



Australian
Human Rights
Commission

Counter-Terrorism and Other Legislation Amendment Bill 2023

Submission to the Parliamentary Joint Committee on Intelligence
and Security

9 October 2023

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1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in relation to its *Review of the Counter-Terrorism and Other Legislation Amendment Bill 2023*.
2. The Counter-Terrorism and Other Legislation Amendment Bill 2023 (Cth) (the Bill) proposes to again extend the sunset dates for a range of counter-terrorism powers, and to make some amendments to these powers in response to recommendations of the PJCIS in its 2021 report, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*.
3. In September 2020, the Commission made a detailed submission to the PJCIS in relation to its previous review (2020 submission). The Commission has also made a range of other submissions on these issues as described in paragraph 4 of the 2020 submission. The Commission relies on its 2020 submission and highlights below particular sections of it that are relevant to aspects of this Bill.

2 Summary

4. This Bill seeks to implement a number of recommendations made by the PJCIS in its 2021 report. The most significant of these recommendations is to again extend the sunset date for a range of extraordinary police powers in relation to terrorism contained in the *Crimes Act 1914* (Cth) (Crimes Act) and the *Criminal Code Act 1995* (Cth) (Criminal Code).
5. The stop, search and seize powers in Div 3A of Part IAA of the Crimes Act and the control order and preventative detention order (PDO) regimes in Divs 104 and 105 of Part 5.3 of the Criminal Code were first introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth), following the July 2005 terrorist attacks in London.
6. The legislative proposals were reviewed in detail, prior to their introduction, by the Senate Legal and Constitutional Legislation Committee chaired by Senator Marise Payne, then in her first full term as a Senator. Senator Payne has recently resigned from the Senate

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after becoming the longest-serving female Senator in Australia's history; but the temporary measures approved in 2005 are now proposed to continue.

7. The Committee chaired by Senator Payne rightly observed that it was dealing with 'the proposed introduction into Australian law of a completely new scheme capable of depriving citizens and residents of their liberty and allowing far reaching intrusions into other fundamental civil liberties'.¹ The rationale for such provisions was the changing nature of the terrorist threat facing Australia. The Committee made 52 recommendations, some of which were accepted by the Government.
8. The Act entered into force on 14 December 2005. The new provisions were made subject to sunset provisions, which meant that they would cease operation after 10 years, that is, on 15 December 2015. The rationale for making the existence of these provisions subject to a time limit was discussed by the Senate Legal and Constitutional Legislation Committee:

Extraordinary laws may be justifiable but they must also be temporary in nature. Sunset provisions ensure that such laws expire on a certain date. This mechanism ensures that extraordinary executive powers legislated during times of emergency are not integrated as the norm and that the case for continued use of extraordinary executive powers is publicly made out by the Government of the day.²
9. Since that time, the sunset date for these laws has been further extended on four occasions, namely:
 - an extension in 2014, providing for a new sunset date of 7 September 2018³
 - an extension in 2018, providing for a new sunset date of 7 September 2021⁴
 - an extension in 2021, providing for a new sunset date of 7 December 2022⁵
 - an extension in 2022, providing for a new sunset date of 7 December 2023.⁶

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10. The suite of provisions the subject of the present review was first introduced as a result of a dramatic change in Australia's security environment. Since then, the threat environment has continued to change. From September 2014 to November 2022, Australia's national terrorism threat level was 'PROBABLE' (or 'high' under the previous regime). In November 2022, the threat level was lowered by the Australian Security Intelligence Organisation (ASIO) to 'POSSIBLE'.

11. In a media release announcing this change, the Minister for Home Affairs said:

Overall, ASIO has assessed that the factors that contributed to raising the terrorism threat level in 2014 no longer exist, or persist to a lesser degree.

In particular, ASIO has assessed that while Australia remains a potential terrorist target, there are fewer violent extremists with the intention to conduct an attack in Australia than there were when the threat level was raised in September 2014.⁷

12. ASIO provided more detail about its decision to lower the threat level:

The threat from religiously motivated violent extremists has moderated. In particular, the offshore networks, capabilities and allure of Sunni violent extremist groups—such as the Islamic State of Iraq and the Levant and al-Qa'ida—have been substantially degraded. Accordingly, the support for these groups in Australia has declined further. But the violent extremist beliefs which motivated these groups persist, and will continue to appeal to a small number of Australians.

Ideologically motivated violent extremism—and particularly nationalist and racist violent extremism—remains a threat to Australian security and its adherents will continue to engage in offensive behaviours. But nationalist and racist violent extremist groups are more likely to focus on recruitment and radicalisation, rather than attack planning. ASIO remains concerned about the potential for these groups to radicalise individuals who then go on to undertake attacks, potentially without any warning.

Over the last two years, ASIO has seen an increase in issue-motivated extremism fuelled by grievances associated with COVID-19 restrictions, conspiracy theories and anti-authority ideologies. While some individuals used violent rhetoric and some protests involved violence, we did not identify acts of terrorism. The Australian community remained largely resilient, and many of the grievance narratives lost momentum as restrictions were eased.

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In the online environment, violent extremists—both in Australia and offshore—will continue to produce and share propaganda intended to sow division and encourage acts of violence. While a single piece of propaganda is unlikely to be the sole catalyst for an attack, it can be amplified in online echo chambers where violent extremist ideologies can proliferate without being challenged.⁸

13. The Minister emphasised that the lowering of the threat level did not mean that there was no or negligible threat from terrorism. Nevertheless, the reduction of the threat level to 'POSSIBLE', the second lowest of five levels and the lowest it has been for a decade, suggests that this Committee should carefully scrutinise proposals to further extend measures to combat terrorism that were only ever intended to be temporary and that have significant human rights implications.
14. For the reasons set out in more detail below, the Commission recommends that:
 - the stop, search and seizure powers be extended for a further 3 years, because their tight framing (including the further safeguards included in the Bill) means that their impact on human rights is proportionate in the circumstances
 - the control order powers be allowed to sunset in December 2023, now that an extended supervision order regime for convicted terrorism offenders has been enacted and is operational
 - the preventative detention order powers be allowed to sunset in December 2023, given their very significant impact on human rights and the availability of less restrictive alternatives that are just as effective in achieving their stated objectives.
15. The Commission also addresses some of the other proposed amendments to these regimes. In summary, it supports amendments to:
 - the stop, search and seize regime to:
 - require police to inform people who are stopped of their right to make a complaint to a relevant oversight body
 - set out mandatory considerations when the Minister declares a prescribed security zone

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- permit declarations of prescribed security zones to be made for periods shorter than 28 days
 - require the Australian Federal Police (AFP) to notify the Commonwealth Ombudsman, the Independent National Security Legislation Monitor (INSLM) and the PJCIS of the declaration of any prescribed security zone within 72 hours
 - require the Minister to provide the PJCIS with a statement of reasons for making a declaration of a prescribed security zone as soon as practicable
- the control order regime (if it is to continue) to limit the making of control orders to the Federal Court
 - the preventative detention order regime (if it is to continue) to limit the issuing of preventative detention orders to current and former superior court judges.
16. The Commission agrees with the additional reporting requirements in relation to post-sentence orders, but notes that a more substantive review of Div 105A is required and is currently being conducted by the PJCIS.
17. The Commission also agrees with the extension for 12 months of the sunseting date for the general secrecy offence under s 122.4 of the Criminal Code of unauthorised disclosure of information by current and former Commonwealth officers, on the basis that the Government is currently in a process of reducing the number and complexity of Commonwealth secrecy offences.

3 Recommendations

Recommendation 1

The Commission recommends that Schedule 1 of the Bill, dealing with amendments to the stop, search and seize powers in the *Crimes Act 1914* (Cth), be passed.

Recommendation 2

The Commission recommends that the provisions of Schedule 2 of the Bill dealing with control orders not be passed, and that the provisions of the Criminal Code dealing with control orders be permitted to sunset on 7 December 2023 as currently provided for in s 104.32.

Recommendation 3

If Recommendation 2 is not accepted, the Commission recommends that the existing control order regime be amended to focus only on orders for preventative purposes, leaving the extended supervision order regime to apply to post-sentence orders. This should be done by:

- (a) repealing ss 104.2(2)(b) and (d) of the Criminal Code
- (b) repealing ss 104.4(1)(c)(ii)-(v) and (vii) of the Criminal Code
- (c) making any other necessary consequential amendments.

Recommendation 4

If Recommendation 2 is not accepted, the Commission recommends that the provisions of Schedule 2 of the Bill that limit the making of control orders to the Federal Court be passed.

Recommendation 5

The Commission recommends that the provisions of Schedule 2 of the Bill dealing with preventative detention orders not be passed, and that the provisions of the Criminal Code dealing with preventative detention orders be permitted to sunset on 7 December 2023 as currently provided for in s 105.56.

Recommendation 6

If Recommendation 5 is not accepted, the Commission recommends that the provisions of Schedule 2 of the Bill that limit the issuing of preventative detention orders to current and former superior court judges be passed.

Recommendation 7

The Commission recommends that the items 53 to 55 of Schedule 2 of the Bill dealing with post-sentence orders be passed.

Recommendation 8

The Commission recommends that the extension of the sunseting of s 122.4 in Part 2 of Schedule 2 of the Bill be passed, on the basis that the Government intends over the next 12 months to reduce and rationalise the number of Commonwealth secrecy offences.

4 Stop, search and seize powers

4.1 Structure of provisions

18. Division 3A of Part IAA of the Crimes Act grants police officers stop, search and seize powers that can be used in relation to suspected terrorist acts. These provisions grant powers both to officers of the AFP and to officers of State and Territory police forces.⁹
19. All but one of these powers¹⁰ may be used in two kinds of situations. The first situation is where a person is in a 'Commonwealth place' and the officer suspects, on reasonable grounds, that the person might be about to commit, might be committing, or might just have committed, a terrorist act.¹¹ That is, there must be a reasonable basis to suspect a terrorist act is imminent, occurring, or has just occurred. A 'Commonwealth place' includes places like airports, defence establishments, Commonwealth departmental premises, the various federal courts and the High Court.¹²
20. The second situation is where a person is in a Commonwealth place that the relevant Minister (currently the Attorney-General) has declared to be a 'prescribed security zone' under s 3UJ of the Crimes Act. In those circumstances, there is no need for the police officer to form any suspicion about the likelihood of a terrorist act occurring. The fact that a person is in a prescribed security zone is sufficient for the stop, search and seize powers to be available.¹³
21. The Minister may declare that a Commonwealth place is a prescribed security zone if the Minister considers that a declaration would assist:

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- in preventing a terrorist act occurring; or
 - in responding to a terrorist act that has occurred.¹⁴
22. The declaration lasts for 28 days unless revoked earlier.
23. The powers that may be exercised in these two situations allow a police officer to:
- require a person to show evidence of their identity and provide details of their name, residential address, and reason for being in that Commonwealth place¹⁵
 - stop and detain a person for the purpose of conducting a search of their person (either an ordinary search or a frisk search), their vehicle, anything in their possession, or anything that they have brought into the Commonwealth place¹⁶
 - seize any item that the officer reasonably suspects may be used in, is connected with the preparation for, is evidence of, or relates to, a serious offence or a terrorist act.¹⁷
24. In addition, this Division contains a broader power that is not limited to Commonwealth places. By virtue of s 3UEA of the Crimes Act, introduced in 2010,¹⁸ a police officer may enter any premises (including any private premises) without a warrant if the officer suspects on reasonable grounds that it is necessary to search the premises for a thing in order to prevent it from being used in connection with a terrorism offence. This power can only be used where the officer also suspects on reasonable grounds that it is necessary to exercise the power without a warrant because there is a serious and imminent threat to a person's life, health or safety.
25. In 2018, additional reporting and oversight provisions were introduced to increase transparency in relation to these stop, search and seize powers.¹⁹ These amendments were made following recommendations of the INSLM²⁰ and the PJCIS.²¹ The new reporting requirements involve:
- reporting by the AFP to the Minister, the INSLM and the PJCIS in relation to the exercise of the powers, as soon as practicable after they are exercised

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- annual reporting by the Minister to Parliament on the exercise of the powers.
26. The reporting is limited to the exercise of stop, search and seize powers by AFP officers, to requests by any police officer to the Minister for declarations of prescribed security zones, and to any declarations made by the Minister. Reporting is not required in relation to the exercise of stop, search and seize powers by officers of State or Territory police forces.
27. An additional oversight role was given to the PJCIS to monitor and review the performance by the AFP of its functions under Div 3A of Part IAA of the Crimes Act and the basis of the Minister's declarations of prescribed security zones.²² The PJCIS does not have a role in monitoring or reviewing the performance by officers of State and Territory police forces of their exercise of the stop, search and seize powers.
28. As at September 2020 (when these powers were last reviewed by the PJCIS), these powers had not been used since they were introduced.²³ Annual reports produced by the Department of Home Affairs in 2020–21 and by the Attorney-General's Department in 2021–22 confirm that the powers were also not used in those financial years.²⁴

4.2 Previous consideration by AHRC

29. The Commission conducted a detailed human rights analysis in relation to the stop search and seizure provisions in its 2020 submission (see [62]–[96]).
30. The Commission concluded that, in the prevailing security environment at the time, it would be open to the PJCIS to find that the stop, search and seize powers were consistent with Australia's human rights obligations. The Commission recommended that the maximum duration of a declaration of a prescribed security zone be limited to 14 days, consistent with equivalent legislation in the United Kingdom, unless there was compelling evidence suggesting that a longer period was necessary in Australian circumstances.
31. The Commission also recommended that further consideration be given to whether the warrantless entry powers should be repealed.

4.3 Proposed amendments

32. Schedule 1 of the Bill substantially implements recommendations 1 and 2 made by the PJCIS in its 2021 report.²⁵
33. *First*, proposed ss 3UD(1A) and (1B) of the Crimes Act would require a police officer exercising stop and search powers under s 3UD to inform the person stopped that they have a right to make a complaint about the conduct of the police officer to the Commonwealth Ombudsman or a State or Territory police oversight body (unless not reasonably practical because of urgency).²⁶ The Commission considers that such notification is appropriate given the extraordinary nature of the powers and the fact that members of the public are likely to experience them as being unusual.
34. *Secondly*, proposed s 3UJ(1A) of the Crimes Act would provide a list of mandatory considerations for the Minister when declaring a prescribed security zone, including:
 - whether the impact of the declaration on the rights of people in the Commonwealth place would be reasonable and proportionate to the purpose of preventing, or responding to, a terrorist act
 - the appropriate duration of the declaration (within the maximum 28 day period)
 - the availability and effectiveness of alternative powers
 - the impact, and proportionality, of successive declarations.
35. The Commission considers that these mandatory considerations assist in ensuring that any declaration of a prescribed security zone is proportionate to the purpose of preventing, or responding to, a terrorist act.
36. *Thirdly*, proposed new s 3UJ(3) would remove the default position that a declaration is in force for 28 days unless revoked, and provide that a declaration may be made for a shorter period of time. This reinforces the position that a declaration should only be made for the period of time that is necessary in the circumstances.
37. *Fourthly*, proposed s 3UJ(5A) would require the AFP to notify the Commonwealth Ombudsman, the INSLM and the PJCIS of the

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declaration of any prescribed security zone as soon as practicable and, in any event, within 72 hours. This provision will assist in ensuring proper oversight of these extraordinary powers.

38. *Fifthly*, proposed s 3UJ(5B) would require the Minister to provide the PJCIS with a statement of reasons for making a declaration of a prescribed security zone as soon as practicable after a declaration is made. This will assist the PJCIS with its statutory function of reviewing the basis of declarations made by the Minister.²⁷
39. In his second reading speech for the Bill, the Attorney-General said that the Government was also committed to implementing recommendation 6 of the PJCIS in its 2021 report.²⁸ This recommendation was that the warrantless entry power in s 3UEA of the Crimes Act be amended to require any agency that enters premises in accordance with that power to obtain an ex post facto warrant as soon as possible thereafter. The Attorney-General said that further consideration would be given to the consequences that should flow from an assessment that the powers were not exercised appropriately, including in relation to the admissibility of any evidence gathered in subsequent criminal proceedings. As noted above, the warrantless entry power was the power in Div 3A of Part IAA of the Crimes Act that the Commission expressed most concern about. The Commission looks forward to engaging with the terms of this additional proposed safeguard when a proposed amendment is introduced.
40. Finally, the Bill would extend the sunseting date for these powers until 7 December 2026.
41. The Commission agrees with the proposed amendments to the Crimes Act described above, and recommends that Schedule 1 of the Bill be passed.

Recommendation 1

The Commission recommends that Schedule 1 of the Bill, dealing with amendments to the stop, search and seize powers in the *Crimes Act 1914* (Cth), be passed.

5 Control orders

5.1 Structure of provisions

42. Control orders allow certain kinds of obligations, prohibitions and restrictions to be imposed on a person for one or more of the following purposes:
 - protecting the public from a terrorist act
 - preventing the provision of support for, or the facilitation of, a terrorist act
 - preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country.²⁹
43. However, it is not necessary to demonstrate that any of these events is likely to occur for a control order to be issued.
44. There are currently 13 broad categories of obligations, prohibitions and restrictions that can be imposed on a person,³⁰ although the Bill proposes to expand this list so that almost any kind of condition may be imposed. Some of the existing provisions amount to restrictions on the liberty or freedom of movement of a person, and engage rights under articles 9 and 12 of the ICCPR—for example:
 - curfews, requiring a person to stay at particular premises for up to 12 hours per day
 - prohibitions on going to particular areas or places
 - prohibitions on travelling overseas
 - a requirement to wear a tracking device
 - a requirement to report to police at certain times and places.
45. Other restrictions place limits on a person's freedom of communication and their freedom to associate with others, or interfere with their family life, engaging articles 17, 19 and 22 of the ICCPR—for example:
 - a prohibition on communicating with particular people
 - a prohibition on associating with particular people

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- a restriction on accessing the internet or using certain telecommunications devices—for example, a requirement to only use a particular, identified mobile phone
 - a prohibition on carrying out certain activities, including in relation to work.
46. Some restrictions, including some of those set out above, interfere with a person’s right to privacy, engaging article 17 of the ICCPR—for example, a requirement:
- to be photographed
 - to be fingerprinted
 - that a person participate in specified counselling or education (but only if they agree to do so).
47. Restrictions can also be imposed on a person ‘possessing or using specified articles or substances’. In practice, these restrictions sometimes merely reiterate other existing legal requirements, but add the criminal consequences involved in breaching a control order.
48. When a control order is imposed on an adult, it may be in force for up to 12 months at a time.³¹ When a control order is imposed on a child aged 14 to 17, it may be in force for up to three months at a time.³² It is possible to make successive control orders in relation to the same person (whether an adult or a child).³³
49. The particular conditions that may be imposed on a person by a control order vary in terms of their severity and their impact on human rights. The most severe are the restrictions on liberty which, if applied inappropriately, have the potential to amount to arbitrary detention, and the restrictions on communication and association.
50. In assessing the full impact of the imposition of control orders, it is also necessary to consider the penalties available for their breach. If a control order is in force in relation to a person and the person contravenes any of the conditions in that control order, they commit an offence and are liable for imprisonment for up to five years.³⁴ The same penalty applies to both adults and children older than 14.

5.2 Previous consideration by AHRC

51. The Commission conducted a detailed human rights analysis in relation to control orders in its 2020 submission (see [97]–[204]).
52. The Commission noted that control orders sought to impose obligations, prohibitions or restrictions on a person based on the person’s anticipated future involvement in terrorism activity. The orders could be sought in a range of circumstances including:
 - (a) as an alternative to prosecution—for example, where a person cannot be arrested because there is no reasonable basis to suspect that they have been involved in a terrorist act, or where they have been arrested but the CDPP has advised that there is no reasonable prospect of conviction
 - (b) as a ‘second attempt’ following an unsuccessful prosecution—for example, where a person has been tried and acquitted
 - (c) once a terrorist offender has been released from prison, in circumstances where they still pose an unacceptable risk to the community.
53. The Commission provided detailed submissions to the PJCS about why the use of control orders in categories (a) and (b) could not be justified, particularly in light of the availability of more appropriate alternatives including surveillance, and arrest and prosecution for those reasonably suspected of having engaged in criminal conduct.³⁵ If there is insufficient evidence to ground a ‘reasonable suspicion’ of criminal conduct, including preparatory offences such as planning a terrorist act, then the significant restrictions involved in a control order cannot be considered to be a proportionate response. If a person has been tried and acquitted of a criminal offence, then the use of control orders based on the same evidence but a lower standard of proof raises serious concerns from a rule of law perspective.
54. However, where a convicted terrorist offender can be demonstrated, through cogent and reliable evidence, to still pose an unacceptable risk to the community at the end of their sentence, then continuing controls, which are reasonable, proportionate and necessary to manage that risk, can be justified.

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55. The Commission recommended that the control order regime be replaced by an extended supervision order (ESO) regime so that the orders were limited to convicted terrorist offenders who would still present an unacceptable risk to the community at the end of their sentence. This is overwhelmingly how control orders have been used in practice. An ESO regime was subsequently introduced in late 2021.³⁶ However, the control order regime has, so far, been retained.
56. In his second reading speech for the present Bill, the Attorney-General noted that as at 6 August 2023 there had been 28 control orders made against 21 individuals since the powers were first introduced in 2005. **Annexure A** to this submission describes each of these control orders (see also the background to early control orders described in Commission's 2020 submission at [138]–[174]). 22 control orders have been made since 2019 in relation to 15 people. Of the 15 people in respect of whom control orders have been made since 2019:
- 11 of those people had previously committed a serious terrorism offence. Since the commencement of the ESO regime in 2021, all cases of this type could be considered for an ESO. Control orders are simply not necessary in relation to this cohort.
 - 1 person (Ms Zainab Abdirahman-Khalif) had a control order imposed after she had initially been acquitted of an offence that would have fallen within the ESO regime. The acquittal was subsequently overturned on appeal the High Court. The circumstances of her case are described in more detail in case study 5 in the Commission's 2020 submission (page 54). For the reasons set out in that submission, the Commission concluded that her case did not demonstrate the necessity for the control order system in any significantly persuasive manner, particularly having regard to alternative surveillance options available to authorities.
 - 3 of those people had previously committed 'terrorism offences' (as defined in s 3(1) of the Crimes Act but these offences were not serious enough to qualify for the ESO regime as it now exists.
57. Expanding on the last dot point, given the specific post-sentence order regime that has now been enacted, there are real questions about whether control orders should still be able to be made in respect of people convicted of lower order offences that Parliament determined

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should *not* be part of the ESO regime. Control orders are meant to be preventative, that is, focused on preventing the risk of *future* conduct. However, in practice they are being applied for not on the basis of demonstrated future risk but on the basis of *past* conduct, including lower level conduct that does not qualify for an ESO. For example:

- Mr Ahmad Saiyer Naizmand has now had three control orders imposed on him based on past criminal conduct, but none of his offences involved a substantive terrorism offence. When the most recent control order was sought in 2022, the AFP did not seek to establish (on the balance of probabilities) that the control order would substantially assist in preventing a terrorist act (s 104.4(1)(c)(i)), or even that it would substantially assist in preventing the provision of support for or the facilitation of a terrorist act (s 104.4(1)(c)(vi)). Instead, the AFP relied only on the fact that Mr Naizmand had previously been convicted of ‘an offence relating to terrorism’ (s 104.4(1)(c)(iv)), namely, a breach of a previous control order.³⁷ The breach involved Mr Naizmand asking relatives on two occasions to convey a message to someone else thereby ‘bypassing controls on the use of a mobile telephone’.³⁸
- Mr Tyler Slavko Jakovac was convicted of an offence under s 80.2C(1) of the Criminal Code of intentionally advocating the doing of a terrorist act. The maximum penalty for this offence is imprisonment for 5 years and it is not an offence to which the ESO regime applies.³⁹ The conduct by Mr Jakovac involved the use of the internet and the encrypted messaging platform Telegram when he was 18 years old to advocate extreme right wing ideology, including ‘numerous instances of applauding well-known racist mass murders overseas, especially in the United States and New Zealand, and suggesting that more of the same should occur’.⁴⁰ Again, the AFP did not seek to establish (on the balance of probabilities) that the control order would substantially assist in preventing a terrorist act (s 104.4(1)(c)(i)), or even that it would substantially assist in preventing the provision of support for or the facilitation of a terrorist act (s 104.4(1)(c)(vi)). Instead, the AFP relied only on the fact that Mr Jakovac had previously been convicted of ‘an offence relating to terrorism’ (s 104.4(1)(c)(iv)).⁴¹ While the Court made an interim control order, when the matter came back before the Court to consider whether to confirm the control order, the Court decided to revoke the interim control order because the risk of Mr Jakovac

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engaging in the same kind of conduct was 'remote and most unlikely to take place'.⁴²

58. The Commission's primary position is that the control order regime should be repealed, now that the ESO regime has been enacted. The ESO regime is a better way of dealing with people convicted of terrorism offences because:
- the regime is appropriately targeted to people who have a demonstrated history of having committed a terrorism offence and who have been shown to still pose an unacceptable risk to the community in the future
 - as a result, the degree to which the conditions imposed limit the human rights of the person subject to the regime are more likely to be proportionate to the purpose for their imposition
 - it avoids problematic aspects of the control order regime, including *ex parte* applications for interim orders based on hearsay evidence, and long delays prior to confirmation hearings
 - instead, the evidence in support of an application can be properly tested in court proceedings when an order is first sought.
59. For people who have not previously been convicted of a relevant offence, it is much more difficult to justify the use of control orders, particularly in light of the availability of more appropriate alternatives including surveillance, arrest and prosecution for those reasonably suspected of having engaged in criminal conduct (see the Commission's 2020 submission at [175]-[192]).
60. When the PJCIS considered the control order regime in its 2021 report, it said that it would be 'necessary to evaluate the extended supervision order scheme [which had not yet been enacted] prior to making a determination that the control order scheme is no longer necessary'.⁴³ Now that the ESO regime has been enacted and used, it is possible for the conclusion flagged by the PJCIS to be reached.

Recommendation 2

The Commission recommends that the provisions of Schedule 2 of the Bill dealing with control orders not be passed, and that the provisions

of the Criminal Code dealing with control orders be permitted to sunset on 7 December 2023 as currently provided for in s 104.32.

61. If Recommendation 2 is not accepted, the Commission reiterates its previous submissions that control orders be clearly distinguished from extended supervision orders by not being available as an alternative form of post-sentence order. This would involve amending s 104.4(1)(c) of the Criminal Code to remove those grounds for making a control order that are based on *past* conduct involving a conviction, or conduct that could be the subject of a conviction, and leaving only those grounds that relate to the prevention of *future* terrorist acts. These amendments would be consistent with previous recommendations of the PJCIS in 2016.⁴⁴

Recommendation 3

If Recommendation 2 is not accepted, the Commission recommends that the existing control order regime be amended to focus only on orders for preventative purposes, leaving the extended supervision order regime to apply to post-sentence orders. This should be done by:

- (a) repealing ss 104.2(2)(b) and (d) of the Criminal Code
- (b) repealing ss 104.4(1)(c)(ii)-(v) and (vii) of the Criminal Code
- (c) making any other necessary consequential amendments.

5.3 Proposed amendments

62. The Bill proposes to retain the control order regime with four broad amendments.
63. *First*, the making of control orders would be restricted to the Federal Court. Control orders would no longer be able to be made by the Federal Circuit and Family Court of Australia (Division 2). This reflects how control orders have generally been made in practice. The first six applications for control orders were made to the Federal Magistrates Court and the Federal Circuit Court as they then were (see rows 1–6 of **Annexure A**), but since 2019 all applications have been made to the Federal Court. This amendment would formalise existing practice into a legislative requirement and implement recommendation 8 of the

PJCIS in its 2021 report. If control orders are retained, then the Commission supports this recommendation.

Recommendation 4

If Recommendation 2 is not accepted, the Commission recommends that the provisions of Schedule 2 of the Bill that limit the making of control orders to the Federal Court be passed.

64. *Secondly*, the conditions included in control orders would no longer be limited to the list set out in s 104.5(3) but would be expanded to include virtually any condition, along the lines of the ESO regime. This amendment reinforces the view that control orders are in effect a substitute for an ESO, with a lower threshold for obtaining them and fewer procedural safeguards. Many of the existing ESO conditions are problematic for the reasons described by the Commission in a submission to the PJCIS when they were introduced.⁴⁵ They are even more problematic when applied to people who are not already convicted terrorist offenders. For the reasons set out in section 5.2 above, the Commission does not agree that these changes should be made and reiterates Recommendation 2.
65. Further, the explicit safeguard in s 104.5(6) on not compelling people to participate in specified counselling or education unless they agree to participate at the time of the counselling or education would be removed by the Bill. Again, this is problematic for the reasons discussed previously by the Commission and is contrary to best practice in countering violent extremism programs.⁴⁶ It is surprising that the Explanatory Memorandum appears to include no discussion of the removal of this safeguard.
66. *Thirdly*, the process for varying a control order would be changed. The Bill proposes to repeal s 104.11A which permits an interim control order to be varied by consent. Instead, the Bill proposes a new s 104.22 which would permit any control order (either interim or confirmed) to be varied by consent. The section includes additional safeguards in relation to control orders made in relation to children aged 14 to 17 year old. An application for a variation would have to be given to the child's parent or guardian. Further, the Court would have to be satisfied that the variation was in the best interests of the child. These are sensible safeguards.

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67. However, an important existing safeguard would be lost if the amendments proposed in the Bill were made. Section 104.11A currently provides that an interim control order can only be varied if it does not involve *adding* any obligations, prohibitions or restrictions to the order. The repeal of this section would also repeal that safeguard.
68. This existing provision for variations followed recommendations of both the third INSLM in 2017 and the PJCIS in 2018. The rationale for this provision was that there may be a delay between an interim control order being made and a confirmation hearing and it was reasonable to provide for a process to remove conditions that were no longer appropriate.⁴⁷ However, there is far less justification for permitting an interim control order to be varied to *add* further conditions before a final hearing on whether a control order should be confirmed (even if it is said that the person subject to the control order has 'consented' to the additional conditions). As the Explanatory Memorandum for the Bill that introduced s 104.11A said:

This measure is an additional safeguard in the control order regime. It allows both parties to make minor and uncontroversial changes to the terms of an interim control order prior to a confirmation proceeding, such as amending a relevant condition to account for a change to the mobile phone number of the controlee, or a change in the controlee's residential or employment arrangements. New paragraph 104.11A(2)(b) does not allow a variation to include additional obligations, prohibitions or restrictions to the interim control order.⁴⁸

69. *Fourthly*, the Bill would extend the sunseting date for these powers until 7 December 2026. As noted above in Recommendation 2, the Commission does not agree that this regime should extend beyond the sunseting date currently determined by Parliament and should expire on 7 December 2023.

6 Preventative detention orders

6.1 Structure of provisions

70. Preventative detention orders (PDOs) permit a person to be detained without charge for up to 48 hours, with very significant limits being placed on their ability to contact other people.
71. Human rights law rightly condemns ‘incommunicado’ detention.⁴⁹ That is particularly the case where, as in Australia, there are equally effective ways to achieve the important policy outcomes of countering terrorism that are less restrictive of individual rights.
72. When originally enacted in 2005, the object of the PDO regime was to allow a person to be taken into custody and detained for a ‘short period of time’ in order to:
- (a) prevent an imminent terrorist act occurring; or
 - (b) preserve evidence of, or relating to, a terrorist act.
73. In 2016, the threshold for ground (a) was lowered. The new object in (a) is detention in order to ‘prevent a terrorist act that is capable of being carried out, and could occur, within the next 14 days from occurring’.⁵⁰
74. An application for a PDO may be made by an AFP member. When seeking a PDO based on ground (a), the AFP member *must* suspect on reasonable grounds that the subject of the PDO:
- will engage in a terrorist act, or
 - possesses a thing that is 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
- where ‘terrorist act’ is one that is capable of being carried out, and could occur, within the next 14 days.⁵¹
75. Importantly, if the AFP member has the suspicion described in the first or third dot points above, the member would also have the option of immediately arresting the person under s 3WA of the Crimes Act

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without a warrant, rather than applying for a PDO.⁵² The AFP member would also have the option of immediately arresting the person based on the suspicion described in the second dot point above, if the member also reasonably suspects that the person knows of, or is reckless as to the existence of, the connection between the thing and the potential terrorist act.⁵³ Arresting the person is likely to be a quicker and more effective way of dealing with the situation than applying for a PDO. It is also a process that better protects human rights because it then engages the requirement for the person to be brought before a court so that the court can determine whether the detention is lawful (see ICCPR article 9(4)) and, ultimately, whether an offence has been committed.

76. When seeking a PDO based on ground (b), the AFP member must suspect on reasonable grounds that:
- a terrorist act has occurred within the last 28 days, and
 - detaining the subject under a PDO is reasonably necessary for the purpose of preserving evidence of, or relating to, the terrorist act.⁵⁴
77. However, if *any* crime has been committed, the police can obtain a warrant under s 3E of the Crimes Act to search a person or premises if there are reasonable grounds for suspecting that the search will locate evidential material. A search warrant entitles an officer to seize:
- evidential material in relation to an offence to which the warrant relates; or
 - evidential material or a thing relevant to another indictable offence
- if the officer believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing an offence.⁵⁵
78. Like a PDO, a search warrant may be obtained by phone in urgent circumstances (Crimes Act s 3R). Further, as noted earlier in this submission, there is a power under s 3UEA of the Crimes Act that allows police to enter premises *without* a warrant to search for and seize a thing to prevent it from being used in connection with a terrorism offence. The use of either of these powers is likely to be a

more direct and effective way of preserving evidence of, or relating to, a terrorist act than using a PDO.

79. In light of these alternative measures for achieving the same aims, that are less restrictive of human rights, the Commission has previously recommended that the PDO regime be repealed.

6.2 Previous consideration by AHRC

80. The Commission conducted a detailed human rights analysis in relation to the preventative detention order provisions in its 2020 submission (see [205]–[241]).
81. On a number of occasions, the Commission has identified the following human rights issues with the PDO regime:
- Unlike a person who has been charged with a criminal offence, there is no obligation on the police to bring a person detained under a PDO promptly before a court.
 - Further, the ability of the person detained to bring their own proceedings to secure their release is very limited. The PDO regime does not allow for meaningful review of the merits of the decision to make a PDO while the person is detained. This significantly impinges on article 9(4) of the ICCPR, which provides that anyone who is deprived of their liberty by arrest or detention is entitled to take proceedings before a court, so that the court can decide without delay whether the detention is lawful, and order the person's release if the detention is not lawful.
 - The lack of review rights also impinges on the right of people under article 2(3) of the ICCPR to an effective remedy. In the context of a regime of preventative detention, a remedy that is 'effective' must be one that enables a person who is wrongfully detained or being ill-treated to obtain redress before the wrongful detention or ill-treatment comes to an end.
 - The strict limitations on communication with others also engages a range of rights including the right to freedom of expression (article 19 of the ICCPR) and the guarantee against arbitrary interference with the family (article 17 of the ICCPR).

82. The PDO regime has been part of the Criminal Code since 2005 but has never been used.⁵⁶
83. In its 2021 report, the PJCIS said that: 'Whilst the non-use of these powers seems to reflect a considered approach by law enforcement, it also presents the Committee with a difficult circumstance as the Committee is left to consider hypotheticals and provides little justification for the continued use of these powers.'⁵⁷
84. The PJCIS referred to the opinion of the third INSLM, Dr James Renwick SC in 2017 who considered the issue to be 'finely balanced' but recommended the retention of the regime given 'the nature and extent of current terrorist threats'.⁵⁸ Similarly, the PJCIS in 2021 referred to the then 'national security threat environment' as an important factor.⁵⁹ As described above, since the time of those reports Australia's terrorism threat level has been reduced from 'PROBABLE' to 'POSSIBLE'. The current threat level is the second lowest on a scale of five levels, and is the lowest level since September 2014.
85. In light of: the serious human rights concerns with PDOs, the availability of equally effective alternative measures that are less restrictive of human rights, the fact that PDOs were introduced as a short term emergency measure in 2005, the fact that they have never been used, and the reduction of the terrorism threat level to 'POSSIBLE', it is now time for the PDO regime to be allowed to sunset as originally intended.

Recommendation 5

The Commission recommends that the provisions of Schedule 2 of the Bill dealing with preventative detention orders not be passed, and that the provisions of the Criminal Code dealing with preventative detention orders be permitted to sunset on 7 December 2023 as currently provided for in s 105.56.

6.3 Proposed amendments

86. The Bill proposes to retain the PDO regime with two amendments.
87. *First*, the Bill would limit the classes of persons who may be appointed as an 'issuing authority' for PDOs to current or former superior court judges, and remove the ability of members of the Administrative

Appeals Tribunal and judges of the Federal Circuit and Family Court of Australia (Division 2) to issue PDOs. Given the extraordinary nature of these powers, the Commission agrees that this restriction is appropriate if, contrary to its primary recommendation, PDOs are to be retained. These amendments would implement Recommendation 15 of the PJCIS in its 2021 report.

Recommendation 6

If Recommendation 5 is not accepted, the Commission recommends that the provisions of Schedule 2 of the Bill that limit the issuing of preventative detention orders to current and former superior court judges be passed.

88. *Secondly*, the Bill would extend the sunseting date for these powers until 7 December 2026. As noted above in Recommendation 4, the Commission does not agree that this regime should extend beyond the sunseting date currently determined by Parliament and should expire on 7 December 2023.

7 Post-sentence orders

89. The Bill proposes amendments to the post-sentence order regime in Div 105A of the Criminal Code. The first thing to note is that there is currently a separate substantial review of Div 105A being undertaken by the PJCIS.
90. This inquiry was referred to the PJCIS in May 2023 and the Commission made a submission on 23 June 2023. Significant change is required to Div 105A following revelations by the INSLM that the Commonwealth has been relying on a risk assessment tool, VERA-2R, in Div 105A proceedings despite the conclusions in a report it commissioned that the tool lacks a strong theoretical and empirical foundation, has poor inter-rater reliability and questionable predictive validity.
91. In a report tabled in Parliament in March 2023, the INSLM concluded that the continuing detention order (CDO) regime could no longer be justified and recommended that it be repealed.
92. The Commission does not seek to deal with those matters as part of this submission as it is the subject of a separate inquiry by the PJCIS.

93. This Bill proposes one substantial change to Div 105A. It proposes that additional information be included in the annual report that the AFP Minister is required to table in Parliament. The additional information includes information about:
- the detention arrangements that applied to terrorist offenders subject to a CDO
 - the rehabilitation or treatment programs that were made available to terrorist offenders subject to a CDO
 - funding for the administration of Div 105A.
94. The Commission agrees with this proposed change, subject to the comments that it has made in its June 2023 submission to the PJCIS about whether the CDO regime should continue.

Recommendation 7

The Commission recommends that the items 53 to 55 of Schedule 2 of the Bill dealing with post-sentence orders be passed.

8 Secrecy provisions

95. Part 2 of Schedule 2 of the Bill deals with a separate issue that is not directly related to the other counter-terrorism aspects of the Bill.
96. It proposes to extend the sunset date for the general secrecy offence under s 122.4 of the Criminal Code of unauthorised disclosure of information by current and former Commonwealth officers. One element of the offence is that the person was under a duty not to disclose the information. According to the Attorney-General, this element picks up duties in approximately 296 other Commonwealth laws.⁶⁰
97. In December 2022, the Attorney-General announced a review of Commonwealth secrecy offences and a report by his department was due to be delivered to Government by 31 August 2023.
98. The Bill proposes extending the general secrecy offence for a further 12 months to 29 December 2024, pending the outcome of the Government's consideration of the current review of secrecy offences.

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99. The Commission has previously expressed concern about the breadth and complexity of Commonwealth secrecy provisions. In circumstances where the proposed extension of this general offence provision is part of an overall process that seeks to reduce this complexity, the Commission considers that the extension is warranted.

Recommendation 8

The Commission recommends that the extension of the sunseting of s 122.4 in Part 2 of Schedule 2 of the Bill be passed, on the basis that the Government intends over the next 12 months to reduce and rationalise the number of Commonwealth secrecy offences.

Appendix A: Control orders made

No	Name	Interim control order date	Confirmation date	Investigation stage when control order made
1.	Mr Jack Thomas	27 August 2006	Not confirmed	After acquittal for terrorism offences
2.	Mr David Hicks	21 December 2007	19 February 2008	After controversial conviction in the US for a terrorism offence (which was ultimately set aside on 18 February 2015 by the United States Court of Military Commission Review)
3.	Mr MO	17 December 2014	Not confirmed	After conviction for an undisclosed offence
4.	CO4	17 December 2014	Not confirmed	Unknown
5.	Mr Ahmad Saiyer Naizmand (#1)	5 March 2015	30 November 2015	After conviction for a passport offence and while released on recognisance to be of good behaviour
6.	Mr Harun Causevic	10 September 2015	8 July 2016	Investigation stage: after CDPP had decided there was no reasonable prospect of conviction
7.	Mr EB	30 January 2019	22 February 2019	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)
8.	Ms Zainab Abdirahman-Khalif (#1)	22 November 2019	17 July 2020	After initial acquittal for terrorism offence (subsequently overturned) and while appeal to High Court pending

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No	Name	Interim control order date	Confirmation date	Investigation stage when control order made
9.	Ms Alo-Bridget Namoa (#1)	19 December 2019	3 February 2020	After conviction for a terrorism offence: conspiring to do acts in preparation for a terrorist act (ss 11.5(1) and 101.6(1) of Criminal Code)
10.	Mr Murat Kaya	22 January 2020	29 July 2020	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)
11.	Mr Ahmad Saiyer Naizmand (#2)	27 February 2020	20 May 2020	After conviction for terrorism offence: breach of first control order (s 104.27 of Criminal Code)
12.	Mr Shayden Jamil Thorne (#1)	6 March 2020	17 August 2020	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)
13.	Mr Paul James Dacre (#1)	14 May 2020	3 June 2020	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)
14.	Mr Kadir Kaya	28 May 2020	31 August 2020	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)
15.	Mr Antonino Granata	29 May 2020	25 September 2020	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)

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No	Name	Interim control order date	Confirmation date	Investigation stage when control order made
16.	Mr Belal Saadallay Khazaal	26 August 2020	7 October 2020	After conviction for a terrorism offence: making a document connected with assistance in a terrorist act (s 101.5(1) of Criminal Code)
17.	Mr Abdul Nacer Benbrika	1 December 2020	Not confirmed	After conviction for terrorism offences: being a member of a terrorist organisation and directing the activities of a terrorism organisation (ss 102.3(1) and 102.2(1) of Criminal Code) Continuing detention order in force for three years from 24 December 2020.
18.	Mr Radwan Dakkak (#1)	31 December 2020	Not confirmed	After conviction for terrorism offences: associating with terrorist organisations (s 102.8(1) of Criminal Code) Arrested on 16 January 2021 and subsequently convicted of breach of interim control order prior to it being confirmed.
19.	Mr Shayden Jamil Thorne (#2)	5 March 2021	9 June 2021	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)
20.	Ms Zainab Abdirahman-Khalif (#2)	4 May 2021	22 December 2021	After conviction for a terrorism offence: intentionally taking steps to become a member of a terrorist organisation (s 102.3 of Criminal Code)

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No	Name	Interim control order date	Confirmation date	Investigation stage when control order made
21	Mr Paul James Dacre (#2)	12 May 2021	8 July 2021	After conviction for a terrorism offence: preparation for incursion into foreign country for purpose of engaging in hostile activities (s 119.4(1) of Criminal Code)
22	Mr Adam Mathew Brookman	6 July 2021	31 January 2022	After conviction for a terrorism offence: performing services in support or promotion of a foreign incursion offence (s 7(1)(e) of the then <i>Crimes (Foreign Incursions and Recruitment) Act 1978</i> (Cth))
23	Mr Mehmet Biber	29 July 2021	Not confirmed	After conviction for a terrorism offence: entering a foreign state (Syria) with the intent to engage in hostile activity (s 6(1)(a) of the then <i>Crimes (Foreign Incursions and Recruitment) Act 1978</i> (Cth)) Reportedly convicted of breach of control order (for conducting a business without authorisation) and sentenced to a non-custodial community correction order for two years.

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No	Name	Interim control order date	Confirmation date	Investigation stage when control order made
24.	Mr Blake Pender	7 October 2021	Not confirmed	<p>After conviction for a terrorism offence and another offence: possessing a thing (a knife) connected with terrorism (s 101.4(1) of Criminal Code) and threatening a judicial officer (s 326(1)(b) of the <i>Crimes Act 1900</i> (NSW))</p> <p>Continuing detention order in force for one year from 13 September 2021. Further conviction for assault while in custody and detained until 18 October 2022. Interim Supervision Order made on 7 October 2022. Further conviction for breach of ISO (re use of mobile phone) and detained until 9 September 2023. Due for release on 9 September 2023 pursuant to extended supervision order made in December 2022 for period of three years.</p>
25.	Ms Alo-Bridget Namoa (#2)	24 November 2021	2 December 2021	After conviction for a terrorism offence: conspiring to do acts in preparation for a terrorist act (ss 11.5(1) and 101.6(1) of Criminal Code)
26.	Mr Radwan Dakkak (#2)	9 September 2022	9 December 2022	After conviction for a terrorism offence: associating with terrorist organisations (s 102.8(1) of Criminal Code)
27.	Mr Ahmad Saiyer Naizmand (#3)	20 September 2022	[unclear]	After conviction for terrorism offences: breach of first and second control orders (s 104.27 of Criminal Code)

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No	Name	Interim control order date	Confirmation date	Investigation stage when control order made
28.	Mr Tyler Slavko Jakovac	29 November 2022	Revoked on 16 March 2023	<p>After conviction for a terrorism offence: intentionally advocating the doing of a terrorist offence (s 80.2C(2) of Criminal Code).</p> <p>Interim control order revoked on 16 March 2023 on the basis that it was no longer justified.</p>

Endnotes

- ¹ Senate Legal and Constitutional Affairs Legislation Committee, *Anti-Terrorism Bill (No 2) 2005* (November 2005) at [2.7]. At https://www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2004_07/terrorism/report/report_pdf.ashx.
- ² Senate Legal and Constitutional Affairs Legislation Committee, *Anti-Terrorism Bill (No 2) 2005* (November 2005) at [2.27].
- ³ *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), Sch 1, items 43–45, 86, 87, 107 and 108.
- ⁴ *Counter-Terrorism Legislation Amendment Act (No. 1) 2018* (Cth), Sch 1, items 7, 11 and 17.
- ⁵ *Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Act 2021* (Cth), Sch 1, items 5, 6 and 7.
- ⁶ *Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Act 2022* (Cth), Sch 1, items 1, 2 and 3.
- ⁷ The Hon Clare O’Neil MP, Minister for Home Affairs, ‘National terrorism threat level’ *Media release*, 28 November 2022, at <https://minister.homeaffairs.gov.au/ClareONeil/Pages/national-terrorism-threat-level.aspx>.
- ⁸ Australian Government, Australian National Security, *Current National Terrorism Threat Level*, at <https://www.nationalsecurity.gov.au/national-threat-level/current-national-terrorism-threat-level>.
- ⁹ *Crimes Act 1914* (Cth), s 3UA, definition of ‘police officer’.
- ¹⁰ The exception is the power in s 3UEA of emergency entry to premises without a warrant.
- ¹¹ *Crimes Act 1914* (Cth), s 3UB(1)(a).
- ¹² Independent National Security Legislation Monitor, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers*, 7 September 2017, at [3.4]. Pursuant to s 3 of the *Commonwealth Places (Application of Laws) Act 1970* (Cth), a ‘Commonwealth place’ is ‘a place (not being the seat of government) with respect to which the Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth’.
- ¹³ *Crimes Act 1914* (Cth), s 3UB(1)(b).
- ¹⁴ *Crimes Act 1914* (Cth), s 3UJ.
- ¹⁵ *Crimes Act 1914* (Cth), s 3UC.
- ¹⁶ *Crimes Act 1914* (Cth), s 3UD.
- ¹⁷ *Crimes Act 1914* (Cth), s 3UE.
- ¹⁸ *National Security Legislation Amendment Act 2010* (Cth).
- ¹⁹ *Counter-Terrorism Legislation Amendment Act (No. 1) 2018* (Cth), which added ss 3UJA and 3UJB.
- ²⁰ Independent National Security Legislation Monitor, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers*, 7 September 2017, at [9.2].
- ²¹ Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (February 2018), at [2.91]. At https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/AFPowersreview/Report.
- ²² *Intelligence Services Act 2001* (Cth), s 29(1)(bba).

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- ²³ Department of Home Affairs, Attorney-General's Department and Australian Federal Police, *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)*, submission to the PJCIS, 4 September 2020, p 6.
- ²⁴ Australian Government, Department of Home Affairs, *Control Orders, Preventative Detention Orders, Continuing Detention Orders, Temporary Exclusion Orders and Powers in Relation to Terrorist Acts and Terrorism Offences, Annual Report 2020-21*, at <https://www.homeaffairs.gov.au/reports-and-pubs/files/reports-to-parliament/20-21-counter-terrorism-powers-annual-report.pdf>; Australian Government, Attorney-General's Department, *Control orders, preventative detention orders, continuing detention orders and powers in relation to terrorist acts and terrorism offences, Annual Report 2021-22*, at <https://www.ag.gov.au/sites/default/files/2022-11/annual-report-on-counter-terrorism-powers-2021-22.PDF>.
- ²⁵ Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ReviewofAFPPowers/Report.
- ²⁶ Proposed ss 3UD(1A) and (1B) of the *Crimes Act 1914* (Cth).
- ²⁷ *Intelligence Services Act 2001* (Cth), s 29(1)(bba)(ii).
- ²⁸ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 10 August 2023, p 3 (*Counter-Terrorism and Other Legislation Amendment Bill 2023*, Attorney-General and Cabinet Secretary).
- ²⁹ *Criminal Code* (Cth), s 104.1.
- ³⁰ *Criminal Code* (Cth), s 104.5(3).
- ³¹ *Criminal Code* (Cth), s 104.5(1)(f).
- ³² *Criminal Code* (Cth), s 104.28(2).
- ³³ *Criminal Code* (Cth), ss 104.5(2), 104.28(3).
- ³⁴ *Criminal Code* (Cth), s 104.27.
- ³⁵ Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJCIS, 10 September 2020, at [97]-[192] <https://www.aph.gov.au/DocumentStore.ashx?id=b2a784cc-435f-4cbd-b5c7-6831eeb05e81&subId=691580>.
- ³⁶ *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth).
- ³⁷ *Nicolson v Naizmand* [2022] FCA 1108 at [15]; cf *Booth v Naizmand* [2020] FCA 244 at [8].
- ³⁸ *Nicolson v Naizmand* [2022] FCA 1108 at [15(f)].
- ³⁹ *Criminal Code*, s 105A.3(1)(a).
- ⁴⁰ *Fogarty v Jakovac* [2022] FCA 1454 at [3].
- ⁴¹ *Fogarty v Jakovac* [2022] FCA 1454 at [14].
- ⁴² *Fogarty v Jakovac (No 2)* [2023] FCA 234 at [10].
- ⁴³ Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, at [3.66].
- ⁴⁴ Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (November 2016) at [3.182].

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- ⁴⁵ Australian Human Rights Commission, *submission to the PJCIS in relation to the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020*, 29 October 2020, at [83]–[133], at <https://www.aph.gov.au/DocumentStore.ashx?id=cccdea26-8e64-433f-8cdd-51430e028cf3&subId=695306>.
- ⁴⁶ Australian Human Rights Commission, *submission to the PJCIS in relation to the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020*, 29 October 2020, at [101]–[109], at <https://www.aph.gov.au/DocumentStore.ashx?id=cccdea26-8e64-433f-8cdd-51430e028cf3&subId=695306>.
- ⁴⁷ Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (February 2018), at [3.92]–[3.97].
- ⁴⁸ Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 (Cth) at [57].
- ⁴⁹ See the cases referred to in M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005), 245 [10].
- ⁵⁰ *Counter-Terrorism Legislation Amendment Act (No 1) 2016* (Cth).
- ⁵¹ *Criminal Code* (Cth), s 105.4(4).
- ⁵² *Criminal Code* (Cth), ss 11.5, 101.1 and 101.6.
- ⁵³ *Criminal Code* (Cth), s 101.4.
- ⁵⁴ *Criminal Code* (Cth), s 105.4(6).
- ⁵⁵ *Crimes Act 1914* (Cth), s 3F.
- ⁵⁶ See Department of Home Affairs, Attorney-General's Department and Australian Federal Police, *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)*, submission to the PJCIS, 4 September 2020, p 11; Australian Government, Department of Home Affairs, *Control Orders, Preventative Detention Orders, Continuing Detention Orders, Temporary Exclusion Orders and Powers in Relation to Terrorist Acts and Terrorism Offences, Annual Report 2020-21*, at <https://www.homeaffairs.gov.au/reports-and-pubs/files/reports-to-parliament/20-21-counter-terrorism-powers-annual-report.pdf>; Australian Government, Attorney-General's Department, *Control orders, preventative detention orders, continuing detention orders and powers in relation to terrorist acts and terrorism offences, Annual Report 2021-22*, at <https://www.ag.gov.au/sites/default/files/2022-11/annual-report-on-counter-terrorism-powers-2021-22.PDF>.
- ⁵⁷ Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, at [4.47].
- ⁵⁸ Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, at [4.23].
- ⁵⁹ Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime*, October 2021, at [4.51].
- ⁶⁰ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 10 August 2023, p 3 (*Counter-Terrorism and Other Legislation Amendment Bill 2023*, Attorney-General and Cabinet Secretary).