



Australian  
Human Rights  
Commission

# Review of Australian Federal Police Powers

Submission to the Parliamentary Joint Committee on Intelligence  
and Security

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# 1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in relation to its 'Review of AFP Powers'.
2. This is a statutory review required by s 29(1)(bb)(i) and (ii) and s 29(1)(cb) of the *Intelligence Services Act 2001* (Cth) into the operation, effectiveness and implications of:
  - Division 3A of Part IAA of the *Crimes Act 1914* (Cth) (Crimes Act) (which provides for certain police powers, including 'stop, search and seize powers', in relation to terrorism) and any other provision of the Crimes Act as it relates to that Division
  - Divisions 104 and 105 of the Criminal Code (which provide for control orders and preventative detention orders in relation to terrorism) and any other provision of the *Criminal Code Act 1995* (Cth) as it relates to those Divisions
  - Division 105A of the Criminal Code (which provides for continuing detention orders).
3. The PJCIS is required to conduct its review of the first two matters by 7 January 2021 and the third matter by 7 December 2022.
4. The Commission has made several submissions about the counter-terrorism laws that are under consideration in this review. This includes submissions made to:
  - the Legal and Constitutional Legislation Committee in relation to the 2005 Bill that introduced the stop, search and seize powers in relation to terrorism, control orders and preventative detention orders<sup>1</sup>
  - the 2013 COAG Review of Counter-Terrorism Legislation<sup>2</sup>
  - the 2016 PJCIS review of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill that introduced continuing detention orders<sup>3</sup>
  - the 2017 Statutory Deadline Reviews by the Independent National Security Legislation Monitor (INSLM)<sup>4</sup>

- the 2018 PJCIS review of police powers, control orders and preventative detention orders.<sup>5</sup>
5. The Commission welcomes the opportunity to make a submission to this review.

## 2 Summary

6. Ensuring community safety is one of the most important tasks of government. Taking steps to prevent the commission of terrorist acts, and to prosecute those responsible for committing terrorist acts, promotes the human rights of members of the Australian community<sup>6</sup> and is an obligation on Australia under international law.<sup>7</sup>
7. International law also requires that the steps taken to prevent the commission of terrorist acts are themselves consistent with human rights.<sup>8</sup> As the UN General Assembly has said:

[T]he promotion and protection of human rights for all and the rule of law is essential to all components of the [United Nations Global Counter-Terrorism] Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.<sup>9</sup>
8. When assessing the impact of powers given to law enforcement agencies to prevent terrorist acts, the rights of two groups of people are particularly relevant: first, people who are at risk of being victims of terrorist attacks; secondly, people who are accused of involvement in terrorist acts or who are otherwise affected by its prevention or investigation.<sup>10</sup>
9. In terms of the first group, the most important of the human rights sought to be protected are the right to life (article 6(1) of the *International Covenant on Civil and Political Rights* (ICCPR))<sup>11</sup> and the right to liberty and security of the person (article 9(1) of the ICCPR) including the right to bodily integrity. We must have comprehensive and effective measures in place in order to protect the lives of all those who live in Australia from the threat of terrorism.
10. Because terrorism is ideologically or politically motivated, an essential strategy in countering the extremism that breeds terrorism is to win ‘the contest of ideas’ by rigorously defending the basic human rights

and freedoms which form 'the bedrock of dignity and democracy that make our societies worth protecting'.<sup>12</sup>

11. Winning the contest of ideas becomes much more difficult if counter-terrorism laws, or the way that they are used, undermine basic human rights standards. That is one reason why it is necessary that the human rights of those in the second group are also safeguarded.
12. But we must protect the human rights of people who are accused or suspected of involvement in terrorist acts, not merely to demonstrate to others the strength of our values, but because we recognise those values as intrinsically important in a 'free and confident society'.<sup>13</sup>
13. The Australian Government has assessed that the primary terrorist threat in Australia currently comes from people motivated by Islamist extremist ideology.<sup>14</sup> This threat was heightened in September 2014 by a number of factors including the return to Australia of people who had been fighting in Syria and Iraq,<sup>15</sup> and the call by the terrorist organisation Islamic State for a war against the West.<sup>16</sup>
14. The risks are particularly acute for Australian Federal Police (AFP) members and other police and intelligence officers who are charged with the dangerous task of investigating these acts. In 2014, two Victorian police officers were stabbed in an ideologically motivated attack. In a separate attack in 2015, Mr Curtis Cheng, an employee of the New South Wales police force, was shot and killed.
15. Australia's federal, State and Territory governments have multi-layered strategies to combat terrorism. A critical tool in those strategies is the investigation of those suspected of planning terrorist acts, followed by their arrest and prosecution where the investigation reveals evidence that an offence has been committed.
16. Since the significant counter-terrorism raids conducted in Sydney and Brisbane in September 2014, 110 people have been charged as a result of 51 counter-terrorism related operations across the country.<sup>17</sup>
17. There are two significant differences between the investigation and prosecution of terrorism offences on the one hand, and other criminal law offences on the other, which give the police the ability to intervene at an earlier point in time and prevent terrorist acts before they take place. The first difference is the inclusion in the Criminal Code of a

broader range of inchoate, or preparatory, offences relating to terrorist acts. One of the most commonly prosecuted terrorism offences is a conspiracy to do an act in preparation for a terrorist act.<sup>18</sup> Some acts, occurring at an even earlier stage, before any intention to engage in an act of terrorism, have also been criminalised. The High Court has recently heard an appeal dealing with the offence of taking an intentional step to become a member of a terrorist organisation.<sup>19</sup>

18. The second difference relates to the threshold for arrest. Since 2014, police have had the ability to arrest a person without a warrant in relation to a terrorism offence if they 'suspect on reasonable grounds' that the person has committed an offence (including a preparatory offence).<sup>20</sup> This is a lower threshold than 'belief on reasonable grounds' which applies to all other Commonwealth offences.<sup>21</sup> The reduced threshold allows police to intervene at an earlier stage in an investigation.
19. Other relevant powers include the ability under Part IC of the *Crimes Act 1914* (Cth) (Crimes Act) to continue to investigate and question suspects, after they have been arrested, for a limited period under strict conditions including judicial oversight.
20. These differences need to be kept in mind when evaluating the continued utility and appropriateness of some of the 'preventative' powers introduced in 2005, particularly control orders and preventative detention orders (PDOs).
21. Further, it is important that each of the powers being considered in the present review is assessed on its merits. It is not enough to justify the retention of a particular power that it is part of a 'full suite' or a 'comprehensive suite' of powers.<sup>22</sup> There should be no assumption that it is better to have more counter-terrorism powers. On the contrary, it may be better to have fewer powers that are appropriately targeted to the risks faced, and to remove powers that merely duplicate existing capacity but have greater potential to impact adversely on human rights. PDOs represent a clear example falling into this category.
22. Section 5 of this submission examines the additional stop, search and seize powers given to the AFP and other police officers to investigate actual or potential terrorist acts, primarily in Commonwealth places. These powers have not been used since they were enacted in 2005.

23. In the context of the current security environment, the Commission considers that it would be open to the PJCIS to find that the stop, search and seize powers that are limited to Commonwealth places continue to be necessary and are consistent with Australia's human rights obligations, subject to a reduction in the scope of the duration of a declaration of a prescribed security zone.
24. The power that should be given the most scrutiny is the power in s 3UEA of the Crimes Act, which enables warrantless entry to any premises (whether or not in a Commonwealth place) to search for a thing that may be used in connection with a terrorism offence. In practice, the power will only be available where a telephone warrant could not be obtained first. The limited situations in which this power could conceivably be used, combined with its extraordinary nature, suggests that serious consideration should be given to its repeal.
25. Oversight of counter-terrorism powers, including by this Committee, helps to ensure that they operate appropriately. An important aspect of oversight is proper authorisation for the use of powers. In the case of searches of people and premises, police are required, except in very limited circumstances, to obtain a warrant on each occasion that they wish to exercise those powers. While warrantless powers can be justified in very limited circumstances, the reduction in oversight also creates a risk of misuse.
26. Our submission includes a case study dealing with recent findings about the misuse of warrantless arrest powers by Victorian police in the course of a counter-terrorism raid in 2015. In this raid, Mr Eathan Cruse, a young Aboriginal man, was beaten by police after he had been handcuffed and while lying on the floor.
27. If the PJCIS decides to recommend that the stop, search and seize powers continue, the Commission submits that they should continue to be viewed as temporary, emergency powers and subject to a further sunset period.
28. Section 6 of this submission examines the control order regime. Control orders are the only powers, within the scope of the present review, which have been exercised. Appendix A to this submission contains a table summarising the 16 control orders made to date. Ten of those control orders were made since 1 January 2019. The



experience of how control orders have been used in practice provides a stronger basis for determining the kinds of situation in which they are appropriate. The submission contains a number of relevant case studies to illustrate those points, based on the experience to date.

29. The Commission submits that if a control order regime is retained in some form, it should be more tightly targeted to people demonstrated to be a risk to the community. It should be limited to people who have been convicted of a terrorist offence and who would still present unacceptable risks to the community at the end of their sentence if they were free of all restraint upon release from imprisonment.
30. The best way to do this would be to replace the current control order regime with the extended supervision order (ESO) regime recommended by the third INSLM, Dr James Renwick CSC SC. Such a regime would be more consistent with human rights because:
  - the scope of the regime would be better targeted to situations where there was more likely to be risk to the community
  - as a result, the degree to which the controls limit the human rights of the person subject to the control order would be more likely to be proportionate to the purpose for their imposition
  - the evidence in support of an application could be properly tested in court proceedings when the order was first sought.
31. As can be seen from Appendix A, most control orders made in practice relate to people who have already been convicted of a terrorism offence and who are being released into the community. In light of the range of other investigation and prevention measures available, and their effectiveness when compared with control orders, the use of control orders in other situations is not justified. This includes the use of control orders:
  - as an alternative to prosecution, either where there is a lack of probative evidence that would ground a 'reasonable suspicion' permitting arrest, or where the Commonwealth Director of Public Prosecutions (CDPP) has advised that there is no reasonable prospect of conviction

- as a ‘second attempt’ following an unsuccessful prosecution—for example, where a person has been tried and acquitted.
32. Section 7 of this submission examines the PDO regime. The Commonwealth regime allows detention of people for up to two days, with restrictions on their communications, for the purpose of preventing a potential terrorist act or preserving evidence of a recent terrorist act. The Commonwealth regime has not been used, but there have been two examples of the use of similar State-based powers.
  33. On the basis of publicly available evidence, this is a clear example of a power that is not necessary. The Commission’s submission examines the purposes and threshold for obtaining a PDO, concluding that in every case where relevant authorities have suggested a PDO might be used, there are alternative, less restrictive options available that are just as effective.
  34. Section 8 of this submission examines the continuing detention order (CDO) regime. When this regime was first proposed, the Commission recognised that it could be a reasonable and necessary response to the potential risk posed by people convicted of terrorism related offences, after their release from imprisonment. However, the scope of any such regime should be narrowly confined so that it applies only in the most serious of cases and only to the extent necessary to address an unacceptable risk to the community.
  35. There are still many aspects of this regime that are not settled. This includes the way that risk is assessed and the identification, training and qualification of relevant experts. There has been no independent appraisal of the Government’s method of assessing whether an individual should be subject to a CDO. Robust and independent appraisal of this assessment methodology is necessary to assure the public, and ultimately the courts, that such assessments are sufficiently accurate and reliable, taking into account the gravity of the decision-making process to which they relate. To this end, the Commission reiterates a number of its recommendations, including that expert reports identify any limitations in their assessment of risk and that an independent risk management body be established to accredit experts and evaluate the operation of risk assessment tools.

36. Also unresolved is the way in which people subject to a CDO will be detained, bearing in mind that this will be civil and not criminal detention, and how the conditions of their detention will be monitored.
37. Finally, as noted above, there are a range of important outstanding recommendations from the third INSLM and the PJCIS in relation to the establishment of an extended supervision order (ESO) regime. This would allow a court considering an application for a CDO to consider whether an ESO would be an effective and less restrictive alternative and, if so, to make an ESO instead. The Commission submits that the ESO regime in this form could replace the existing control order regime on the basis that it has a better focus on risk and is more consistent with human rights.
38. Shortly before this submission was due, the Australian Government introduced the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 into Parliament. This Bill would implement an ESO regime, but with significant differences from the model recommended by the third INSLM and the PJCIS. The Commission notes that the Government intends to refer this Bill to the PJCIS for separate inquiry.

### **3 Recommendations**

39. The Commission makes the following recommendations.

#### **Recommendation 1**

The Commission recommends that s 3UJ(3) of the Crimes Act be amended to reduce the maximum duration of a declaration of a prescribed security zone to 14 days, consistent with equivalent legislation in the United Kingdom, unless there is compelling evidence that a longer period is necessary in Australian circumstances.

#### **Recommendation 2**

The Commission recommends that the PJCIS seek evidence from the Australian Federal Police about the process involved in obtaining a warrant by telephone or other electronic means, and consider any improvements that could be made to this process.

### **Recommendation 3**

The Commission recommends that s 3UEA of the Crimes Act, which permits warrantless entry by police onto private premises in certain emergency circumstances, be repealed, unless investigations in response to Recommendation 2 reveal a significant operational gap that requires the retention of such an extraordinary power.

### **Recommendation 4**

The Commission recommends that, if the PJCIS decides to recommend that the powers in Division 3A of Part IAA of the Crimes Act continue, they be subject to a further sunset period.

### **Recommendation 5**

The Commission recommends that control orders be limited to people who have been convicted of a terrorist offence and who would still present unacceptable risks to the community at the end of their sentence if they were free of all restraint upon release from imprisonment. This should be done by replacing the existing control order scheme with the extended supervision order scheme previously recommended by the third INSLM and the PJCIS.

### **Recommendation 6**

The Commission recommends that s 104.5(3) of the Criminal Code be amended to expressly prohibit the making of a relocation order as part of a control order (or extended supervision order).

### **Recommendation 7**

The Commission recommends that s 104.5(3) of the Criminal Code be amended to expressly prohibit long curfew periods during daylight hours as part of a control order (or extended supervision order).

### **Recommendation 8**

In the absence of some further compelling justification for the retention of the preventative detention order regime, the Commission recommends that the regime be repealed.

## **Recommendation 9**

The Commission recommends that the offence in s 119.2 of the Criminal Code (entering, or remaining in, declared areas) be excluded from the definition of ‘terrorist offender’ in s 105A.3(1)(a) of the Criminal Code, with the effect that a person convicted of such an offence is not liable for a continuing detention order.

## **Recommendation 10**

The Commission recommends that a report prepared by an expert appointed under s 105A.6 of the Criminal Code be required to contain details of any limitations on the expert’s assessment of the risk of the offender committing a serious Part 5.3 offence if the offender were released into the community, and the expert’s degree of confidence in that assessment.

## **Recommendation 11**

The Commission recommends that the PJCIS seek an update from the Department of Home Affairs about the following matters in relation to the continuing detention order regime in Div 105A of the Criminal Code:

- (a) the development of a risk assessment tool, steps taken to validate any tool for Australian circumstances, and any independent evaluation of the reliability of this tool in Australia and/or other comparable jurisdictions
- (b) the identification, training and qualification of relevant experts
- (c) the minimum standards for housing people detained under the continuing detention order regime
- (d) the mechanisms for oversight and inspection of conditions of detention for people detained under the continuing detention order regime
- (e) the steps taken to develop rehabilitation programs to reduce the risk of reoffending

and publish the responses to the full extent possible that is consistent with the requirements of national security.

## **Recommendation 12**

The Commission recommends that an independent risk management body be established to:

- (a) accredit people in the assessment of risk for the purpose of becoming 'relevant experts' as defined in s 105A.2 of the Criminal Code
- (b) develop best-practice risk-assessment and risk-management processes, guidelines and standards
- (c) validate new risk assessment tools and processes
- (d) evaluate the operation of risk assessment tools
- (e) undertake and commission research on risk assessment methods; and
- (f) provide education and training for risk assessors.

## **Recommendation 13**

The Commission recommends that 'relevant experts' be required to be accredited by the independent risk management body in order to be appointed under s 105A.6 of the Criminal Code.

## **Recommendation 14**

The Commission recommends that the State and Territory Supreme Courts be authorised to make an extended supervision order as an alternative to a continuing detention order under Div 105A of the Criminal Code, based on the criteria recommended by the INSLM in the 2017 Statutory Deadline Reviews.

## **Recommendation 15**

The Commission recommends that the special advocate regime currently available for use in control order proceedings also be available for proceedings in relation to applications for continuing detention orders or extended supervision orders under Div 105A of the Criminal Code.

## **Recommendation 16**

The Commission recommends that, if the control order regime is retained and a parallel extended supervision order regime is created:

- (a) the AFP Minister be unable to give consent under s 104.2 of the Criminal Code to the AFP requesting a control order, if proceedings for a continuing detention order or an extended supervision order under Div 105A are pending
- (b) in requesting an interim control order in relation to a person, the senior AFP member be required to give the issuing court a copy of any application under Div 105A in relation to that person, and any order (including reasons) of the relevant court in respect of that application
- (c) no control order may be in force in relation to a person while a continuing detention order or an extended supervision order is in force in relation to that person.

## **4 Background**

- 40. The stop, search and seize powers in Div 3A of Part IAA of the Crimes Act and the control order and 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.
- 41. The legislative proposals were reviewed in detail, prior to their introduction, by the Senate Legal and Constitutional Legislation Committee chaired by Senator Marise Payne. The Committee recognised that the Bill represented ‘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’.<sup>23</sup> 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.
- 42. 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. It said:

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.<sup>24</sup>

43. The date for the sunset of these provisions was extended in 2014 by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth). As a result of that extension, the provisions were due to expire on 7 September 2018.<sup>25</sup>
44. In 2016, the CDO regime was inserted into Div 105A of Part 5.3 of the Criminal Code by the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth). The CDO regime was made subject to a 10-year sunset provision from the date that Act received Royal Assent. Unless extended, it will expire on 8 December 2026.
45. The INSLM was tasked to inquire into and report on the stop, search and seize powers, control orders and PDOs by 7 September 2017, one year before these provisions were due to sunset (the Statutory Deadline Reviews).<sup>26</sup>
46. The INSLM conducted an inquiry into these provisions. The Commission made a submission to the INSLM's inquiry on 15 May 2017.<sup>27</sup> The INSLM reported by the statutory deadline of 7 September 2017.<sup>28</sup>
47. The PJCIS then conducted an inquiry into these provisions. The Commission made a submission to the PJCIS inquiry on 3 November 2017.<sup>29</sup> On 1 March 2018, the PJCIS published a report of its review into these provisions.<sup>30</sup>
48. In August 2018, the sunset date for these provisions was extended by a further three years to 7 September 2021.<sup>31</sup>
49. 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. Australia's current national terrorism threat level is 'probable' and has been at this level (or 'high' under the previous regime) since September 2014.<sup>32</sup> This means there is credible intelligence indicating individuals or groups have both the intention and capability of conducting an attack in Australia. The most recent summary of the national security and counter-terrorism landscape produced by the INSLM highlighted the following matters:

- the credible threat of one or more terrorist attacks will remain a significant factor in the Australian national security and counter-terrorism landscape for the reasonably foreseeable future
- while more complex or extensive attacks cannot be ruled out and must be prepared for, attacks by lone actors using simple but deadly weapons, with little if any warning, are more likely
- there can be no guarantee that the authorities will detect and prevent all attacks, although most have been
- there is also the risk of opportunistic, if unconnected, 'follow-up' attacks in the immediate aftermath of a completed attack, at a time when police and intelligence agencies are fully occupied in obtaining evidence and returning the attacked locality to normality
- the threats come mainly from radical and violent Islamist action – which is not to be confused with the great world religion of Islam which practices peace, but there are also increasing concerns about radical, violent, right-wing activity
- the implications of the recent atrocities in Christchurch and Sri Lanka are yet to be fully worked out. Equally hard to predict are the likely activities of the remnant foreign fighters (and their supporters) of the so-called Caliphate of ISIL
- as well as terrorism threats, there is an increasing threat to Australia's national security posed by acts contrary to the Criminal Code, including foreign interference, foreign interference involving foreign intelligence agencies, and espionage.<sup>33</sup>

50. Given that the powers considered in this review impinge significantly on a range of human rights, it is important that the powers are regularly examined to determine whether they are effective and

appropriate, by reference to the current threats facing Australia and the totality of counter-terrorism and related laws that have been introduced, especially since 2001.

## **5 Stop, search and seize powers**

### **5.1 Structure of provisions**

51. 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. While the title of the present review is 'Review of AFP powers', these provisions grant powers both to officers of the AFP and to officers of State and Territory police forces.<sup>34</sup>
52. All but one of these powers<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>
53. The second situation is where a person is in a Commonwealth place that the relevant Minister (formerly the Attorney-General, now the Minister for Home Affairs) 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.<sup>38</sup>
54. The Minister for Home Affairs may declare that a Commonwealth place is a prescribed security zone if the Minister considers that a declaration would assist:
  - in preventing a terrorist act occurring; or
  - in responding to a terrorist act that has occurred.<sup>39</sup>

55. The declaration lasts for 28 days unless revoked earlier.
56. 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 place<sup>40</sup>
  - 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 place<sup>41</sup>
  - 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.<sup>42</sup>
57. 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,<sup>43</sup> 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.
58. In 2018, additional reporting and oversight provisions were introduced to increase transparency in relation to these stop, search and seize powers.<sup>44</sup> These amendments were made following recommendations of the INSLM<sup>45</sup> and the PJCIS.<sup>46</sup> The new reporting requirements involve:
- reporting by the AFP to the Minister for Home Affairs, the INSLM and the PJCIS in relation to the exercise of the powers, as soon as practicable after they are exercised
  - annual reporting by the Minister for Home Affairs to Parliament on the exercise of the powers.

59. The reporting is limited to the exercise of stop, search and seize powers by AFP officers, and to requests by any police officer to the Minister for declarations of prescribed security zones. Reporting is not required in relation to the exercise of stop, search and seize powers by officers of State or Territory police forces.
60. 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.<sup>47</sup> 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.
61. These powers have not been used since they were introduced.<sup>48</sup>

## **5.2 Consideration**

### **(a) Relevant human rights**

62. The power to detain a person for the purposes of conducting a search engages the right to liberty and security of the person (article 9(1) of the ICCPR) and the rights to freedom of movement and privacy (articles 12 and 17 of the ICCPR). The power to require a person to show evidence of their identity and provide details of their name, residential address, and reason for being in a Commonwealth place engages the right to privacy.
63. Under international law, a restriction on these rights is permissible only if it is in accordance with the relevant provisions of the ICCPR. In particular, the State must demonstrate the necessity of any restriction and it may only take measures that are reasonable and proportionate in carrying out legitimate aims.<sup>49</sup>
64. The right to liberty in article 9 of the ICCPR prohibits 'arbitrary' detention and provides that no one shall be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law. Lawful and non-arbitrary detention is not a breach of this right. However, lawful detention may become arbitrary if it has elements of inappropriateness, injustice or lack of predictability.<sup>50</sup>

Further, detention should not continue for longer than the State can provide appropriate justification.<sup>51</sup>

65. The right to privacy in article 17 of the ICCPR is similarly confined to protection against ‘arbitrary or unlawful interference’. The right to freedom of movement can be subject to lawful restrictions that are necessary to protect national security, public order or the rights and freedoms of others.

(b) Stop, search and seize powers

66. The first step in a human rights analysis is assessing whether these powers are ‘necessary’ to achieve a legitimate purpose. The fact that the powers have not been used in 15 years may be an indication that they are not necessary. However, the AFP has submitted previously that there are two reasons why the powers have not been used.<sup>52</sup> First, the powers have a narrow field of application, because they are limited to Commonwealth places. Secondly, since the powers were introduced, the AFP has not responded to a terrorist attack on a Commonwealth place.
67. The AFP says that the powers are necessary because, although they have not been used to date, there have been a number of threats to Commonwealth places where the powers could have been required.<sup>53</sup>
68. Further, the AFP says that these powers ‘fill a gap’ in State and Territory emergency counter-terrorism powers. Around the time that the stop, search and seize powers were first introduced into the Crimes Act, the States and Territories gave similar powers to their own police forces.<sup>54</sup> The powers in the Crimes Act were intended to ‘dovetail’ with these State and Territory regimes and provide a common approach when dealing with Commonwealth places. The Commission has not reviewed the scope of the equivalent powers in each of the State and Territory regimes to identify whether a gap exists, but accepts that the provisions in the Crimes Act would ensure consistency in application across Commonwealth places.
69. The second step in a human rights analysis is examining whether the powers are reasonable. This involves examining the checks and balances on the powers, and whether less restrictive alternatives are available. Here, the powers are geographically limited in that they only

apply in Commonwealth places. Further, there are appropriate limits on the power to conduct a search. An officer conducting a search must not:

- use more force, or subject a person to greater indignity, than is reasonable and necessary<sup>55</sup>
- detain a person for longer than is reasonably necessary for the search to be conducted<sup>56</sup>
- damage a thing being searched by forcing it open, unless the person has been given a reasonable opportunity to open the thing (or it is not possible to give that opportunity).<sup>57</sup>

70. The third step in a human rights analysis is examining whether the impact on rights is proportionate to the purpose of the power. In the first kind of situation where these powers can be used—namely, where a police officer suspects on reasonable grounds that a terrorist act is imminent, occurring or has just occurred—there is a tight correlation between the purpose of the power and its exercise. It is only those people who are suspected of being involved in the act that can be stopped, questioned and searched. Further, the impact on liberty, freedom of movement and privacy is limited in time and intensity to what is reasonably necessary. In those circumstances, there is a reasonable basis to find that any detention for the purpose of a search is not arbitrary and that the impact on freedom of movement and privacy is proportionate to the purpose of the power in the context of the current security environment.

(c) Prescribed security zones

71. It is more doubtful that the current provisions dealing with the declaration of prescribed security zones meet the requirements of reasonableness and proportionality. Once a security zone is prescribed, there is no requirement for a police officer to suspect that a person in the zone is connected in any way with a terrorist act. Any person in the zone is liable to detention for the purpose of a search by police while the zone is in force, which can be for a period of up to 28 days. This clearly has a much broader impact on human rights, because it subjects ordinary citizens, unrelated to any terrorist act, to the potential of detention and search.

72. Two reasonably available alternatives that would be less restrictive of human rights are as follows:
- Detention could be limited for the purpose of search to people reasonably suspected by police of being involved in the terrorist act. This would involve a removal of the prescribed security zone regime entirely and limiting the application of the stop, search and seize powers to the circumstances in s 3UB(1)(a) of the Crimes Act.
  - A second less restrictive alternative would be to reduce the period for which a security zone could be prescribed. This was the recommendation of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.<sup>58</sup> Both the COAG Review Committee<sup>59</sup> and the third INSLM, Dr James Renwick CSC SC,<sup>60</sup> recognised that there may be merit in reducing the duration of a declaration, but both hesitated before making such a recommendation ‘in the absence of any evidence to suggest the 28 day period is unreasonable’. In the Commission’s view, this reverses the proper analysis. It would be appropriate for the PJCIS, in the course of the current review, to seek evidence from the proponents of the law that the 28-day period is appropriate.
73. In relation to the first of these alternatives, while removing the prescribed security zone regime and requiring police to have a reasonable suspicion in order to search a person would be less restrictive, there may be circumstances where it is not as effective in achieving the relevant purpose and the additional burden on ordinary citizens may be justified. For example, the AFP may be able to identify specific circumstances where being able to conduct searches without a reasonable suspicion in limited areas and for limited time periods would assist them in responding quickly to a terrorist threat.
74. In relation to the second of these alternatives, the Commission considers that there has been little justification given for the ability to prescribe security zones for 28 days at a time. In their submission to the present inquiry, government agencies have identified the United Kingdom as the only jurisdiction to have a comparable provision, in s 47A of the *Terrorism Act 2000* (UK).<sup>61</sup> Section 47A was introduced following a decision of the European Court of Human Rights in 2010 which held that a previous regime of no-suspicion searches was contrary to human rights.<sup>62</sup> That previous regime permitted ‘rolling’

authorisations of particular police areas for 28 days at a time, allowing police to stop anyone in the relevant area to search for articles that could be used in connection with terrorism, regardless of whether police had a reasonable suspicion that the person was carrying such an article. These powers were held not to be sufficiently circumscribed, nor subject to adequate legal safeguards against abuse.<sup>63</sup>

75. Significantly, since the introduction of s 47A, the maximum duration of an authorisation under the UK legislation is 14 days.<sup>64</sup> That power, in its present form, has only been used once, following the detonation of an improvised explosive device on the District Line at Parsons Green underground station in London on 15 September 2017. 29 people were injured in the attack. On that occasion, authorisations were made in relation to four police areas, and each authorisation lasted for less than two days.<sup>65</sup> 149 people were stopped, with 145 of those stops being conducted by British Transport Police. As at March 2020, the use of the s 47A power in this case had not yet been reviewed by the UK Independent Reviewer of Terrorism Legislation.<sup>66</sup> The results of that review may be relevant when the PJCIS comes to review the power in s 3UJ of the Crimes Act again.
76. Unless some unique circumstances can be identified that are particular to the Australian environment, it would be reasonable for the PJCIS to conclude that the maximum period for a prescribed security zone under the Crimes Act should also be 14 days.
77. It would also be relevant for the PJCIS to consider, in the event that a longer period were deemed necessary in a particular case, whether any renewal of a declaration would necessarily involve a substantial 'diversion of resources from operational agencies',<sup>67</sup> or whether the work involved in seeking a renewal could be primarily carried out by officers within the Department of Home Affairs.
78. The Commission recognises that there are already some appropriate limitations on the ability of the Minister for Home Affairs to prescribe security zones, which may support a finding that a temporary continuation of this power, limited to a maximum period of 14 days, is reasonable in the circumstances:
  - The Minister must consider that the declaration 'would assist' in either preventing or responding to a terrorist act.<sup>68</sup> As with all such



powers that depend on the subjective view of a Minister, this state of satisfaction must be reasonably formed.<sup>69</sup>

- A prescribed security zone can only be declared in relation to a 'Commonwealth place'. Leaving to one side the application of any concurrent State or Territory emergency powers, once the fact of the declaration of a zone has been published,<sup>70</sup> the public has some ability to avoid an intrusion into their rights by not entering the zone. However, for other people this will not be possible, for example, if the zone includes essential services like airports and courts.
- While these ministerial decisions are not subject to independent merits review, the *legality* of any decision by the Minister to make a declaration is reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).<sup>71</sup>
- The Minister must revoke a declaration if satisfied that there is no longer a terrorism threat that justifies the declaration, or that the declaration is no longer required.<sup>72</sup>

79. As noted by the first INSLM, Mr Bret Walker SC, one of the key risks in giving these kinds of broad search and seizure powers to police is the potential for them to be abused. This was not a comment on the propensity of police or other authorities to abuse their powers, but rather a question about whether the nature of the powers themselves lends them to be abused.<sup>73</sup> That risk is higher when police are given the power to 'systematically stop and search'<sup>74</sup> ordinary citizens without the need to form a reasonable suspicion that they are involved in any act of terrorism. If there are no criteria to delineate the scope of a lawful search, there is a risk that arbitrary, irrelevant or discriminatory criteria may be applied. For example, the House of Lords recognised the potential for such powers to be used to disproportionately target people from ethnic minorities.<sup>75</sup>
80. Fortunately, there has been no need for these powers to be exercised in Australia. The lack of experience of how these temporary emergency powers might be used in practice is another reason why it is important to keep them under review by this Committee.

(d) Warrantless entry to premises

81. The most intrusive of the emergency powers in Division 3A of Part IAA of the Crimes Act is the power in s 3UEA, which permits police to enter any premises without a warrant. This power is much broader than the powers described above, because it is not limited to Commonwealth places.<sup>76</sup> It can be used in relation to any premises in any location including, for example, a family home.
82. Warrantless entry to premises clearly engages the right to privacy. This right is also recognised at common law. Every unauthorised entry onto private premises, whether by police officers or anyone else, amounts to a trespass.<sup>77</sup>
83. In the absence of permission from the lawful owner or occupier, a police officer may normally only enter private premises pursuant to a warrant. Legislation provides for warrants to be issued by justices or magistrates and to be subject to conditions, in order to 'balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his privacy and property'.<sup>78</sup>
84. At common law, a police officer may enter private premises without a warrant in order to arrest a person who the officer suspects on reasonable grounds has committed a felony.<sup>79</sup> Section 3ZB(2) of the Crimes Act provides a limited statutory power to enter premises without a warrant for the purpose of arresting a person for an indictable offence.
85. Section 3UEA extends the ability of police to enter private premises without a warrant to circumstances where both of the following apply:
  - a police 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; and
  - 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.
86. There are two related issues involved with the scope of this power. First, it permits police entry to private property in circumstances that would otherwise not be permitted. Secondly, it removes the oversight

of the warrant process which, among other things, is designed to ensure that powers of entry reserved to police are not misused.

87. In considering whether this power is necessary, a key question is why it is not sufficient to obtain a warrant, particularly given that telephone warrants can be obtained quickly and simply under s 3R of the Crimes Act. An application for a warrant may be made by telephone, fax or other electronic means in an urgent case, or if the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.<sup>80</sup> This permits warrants to be obtained quickly, while still subjecting searches to appropriate oversight by a justice or magistrate.
88. If there are practical obstacles in obtaining a warrant, then, as the Commission and other bodies such as the Law Council of Australia have previously recommended, attention should be directed to improving that process so that it is effective in times of emergency.<sup>81</sup>
89. In their submission to the present inquiry, the government agencies have not identified any comparable provision, in the laws of countries comparable to Australia, that permits warrantless entry to private premises without a reasonable suspicion that a serious crime has been committed.<sup>82</sup>
90. The Commission expects that the PJCIS will receive evidence on whether police consider that the continuation of this power is necessary. The AFP has previously said that it has not been faced with a situation warranting the use of the power, but that it would be of critical use where police have no prior warning of an attack and immediate action is required to protect an individual or the public.<sup>83</sup> It will be necessary for the PJCIS to take into account Australia's current security environment.
91. The PJCIS should also take into account the way in which warrantless anti-terrorism powers have been used by police in practice. The case study set out below describes recent findings of misuse of such powers by police during Operation Rising in 2015.

### Case study 1: Mr Eathan Cruse

Mr Eathan Cruse, a young Aboriginal man, was 19 years old on 18 April 2015 when the house in which he was staying with his parents and siblings was raided by Victorian police from specialist counter-terrorism units at around 3.30am.

The raid was one of six raids conducted in different locations across Melbourne in the early hours of that morning as part of Operation Rising. One of the people arrested as a result of those raids, Mr Sevdet Besim, was later convicted of doing an act in preparation for, or planning, a terrorist act and sentenced to 14 years imprisonment.<sup>84</sup>

Mr Cruse had been a friend of Mr Ahmad Numan Haider.<sup>85</sup> Mr Haider had been shot and killed by a police officer in September 2014, after Mr Haider had stabbed him and another police officer with a knife.<sup>86</sup> Mr Cruse became a person of interest to the police because he was a friend of Mr Haider and is a Muslim.<sup>87</sup>

The arrest of Mr Cruse was recently considered in detail in a civil action brought by him against the State of Victoria.<sup>88</sup> The following factual findings were made by the Court in that case:

When he was told by a police officer to 'Get down', Mr Cruse immediately lay face down on the hallway floor, with his hands flat down on the floor. ...

[A]fter his hands had been cuffed behind his back, a police officer struck him to the left side of his head, causing him to bleed. ... [A] police officer slammed Mr Cruse into the fridge, and then pushed him to the floor. ...

One or more police officers, armed and armoured, their faces masked, struck Mr Cruse repeatedly to his head, neck and upper body while he was lying, handcuffed and defenceless, on his parents' kitchen floor. As he lay there, bleeding from the head, one of them threatened him with more of the same. ...

Two police officers then escorted Mr Cruse out of the house. As they walked out the front door, one of the officers twisted Mr Cruse's wrist and said: 'Don't fucking say a word'.<sup>89</sup>

The judge did not make these findings lightly, saying that she was 'acutely conscious that it is a serious matter to find that police officers

beat a man who was restrained and defenceless'.<sup>90</sup> Her Honour described the assault on Mr Cruse as 'cowardly and brutal' and 'a shocking departure from the standards set for police officers by Parliament and expected of them by the community'.<sup>91</sup>

The raid on Mr Cruse's parents' house was undertaken pursuant to a search warrant under s 3E of the Crimes Act. Mr Cruse was purportedly arrested pursuant to s 3WA of the Crimes Act, which is a power to arrest a person, without first obtaining a warrant, for a terrorism offence. The alleged offence was that he was 'doing acts in preparation for a terrorist act', contrary to s 101.6(1) of the Criminal Code. The Court found that the arrest was unlawful because neither of the arresting officers suspected on reasonable grounds that he had committed the terrorism offence for which he was arrested. Further, there were no reasonable grounds for anyone to suspect him of that offence.<sup>92</sup>

After Mr Cruse was interviewed by investigators, he was released without charge. As at the date of his civil hearing in July 2019, he had never been charged with any terrorism offence.<sup>93</sup>

The judge made a number of comments about the danger of police misusing the extraordinary powers given to them to combat terrorism:

Section 3WA was added to the Crimes Act (Cth) as part of a suite of counter-terrorism measures ... . It lowered the threshold for arrest without warrant for terrorism offences to enable police to take more rapid action and to disrupt terrorist activity at an earlier stage. Other measures introduced by that legislation included control orders, preventative detention orders, and stop, search and seizure powers. These measures conferred on police, and other law enforcement agencies, extensive powers to interfere with the liberty, privacy and personal integrity of suspected terrorists. ...

It is imperative that police exercise these powers with care and discretion, and only when the conditions for their exercise exist.

The necessary care and discretion was not exercised in this case. The decision of the Joint Management Committee to arrest Mr Cruse, rather than simply executing a search warrant at his house, was unexplained. The evidence did not demonstrate a reasonable basis to suspect that he was planning a terrorist act.<sup>94</sup>

This misuse by police of the power of arrest without warrant was a significant factor in the Court awarding exemplary damages to Mr Cruse.

The case has reportedly been referred to Victoria's Independent Broad-based Anti-corruption Commission, which may also investigate potential collusion between police officers in relation to statements given by them to the Court.<sup>95</sup>

92. In its review of whether the extraordinary powers in Division 3A of Part IAA of the Crimes Act continue to be warranted, it is important for the PJCIS to inquire into circumstances where those powers, or related powers, have been abused. As noted above, this was one of the key concerns identified by the first INSLM. In Mr Cruse's case, while identifying instances of abuse of power, the Court also identified limitations on those powers designed to protect human rights.<sup>96</sup> Particular instances of abuse do not necessarily mean that the powers, in appropriate cases, should not be available at all. However, the Committee has an important role in considering whether the relevant legislation could be amended to make such abuses less likely to occur in future.
93. The Commission recognises that there are some appropriate limitations on the power in s 3UEA, which could support a finding that the scope of the power is reasonable and proportionate to a legitimate aim. In particular:
- there must be a serious and imminent threat to a person's life, health or safety
  - it must be 'necessary' to exercise the power without a warrant because of that serious and imminent threat.
94. However, the Commission considers that the limited situations in which this power could conceivably be used, combined with its extraordinary nature, suggests that serious consideration should be given to its repeal. As noted above, the availability of telephone warrants means that the opportunity for the use of this power is extremely limited. The AFP has previously submitted that the warrantless entry power will only be available 'where the immediacy of the threat is such that there is not even enough time to make a telephone warrant application'.<sup>97</sup> If there are real concerns about the

time taken to obtain a telephone warrant, it would be far preferable to devote energy into simplifying that process, rather than dispensing with the appropriate scrutiny that the warrant process provides.

(e) Extension of emergency powers

95. The Commission's submissions have sought to outline the matters that the PJCIS should take into account in assessing whether these powers continue to be necessary.
96. In the context of the current security environment, the Commission considers that it would be open to the Committee to find that the stop, search and seize powers that are limited to Commonwealth places are consistent with Australia's human rights obligations, subject to a reduction in the maximum duration of a declaration of a prescribed security zone. If the PJCIS decides to recommend that the powers continue, the Commission submits that these powers should continue to be viewed as temporary, emergency powers and subject to a further sunset period.

**Recommendation 1**

The Commission recommends that s 3UJ(3) be amended to reduce the maximum duration of a declaration of a prescribed security zone to 14 days, consistent with equivalent legislation in the United Kingdom, unless there is compelling evidence that a longer period is necessary in Australian circumstances.

**Recommendation 2**

The Commission recommends that the PJCIS seek evidence from the Australian Federal Police about the process involved in obtaining a warrant by telephone or other electronic means, and consider any improvements could be made to this process.

**Recommendation 3**

The Commission recommends that s 3UEA of the Crimes Act, which permits warrantless entry by police onto private premises in certain emergency circumstances, be repealed, unless investigations in response to Recommendation 2 reveal a significant operational gap that requires the retention of such an extraordinary power.

#### **Recommendation 4**

The Commission recommends that, if the PJCIS decides to recommend that the powers in Division 3A of Part IAA of the Crimes Act continue, they be subject to a further sunset period.

## **6 Control orders**

97. Control orders represent a substantial departure from the way in which the law has traditionally addressed criminal wrongdoing.
98. Under well-established principles central to our criminal law, if an individual is reasonably suspected of relevant criminal conduct, the appropriate course is to arrest the person and bring them before a court. Those who have been convicted of committing a criminal offence are subject to punishment, including imprisonment or the imposition of bond conditions. This includes people who commit inchoate offences, such as attempting, encouraging or assisting; doing an act in preparation for, or planning; or conspiring to commit a substantive offence. Those charged with criminal offences who are awaiting trial may be remanded in custody or subject to bail conditions.
99. Control orders, by contrast, are civil remedies, but they impose significant obligations, prohibitions and restrictions based on anticipated future involvement in criminal conduct. Significantly, they allow restrictions to be placed on people who may not have committed any offence in the past and in respect of whom there is no reasonable basis to suspect that they are planning to commit a terrorist act in the future.
100. The Commission submits that if the current control order regime is retained, it should be more tightly targeted to people demonstrated to be a risk to the community. It should be limited to people who have been convicted of a terrorist offence and who would still present unacceptable risks to the community at the end of their sentence if they were free of all restraint upon release from imprisonment.
101. The most effective way to do this would be to replace the current control order regime with the ESO regime recommended by the third INSLM and the PJCIS discussed in section 8 below. This would allow the



same controls to be imposed, but would amount to a regime that was more consistent with human rights because:

- the scope of the regime would be better targeted to situations where there was more likely to be risk to the community
- the evidence in support of an application could be properly tested in court proceedings when the order was first sought.

102. As can be seen from Appendix A, most control orders made in practice relate to people who have already been convicted of a terrorism offence and who are being released into the community. In light of the range of other investigation and prevention measures available, and their effectiveness when compared with control orders, the Commission considers that the use of control orders in other situations is not justified. This includes use of control orders:

- as an alternative to prosecution, either where there is a lack of probative evidence that would ground a 'reasonable suspicion' permitting arrest, or where the CDPP has advised that there is no reasonable prospect of conviction
- as a 'second attempt' following an unsuccessful prosecution—for example, where a person has been tried and acquitted.

## **6.1 Structure of provisions**

(a) Nature of controls and consequences for breach

103. Control orders allow certain kinds of obligations, prohibitions and restrictions to be imposed on a person. They may be imposed 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.<sup>98</sup>

104. However, as discussed in more detail below, it is not necessary to demonstrate that any of these events is likely to occur for a control order to be issued.
105. There are 12 broad categories of obligations, prohibitions and restrictions that can be imposed on a person.<sup>99</sup> Some of these 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.
106. 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
  - 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.
107. 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).<sup>100</sup>
108. 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.

109. When a control order is imposed on an adult, it may be in force for up to 12 months at a time.<sup>101</sup> In practice, all control orders issued to date have been made for 12 months. 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.<sup>102</sup> While some control orders have been imposed on young adults in their late teens and early 20s, no control orders have yet been imposed on children.
110. It is possible to make successive control orders in relation to the same person (whether an adult or a child).<sup>103</sup> The Commission is only aware of one person who has been subject to more than one control order. Mr Ahmad Saiyer Naizmand first had an interim control order made against him on 5 March 2015. He was charged with breaching that control order six days before it was due to expire. As discussed in case study 3 below, the breach involved him watching three short ISIL propaganda videos on YouTube. He was convicted of the breach of the control order and sentenced to four years imprisonment.<sup>104</sup> He served the full period of the sentence, without parole. On 27 February 2020, the day before he was released, a second interim control order was made against him for a further period of 12 months.<sup>105</sup>
111. 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.
112. However, 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.<sup>106</sup> The same penalty applies to both adults and children older than 14.
113. The Commission is aware of two cases in which a person has been prosecuted for a breach of a control order. In each case, in the Commission's view, the penalties imposed for the breach have been

severe and arguably disproportionate to the seriousness of the breach.<sup>107</sup> Their respective situations are summarised in case studies 2 and 3 below.

**Case study 2: Mr MO**

On 17 December 2014, the third control order under Div 104 of the Criminal Code was imposed on a man known as Mr MO. It followed a period of approximately seven years during which no control orders had been made in relation to any person.

Mr MO was on bail in relation to an undisclosed offence at the time that the control order was imposed on him. The terms of the control order, among other things, prohibited him from using public telephones except in an emergency, and restricted him to using one mobile phone that had been approved by the Joint Counter Terrorism Team.<sup>108</sup>

Six days after the control order was imposed, MO was charged with using a public telephone on two occasions and using an unapproved mobile phone on one occasion. He called the same person each time. Those calls were monitored by authorities and it was common ground that the content of the calls was 'trivial' and did not relate to any criminal activity.<sup>109</sup>

Mr MO was not provided with a warning in relation to his conduct. He was immediately prosecuted for a breach.

Mr MO pleaded guilty and said that he was simply naïve. The Court sentenced him to two years imprisonment, with a non-parole period of 18 months.<sup>110</sup>

114. The only other prosecution for a breach of a control order that the Commission is aware of was the prosecution of Mr Naizmand, referred to above. While the conduct was more serious than the conduct of Mr MO, the sentence imposed was particularly severe.

### **Case study 3: Mr Ahmad Saiyer Naizmand**

In February 2017, when he was sentenced for breaching a control order, Mr Naizmand was 22 years old, married and working as a gyprocker in Sydney.

Almost four years previously, in July 2013, he had had his passport cancelled due to security concerns. In August 2014 he used his brother's passport to fly from Australia to Malaysia and then to the United Arab Emirates. He was detained in Dubai for passport irregularities and returned to Australia. In February 2015, he was convicted of using an Australian travel document that had not been issued to him and placed on a recognisance to be of good behaviour for 12 months.

On 5 March 2015, an interim control order was made in relation to him. It does not appear that Mr Naizmand was present when the interim control order was made, or that he was given the opportunity to make submissions about the basis for the control order, given that it was served on him the following day.<sup>111</sup> The evidence put forward by the police during the hearing was largely about Mr Naizmand's alleged association with others.

The judge was satisfied on the balance of probabilities that Mr Naizmand: was named in an intercepted telephone call concerning the threat of a terrorist act in Australia; was a member of a group of men who strongly supported the ideology and activities of Islamic State; and had a close association with the activities and intentions of his brother-in-law, who had been charged with a number of serious terrorism offences.<sup>112</sup>

Mr Naizmand consented to orders confirming the control order at a confirmation hearing almost nine months later on 30 November 2015.

On 29 February 2016, six days prior to the end of the control order, he was charged with breaching a term of the order. The control order did not prohibit him from accessing the internet. It did prohibit him from accessing electronic media depicting propaganda for a terrorist organisation (unless the material was broadcast on free to air television, pay television, commercial cinema, or has a classification from the Office of Film and Literature).

In Mr Naizmand's case, he had accessed three ISIL propaganda videos on YouTube of between 3 minutes and 18 seconds and 6 minutes and

26 seconds in duration. Two of the videos he watched twice. As a result, he was charged with five separate breaches of the control order.

Prior to the trial, Mr Naizmand was detained in the High Risk Management Unit in Goulburn Correctional Centre: the most secure prison in New South Wales. During the day he was locked in a cell without windows from 2.30pm to 8.30am the following day. When outside his cell he was handcuffed and had his legs shackled. He was always escorted by six correctional officers.<sup>113</sup> Those conditions were expected to continue for the duration of his sentence.<sup>114</sup>

Mr Naizmand pleaded guilty to the breaches of the control order and was sentenced to a total of four years imprisonment, with a non-parole period of three years.<sup>115</sup> This was four times longer than the good behaviour bond that he had been ordered to comply with as a result of his only previous criminal conviction.

Mr Naizmand served the full period of his sentence, without parole. On 27 February 2020, the day before he was released, a second interim control order was made against him for a further period of 12 months.<sup>116</sup>

115. Breaching a control order is classified as a 'terrorism offence'.<sup>117</sup> One result of that is that the Attorney-General must not make an order for parole in relation to such a person unless there are exceptional circumstances.<sup>118</sup> Mr MO and Mr Naizmand are now classed as terrorist offenders as a result of making three trivial telephone calls and watching three YouTube videos, respectively, while subject to a prohibition not to do so.

(b) Process of making a control order

116. The first step in making a control order is that a senior member of the AFP must seek the written consent of the Minister for Home Affairs (unless there are urgent circumstances).<sup>119</sup> Prior to the establishment of the Department of Home Affairs in December 2017, the responsible Minister was the Attorney-General.
117. Once the Minister's consent is obtained, the senior AFP member may apply to the Federal Court or the Federal Circuit Court for an interim control order.<sup>120</sup> The first six applications for control orders (up to 2016) were made to the Federal Circuit Court (or the Federal Magistrates Court as it was formerly known). No control orders were

sought in 2017 or 2018. Since 2019, all applications for control orders have been made to the Federal Court.<sup>121</sup>

118. The hearing in relation to an application for an interim control order can take place on an *ex parte* basis, without the person who is to be subject to the control order being present. The proceedings are interlocutory,<sup>122</sup> which means that the request for the interim control order can be supported by hearsay evidence, provided that the source of the evidence is identified.<sup>123</sup> In some recent cases, the AFP has notified the person who is the subject of the request of the hearing and they have been allowed to appear.
119. If the Court makes an interim control order, it must be served on the person who is the subject of the order as soon as practicable.<sup>124</sup> The interim control order comes into effect when it is served.<sup>125</sup>
120. At the time the Court makes the interim control order, it also sets a date for another hearing to determine whether the control order will be confirmed, varied, declared void or revoked.<sup>126</sup> This is a final hearing where the rules of evidence apply and the person who is the subject of the interim control order is entitled to be present and challenge the basis for the making of the order.<sup>127</sup> The confirmation hearing will only take place if the senior AFP member elects to confirm the order.<sup>128</sup> In those circumstances, the senior AFP member must serve the person who is subject to the interim control order with a range of documents including the statement of facts supporting the making of the interim order and an explanation of why each of the control conditions should be imposed.<sup>129</sup> If the senior AFP member elects not to confirm an interim control order, it immediately ceases to be in force.<sup>130</sup>
121. The confirmation hearing is supposed to occur 'as soon as practicable, but at least 7 days, after' the interim control order is made.<sup>131</sup> However, in practice, there can be significant delays between an interim control order being made and a confirmation hearing. In three cases, there were so many delays that the interim control order continued for 12 months before expiring, without any confirmation hearing.<sup>132</sup> In three other cases, the confirmation hearing occurred between seven and 10 months after the interim control order hearing, with comparatively little time left before the control order was due to expire.<sup>133</sup> In each of these six cases, the control order continued in force for substantial periods of time based on the lower level of scrutiny and lower

standards of evidence of the often *ex parte* interlocutory proceedings. This is a cause for concern, particularly because, as the PJCIS has recognised, the confirmation hearing 'is an essential safeguard in the legislation that provides a controlee with their first and only opportunity to have an interim order revoked'.<sup>134</sup>

122. In the case of Mr Causevic, for example (see case study 4 below), he was required to wear a monitoring device for almost 10 months before the judge at a contested confirmation hearing determined that such a control was not warranted. While a material reason for the delay in the confirmation hearing was two requests for an adjournment, first by both parties and then by Mr Causevic,<sup>135</sup> this was considered necessary by Mr Causevic's legal advisers in order to effectively respond to the allegations that had been made. As the PJCIS heard during the last review hearing, the interim control order application in this case was over 140 pages long and attached over 2,000 pages of annexures.<sup>136</sup>
123. In 2016, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) was amended to make provision for the withholding of sensitive information from a respondent during a control order proceeding, along with the introduction of a regime for the use of special advocates in such proceedings.<sup>137</sup> Regulations containing the administrative arrangements relating to special advocates came into force on 20 December 2017.<sup>138</sup> The Commission has previously made submissions to the PJCIS about these matters.<sup>139</sup> It appears that they are outside the scope of the current review.
124. Regardless of whether it is confirmed, a control order will expire 12 months after the interim control order was first granted (for adults),<sup>140</sup> or three months after the interim control order was granted (for children aged 14 to 17)<sup>141</sup> unless it is declared void, revoked or ceases to be in force earlier.
125. Once a control order is made, it permits police and other relevant authorities to use a wide range of investigatory tools to monitor compliance with the order. As the second INSLM, the Hon Roger Gyles AO QC, noted, 'the mere existence of the order is a trigger for monitoring'. The monitoring powers include the power to obtain:
  - a 'monitoring warrant' to enter and search premises owned or occupied by the relevant person<sup>142</sup>



- a 'monitoring warrant' to conduct a frisk search of the person or a search of a recently used conveyance<sup>143</sup>
- a 'control order warrant' to intercept communications made by the person over a telecommunications service<sup>144</sup>
- a 'control order warrant' for the installation and use of surveillance devices<sup>145</sup>
- a tracking device authorisation, where one of the conditions in the control order is that the person wear a tracking device.<sup>146</sup>

Each of these warrants may be obtained for a range of purposes including determining whether the control order is being complied with.

126. As the Commission has previously submitted to the PJCIS, the broad scope of monitoring that control orders permit needs to be considered alongside the range of formal controls that may be imposed (and the potential penalties for non-compliance) when assessing whether the infringement on human rights imposed is proportionate to a legitimate aim. In relation to the additional burden imposed by monitoring, the second INSLM said:

Monitoring compliance seems a reasonable concept, but reading these schedules [ie the schedules of the Bill which introduced the current control order monitoring powers] brings home forcibly the extent of intrusion into life and liberty by the making of a control order. The mere existence of the order is a trigger for monitoring. The details of the potential monitoring blur, if not eliminate, the line between monitoring and investigation. The case for control orders is weakened if control orders are of little utility without such far reaching surveillance. It is difficult to imagine such provisions being applied to an accused on bail. The significance for present purposes is to emphasise the seriousness of the impact upon a person of the grant of a control order if these changes come into force and the consequent necessity for proper safeguards of the interests of a potential controlee.<sup>147</sup>

127. The greater the limits that control orders place on the human rights of those subject to them, the more compelling the evidence in support of the need for control orders must be.

(c) Threshold for making a control order

128. Although the making of a control order has serious consequences, particularly in the event of a breach, the proceedings are civil proceedings and not criminal proceedings. In order for a Court to make a control order (whether interim or confirmed), it must be satisfied on the balance of probabilities of at least one of the following matters:
- i. making the order would substantially assist in preventing a terrorist act
  - ii. the person has provided training to, received training from or participated in training with a listed terrorist organisation
  - iii. the person has engaged in hostile activity in a foreign country
  - iv. the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act
  - v. 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
  - vi. making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act
  - vii. the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country.<sup>148</sup>
129. In addition, it must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions are reasonably necessary, and reasonably appropriate and adapted, for the purposes set out in s 104.1 (see paragraph 103 above).<sup>149</sup>
130. It can immediately be seen that each of the grounds for making a control order, other than grounds (i) and (vi), relate to past conduct. In substance, the past conduct is all conduct that is prohibited under the Criminal Code and could be the subject of a prosecution.<sup>150</sup> Grounds (i) and (vi), by contrast, enable a control order to be made where it would 'substantially assist in preventing' certain future conduct.

131. The phrase ‘substantially assist’ is apt to mislead. It does not mean that the assistance provided by the control order must be large. Instead, as the AFP submitted in a recent control order case, it merely means that the assistance must be ‘non-trivial’.
132. In *McCartney v Abdirahman-Khalif* [2019] FCA 2218, the AFP said that the Court does not need to find on the balance of probabilities that a terrorist act would otherwise occur before it can grant an interim control order.<sup>151</sup> Further, the phrase ‘substantially assist’ should be read as meaning that the assistance the control order would provide in preventing the provision of support for, the facilitation of or the doing of an act of terrorism should be ‘not trivial or minimal’ or ‘more than merely insubstantial or insignificant’.<sup>152</sup> In support of this submission, the AFP said:
- The sorts of obligations, prohibitions and restrictions that can be contained in a control order are, by their very nature, not necessarily going to be decisive in preventing a terrorist act.<sup>153</sup>
133. It appears that the AFP argued for such a low threshold because the case involved an application for an interim control order in relation to a person who had been assessed by a Joint Terrorism Threat Assessment as being ‘highly unlikely’ to have either the knowledge or skills to carry out an act of politically-motivated violence (see case study 5 below).
134. The AFP’s construction was accepted by the Court.<sup>154</sup>
135. This concession by the AFP in this case about the utility of control orders is also significant. The stated purposes of control orders are to protect the public from a terrorist act; to prevent the provision of support for or the facilitation of a terrorist act; and to prevent the provision of support for or the facilitation of the engagement in a hostile activity in another country. However, according to the AFP’s submissions, the kinds of controls that can be imposed are not necessarily going to be decisive in achieving any of these purposes.
136. If control orders have limited effectiveness in achieving their aims, and if the bar for obtaining a control order is so low (non-trivial assistance), in part because of the limited utility of control orders, the argument that the limitation that control orders impose on the liberty of their subjects is proportionate to their purpose loses a substantial amount of its force.

137. It is this understanding of the utility of control orders that must be borne in mind when assessing the circumstances where control orders may be appropriate and the circumstances where, in light of the availability of other more robust tools for preventing terrorist acts, the infringements on human rights imposed by control orders cannot be justified.

## **6.2 Use of control orders**

138. From their introduction in 2005, 16 interim control orders have been issued under Division 104 of the Criminal Code.<sup>155</sup> Ten of these have been issued since January 2019.<sup>156</sup> Appendix A to this submission contains the following details of each control order made under Div 104, where this information is publicly available:
- the name of the person in respect of whom the control order was made
  - the date the interim control order was made
  - if there was a confirmation hearing, the date the order was confirmed
  - the stage of the investigation at which the control order was imposed.
139. Nine of the 10 control orders made since January 2019 relate to people already convicted of a terrorist offence, and were made at the time that the person was being released into the community.
140. The figures in Appendix A are consistent with the data included in the joint agency submission to this inquiry, and include the interim control order made in relation to Mr Belal Saadallay Khazaal which it appears had been applied for but not made at the time of the preparation of the joint agency submission.<sup>157</sup>
- (a) Initial experience with control orders
141. The first two control orders were made on 27 August 2006 in relation to Mr Jack Thomas,<sup>158</sup> and on 21 December 2007 in relation to Mr David Hicks.<sup>159</sup>

142. After those two initial control orders were issued, no other control order was issued for the next seven years. In 2010, the office of the INSLM was established.<sup>160</sup> In 2012, the first INSLM, Mr Bret Walker SC, considered the control order regime in detail, along with the cases of Thomas and Hicks.<sup>161</sup> He also reviewed the files of the AFP in relation to all of the 23 other cases where control orders had been considered but not sought as at that point in time.<sup>162</sup>
143. The INSLM found 'no evidence that Australia was made appreciably safer' by the existence of the two control orders that had been made, and that 'neither [control order] was reasonably necessary for the protection of the public from a terrorist act'.<sup>163</sup>
144. The COAG Review Committee agreed that the cases of Thomas and Hicks were 'problematic' and that 'neither case demonstrates the necessity for, or the effectiveness of, the control order system, at least in a significantly persuasive manner'.<sup>164</sup>
145. Mr Thomas had been charged with three terrorism offences (one count of receiving funds from a terrorist organisation and two counts of providing support to a terrorist organisation) and one non-terrorism offence (possessing a falsified passport). He was ultimately convicted only of the passport offence and sentenced to nine months imprisonment.
146. The AFP applied for an interim control order against Mr Thomas.<sup>165</sup> In an *ex parte* hearing, with no contradictor, the AFP relied on alleged admissions made by Mr Thomas while he was in Pakistan.<sup>166</sup> Those admissions had been found by the Victorian Court of Appeal to have been involuntary and inadmissible in his criminal trial.<sup>167</sup> The Federal Magistrates Court granted the interim control order. There was ultimately never a confirmation hearing where the factual basis for the control order could be tested because the parties agreed to an extension of the interim order for 12 months while Mr Thomas unsuccessfully sought to challenge Div 104 as being unconstitutional.<sup>168</sup>
147. Following the conclusion of all of these legal proceedings, no further control order was ever sought against Mr Thomas.<sup>169</sup>

148. The first INSLM described his concerns with the Thomas case in the following way:

The use of a CO [control order] immediately following Thomas' successful appeal and the quashing of his initial conviction is a worrying real life example of how COs can provide an alternative means to restrict a person's liberty where a prosecution fails but the authorities continue to believe the acquitted (or not convicted) defendant poses a threat to national security. The case of Thomas illustrates the ability to use COs in addition to the normal trial process and as a "second attempt" at restraining a person's liberty where there has been a criminal trial but no conviction.<sup>170</sup>

149. The first INSLM noted that of the 23 other AFP cases where control orders had been considered but not sought as at 2012, six of the cases involved consideration of control orders during a criminal trial against the contingency of an acquittal.<sup>171</sup>

150. As noted in case study 5 below, there has been one other recent example of a control order being sought in a case where a person had been acquitted of criminal charges.

151. In the case of Mr Hicks, he had been controversially tried and convicted by a United States Military Commission. The United Nations Human Rights Committee subsequently found that by the time Mr Hicks was transferred to Australia to serve the final nine months of his sentence, and before any control order was imposed on him:

there was abundant information in the public domain that raised serious concerns about the fairness of the procedures before the United States Military Commission and that should have been enough to cast doubts among Australian authorities as to the legality and legitimacy of [Mr Hicks'] sentence.<sup>172</sup>

152. In 2015, the United States Court of Military Commission Review set aside the findings and sentence of the United States Military Commission in relation to Mr Hicks.<sup>173</sup>

153. One of the main problems identified by the first INSLM with decision making in the interim control order proceeding involving Mr Hicks was the thin basis for any claim that making the order 'would substantially assist in preventing a terrorist act'.<sup>174</sup> Following the expiration of the control order, no further control order was sought in relation to him.

(b) Situations in which control orders may be imposed

154. The first INSLM noted that control orders can be sought in a broad range of situations. They can be sought:
- (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.
155. The INSLM ultimately recommended that control orders be limited to category (c).<sup>175</sup> This was one of the bases upon which the COAG Review Committee recommended that control orders be available (namely: ‘where a person has been convicted of a terrorist offence, has served his or her sentence, but where upon release his or her renunciation of extremist views has not been demonstrated’).<sup>176</sup> The recent recommendation by the PJCIS for an ESO regime is the kind of regime recommended by the first INSLM.<sup>177</sup> Pursuant to that recommendation, the ESO would allow the same controls to be imposed as the current control order regime, and could be made as an alternative to a CDO.
156. The Commission agrees that the option of an ESO may be appropriate where a convicted terrorist offender is to be released back into the community. As discussed in more detail in section 8 below, it is particularly important for the proposed ESO regime to be implemented if the CDO regime in Div 105A of the Criminal Code is to continue. Extended supervision orders would provide a less restrictive alternative to a CDO and permit the Supreme Court to make the order that is most appropriate in the circumstances.
157. In its submissions to the previous PJCIS inquiry, the AFP and the Attorney-General’s Department (AGD) put particular emphasis on category (a) referred to in paragraph 154 above. That is, they submitted that control orders are appropriate as a ‘preventative

measure' when there is not enough admissible evidence to charge and prosecute a person. This view was also supported by the COAG Review Committee (namely: 'where a prosecution for a terrorist offence is not a feasible or possible alternative').<sup>178</sup>

158. The AFP said that where there is enough evidence to formally charge and prosecute a person, it will always take this approach over seeking the imposition of a control order.<sup>179</sup> This is substantially borne out in practice. Since September 2014, 110 people have been charged as a result of 51 counter-terrorism related operations across the country.<sup>180</sup> The circumstances in which a control order may be used as a 'preventative measure' are therefore limited to circumstances where there is a lack of probative evidence of a crime. That may be because:

- the police may be investigating a possible offence but there is not enough evidence to prove that an offence has been committed
- the police may believe that there is enough evidence to prove that an offence has been committed but the CDPP may disagree and decline to prosecute.

159. The first INSLM considered this proposition in his second annual report, noting:

The INSLM has been told that the most serious category of people for whom a CO [control order] could be sought is for those individuals who cannot be prosecuted because there is insufficient evidence to support a prosecution. The belief that there is not enough evidence could be an intuitive belief by the police that there is a case although it is not supported by enough evidence. It could also be a belief by the police that there is sufficient evidence, being a view disagreed with by the CDPP, with the proper result that there will not be a prosecution.<sup>181</sup>

160. These comments by the INSLM also need to be considered in light of the subsequent introduction of s 3WA of the Crimes Act, which reduced the threshold for police to arrest a person in relation to a terrorism offence. Since 2014, the police can arrest a person in relation to a terrorism offence—including a conspiracy, or doing an act in preparation for, or planning, a terrorist act—if they 'suspect on reasonable grounds' that the person has committed the offence.
161. The fact that police suspect, but cannot prove, that a person has committed a crime, is a very weak basis upon which to impose



restraints on their liberty. The scenario that is being used to justify the making of a control order is where the police suspect the person has committed a crime, but the evidential basis for the police's suspicion is insufficient to amount to a *reasonable suspicion*. In the Commission's view, the use of control orders on a person where there is not even a reasonable suspicion that the person has been involved in a terrorist act, including a preparatory step, is highly problematic.

162. The view of the first INSLM was that Australia has an obligation to prosecute those involved in acts of terrorism (including relevant preparatory acts), but '[t]here is no proper need for another route to official restraints on a person's liberty where the case against a person may be arguably considered weak'.<sup>182</sup>
163. The case of Mr Harun Causevic is an example of the use of control orders in category (a) above. A control order was sought after the CDPP advised the AFP that there was not enough evidence to convict Mr Causevic of a terrorism offence.

#### **Case study 4: Mr Harun Causevic**

In April 2015, Mr Harun Causevic was 18 years old and living with his parents and two siblings in Hampton Park, Victoria.

As with Mr Cruse (see case study 1 above), he had been a friend of Mr Ahmad Numan Haider,<sup>183</sup> who had had been shot and killed by a police officer in September 2014 after Mr Haider had stabbed him and another police officer with a knife.<sup>184</sup> Mr Causevic had been with Mr Haider earlier that day and he came to the attention of the Joint Counter Terrorism Team following this incident.<sup>185</sup>

The JCTT conducted a raid on Mr Causevic's parents' home at approximately 3.30am on 18 April 2015. This was one of six simultaneous raids conducted as part of Operation Rising (see case study 1 above). Mr Causevic was taken into custody in accordance with an interim preventative detention order issued the previous day under s 13E of the *Terrorism (Community Protection) Act 2003* (Vic).

Mr Causevic was removed from detention under the interim PDO on 20 April 2015 and charged with offences against s 11.5 (conspiracy) and s 101.6 (doing an act in preparation for, or planning, a terrorist act) of the Criminal Code. The charges related to an alleged plan to carry out

a terrorist attack in Melbourne on or around Anzac Day 2015. He was held on remand.

On 25 August 2015, the CDPP issued a media statement, announcing that it had determined that there was not enough evidence to convict Mr Causevic of an offence against ss 11.5 or 101.6 of the Criminal Code.<sup>186</sup> Instead, Mr Causevic pleaded guilty to three summary offences under s 5AA of the *Controlled Weapons Act 1990* (Vic), relating to the possession of three knives seized during the raid of his home. He was released on conditional bail and ordered to appear for sentencing on 12 November 2015.

On 10 September 2015, the Federal Circuit Court made an interim control order in relation to Mr Causevic, including a requirement that he wear a tracking device. The order was made *ex parte* on the basis of evidence placed before the Court by the AFP that Mr Causevic was not given an opportunity to challenge. The basis for making the order was an allegation by the AFP that Mr Causevic had 'planned to participate in a terrorist attack on Anzac Day 2015 at either the Shrine of Remembrance or the Dandenong RSL'.<sup>187</sup> This was the offence that the CDPP had already assessed as having no reasonable prospects of conviction.

During the confirmation hearing almost 10 months later, which was the first opportunity to test the evidence relied on by the AFP, the Court found that:

- despite extensive physical, telephonic and listening device surveillance Mr Causevic, there was no direct evidence that he had any intention or plan to carry out a terrorist act<sup>188</sup>
- there was no direct evidence that Mr Causevic intended to assist in or knew of any plan to commit a terrorist act<sup>189</sup>
- the inference alleged by the AFP that Mr Causevic was conducting a 'reconnaissance' of the Shrine of Remembrance on 15 April 2015 could not be drawn<sup>190</sup>
- there was no basis for inferring that Mr Causevic conducted a 'reconnaissance' of the Dandenong RSL on 15 April 2015, as alleged by the AFP.<sup>191</sup>

The Court also rejected, on the balance of probabilities, other inferences suggested by the AFP, including that a reference to having an 'arm wrestle' was code for a plan to carry out an act of violence.<sup>192</sup>

The Court decided to confirm the control order but with some substantial modifications.

Most significantly, the confirmed control order no longer contained a requirement that Mr Causevic wear a tracking device. This had been described by the AFP as 'by far the single most important control in reducing the risk that the Respondent will carry out a terrorist act'.<sup>193</sup> Further, in light of the rejection of the allegation that Mr Causevic had been involved in a planned terrorist act, the confirmed control order no longer contained restrictions on him being near the Shrine of Remembrance or the Dandenong RSL.

The basis for confirming that control order is not entirely clear from the judgment. The most significant issues from which adverse inferences were drawn in relation to Mr Causevic were that:

- he had shown a 'preoccupation' with Islamic State, which included downloading over 60 videos, the contents of which supported Islamic State, and watching some of them; it was accepted that he could not understand and did not speak Arabic, but concern was raised about the images contained in the videos<sup>194</sup>
- he had been 'exposed to extreme interpretations of Islam' through attending the Al-Furqan mosque and spending time with 'a group of friends known to have been radicalised'<sup>195</sup>
- he had exhibited 'hostile and concerning behaviours and attitude to the AFP, police and ASIO', including staring at a police officer and spitting at a police van; although it was accepted that he had not made any threats of violence towards police.<sup>196</sup>

There must be a real question whether an interim control order would have been granted if this was the basis of the initial application.

The control order expired around two months after it was confirmed. No further control order was sought in relation to Mr Causevic.

164. Dr David Neal SC, who acted for Mr Causevic, gave evidence to the PJCIS during the last review of the control order provisions. He described the extensive resources that had been used in relation to this case, including telecommunications interception warrants and physical surveillance—teams of police officers following Mr Causevic while he was driving on 15 April 2015—and concluded that if a successful prosecution could not be mounted following such a significant exercise, then no further restrictions on the liberty of his client were reasonably justified:

There were some thousands of pages of intercepts, computer analysis, telephone and physical observations and so on. If that doesn't establish enough to show that you are preparing to do a terrorist act, we'd say that's where the balance or the line should be drawn between the need for security and the protection of individuals.<sup>197</sup>

165. For completeness, in relation to category (a) referred to in paragraph 154 above, the COAG Review Committee suggested that control orders may be necessary where a person is not arrested for a terrorism offence because the prosecution is unwilling or unable to rely on intelligence it has because 'the information comes from a source that needs to be protected' or the information has been 'obtained through intelligence exchanged at the international level, thus embodying a need for confidentiality'.<sup>198</sup> There are two answers to this proposition. The first is that evidence that has national security implications can be protected in criminal proceedings through the NSI Act. A controversial example of where this process has been used recently is in the prosecution of 'Witness K' and Mr Bernard Collaery.<sup>199</sup> The application of the NSI Act—in that case and more generally—raises other human rights issues, but the Commission does not here express a view on those issues. For present purposes, it suffices to say that where evidence in a criminal trial is sensitive for national security reasons, the NSI Act contains robust provisions to protect the confidentiality of that information without preventing the continuation of the prosecution. These provisions undermine the claimed need for control orders in these situations. The second answer is that if, despite the NSI Act, the authorities are unwilling to rely on this kind of evidence in a prosecution of an alleged offender, there does not seem to be any reason why they would put this evidence forward in support of an application for a control order.

166. The remaining situation in which control orders have been proposed is category (b) described in paragraph 154 above: a 'second attempt' following an unsuccessful prosecution. This option was also supported by the COAG Review Committee, although on a narrower basis. The Committee said that control orders should only be available in these circumstances 'where a person has been acquitted of a terrorist offence on a purely technical ground, or where the intelligence/evidence pointing to terrorist activity has been rejected otherwise than on the merits'.<sup>200</sup>
167. The COAG Review Committee accepted that this category would be 'highly contentious'.<sup>201</sup> The Commission agrees. It is not clear who should be able to decide whether the acquittal was on a 'purely technical' ground or that the case brought by prosecutors was rejected 'otherwise than on the merits'. The suggestion seems to be that control orders should be available on the basis that investigators or prosecutors were dissatisfied in some way with the reasons why a person was acquitted of a criminal offence.
168. From a rule of law perspective, it is highly problematic to subject a person to restraints on their liberty based on conduct said to be related to a terrorist act when the evidence supporting those allegations has been considered and rejected in criminal proceedings.
169. One example of a case falling within category (b) is that of Mr Thomas discussed above, who was acquitted of any terrorism offence but then subjected to a control order. The first INSLM, having considered both classified and non-classified information, found no evidence that Australia was made appreciably safer by the existence of that control order.
170. Another case potentially falling within category (b) is that of Ms Zainab Abdirahman-Khalif, noting that her acquittal it is currently the subject of an appeal by the Crown to the High Court.

### **Case study 5: Ms Zainab Abdirahman-Khalif**

Ms Abdirahman-Khalif was born in a refugee camp near Mombasa in Kenya to Somali parents. She immigrated to Australia as a refugee with her mother and two brothers when she was 14 years old. She obtained Australian citizenship in 2015.

She was detained at Adelaide Airport on 14 July 2016 en route to Turkey. At the time, she was 21 years old. Her mobile phone was seized. The following morning she was released without charge. An analysis of her phone showed that it contained hundreds of images of Islamic State propaganda and extremist material.

After she was released, she communicated with three other young women in Mombasa. Those women were subsequently killed while attacking the Mombasa police station on 11 September 2016.

Ms Abdirahman-Khalif's phone and computer were seized again and records were found of an online discussion with others about travel to Islamic State controlled regions for the purposes of working as a paramedic or marrying an Islamic State fighter.

On 2 October 2016, a listening device placed in her bedroom captured her reciting a pledge of allegiance to the leader of Islamic State, Abu Bakr al-Baghdadi.

Ms Abdirahman-Khalif was arrested and charged with intentionally having taken a step to becoming a member of a terrorist organisation, namely Islamic State, contrary to s 102.3(1) of the Criminal Code. The prosecution made clear at her trial that it was not any part of their case that she was involved in any way in any act of violence, or that she was planning or intending to commit any act of violence.<sup>202</sup>

The evidence at trial was capable of supporting an inference that she:

- was a supporter of Islamic State, its extremist ideology and its terrorist activities
- intended to travel to Turkey to make contact with members or supporters of Islamic State in Turkey, with the intention of travelling into the areas of Syria, Iraq and Turkey controlled by it for the

purposes of either providing medical assistance to fighters and others or to marry an Islamic State fighter.<sup>203</sup>

She was convicted on 17 September 2018 and sentenced to imprisonment for three years. On 31 October 2019 the Court of Criminal Appeal ordered that the guilty verdict be set aside and that a verdict of acquittal be entered.<sup>204</sup> By that stage, she had already been imprisoned for two and a half years. During that time, she had been a well-behaved prisoner.<sup>205</sup>

The appeal court found that while there was evidence that she supported the cause of Islamic State, no evidence had been adduced at trial about how people, particularly non-combatants, became 'members' of Islamic State as opposed to supporters of Islamic State or members of the population of territory controlled by Islamic State.<sup>206</sup> As a result, the conviction could not be supported on the evidence.

Following her acquittal, she was released into the community. The AFP applied for an interim control order which was made by the Federal Court on 22 November 2019, approximately three weeks after her release.<sup>207</sup> The control order was confirmed almost eight months later on 17 July 2020.<sup>208</sup>

The High Court granted the Crown special leave to appeal against the judgment of the Court of Criminal Appeal,<sup>209</sup> and the appeal was heard on 3 September 2020. Judgment is reserved.

While the conviction of Ms Abdirahman-Khalif may ultimately be upheld, and she may be required to serve the remaining 6 months of her sentence, there are real questions about the basis for the grant of a control order pending that conviction. The Federal Court was provided with two independent reports dealing with the risk posed by Ms Abdirahman-Khalif. The first was a report of a psychologist who assessed Ms Abdirahman-Khalif in advance of sentencing and concluded that she had 'a low risk of recidivism and a low risk of causing serious physical harm to herself or others'.<sup>210</sup> The second was a Joint Terrorism Threat Assessment that it was 'highly unlikely' that Ms Abdirahman-Khalif's had the knowledge or skills to carry out an act of politically-motivated violence.<sup>211</sup>

In making the interim control order, the Federal Court rejected both of these assessments and instead found, on the basis of what was

acknowledged to be primarily hearsay evidence, that Ms Abdirahman-Khalif had an 'obsession with violence', that there was a 'high likelihood' that she 'will act on her intention to marry an IS extremist in the very short term' and that there was 'a real risk that [she] will do any act in support of the IS cause as may be requested or demanded of her by others, including acts of terrorism'.<sup>212</sup>

The Federal Court said that it was not necessary to identify with any specificity what Ms Abdirahman-Khalif may do. Instead, the Court considered that it was enough to find that there is a risk that 'she will do whatever it is that she is told to do'.<sup>213</sup>

The control order was confirmed on 17 July 2020 with some narrowing of the controls. Unlike the reasons for the interim control order, the reasons given for confirming the control order did not find that she was obsessed with violence or predict that it was highly likely that she would imminently marry an Islamic State extremist.

The Court found that Ms Abdirahman-Khalif maintained an adherence to Islamic State ideology. Significantly, this was in the context of:

- a letter she had written in support of an application for parole in which she rejected extremist ideology and expressed remorse for her actions
- her engagement with a psychologist and counsellor while in prison about how to integrate into Australian society as a Muslim woman
- her weekly attendance at a South Australian State Government Intervention program following her release from detention
- an acknowledgement by the Court that she had a good reason not to give oral evidence at the control order hearing because of the prospect that her criminal matter may be remitted for retrial.<sup>214</sup>

171. In assessing this case study, it is worth bearing in mind that there has not been any allegation by police or prosecutors that Ms Abdirahman-Khalif had been planning, or taken any step towards, a terrorist act. If there were evidence to support such an allegation, it could have formed the basis for a separate criminal charge. Instead, it was an agreed fact that she had never engaged in, or provided support for, or facilitated a terrorist act in Australia.<sup>215</sup> Further, the Federal Court



acknowledged that there was no evidence that a specific terrorist act was currently within her contemplation.<sup>216</sup>

172. It is also surprising that the Court hearing an application for a control order rejected a Joint Terrorism Threat Assessment that it was 'highly unlikely' that Ms Abdirahman-Khalif had either the knowledge or skills to carry out an act of politically-motivated violence. It is perhaps even more surprising that a control order was applied for in the face of such an assessment.
173. Less restrictive alternatives to the use of a control order were available, such as surveillance by the police or security agencies. This was demonstrated by the fact that in September 2016 a listening device was lawfully placed in Ms Abdirahman-Khalif's bedroom, allowing police to monitor things said by her during telephone calls.<sup>217</sup>
174. As the COAG Review Committee said of the control orders in relation to Mr Thomas and Mr Hicks, the case of Ms Abdirahman-Khalif does not demonstrate the necessity for, or the effectiveness of, the control order system, at least in a significantly persuasive manner.

### **6.3 Consideration**

175. A key issue for the PJCIS to determine is the appropriate scope for control orders (or their equivalent, in the case of ESOs).
176. In applying a human rights framework, it is clear that control orders are directed towards a legitimate purpose: preventing acts of terrorism and protecting the public from such acts. The primary focus of analysis must be on whether control orders are effective in achieving this purpose, whether there are alternative methods available to achieve the same aims that are less restrictive of human rights, and whether in all of the circumstances the restrictions on human rights are proportionate.
177. The impact of control orders on human rights is significant. There are a number of dimensions to this impact:
  - Control orders invariably involve a suite of obligations, prohibitions and restrictions that limit a range of human rights. The control order recently made in *Booth v Thorne (No 2)* [2020] FCA 1196 is typical and involved 20 different detailed controls, many of which

are now 'boilerplate' conditions sought in relation to most, if not all, control orders.

- The restraints on liberty are extensive. Curfews and restrictions on travel or being in certain areas are invariably required, which significantly limit the liberty and freedom of movement of the person subject to the control order. Strong justification is required for these kinds of limits to be imposed. Other common provisions of control orders limit freedom of communication, freedom of association and the right to privacy.
  - There is regularly a long gap between an interim control order being made and the order being confirmed. This means that restraints can be obtained for substantial periods of time without a proper testing of the evidence said to support them.
  - The controls are backed by criminal sanctions, which can result in imprisonment for several years, even for minor or trivial breaches.
  - There is a low threshold for obtaining these orders. Where there is no demonstrated previous conduct by the person that may support the making of a control order, it is enough if a court is satisfied on the balance of probabilities that the restrictions on the liberty and other human rights of the person would assist police in a way that is more than merely insubstantial or insignificant.
178. This last point, in particular, focuses attention on whether control orders should be limited to people who have a demonstrated level of risk, by virtue of previous proven involvement in terrorist acts.
179. There are real questions about the utility of control orders to achieve their stated purpose. As noted above, the AFP has recently submitted that the sorts of obligations, prohibitions and restrictions that can be contained in a control order are, by their very nature, not necessarily going to be decisive in preventing a terrorist act.
180. By contrast, there are a range of other tools available to police that are more useful and less restrictive of human rights. A key tool is surveillance, which is often employed in any event in order to gather evidence in support of a control order application. While surveillance is resource intensive, so too is the task of monitoring a person who is the subject of a control order once it is made. The cost of obtaining a

control order also needs to be factored in. The PJCIS has previously heard that the cost of preparing and arguing a substantial contested control order proceeding can be in the order of \$300,000 to \$400,000.<sup>218</sup>

181. Another available option, where there is a reasonable suspicion that a person has taken a step in preparation for a terrorist act, it to arrest and charge the person for that conduct. If the arrest threshold is not met, because there is no reasonable suspicion of this kind of conduct, there will also be less justification for significant limitations on human rights involved in the making of a control order.
182. The first INSLM evaluated the relative utility of control orders as against surveillance and investigation following a review of all AFP files up to 2012 in which control orders had been contemplated. He found that properly funded and resourced surveillance and investigation efforts had been effective in dealing with the risk posed by terrorism. He rated these tools 'much more highly than resort to [control orders]' which he considered had been 'ineffective'.<sup>219</sup>
183. The largest category of control orders that have been sought to date, and arguably the least controversial, relate to people who have already been convicted of a terrorism offence.
184. Nine of the 10 control orders that have been made since these provisions were last considered by the PJCIS have been made in relation to a person who had been convicted of a terrorism offence, and were made at the time the person finished their sentence and was to be released into the community.<sup>220</sup> The tenth control order was made in relation to Ms Abdirahman-Khalif (see case study 5 above).
185. The Commission considers that post-sentence restrictions on convicted terrorism offenders is the appropriate scope for control orders. As can be seen from Appendix A to this submission, this category amounts to more than half of all control orders ever issued.
186. This submission has identified serious problems regarding the use of control orders in other situations.
187. First, the Commission considers that there is no convincing justification for the use of control orders, and specifically the attendant limitations on human rights, in relation to people with no previous history of

terrorist activity, where there is a lack of probative evidence that would even ground a 'reasonable suspicion' that they are currently involved in planning any terrorist act, or where prosecutors have confirmed that there is no reasonable prospect of a conviction. Case study 4 dealing with Mr Harun Causevic illustrates some of the problems with this kind of approach.

188. Secondly, the use of control orders after a person has been tried and acquitted of a criminal offence is concerning from a rule of law perspective. It is understandable that investigators may disagree with the outcome of a judicial process where a prosecution is unsuccessful. However, once this process has taken its course and all of the evidence has been thoroughly examined as part of a criminal trial, the defendant should not be subjected to quasi-criminal sanctions on the basis of the same evidence adduced against a lower standard of proof.
189. The Commission submits that control orders should be more tightly targeted to people demonstrated, through a rigorous process of scrutiny and review, to be a risk to the community.
190. It appears that this function could be performed by an ESO regime. As discussed in more detail in section 8 below, the ESO regime proposed by the third INSLM, and recommended by the PJCIS, would allow the same controls to be imposed as the current control order regime, but would be limited to people who have been convicted of a terrorist offence and who would still present unacceptable risks to the community at the end of their sentence if they were free of all restraint upon release from imprisonment.
191. An ESO requires an application to the Supreme Court, and allows the potential subject of the order to challenge the necessity for the order at the time that it is made, rather than waiting for a confirmation hearing sometime in the future.
192. Such a regime would be more consistent with human rights because:
  - the scope of the regime would be better targeted to situations where there was more likely to be risk to the community
  - as a result, the degree to which the controls limit the human rights of the person subject to the control order would be more likely to be proportionate to the purpose for their imposition

- the evidence in support of an application could be properly tested in court proceedings when the order was first sought.

### **Recommendation 5**

The Commission recommends that control orders be limited to people who have been convicted of a terrorist offence and who would still present unacceptable risks to the community at the end of their sentence if they were free of all restraint upon release from imprisonment. This should be done by replacing the existing control order scheme with the extended supervision order scheme previously recommended by the third INSLM and the PJCIS.

## **6.4 Scope of control orders**

193. If the control order regime is retained, or a new ESO regime is implemented based on the same range of controls under s 104.5(3) (as recommended by the third INSLM and the PJCIS), there are two amendments recommended by both the COAG Review Committee and the second INSLM, the Hon Roger Gyles AO QC, which are appropriate to make to the scope of the obligations, prohibitions and restrictions that can be imposed. In both cases, the Government has agreed with the substance of the concern expressed but not made any amendment on the basis that it considered that no amendment was necessary.
194. The first recommendation is that s 104.5(3)(a) be amended to ensure that a control imposed by a control order would not constitute a relocation order. A relocation order is an order that a person move from their place of residence. The concern is a legitimate one given the experience of relocation orders in the UK.<sup>221</sup> It engages the prohibition against arbitrary interference with a person's home in article 17(1) of the ICCPR.
195. Section 104.5(3)(a) provides that one kind of control that the court may impose is 'a prohibition or restriction on the person being at a specified place'. The concern expressed by the COAG Review Committee and the second INSLM was that a 'specified place' could be a person's own home.
196. The Government response appeared to accept that a relocation order would not be appropriate, in saying that such an amendment was

‘unnecessary’ because ‘there is no express power that would allow for the relocation of a control order subject’.<sup>222</sup>

197. Despite the absence of an *express* relocation power, as the second INSLM identified:

The wording of the section would literally permit de facto relocation by excluding the place of residence of the controlee. It is preferable to spell out the position as recommended in the COAG Review.<sup>223</sup>

198. The Commission agrees. Given that there is no dispute about the inappropriateness of relocation orders, the position should be made clear in the legislation.

### **Recommendation 6**

The Commission recommends that s 104.5(3) of the Criminal Code be amended to expressly prohibit the making of a relocation order as part of a control order (or extended supervision order).

199. The second recommendation was that consideration be given to including an ‘overnight residence requirement’ as an alternative to a curfew, as was done in the *Terrorism Prevention and Investigation Measures Act 2011* (UK).
200. At present, s 104.5(3)(c) provides that a control order may include a curfew, requiring the person to stay at specified premises for up to 12 hours each day. However, there are no restrictions on when a particular 12 hour period could start or finish. The concern, as summarised by the second INSLM, is that ‘a 12 hour daytime curfew plus residence at home overnight would be close to home detention’.<sup>224</sup>
201. The Government response appears to accept that creating *de facto* home detention through the control order regime would be inappropriate. However, it said that no amendment is required because the Court would inevitably reject such a proposal when applying the test under s 104.4(2).<sup>225</sup> That test describes the considerations that the Court must take into account when assessing whether a proposed control condition is ‘reasonably necessary’ and ‘reasonably appropriate and adapted’. The Government response identifies that an ‘additional consideration’ in the test is the impact of the control on the person’s circumstances, including their personal

circumstances. In the Commission's view, this is not a sufficient safeguard.

202. Given that there appears to be common ground that *de facto* home detention would be inappropriate, it would be better to make that clear in the legislation.
203. There are a number of ways in which this could be done. The Law Council of Australia suggested that 'an overnight residence requirement should be required where the curfew imposed is considerable'.<sup>226</sup> This would still allow the flexibility to impose a short period of daytime curfew if that were considered appropriate, but longer curfew periods would be limited to overnight periods.
204. This would not detract from the way in which curfew conditions have typically been imposed in Australian cases which have been for overnight periods, for example from midnight to 6.00am.

### **Recommendation 7**

The Commission recommends that s 104.5(3) of the Criminal Code be amended to expressly prohibit long curfew periods during daylight hours as part of a control order (or extended supervision order).

## **7 Preventative detention orders**

### **7.1 Structure of provisions**

205. 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.
206. 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'.<sup>227</sup>

207. 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.<sup>228</sup>
208. As discussed further below, 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 without a warrant, rather than applying for a PDO.<sup>229</sup> 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.<sup>230</sup> Arresting the person is likely to be a quicker and more effective way of dealing with the situation than applying for a PDO.
209. 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.<sup>231</sup>
210. As discussed further below, 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



- a thing relevant to another offence that is an 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.<sup>232</sup>

211. Like a PDO, a search warrant may be obtained by phone in urgent circumstances (Crimes Act s 3R). Further, as noted in section 5 of 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.
212. A PDO may be sought in relation to a person who is at least 16 years old.<sup>233</sup>
213. There are two kinds of PDOs that can be made. An initial PDO may be made by a senior AFP member for a period of up to 24 hours.<sup>234</sup> A continuing PDO may be made (broadly speaking) by a judge of a federal court, a former judge of a superior court, or the President or Deputy President of the Administrative Appeals Tribunal (AAT) in relation to a person in custody under an initial PDO.<sup>235</sup> In carrying out this function, the issuing officer is acting in their personal capacity and not as a judicial officer.<sup>236</sup> Unlike the restrictions imposed by control orders and CDOs, the detention authorised by the PDO is executive detention and not the result of a judicial process. The total length of time that a person may be detained under a PDO is 48 hours.<sup>237</sup>
214. There are a range of significant limits placed on the ability of a person detained under a PDO to contact other people. The detainee may contact:
  - a family member, a person who the detainee lives with, and a person who the detainee works with, but only for the purpose of 'letting the person contacted know that the person being detained is safe but not able to be contacted for the time being'<sup>238</sup>
  - a lawyer, but only to obtain advice about the detainee's rights in relation to the PDO or their treatment in detention<sup>239</sup>

- the Ombudsman or a relevant police complaints officer, for the purpose of exercising a statutory right to make a complaint about their treatment.<sup>240</sup>
215. However, even in relation to these communications, there are a range of significant restrictions:
- An AFP member may apply for a prohibited contact order, which prohibits a person detained under a PDO from contacting a specified person.<sup>241</sup> The specified person could be a family member, a person the detainee lives or works with, or a lawyer.
  - The detainee must not tell a family member, or a person the detainee lives or works with that they are being detained, how long they are being detained, or that a PDO has been made.<sup>242</sup>
  - The contact with a family member, a person the detainee lives or works with, or a lawyer may only take place if it can be monitored by police.<sup>243</sup>
216. If the person detained is a child or ‘incapable of managing his or her affairs’, they may also tell any parent or guardian that a PDO has been made, that they are being detained, and how long they are being detained (unless a prohibited contact order has been made in relation to their parent or guardian). They may also be visited by their parents or guardians while detained. Again, all of these communications must be able to be monitored by police.<sup>244</sup>
217. While a person is detained under a PDO, they may not be questioned by police.<sup>245</sup> By contrast, if the person had been arrested under s 3WA of the Crimes Act instead of being detained under the PDO, the police would be able to question the person under the pre-charge detention regime in Part IC of the Crimes Act for the purpose of investigating whether they committed the offence.
218. A decision to make a PDO, or any other decision under Div 105, cannot be challenged under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).<sup>246</sup> A decision to make a PDO may be reviewed by the Security Division of the AAT, but only after the order has ceased to be in force.<sup>247</sup> As a result, if a person was successful in such a review by the AAT, this would not release them from detention. At most, they may be entitled to compensation.

219. The only option available for a person to review a decision to make a PDO while the order is in force would be to challenge the decision in a federal court on the ground that there was a jurisdictional error in making the decision. This is a very narrow type of review and is the minimum level of judicial review that cannot be excluded by statute. On such a review, the court is not entitled to consider the merits of the decision to detain the person, and so the court could not consider, for example, whether the person's detention was reasonable or proportionate.

## **7.2 Human rights issues**

220. The Commission has previously raised a range of human rights issues in relation to the PDO regime. In particular:
- 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).

### 7.3 Use of preventative detention orders

(a) Actual use

221. Based on the annual reports published in relation to the use of the PDO powers and the respective submissions of the Ombudsman and the AFP to the current PJCIS inquiry, it does not appear that the Commonwealth PDO powers have been used since they were introduced in 2005.<sup>248</sup>
222. At the time of the last review of these provisions in 2017, the AFP confirmed that it had not used a Commonwealth PDO since the relevant legislation was introduced.<sup>249</sup> There were a number of reasons for this, but a particularly significant reason was the view of the AFP that they were unlikely to use the Commonwealth provisions in circumstances where they had access to more extensive State and Territory regimes through cooperation with police forces in those jurisdictions. Those State and Territory regimes provide for detention of up to 14 days.<sup>250</sup> The Deputy Commissioner of the AFP told the third INSLM during a public hearing in May 2017:
- But the reality of the situation is that at the moment I'm unlikely to use one that's going to give me two days if I can use a state police one that's going to give me 14 days.<sup>251</sup>
223. By 2017, the State and Territory PDO regimes had been used on two occasions. The first was in relation to three individuals in New South Wales in 2014 as part of Operation Appleby. The second was in relation to one individual in Victoria in 2015 as part of Operation Rising.<sup>252</sup>
224. In the case of the three PDOs issued in relation to Operation Appleby, there is a limited amount of public information because the Court that issued the interim PDOs made non-publication orders that prevented disclosure of any information about the grounds for the making of those orders. At the time, the New South Wales Ombudsman had a statutory responsibility for reviewing the operation of PDOs in New South Wales and later reported on the use of these powers.<sup>253</sup> Three people were detained and held for two days on 18 and 19 September 2014 before being released without charge when the interim PDOs expired. Officers of the Ombudsman's office visited the detainees

while they were held and consulted with police. One of the detainees had a facial injury but did not want to make a complaint to the Ombudsman about this.<sup>254</sup> The police had not photographed the detainee's injuries, apparently because of concerns that this may contravene a statutory requirement not to collect evidence from a person who was subject to a PDO. The New South Wales Police Force later conducted an internal investigation to determine whether the detainee had been assaulted by police while being arrested and found the allegation to be 'not sustained'.<sup>255</sup>

225. The New South Wales Ombudsman recommended that the New South Wales PDO regime be allowed to sunset in December 2018.<sup>256</sup> The primary reason for this was the introduction of new investigative detention powers in Part 2AA of the *Terrorism (Police Powers) Act 2002* (NSW) which the Ombudsman considered removed 'any occasion for future use' of the PDO regime. A statutory review of these powers in 2018 by the NSW Department of Justice considered that it was 'premature' to allow the PDO regime to sunset at that stage because the investigative detention powers were 'yet to be operationally tested'.<sup>257</sup> The New South Wales regime is currently due to sunset on 16 December 2021.<sup>258</sup>
226. In relation to the PDO issued as part of Operation Rising, more is known. It is instructive to compare the exercise of powers during that operation in relation to Mr Sevdit Besim and Mr Harun Causevic.

#### **Case study 6: use of a PDO in Operation Rising**

Mr Sevdit Besim and Mr Harun Causevic were both the subject of raids by the AFP on the morning of 18 April 2015 pursuant to warrants that had been issued under s 3E of the Crimes Act.<sup>259</sup> Both were arrested under s 3WA of the Crimes Act.<sup>260</sup> Mr Besim was the primary suspect, while Mr Causevic had also been identified by police as a person of interest.<sup>261</sup>

In the case of Mr Besim, he was taken to AFP headquarters, interviewed and charged with doing an act in preparation for, or planning, a terrorist act.<sup>262</sup> The conduct alleged against him was communicating electronically with another person and searching the internet in preparation for, or planning, the act of killing and beheading a law enforcement officer on ANZAC Day, in a public street, with the

intention of advancing violent jihad and intimidating the Commonwealth Government and the people of Australia.<sup>263</sup> He was remanded in custody until the hearing of that charge in August 2016.<sup>264</sup> He was convicted and sentenced to 10 years imprisonment, which was increased to 14 years imprisonment on appeal.<sup>265</sup> This was an orthodox application of traditional investigatory powers to prevent a serious terrorist act before it took place. At no stage was Mr Besim detained pursuant to a PDO.

In the case of Mr Causevic, following his arrest he was also interviewed by police.<sup>266</sup> He denied any involvement with a plan to commit a terrorist act on Anzac Day. After his home was searched and after being interviewed, and while he was already in police custody, he was then detained in accordance with an interim PDO that had been issued the previous day (17 April 2015) by Riordan J of the Supreme Court of Victoria under s 13E of the *Terrorism (Community Protection) Act 2003* (Vic).<sup>267</sup> Given that Mr Causevic was already in police custody and the search warrant on his premises had been executed, it is difficult to see how the use of the PDO at that stage was necessary either to prevent the alleged act of terrorism or to preserve evidence.

Two days later, Mr Causevic was released from detention under the PDO and charged with conspiracy to do an act in preparation for, or planning, a terrorist act, contrary to ss 11.5(1) and 101.6(1) of the Criminal Code.<sup>268</sup> It is unclear why the police did not charge Mr Causevic on 18 April 2015 when they felt able to charge him on 20 April 2015 after detaining him for two days. If the answer is that they did not have enough evidence to charge him on 18 April 2015, he could have been detained under Part IC of the Crimes Act which provides for post-arrest detention for the purpose of investigating Commonwealth offences. In the case of a person arrested in relation to a terrorism offence, they may be held for the purpose of investigation (including questioning) for up to 24 hours after arrest (with the approval of a Magistrate). However, this investigation period may be paused for a variety of reasons. The total period that a person may be held, including any pauses in the investigation, is eight days (again, with the approval of a Magistrate).

As noted in case study 4 above, after being charged Mr Causevic was detained on remand until 25 August 2015 when the CDPP decided not

to prosecute him on the terrorism charges because there was no reasonable prospect of a conviction.

227. As the only example of a PDO where substantial public information is available, this does not provide any convincing evidence of the necessity of these powers, particularly in light of the less restrictive alternative powers available, and when compared with the orthodox use of traditional powers in the case of Mr Besim.
- (b) Hypothetical examples
228. During the last inquiry into these provisions, the PJCIS asked the AFP and the AGD (which at the time was the Department responsible for these provisions) for hypothetical scenarios that would demonstrate why PDOs were necessary and what gap in legislative powers they filled.<sup>269</sup> In the Commission's view, the hypothetical examples given did not identify any practical legislative gap that required the retention of PDOs.
229. In assessing these submissions, it is necessary to refer back to the grounds pursuant to which a PDO can be issued (see paragraphs 205 to 206 above).
230. An initial submission of the AFP and AGD related to ground (a): the purpose of preventing a terrorist act. The agencies submitted that a PDO would be available in circumstances where: 'there is little to no lead time to disrupt a terrorist act' and 'there may not be sufficient information available on the individual(s) to meet the arrest threshold under s 3WA of the Crimes Act'.<sup>270</sup> However, as noted in paragraphs 207 to 208 above, the threshold for making a PDO when seeking to prevent a terrorist act is equivalent to the threshold for arrest under s 3WA. This has been the case since the introduction of s 3WA in 2014 which permits an officer to arrest a person without a warrant if the officer 'suspects on reasonable grounds' that a person has committed or is committing a terrorism offence. The rationale for reducing the arrest threshold was to 'allow police to intervene and disrupt terrorist activities and the advocating of terrorism at an earlier point' in time.<sup>271</sup> The new lower threshold applies to arrests for an attempt to commit a terrorism offence; a conspiracy to commit a terrorism offence; or the doing any act in preparation for, or planning, a terrorist act.

231. The AFP and AGD also gave two hypothetical examples related to ground (b): the use of PDOs on 'non-suspects' for the purpose of preserving evidence of a terrorist act. The first example was 'a situation where a terrorist suspect has given a bag containing an explosive device to a second person who is believed to have no knowledge of its contents and refuses to cooperate with police'.<sup>272</sup>
232. Presumably the inclusion of the fact that the person has 'no knowledge' of the contents of the bag is intended to highlight a situation where the person could not be arrested because the police do not have a 'reasonable suspicion' that the mental element of any offence is present. If, on the other hand, police suspected on reasonable grounds that the person knew, or was reckless as to whether, the bag contained a thing that was connected to a terrorist act, the police could arrest and charge the person.<sup>273</sup>
233. In this hypothetical example, instead of applying for a PDO, it would be equally open for police to apply for a warrant under s 3E(2) of the Crimes Act to conduct an ordinary search or a frisk search of the person with the bag because there are reasonable grounds for suspecting that the person has 'evidential material' in their possession. In urgent cases, such a warrant can be obtained over the phone.<sup>274</sup> This would be a much more direct way of dealing with the threat than applying for and then detaining the person under a PDO. Although a PDO may be obtained from a senior AFP member rather than from a Magistrate, given the information necessary for a PDO application,<sup>275</sup> it seems unlikely that the PDO application could be obtained significantly more quickly than a search warrant.
234. Further, as noted in section 5 of 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. If this power is retained, this would be quicker alternative to making an application for a PDO.
235. After reviewing the first hypothetical example, the PJCIS asked the AFP and the AGD to provide 'any more detailed scenarios in which the PDO would be the only viable option to intervene'. In particular, the PJCIS asked for 'an explanation of the other powers that could be considered for such a scenario, and why they would not be appropriate in the



circumstances'.<sup>276</sup> In response, the agencies provided a second hypothetical example of an explosion in the CBD with significant casualties.<sup>277</sup> The police arrest one suspect and establish that the person had called an unknown associate around the time of the attacks. The associate is previously unknown to police, there is insufficient information to reach the threshold for arrest, and further investigation is required. According to the example, a PDO is issued in relation to the associate.

236. Although not explicitly stated, based on this example it appears that the PDO must have been issued in order to preserve evidence (ground (b)). The associate has no criminal record and, according to the facts, there are no reasonable grounds to suspect that the person has been involved in any terrorist offence, so the PDO could not have been issued in relation to ground (a). The example does not identify the evidence sought to be preserved or why a PDO was the only option available for preserving that evidence. If the evidence is the contents of the phone conversation with the associate, available options may include:

- asking the associate to participate in an interview with police
- if the associate does not cooperate and if police consider that the person arrested may have left a message on the phone: obtaining a warrant to either seize the phone, or obtain information from the associate's telecommunications provider.

237. In this example, making a PDO does not seem to be a useful way of either preserving evidence or of finding out what evidence may be available, because a person detained under a PDO will not be able to be questioned by police. Further, detention of a person with no criminal record, and who is not reasonably suspected of being involved in a terrorist act, on the basis of having received a phone call, is difficult to justify.

## **7.4 Assessment**

238. The first step in any human rights analysis is assessing whether a provision that limits human rights is necessary, in the sense that it is directed towards a legitimate purpose. The PDO regime is directed towards an important and legitimate purpose: the protection of the

public from a terrorist act. However, the aim of preventing terrorism is not unique to the PDO regime.

239. The second step is examining whether the regime is reasonable. It is here that the PDO regime falls down. Crucially, there are alternative measures available that are just as effective as the PDO regime in protecting the public from the threat of terrorism and preserving evidence of terrorist acts, but are less restrictive of human rights. In particular, those reasonably suspected of engaging in terrorist acts can be arrested under s 3WA of the Crimes Act, and there are a range of existing powers available to seize and preserve evidence.
240. In their previous submissions to the PJCIS, the AFP and the AGD sought to frame the PDO regime as unique because it has a 'preventative purpose' in contrast to other criminal justice mechanisms which are focused on investigation and prosecution. However, traditional mechanisms including arresting suspected offenders for attempt, conspiracy or doing an act in preparation for, or planning, a terrorist act are equally directed to preventing terrorist acts occurring and have an equivalent threshold for their use.
241. Based on the current legislative framework and the public submissions made to the PJCIS as to the necessity of the PDO regime, the Commission has not been able to identify any practical situation where traditional investigative powers have been shown to be less effective than the PDO regime to meet a potential terrorist threat. The Commission therefore recommends that this regime be repealed.

### **Recommendation 8**

In the absence of some further compelling justification for the retention of the preventative detention order regime, the Commission recommends that the regime be repealed.

## **8 Continuing detention orders**

242. The Commission made detailed submissions to the PJCIS about the CDO regime in Div 105A of the Criminal Code when it was first proposed as part of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth).<sup>278</sup>

243. At that time, the Commission recognised that a post-sentence preventative detention regime can be a reasonable and necessary response to the potential for risk to be posed by people convicted of terrorism related offences after the expiration of the period of their imprisonment. However, the scope of any such regime should be narrowly confined so that it applies only in the most serious of cases and only to the extent necessary to address an unacceptable risk to the community. The majority of the Commission's submissions were directed to whether the degree to which the right to liberty is infringed by the proposed regime is proportionate to achieving the objective of community safety.
244. Some of the Commission's proposed changes to the Bill were endorsed by the PJCIS and resulted in amendments to the Bill.
245. This submission does not repeat the matters covered in the Commission's previous submission. Instead, it focuses on a number of recommended safeguards that were not adopted at the time that the regime was legislated.

## **8.1 Structure of provisions**

246. A CDO may be made in relation to a person who has been convicted of a particular kind of offence relating to terrorism and who would pose an unacceptable risk of committing a serious terrorism offence if released into the community. In those circumstances, the Supreme Court of a State or Territory may order that the offender continue to be detained at the expiration of their sentence for a period of up to three years at a time.
247. An application for a CDO may only be made by the Minister for Home Affairs and must be made within 12 months of the end of the offender's sentence of imprisonment.<sup>279</sup>
248. In assessing whether a CDO should be made, the Court must be:
- 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 (terrorism) offence with a maximum period of imprisonment of seven years or more if they were released into the community;<sup>280</sup> and

- satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.<sup>281</sup>

The Minister for Home Affairs bears the onus of satisfying the Court of each of these matters.<sup>282</sup>

249. The Court may appoint an expert to conduct a risk assessment of the offender.<sup>283</sup> There is a broad, inclusive definition of 'relevant expert'.<sup>284</sup> The Commission is not aware of any processes that are currently in place relating to the identification, training and qualification of relevant experts.
250. The period for a CDO must be limited to a period that the Court is satisfied is reasonably necessary to prevent the unacceptable risk, and any single CDO must be no longer than three years (noting that a further CDO can be applied for within 12 months of the expiry of a previous CDO).<sup>285</sup>
251. Because a CDO is a civil order, a person detained under a CDO must be treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment, subject to any reasonable requirements necessary to maintain:
- the management, security or good order of the prison,
  - the safe custody or welfare of the offender or any prisoners
  - the safety and protection of the community.<sup>286</sup>
252. The Commission is not aware of processes that have been put in place to ensure compliance with this requirement.
253. The Supreme Court must conduct a review of each CDO at least annually (or on application if there are changed circumstances) for the purpose of determining whether it should continue in force. The Court may affirm the order only if, at the time of the review, the Court is satisfied that the grounds for making the order remain and there are no less restrictive alternatives that would be effective in preventing the unacceptable risk.<sup>287</sup>
254. The Court must give reasons for any decision making, affirming, varying or revoking a CDO and provide a copy to the parties,<sup>288</sup> and these decisions can be the subject of an appeal.<sup>289</sup>

## **8.2 Use of provisions**

255. Division 105A was added to the Criminal Code on 7 December 2016 and commenced six months later on 7 June 2017.
256. The Commission is not aware of any application that has been made for a CDO. According to media reports, the Commonwealth has written to Mr Abdul Nacer Benbrika to inform him that the Home Affairs Minister is considering whether to apply to the Victorian Supreme Court for a CDO in relation to him.<sup>290</sup> Mr Benbrika was convicted of directing activities, and being a member, of a terrorist organisation contrary to ss 102.2(1) and 103.2(1) of the Criminal Code. He was sentenced to 15 years imprisonment, with a 12-year non-parole period, which the Commission understands is due to expire in November 2020.<sup>291</sup> According to media reports, he has been asked to undergo interviews with a forensic psychologist.
257. The Commission is aware of approximately ten cases since these provisions were introduced where a person has been convicted of an offence to which Div 105A could apply, and where the offender was given a warning by the Court to that effect under s 105A.23.
258. The Commission is also aware of a number of cases since these provisions were introduced where a person convicted of a relevant terrorism offence has been released at the end of their sentence without any CDO being applied for. In eight cases, the AFP has sought and obtained control orders in relation to those offenders at the time that they were released.<sup>292</sup> As discussed in section 6 of this submission, the Commission submits that the use of control orders in these circumstances is the proper scope for control orders (or ESOs) where the person being released continues to pose an unacceptable risk to the community.

## **8.3 Consideration**

### **(a) Scope of offences**

259. A key issue is who the CDO regime should apply to. The regime applies to people who have committed certain kinds of terrorism related offences.<sup>293</sup> The Commission submits that the list of relevant offences should be limited to only those offences where the nature of the

offence gives rise to an inference that there would be a high risk to community safety once a person is released after serving their term of imprisonment.

260. At the 2016 hearing in relation to the Bill, the PJCIS accepted a submission from the Commission that the regime should not apply to people convicted of offences in s 119.7(2) and (3) of the Criminal Code relating to publishing certain advertisements.
261. The Commission also submitted that the regime should not apply to people convicted of the offence in s 119.2 of the Criminal Code, dealing with entering, or remaining in, declared areas. This is one of a range of 'declared area provisions'. The particular offence in s 119.2 does not require any intent to engage in terrorist activity, or any other insurgent or violent activity. There is a list of legitimate purposes for which a person may enter or remain in a declared area in s 119.2(3), but this list is limited. For instance, the list of legitimate purposes does not include visiting friends, transacting business, retrieving personal property or attending to personal or financial affairs. It includes making a news report, but only if the person is 'working in a professional capacity as a journalist'. It does not include undertaking religious pilgrimage.
262. As a result, there are likely to be many innocent reasons a person might enter or remain in a declared zone that would not bring a person within the scope of the exception in s 119.2(3). Further, in order to come within the exception, a person is required to show they were in the zone solely for one or more of the limited specified purposes. So, for instance, if a person travelled to a declared zone to visit their parents (a 'legitimate purpose'), and also to attend a friend's wedding (not a 'legitimate purpose'), they would not be protected by the exception.
263. Given the scope and nature of this offence, the Commission considers that there is not a sufficient basis for it to be included in a post-sentence preventative detention regime. Satisfaction of the elements of this offence does not give rise to an inference that a person poses a risk to community safety. In any event, the breadth of this offence provision means that there are many situations in which a convicted person would not pose a relevant risk to community safety.

264. Based on the joint agency submission to the present inquiry, there is only one person due for release in the next five years who has been convicted of an offence against s 119.2, but this person has also been convicted of a more serious offence under s 119.1(2) (incursions into foreign countries with the intention of engaging in hostile activities).<sup>294</sup> As a result, the Commission's proposed amendment would not prevent a CDO from being sought in respect of him. The offence under s 119.1(2) was the principal offence for which this offender was convicted and he was sentenced to 3 years and 8 months imprisonment. In relation to the separate offence under s 119.2, the sentencing judge rejected the submission of the Crown that merely being in the declared area represented 'additional criminality that should be reflected in the sentence imposed for the principal offence'.<sup>295</sup> If anything, this judgment is consistent with the submission of the Commission that the offence of merely being in a declared area is not sufficiently independently serious to trigger a person's eligibility for the CDO regime.
265. The offence in s 119.2 has the same maximum penalty as the offences in s 119.7(2) and (3) which were previously removed from the relevant list of offences to which the CDO regime could apply.
266. The Commission has recently made a submission to the PJCIS in relation to its separate inquiry into the declared areas provisions which deals with these provisions in more detail.<sup>296</sup>

## **Recommendation 9**

The Commission recommends that the offence in s 119.2 of the Criminal Code (entering, or remaining in, declared areas) be excluded from the definition of 'terrorist offender' in s 105A.3(1)(a) of the Criminal Code, with the effect that a person convicted of such an offence is not liable for a continuing detention order.

### **(b) Assessment of risk**

267. The Commission's primary concern with any CDO regime is its ability to accurately assess risk. For any system of preventative detention to be justifiable, it must be possible to make robust predictions about the likelihood of future risk. Experience in similar areas has shown that this is a very difficult thing to do.<sup>297</sup>

268. In *Fardon*, Kirby J (in dissent) noted:

Experts in law, psychology and criminology have long recognised the unreliability of prediction of criminal dangerousness. In a recent comment, Professor Kate Warner remarked:

‘[A]n obstacle to preventative detention is the difficulty of prediction. Psychiatrists notoriously overpredict. Predictions of dangerousness have been shown to have only a one-third to 50% success rate [Ashworth, *Sentencing and Criminal Justice*, 3<sup>rd</sup> ed (2000), p 180]. While actuarial predictions have been shown to be better than clinical predictions – an interesting point as psychiatric or clinical predictions are central to continuing detention orders – neither are accurate.’

Judges of this Court have referred to such unreliability. Even with the procedures and criteria adopted, the Act ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed ‘guess’.<sup>298</sup>

269. According to the Victorian Sentencing Advisory Council, research suggests that the predictive accuracy of unguided clinical assessments is typically only slightly above chance. Actuarial risk assessment tools may be able to increase predictive accuracy into the moderate range, but with very broad margins of error.<sup>299</sup> However, actuarial tools typically predict the prevalence of particular conduct within a group of people sharing the same static characteristics. It is therefore problematic in assessing the propensity of an individual within that group to offend, or the potential of an individual to respond to management.<sup>300</sup> That is, an estimate of the likelihood (probability) of an outcome occurring in a population may not be the same as the propensity of a particular individual in that population to engage in that conduct.

270. It appears that the most accurate available means of making such predictions currently involves a combination of structured tools and individualised expert clinical assessment but that there are still significant limitations in this approach.<sup>301</sup>



271. Regardless of the methodology, there is a risk that the results from a formal risk assessment tool may be treated as being more reliable than they actually are, particularly if they purport to quantify a level of risk.
272. In recent years, Australian courts have heard a growing number of applications for orders, under relevant State and Territory legislation, to detain or otherwise restrict the liberty of individuals because those individuals present an unacceptable risk of future criminal behaviour. Some of that State and Territory legislation is directed towards the risk of terrorism offences; other legislation is directed towards the risk of sexual offences; and a third category of legislation is directed towards the risk of violent offences. The Commission urges that the PJCIS review some of these cases, because they demonstrate the difficulty in accurately assessing the risk of future serious criminal behaviour.
273. One such case involved an interim supervision order sought by the State of New South Wales against Mr Trent Scruse (formerly known as Trent Wainwright) under the *Crimes (High Risk Offenders) Act 2006* (NSW).<sup>302</sup> Mr Scruse had previously been convicted of a serious violent offence, and the State alleged that he posed an unacceptable risk of committing another serious offence if not kept under supervision in the community, pursuant to s 5B of the NSW Act.
274. In determining whether or not to make an extended supervision order under the NSW Act, the Supreme Court must have regard to: ‘the results of any statistical or other assessment as to the likelihood of persons with histories and characteristics similar to those of the offender committing a further serious offence’.<sup>303</sup> The Crown tendered a risk assessment report from a forensic psychologist employed by Corrective Services NSW, which set out risk ratings for Mr Scruse derived from four different risk assessment tools. However, the Crown conceded that the Court should give ‘little weight’ to this evidence.<sup>304</sup>
275. The Court was highly critical of this evidence and gave it little weight, with Payne J noting that the tools were ‘certainly not the product of “actuarial” expertise as I understand that field of discourse’.<sup>305</sup> Among the problems identified with these tools, his Honour noted that:
- while one tool, the Level of Service Inventory – Revised (LSI-R), was regularly used in applications under the NSW Act, a Corrective

Services NSW Research bulletin described a 'paucity of rigorous evaluations' establishing its validity in Australia

- the three other tools, the Violence Risk Scale (VRS) the Violence Risk Appraisal Guide – Revised (VRAG-R) and the Domestic Violence Risk Appraisal Guide (DVRAG), were all based on specific cohorts of offenders in Canada and had not been subject to 'repeated empirical evaluation with client groups that differ in demographic characteristics'
- both the VRS and the VRAG-R had been the subject of a warning in a meta-analysis of risk assessment tools that they 'should not be used as the sole or primary means for clinical or criminal justice decision making that is contingent on a high level of predictive accuracy, such as preventative detention'.<sup>306</sup>

276. The ratings derived from these tools were only one of a large number of relevant factors in Mr Scruse's case, but ultimately the interim supervision order made in relation to him was revoked.<sup>307</sup>
277. In this case, the Court was in the fortunate position to have material before it that critically engaged with the reliability of the risk assessment tools relied on by the State. That may not always be the case. The Commission's 2016 submission to the PJCIS about the CDO regime highlighted the fact that an expert report provided to the Court under Div 105A of the Criminal Code is not required to include any discussion of the limitations on the expert's assessment of the risk of the offender committing a serious Part 5.3 offence if released into the community. The Commission reiterates its recommendation that such a mandatory requirement be included in s 105A.6.
278. There are good rule of law reasons for requiring an expert's report on risk to identify any limitations in that assessment. First, the respondent in proceedings under Div 105A may not be represented and may not be in a position to question the validity of risk assessment tools. Secondly, the potential outcomes in such proceedings are severe and quasi-criminal, particularly if a continuing detention order is made.
279. In a criminal proceeding, the prosecutor has both a statutory<sup>308</sup> and common law duty<sup>309</sup> to disclose to a defendant all of the evidence it intends to rely upon at trial, along with any exculpatory material in its possession. A similar obligation is reflected in the control order regime

which, like the CDO regime, is civil but imposes significant restrictions on a subject's human rights. In control order proceedings, the AFP member applying for a control order must provide both the AFP Minister and the Court with a statement of facts relating to why any of the restrictions sought in the order should *not* be imposed.<sup>310</sup> Each of those statements must then be served on a person subject to an interim control order prior to the confirmation hearing.<sup>311</sup>

280. In a CDO proceeding, the expert's risk assessment is likely to be a crucial piece of evidence in the Court's determination of whether there is a high degree of probability of an unacceptable risk of future offending. It is important that the respondent is provided with details of any limitations in that expert assessment.

### **Recommendation 10**

The Commission recommends that a report prepared by an expert appointed under s 105A.6 of the Criminal Code be required to contain details of any limitations on the expert's assessment of the risk of the offender committing a serious Part 5.3 offence if the offender were released into the community, and the expert's degree of confidence in that assessment.

281. The CDO regime was legislated without any validated risk assessment tool being in place. At the time, the AGD said that it had formed an Implementation Working Group to progress a number of issues including the development of risk assessment tools. The PJCIS recommended that the Attorney-General provide it with a 'clear development and implementation plan' by the time of the second reading debate in the Senate, and a timetable for the implementation of any outstanding matters being considered by the Implementation Working Group by 30 June 2017.<sup>312</sup> Responsibility for these issues now lies with the Minister for Home Affairs.
282. Officers from the AGD and, later, the Department of Home Affairs with responsibility for Counter Terrorism Policy and the Countering Violent Extremism Centre met with the Commission in December 2017 and May 2018 respectively to discuss their progress on implementation. Among other things, the Commission asked about:
- the development of a risk assessment tool, and steps taken to validate any tool for Australian circumstances

- the identification, training and qualification of relevant experts
  - the minimum standards for housing people detained under the CDO regime, noting that this will be civil rather than criminal detention
  - the mechanisms for oversight and inspection of conditions of detention for people detained under the CDO regime, and the interaction with OPCAT
  - the steps taken to develop rehabilitation programs to reduce the risk of reoffending
  - the steps taken to ensure that control orders, or ESOs, were available as an alternative to the CDO regime.
283. It will be important for the PJCIS to understand how that work has progressed as part of this review of the operation, effectiveness and implications of Div 105A.<sup>313</sup>
284. The joint-agency supplementary submission to the PJCIS in relation to the present inquiry notes that the Australian Government has 'identified the VERA-2R as the most appropriate tool currently available' to assess risk of people engaging in terrorism related conduct.<sup>314</sup> The agencies note that other kinds of risk assessment tools 'have been validated statistically against large populations of offenders' and revised over a number of decades. A key question is whether an independent statistical validation has been done of VERA-2R for Australian circumstances.
285. The Commission recognises that there can be difficulties in the validation of a terrorism-specific tool because, fortunately, there are comparatively few people who have committed acts of terrorism who could be the subject of an actuarial analysis. At the same time, the scarcity of the data means that the predictive power of these kinds of tools is likely to be limited. In any event, while validation of a tool such as VERA-2R would be challenging, it is imperative. Without that information, it would be difficult, if not impossible, for a Court to conclude that evidence derived from an assessment made using VERA-2R is sufficiently reliable to be used in determining whether to issue a CDO.

286. The VERA-2R website itself contains the following warning about the limitations of the tool:

Predictive validity is problematic due to the low base rate of terrorists and violent extremists. Moreover, extremists and terrorists may change their strategies, make unexpected decisions and use unpredictable triggers. Unpredictable and dynamic factors such as events at a personal, local or global level can also trigger unexpected violent acts. Due to such triggers and other dynamic factors, risks are time and context sensitive and are not able to be predicted with certainty. For each evaluation, limitations in the assessment must be clearly identified.<sup>315</sup>

287. This warning reinforces the importance of Recommendation 10 above.

288. The VERA-2R is a structured professional judgment tool. As the Government agencies acknowledge in their joint submission, it relies in part on the expertise of the risk assessor and the quality of information available. In 2017, the Victorian Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers noted that VERA-2R ‘has only been developed relatively recently and lacks a strong and validated body of evidence as to its efficacy’ in the context of assessing risk and managing post-sentence high risk terrorist offenders.<sup>316</sup>

289. The developers of this tool, and the previous iteration known as VERA-2, have warned that it is ‘not a silver bullet of prediction’ and is ‘not intended to serve as a definitive predictive instrument for those who have offended but rather provides some indicators as to a measure of the likeliness of danger’.<sup>317</sup>

290. Ultimately, great caution needs to be applied in relying on any such tool in the context of applying for, or making, a CDO. It is not enough that a particular tool is, relatively speaking, better than other comparable tools. Rather, before a tool is used in this context, it should be shown to produce *objectively* reliable evidence, to a standard that is commensurate with the gravity of the decision making. That standard ought to be high: where a CDO is wrongly made, it would severely infringe an individual’s human rights, almost always amounting to arbitrary detention.

291. Clearly further work in this area is required.

## **Recommendation 11**

The Commission recommends that the PJCIS seek an update from the Department of Home Affairs about the following matters in relation to the continuing detention order regime in Div 105A of the Criminal Code:

- (a) the development of a risk assessment tool, steps taken to validate any tool for Australian circumstances, and any independent evaluation of the reliability of this tool in Australia and/or other comparable jurisdictions
- (b) the identification, training and qualification of relevant experts
- (c) the minimum standards for housing people detained under the continuing detention order regime
- (d) the mechanisms for oversight and inspection of conditions of detention for people detained under the continuing detention order regime
- (e) the steps taken to develop rehabilitation programs to reduce the risk of reoffending

and publish the responses to the full extent possible that is consistent with the requirements of national security.

292. At present, the definition of 'relevant expert' is broad, vague and does not guarantee sufficient training or independence. There are no minimum requirements for training or accreditation.

293. When this issue was considered by the New South Wales Sentencing Council, it recommended that:

- risk assessment should be undertaken independently of the corrections system in order to avoid any apprehension of bias as a result of the involvement of the executive in the process; and
- in order to be eligible to be appointed as a relevant expert, the expert should be accredited by an independent authority.<sup>318</sup>

294. The Council said that establishing an independent risk management body would facilitate best practice in relation to risk-prediction by:

- setting out best-practice risk-assessment and risk-management processes and developing guidelines and standards with respect to such processes
  - validating new risk assessment tools and processes
  - providing for rigorous procedures by which practitioners become accredited for assessing risk
  - providing education and training for practitioners
  - increasing the pool of experts available to give evidence in matters which require risk-prediction
  - facilitating risk assessment by an independent panel of experts
  - developing an individual risk-management plan when an offender likely to become subject to post-sentence restraints enters custody.<sup>319</sup>
295. The Commission considers that the recommendations made by the New South Wales Sentencing Council should also be adopted in relation to Div 105A in order to improve the process for assessing risk.

### **Recommendation 12**

The Commission recommends that an independent risk management body be established to:

- (a) accredit people in the assessment of risk for the purpose of becoming 'relevant experts' as defined in s 105A.2 of the Criminal Code
- (b) develop best-practice risk-assessment and risk-management processes, guidelines and standards
- (c) validate new risk assessment tools and processes
- (d) evaluate the operation of risk assessment tools
- (e) undertake and commission research on risk assessment methods; and
- (f) provide education and training for risk assessors.

### **Recommendation 13**

The Commission recommends that 'relevant experts' be required to be accredited by the independent risk management body in order to be appointed under s 105A.6 of the Criminal Code.

(c) Availability of less restrictive alternatives

296. One concern raised by the Commission in its submissions to the PJCIS in 2016 was the disjuncture between:
- the exclusive jurisdiction of the Supreme Court to make a CDO, if satisfied that there was no other less restrictive measure that would be effective in preventing the unacceptable risk
  - the identification of a control order as an example of a less restrictive measure, and
  - the exclusive jurisdiction of the Federal Court or Federal Circuit Court to make a control order.<sup>320</sup>
297. The Commission submitted that if the Court hearing an application for a CDO forms the view that a control order (or an ESO) would be more appropriate, the safety of the community would be better served by the Court having the power to make that order, rather than making no order at all and relying on a subsequent application for a control order to be made by the AFP.
298. The PJCIS recommended that the Government consider whether the existing control order regime could be improved to operate alongside the CDO regime. It recommended that any potential changes be developed in time to be considered as part of the INSLM's 2017 Statutory Deadline Reviews.<sup>321</sup> It does not appear that any legislative proposal has yet been introduced.
299. In 2017, the INSLM recommended that there be a separate ESO regime to operate alongside the CDO regime, rather than seeking to amend the control order regime. Part of the reason for this recommendation was the different thresholds that would apply when making a control order and an ESO, respectively.



300. The INSLM recommended that:

- State and Territory Supreme Courts be authorised to make an ESO as an alternative to a CDO on application by the relevant Minister
- the conditions that may be imposed on a person pursuant to an ESO should be the same as the conditions that can currently be imposed on a person pursuant to a control order under s 104.5(3)
- the threshold for making an ESO should be the same as the threshold for making a CDO, namely that 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
- the Court should only make a CDO if satisfied that an ESO would not be effective in preventing the identified risk
- the period of any ESO be up to three years at a time
- the same controls and monitoring regime be available for an ESO as for control orders
- the Government should consider making the special advocate regime currently available for use in relation to control orders also available for applications under Div 105A.<sup>322</sup>

301. The Commission supports the recommendations made by the INSLM in relation to the establishment of the ESO regime. The INSLM's recommendations were also supported by the PJCIS in its last review of these provisions,<sup>323</sup> and by the Government in response to the report of the PJCIS.<sup>324</sup>

#### **Recommendation 14**

The Commission recommends that the State and Territory Supreme Courts be authorised to make an extended supervision order as an alternative to a continuing detention order under Div 105A of the Criminal Code, based on the criteria recommended by the INSLM in the 2017 Statutory Deadline Reviews.

## Recommendation 15

The Commission recommends that the special advocate regime currently available for use in control order proceedings also be available for proceedings in relation to applications for continuing detention orders or extended supervision orders under Div 105A of the Criminal Code.

302. On 3 September 2020, the Australian Government introduced the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 into Parliament. This Bill responds to the recommendations made by the INSLM and the PJCIS and implements some, but not all, of those recommendations. The Government has said that it will refer the Bill to the PJCIS for further inquiry.
303. As the Bill will be subject to more detailed consideration in a future inquiry, the Commission makes only the following brief observations here.
304. Based on a preliminary review of the Bill, it appears to implement the INSLM and PJCIS recommendations for:
- the establishment of an ESO regime, which would allow the Supreme Court to make an ESO as an alternative to a CDO
  - the period of an ESO to be up to three years at a time
  - substantially the same monitoring regime to be available for an ESO as currently exists for control orders
  - substantially the same special advocate regime to be available for applications under Div 105A as currently exists for control orders.
305. However, there are some aspects of the Bill that differ from the model recommended by the INSLM and the PJCIS. Six of these are referred to briefly below.
306. **First**, the kinds of conditions that may be imposed under the proposed ESO regime are not limited to the conditions that may be imposed under the control order regime. Instead, any kind of condition may be imposed under the ESO regime, provided the court making the order is satisfied, on the balance of probabilities, that the condition is reasonably necessary, and reasonably appropriate and adapted, for

the purpose of protecting the community from the unacceptable risk of the offender committing a serious Part 5.3 offence. Two non-exhaustive lists of possible conditions, significantly more extensive than the conditions that may be imposed in relation to a control order, are included in the Bill.<sup>325</sup>

307. The fact that conditions are 'at large' provides a risk that over time they may become more onerous. Without some legislative limit on these kinds of orders, it will be left to courts to determine the appropriate upper threshold of what are, in essence, civil obligations.
308. The Commission's recommendations 5 and 6 in this submission are directed to amending the nature of the conditions that may be imposed under either control orders or ESOs to ensure that there are proper limits on their scope.
309. **Secondly**, the Bill would include new obligations that can be imposed under a control order (see the proposed new ss 104.5(3)(d)–(da), 104.5A(1)).
310. **Thirdly**, the ESO regime in the Bill contains a lower threshold than recommended by the INSLM and the PJCIS. An ESO may be granted if the Court is satisfied 'on the balance of probabilities' that the offender poses an unacceptable risk of committing a serious Part 5.3 offence. The threshold for imposing a CDO, and the threshold recommended by the INSLM and the PJCIS for an ESO, was satisfaction 'to a high degree of probability'.
311. **Fourthly**, unlike the case for control orders, a Court hearing an application for an ESO is not required to consider the impact of the proposed conditions on the person's circumstances, including their financial and personal circumstances (compare s 104.4(2)(c) with proposed ss 105A.7A(2), 105A.9A(5), 105A.9C(2) and 105A.12A(5)).
312. **Fifthly**, unlike the case for control orders, an ESO may be varied without the consent of the person who is subject to the order (compare s 104.11A(2)(a) with proposed s 105A.9C).
313. **Sixthly**, unlike the case for control orders, an ESO may be varied to *add* conditions, including without the consent of the person who is subject to the order (compare s 104.11A(2)(b) with proposed ss 105A.9B(1) and 105A.9C(1)).

314. As the INSLM noted, there is a potential for an overlap between the ESO regime and the control order regime. The Commission's primary submission is that the ESO regime in the form recommended by the INSLM and the PJCIS should replace the existing control order regime.
315. If the control order regime is retained, it will be necessary to consider the degree to which it overlaps with the ESO regime. The INLSM made a number of recommendations to reduce this overlap.<sup>326</sup> Again, these recommendations were endorsed both by the PJCIS in its last review of these provisions,<sup>327</sup> and the Government in response to the report of the PJCIS.<sup>328</sup> The Commission also supports these recommendations.

### **Recommendation 16**

The Commission recommends that, if the control order regime is retained and a parallel extended supervision order regime is created:

- (a) the AFP Minister be unable to give consent under s 104.2 of the Criminal Code to the AFP requesting a control order, if proceedings for a continuing detention order or an extended supervision order under Div 105A are pending
  - (b) in requesting an interim control order in relation to a person, the senior AFP member be required to give the issuing court a copy of any application under Div 105A in relation to that person, and any order (including reasons) of the relevant court in respect of that application
  - (c) no control order may be in force in relation to a person while a continuing detention order or an extended supervision order is in force in relation to that person.
316. Based on a preliminary review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, it appears that:
- there is no proposed amendment that would give effect to the issue raised in Recommendation 16(a) above
  - there are a number of proposed amendments to ss 104.3(e) of the Criminal Code that are directed to the issue raised in Recommendation 16(b) above

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- there are proposed amendments to insert new ss 104.5(1D)–(1F), 104.15(4)–(6) and 104.17A of the Criminal Code that are directed to the issue raised in Recommendation 16(c) above.

## Appendix A: Control orders made

No	Name	Interim control order date	Confirmation date	Investigation stage when control order made
1.	Jack Thomas	27 August 2006	Not confirmed	After acquittal for terrorism offences
2.	David Hicks	21 December 2007	18 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)

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No	Name	Interim control order date	Confirmation date	Investigation stage when control order made
8.	Ms Zainab Abdirahman-Khalif	22 November 2019	17 July 2020	After acquittal for terrorism offence and while appeal to High Court pending
9.	Ms Alo-Bridget Namoa	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	25 June 2020*	After conviction for terrorism offence: breach of first control order (s 104.27 of Criminal Code)
12.	Mr Shayden Jamil Thorne	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	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)

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No	Name	Interim control order date	Confirmation date	Investigation stage when control order made
15.	Mr Antonino Granata	29 May 2020	Not yet confirmed	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)
16.	Mr Belal Saadallay Khazaal	26 August 2020	Not yet confirmed	After conviction for a terrorism offence: making a document connected with assistance in a terrorist act (s 101.5(1) of Criminal Code)

\* Court records suggest that this matter was resolved by consent on 25 June 2020. It does not appear that either a judgment or the terms of a confirmed control order have been published.



## Endnotes

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- <sup>1</sup> Human Rights and Equal Opportunity Commission, *submission to the Senate Legal and Constitutional Legislation Committee inquiry into the Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, at [https://www.aph.gov.au/~media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2004\\_07/terrorism/submissions/sub158\\_pdf.ashx](https://www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2004_07/terrorism/submissions/sub158_pdf.ashx).
- <sup>2</sup> Australian Human Rights Commission, *COAG Review of Counter-Terrorism Legislation*, 28 September 2012, at [https://www.ag.gov.au/sites/default/files/2020-05/Australian%20Human%20Rights%20Commission\\_0.pdf](https://www.ag.gov.au/sites/default/files/2020-05/Australian%20Human%20Rights%20Commission_0.pdf).
- <sup>3</sup> Australian Human Rights Commission, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)*, submission to the PJCS, 12 October 2016, at <https://www.aph.gov.au/DocumentStore.ashx?id=32397a66-a179-4a07-a5fb-ab60b776676f&subId=414693>.
- <sup>4</sup> Australian Human Rights Commission, *Independent National Security Legislation Monitor (INSLM) Statutory Deadline Review*, submission to the Acting Independent National Security Legislation Monitor, 15 May 2017, at <https://www.inslm.gov.au/sites/default/files/11-australian-human-rights-commission.pdf>.
- <sup>5</sup> Australian Human Rights Commission, *Review of certain police powers, control orders and preventative detention orders*, supplementary submission to the PJCS, 3 November 2017, at <https://www.aph.gov.au/DocumentStore.ashx?id=766df2d3-b918-4b17-aadf-28cca57bca5&subId=516302>.
- <sup>6</sup> For example, the right to life (article 6 of the ICCPR) and the rights to bodily integrity (an aspect of article 7 of the ICCPR) and security of person (article 9(1) of the ICCPR).
- <sup>7</sup> United Nations Security Council, *Resolution 1373 (2001)*, UN Doc S/RES/1373 (2001), paras 2(b) and (e).
- <sup>8</sup> Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008). At <http://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws#fnB8>.
- <sup>9</sup> United Nations General Assembly, *Resolution 60/288 The United Nations Global Counter-Terrorism Strategy*, UN Doc A/RES/60/288 (2006), p 9.
- <sup>10</sup> 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 [5.5].
- <sup>11</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entry into force generally 23 March 1976, entry into force for Australia (except Article 41) 13 November 1980, article 41 came into force for Australia on 28 January 1993).
- <sup>12</sup> The Hon John von Doussa QC, *Security and Human Rights in Australia: Australia's counter-terrorism response*, Beijing Forum on Human, 21–23 April 2008, quoting Professor David Feldman, *The roles of Parliament in Protecting Human Rights: A view from the UK*, address at the Human Rights and Legislatures Conference, Melbourne University (20–22 July 2006).
- <sup>13</sup> *Thomas v Mowbray* (2007) 233 CLR 307 (Gummow and Crennan JJ) at [61].
- <sup>14</sup> 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 PJCS, 4 September 2020, p 3, at <https://www.aph.gov.au/DocumentStore.ashx?id=a7b77fd7->

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- [2a24-4d94-8177-59d38a55d085&subId=691389](#). See also Independent National Security Legislation Monitor, *Annual Report 2018–19*, pp 5–7.
- <sup>15</sup> Independent National Security Legislation Monitor, *Annual Report 2014–15*, pp 2–4.
- <sup>16</sup> Dylan Welch, 'Islamic State: Militant group calls on supporters to kill Australians 'in any possible way' *ABC News*, 22 September 2014, at <https://www.abc.net.au/news/2014-09-22/islamic-state-calls-on-supporters-to-kill-australians/5761502>.
- <sup>17</sup> Australian Federal Police, *Inquiry into AFP Powers (Division 3A Part IAA of the Crimes Act 1914 and Divisions 104 and 105 of the Criminal Code)*, submission to the PJCIS, August 2020, at [6]. See also Independent National Security Legislation Monitor, *Annual Report 2018–19*, p 6.
- <sup>18</sup> See the list of prosecutions for terrorism offences in Independent National Security Legislation Monitor, *Annual Report 2018–19*, Appendix I.
- <sup>19</sup> *The Queen v Abdirahman-Khalif*, High Court proceeding A5/2020. As at the time of writing this submission, judgment was reserved in this matter.
- <sup>20</sup> *Crimes Act 1914* (Cth), s 3WA.
- <sup>21</sup> *Crimes Act 1914* (Cth), s 3W.
- <sup>22</sup> 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, pp 3, 5 and 8.
- <sup>23</sup> 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](https://www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2004_07/terrorism/report/report_pdf.ashx).
- <sup>24</sup> Senate Legal and Constitutional Affairs Legislation Committee, *Anti-Terrorism Bill (No 2) 2005* (November 2005) at [2.27].
- <sup>25</sup> *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), Sch 1, items 43–45, 86, 87, 107 and 108.
- <sup>26</sup> *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), Sch 1, item 131A.
- <sup>27</sup> Australian Human Rights Commission, *Independent National Security Legislation Monitor (INSLM) Statutory Deadline Review*, submission to the Acting Independent National Security Legislation Monitor, 15 May 2017, at <https://www.inslm.gov.au/sites/default/files/11-australian-human-rights-commission.pdf>.
- <sup>28</sup> 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 <https://www.inslm.gov.au/sites/default/files/rpt-stop-search-seize-powers.pdf>; Independent National Security Legislation Monitor, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, 7 September 2017, at <https://www.inslm.gov.au/sites/default/files/control-preventative-detention-orders.pdf>.
- <sup>29</sup> Australian Human Rights Commission, *Review of certain police powers, control orders and preventative detention orders*, supplementary submission to the PJCIS, 3 November 2017, at <https://www.aph.gov.au/DocumentStore.ashx?id=766df2d3-b918-4b17-aadf-28ccca57bca5&subId=516302>.
- <sup>30</sup> 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

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2018), at

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/AFPpowersreview/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/AFPpowersreview/Report).

<sup>31</sup> *Counter-Terrorism Legislation Amendment Act (No. 1) 2018* (Cth), Sch 1, items 7, 11 and 17.

<sup>32</sup> Australian Government, *Australian National Security, National Terrorism Threat Advisory System*, at <https://www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/National-Terrorism-Threat-Advisory-System.aspx>.

<sup>33</sup> Independent National Security Legislation Monitor, *Annual Report 2018–19*, p 5.

<sup>34</sup> *Crimes Act 1914* (Cth), s 3UA, definition of ‘police officer’.

<sup>35</sup> The exception is the power in s 3UEA of emergency entry to premises without a warrant.

<sup>36</sup> *Crimes Act 1914* (Cth), s 3UB(1)(a).

<sup>37</sup> 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’.

<sup>38</sup> *Crimes Act 1914* (Cth), s 3UB(1)(b).

<sup>39</sup> *Crimes Act 1914* (Cth), s 3UJ.

<sup>40</sup> *Crimes Act 1914* (Cth), s 3UC.

<sup>41</sup> *Crimes Act 1914* (Cth), s 3UD.

<sup>42</sup> *Crimes Act 1914* (Cth), s 3UE.

<sup>43</sup> *National Security Legislation Amendment Act 2010* (Cth).

<sup>44</sup> *Counter-Terrorism Legislation Amendment Act (No. 1) 2018* (Cth), which added ss 3UJA and 3UJB.

<sup>45</sup> 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].

<sup>46</sup> 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/AFPpowersreview/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/AFPpowersreview/Report).

<sup>47</sup> *Intelligence Services Act 2001* (Cth), s 29(1)(bba).

<sup>48</sup> 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. See also Australian Federal Police, *2017 Counter-terrorism powers review*, submission to the PJCIS (October 2017), at [14], at

<https://www.aph.gov.au/DocumentStore.ashx?id=5bec13ed-117f-4148-9e7e-4ceb6a92383c&subId=561438>; Australian Government, Department of Home Affairs, *Control Orders, Preventative Detention Orders, Continuing Detention Orders, and Powers in Relation to Terrorist Acts and Terrorism Offences, Annual Reports 2017–2018 and 2018–19* available at

<https://www.nationalsecurity.gov.au/Media-and-publications/Annual-Reports/Pages/default.aspx>.

<sup>49</sup> United Nation Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 1326 (2004)

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- at [6]; United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).
- <sup>50</sup> *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]–[42], (Hammond J). See also the views of the UNHRC in *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).
- <sup>51</sup> *A v Australia*, Communication No. 900/1993, UN Doc CCPR/C/76/D/900/1993 (1997); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
- <sup>52</sup> Australian Federal Police, *2017 Counter-terrorism powers review*, submission to the PJCIS (October 2017), at [14].
- <sup>53</sup> 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 [2.16]–[2.19].
- <sup>54</sup> 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 [5.32] and the legislation described in footnote 58.
- <sup>55</sup> *Crimes Act 1914* (Cth), s 3UD(2).
- <sup>56</sup> *Crimes Act 1914* (Cth), s 3UD(3).
- <sup>57</sup> *Crimes Act 1914* (Cth), s 3UD(4).
- <sup>58</sup> Martin Scheinin, Special Rapporteur, *Australia: Study on Human Rights Compliance While Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (14 December 2006) at [30] and [68].
- <sup>59</sup> Council of Australian Governments Review of Counter-Terrorism Legislation (2014), at [317]. At <https://www.ag.gov.au/sites/default/files/2020-03/Final%20Report.PDF>.
- <sup>60</sup> 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 [8.55]–[8.56].
- <sup>61</sup> 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.
- <sup>62</sup> European Court of Human Rights, *Gillan and Quinton v United Kingdom* (Application no. 4158/05), 12 January 2010.
- <sup>63</sup> European Court of Human Rights, *Gillan and Quinton v United Kingdom* (Application no. 4158/05), 12 January 2010 at [81] and [87].
- <sup>64</sup> *Terrorism Act 2000* (UK), Sch 6B, paragraph 6.
- <sup>65</sup> Jonathan Hall QC, Independent Reviewer of Terrorism Legislation, *Report on the Operation of the Terrorism Acts 2000 and 2006*, March 2020, pp 61–63. At <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/03/Terrorism-Acts-in-2018-Report-1.pdf>.
- <sup>66</sup> Jonathan Hall QC, Independent Reviewer of Terrorism Legislation, *Report on the Operation of the Terrorism Acts 2000 and 2006*, March 2020, p 62.
- <sup>67</sup> Attorney-General's Department and Australian Federal Police, submission in response to questions from the PJCIS, 2018 review, p 7. At

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<https://www.aph.gov.au/DocumentStore.ashx?id=5447abfd-97eb-4433-8253-7e955db74537&subId=561854>.

- <sup>68</sup> *Crimes Act 1914* (Cth), s 3UJ(1).
- <sup>69</sup> *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.
- <sup>70</sup> *Crimes Act 1914* (Cth), s 3UJ(5).
- <sup>71</sup> Decisions under s 3UJ of the *Crimes Act 1914* (Cth) are not excluded from review by reason of Sch 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
- <sup>72</sup> *Crimes Act 1914* (Cth), s 3UJ(4).
- <sup>73</sup> Independent National Security Legislation Monitor, *Annual Report*, 16 December 2011, p 43. At <https://www.inslm.gov.au/sites/default/files/inslm-annual-report-2011.pdf>.
- <sup>74</sup> Attorney-General's Department and Australian Federal Police, submission in response to questions from the PJCIS, 2018 review, p 5.
- <sup>75</sup> *R (on the application of Gillan (FC) v Commissioner of Police for the Metropolis* [2006] UKHL 12 at [43]–[47] (Lord Hope of Craighead); see also European Court of Human Rights, *Gillan and Quinton v United Kingdom* (Application no. 4158/05), 12 January 2010 at [85]–[86].
- <sup>76</sup> *Crimes Act 1914* (Cth), s 3UB(2).
- <sup>77</sup> *Halliday v Nevill* (1984) 155 CLR 1 at 10 (Brennan J).
- <sup>78</sup> *George v Rockett* (1990) 170 CLR 104 at 109–110.
- <sup>79</sup> *Halliday v Nevill* (1984) 155 CLR 1 at 10 (Brennan J).
- <sup>80</sup> *Crimes Act 1914* (Cth), s 3R.
- <sup>81</sup> For example, Law Council of Australia, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, submission to the PJCIS (3 November 2017), p 8. At <https://www.aph.gov.au/DocumentStore.ashx?id=19741c6e-98fc-4d3a-b52f-c4f9c5ee9595&subId=561442>.
- <sup>82</sup> 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, pp 6 and 13.
- <sup>83</sup> Australian Federal Police, *2017 Counter-terrorism powers review*, submission to the PJCIS (October 2017), at [18].
- <sup>84</sup> *R v Besim* [2016] VSC 537 (Croucher J); *R v Besim* [2017] VSCA 158 (Warren CJ, Weinberg and Kaye JJA).
- <sup>85</sup> *Cruse v State of Victoria* (2019) 59 VR 241 (Richards J) at [111].
- <sup>86</sup> *Finding into Death with Inquest: Ahmad Numan Haider* (Coroners Court of Victoria, 31 July 2017).
- <sup>87</sup> *Cruse v State of Victoria* (2019) 59 VR 241 (Richards J) at [136].
- <sup>88</sup> *Cruse v State of Victoria* (2019) 59 VR 241 (Richards J).
- <sup>89</sup> *Cruse v State of Victoria* (2019) 59 VR 241 (Richards J) at [6], [84] and [211].
- <sup>90</sup> *Cruse v State of Victoria* (2019) 59 VR 241 (Richards J) at [85].
- <sup>91</sup> *Cruse v State of Victoria* (2019) 59 VR 241 (Richards J) at [212] and [219].
- <sup>92</sup> *Cruse v State of Victoria* (2019) 59 VR 241 (Richards J) at [132].
- <sup>93</sup> *Cruse v State of Victoria* (2019) 59 VR 241 (Richards J) at [3].
- <sup>94</sup> *Cruse v State of Victoria* (2019) 59 VR 241 (Richards J) at [221]–[223].
- <sup>95</sup> SBS News, *Indigenous police brutality victim awarded \$400,000*, 27 August 2019, at <https://www.sbs.com.au/news/indigenous-police-brutality-victim-awarded-400-000>; *Cruse v State of Victoria* (2019) 59 VR 241 (Richards J) at [65]–[66] and [94]–[96].



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- <sup>96</sup> *Cruse v State of Victoria* (2019) 59 VR 241 (Richards J) at [221]–[222].
- <sup>97</sup> Australian Federal Police, *2017 Counter-terrorism powers review*, submission to the PJCIS (October 2017), at [17].
- <sup>98</sup> *Criminal Code* (Cth), s 104.1.
- <sup>99</sup> *Criminal Code* (Cth), s 104.5(3).
- <sup>100</sup> *Criminal Code* (Cth), s 104.5(6).
- <sup>101</sup> *Criminal Code* (Cth), s 104.5(1)(f).
- <sup>102</sup> *Criminal Code* (Cth), s 104.28(2).
- <sup>103</sup> *Criminal Code* (Cth), ss 104.5(2), 104.28(3).
- <sup>104</sup> *R v Naizmand* [2017] NSWDC 4 (Scotting DCJ).
- <sup>105</sup> *Booth v Naizmand* [2020] FCA 244 (Bromwich J).
- <sup>106</sup> *Criminal Code* (Cth), s 104.27.
- <sup>107</sup> Tim Matthews, 'Under Control but Out of Proportion: Proportionality in Sentencing for Control Order Violations' (2017) 40(4) *UNSWLJ* 1422.
- <sup>108</sup> Independent National Security Legislation Monitor, *Control Order Safeguards – Part 2* (April 2016), Appendix A4, p xv. At <https://www.inslm.gov.au/sites/default/files/control-order-safeguards-part2.pdf>.
- <sup>109</sup> *R v MO [No 1]* [2016] NSWDC 144 (Berman DCJ) at [4].
- <sup>110</sup> *R v MO (No 2)* [2016] NSWDC 145 (Berman DCJ). Mr MO was initially sentenced to two and a half years imprisonment with an order that he be released pursuant to a recognisance release order after serving 18 months, but the head sentence was reduced to two years the following day because the prosecution and the Court had failed to take into account the effect of s 19AG of the Crimes Act which provides that where a person is convicted of a terrorism offence a non-parole period of at least three-quarters of the sentence must be set by the Court.
- <sup>111</sup> *R v Naizmand* [2017] NSWDC 4 (Scotting DCJ) at [9].
- <sup>112</sup> *R v Naizmand* [2017] NSWDC 4 (Scotting DCJ) at [8].
- <sup>113</sup> *R v Naizmand* [2017] NSWDC 4 (Scotting DCJ) at [39].
- <sup>114</sup> *R v Naizmand* [2017] NSWDC 4 (Scotting DCJ) at [71].
- <sup>115</sup> *R v Naizmand* [2017] NSWDC 4 (Scotting DCJ) at [78]–[83]. An appeal against the severity of this sentence was dismissed: *Naizmand v R* [2018] NSWCCA 25.
- <sup>116</sup> *Booth v Naizmand* [2020] FCA 244 (Bromwich J).
- <sup>117</sup> *Crimes Act 1914* (Cth), s 3(1), definition of 'terrorism offence'.
- <sup>118</sup> *Crimes Act 1914* (Cth), s 19ALB.
- <sup>119</sup> *Criminal Code* (Cth), s 104.2(1). For the process in urgent circumstances, see *Criminal Code* (Cth), ss 104.6–104.11.
- <sup>120</sup> *Criminal Code* (Cth), s 104.
- <sup>121</sup> It was a recommendation of the COAG Review Committee that only the Federal Court have jurisdiction to issue control orders. Both the Federal Court and the Federal Circuit Court agreed with this submission, with the Federal Circuit Court noting in 2015 that its premises were not all suitable for security cases. In April 2016, the second INSLM recommended that only the Federal Court have jurisdiction to make control orders, but that it have the power to remit a request for a control order to the Federal Circuit Court: Independent National Security Legislation Monitor, *Control Order Safeguards – Part 2* (April 2016) at [6.7]. This submission was not accepted by the Government: Attorney-General's Department and Australian Federal Police, *Joint supplementary submission and responses to questions on notice*, 2018 PJCIS review, at

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<https://www.aph.gov.au/DocumentStore.ashx?id=21ad9998-5d4e-422e-8f72-cdc0623e1d4b&subId=561854>. Since then, all applications have been brought in the Federal Court.

<sup>122</sup> *Criminal Code* (Cth), s 104.28A(1).

<sup>123</sup> *Evidence Act 1995* (Cth), s 75.

<sup>124</sup> *Criminal Code* (Cth), s 104.12(1)(a).

<sup>125</sup> *Criminal Code* (Cth), s 104.5(1)(d).

<sup>126</sup> *Criminal Code* (Cth), s 104.5(1)(e).

<sup>127</sup> *Criminal Code* (Cth), s 104.28A(2)(a).

<sup>128</sup> *Criminal Code* (Cth), s 104.12A.

<sup>129</sup> *Criminal Code* (Cth), s 104.12A(2).

<sup>130</sup> *Criminal Code* (Cth), s 104.12A(4).

<sup>131</sup> *Criminal Code* (Cth), s 104.5(1A).

<sup>132</sup> This occurred in relation to the interim control orders issued to Mr Jack Thomas on 27 August 2006, to Mr MO on 17 December 2014, and to an unidentified person also on 17 December 2014. Mr Thomas' matter was unusual because he had brought High Court proceedings challenging the constitutional validity of Div 104: *Thomas v Mowbray* (2007) 233 CLR 307.

<sup>133</sup> In Mr Ahmad Saiyer Naizmand's case there were 8 months and 25 days between the initial hearing and the confirmation hearing (INSLM report on Control Order Safeguards – Part 2, Appendix A4, p xvii, there referred to as 'CO5'); in Mr Harun Causevic's case there were 9 months and 28 days between the initial hearing and the confirmation hearing (*Gaughan v Causevic* (No. 2) [2016] FCCA 1693); in Ms Zainab Abdirahman-Khalif's case there were 7 months and 25 days between the initial hearing and the confirmation hearing (*McCartney v Abdirahman-Khalif* (No 2) [2020] FCA 1002).

<sup>134</sup> 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 [3.105].

<sup>135</sup> *Gaughan v Causevic* (No.2) [2016] FCCA 1693 at [2].

<sup>136</sup> 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 [3.101].

<sup>137</sup> *Counter Terrorism Legislation Amendment Act (No. 1) 2016* (Cth).

<sup>138</sup> National Security Information (Criminal and Civil Proceedings) Amendment Regulations 2017 (Cth).

<sup>139</sup> Australian Human Rights Commission, *Inquiry into the Counter Terrorism Legislation Amendment Bill (No. 1) 2015*, submission to the PJCIS (9 December 2015), at [66]–[75]. At <https://www.aph.gov.au/DocumentStore.ashx?id=080c06ef-59cb-4d40-9132-f1664588c82c&subId=407290>.

<sup>140</sup> *Criminal Code* (Cth), ss 104.5(1)(f) and 104.16(1)(d).

<sup>141</sup> *Criminal Code* (Cth), s 104.28(2).

<sup>142</sup> *Crimes Act 1914* (Cth), ss 3ZZKA–3ZZKG.

<sup>143</sup> *Crimes Act 1914* (Cth), s 3ZZLA–3ZZLD.

<sup>144</sup> *Telecommunications (Interception and Access) Act 1979* (Cth), ss 46(4) and 46A(2A).

<sup>145</sup> *Surveillance Devices Act 2004* (Cth), s 16(1)(bc).

<sup>146</sup> *Surveillance Devices Act 2004* (Cth), s 39(3B).

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- <sup>147</sup> Independent National Security Legislation Monitor, *Control Order Safeguards – (INSLM Report) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (January 2016), at [2.4].
- <sup>148</sup> *Criminal Code* (Cth), ss 104.4(1)(c) and 104.14(7).
- <sup>149</sup> *Criminal Code* (Cth), ss 104.4(1)(d) and 104.14(7).
- <sup>150</sup> Conduct described in (ii) is prohibited by s 101.2 of the Criminal Code, provided that the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act and the person knows or is reckless as to the existence of the connection; conduct described in (iii) is prohibited by s 119.1(2) of the Criminal code; conduct described in (vii) is prohibited by ss 11.2, 119.1(2) and 119.4 of the Criminal Code.
- <sup>151</sup> *McCartney v Abdirahman-Khalif* [2019] FCA 2218 at [9](38).
- <sup>152</sup> *McCartney v Abdirahman-Khalif* [2019] FCA 2218 at [9](37).
- <sup>153</sup> *McCartney v Abdirahman-Khalif* [2019] FCA 2218 at [9](38.3).
- <sup>154</sup> *McCartney v Abdirahman-Khalif* [2019] FCA 2218 at [18].
- <sup>155</sup> 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 [1.17]; and annual reports for 2017–18 and 2018–19 available at <https://www.nationalsecurity.gov.au/Media-and-publications/Annual-Reports/Pages/default.aspx>.
- <sup>156</sup> These figures are based on a review by the Commission of court records as the annual report for 2019–20 has yet to be tabled.
- <sup>157</sup> 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 PJCS, 4 September 2020, p 8.
- <sup>158</sup> *Jabbour v Thomas* [2006] FMCA 1286.
- <sup>159</sup> *Jabbour v Hicks* [2007] FMCA 2139.
- <sup>160</sup> *Independent National Security Legislation Monitor Act 2010* (Cth).
- <sup>161</sup> Independent National Security Legislation Monitor, Declassified Annual Report, 20 December 2012. At <https://www.inslm.gov.au/sites/default/files/inslm-annual-report-2012.pdf>.
- <sup>162</sup> Independent National Security Legislation Monitor, Declassified Annual Report, 20 December 2012, p 13.
- <sup>163</sup> Independent National Security Legislation Monitor, Declassified Annual Report, 20 December 2012, p 14.
- <sup>164</sup> Council of Australian Governments Review of Counter-Terrorism Legislation (2014), at [224]. At <https://www.ag.gov.au/sites/default/files/2020-03/Final%20Report.PDF>.
- <sup>165</sup> The control order was sought after Mr Thomas' successful appeal, but before his retrial when he was convicted of the passport offence.
- <sup>166</sup> *Jabbour v Thomas* [2006] FMCA 1286 at [11].
- <sup>167</sup> *R v Thomas* [2006] VSCA 165 (Maxwell P, Buchanan and Vincent JJA).
- <sup>168</sup> *Thomas v Mowbray* (2007) 233 CLR 307.
- <sup>169</sup> Independent National Security Legislation Monitor, Declassified Annual Report, 20 December 2012, p 20.
- <sup>170</sup> Independent National Security Legislation Monitor, Declassified Annual Report, 20 December 2012, p 17.



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- <sup>171</sup> Independent National Security Legislation Monitor, Declassified Annual Report, 20 December 2012, p 13.
- <sup>172</sup> United Nations Human Rights Committee, *Hicks v Australia*, Communication No. 2005/2010, UN Doc CCPR/C/115/D/2005/2010 (19 February 2016) at [4.8].
- <sup>173</sup> *Hicks v United States* CMCR 13-004 (18 February 2015).
- <sup>174</sup> Independent National Security Legislation Monitor, Declassified Annual Report, 20 December 2012, pp 21–22; *Jabbour v Hicks* [2007] FMCA 2139 at [26].
- <sup>175</sup> Independent National Security Legislation Monitor, Declassified Annual Report, 20 December 2012, p 44, Recommendation II/4.
- <sup>176</sup> Council of Australian Governments Review of Counter-Terrorism Legislation (2014), at [216].
- <sup>177</sup> 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 [3.140].
- <sup>178</sup> Council of Australian Governments Review of Counter-Terrorism Legislation (2014), at [216].
- <sup>179</sup> Attorney-General's Department and Australian Federal Police, submission in response to questions from the PJCIS, 2018 review, p 11. At <https://www.aph.gov.au/DocumentStore.ashx?id=5447abfd-97eb-4433-8253-7e955db74537&subId=561854>.
- <sup>180</sup> Australian Federal Police, *Inquiry into AFP Powers (Division 3A Part IAA of the Crimes Act 1914 and Divisions 104 and 105 of the Criminal Code)*, submission to the PJCIS, August 2020, at [6]. See also Independent National Security Legislation Monitor, *Annual Report 2018–19*, p 6.
- <sup>181</sup> Independent National Security Legislation Monitor, Declassified Annual Report, 20 December 2012, p 31.
- <sup>182</sup> Independent National Security Legislation Monitor, Declassified Annual Report, 20 December 2012, p 31.
- <sup>183</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [42].
- <sup>184</sup> *Finding into Death with Inquest: Ahmad Numan Haider* (Coroners Court of Victoria, 31 July 2017).
- <sup>185</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [48].
- <sup>186</sup> Commonwealth Director of Public Prosecutions, *Discontinuance of conspiracy charge against Mr Harun Causevic*, Media Statement, 25 August 2015, at <https://www.cdpp.gov.au/news/media-statement-discontinuance-conspiracy-charge-against-mr-harun-causevic>.
- <sup>187</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [1] and [169] and see Schedule 2 to the Interim Control Order annexed to the judgment.
- <sup>188</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [63].
- <sup>189</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [64].
- <sup>190</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [87].
- <sup>191</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [98].
- <sup>192</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [105].
- <sup>193</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [168].
- <sup>194</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [111] and [133].
- <sup>195</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [111] and [133].
- <sup>196</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [63], [131] and [133].
- <sup>197</sup> 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 [3.37].

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- <sup>198</sup> Council of Australian Governments Review of Counter-Terrorism Legislation (2014), at [220].
- <sup>199</sup> Elizabeth Byrne and Matthew Doran, 'Part of Witness K lawyer Bernard Collaery's trial will be heard in secret, judge rules' ABC News, 26 June 2020, at <https://www.abc.net.au/news/2020-06-26/part-of-witness-k-lawyer-bernard-collaery-trial-heard-in-secret/12397584>.
- <sup>200</sup> Council of Australian Governments Review of Counter-Terrorism Legislation (2014), at [216].
- <sup>201</sup> Council of Australian Governments Review of Counter-Terrorism Legislation (2014), at [218].
- <sup>202</sup> *McCartney v Abdirahman-Khalif* [2019] FCA 2218 (Charlesworth J) at [23].
- <sup>203</sup> *Abdirahman-Khalif v The Queen* [2019] SASCFC 133 (Kourakis CJ) at [8]; (Parker J) at [240].
- <sup>204</sup> *Abdirahman-Khalif v The Queen* [2019] SASCFC 133 (Kourakis CJ and Parker J; Kelly J dissenting).
- <sup>205</sup> *McCartney v Abdirahman-Khalif (No 2)* [2020] FCA 1002 (Charlesworth J) at [103].
- <sup>206</sup> *Abdirahman-Khalif v The Queen* [2019] SASCFC 133 (Kourakis CJ) at [9]–[14], [68] and [90] (Parker J) at [271].
- <sup>207</sup> *McCartney v Abdirahman-Khalif* [2019] FCA 2218 (Charlesworth J).
- <sup>208</sup> *McCartney v Abdirahman-Khalif (No 2)* [2020] FCA 1002 (Charlesworth J).
- <sup>209</sup> *The Queen v Abdirahman-Khalif* [2020] HCATrans 038.
- <sup>210</sup> *McCartney v Abdirahman-Khalif* [2019] FCA 2218 (Charlesworth J) at [62].
- <sup>211</sup> *McCartney v Abdirahman-Khalif* [2019] FCA 2218 (Charlesworth J) at [70].
- <sup>212</sup> *McCartney v Abdirahman-Khalif* [2019] FCA 2218 (Charlesworth J) at [33], [48](11) and [77].
- <sup>213</sup> *McCartney v Abdirahman-Khalif* [2019] FCA 2218 (Charlesworth J) at [78].
- <sup>214</sup> *McCartney v Abdirahman-Khalif (No 2)* [2020] FCA 1002 (Charlesworth J) at [104]–[106], [129] and [175].
- <sup>215</sup> *McCartney v Abdirahman-Khalif (No 2)* [2020] FCA 1002 (Charlesworth J) at [145].
- <sup>216</sup> *McCartney v Abdirahman-Khalif (No 2)* [2020] FCA 1002 (Charlesworth J) at [167].
- <sup>217</sup> *McCartney v Abdirahman-Khalif (No 2)* [2020] FCA 1002 (Charlesworth J) at [83]–[97].
- <sup>218</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (November 2016) at [3.121].
- <sup>219</sup> Independent National Security Legislation Monitor, *Declassified Annual Report*, 20 December 2012, p 13.
- <sup>220</sup> *McCartney v EB (No 2)* [2019] FCA 184 (Wigney J); *Booth v Murat Kaya* [2020] FCA 25 (Anastassiou J); *Booth v Namoa (No 2)* [2020] FCA 73 (Rares J); *Booth v Naizmand* [2020] FCA 244 (Bromwich J); *Booth v Thorne* [2020] FCA 445; *Booth v Dacre* [2020] FCA 751 (White J); *Booth v Granata* [2020] FCA 768 (White J); *Booth v Kadir Kaya (No 2)* [2020] FCA 1119 (Anastassiou J); *Booth v Khazaal* [2020] FCA 1241 (Wigney J).
- <sup>221</sup> Independent National Security Legislation Monitor, *Control Order Safeguards – Part 2* (April 2016), at [10.3]–[10.4].
- <sup>222</sup> Attorney-General's Department and Australian Federal Police, *Joint supplementary submission and responses to questions on notice*, 2018 PJCS review, p 15, at <https://www.aph.gov.au/DocumentStore.ashx?id=21ad9998-5d4e-422e-8f72-cdc0623e1d4b&subId=561854>.
- <sup>223</sup> Independent National Security Legislation Monitor, *Control Order Safeguards – Part 2* (April 2016), at [10.5].
- <sup>224</sup> Independent National Security Legislation Monitor, *Control Order Safeguards – Part 2* (April 2016), at [11.3].
- <sup>225</sup> Attorney-General's Department and Australian Federal Police, *Joint supplementary submission and responses to questions on notice*, 2018 PJCS review, pp 15–16, at

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<https://www.aph.gov.au/DocumentStore.ashx?id=21ad9998-5d4e-422e-8f72-cdc0623e1d4b&subId=561854>.

- <sup>226</sup> Law Council of Australia, *Adequacy of safeguards relating to the control order regime*, submission to the Independent National Security Legislation Monitor, 30 September 2015, pp 24–25. At [https://www.inslm.gov.au/sites/default/files/08\\_LCA\\_submission.pdf](https://www.inslm.gov.au/sites/default/files/08_LCA_submission.pdf).
- <sup>227</sup> *Counter-Terrorism Legislation Amendment Act (No 1) 2016* (Cth).
- <sup>228</sup> *Criminal Code* (Cth), s 105.4(4).
- <sup>229</sup> *Criminal Code* (Cth), ss 11.5, 101.1 and 101.6.
- <sup>230</sup> *Criminal Code* (Cth), s 101.4.
- <sup>231</sup> *Criminal Code* (Cth), s 105.4(6).
- <sup>232</sup> *Crimes Act 1914* (Cth), s 3F.
- <sup>233</sup> *Criminal Code* (Cth), s 105.5.
- <sup>234</sup> *Criminal Code* (Cth), ss 100.1 (definition of ‘issuing authority’), 105.4, 105.7, 105.8.
- <sup>235</sup> *Criminal Code* (Cth), ss 105.2, 105.12.
- <sup>236</sup> *Criminal Code* (Cth), s 105.18(2).
- <sup>237</sup> *Criminal Code* (Cth), s 105.12(5).
- <sup>238</sup> *Criminal Code* (Cth), s 105.35.
- <sup>239</sup> *Criminal Code* (Cth), s 105.37.
- <sup>240</sup> *Criminal Code* (Cth), s 105.36.
- <sup>241</sup> *Criminal Code* (Cth), ss 105.14A–105.16.
- <sup>242</sup> *Criminal Code* (Cth), s 105.35(2).
- <sup>243</sup> *Criminal Code* (Cth), s 105.38.
- <sup>244</sup> *Criminal Code* (Cth), s 105.39.
- <sup>245</sup> *Criminal Code* (Cth), s 105.42.
- <sup>246</sup> *Criminal Code* (Cth), s 105.51(4); *Administrative Decisions (Judicial Review) Act 1977* (Cth), Sch 1, paragraph (dac).
- <sup>247</sup> *Criminal Code* (Cth), ss 105.51(5)–(9).
- <sup>248</sup> Department of Home Affairs, *Control orders, preventative detention orders, continuing detention orders, and powers in relation to terrorist acts and terrorism offences*, annual reports for 2017–18 and 2018–19 available at <https://www.nationalsecurity.gov.au/Media-and-publications/Annual-Reports/Pages/default.aspx>.
- <sup>249</sup> Australian Federal Police, *2017 Counter-terrorism powers review*, submission to the PJCIS (October 2017), at [5].
- <sup>250</sup> Independent National Security Legislation Monitor, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, 7 September 2017, at [3.40] and the legislation described in footnote 31.
- <sup>251</sup> Transcript of Proceedings, Public Hearing, INSLM Statutory Deadline Reviews 2017, Canberra, 19 May 2017, p 20 (Mr Michael Phelan, Deputy Commissioner for National Security, Australian Federal Police). At <https://www.inslm.gov.au/sites/default/files/INSLM-transcript-public-hearing-19-may-2017.pdf>.
- <sup>252</sup> Dr Jessie Blackbourn, Professor Andrew Lynch, Dr Nicola McGarrity, Dr Tamara Tulich and Professor George Williams AO, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, submission to the PJCIS (22 September 2017), p 5.

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- <sup>253</sup> Ombudsman New South Wales, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002 Review period 2014-16* (March 2017), p 10. At [https://www.ombo.nsw.gov.au/\\_data/assets/pdf\\_file/0005/45455/Preventative-detention-and-covert-search-warrants-Review-of-Parts-2A-and-3-of-the-Terrorism-Police-Powers-Act-2002..pdf](https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0005/45455/Preventative-detention-and-covert-search-warrants-Review-of-Parts-2A-and-3-of-the-Terrorism-Police-Powers-Act-2002..pdf).
- <sup>254</sup> Ombudsman New South Wales, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002 Review period 2014-16* (March 2017), p 11.
- <sup>255</sup> Ombudsman New South Wales, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002 Review period 2014-16* (March 2017), p 12.
- <sup>256</sup> Ombudsman New South Wales, *Preventative detention and covert search warrants: Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002 Review period 2014-16* (March 2017), p 17.
- <sup>257</sup> New South Wales Department of Justice, *Statutory Review of the Terrorism (Police Powers) Act 2002* (June 2018), p 46. At <https://www.justice.nsw.gov.au/justicepolicy/Documents/statutory-review-of-the-tpa.pdf>.
- <sup>258</sup> *Terrorism (Police Powers) Act 2002* (NSW), 26ZS.
- <sup>259</sup> *Cruse v State of Victoria* (2019) 59 VR 241 (Richards J) at [117].
- <sup>260</sup> *Cruse v State of Victoria* (2019) 59 VR 241 (Richards J) at [120]; *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [50].
- <sup>261</sup> *Cruse v State of Victoria* (2019) 59 VR 241 (Richards J) at [112].
- <sup>262</sup> *R v Besim* [2016] VSC 537 (Croucher J) at [116]–[119].
- <sup>263</sup> *R v Besim* [2016] VSC 537 (Croucher J) at [123].
- <sup>264</sup> *R v Besim* [2016] VSC 537 (Croucher J) at [117].
- <sup>265</sup> *R v Besim* [2017] VSCA 158 (Warren CJ, Weinberg and Kaye JJA).
- <sup>266</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [50].
- <sup>267</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [53].
- <sup>268</sup> *Gaughan v Causevic (No 2)* [2016] FCCA 1693 at [55].
- <sup>269</sup> 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 [4.48].
- <sup>270</sup> 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 [4.43].
- <sup>271</sup> Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) at [98].
- <sup>272</sup> 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 [4.57].
- <sup>273</sup> *Criminal Code* (Cth), s 101.4.
- <sup>274</sup> *Crimes Act 1914* (Cth), s 3R.
- <sup>275</sup> *Criminal Code* (Cth), s105.7(2).
- <sup>276</sup> Attorney-General's Department and Australian Federal Police, *Joint supplementary submission and responses to questions on notice*, 2018 PJCIS review, p 3.

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- <sup>277</sup> 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 [4.48], Box 4.1.
- <sup>278</sup> Australian Human Rights Commission, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)*, submission to the PJCIS (12 October 2016). At <https://www.aph.gov.au/DocumentStore.ashx?id=32397a66-a179-4a07-a5fb-ab60b776676f&subId=414693>.
- <sup>279</sup> *Criminal Code* (Cth) ss 105A.5(1)–(2).
- <sup>280</sup> *Criminal Code* (Cth) s 105A.7(1)(b).
- <sup>281</sup> *Criminal Code* (Cth) s 105A.7(1)(c).
- <sup>282</sup> *Criminal Code* (Cth) s 105A.7(3).
- <sup>283</sup> *Criminal Code* (Cth) s 105A.6.
- <sup>284</sup> *Criminal Code* (Cth) s 105A.2.
- <sup>285</sup> *Criminal Code* (Cth) ss 105A.7(5) and (6), and 105A.5(2)(b).
- <sup>286</sup> *Criminal Code* (Cth) s 105A.4.
- <sup>287</sup> *Criminal Code* (Cth) ss 105A.10–105A.12.
- <sup>288</sup> *Criminal Code* (Cth) s 105A.16.
- <sup>289</sup> *Criminal Code* (Cth) s 105A.17.
- <sup>290</sup> Dan Oakes, *Terrorist prisoner Abdul Nacer Benbrika could be kept in detention after sentence expires*, ABC Investigations, 28 July 2020, at <https://www.abc.net.au/news/2020-07-28/terrorist-prisoner-benbrika-could-be-kept-in-detention/12474720>.
- <sup>291</sup> *R v Benbrika* [2009] VSC 21 at [247] (Bongiorno J); *Benbrika v R* (2011) 29 VR 593 at [566]–[567] (Maxwell P, Nettle and Weinberg JJA).
- <sup>292</sup> For example: *McCartney v EB (No 2)* [2019] FCA 184 (Wigney J); *Booth v Murat Kaya* [2020] FCA 25 (Anastassiou J); *Booth v Namoa (No 2)* [2020] FCA 73 (Rares J); *Booth v Thorne* [2020] FCA 445; *Booth v Dacre* [2020] FCA 751 (White J); *Booth v Granata* [2020] FCA 768 (White J); *Booth v Kadir Kaya (No 2)* [2020] FCA 1119 (Anastassiou J); *Booth v Khazaal* [2020] FCA 1241 (Wigney J).
- <sup>293</sup> *Criminal Code* (Cth) s 105A.3.
- <sup>294</sup> Department of Home Affairs, Attorney-General's Department and Australian Federal Police, *Joint-agency supplementary submission – Review of AFP Powers – Division 105A*, submission to the PJCIS, 4 September 2020, Attachment B.
- <sup>295</sup> *R v Betka* [2020] NSWSC 77 at [38]–[41] (Harrison J).
- <sup>296</sup> Australian Human Rights Commission, *Review of the 'declared areas' provisions*, submission to the PJCIS, 28 August 2020 at [7]. At <https://www.aph.gov.au/DocumentStore.ashx?id=17e06008-e0f9-491e-98f0-1913b835392a&subId=691220>.
- <sup>297</sup> Sentencing Advisory Council (Victoria), *High Risk Offenders: Post-Sentence Supervision and Detention* (2007), pp 11–16, at <https://www.sentencingcouncil.vic.gov.au/publications/high-risk-offenders-final-report>; NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), pp 20–29, at [http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing\\_Serious\\_Violent\\_Offenders/online%20final%20report%20hrvo.pdf](http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/online%20final%20report%20hrvo.pdf).
- <sup>298</sup> *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 623 [124]–[125] (most footnotes omitted).



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- <sup>299</sup> Sentencing Advisory Council (Victoria), *High Risk Offenders: Post-Sentence Supervision and Detention* (2007), pp 12-13, at <https://www.sentencingcouncil.vic.gov.au/publications/high-risk-offenders-final-report> (viewed 12 October 2016).
- <sup>300</sup> NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), pp 21-22, at [http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent\\_council\\_index/publications/completed\\_projects/svo/svo.aspx](http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent_council_index/publications/completed_projects/svo/svo.aspx) (viewed 12 October 2016).
- <sup>301</sup> NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), pp 22-26, at [http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent\\_council\\_index/publications/completed\\_projects/svo/svo.aspx](http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent_council_index/publications/completed_projects/svo/svo.aspx) (viewed 12 October 2016).
- <sup>302</sup> *New South Wales v Wainwright (Preliminary)* [2019] NSWSC 1603.
- <sup>303</sup> *Crimes (High Risk Offenders) Act 2006* (NSW), s 9(3)(d).
- <sup>304</sup> *New South Wales v Wainwright (Preliminary)* [2019] NSWSC 1603 at [40].
- <sup>305</sup> *New South Wales v Wainwright (Preliminary)* [2019] NSWSC 1603 at [51].
- <sup>306</sup> *New South Wales v Wainwright (Preliminary)* [2019] NSWSC 1603 at [51].
- <sup>307</sup> *State of New South Wales v Wainwright (Final)* [2020] NSWSC 104.
- <sup>308</sup> For example, *Criminal Procedure Act 1989* (NSW), s 62(1)(b)–(c), which is picked up for the prosecution of federal offences in New South Wales as a result of the *Judiciary Act 1903* (Cth), s 68.
- <sup>309</sup> For example, *AJ v The Queen* (2010) 32 VR 614 at [22]–[28] (Weinberg and Bongiorno JJA, Buchanan JA agreeing); *Mallard v The Queen* (2005) 224 CLR 125; *Grey v The Queen* [2001] HCA 65.
- <sup>310</sup> *Criminal Code* (Cth), ss 104.2(3)(aa)(ii), 104.3(d)(ii).
- <sup>311</sup> *Criminal Code* (Cth), s 104.12A(2)(a)(ii).
- <sup>312</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (November 2016) at [4.87] and [4.90]. At [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/HRTOBill/Report-PDF](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/HRTOBill/Report-PDF).
- <sup>313</sup> *Intelligence Services Act 2001* (Cth), s 29(1)(cb).
- <sup>314</sup> Department of Home Affairs, Attorney-General's Department and Australian Federal Police, *Joint-agency supplementary submission – Review of AFP Powers – Division 105A*, submission to the PJCS, 4 September 2020, pp 6 and 13–14.
- <sup>315</sup> *VERA-2R Instrument, Strengths and limitations*, at <https://www.vera-2r.nl/vera-2r-instrument/strengths-and-limitations/index.aspx>.
- <sup>316</sup> Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, *Report 2* (2017), p 119.
- <sup>317</sup> D Elaine Pressman and John Flockton, 'Calibrating risk for violent political extremists and terrorists: the VERA 2 structured assessment' (2012) 14(4) *The British Journal of Forensic Practice* 237 at 245-246.
- <sup>318</sup> NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), p 28, at [http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent\\_council\\_index/publications/completed\\_projects/svo/svo.aspx](http://www.sentencingcouncil.justice.nsw.gov.au/Pages/sent_council_index/publications/completed_projects/svo/svo.aspx).

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- <sup>319</sup> NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), pp 130–131.
- <sup>320</sup> Australian Human Rights Commission, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)*, submission to the PJCIS (12 October 2016) at [81]–[86].
- <sup>321</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (November 2016) at [3.187].
- <sup>322</sup> Independent National Security Legislation Monitor, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, 7 September 2017, at [9.40]–[9.42].
- <sup>323</sup> 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 [3.140].
- <sup>324</sup> Australian Government, *Response to the Committee's review of police stop, search and seizure powers, the control order regime and the preventative detention order regime, and to the INSLM Statutory Deadline Reviews*, 24 May 2018, pp 3 and 8–9, at <https://www.aph.gov.au/DocumentStore.ashx?id=ed7b9dc5-07b4-4672-a2e6-1b015c1248dd>.
- <sup>325</sup> Proposed ss 105A.7B(3) and (5).
- <sup>326</sup> Independent National Security Legislation Monitor, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*, 7 September 2017, at [9.44]–[9.47].
- <sup>327</sup> 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 [3.140].
- <sup>328</sup> Australian Government, *Response to the Committee's review of police stop, search and seizure powers, the control order regime and the preventative detention order regime, and to the INSLM Statutory Deadline Reviews*, 24 May 2018, pp 3 and 8–9, at <https://www.aph.gov.au/DocumentStore.ashx?id=ed7b9dc5-07b4-4672-a2e6-1b015c1248dd>.