. A PDO cannot be made with regard to a person under 16 years of age. On application by an AFP member, a senior AFP member may provide an extension (of no more than 24 hours) to the initial PDO that is in force, if satisfied that detaining the person for the extended period is reasonably necessary for the purpose specified in the PDO.

While an initial PDO is in force, an AFP member may apply to an issuing authority (being certain judges, retired judges or members of the Administrative Appeals Tribunal as appointed by the Attorney-General under section 105.2 of the Criminal Code) for a continued PDO. If satisfied of the criteria, the issuing authority may make a continued PDO, under which the person may be detained for up to 48 hours. The AFP member may apply to the issuing authority for an extension to the continued PDO (of no more than 48 hours).

Under Subdivision C, while a PDO is in force in relation to a person, any police officer may take into custody and detain the person as if the person were being detained for an offence. Subject to a number of exceptions, the person being detained is not entitled to contact another person. Section 105.42 of the Criminal Code prohibits the questioning of the person being detained, subject to a number of exceptions.

Under sections 105.8 and 105.12 of the Criminal Code, the Commonwealth Ombudsman and the PJCIS must be notified of the making of an initial or continued PDO as soon as reasonably practicable.

## Ongoing necessity

In the current threat environment, where there is an increase in the threat of smaller-scale opportunistic attacks by lone actors, and where there is less time for law enforcement agencies to respond to an attack, the PDO provides a valuable tool to assist police in disrupting terrorist activity. Where there is little to no lead time to disrupt a terrorist act, there may not be sufficient information available regarding the individual to

meet the arrest thresholds. The PDO fills this gap by either preventing a person's immediate engagement in a terrorist act, or providing authorities with additional time to secure evidence following a terrorist act.

While PDOs have not been used yet, Commonwealth PDOs provide an important baseline level of national consistency for the AFP, and complement State and Territory PDO schemes. Joint Counter Terrorism Team (JCTT) arrangements provide police with the full range of State/Territory and Commonwealth powers and offences, including PDO powers. The JCTT model allows law enforcement to consider and utilise the best tools available in any particular investigation, whether they be State/Territory or Commonwealth.

The rationale to prohibit questioning of an individual detained under a PDO ensures there is a clear demarcation between police powers which are preventative in nature, and those powers which are investigative in nature. The PDO regime is shaped around preventing a terrorist act, rather than as an information gathering tool to assist investigations and prosecutions. As such, PDOs do not enable questioning, except for the purpose of identifying the person, ensuring the person's safety and well-being, or allowing the police to comply with a legislative requirement under the Criminal Code in relation to the person's detention under the PDO. However, where an individual is arrested for a Commonwealth terrorism offence, the investigation powers under Part IC of the Crimes Act will apply.

## International context

Canada's Criminal Code permits similar measures to Australia to enable the detention of terror suspects without a warrant necessary for preserving evidence or preventing an attack. An individual can be detained for up to six days where detention is necessary to prevent terrorist activity and where police can demonstrate they are conducting an investigation diligently<sup>14</sup>.

UK legislation permits up to 14 days of investigative detention without charge for individuals suspected of committing terrorism offences, or individuals concerned in the commission or preparation of terrorist acts.<sup>15</sup> Since enactment, this power has been used 2,063 times, with 260 individuals being held for longer than seven days under these powers.<sup>16</sup> While Australia also has an investigative detention regime under Part IC of the Crimes Act, the UK regime is also used to preserve evidence.<sup>17</sup> Australia has instead sought to separate investigatory and preventative powers in order to provide additional safeguards to a person who has not yet been charged with an offence.

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<sup>14</sup> Criminal Code, RSC, 1985, C-46, s83.3.

<sup>15</sup> *Terrorism Act 2000* (UK) s41, Sch 8.

<sup>16</sup> *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, annual tables* (Report, 11 June 2020) A.02.

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/891123/operation-police-powers-terrorism-mar2020-annual-tables.xlsx](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891123/operation-police-powers-terrorism-mar2020-annual-tables.xlsx)>.

<sup>17</sup> *Terrorism Act 2000* (UK) Sch 8 para 32(1A)(b).

## Conclusion

The Australian Government is responsible for ensuring the safety and security of Australians. Considering the potentially catastrophic consequences of a terrorist act, Australia's counter-terrorism framework cannot be solely reliant upon traditional criminal justice methods to disrupt threats before the point of attack. The preventative measures which are subject of this review serve a unique purpose and are appropriate and proportionate tools for authorities in very exceptional and grave circumstances. The threat of terrorism has continued to evolve since the INSLM and PJCIS concluded in 2017 and 2018 respectively that the preventative measures should be continued. In light of that evolving threat, these schemes enable agencies to respond effectively to terrorism and remain necessary components of Australia's counter-terrorism legislative framework.

## Appendix

### Stop, search and seizure

#### United Kingdom

Sections 43, 43A and 47A of the *Terrorism Act 2000* (UK):

- A constable may stop and search any person who they reasonably suspect to be a terrorist and seize anything which they reasonably suspect may constitute evidence the person is a terrorist.
- A senior police officer can authorise a specified area where they reasonably suspect that an act of terrorism will take place and they consider that the authorisation is necessary to prevent such an act and the area and duration are no greater than is necessary.

#### New Zealand

Sections 16, 17 and 110 of the *Search and Surveillance Act 2012* (NZ):

- A constable may search and seize any person or vehicle in a public place if they have reasonable grounds to believe that the person or vehicle has evidential material relating to an offence punishable by imprisonment for a term of 14 years or more.

Police officers have a range of powers under the *Search and Surveillance Act 2012* (NZ), *Crimes Act 1961* (NZ), the *Arms Act 1983* (NZ) and the *Immigration Act 1987* (NZ) to search people for weapons or places for unlawful non-citizens.

#### Canada

Sections 83.14, 117.02, 117.04 of the *Criminal Code*:

- A peace officer (police officer) can search a person and seize evidence, without a warrant, where they believe on reasonable grounds:
  - i. A weapon was used in the commission of an offence and that evidence of that offence is likely to be found on a person.
  - ii. A person possesses a weapon and it is not desirable in the interests of public safety for the person to possess the weapon and where it would not be practicable to obtain a warrant, the police officer search and seize the weapon and any registration for the weapon.
- Attorney-General can make an application to a judge of the Federal Court to seize property that has been or will be used to carry out a terrorist activity.

#### United States

Under Common Law:

- A police officer may stop and search a person when there is:
  - i. A “particularized and objective basis for suspecting” the individual is engaged in or about to engage in criminal activity;
  - ii. Probable cause to believe that they have committed a felony (which includes terrorist offences)
- The police officer may subsequently undertake a search if they have probable cause to believe that a suspect possesses evidence or a weapon.

## Control Orders

### United Kingdom

Sections 2-3 of the *Terrorism Prevention and Investigation Measures Act 2011* (UK):

- The Secretary of State can impose a Terrorism Prevention and Investigation Measures (TPIM) order if satisfied that the individual has been involved in terrorism-related activity and that a control order is necessary to protect members of the public from the individual's risk of engaging in terrorism.
- A TPIM order can be imposed when urgent, but it must be immediately referred to the High Court. TPIM can be applied for up to 12 months but can be extended by a maximum of 12 additional months.

Conditions include limitations to a person's travel, property rights, work or studies, or requirements for a person to take certain actions regarding reporting, being photographed and being monitored.

### New Zealand

Sections 6 and 12 of the *Terrorism Suppression (Control Orders) Act 2019* (NZ):

- A control order can be imposed on a person who is 18 years old or older and who has engaged in, or attempted to travel to engage in, terrorism related activities in a foreign country
- A court must be satisfied that the person poses a real risk of engaging in terrorism related activities and that the restrictions imposed are necessary and appropriate to protect the public and prevent the terrorism related activities.
- Section 17 outlines conditions that may be imposed in a control order, including limitations to a person's travel, communication, property rights, work or studies. Conditions can also be imposed to require that person to adhere to a curfew, report to constables at specified times and places, have photographs and fingerprints taken, to be electronically monitored or to engage in rehabilitation or reintegration programs.

### Canada

Under Section 83.3 of the Criminal Code:

- With the Attorney General's consent, a peace (police) officer may apply to a provincial court judge for a 'recognizance with conditions' (also known as a 'terrorism peace bond'), if the judge believes on reasonable grounds that the person may carry out terrorist activity and that the recognizance is necessary to prevent it. A person may refuse to enter into a recognizance, and instead may be committed to prison for 12 months.
- Conditions include prohibition from possessing firearms, surrendering their passport passports or limits on geographical locations.

A recognizance can apply for up to 12 months, but may be extended to 24 months if the person was previously convicted of a terrorist offence.

### United States

While not specific to terrorism, the United States has conditions that are comparable to control order conditions that can be imposed under federal bail laws (18 USC 3142-3144) or federal probation (18 USC 3561-3566). Bail is predicated on a charge being laid and probation is predicated upon a successful conviction.

## Preventative Detention Orders

### United Kingdom

Section 41 of the *Terrorism Act 2000* (UK):

- A constable can arrest a person and detain them for up to 48 hours without warrant if they reasonably hold a suspicion that the person is a terrorist. A constable can make an application to the High Court to increase the duration of detention for up to 14 days.

### New Zealand

No similar powers.

### Canada

Section 83.3 of the *Criminal Code*

- A peace (police) officer is permitted to arrest a person without a warrant if, the detention of a person is necessary to prevent a terrorist activity. The individual must be brought before a judge within 24 hours (or as soon as possible thereafter). A judge can adjourn the hearing to retain the person in detention for up to 144 hours if the detention is necessary for the protection or safety of the public.

### United States

Under Common Law:

- An individual can be arrested, stopped and searched if a police officer has probable cause to believe that the person has committed a federal felony, such as a terrorism offence.