The Committee Secretary,
Parliamentary Joint Committee on Intelligence & Security
PO Box 6021
Parliament House
Canberra ACT 2600

10 September 2020

Dear Committee Secretary,

RE: Review of AFP Powers

The Australian National University Law Reform and Social Justice Research Hub (ANU LRSJ Research Hub) welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence & Security (PJCIS) concerning the ongoing review of AFP Powers. These powers are contained in the *Crimes Act 1914* (**the Act**) and the *Commonwealth Criminal Code* (**the Code**).

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law. The ANU LRSJ has partnered with Alexandra Touw to author this submission.

Our submissions reflect our views as researchers, and are not the institutional views of the Australian National University or the University of Sydney.

Summary of Recommendations:

1. The Committee expressly assess the proportionality of powers granted to the AFP in undertaking this inquiry.
2. The Committee consider whether any powers or responsibilities afforded to the AFP are duplicated with other security or intelligence agencies. If so, those powers or responsibilities should be clearly delineated.
3. Section 3F of the Act be amended to include similar protections to those contained within s 180T of the *Telecommunications (Interception and Access Act) 1979* (Cth).
4. The Act is amended to expressly incorporate protections afforded to journalists in the Minister's Direction.
5. Section 3EUA of the Act be repealed.
6. The Act is amended to require the AFP to surrender materials collected during a search not authorised by a valid warrant or otherwise authorised under the common law.
7. Div 104 of the *Commonwealth Criminal Code* be repealed.
8. In the alternative, that div 104 is amended to clarify the operation and scope of the control orders.

9. That an inquiry is held into the success of rehabilitation programs in prison for terrorism offenders to minimise the need to seek orders under divs 104 and 105A of the Code (or their future equivalents).
10. That the schemes contained in divs 104 and 105A are merged into a single scheme contained within div 105A pending an assessment of the ongoing need for a CDO regime with regard to terrorism offenders.
11. That the Committee consider referring the issue of unnecessary overlap with state law to the National Cabinet.

We are happy to provide further comment clarifying or expanding on these submissions. If further information is required, please contact us [redacted]

On behalf of the ANU LRSJ Research Hub
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Introduction

This submission focuses on addressing the implications of the operation of powers contained within Division 3A of Part IAA of the *Crimes Act 1914* (Cth) (**the Act**), and Divisions 104, 105 and 105A of the *Commonwealth Criminal Code*. In structuring these submissions we focused our analysis around the *proportionality* of the powers contained within those divisions.

1. Balancing AFP Powers and Individual Liberty

As we have previously submitted to this committee, intelligence and security agencies have accepted (in the context of counter-terrorism) that ensuring security measures are proportionate to the threat they aim to prevent is key in ensuring that powers are appropriate and do not unduly impinge individual liberty and privacy.[1] Such considerations should also extend to the AFP both in undertaking their day-to-day duties, and also in reference to their powers and responsibilities in relation to national security and counter-terrorism. We note that in the context of counter-terrorism, the AFP has less extensive powers than other security agencies – most notably ASIO.[2] This is appropriate. The AFP has less direct responsibility in combating national security threats, and unnecessary duplication of broad powers should be avoided. We recommend to the Committee that where a duplicated power or responsibility is identified, that power or responsibility should be exercised by only a single security agency or police body so that a clear delineation in responsibility is present, and so that appropriate independent oversight remains.[3] In particular, we want to avoid situations where an agency can avoid responsibility for an action by "passing the buck".

In determining whether powers granted to the AFP are proportionate, it is critical to assess both the provisions themselves and any actions taken under the divisions. We note that the use of these powers is rare and so it is difficult to assess this second question. The general assessment of the proportionality of counter-terrorism powers is also challenged by limited publicly available information regarding the precise scope of the threat and operational matters – this heightens the need for appropriate scrutiny by parliamentary committees who are privy to information not within the public domain.

[1] Australian Security Intelligence Organisation, Submission No 3 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review into the effectiveness of the Australian Security Intelligence Organisation Amendment Bill 2020* (29 May 2020) 2; ANU Law Reform and Social Justice Research Hub, Submission No 17 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review into the effectiveness of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020* (30 April 2020); ANU Law Reform and Social Justice Research Hub, Submission No 24 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Australian Security Intelligence Organisation Amendment Bill 2020* (26 June 2020).

[2] For example many of their powers are limited to particular places that the AFP is responsible for.

[3] This delineation could, where appropriate be present in an executive order or direction to agencies – however greater transparency would occur if this was expressed in legislation.

Recommendation 1: The Committee expressly assess the proportionality of powers granted to the AFP in undertaking this inquiry.

Recommendation 2: The Committee consider whether any powers or responsibilities afforded to the AFP are duplicated with other security or intelligence agencies. If so, those powers or responsibilities should be clearly delineated.

In undertaking a proportionality assessment, the Committee should consider whether less extensive powers would achieve the same goals, and expressly consider the weight of the threat and the likelihood the measures will prevent the threat from occurring.

2. Concerns Regarding AFP Warrant Powers

Warrants sought against journalists

In 2018, the Commonwealth Parliament amended the Act to extend the general warrant scheme contained in Division 2. In particular, the search powers contained in s 3F were extended to include powers to 'add, copy, delete or alter … data' found on devices.[4] These changes were motivated by concerns of misuse and exploitation of technology, such as secure messaging services, by criminal syndicates and terrorists.[5]

When the powers contained in this division are used in conjunction with the powers in relation to terrorist acts and terrorism offences in Division 3A, they provide an important means for law enforcement agencies to combat national security threats. Nonetheless, an appropriate balance must be struck to ensure that the ability of key actors in civil society to fulfill their critical functions

[4] The amendments to the *Crimes Act 1914* were enacted by the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018*, Schedule 3. See especially item 3, which introduced s3F(2A)-(2E). See further Josh Taylor, 'Australia's anti-encryption laws being used to bypass journalist protections, expert says', *The Guardian* (online, 8 July 2019) <https://www.theguardian.com/australia-news/2019/jul/08/australias-anti-encryption-laws-being-used-to-bypass-journalist-protections-expert-says>.

[5] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 September 2018, 9671-2 (Peter Dutton, Minister for Home Affairs) <https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/6be1e50a-06c5-4722-8ba8-9036615ea93c/toc_pdf/House%20of%20Representatives 2018 09 20 6575 Official.pdf;fileType=application%2Fpdf>. The Minister stated that: 'The AFP advise that encrypted communications have directly impacted around 200 operations conducted by the AFP in the last 12 months, all of which related to the investigation of serious criminal offences carrying a penalty of seven years imprisonment or more'.

is not disproportionately hindered. In relation to journalists, the current legislative scheme does not currently achieve this balance.

The introduction of this scheme poses particular problems for journalists as it does not contain safeguards present in other warrant schemes to ensure they are able to freely obtain and publish information. For example, under the *Telecommunications (Interception and Access) Act 1979* (Cth) (**the TIA Act**), to issue a warrant against a journalist the decision-maker must consider whether the public interest in protecting the confidentiality of the identification of the sources which may be affected is outweighed by the public interest in issuing the warrant. This is done by reference to numerous factors including whether reasonable attempts have been made to obtain the information by other means and the likely extent to which the information would assist the organisation to perform its functions.[6] Without the provision of similar safeguards in the *Crimes Act*, the latter Act can be used to avoid the protective restrictions provided by other regimes and erode the freedom of journalists to investigate issues in the public interest.

The potential consequences of this omission have been demonstrated through the recent case studies of the AFP raids on the ABC and on the home of the News Corp journalist Annika Smethurst.[7] Although the cases do not relate directly to terrorism, in both the journalists were investigating matters relating to national security - and indeed matters of national significance. They also demonstrate the clear use of the extended powers contained within the general warrant scheme under the *Crimes Act* to gain access to information on journalists' sources.[8] We note that there is no suggestion that the police acted beyond power in seeking a warrant under s 3F instead of using powers contained in other Federal Acts.

Nevertheless, these cases are concerning for two reasons. First, the ability of the AFP to conduct raids on journalists' property without specific safeguards may discourage journalists from publishing information about unlawful government actions in the public interest. In relation to these cases, both News Corp and the ABC have complained of the intimidatory effect of AFP raids on the property of journalists.[9] As highlighted by the Australian Press Council response to the raids, it is particularly important for journalists to be protected from search warrants because of their function to scrutinise those in power and inform citizens of the truth.[10] Although the line between

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[6] *TIA Act* s 180T.
[7] Paul Karp, 'Federal police raid home of News Corp journalist Annika Smethurst', *The Guardian* (online, 4 June 2019) <https://www.theguardian.com/australia-news/2019/jun/04/federal-police-raid-home-of-news-corp-journalist-annika-smethurst>.
[8] Josh Taylor, 'Australia's anti-encryption laws being used to bypass journalist protections, expert says', *The Guardian* (online, 8 July 2019) <https://www.theguardian.com/australianews/2019/jul/08/australias-anti-encryption-laws-being-used-to-bypass-journalist-protections-expert-says>.
[9] For discussion see Karp (n 6): News Corp labelled the raids on the home of Annika Smethurst a 'dangerous act of intimidation'. See further statements made to the Senate Press Freedom Inquiry by Gaven Morris, the Director of the ABC News who stated that: 'straight away following last year's raid the ABC had sources withdraw from stories – meaning matters remain concealed from public view': Gaven Morris, 'ABC Statement to the Senate Press Freedom Inquiry', *ABC News* (online, 12
[10] Australian Press Council, 'Australian Press Council response to AFP raids' (Media Release, 5 June 2019) <https://www.presscouncil.org.au/australian-press-council-response-to-afp-raids/>. See further Media, Entertainment and Arts Alliance, 'MEAA Journalist Code of Ethics' (2020) <https://www.meaa.org/meaa-media/code-of-ethics>.

publishing in the public interest and leaking state secrets may become blurred when dealing with complex national security situations like terrorist threats, the limited availability of public information (and therefore limited accountability and transparency) heightens the importance of accountability through journalism.

Second, even if the validity of a warrant is successfully challenged, law enforcement officials are not necessarily required to return any property taken, leaving journalists vulnerable to further investigation. This was the case with Smethurst's High Court challenge to the validity of the search warrant used by the AFP to justify their search of her home.[11] Although the Court was unanimous in finding that the search warrant was invalid, injunctive relief was refused by a narrow majority. This meant that the AFP was not prevented from retaining the material seized in the raid.[12]

While these search powers have not, to date, been used in relation to journalists reporting on matters related to terrorism, it is possible the powers could be used to try and compel journalists to reveal their sources for a counter-terrorism investigation. While accepting that it may in some cases be genuinely necessary to seek that information, we would encourage the adoption of legislative protections within the general warrant scheme of a similar form to the protections contained within s 180T of the *TIA Act*. It is unclear why special protections are afforded with respect to warrants seeking metadata that would identify a source when general warrant powers that enable data gathering which could similarly reveal a journalist's source are not afforded the same protections. Additionally, there is a ministerial direction issued by Minister Dutton requiring the AFP to, among other things, 'take into account the importance of a free and open press in Australia's democratic society'.[13] This direction could be amended with limited oversight or accountability (other than public pressure). To strengthen this safeguard, the measures contained within the Direction should be incorporated into the Act.

Recommendation 3: Section 3F of the Act be amended to include similar protections to those contained within s 180T of the *TIA Act*.

Recommendation 4: The Act is amended to expressly incorporate protections afforded to journalists in the Minister's Direction.

Warrantless searches

We mirror and support the concerns raised by earlier submitters to this inquiry,[14] in being extremely concerned about the ability for police officers to conduct searches without a warrant.

[11] *Smethurst v Commissioner of Police* [2020] HCA 14.
[12] Ibid.
[13] Jade Macmillan, 'Peter Dutton orders AFP to consider importance of press freedom before investigating reporters', ABC News (online, 9 August 2019) <https://www.abc.net.au/news/2019-08-09/peter-dutton-orders-afp-press-freedom-investigating-journalists/11401108>.
[14] Jessie Blackbourn et al, Submission No 5 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of AFP Powers* (9 September 2020).

We accept that warrant schemes need to be efficient, but contend that efficiency should not come at the cost of fundamental common law rights or rule of law values. As noted in earlier submissions, 'searches of private property violate the rights to home and privacy'.[15] In this context we agree that searches should be subject to *independent* judicial oversight.[16] This step allows an appropriate balancing of considerations by a trained judicial officer.

In assessing the power to conduct a warrantless search utilising a proportionality framework, it is not clear why a different system creating an expedited warrant scheme would not satisfy any operational or security need.[17] In this we agree with earlier submitters regarding the likelihood that the creation of a duty judge registry to facilitate rapid assessment of search orders where needed would satisfy any security need - and note that there is no evidence that the powers contained in s 3EUA have been used (or needed) in any case to date.[18] In addition to the points made by Blackbourn et al, we raise one additional concern: the implications arising from the recent *Smethurst* case where a warrant has not been lawfully issued. As outlined above, even where a warrant is not validly issued, the *Smethurst* case allows the AFP to retain collected materials for further investigation. It is not clear how this ruling would apply to warrantless search powers if such powers were exercised in circumstances that do not meet the test set out in s 3EUA of the Act. In effect, it is possible that the finding the *Smethurst* case significantly weakens the (already limited) protection afforded by notifying an individual of a search as even where they are able to successfully challenge the search they may not be able to recover the material and may still be subject to further investigation.[19] In the case of warrantless searches, this could in effect grant the AFP a very broad search power, which even if used incorrectly may allow them to keep collected material.

Recommendation 5: Section 3EUA of the Act be repealed.

Recommendation 6: The Act is amended to require the AFP to surrender materials collected during a search not authorised by a valid warrant or otherwise authorised under the common law.

[15] Ibid 8.
[16] Such oversight is to be contrasted with proposed schemes in relation to ASIO where the Attorney-General would be empowered to authorise certain acts.
[17] Noting that the AFP retains common law rights of entry in certain circumstances.
[18] Blackbourn et al (n 14) 9.
[19] While the High Court did not deal with the question of admissibility, it is worth noting that it is extremely unlikely that the evidence collected in the Smethurst case would have been admissible. The admissibility of evidence arising from further investigation triggered by anything contained within those materials is less clear.

3. Proportionality, Transparency and Div 104 and 105A Powers

The need for and use of control orders

As outlined above, AFP powers and their use must be proportionate to the threat they are combating. Understandably there is an argument that we can never respond in a truly proportionate way to a terrorism threat because we do not understand the scope of it. However, such arguments, alongside similar rhetoric arguing that measures taken to fight terrorism are only harming terrorists (e.g. if you have nothing to hide you have nothing to fear), should be rejected. Agencies and legislative bodies must instead justify in a clear and transparent manner the grounds on which they seek extended powers. We emphasise again, as we have in past submissions, that expansive powers, and broad orders should not be implemented simply where a proportionality analysis becomes too much of an administrative burden.

In relation to control orders, we echo the concerns of Blackbourn et al, regarding their imposition. These orders are far-reaching and have been imposed with increasing frequency in the past year.[20] We note that in the AFP Report for 2018-2019, one interim control order was made and one control order was confirmed.[21] The AFP Report for 2019-2020 is not yet publicly available, however the list of cases contained in the submission by Blackbourn et al shows a marked increase in the number of control orders being sought and granted.

We recognise that there is an argument that control orders serve a necessary purpose in the case of offenders who have not rehabilitated during their period of incarceration. However, this argument is likely dealt with by powers contained in div 105A of the *Commonwealth Criminal Code*. In this context div 104 appears an unnecessary duplication, allowing both an additional attempt to impose conditions on offenders who have otherwise served the sentence imposed by a court but also appearing alongside further powers relating to Continuing Detention Orders. It is already of concern that the AFP can seek to keep offenders in prison (or impose significant limitations on their movement and freedoms) beyond the period of imprisonment they have already served. When sentencing federal offenders, including terrorism offenders, courts appropriately weigh and balance competing considerations including the need for specific and general deterrence, and an offender's prospects of rehabilitation. In this context, a court has already implicitly considered the threat posed by the offender. In relation to terrorism offenders we note that courts are currently affording very limited weight to an offender's antecedents and rehabilitative prospects and affording significant weight to general and specific deterrence.[22] Notably, Australian courts have applied UK case authority that held that:

[20] A table of cases was contained in the submission of Blackbourn et al (n 14) 16-18.
[21] Australian Department of Home Affairs, 'Control Orders, Preventative Detention Orders, Continuing Detention Orders, and Powers in Relation to Terrorist Acts and Terrorism Offences: Annual Report 2018-2019 (Report, 2019) <https://www.nationalsecurity.gov.au/Media-and-publications/Annual-Reports/Documents/annual-report-2018-19.pdf>.
[22] See generally, National Judicial College of Australia, 'Sentencing Terrorism Offenders' (3 July 2019) <https://csd.njca.com.au/principles-practice-categories-of-federal-offenders-sentencing-terrorism-offenders/>.

> [I]n passing sentence for the most serious terrorist offences, the object of the Court will be to punish, deter and incapacitate; rehabilitation is likely to play a minor (if any) part.[23]

Any additional punishment imposed due to orders sought under divs 104 and 105A is troubling given the strength and importance of principles such as protection from double jeopardy and double punishment. These concerns are heightened given the presence of state schemes that further overlap such as the *Terrorism (High Risk Offenders) Act 2017* (NSW). In combination, these provisions can give Federal and State authorities up to three attempts (before different courts) to limit the freedoms of individuals who courts have deemed have served the sentence that ought to be imposed for their crime. We therefore mirror the recommendation that div 104 be repealed in its entirety (noting that the only ground on which a control order may be sought is not referable to a sentence already served with respect of a terrorism offence, or that may be the subject of a future charge is vague and open-ended).

Recommendation 7: Div 104 of the Code be repealed.

Breadth of conditions that can be imposed under, and the threshold to grant a control order
In the event that the Committee decides that div 104 should not be repealed (or should not be repealed in its entirety), then we recommend that the operation of the division be clarified significantly.

Currently, the threshold for imposing control orders is unclear, and seemingly very broad, as are the conditions that can be imposed on offenders. For example, the Federal Court has noted that the conditions of the control orders imposed has, at times, been extremely, and unjustifiably, expansive.[24] This poses significant concerns from a rule of law perspective, and may also challenge the role and responsibilities of courts in applying clear legal tests. It is of even further concern given that the implementation of broad, untailored control orders minimises opportunities for rehabilitation that terrorism offenders could otherwise seek out.

[23] *R v Martin* [1998] EWCA Crim 3046 applied in Australia by: *Lodhi v The Queen* [2007] NSWCCA 360, [89]; *R v Mulahlilovic* [2009] NSWSC 1010, [42] (Whealy J); *R v Roche* [2005] WASCA 4, [112] (McKechnie J, Murray ACJ agreeing); *R v HG* [2018] NSWSC 1849, [106] (Bellew J); *Elomar v The Queen* [2014] NSWCCA 303, [78]; *DPP (Cth) v Besim* [2017] VSCA 158, [81]. For further discussion see National Judicial College of Australia, 'Sentencing Terrorism Offenders' (3 July 2019) <https://csd.njca.com.au/principles-practice-categories-of-federal-offenders-sentencing-terrorism-offenders/>.

[24] *Booth v Naizmand* [2020] FCA 244, [4]: 'Commander Booth sought to prevent Mr Naizmand from having contact with a friend he made in prison. I was not satisfied that this restriction was reasonably necessary, appropriate and adapted for the statutory purposes to which it was directed'.

Control orders have been implemented where 'it is not possible conclusively to say that she is not at risk of relapsing to or actually maintaining, the offending behaviours that led to her conviction although … there are many positive indications that she has abandoned those behaviours'.[25] Though there is a strong justification for not re-exposing offenders to the circumstances that led to their original offending, the control orders sought by the AFP under the current scheme seem to emphasise specific deterrence more than rehabilitation, in circumstances where offenders have already served the period for which they were sentenced. This is concerning, as, while noting the limited sample size, the current tests being applied in relation to the control order scheme are arguably weighted even more heavily against offenders than federal sentencing law. Given these comments from courts, it is clear that the application of the scheme could be better tailored to allow courts to weigh up positive factors including rehabilitative prospects.

If the scheme is retained, we recommend that the orders sought by the AFP be proportional to the risks posed by the offenders, with the division amended to expressly require the AFP and courts to consider the importance of providing offenders with the opportunity to be rehabilitated, including through providing access to programs after their time in prison, and by facilitating access to their family and friends where possible.

Further to the above, the present breadth of orders that may be sought can in some cases leave individuals completely isolated. In addition to the above amendments, if the division is maintained, we recommend the imposition of a minimum standard of access to communications technology given the importance of modern communications in being able to operate in broader society.

Recommendation 8: In the alternative, that div 104 is amended to clarify the operation and scope of the control orders. This could include requiring a more formal and tailored proportionality assessment in relation to the orders sought, better consideration of the need for and utility in rehabilitation and the imposition of a minimum standard of access to communications technology.

The operation of Div 105A

We mirror the recommendations made by Blackbourn et al regarding the need for clarification around the interoperability of div 105A and div 104. We further support the collapse of these divisions into a single scheme accepting that there is a need to be able to seek, in exceptional circumstances, measures to protect the community with regard to offenders who have not rehabilitated during their time in prison. We do however make a general note that further efforts should be made to help offenders rehabilitate in prison, including through the continued creation and testing of programs targeting terrorism offenders. Such a recommendation, unfortunately falls outside the scope of this review, and is something that should be investigated in further detail.

[25] *Booth v Namoa* [2019] FCA 2213, [42]

We repeat our concerns raised above that the creation of state schemes that allow for post detention orders with regard to terrorism offenders is another example of unnecessary and complex duplication. It could also lead to an unsavoury attempt to seek a CDO under both federal and state law with regard to the same offender (possibly in circumstances where an earlier control order has already been sought). We recommend the Committee considering whether it is appropriate to refer this duplication to the National Cabinet for consideration.

We also question whether the powers contained in div 105A are necessary given their lack of use to date. No applications pursuant to 105A having been made based on currently available information. At the time the measures were implemented it was hinted that such an order was going to be sought with respect to a particular offender. No such order eventuated. In circumstances where the division continues not to have been used, we consider it to be appropriate for the Committee to seek further information relating to the continued justification for the existence of the division. We note that if the division is not reducing a presently existing security threat (because for example it is unlikely that a court would find the requirements contained in the division met) then the division should be repealed in its entirety.

Recommendation 9: That an inquiry is held into the success of rehabilitation programs in prison for terrorism offenders to minimise the need to seek orders under divs 104 and 105A (or their future equivalents).

Recommendation 10: That the schemes contained in divs 104 and 105A are merged into a single scheme contained within div 105A pending an assessment of the ongoing need for a CDO regime with regard to terrorism offenders.

Recommendation 11: That the Committee consider referring the issue of unnecessary overlap with state law to the National Cabinet.

We would be happy to answer questions, or provide further submissions if requested by the committee and may be contacted [redacted]

Yours sincerely,

Andrew Ray, Alexandra Touw and Charlotte Michalowski