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Parliamentary Joint Committee on Intelligence and Security

2017 Counter-terrorism
powers review

(Review of Stop, Search
and Seize Powers; Control
Orders; Preventative
Detention Orders; and
Declared Areas)

October 2017

Submission by the
Australian Federal Police

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Introduction

The introduction of a number of specialised counter-terrorism laws in 2005 recognised the limitations of the criminal justice framework in dealing with the unique and unpredictable nature of the terrorist threat, and the potentially catastrophic consequences of a terrorist attack on the Australian community.

2. In particular, the laws recognised that the dynamic nature of the terrorist threat environment necessitates preventative measures, as well as traditional criminal justice processes.
3. The focus on the prevention of terrorist attacks means that police may need to move to overt action quickly in order to disrupt terrorist attacks or terrorist attack planning. Early overt action can mean that, while there is strong intelligence to indicate that a person poses a continuing terrorist threat, insufficient evidence is available to support the laying of charges.
4. The current counter-terrorism legislative framework is necessary to combat the ongoing threat of mass casualty terrorist attacks. However, the evolving threat environment in Australia will continue to test the limits of the current framework.
5. The AFP acknowledges that the Independent National Security Legislation Monitor (INSLM) recently reported on his reviews into Division 3A of Part IAA of the *Crimes Act 1914* (stop, search and seize powers), sections 119.2 and 119.3 of the Criminal Code (declared areas), and Divisions 104 and 105 of the Criminal Code (control orders and preventative detention orders). The AFP submissions to the INSLM's reviews reflect the AFP's perspective as an operational agency, based on its experience utilising the relevant provisions, and the views expressed in the current submission largely mirror the earlier submissions to the INSLM. The AFP notes that the Government response to the INSLM reviews has not yet been tabled, and does not purport to pre-empt that response in its evidence to the Committee's current inquiries.

The current threat environment

6. In 2005, the terrorist threat in Australia was primarily from large-scale operations involving substantial, organised networks. This threat was characterised by the 7 July 2005 London attack, which involved a series of coordinated suicide bomb attacks on London transport. To address this threat, a suite of preventative powers were introduced.
7. The terrorism threat environment changed significantly in 2014-15 with the rise of Islamic State of Iraq and Syria (ISIS) and the ease of online radicalisation. Since then, the occurrence of smaller-scale lone actor style attacks has significantly increased in Western countries. This threat is characterised by low cost, locally financed plots using relatively simple tactics and readily available weapons.
8. The threat of terrorism has increased considerably. On 12 September 2014, the National Terrorism Threat Level was raised to 'probable'. This means that credible intelligence, assessed by Australian security agencies, indicates that individuals or groups continue to possess the intent and ability to conduct a terrorist attack in Australia. Since the elevation of this Threat Level, there have been five attacks, as well as a number of major terrorism disruption operations in response to potential attack planning in Australia.

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9. However, the threat of more complex, well-planned attacks has not subsided. This was evidenced by the July 2017 disruption of a planned improvised explosive device (IED) attack on an Aviation target that was disrupted by the Sydney Joint Counter Terrorism Team (JCTT). The range of attack styles that police are responding to is becoming increasingly diverse.

10. A significant, practical impact of this fast-paced and dynamic terrorist threat environment is that plots tend to materialise quickly and with little opportunity for law enforcement to gather evidence before being forced to intervene. Actors can move from intention to action within days or even hours, and the JCTTs often need to disrupt very soon after becoming aware of the threat.

11. In this environment, well-functioning preventative and emergency powers are more necessary than ever.

Stop, Search and Seize Powers

12. The stop, search and seize powers under Division 3A of the *Crimes Act 1914* (the Crimes Act) are part of a suite of emergency police powers in State and Commonwealth law which ensures police are able to effectively exercise their powers in terrorism investigations in each state and territory.

13. The powers under Division 3A (with the exception of section 3UEA, which is discussed separately below) can only be used in relation to persons in a Commonwealth place, which significantly narrows the geographical ambit of the powers.

14. To date, these powers have not been used. Since the powers were introduced in December 2005, the AFP has not responded to any attacks that have been carried out on a Commonwealth Place. Given the narrow geographical remit of the powers, and given that they are to be used only in very limited circumstances, the AFP would not anticipate frequent use of these powers.

15. The fact that these powers have not yet been used is not an indication that they are unnecessary. They fill a critical, albeit narrow, gap in state and territory emergency counter-terrorism powers, by enabling the AFP to act immediately in the event of a terrorist threat to, or terrorism incident within, a Commonwealth place.

16. Division 3A also provides an emergency entry power (section 3UEA), which is not limited to Commonwealth places. This power is nonetheless very limited in its application. The power can only be utilised where it is necessary to enter premises without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.

17. In general – where investigators have sufficient warning of a terrorism plot prior to it being carried out – the AFP must obtain a search warrant. In urgent operations, the AFP is able to apply for a warrant by telephone, under section 3R. The section 3UEA power can only be used in circumstances where the immediacy of the threat is such that there is not even enough time to make a telephone warrant application.

18. To date, the AFP has not been faced with a situation warranting the use of the power under section 3UEA. However, this is not an indication that section 3UEA is unnecessary.

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The AFP considers the power would be of critical use in a situation where police have no prior warning of an attack and immediate action is required to protect an individual or the public.

19. The AFP is acutely aware that the powers in Division 3A are designed to be used only in a very particular set of circumstances. To date, those circumstances have not arisen, and the AFP and partner agencies have been able to disrupt terrorist attacks and planning without recourse to emergency powers.

20. These powers are of critical importance, enabling the AFP to act immediately in the event of a terrorist threat to, or terrorism incident within, a Commonwealth place, or an emergency situation requiring entry where there is a serious and imminent threat of harm, and no time to obtain a warrant.

Control Orders

21. In the AFP's experience, control orders are an effective tool for managing persons who present a significant terrorism risk.

22. Operational experience has demonstrated that the current process is complex and resource-intensive. The AFP submissions to the recent INSLM inquiry into control orders and preventative detention orders sought clarification as to whether the court rules and rules of evidence relating to civil proceedings apply.

23. The AFP acknowledges that the INSLM's report has directly addressed issues regarding the applicable rules of evidence, and made recommendations regarding clarifying that the issuing court may take judicial notice of the fact that an original request for an interim control order was made, but is only to act on evidence received in accordance with the *Evidence Act 1995* (Cth).

24. As the AFP has previously noted, intelligence may not always be in a form required for admissible evidence. Law enforcement continues to face challenges regarding converting intelligence material into an evidentiary form in a variety of contexts, including in relation to counter-terrorism operations.

25. The AFP submissions to the recent INSLM inquiry into control orders and preventative detention orders highlighted the current lack of legislative power to vary interim control conditions, either by court order or by consent of both parties. The AFP acknowledges that the INSLM's report has made recommendations to address this issue.

Preventative Detention Orders

26. Like control orders, preventative detentions orders (PDOs) play a critical role in providing the AFP with appropriate powers to prevent terrorist attacks. These powers recognise that in some circumstances, police need to act quickly, and with little warning to prevent a potentially catastrophic attack or to preserve vital evidence in the aftermath of an attack. In those circumstances, traditional policing powers may not be sufficient.

27. The Commonwealth PDO regime includes a number of safeguards, including a prohibition on questioning persons detained under a PDO.

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28. To date, the AFP has not used a Commonwealth PDO since their introduction in 2005. However, the JCTTs have used state-based PDO legislation on a number of occasions in NSW and Victoria, where PDO legislation permits police to detain a person for considerably longer.

29. The AFP considers Commonwealth PDOs an important emergency power that complements state and territory PDO powers. The JCTT model allows law enforcement to utilise the best tools available in any particular investigation, whether they be state/territory or Commonwealth powers. Decisions around which powers to use are made jointly between Commonwealth and the relevant state/territory police agency.

Declared Areas

30. The 'declared area' offence in section 119.2 of the Criminal Code forms part of a suite of legislative measures designed to deter Australians from travelling to areas where terrorist organisations are engaged in hostile activity.

31. The offence recognises that people who enter, or remain in, a declared area put their own personal safety at risk. This risk exists regardless of whether or not the individual intends to engage in hostile activities. There are also broader reasons to criminalise entering or remaining in a declared area, including the risk of a person being captured by ISIS and held for ransom.

32. The declared area offence also plays a critical role in preventing persons from travelling to a conflict zone to engage in a hostile activity. The offence has a strong deterrent effect and provides a useful disruption tool for police.

33. Finally, the declared area offence plays a critical role in ensuring Australia is able to manage the terrorist threat posed by the widespread return of Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas. Around 110 Australians are currently fighting or engaged with terrorist groups in Syria and Iraq. There may be instances where there is strong intelligence, but no admissible evidence, to support the intention element in other foreign incursions offences.

34. To date, there have been no prosecutions for 'declared area' offences under section 119.2 of the Criminal Code. However, the AFP currently has five outstanding arrest warrants for persons suspected of contravening this offence. There are also a number of ongoing investigations which may lead to charges under section 119.2.

Evidentiary issues

35. Obtaining foreign evidence is a difficult and complicated process, particularly when evidence is located in an area outside the control of any legitimate government.

36. In particular, where evidence or intelligence suggests a person has been located in a declared area, it can be difficult to prove:

- i. The person was located within the precise boundaries of the declared area; and
- ii. The area was a declared area at the time the person was located there.

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37. The AFP continues to work with the Attorney-General's Department and government partners to consider options to address challenges in obtaining foreign evidence.

Conclusion

38. The AFP continues to use traditional law enforcement powers, including prosecution for criminal offences, where possible. However, protection of the community from terrorism is the AFP's highest priority, and so, where necessary, the AFP will use preventative and emergency powers to ensure community safety.

39. The current suite of counter-terrorism laws was put into force to address the growing risk of terrorism. In passing these laws, Parliament acknowledged the threat was a significant one and required a targeted, and particularly robust, legislative response.

40. The threat of terrorism continues to be at an elevated level and has become more complex, agile and fast-paced. Counter-terrorism laws must continue to be reviewed to ensure they remain appropriate and effective in addressing the threat of terrorism.

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