22 September 2017

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime

Thank you for the opportunity to make a submission to this review of the operation, effectiveness and implications of provisions under Division 3A of Part IAA of the *Crimes Act 1914* (Cth), and Divisions 104 and 105 of the *Criminal Code Act 1995* (Cth) (Criminal Code). This submission will only address the relevant Divisions of the Criminal Code.

This is a joint submission by legal academics from the:

- Centre for Socio-Legal Studies, University of Oxford;
- Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales; and
- University of Western Australia Law School.

We are solely responsible for the views and content contained in therein.

We note that this submission is in substantially the same terms as that which we made to the Independent National Security Legislation Monitor, Dr James Renwick SC, on 27 April 2017. The Monitor is required to provide his report on Divisions 104 and 105 of the Criminal Code to the Prime Minister by 7 September 2017. That report must then be tabled in the House of Representatives within 15 sitting days, that is, by the end of November 2017. We would appreciate an opportunity to make a further written submission to this inquiry once we have been able to consider the recommendations made by the Monitor.

Yours Sincerely

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Preventative Detention Orders

Division 105 of the Criminal Code provides that a person may be detained under a preventative detention order (PDO) for up to 48 hours in order to prevent an imminent terrorist act from occurring (Ground A) or to preserve evidence relating to a recent terrorist act (Ground B).[1] This period of detention can be extended up to a maximum of two weeks under state legislation.[2] For a PDO to be issued to prevent a terrorist act, an issuing court must be satisfied, on application by an Australian Federal Police (AFP) officer, that there are reasonable grounds to suspect that a person will engage in a terrorist act, possesses a thing connected with preparation for a terrorist act, or has done an act in preparation for a terrorist act.[3] The issuing authority must also be satisfied that 'making the order would substantially assist in preventing a terrorist act occurring' and 'detaining the subject for the period for which the person is to be detained under the order is reasonably necessary' for this purpose.[4] The detainee is not entitled to contact any person except a family member, employer or similar to let them know that they are 'safe but … not able to be contacted for the time being.'[5]

The power to detain individuals incommunicado on the basis that they are reasonably suspected of involvement in terrorism is extraordinary and does not exist in any comparable nation.[6] Division 105 clearly infringes the freedoms of movement, association and from arbitrary detention. It also infringes client legal privilege as any communication between the person and a lawyer must be capable of being monitored.[7] The infringement of these rights is unjustified. The former Independent National Security Legislation Monitor (INSLM), Bret Walker SC, described the powers in his 2012 Annual Report as being 'at odds with our normal approach to even the most reprehensible crimes'.[8] The Council of Australian Governments Review of Counter-Terrorism Legislation (COAG Review) remarked that such powers 'might be thought

1 *Criminal Code Act 1995* (Cth) s 105.1.
2 *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) pt 2; *Terrorism (Police Powers) Act 2002* (NSW) pt 2A; *Terrorism (Emergency Powers) Act 2003* (NT) pt 2B; *Terrorism (Preventative Detention) Act 2005* (Qld) pt 2; *Terrorism (Preventative Detention) Act 2005* (SA) pt 2; *Terrorism (Preventative Detention) Act 2005* (Tas) pt 2; *Terrorism (Community Protection) Act 2003* (Vic) pt 2A; *Terrorism (Preventative Detention) Act 2006* (WA) pt 2
3 *Criminal Code Act 1995* (Cth) s 105.4(4)(a).
4 *Criminal Code Act 1995* (Cth) s 105.4(4).
5 *Criminal Code Act 1995* (Cth) s 105.35(1).
6 See Svetlana Tyulkina and George Williams, 'Combatting Terrorism in Australia through Preventative Detention Orders' in Tamara Tulich, Simon Bronitt, Rebecca Ananian-Welsh and Sarah Murray (eds) *Regulating Preventive Justice: Principles, Policy and Paradox* (Routledge, 2017) 143-5.
7 *Criminal Code Act 1995* (Cth) s 105.38.
8 Bret Walker SC, *Independent National Security Legislation Monitor Declassified Annual Report* (2012) 47.

to be unacceptable in a liberal democracy'.[9] Both recommended that the preventative detention order regime be repealed.[10] Importantly, however, their recommendations were not based only on human rights – but also practical considerations.

Multiple submissions by federal, state and territory police forces to the INSLM and COAG Review indicated that law enforcement is unlikely to use the PDO provisions because other, more suitable, detention powers are available.[11] Walker therefore concluded in relation to the preventative detention regime that 'no material or argument demonstrated that the traditional criminal justice response to the prevention and prosecution of serious crime through arrest, charge and remand is ill-suited or ill-equipped to deal with terrorism'.[12] This is clear from an examination of the two bases identified above on which a PDO may be issued.

First, where evidence is available to support Ground A (i.e. to prevent an imminent terrorist attack from occurring), one would expect a range of alternative measures to be available. These include: questioning under the pre-charge detention regime in Part IC of the *Crimes Act 1914* (Cth); laying of charges for preparatory or other terrorism offences (especially in combination with the inchoate offences of attempt, conspiracy and incitement); obtaining control orders over relevant persons; or, finally, applying for an Australian Security Intelligence Organisation Questioning Warrant. Each of these measures is likely to be far more effective in preventing terrorism because it permits questioning of the subject. Of concern to both Walker and the COAG Review was that the preventative detention regime would ultimately be counter-productive to the overarching aim of preventing terrorist acts because detainees cannot be questioned.[13]

Secondly, where evidence is available to support Ground B (i.e. to preserve evidence relating to a recent terrorist attack), it is arguably easier to appreciate the function that a PDO may serve. However, even though it aims to assist criminal investigations, detention of individuals

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9 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 68.

10 Bret Walker SC, *Independent National Security Legislation Monitor Declassified Annual Report* (2012) 67 (Recommendation III/4); Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 68 (Recommendation 39).

11 See examples in: Bret Walker SC, *Independent National Security Legislation Monitor Declassified Annual Report* (2012) 55-59; and Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 69-70.

12 Bret Walker SC, *Independent National Security Legislation Monitor Declassified Annual Report* (2012) 52.

13 Bret Walker SC, *Independent National Security Legislation Monitor Declassified Annual Report* (2012) 56-59; Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 68-70.

– without any requirement of wrongdoing or even *suspicion* of wrongdoing on their part – is an extraordinary measure. It may potentially allow detention of large groups of people from 'suspect communities' based upon crude racial profiling in the wake of a terrorist incident. This occurred in the United States after September 11, with many people held under 'material witness' provisions. This is a highly undesirable way in which to conduct efficient police investigations that respect the rights of innocent people. Ultimately, we submit that PDOs are only capable at best of filling a very slight gap in Australia's anti-terrorism measures. That is, they are valuable in permitting the detention of a person as part of a criminal investigation which does not necessarily involve him or her directly. This is starkly at odds with basic criminal justice and rule of law values.

We acknowledge that there have been four occasions to date on which PDOs have been utilised:

Name	**Date of issue**	**Date of detention**	**Date order lifted**	**Issuing court**	**Grounds**
Unnamed	17/9/2014	18/9/2014	19/9/2014	NSW Supreme Court	Non-publication order prevents disclosure of any information
Unnamed	17/9/2014	18/9/2014	19/9/2014	NSW Supreme Court	Non-publication order prevents disclosure of any information
Unnamed	17/9/2014	18/9/2014	19/9/2014	NSW Supreme Court	Non-publication order prevents disclosure of any information
Harun Causevic	17/4/2015	18/4/2015	21/4/2015 [2015] VSC 248	Victorian Supreme Court	Reasonable grounds to suspect that Causevic had been planning to engage in a terrorist act in the next 14 days

To date, PDOs have not been used as a means to preserve evidence relating to a recent terrorist attack; they have been issued on the grounds of preventing an imminent terrorist attack from occurring. All four uses of the PDO regime appear to have occurred when the police already had sufficient evidence for an arrest. Causevic was arrested immediately following his release from detention under a PDO and charged with the offence of planning a terrorist attack, charges which were later withdrawn. The three unnamed men detained under a PDO on 18 September 2014 had been arrested by the AFP as part of Operation Appleby. The PDOs were only issued

when the men exercised their right to silence.[14] This raises the question as to whether the PDOs in this case were used as a punitive, rather than preventive, measure. Both cases, however, demonstrate the overlap between the PDO regime and the police's powers of arrest.

In light of the broad powers already existing, which enable charging or questioning of persons before any terrorist act has occurred, and the extreme impact of detention as a means of preserving evidence, we submit that Division 105 is unnecessary and should be repealed in its entirety.

Control Orders

We have consistently argued for repeal of control orders in Division 104 of the Criminal Code. This is a view shared by former INSLM Bret Walker SC, who in his 2012 annual report recommended replacing the existing control order scheme with what he termed '*Fardon* type provisions',[15] which would provide for control orders to be issued against 'terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness.'[16]

Walker's recommendation to repeal and replace Division 104 with a system of post-sentence control orders was not implemented by the Commonwealth government of Prime Minister Gillard to which the recommendation was made, nor by the subsequent administrations of Prime Ministers Rudd, Abbott or Turnbull. Instead, Division 104 has been considerably

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14 'Gaughan said: "We already have questioning powers when we arrest somebody for an offence prior to the issuance of the PDO. I suppose the example I can give in reality is what occurred in Sydney last month with Operation Appleby, where we took a number of people into custody for questioning. One person exercised his right to silence and then he was issued with a PDO. A couple of others continued to talk with us for a while."' Paul Farrell, 'Preventative detention orders "used as a tool to break terrorism suspects"' *The Guardian* (8 October 2014) <https://www.theguardian.com/australia-news/2014/oct/08/preventative-detention-orders-used-as-a-tool-to-break-terrorism-suspects>.

15 Walker notes: 'In *Fardon v Attorney-General* (Qld) (2004) 223 CLR 575 the High Court upheld a scheme allowing for the continued detention of convicted serious sexual offenders after expiry of their sentence where there is an "unacceptable risk" of the prisoner committing a serious sexual offence in the future.' Bret Walker SC, *Independent National Security Legislation Monitor Declassified Annual Report* (2012) 34 (n 113). Walker was not proposing that control orders should be replaced with a continuing detention order scheme, as per *Fardon*, but that the *Fardon* model for determining dangerousness post-sentence could be the basis for control orders.

16 Bret Walker SC, *Independent National Security Legislation Monitor Declassified Annual Report* (2012) 44. Walker identified two conditions for issuing a control order post-sentence: 'propensity … in relation to like offences for which he or she has been convicted', and that have been proven to the standard of *beyond a reasonable doubt*; and 'current dangerousness', proved on the *balance of probabilities*. Bret Walker SC, *Independent National Security Legislation Monitor Declassified Annual Report* (2012) 37.

expanded,[17] both as to the grounds upon which a control order may be obtained,[18] and through the extension of the regime so as to apply to 14-16 year-olds.[19]

In 2016, a post-sentence continued detention scheme for 'high risk' terrorist offenders was introduced.[20] Consequently, what was initially proposed by Walker as a more targeted alternative to the original control order scheme, now exists *alongside* an expanded Division 104. A key issue for the operation and effectiveness of the control order regime is how it interoperates with the high risk terrorist offenders regime. It is our view that the current relationship between the two schemes under Divisions 104 and 105A of the *Criminal Code* should be clarified as a matter of high priority. We outline below the key problems regarding the interoperability of the two regimes and our recommendations for remedying them.

Interoperability with the High Risk Terrorist Offenders Regime

The *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth) (HRTO Act) introduced a new regime empowering the Commonwealth Attorney-General or his or her legal representative to apply to a Supreme Court of a State or Territory for a 'continuing detention order' (CDO) – that is an order that commits a 'terrorist offender'[21] to detention in prison at the end of his or her prison sentence.[22] The Court may make such an order if 'satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an

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17 The control order regime was amended by: *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* (Cth); *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth); *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth); *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth).

18 When Division 104 was introduced, a senior AFP member could only seek the Attorney-General's consent if he or she: 1. considered on reasonable grounds that the order would substantially assist in preventing a terrorist act, or 2. suspected on reasonable grounds that the person had provided training to, or received training from, a listed terrorist organisation. Following amendments made by the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* (Cth) and the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), the Attorney-General's consent may now be sought if the senior AFP member suspects any of the following on reasonable grounds: 1. that the order would substantially assist in preventing a terrorist act; 2. that the person has provided training to, received training from or participated in training with a listed terrorist organisation; 3. that the person has engaged in a hostile activity in a foreign country; 4. that the person has been convicted in Australia of a terrorism offence; 5. that the person has been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence; 6. that the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or 7. that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country. *Criminal Code Act 1995* (Cth) s 104.2(2).

19 *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth) Schedule 2.

20 *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth).

21 *Criminal Code Act 1995* (Cth) s 105A.3(1)

22 *Criminal Code Act 1995* (Cth) s 105A.3(1)

unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community' and 'that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.'[23] An example of a less restrictive measure provided in the HRTO Act is a control order.[24] The effect of a continuing detention order is to commit the offender to detention in prison for the period of time that the order is in force,[25] which may be no more than three years.[26] There is no legislative restriction on the number of successive continuing detention orders that the court can make against a terrorist offender.[27] This regime will commence operation as Division 105A of the *Criminal Code* in June 2017.[28]

The issue of the interoperability of the control order and high risk terrorist offender regimes was raised by Attorney-General Brandis in referring the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 to the PJCIS,[29] in submissions made to the Committee, and in the Committee's Advisory Report.[30] Detailed consideration of how the two regimes 'might better interact with each other' was deferred to this current review by the INSLM and the scheduled 2018 PJCIS review of the control order regime.[31] In recommending that further consideration be given to improving the interoperability of the two regimes, the PJCIS noted the 'complexity of the two regimes operating through separate court processes and the limitations in the capacity of either process to consider the entire graduation of control that could be applied to a terrorist offender.'[32]

It is our view that the current relationship between the two schemes under Divisions 104 and 105A of the *Criminal Code* should be clarified as a matter of high priority. The deferral to post-

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23 *Criminal Code Act 1995* (Cth) s 105A.7(1)(b) and (c).
24 *Criminal Code Act 1995* (Cth) s 105A.7(1) (Note 1)
25 *Criminal Code Act 1995* (Cth) s 105A.3(2).
26 *Criminal Code Act 1995* (Cth) s 105A.7(5).
27 *Criminal Code Act 1995* (Cth) s 105A.7(6).
28 *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth) s 2.
29 Parliamentary Joint Committee on Intelligence and Security (PJCIS), Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) (November 2016), 95 (quoting the Attorney-General's referring letter to the Bill).
30 Joint Supplementary Submission of the AFP and AGs to PJCIS Review of Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) (Submission 9); Australian Human Rights Commission (AHRC) Supplementary Submission to PJCIS Review of Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) (Submission 8); Law Council Supplementary Submission to PJCIS Review of Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) (Submission 4).
31 Parliamentary Joint Committee on Intelligence and Security (PJCIS), *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)* (November 2016), 95 (quoting the Attorney-General's referring letter to the Bill).
32 Parliamentary Joint Committee on Intelligence and Security (PJCIS), *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)* (November 2016), 99.

enactment review processes of the challenge of resolving the interoperability of control orders (COs) and CDOs is, regrettably, not without precedent in Australian anti-terrorism law-making. We feel it necessary to emphasise the serious deficiencies of enacting legislative provisions on the basis that their acknowledged shortcomings or uncertain impact alongside existing anti-terrorism powers and processes can be fixed by later review.

Three key issues were raised regarding the interoperability of the two regimes at the Committee stage:

1. Whether an interim CO could be applied for in respect of someone serving a sentence of imprisonment;
2. The distinct procedural and threshold requirements of each regime; and
3. The absence of discretion of a court dealing with a CDO application to impose a CO if the court thinks that more appropriate.

Interim control orders for sentenced prisoners

Attorney-General Brandis, in a supplementary letter to the PJCIS, noted that it was 'unclear whether the legislation would support the AFP applying for a control order while a person is serving a sentence of imprisonment, with the conditions of a control order to apply on release'.[33] In supplementary submissions, the AFP and AHRC highlighted the need for this to be clarified.[34]

The PJCIS recommended that Division 104 be amended to '*make explicit that a control order can be applied for and obtained while an individual is in prison, but that the controls imposed by that order would not apply until the person is released.*'[35] This was accepted by the Government. The HRTO Act, as passed, includes a number of provisions enabling an interim control order to be sought and made in respect of a person detained in custody.[36] This will

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33 Parliamentary Joint Committee on Intelligence and Security (PJCIS), *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)* (November 2016), 98 (quoting the Attorney-General's supplementary letter to the Bill).

34 Parliamentary Joint Committee on Intelligence and Security (PJCIS), *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)* (November 2016), 97, 99.

35 Parliamentary Joint Committee on Intelligence and Security (PJCIS), *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)* (November 2016), Recommendation 16.

36 *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth), Sch 1, 1C, 1D, 1E, 1F, 1Q.

enable the Federal Court or the Federal Circuit Court to issue a control order against a person in detention, where either the Attorney-General has not sought a CDO from the Supreme Court of a State or Territory or where such an application has been denied.

Distinct procedural and threshold requirements of each regime, no discretion to impose a CO as an alternative to a CDO

While a control order may now be issued against an incarcerated person, a control order cannot be made as an alternative to a CDO in CDO proceedings. This is because each order is issued by a different court. A control order is made by an 'issuing court', defined by the *Criminal Code* as the Federal Court of Australia or the Federal Circuit Court of Australia.[37] A CDO, by contrast, is issued by a Supreme Court of a State or Territory. The applicants are also different: a senior member of the AFP may apply for a control order, whereas the Attorney-General or legal representative may apply for a CDO. As outlined above, the threshold requirements for each order are also distinct. As a Supreme Court has no discretion to impose a control order as an alternative to a CDO**,** a separate application would need to be made by the AFP to an issuing court. The Attorney-General's Department acknowledged that this would 'potentially lead to an undesirable situation in which the offender is subject to two court processes and there is a duplication of effort'.[38]

The Law Council submitted to the PJCIS that a single court process would be preferable to improve the interoperability of the two regimes. The Council considered this could involve either a control order or extended supervision order (as exists under state based post-sentence regimes) being made as an alternative to a CDO under the HRTO Act. The Attorney-General's Department similarly identified two options for improving the interoperability of the regimes, either the creation of an extended supervision regime or the amendment of the control order regime so that a control order could be obtained as an alternative to a CDO.[39] The Law Council's preliminary view was that a control order would be preferable, to ensure consistency with the broader anti-terrorist framework. The Council further recommended that the HRTO Act be amended to require that the Attorney-General be satisfied in making an application for

37 *Criminal Code* s 100.1.

38 Parliamentary Joint Committee on Intelligence and Security (PJCIS), *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)* (November 2016), 95.

39 Parliamentary Joint Committee on Intelligence and Security (PJCIS), *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)* (November 2016), 95-6.

CDO that no other less restrictive measure would be effective. The Australian Human Rights Commission similarly recommended that the Supreme Court have the discretion to impose a control order as an alternative to a CDO.[40]

The Committee was of the view that:

> *Given these differing purposes, an appropriate solution to the interoperability issue could be that, in the first instance, the application processes for the existing control order regime be retained for preventative cases. In addition, a separate application process could be introduced for post-sentence control orders that aligns more closely to the CDO regime. The Committee suggests that consideration is given to these options*[41]

Further issue regarding interoperability: the necessity of both regimes

The question of interoperability highlights the presence of overlap between Division 104 of the *Criminal Code* and the High Risk Terrorist Offenders regime. This invites attention to the necessity of maintaining both regimes to the extent that they provide for action to be taken against a terrorist offender post-sentence.

One of the grounds on which a control order may be applied for and issued is that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation, or a terrorist act.[42] There is, however, no link to a failure on the part of the terrorist offender to rehabilitate or to a specific assessment of his or her dangerousness and the degree of risk posed.

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40 Parliamentary Joint Committee on Intelligence and Security (PJCIS), *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)* (November 2016), 97.

41 Parliamentary Joint Committee on Intelligence and Security (PJCIS), *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)* (November 2016),100 [3.182].

42 *Criminal Code Act 1995* (Cth) s 104.4(1)(c)(iv).

In contrast, a continuing detention order is not determined by past behaviour, though this may play a part in the court's considerations.[43] Instead, the continuing detention regime is future oriented; an order may be issued if the 'Court is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community' and 'the Court is satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.'[44] In deciding whether the offender poses an unacceptable risk of committing a serious Part 5.3 offence if they are released into the community, the court must have regard, inter alia, to:

1. 'the safety and protection of the community';
2. 'the results of any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence, and the level of the offender's participation in any such assessment';
3. 'any other information as to the risk of the offender committing a serious Part 5.3 offence'.[45]

While the HRTO Act provides a control order as an example of a less restrictive measure,[46] the Explanatory Memorandum accompanying the Bill provided that 'this will not require an application for a control order to be made or for the Court to consider whether the threshold for obtaining a control order would be met'.[47] The principle of the least restrictive alternative or of least interference, however formulated to address the specific circumstances in which it is invoked, requires the decision-maker to turn their mind to what constitutes the least restriction or interference with liberty. This principle is used in other preventive regimes, for

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43 For example, in deciding whether the court is satisfied that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if they are released into the community, the court must have regard, inter alia, to: any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation in any such programs; the offender's history of any prior convictions for, and findings of guilt made in relation to, any offence referred to in paragraph 105A.3(1)(a); the views of the sentencing court at the time any sentence for any offence referred to in paragraph 105A.3(1)(a) was imposed on the offender. *Criminal Code Act 1995* (Cth) s 105A.8(1).

44 *Criminal Code Act 1995* (Cth) s 105A.7(1).

45 *Criminal Code Act 1995* (Cth) s 105A.8(1).

46 *Criminal Code Act 1995* (Cth) s 105A.7(1) (Note 1)

47 Explanatory Memorandum to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth), 21.

example in New South Wales, the civil mental health regime,[48] and the post-sentence high-risk offender regime.[49] The COAG Review also recommended that a similar principle be introduced into the control order regime.[50]

It is important to recognise that the availability of control orders as a less restrictive measure could result in few CDOs being granted. This is borne out by the experience of state-based post-sentence regimes, which contain two types of orders: continuing detention orders and extended supervision orders (ESO). An ESO imposes obligations on an offender when released from custody, which in New South Wales may include electronic tagging and not residing in specific locations.[51] The availability of ESOs has meant that CDOs are used less often. As at 1 September 2010, there were 27 offenders in New South Wales subject to ESOs and just two offenders detained pursuant to CDOs.[52] As at 1 September 2014, there were 36 extended supervision orders in place in NSW – 35 of these were made against high risk sex offenders and one against a high risk violent offender.[53] At that time, no CDO was in place in NSW.[54] In respect of the 2015/2016 year, Corrective Services NSW reported that there were nine offenders in custody on a CDO.[55] By contrast, at the end of that year, 55 offenders in NSW were subject to an ESO.[56]

To the extent that the co-existence of COs and CDOs under Commonwealth law will have a similar operation, this is no more than the result of the Parliament's expressly-stated intention

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48 *Mental Health Act* 2007 (NSW) s 12. In 2008, following the James review, the least restrictive alternative formulation was amended to include a requirement of consistency with safe and effective care. This applies to each stage of admission and ongoing detention. As the Explanatory Memorandum to the amending Bill made clear: 'it is a requirement to be satisfied that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available': Explanatory Memorandum, Mental Health Legislation Amendment (Forensic Provisions) Bill 2008 (NSW) 7. In *S v South Eastern Sydney & Illawarra* (2010) NSWSC 178, a matter which raised the question of the meaning of least restrictive alternative in respect of a community treatment order, Brereton J held, at 40, that: '"Appropriate and reasonably available" treatment does not connote the very best treatment. So long as the alternative is appropriate and reasonably available and is consistent with safe and effective care, it matters not that it may not be the most desirable course of treatment'.

49 *Crimes (High Risk Offenders) Act 2006* (NSW) s 18CC.

50 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 63 (Recommendation 37).

51 The non-exclusive list of conditions that may be imposed pursuant to an extended supervision order are set out in s 11 of the *Crimes (High Risk Offenders) Act 2006* (NSW).

52 NSW Department of Justice and Attorney-General, *Review of the Crimes (Serious Sex Offenders) Act 2006* (November 2010), 20.

53 New South Wales, *Parliamentary Debates,* Legislative Assembly, 17 September 2014, 703 (Paul Lynch) citing the Attorney-General's response to a supplementary question on notice during an estimates hearing.

54 New South Wales, *Parliamentary Debates,* Legislative Assembly, 17 September 2014, 703 (Paul Lynch).

55 New South Wales Corrective Services, Department of Justice, *Fact Sheet 5: Extended Supervision Orders* (March 2017) 1.

56 Ibid.

that 'the less restrictive measure' be used to prevent unacceptable risk.[57] But unlike State schemes that make available ESO and CDO as options within a single unified system for addressing future harm, the interrelationship between continued detention of terrorist offenders or release subject to the imposition of various controls is far less clear – tugged, as it is, in different directions by reliance on different processes and the allocation of responsibility to different actors. In short, the tenor of the Commonwealth's law is that the two schemes compete with, rather than complement, each other.

Additionally, there are more pragmatic reasons to question whether the operation of CDOs and COs under Commonwealth law will reflect that which has been observed at the state level. This is because in the anti-terror context at present:

- a mechanism does not exist to accurately assess the level of risk that a convicted terrorist poses upon his or her release;[58] and,
- effective rehabilitation programs are not available for convicted terrorists in prison.[59]

Recommendations

We recommend that the problem of interoperability that was identified as the HRTO legislation went through the Commonwealth Parliament in late 2016 be addressed by the following amendments of the *Criminal Code*:

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57 *Criminal Code Act 1995* (Cth) s 105A.7(1)(c).

58 At present, there is no way to accurately assess the level of risk that a convicted terrorist will reoffend. This is because no validated terrorism-specific risk assessment tools currently exist. Extensive research has been conducted in this regard by Charisse Smith and Mark Nolan. With respect to the existing tools for assessing the level of risk posed by violent offenders, they explain that these 'would not produce results to a sufficient level of accuracy to justify their use in a CDO [continuing detention order] regime for terrorist offenders. Therefore, in order to accurately assess risk for terrorism recidivism, the development of a new tool is necessary, which includes risk factors relevant to terrorism.' Charisse Smith and Mark Nolan, 'Post-sentence continued detention of high-risk terrorist offenders in Australia' (2016) 40 *Crim LJ* 163, 169

59 Section 105A.8(1)(e) (as inserted by the HRTO Act) states that the Court must consider whether the offender participated in rehabilitation or treatment programs. This presupposes that appropriate rehabilitation or treatment programs are available. Appropriate rehabilitation or treatment programs, building on international best practice, must be available to ensure an individual has the opportunity to avoid the operation of the regime. In order to be effective, these programs must both understand and respond to the particular characteristics of terrorism-related activities which distinguish those activities from ordinary crime. These include: the underlying political, religious or ideological motive of convicted terrorists; and their intention to coerce a government or intimidate the public. Existing programs which apply generally in gaols – for example, education and vocational courses – are insufficient to address these particular characteristics. If a State does not provide convicted terrorists meaningful opportunities for rehabilitation in gaol, then the State is effectively condemning every person convicted of a terrorism offence covered by the HRTO Act to the possibility – if not likelihood – of detention beyond the sentence handed down by the trial judge. Indeed, there is a very real possibility of life imprisonment.

1. Division 104 should be amended to remove from the operation of the CO scheme the power of an issuing court to make an order on the ground that the person has been earlier convicted of an offence relating to terrorism, a terrorist organisation or a terrorist act (s 104.4(1)(c)(iv));

2. Division 105A (as inserted by the HRTO Act) should be substantially amended to provide for a system of Extended Supervision Orders (release subject to supervision) similar to those that exist in state level post-sentence regimes. A number of positives follow from this, including:

    a. It would give those courts with the power to issue a CDO an ability to directly consider the availability of a 'less restrictive measure that would be effective in preventing the unacceptable risk';
    b. It would empower those same courts to issue an ESO in the alternative to a CDO, avoiding the duplication of effort on the part of the executive that is required by the existence of two wholly distinct and separate procedures;
    c. The issuing of an ESO would occur against the higher threshold test of the CDO scheme rather than that of the CO regime;
    d. The holistic approach would logically support the inclusion of a requirement that the Attorney-General, in making an application for a CDO, be satisfied that no other less restrictive measure would be effective (this was called for by the submission on the HRTO Bill made by the Law Council of Australia and is consistent with the New South Wales high-risk offender regime);[60]
    e. Greater protections for individuals exist under Division 105A than Division 104 – including a lack of reliance on *ex parte* hearings, and stronger appeal and review rights;
    f. ESOs are more justifiable than COs generally because, as former INSLM Bret Walker pointed out, the former rely upon the existence of a proven offence and apply exclusively to 'terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness.'[61]

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60 *Crimes (High Risk Offenders) Act 2006* (NSW), ss 18CA and 18CC.

61 Bret Walker SC, *Independent National Security Legislation Monitor Declassified Annual Report* (2012) 44.

This solution is far simpler than maintaining any scope in Division 104 for the use of control orders in respect of persons post-sentence. It relieves the Parliament of the great difficulty of devising some clear and justifiable interoperability between two very distinctive schemes.

However, we do note two issues attached to our recommended solution that may be viewed negatively. The first relates to the extent to which one accepts that existing rehabilitation systems and methods of assessing future risk posed by a terrorism offender are sufficiently developed and reliable. Second, an ESO would, on the basis of existing provisions in Division 105A, likely be issued for a duration of 3 years, with successive orders available. That is significantly more onerous than the duration of COs which are limited to a year.

3. In addition, there is a great deal to be said for the removal from Division 104 of those other grounds for issuing a CO that concern conduct that is covered by various terrorism offences under which the individual could be charged and prosecuted. This would amount to the repeal of s 104.4(1)(c)(ii), (iii), (v), (vi) and (vii). We have long argued, across many submissions to various review bodies since the introduction of COs in 2005, that the extensive range of preparatory terrorism offences in Australian law has meant that preventative COs (as distinguished from any post-sentence function they may serve) are unnecessary. This continues to be borne out by the extremely limited use of the scheme to this day.[62] That experience shows that the emphasis that is often placed upon the need to address situations in which there is insufficient evidence to lay charges, is, in practice, barely significant and cannot be used to strongly support the retention of COs.

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62 Six control orders in total have been issued since the regime was established in 2005: three orders lapsed at the interim stage, and three have been confirmed. Two of these control orders are 'historic', in the sense that they were issued prior to the current threat from foreign fighter inspired terrorism: see Bret Walker SC, *Independent National Security Legislation Monitor Declassified Annual Report* (2012) 13-25. Only four control orders have been issued since 2014: two interim control orders were issued against unknown persons in December 2014 but were vacated a year later without confirmation: *Neil Gaughan v BXO15 & Anor* FILE NO: (P)SYG3493/2014 (23 December 2015). One of the two confirmed control orders lapsed at the end of the one-year period: *Gaughan v Causevic (No 2)* [2016] FCCA 1693. The other order remains in force whilst its subject serves a four-year prison sentence for breach of the order: *R v Naizmand* [2016] NSWSC 836.

4. Removal of all those grounds for issuing a CO that cover conduct relevant to a criminal offence would leave just one basis upon which an issuing court may make such an order – because doing so 'would substantially assist in preventing a terrorist act' (s 104.4(1)(c)(i)). This vague and open-ended ground upon which a CO may be issued presents a stark challenge to the limits upon the power of the State to curtail individual liberty in the interests of collective security.

5. Ultimately, we submit that Division 104 should be repealed in its entirety – for once the prospect of a post-sentence control is transferred to Division 105A so as to craft a regime of ESOs that complements the power to order continued detention, the need for what remains is far from compelling. In that respect, we approve the following passage from Bret Walker's 2012 report:

   The flaws and problems of the CO provisions discussed above are most evident and pressing in cases where COs are proposed to be made against persons before charge and trial, after trial and acquittal or who will never be tried. …
   … [T]he proper response need not and should not involve COs in their present form. Instead, the twofold strategy obtaining elsewhere in the social control of crime should govern. First, investigate, arrest, charge, remand in custody or bail, sentence in the event of conviction, with parole conditions as appropriate. Second, and sometimes alternatively, conduct surveillance and other investigation with sufficient resources and vigour to decide whether the evidence justifies arrest and charge. (And, meantime, surveille as intelligence priorities justify.)[63]

   The scenarios referred to by Walker in the first sentence of this extract – and his preferred response to them in what follows – speak to the redundancy of Division 104 as an effective or meaningful tool in Australia's national security legislation framework. That redundancy is demonstrated by over a decade's operation of the Division and its highly marginal significance to the work of Australian agencies. The value of maintaining Division 104 has long been unclear; the difficulties now posed to its operation and the confusion as to its purpose made plain by the insertion of Division 105A by the HRTO Act provide the strongest reason to date for its repeal.

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63 Bret Walker SC, *Independent National Security Legislation Monitor Declassified Annual Report* (2012) 43.