

Our reference: A23443502

23 June 2023

The Hon Peter Khalil MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email to: PJCIS@aph.gov.au

Dear Mr Khalil

Review of post-sentence terrorism orders: Division 105A of the *Criminal Code Act 1995*

Thank you for the opportunity to provide comments to the Parliamentary Joint Committee on Intelligence and Security (the Committee) in relation to the abovenamed review. My comments relate to my Office's oversight responsibilities as they pertain to Division 105A of the *Commonwealth Criminal Code* (the Criminal Code).

My Office has an indirect role in relation to continuing detention orders or extended supervision orders by virtue of our inspection responsibilities under the *Crimes Act 1914* (the Crimes Act), *Telecommunications Interception and Access Act 1979* (TIA Act), and the *Surveillance Devices Act 2006*. This includes oversight of the Australian Federal Police's (AFP) monitoring of compliance with extended supervision orders.

Under s3ZZUB of the Crimes Act we may inspect the AFP's records to determine the extent of the AFP's compliance with Part IAAB of the Crimes Act or use of monitoring warrants under that Part. Monitoring warrants can be used by the AFP to monitor compliance with supervisory orders under Part 5.3 of the Criminal Code, which includes interim and extended supervision orders under Division 105A. Our inspections examine the extent to which the AFP complies with the legislation in using monitoring powers and monitoring warrants. This involves engaging with AFP staff, inspecting relevant records, and reviewing the AFP's policies and processes to assess compliance with legislative requirements.

We must report the results of any inspections we conduct during the year in an annual report to the Attorney-General under s3ZZUH of the Crimes Act. Our report forms part of the Attorney-General's report under s 104.29 of the Criminal Code Act, which is tabled in Parliament and made public.

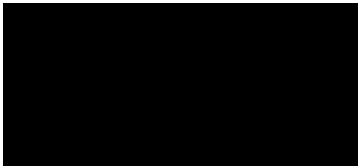
The AFP may also use powers under the TIA Act and Surveillance Devices Act, which we oversee, to monitor compliance with an extended supervisor order, and to inform a decision about whether to apply for an extended supervision order or a continuing detention order. A report on the findings from our inspections under the TIA Act, must be submitted to the Attorney-General by 30 September each year. A summary of our report is included in the Attorney-General's annual report to Parliament,

prepared under s93 of the TIA Act. We also produce a report for the Attorney-General by 31 March and 30 September each year on the findings from our inspections under the Surveillance Devices Act. These reports are tabled by the Attorney-General in Parliament and published on our website.

I note that the Independent National Security Legislation Monitor (INSLM) Review of Division 105A made a provisional recommendation to the Attorney-General that an independent statutory body be created to oversee specified authorities to ensure that extended supervision orders are administered uniformly and consistently.¹ The provisional recommendation seeks that the Attorney-General publish a report within the next three years responding on this issue. I acknowledge the importance of ensuring there is appropriate oversight of Division 105A and would be happy to assist with any consideration of this provisional recommendation.

If Committee staff would like to discuss this letter they may contact [REDACTED].
[REDACTED] If you or other members would like to speak with the Ombudsman, he or I are available on [REDACTED].

Yours sincerely



Penny McKay
Acting Commonwealth Ombudsman

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¹Commonwealth of Australia, Independent National Security Legislation Monitor (INSLM) *Report into the operation, effectiveness and implications of Division 105A of the Criminal Code Act 1995 (Cth) and any other provision of that Code as far as it relates to that Division* (4th INSLM, 3 March 2023) at [33].