

**SUBMISSION TO THE PARLIAMENTARY JOINT STANDING COMMITTEE**  
**ON SECURITY AND INTELLIGENCE**

**Introduction**

1. The essential position at common law has been that an arrest without warrant may be effected where a person is suspected on reasonable grounds of having committed a felony whereas for summary offences, the authority of a statute is required before there can be an arrest without warrant, and there cannot be an arrest without warrant on the mere suspicion that a misdemeanour has been committed.<sup>1</sup>
2. In Australia, powers of arrest are now substantially contained in variety of legislation at both the State and Federal level. Relevant to the present consideration of terrorism offences is the fact that traditional statutory powers of arrest are most often of general application even when the legislation deals with specific subject matter. For example, a power of arrest without warrant under s 352(1) of the *Crimes Act 1900* (NSW) is of general application to all offences irrespective of the statute creating them.<sup>2</sup> The result being that a range of traditional powers of arrest are generally available to be applied to specific terrorism offences.
3. In this submission, the description of the powers of arrest in State and Federal statute as ‘traditional powers of arrest’ is meant to denote that they are generally powers of sub-charge detention meant to apply before a person has been charged. Inside this category of sub-charge detention the traditional arrest powers are also generally divisible between arrest with or without warrant.
4. Halsbury’s Laws of Australia describes that arrest without warrant is generally permitted where the offender is caught committing the offence and the following paragraphs 4, 5 and 6 provide a condensed summary of what Halsbury’s Laws of Australia establishes are the central features of arrest without and with warrant in Australia; as a means of providing an overview of the general situation that this submission will refer to as ‘traditional powers of arrest’.<sup>3</sup> In some jurisdictions, arrest without warrant is also permitted where the person has previously committed an offence of a specified type and has not yet been tried.<sup>4</sup> A police officer may effect an arrest without a warrant

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<sup>1</sup> See *Nolan v Clifford* (1904) 1 CLR 429

<sup>2</sup> See *Maybury v Plowman* (1913) 16 CLR 468; 14 SR (NSW) 17; 20 ALR 9; *Ex parte Finney*; *Re Miller* (1936) 53 WN (NSW) 190; *Hazell v Parramatta City Council* [1968] 1 NSWLR 165; (1967) 87 WN (Pt 1) (NSW) 229.

<sup>3</sup> See *Crimes Act 1914* (Cth) ss 3W, 3Z; *Criminal Code* (NT) s 441; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 100; *Criminal Code* (QLD) ss 546, 548; *Police Powers and Responsibilities Act 2000* (QLD) s 198; *Criminal Law Consolidation Act 1935* (SA) s 271; *Criminal Code Act 1924* (TAS) s 27(1); *Crimes Act 1958* (VIC) s 458; *Criminal Investigation Act 2006* (WA) ss 127, 128. There are no equivalent provisions in the Australian Capital Territory.

<sup>4</sup> See *Crimes Act 1914* (Cth) s 3Y; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99; *Criminal Code* (QLD) s 260; *Criminal Code Act 1924* (TAS) s 27(6). There are no equivalent provisions in the other jurisdictions.

where there has been a breach of the peace.<sup>5</sup> A police officer may also effect an arrest without warrant if he or she has reasonable grounds to believe that an offence has been committed,<sup>6</sup> or where he or she has reasonable grounds to believe that a warrant has been issued.<sup>7</sup> Any person may be arrested without warrant on reasonable suspicion of being an escaped prisoner<sup>8</sup> and the power of arrest without warrant may be extended to: persons being pursued<sup>9</sup>; persons committing offences on aircraft<sup>10</sup>; persons offering stolen property for sale;<sup>11</sup> certain specified types of offences<sup>12</sup>; and some indictable offences which are tried summarily<sup>13</sup>. The power may also be extended to public order offences, such as drunkenness<sup>14</sup>; and being a person whose name is unknown to the arresting officer.<sup>15</sup> In some jurisdictions, a duty to arrest is imposed, as distinct from the conferral of a power to arrest.<sup>16</sup>

5. With respect to powers of arrest without warrant it is important to note that there must be strict compliance with any statutory power of arrest<sup>17</sup> and where a statute requires reasonable cause as a prerequisite to the exercise of a power of arrest it must be shown that reasonable cause exists to believe facts which, if they did exist, would establish the material facts, and there must be an honest suspicion of the commission of an offence based on full conviction of the existence of those facts which would reasonably lead an ordinary, prudent and cautious person in the police officer's position to conclude that

<sup>5</sup> *Criminal Code* (QLD) s 260; *Criminal Code Act 1924* (TAS) s 27(6); *Criminal Investigation Act 2006* (WA) s 128 (the person will endanger another person's safety or property). There are no equivalent provisions in the other jurisdictions.

<sup>6</sup> *Crimes Act 1914* (Cth) s 3W; *Police Administration Act 1978* (NT) s 123 (power may be exercised by a police officer having reasonable grounds to believe that an offence has been committed, is being or is about to be committed); *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99; *Police Powers and Responsibilities Act 2000* (QLD) s 198; *Criminal Code Act 1924* (TAS) s 27(2); *Crimes Act 1958* (VIC) s 459; *Criminal Investigation Act 2006* (WA) s 128. There are no equivalent provisions in the other jurisdictions.

<sup>7</sup> *Crimes Act 1900* (ACT) s 213, *Police Administration Act 1978* (NT) s 124, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99. There are no equivalent provisions in the other jurisdictions.

<sup>8</sup> See *Crimes Act 1914* (Cth) s 3X, *Crimes Act 1900* (ACT) s 349Y, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 102. At common law, anyone may arrest a convicted felon without warrant when he or she is unlawfully at large: *R v Ryan* (1890) 11 LR (NSW) L 171; 6 WN (NSW) 162.

<sup>9</sup> See *Criminal Code* (QLD) s 550; *Criminal Code Act 1924* (TAS) ss 24, 27(8). There are no equivalent provisions in the other jurisdictions.

<sup>10</sup> See *Criminal Code* (NT) s 443; *Criminal Code* (QLD) s 547A; *Criminal Code Act 1924* (TAS) s 27(10), 27(11); *Crimes Act 1958* (VIC) s 463A.

<sup>11</sup> See *Criminal Code* (QLD) s 551.10.

<sup>12</sup> *Criminal Code Act 1924* (TAS) s 27(4), 27(5). There are no equivalent provisions in the other jurisdictions.

<sup>13</sup> See *Criminal Law Consolidation Act 1935* (SA) s 271. There are no equivalent provisions in the other jurisdictions.

<sup>14</sup> See, for example, *Police Administration Act 1978* (NT) s 128 (power includes a power of entry and search and a register of valuables removed must be kept). Where a person has been apprehended under this section but not yet placed in custody, this does not prevent his or her arrest and charge with an offence: *Japaljarri v Cooke* (1982) 19 NTR 19.

<sup>15</sup> See *Trobridge v Hardy* (1955) 94 CLR 147; 29 ALJ 532; [1956] ALR 15.

<sup>16</sup> See *Criminal Law Consolidation Act 1935* (SA) s 271 (those found committing offences must be arrested); *Criminal Code Act 1924* (TAS) s 27(3) (all people have a duty to arrest without warrant anyone found committing an offence set out in *ibid* Appendix A). There is a duty to assist a police officer when called upon to do so: *ibid* s 28. A police officer has a duty to arrest where there is an accusation of a crime for which an arrest may be made without warrant unless there is reason to believe that the complaint is without foundation: *ibid* s 302.

<sup>17</sup> See *Freeman v McGee* (1857) *Legge* 1009 at 1009 per Dickinson J.

there is probable guilt of an offence.<sup>18</sup> A suspicion need not be based upon the police officer's own knowledge or observation but may rest on information received from others.<sup>19</sup> Where there is a specific power of arrest conferred on specific officers in respect of specific offences, such a power is in addition to the general power conferred on all police officers<sup>20</sup> and interstate offenders may be arrested by a police officer without warrant in some circumstances, although the *Service and Execution of Process Act 1992* (Cth) provides for the execution of warrants for such offenders<sup>21</sup>.

6. Warrants for arrest are addressed to the police and authorise the arrest of a person for an offence charged.<sup>22</sup> Warrants for arrest may be issued in all jurisdictions<sup>23</sup> and telephone warrants may be issued where it is impracticable to make an application to a justice in person.<sup>24</sup> State or Territory writs or warrants in respect of Commonwealth or Territory laws may be executed by members of the Australian Federal Police, even though they are not addressed to such officers and irrespective of any State or Territory laws as to who may execute them.<sup>25</sup>
7. Whereas traditional powers of arrest either with or without warrant are generally powers of sub-charge detention meant to apply before a person has been charged, the powers to detain available to Commonwealth Law officers under the Preventative Detention Order ('PDO') provisions of the *Criminal Code Act 1995* (Cth) ('the Cth Criminal Code'), fall into a different category of detention which may be described as sub-arrest detention.
8. In order to submit in favour of the amendment of the powers available to officers under the PDO provisions of the Cth Criminal Code (to include powers to ask questions of persons potentially detained under those provisions), it is necessary to outline the operation of existing traditional powers of detention available in relation to persons suspected of terrorist offences. Allowing for time limitations in the preparation of the present submission, the outline provided in '**Part 1**' does not detail the operation of

<sup>18</sup> See *Misel v Teese* [1942] VLR 69; [1942] ALR 100. Where an accused is acquitted of an offence for which he or she was arrested, on a charge of resisting a police officer in the execution of his or her duty, if the arrest is to be justified, the prosecution must show that the police officer honestly believed that the offence had been committed and made such inquiries as a reasonable person would, and that the facts were such that a reasonable person might draw an inference of guilt: *R v McDowall* [1910] QWN 43; (1910) 4 QJPR 141.

<sup>19</sup> See *Feldman v Buck* [1966] SASR 236.

<sup>20</sup> See *R v Cockings; Ex parte Harris* [1937] St R Qd 103 sub nom *R v Acting Police Magistrate at Brisbane; Ex parte Harris* (1937) 31 QJPR 29.

<sup>21</sup> See *Service and Execution of Process Act 1992* (Cth).

<sup>22</sup> See *Crimes Act 1914* (Cth) ss 3E(5)(d), 3F; *Magistrates Court Act 1930* (ACT) s 44; *Police Administration Act 1978* (NT) s 121; *Criminal Code* (QLD) s 249. Erroneous execution is justified in some cases: *ibid* ss 250-253. *Summary Procedure Act 1921* (SA) s 58; *Magistrates Court Rules 1992* (SA) Form 6; *Criminal Code Act 1924* (TAS) s 21(2), 21(3); *Magistrates' Court Act 1989* (VIC) ss 63, 64; *Criminal Code Act Compilation Act 1913* (WA) ss 226-230. See also *Criminal Investigation Act 2006* (WA) s 13.

<sup>23</sup> See *Crimes Act 1914* (Cth) s 3ZA; *Magistrates Court Act 1930* (ACT) s 42, *Police Administration Act 1978* (NT) s 121; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 10, 142 (for drugs); *Criminal Code* (QLD) s 249; *Criminal Law Consolidation Act 1935* (SA) s 273; *Criminal Code Act 1924* (TAS) s 21; *Crimes Act 1958* (VIC) s 457; *Criminal Investigation Act 2006* (WA) s 13.

<sup>24</sup> See for example, *Police Administration Act 1978* (NT) s 122.

<sup>25</sup> See *Australian Federal Police Act 1979* (Cth) s 11.

existing traditional powers of detention available in all Australian State and Territory jurisdictions but rather '**Part 1**' outlines the traditional powers presently existing at the Commonwealth level and in three States; Western Australia, Victoria and New South Wales. These States demonstrate traditional systems of sub-charge arrest which are generally representative of the arrest powers available in most Australian State Jurisdictions.

9. A detailed outline of traditional powers of arrest available in relation to persons suspected of terrorist offences is necessary because, in considering the appropriateness of the ability to question a person held on a PDO, a critical preliminary question is whether and to what extent a PDO is available according to a different threshold than the threshold which generally applies to more traditional powers of arrest. This analysis will be the subject of '**Part 2**' of the present submission.
10. Where a PDO is available on a different threshold to traditional arrest powers then it will likely apply in different circumstances than those covered by traditional arrest and it may follow that allowing questioning in those different circumstances could serve a substantial purpose to aid in the investigation, prevention or prosecution of terrorist acts. This analysis will be the subject of '**Part 3**' of the present submission.

## **Part 1 –Existing Powers of Arrest and Detention Available to Law Enforcement Authorities Across Federal and State Jurisdictions**

### **Federal Law Enforcement Authorities – Crimes Act 1914 (Special Powers)**

11. Division 3A of the *Crimes Act 1914* (Cth) ('Cth Crimes Act') provides law enforcement officers ('Cth Officers') with special investigative powers relating to 'terrorist acts'<sup>26</sup> and 'terrorism offences',<sup>27</sup> which powers can only be utilised where the person is in a Commonwealth place or Commonwealth place in a prescribed security zone<sup>28</sup> and only

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<sup>26</sup> Terrorist acts are defined in paragraph 100.1 of the *Criminal Code 1995* (Cth) as being:

An action or threat of action where:

- (a) the action falls within subsection (2) [actions that cause significant harm, death, property damage or disruption] and does not fall within subsection (3) [actions for advocacy, dissent, protest or absent the intention to cause significant harm, death, property damage or disruption]; and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
  - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
  - (ii) intimidating the public or a section of the public.

<sup>27</sup> Terrorist offenses are defined pursuant to s3 of the Cth Crimes Act as being

- (a) an offence against Subdivision A of Division 72 of the *Criminal Code*; or
- (b) an offence against Part 5.3 of the *Criminal Code*.

<sup>28</sup> A zone prescribed by the Minister under Subdivision C with respect to a Commonwealth place

where the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act.<sup>29</sup>

12. In brief summary, these powers can be described as follows:
  - 12.1. The power to require a suspect to provide the requesting officer with the suspect's name and identifying particulars, as well as an explanation for their presence in the place;<sup>30</sup>
  - 12.2. The power to stop and detain the suspect for the purposes of conducting a search of the suspect's person for a terrorism related item<sup>31</sup> and seize any terrorism related item that is located, without warrant;<sup>32</sup>
  - 12.3. The power to enter premises without a warrant for the purposes of search and seizure if the officer believes there is a serious imminent threat to a person's life, health or safety.<sup>33</sup>
13. Save for the power to detain for the purposes of conducting a search, these special powers do not provide specific additional powers for arrest and detention and, for the present purposes, are not substantially relevant.
14. General powers of arrest and detention must be exercised in accordance with Division 4 of the Cth Crimes Act and do not relate specifically to terrorism offenses but rather to general offenses that may apply to offenses of terrorism.

*Federal Law Enforcement Authorities – Cth Crimes Act 1914 (General Powers of Arrest)*

15. Under Division A of the Cth Crimes Act there exist general powers of arrest which may apply to terrorism offences. A constable<sup>34</sup> may, without warrant, arrest a person for an offence if the constable believes on reasonable grounds<sup>35</sup> that:
  - 15.1. The person has committed or is committing the offence; and
  - 15.2. Proceedings by summons would not achieve one or more of the purposes outlined in s3W(1)(b)(i)-(vi)<sup>36</sup>
16. A warrant may be issued for the arrest of a person for an offence only if information is provided to the issuing officer on oath<sup>37</sup> outlining why the informant believes the

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<sup>29</sup> Provided that the officer suspects, on reasonable grounds, that the person might have just committed, might be committing or might be about to commit a terrorist act (s3UB(1)(a))

<sup>30</sup> Cth Crimes Act s3UC

<sup>31</sup> Cth Crimes Act s 3UD

<sup>32</sup> Cth Crimes Act s 3UE

<sup>33</sup> Cth Crimes Act s 3UEA

<sup>34</sup> Defined under s3 of the Cth Crimes Act as a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.

<sup>35</sup> Section 3W

<sup>36</sup> Notably, to ensure the person's attendance at court, prevent repetition or continuation of the offence, interfere with the integrity of the investigation or to preserve the safety or welfare of the person.

<sup>37</sup> Cth Crimes Act s3ZA(1)(a)

subject of the warrant has committed an offence<sup>38</sup> and why proceedings by summons could not achieve the purposes set out in s3W(1)(b)<sup>39</sup>, provided that the sworn information satisfies the issuing officer that there are reasonable grounds for issuing the warrant.<sup>40</sup>

17. If arrested pursuant to Division A of the Cth Crimes Act in relation to a terrorism offence, Part IC, Division 2, Subdivision B of the Cth Crimes Act will authorise the detention of the suspect in accordance with that Subdivision.<sup>41</sup> The detention regime established by the operation of that Subdivision can be summarised as follows:
  - 17.1. The suspect is to be detained for investigating whether the person committed the offence and/or whether the person has committed another Commonwealth offence;<sup>42</sup>
  - 17.2. The power to detain under s23DB(2) will cease to apply at the expiration of the investigation period, which is either 2 or 4 hours.<sup>43</sup> An authorised officer may apply to a magistrate for an extension of the investigating period<sup>44</sup> for up to 20 hours;<sup>45</sup>
  - 17.3. The magistrate may extend the investigation period if the magistrate is satisfied that the extension is necessary to preserve or obtain evidence and to complete the investigation, provided that the investigation is proceeding properly and without delay.<sup>46</sup>
18. During the course of the detention, officers are authorised to question the suspect. Application can be made to a magistrate to suspend the operation of the investigation period<sup>47</sup> so as to suspend or delay questioning, provided that suspension or delay of questioning is reasonable<sup>48</sup> and does not exceed 7 days.<sup>49</sup> The magistrate may extend the investigation period if the magistrate is satisfied that the extension is necessary to preserve or obtain evidence and to complete the investigation, provided that the investigation is proceeding properly and without delay.<sup>50</sup>
19. Prior to questioning a person under arrest or a protected suspect<sup>51</sup> an investigating official<sup>52</sup> must advise the person of, or provide the person with, the following:

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<sup>38</sup> Cth Crimes Act s 3ZA(1)(b)(i)

<sup>39</sup> Cth Crimes Act s 3ZA(1)(b)(ii)

<sup>40</sup> Cth Crimes Act s 3ZA(1)(d)

<sup>41</sup> If arrested in relation to a non-terrorism, Commonwealth offence, Part IC, Division 2, Subdivision A will authorise the detention of the suspect in accordance with that Subdivision.

<sup>42</sup> Cth Crimes Act s 23DB(2)

<sup>43</sup> If the person is, or appears to be, under 18, Aboriginal or Torres Strait Islander the detention period is 2 hours, In any other case it is 4 hours (see s23DB(5))

<sup>44</sup> Cth Crimes Act s 23DE

<sup>45</sup> Cth Crimes Act s 23DF(7)

<sup>46</sup> Cth Crimes Act s 23DF(2)

<sup>47</sup> Cth Crimes Act s 23DC

<sup>48</sup> Cth Crimes Act s 23DB(9)(m)

<sup>49</sup> Cth Crimes Act s 23DB(11)

<sup>50</sup> Cth Crimes Act s 23DD(2)

<sup>51</sup> As defined in Cth Crimes Act s 23B(2) a protected suspect is, in summary, a person who has not been charged nor arrested with an offence, but is in the company of an official who holds the reasonable belief the person may have committed an offence

- 19.1. That the person does not have to say or do anything, but that anything the person does say or do may be used in evidence;<sup>53</sup>
  - 19.2. That the person has a right to communicate, or attempt to communicate with a friend or relative and legal practitioner.<sup>54</sup> Questioning must be deferred for a reasonable time to allow for these attempts to be made;<sup>55</sup>
  - 19.3. Provide the person with an interview friend<sup>56</sup> if the officer reasonably believes the person is Aboriginal or Torres Strait Islander<sup>57</sup> or under the age of 18;<sup>58</sup>
  - 19.4. Provide the person with an interpreter if the officer reasonably believes that the person is unable to understand the English language.<sup>59</sup>
20. Further, an investigating official is also obliged to:
- 20.1. Inform the arrested person or protected suspect as to any request for information as to the person's whereabouts made by the person's relatives, friends or legal representatives. The investigating official must satisfy that request unless the arrested person or protected suspect does not consent or the investigating official does not reasonably believe the person making the request is a relative, friend or legal representative;<sup>60</sup>
  - 20.2. If the arrested person or protected suspect is not an Australia citizen facilitate contact with the person's consular office if the person requests it;<sup>61</sup>
  - 20.3. Where the Cth Crimes Act requires the investigating officer to provide advice or inform the arrested person or suspect with information, tape record the provision of that information;<sup>62</sup>
  - 20.4. Where the arrested person or protected suspect provides a confession or admission, tape record that confession or admission else it be rendered inadmissible.<sup>63</sup>
21. In summary, an officer of the AFP is authorised to:

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<sup>52</sup> Per Cth Crimes Act s3ZQA investigating official means:

- (a) a member or special member of the Australian Federal Police; or
- (b) a member of the police force of a State or Territory; or
- (c) a person who holds an office the functions of which include the investigation of

Commonwealth offences and who is empowered by a law of the Commonwealth because of the holding of that office to make arrests in respect of such offences.

<sup>53</sup> Cth Crimes Act s 23F

<sup>54</sup> Cth Crimes Act s 23G

<sup>55</sup> Suspension of the investigation period will occur pending the completion of the attempt (see Cth Crimes Act s 23DB(9)(b))

<sup>56</sup> As defined in Cth Crimes Act s 23H(9) or 23K(3)

<sup>57</sup> Cth Crimes Act s 23H

<sup>58</sup> Cth Crimes Act s 23K

<sup>59</sup> Cth Crimes Act s 23N

<sup>60</sup> Cth Crimes Act s 23M

<sup>61</sup> Cth Crimes Act s 23P

<sup>62</sup> Cth Crimes Act s 23U

<sup>63</sup> Cth Crimes Act s 23V

- 21.1. Execute an arrest of a suspect, without warrant, if that officer has a reasonable suspicion that the person has committed, or is committing, an offence and proceedings by summons is not appropriate;
  - 21.2. Detain the suspect, with questioning, without charge for an investigation period of 4 hours, with the power to have that period extended for up to 7 days through application to a judicial officer; and
  - 21.3. Question the person and utilise the answers to those questions as admissible evidence provided that the questioning is recorded and the person is afforded rights to:
    - 21.3.1. Silence;
    - 21.3.2. Have their presence in custody made known to a third party and to be made aware of any attempts by a third party to contact the person;
    - 21.3.3. Access to a legal practitioner
    - 21.3.4. An interpreter (where necessary)
    - 21.3.5. Access to consular services (where applicable).
22. A summary of general powers of arrest and detention existing in 3 Australian States are set out below.

Western Australian Law Enforcement Authorities – Criminal Investigation Act 2006 ('WA Act')

23. Part 12, Division 2 of the WA Act at s128 provides a police officer with powers of arrest, with or without a warrant. A police officer is authorised to arrest a person for a serious offence,<sup>64</sup> without warrant, if the officer reasonably suspects that the person has committed, is committing or is just about to commit the offence.<sup>65</sup>
24. In relation to an offence that is not a serious offence, the officer is authorised to exercise a power of arrest if the officer holds:
- 24.1. A reasonable belief that the person has committed, is committing or is just about to commit the offence; and
  - 24.2. If the person was not arrested the person would contravene s128(3)(b)(i)-(vii).<sup>66</sup>
25. In the event that s128 of the WA Act does not authorise an arrest, Part 3 of the *Criminal Procedure Act 2004* (WA) ('WACPA') outlines the procedure for commencing a prosecution and compelling the person's attendance at court. Where an accused is not in custody, an officer may lodge and serve a summons (known as a 'prosecution notice') with the Magistrates Court and the suspected person.<sup>67</sup> Provided that the summons complies with specified content requirements,<sup>68</sup> failure to attend at court will empower

<sup>64</sup> Defined as an offence for which the statutory penalty is, or includes, imprisonment for 5 years or more or life or is an offence against specified provisions of other named Acts (per s128(1))

<sup>65</sup> Section 128(2)

<sup>66</sup> In summary, that the identity of the person would not be able to be lawfully ascertained, would continue, repeat or commit another offence or interfere with the investigation.

<sup>67</sup> WACPA s 28

<sup>68</sup> WACPA s 32



the court to issue an arrest warrant.<sup>69</sup> Police officers are not empowered, in their own right, to issue an arrest warrant.

26. Once arrested, Division 5 of the WA Act authorises the detention of an arrested suspect for the purposes of investigating any offence the arrested suspect is suspected of having committed<sup>70</sup> as well as interviewing the arrested suspect,<sup>71</sup> and affords the arrested suspect specific rights, namely:<sup>72</sup>
- 26.1. To any necessary medical treatment;
  - 26.2. To a reasonable degree of privacy from the mass media;
  - 26.3. To a reasonable opportunity to communicate or attempt to communicate with a relative or friend to inform that person of his or her whereabouts;
  - 26.4. If the arrested person is unable to understand or communicate in spoken English, to a translator;
  - 26.5. To be informed of the offence for which he or she is under suspicion;
  - 26.6. To be cautioned prior to interview;
  - 26.7. To a reasonable opportunity to communicate with a legal practitioner; and
  - 26.8. To a translator if one is required.
27. An arrested suspect may be detained for a period of up to 6 hours.<sup>73</sup> At any time during that detention period, a senior officer may authorise a further period of detention for up to an additional 6 hours if the senior officer is satisfied that detention of the suspect for a further period is justified.<sup>74</sup> At any time during the further period of detention authorised by the senior officer, a magistrate may, upon application, authorise a further period of detention for up to an additional 8 hours if the magistrate is satisfied that the further period of detention is justified.<sup>75</sup>
28. During the course of detention, the arrested suspect may be questioned. Any admission against interest made by the arrested suspect will be inadmissible if the:
- 28.1. Admissions are not audio visually recorded;<sup>76</sup> or
  - 28.2. Rights referred to above at paragraph [26] are not afforded to the arrested suspect.<sup>77</sup>
29. In summary, an officer of the Western Australian Police is authorised to:
- 29.1. Execute an arrest of a suspect, without warrant, if that officer has a reasonable suspicion that the person is about to commit, is committing or has committed a

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<sup>69</sup> WACPA s 30

<sup>70</sup> WA Act s 139(2)(b)

<sup>71</sup> WA Act s 139(2)(c)

<sup>72</sup> Pursuant to the combination of WA Act ss137 & 138

<sup>73</sup> WA Act s 140(3)(a)

<sup>74</sup> WA Act s 140(4)

<sup>75</sup> WA Act s 140(6)

<sup>76</sup> WA Act s 118

<sup>77</sup> WA Act s 154

- serious offence. In relation to a serious offence, there is no requirement to utilise alternative forms of commencement of proceedings (such as through summons);
- 29.2. Detain a suspect, with questioning, without charge for up to 12 or up to a maximum of 20 hours through application to a judicial officer;
- 29.3. Question the person and utilise the answers to those questions as admissible evidence provided that the questioning is recorded and the person is afforded rights to:
- 29.3.1. Silence and knowledge of the charge being interviewed in relation to;
  - 29.3.2. Have their presence in custody made known to a third party;
  - 29.3.3. Access to a legal practitioner;
  - 29.3.4. An interpreter (where necessary); and
  - 29.3.5. Medical treatment (where necessary); and
  - 29.3.6. Reasonable protection from the mass media

Victorian Law Enforcement Authorities – Crimes Act 1958 ('Vic Act')

30. Section 457 of the Vic CA Act stipulates that no person shall be arrested without warrant except in accordance with that Act. Section 458 authorises any person to make an arrest, without warrant, if that person:
- 30.1. Finds the subject of the intended arrest committing an offence (indictable or summary) and the person making the arrest believes the arrest is necessary so as to ensure the attendance of the offender at court, to prevent the continuation or repetition of the offence or commission of a further offence, or for the safety and welfare of others or the offender;
  - 30.2. Is instructed to do so by a police officer;
  - 30.3. Believes on reasonable grounds that the subject of the intended arrest is escaping from legal custody or aiding or abetting another to escape.
31. In addition to the above powers of general arrest, a police officer is also empowered to carry out an arrest without warrant if the officer believes on reasonable grounds that the subject of the intended arrest has committed an indictable offence either in Victoria<sup>78</sup> or, if committed outside of Victoria, would constitute an indictable offence if committed inside Victoria.<sup>79</sup>
32. For the purposes of executing an arrest in relation to a 'serious indictable offence',<sup>80</sup> a police officer is authorised to enter any place where the police officer, on reasonable grounds, believes that person to be, without warrant.<sup>81</sup>
33. A police officer is not bound to take an arrested suspect into custody if the officer believes on reasonable grounds that proceedings can effectively be brought by way of

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<sup>78</sup> Vic Act s 459(1)(a)

<sup>79</sup> Vic Act s 459(1)(b)

<sup>80</sup> Defined in s325 as any offence punishable by 5 years or more or life

<sup>81</sup> Vic Act s 459A

either summons or notice to appear.<sup>82</sup> Under the *Criminal Procedure Act 2009* (Vic) ('Vic CP Act') a police officer can commence a prosecution by filing a charge sheet with the Magistrates' Court.<sup>83</sup> Upon filing of the charge sheet, an application can be made to have the Magistrates' Court issue either a summons to appear or an arrest warrant with respect to the charged defendant.<sup>84</sup>

34. For the purposes of the Vic Act, a person will be in custody if under arrest by either warrant or pursuant to sections 458 or 459, or if in company with an official for the purposes of questioning in order to ascertain if there is sufficient evidence to arrest or charge.
35. Once a suspect is taken into custody, the suspect is to be released to bail, or taken before a court to set terms of bail, within a 'reasonable time' of being taken into custody.<sup>85</sup> For the purposes of this section, 'reasonable time' is not defined however s464A(4)(a)-(l) provide a number of factors to be taken into consideration when assessing what amounts to 'reasonable time.' These factors include, amongst others, the number and complexity of offences to be investigated, the amount of evidence or material that needs to be considered, any delays in affording the suspect access to communication to third parties and any other matters connected with the investigation of the offence.
36. Prior to any questioning of the suspect, the interviewing officer must:
  - 36.1. Inform the person in custody that he or she does not have to say or do anything but that anything the person does say or do may be given in evidence;<sup>86</sup>
  - 36.2. Inform the person that they may communicate, or attempt to communicate, with a friend or relative<sup>87</sup> or legal practitioner<sup>88</sup> and defer the questioning for a time that is reasonable to enable that communication to occur;
  - 36.3. Provide the person with an interpreter where the person does not have a sufficient knowledge of the English language to enable understanding;<sup>89</sup>
  - 36.4. Where the person in custody is not a citizen or permanent resident of Australia, inform the person that he or she may communicate with the consular office of their country and questioning must be deferred for a reasonable time to enable the person to make, or attempt to make, that communication;<sup>90</sup>
  - 36.5. Record any admission made by the person with respect to an indictable offence during the course of the interview or else the admission is rendered inadmissible.<sup>91</sup>

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<sup>82</sup> Vic Act s 461(2)

<sup>83</sup> Vic CP Act s 6

<sup>84</sup> Vic CP Act s 12

<sup>85</sup> Vic Act s 464A

<sup>86</sup> Vic Act s 464A(3)

<sup>87</sup> Vic Act s 464C(1)(a)

<sup>88</sup> Vic Act s 464C(1)(b)

<sup>89</sup> Vic Act s 464D

<sup>90</sup> Vic Act s 464F

<sup>91</sup> Vic Act s 464H

37. In summary, an officer of the Victorian Police is authorised to:

- 37.1. Execute an arrest of a suspect if that officer has a reasonable belief that the person has committed an indictable offence. Alternatively, where an offence is in the process of being committed, an officer may execute an arrest where he or she reasonably believes it is necessary to secure attendance at a future date;<sup>92</sup>
- 37.2. Detain a person, with questioning, without charge for a period that is reasonable; and
- 37.3. Question the person and utilise the answers to those questions as admissible evidence provided that the questioning is recorded and the person is afforded rights to:
  - 37.3.1. Silence
  - 37.3.2. Have their presence in custody made known to a third party;
  - 37.3.3. Access to a legal practitioner;
  - 37.3.4. An interpreter (where necessary); and
  - 37.3.5. Consular assistance (where applicable).

*New South Wales Law Enforcement Authorities - Law Enforcement (Powers and Responsibilities) Act 2002 ('NSW Act')*

38. Powers of arrest are conferred by Part 8 of the NSW Act. However, prior to exercising any power of arrest, the arresting officer must first discharge the obligations imposed by Part 15.<sup>93</sup> Those safeguards require the arresting officer to provide the person with the following:

- 38.1. Evidence that the police officer is a police officer;
- 38.2. The name of the police officer and his or her place of duty;
- 38.3. The reason for the exercise of power.

39. A police officer is authorised to arrest without warrant where:<sup>94</sup>

- 39.1. The person is in the act of committing an offence;
- 39.2. The person has just committed any such offence;
- 39.3. The person has committed a serious indictable offence for which the person has not been tried.
- 39.4. The police officer believes, on reasonable grounds, that the person has committed an offence under any Act or statutory instrument.<sup>95</sup>

40. A police officer must not exercise a power of arrest for the purpose of taking proceedings against a person unless he or she suspects, on reasonable grounds, that it is

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<sup>92</sup>92 Note, the Victorian provisions do not appear to allow for a preventative arrest, that is, where an arrest is about to be committed

<sup>93</sup>93 NSW Act s 201

<sup>94</sup>94 NSW Act s 99

<sup>95</sup>95 NSW Act s 99(2)

necessary to arrest the person so as to, in summary, achieve the person's appearance in court, to prevent repetition or continuation of the offence or commission of another offence, to preserve the integrity of the investigation or to protect the safety or welfare of the person.<sup>96</sup>

41. A police officer is authorised to arrest a person named in a warrant issued under any Act or law and may do so whether in possession of the warrant or not.<sup>97</sup> An officer is also authorised to arrest a person, with or without warrant, who the officer reasonably suspects is unlawfully at large.<sup>98</sup>
42. A police officer who exercises an arrest under s99 of the NSW LE Act must, as soon as is reasonably practicable, take the person before an authorised officer<sup>99</sup> to be dealt with.<sup>100</sup> Nevertheless, Part 9 permits the detention and questioning of the suspect prior to compliance with s99(4).
43. A police officer may detain a person who is under arrest for the investigation period for the purposes of investigating whether the person committed the offence.<sup>101</sup> The investigation period extends for a reasonable period, having regard to all the circumstances, following arrest but does not exceed 4 hours.<sup>102</sup> A number of factors are specified for the purposes of determining what is a reasonable period to detain but will generally involve considerations of the suspect's age and health, whether their presence is necessary, the complexity of the investigation, the number of suspects involved and what further investigative steps are required.<sup>103</sup>
44. Times taken to undertake a number of specified activities<sup>104</sup> will not count for the purposes of calculating the investigation period. The investigation period can be extended upon application to a magistrate for a singular period of up to no more than 8 hours.<sup>105</sup>
45. Whilst detained for the purposes of questioning, the following 'safeguards' must be maintained:
  - 45.1. As soon as practicable after the suspect comes into custody, the suspect must be provided with a caution advising that the suspect does not have to say or do anything but that anything the suspect does or says may be used in evidence.

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<sup>96</sup> NSW Act s 99(3)(a)-(f)

<sup>97</sup> NSW Act s 101

<sup>98</sup> Section 102

<sup>99</sup> Defined as being a Magistrate or Children's Court Magistrate, a Registrar of the Local Court or an employee of the Attorney-General's Department (NSW) authorised to do so (see s3)

<sup>100</sup> NSW Act s 99(4)

<sup>101</sup> NSW Act s 114(1)

<sup>102</sup> NSW Act s 115

<sup>103</sup> NSW Act s 116(2)(a)-(l)

<sup>104</sup> See NSW Act s 117(1)(a)-(n); namely these activities are times spent transferring the suspect to appropriate facilities, allowing the suspect to communicate with third parties or arrange medical attention, to carry out forensic procedures or to allow the suspect time to recover

<sup>105</sup> NSW Act s 118

- Further, the suspect must be given a summary of Part 9<sup>106</sup> including a reference to the fact the maximum investigation period may be extended beyond 4 hours but that the suspect's legal representative may make representations to the magistrate when hearing any such application;<sup>107</sup>
- 45.2. The suspect must be advised both orally and in writing that the suspect has a right to communicate with a friend, relative, guardian or independent person to advise of the suspect's whereabouts and, should the suspect wish to, invite the person communicated with to attend so as to consult with the suspect in private.<sup>108</sup> Further, the suspect has the right to contact, or attempt to contact, a legal practitioner to attend and be present during any investigative procedure. Any investigative procedure must be deferred, to the extent that is reasonable, to allow for this to occur, but for no longer than 2 hours;<sup>109</sup>
- 45.3. Where the suspect is not an Australian citizen or permanent resident, the suspect must be informed that he or she is entitled to communicate, or attempt to communicate, with a consular official and ask the consular official to attend.<sup>110</sup> Any investigative procedure must be deferred for a reasonable period, not exceeding 2 hours, to allow for this to occur;
- 45.4. The suspect must be provided with details of any request for information as to the suspect's whereabouts made by a person claiming to be the suspect's friend, relative or guardian<sup>111</sup> or legal practitioner, consular official or other person who, in their professional capacity, is concerned with the welfare of the suspect.<sup>112</sup> Should the suspect agree, that information must be provided to the person requesting the information;<sup>113</sup>
- 45.5. In the event that the officer has reasonable grounds to believe that the suspect does not speak English or is unable to communicate fluently, or is unable to communicate due to a disability, the officer must arrange for an interpreter and defer any investigative procedure;<sup>114</sup>
- 45.6. The officer must arrange for medical attention immediately if it appears that the suspect requires it or if the suspect requests it and the request appears reasonable to the officer;<sup>115</sup>
- 45.7. The officer must ensure that the suspect is provided with reasonable refreshments and access to toilet facilities. If reasonably practicable to do so, the officer must provide access to facilities to allow the suspect to wash, shower or bathe and, if appropriate, shave;<sup>116</sup>

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<sup>106</sup> Containing the safeguards to which the person is entitled

<sup>107</sup> NSW Act s 122

<sup>108</sup> NSW Act s 123

<sup>109</sup> This right does not have to be conferred if the officer believes on reasonable grounds that doing so may, in effect, compromise the investigation (see s125)

<sup>110</sup> NSW Act s 124

<sup>111</sup> NSW Act s 126

<sup>112</sup> NSW Act s 127

<sup>113</sup> Unless the officer believes on reasonable grounds that to do so would compromise the investigation (see NSW Act s 126(2)(c) or s127(2)(c) respectively)

<sup>114</sup> NSW Act s 128

<sup>115</sup> NSW Act s 129

<sup>116</sup> NSW Act s 130

- 45.8. To maintain a custody record of the suspect's arrival and relevant details as specified.<sup>117</sup>
46. In summary, an officer of the New South Wales Police is authorised to:
- 46.1. Execute an arrest of a suspect, without warrant, if the person is committing an offence, has just committed an offence, or has committed a serious indictable offence for which the person has not been tried.<sup>118</sup> Alternatively, where the officer suspects on reasonable grounds that the person has committed an offence under a statutory instrument. Any of these powers can only be exercised where the officer reasonably believes that arrest is necessary to secure attendance in court or to prevent interference with the investigation;
  - 46.2. Detain a person, with questioning, without charge for an investigation period of 4 hours with the power to have that period extended by 8 hours through application to a judicial officer;
  - 46.3. Question the person and utilise the answers to those questions as admissible evidence provided that the questioning is recorded and the person is afforded rights to:
    - 46.3.1. Silence;
    - 46.3.2. A written copy of all of the person's rights as afforded under the Act;
    - 46.3.3. Have their access made known to a third party and to be made aware of any attempts made by a third party to contact the person;
    - 46.3.4. Access to a legal practitioner;
    - 46.3.5. Access to consular assistance (where applicable);
    - 46.3.6. An interpreter (where necessary);
    - 46.3.7. Medical treatment (where necessary);
    - 46.3.8. Reasonable refreshments and treatment;
    - 46.3.9. A record of the custody.

Australian Security Intelligence Organisation ('ASIO') – Australian Security Intelligence Organisation Act 1979 – ('ASIO Act')

47. Part III, Division 3 of the ASIO Act confers the power for the Director-General to seek and obtain a 'Questioning Warrant' in relation to a terrorism offence. Prior to a request for the issuing of a warrant, the Minister's consent must be obtained.<sup>119</sup> The Minister can only consent to the request if the Minister is satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist in the collection of intelligence in relation to a terrorism offence and that ordinary methods of collecting intelligence would be ineffective.<sup>120</sup>

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<sup>117</sup> NSW Act s 131

<sup>118</sup> Note that a reasonable belief component for this power is not referred to in the statutory provision nor does it provide for preventative arrest where the offence is yet to be committed

<sup>119</sup> ASIO Act s 34D

<sup>120</sup> ASIO Act s 34D(4)

48. The Director-General may also request a 'Questioning and Detention Warrant'<sup>121</sup> where there are reasonable grounds for the Minister to believe that, if not immediately taken into custody, the person the subject of the proposed warrant may:<sup>122</sup>
- 48.1. alert another person involved in a terrorism offence that the offence is being investigated;
  - 48.2. may not appear before the prescribed authority<sup>123</sup>; or
  - 48.3. May destroy damage or alter a record of thing the person may be requested in accordance with the warrant to produce.
49. A person who has been notified that the Director-General has requested the Minister's approval for a warrant in relation to that person will commit an offence if that person then leaves Australia and faces a penalty of up to 5 years imprisonment.<sup>124</sup> Once the warrant has been issued by the issuing authority, if the person is notified of the warrant, the person must deliver to someone exercising authority under the warrant a copy of any passport that person may hold or commit an offence punishable by up to 5 years imprisonment.<sup>125</sup> Similarly, once the person has been notified of the warrant's issue, the person will commit an offence punishable by up to 5 years imprisonment if that person leaves Australia.<sup>126</sup>
50. Once the Ministers approval for the seeking of a Questioning Warrant or Questioning Detention Warrant has been provided, an issuing authority<sup>127</sup> may issue the warrant if the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence.<sup>128</sup>
51. The issuing of the warrant compels a person specified in the warrant to appear immediately after being notified of the issuing of the warrant, before a prescribed authority for questioning.<sup>129</sup> The warrant must specify that the specified person is entitled to contact a single lawyer of the person's choice at any time before appearing before the prescribed authority<sup>130</sup> and at any time whilst in detention in connection with the warrant.<sup>131</sup>

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<sup>121</sup> ASIO Act s 34F

<sup>122</sup> ASIO Act s 34F(4)(d)(i)-(iii)

<sup>123</sup> A person who has served as a judge in a superior court for a period of at least 5 years and no longer holds a commission (per s34B)

<sup>124</sup> ASIO Act s 34X

<sup>125</sup> ASIO Act s 34Y

<sup>126</sup> ASIO Act s 34Z

<sup>127</sup> A Judge who has been appointed by the Minister under s34AB and consented in writing to being appointed

<sup>128</sup> ASIO Act s 34E with respect to Questioning Warrants; s34G with respect to a Questioning and Detention Warrant

<sup>129</sup> ASIO Act s 34E(2)

<sup>130</sup> This request for a lawyer can be denied at the Organisation's direction if the Organisation is of the view that, if permitted to contact the lawyer, the investigation may be compromised (see ASIO Act s 34ZO), and questioning can continue before the prescribed authority in the absence of the lawyer's presence (see ASIO Act s 34ZP)

<sup>131</sup> ASIO Act s 34E(3)



52. In the event that a Questioning and Detention Warrant has been issued, in addition to the matters authorised above at paragraph [33], the person is to be:
- 52.1. Taken into custody immediately by a police officer;
  - 52.2. Brought before a prescribed authority immediately for questioning under the warrant; and
  - 52.3. Detained under arrangements made by a police officer for a period of up to 7 days.<sup>132</sup>
53. Upon appearing before the prescribed authority for questioning under the warrant, the prescribed authority must inform the person:<sup>133</sup>
- 53.1. Whether the warrant authorises detention and, if so, for how long;
  - 53.2. What the warrant authorises the Organisation to do, how long it is in force for and that non-compliance may constitute an offence under s34L (discussed in further detail below);
  - 53.3. That the person has a right to make a written complaint to the Inspector-General of Intelligence and Security, the Ombudsman and any complaints agency relevant to the police service of the State or Territory concerned;
  - 53.4. That a remedy may be available from the Federal Court relating to the warrant or the person's treatment under the warrant; and
  - 53.5. Any limitations placed on the person by the warrant in relation to communicating with third parties.
54. At any time during questioning before the prescribed authority, the authority may give directions regarding the person's detention, further detention or release from detention, allowing contact with a third party, to defer questioning or to direct the person's further appearance for questioning. Any such direction must be consistent with the warrant or has been approved in writing by the Minister.<sup>134</sup> Other than by direction given under this section, or as permitted by the terms of the warrant, a person taken into custody is ordinarily not permitted to contact, and may be prevented from doing so, anyone at any time, other than the Inspector-General for the purposes of making a complaint, whilst in custody or detention.<sup>135</sup>
55. A person who fails to appear before the prescribed authority in accordance with a warrant issued, refuses to provide information in accordance with the request in the warrant, or deliberately providing false or misleading information constitutes an offence that is punishable with imprisonment of up to 5 years.<sup>136</sup>

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<sup>132</sup> ASIO Act s 34G(4)(a) and (b) provides that the detention period may also end if the Organisation no longer seeks any information from the person (s34G(4)(a)) or the person has been questioned under the warrant for a maximum of 24 hours (ASIO Act s 34G(6))

<sup>133</sup> ASIO Act s 34J

<sup>134</sup> ASIO Act s 34K

<sup>135</sup> ASIO Act s 34K(10)

<sup>136</sup> ASIO Act s 34L

56. A prescribed authority may provide for an interpreter if the authority believes on reasonable grounds that the person is unable to understand or communicate because of an inadequate knowledge of English.<sup>137</sup> Alternatively, the person being questioned can make a request for an interpreter and that request is to be complied with unless the prescribed authority believes on reasonable grounds that the person's knowledge of English is adequate.<sup>138</sup>
57. The Inspector-General or one of the Inspector-General's employees may be present during the questioning of the person or the taking into custody of that person.<sup>139</sup> Should the Inspector-General be concerned about impropriety or illegality in connection with the exercise of a power under the warrant, the Inspector-General may inform the prescribed authority and the Director-General and the prescribed authority must consider the Inspector-General's concern.<sup>140</sup>
58. Specific statutory provision requires that at any time that anything is being done in relation to the person under the warrant, the person must be treated with humanity, respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment.<sup>141</sup>
59. At the conclusion of the execution of the warrant, the Director-General must provide a written report to the Minister detailing the extent to which the action taken under the warrant has assisted the Organisation in carrying out its functions<sup>142</sup> as well as keeping the Inspector-General informed as to the Organisation's request for, and execution of, the warrant.<sup>143</sup>

### Comparative Summary

60. In general, a comparative analysis of the regimes of arrest detailed above identifies the following:
- 60.1. Officers will be authorised, with respect to serious offences (of which terrorist related offences would ordinarily apply) where the officer has a reasonable belief that an offence has been committed or is in the process of being committed, and that arrest is necessary to ensure attendance at court and not to prevent interference with the investigation;
- 60.2. That detention, without charge, of the suspect for a variable period will be permissible in order to allow for questioning. Such detention will usually not exceed 24 hours and will ordinarily involve judicial monitoring to ensure the reasonableness of the detention period;

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<sup>137</sup> ASIO Act s 34M

<sup>138</sup> ASIO Act s 34N

<sup>139</sup> ASIO Act s 34P

<sup>140</sup> ASIO Act s 34Q

<sup>141</sup> ASIO Act s 34T

<sup>142</sup> ASIO Act s 34ZH

<sup>143</sup> ASIO Act s 34ZI

- 60.3. For admissions made by a suspect during questioning to be admissible, any such questioning must be recorded; and
- 60.4. Minimum safeguards are imposed to maintain the voluntariness of the suspect's involvement in the questioning process, both to ensure admissibility but also to protect the individual. Whilst not uniform across all jurisdictions, generally those minimum safeguards can be categorised as follows:
- 60.4.1. A right to be informed of the right to silence and voluntary participation in the questioning process;
  - 60.4.2. A right to legal advice;
  - 60.4.3. Assistance from other third party professionals as necessary (such as interpreters, medical practitioners or consular's); and
  - 60.4.4. A right to communicate with a third party to advise of the suspect's whereabouts and the fact that the suspect is in police custody;
  - 60.4.5. All jurisdictions examined had discretion to suspend the right to communicate with a third party where to do so would interfere with the integrity of the investigation.
61. One notable exception is that powers in Western Australia also allow preventative arrest where the commission of the offence is about to occur. Further, it will not be necessary for the officer to hold a reasonable belief that arrest is necessary in order to secure attendance or to prevent interference with the investigation.<sup>144</sup>

## **Part 2 – Operation of the Preventative Detention Order ('PDO') Provisions**

62. Division 105 was inserted into the Cth Criminal Code as part of the *Anti-Terrorism (No. 2) Act 2005* (Cth). The PDO operates as an executive administrative order for the purposes of prevention of offences and protection of the public.<sup>145</sup> Unlike the 'preventative warrantless arrest system' established by the analogous United Kingdom ('UK') legislation in the *Terrorism Act 2000* (UK) following the London terrorist attacks in 2005, the PDOs under the Australian regime do not allow for interrogation during detention. The object of the PDO, as provided by the Cth Criminal Code, is to prevent an imminent terrorist act from occurring or to preserve evidence relating to a terrorist act.<sup>146</sup>
63. A member of the Australian Police Force ('AFP') may make an application for a PDO if:<sup>147</sup>
- 63.1. there are reasonable grounds to believe that the subject will engage in a terrorist act, is preparing or planning for a terrorist act, or possesses a thing in connection with the preparation of a terrorist act, and that terrorist act is imminent or will occur in the next 14 days;<sup>148</sup> and
  - 63.2. making the order would substantially assist in preventing a terrorist act occurring; and

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<sup>144</sup> WA Act s 128(2)

<sup>145</sup> PDOs cannot be made with respect to a person who is under 16 years of age (see paragraph 105.5(1))

<sup>146</sup> Cth Criminal Code paragraph 105.1

<sup>147</sup> Cth Criminal Code paragraph 105.4(4)

<sup>148</sup> Cth Criminal Code paragraph 105.4(5)

- 63.3. Detaining the person for the period for which the person is to be detained under the order is reasonably necessary for preventing the terrorist act occurring. (emphasis added)
64. Alternatively, an application can also be made if:<sup>149</sup>
- 64.1. A terrorist act has occurred within the last 28 days; and
  - 64.2. It is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and
  - 64.3. Detaining the subject for the period for which the person is to be detained is reasonably necessary for the purposes of preserving the evidence.
65. An application for an initial PDO is made by an AFP member to a senior AFP member<sup>150</sup> and, if granted, lasts for duration of up to 24 hours.<sup>151</sup> As part of the order, the PDO must set out the name of the person in relation to whom it is made.<sup>152</sup> Upon making the order, the senior AFP member must notify, and provide a copy of the order to, the Commonwealth Ombudsman.<sup>153</sup>
66. During the course of the PDO, an AFP member may apply to an issuing authority<sup>154</sup> for an extension of the order.<sup>155</sup> That extension can be made if the initial PDO is still in force and the person has been taken into custody.<sup>156</sup> If those preconditions are satisfied, the issuing authority may extend the maximum duration of the PDO to a total of 48 hours from the point that the person was taken into custody.<sup>157</sup>
67. Upon the making of the PDO, any police officer, including both AFP and State or Territory police officers, may take the person into custody. In doing so the police officer has the same powers and obligations that would ordinarily apply if that officer was arresting the person, or detaining the person, for an offence within their own jurisdiction.<sup>158</sup>
68. Where concurrent to the making of a PDO a warrant has been issued under Division 3 of Part III of the ASIO Act (either a Questioning Warrant or a Questioning and Detention Warrant), the police officer must take such steps as to ensure that the person can be

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<sup>149</sup> Cth Criminal Code paragraph 105.4(6)

<sup>150</sup> A 'senior AFP member' is defined as the Commissioner, a Deputy Commissioner or any officer holding the rank of Superintendent or above (see Cth Criminal Code paragraph 100.1)

<sup>151</sup> Cth Criminal Code paragraph 105.8(5)

<sup>152</sup> Cth Criminal Code paragraph 105.8(6)(a)

<sup>153</sup> Cth Criminal Code paragraph 105.8(8)

<sup>154</sup> For the purposes of these provisions, an issuing authority is a person appointed by the Minister, who has consented to the appointment in writing, and is a State, Territory or Federal Court Judge, a person who served as a judge for 5 years or more but is no longer commissioned, or a member of the AAT who holds the position of President or Deputy President and has been enrolled as a legal practitioner for more than 5 years (see Cth Criminal Code paragraph 105.2)

<sup>155</sup> Cth Criminal Code paragraph 105.10

<sup>156</sup> Cth Criminal Code paragraph 105.12

<sup>157</sup> Cth Criminal Code paragraphs 105.12(5) and 105.14

<sup>158</sup> Cth Criminal Code paragraph 105.19

dealt with in accordance with the warrant which may include releasing the person from the PDO under paragraph 105.26.<sup>159</sup>

69. Upon being taken into custody, the police officer detaining the person must inform the person of:<sup>160</sup>
- 69.1. The fact that a PDO has been made, the period over which the person is to be detained, what restrictions apply in relation to the person contacting third persons during the duration of the order and the fact there is provision for the order to be extended;
  - 69.2. That the person has the ability to write to a senior AFP officer with the view to having the order revoked;<sup>161</sup>
  - 69.3. Any right the person has to complain to the Ombudsman, the AFP Commissioner, or State or Territory authority in relation to treatment by the police;
  - 69.4. That the person may seek a remedy from the Federal Court regarding the order or treatment whilst under the order;
  - 69.5. The person's entitlement under paragraph 105.37 to a lawyer.
70. During the course of the detention, the person must be not treated with humanity and with respect for human dignity, nor be subjected to cruel, inhuman or degrading treatment.<sup>162</sup>
71. The person detained is entitled to contact a lawyer, but solely for the purposes of obtaining advice in relation to the PDO, to assist in the preparation for a remedy in the Federal Court or for assisting in the preparation of a complaint to the Ombudsman, Commissioner or relevant authority with respect to State or Territory police.<sup>163</sup> This contact must be conducted in a fashion that it allows it to be monitored by a police officer, but is not admissible against the person in subsequent legal proceedings.<sup>164</sup>
72. Questioning of a person detained under a PDO is specifically prohibited by either a police officer or by an ASIO member.<sup>165</sup> Contravention of this provision may amount to a criminal offence punishable by up to 2 years imprisonment.<sup>166</sup>
73. At a meeting of the Council of Australian Governments ('COAG') on 27 September 2005, agreement was reached to establish a nationally consistent regime for PDOs to complement the operation of the Federal regime. This was, in part, designed to deal

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<sup>159</sup> Cth Criminal Code paragraph 105.25

<sup>160</sup> Cth Criminal Code paragraph 105.28(2)(a)-(i)

<sup>161</sup> Cth Criminal Code paragraph 105.17(7)

<sup>162</sup> Cth Criminal Code paragraph 105.33

<sup>163</sup> Cth Criminal Code paragraph 105.37

<sup>164</sup> Cth Criminal Code paragraph 105.38

<sup>165</sup> Cth Criminal Code paragraph 105.42. Note that paragraph 105.42 only specifically prohibits AFP and ASIO officers from speaking to detainees. Conceivably, this may permit ASIS officers to question detainees where it would be appropriate for them to do so.

<sup>166</sup> Cth Criminal Code paragraph 105.45

with concerns regarding the constitutionality of PDOs and to provide State jurisdictions with a greater detention period pursuant to the operation of domestic legislation as it was considered that State jurisdictions would not encounter the same potential constitutional difficulty as the Federal legislation.

74. The overall consequence of the complementary State preventative detention regime is that it will effectively permit detention, when operating together, for a period of up to 14 days.
75. Whilst there is a general degree of uniformity in the legislative regimes that have been implemented, each jurisdiction varies in the degrees of safeguards imposed with respect to the supervision and oversight of PDOs. For the present purposes, a comparative analysis of the differences or similarities in each jurisdiction is unnecessary. All complementary regimes prohibit the questioning of persons detained pursuant to a PDO.<sup>167</sup>
76. It should be noted that a reasonable expectation would exist that, if the Cth Criminal Code was amended to allow for questioning of a person detained under a PDO that commensurate amendments would follow in the relevant State Acts to similarly allow such questioning.

#### Comparative Analysis between Arrest and Detention Powers and PDOs

77. In considering the appropriateness of the ability to question a person held on a PDO a preliminary question is whether a PDO is available according to a substantially different threshold and, therefore, is in substantially different circumstances to the other State and Federal traditional powers of arrest and detention summarised in Part I above.
78. A comparison between PDOs and the existing State and Federal powers of arrest and detention detailed above (other than ASIO powers for a Questioning and Detention warrant) establishes the following:
- 78.1. Engagement thresholds are, fundamentally distinguishable by the fact that the relevant State and Federal traditional arrest regimes require the arresting officer to hold a reasonable belief regarding the commission, or commissioning, of an offence prior to invocation of the power being authorised.<sup>168</sup> Alternatively, the PDO allows for detention before the commission of an offence, notably, where there is reasonable grounds that the subject will engage in a terrorist act. The PDO also imposes additional qualifiers that:
- 78.1.1. Making the order would substantially assist in preventing the attack (emphasis added); and

<sup>167</sup> *Terrorism (Police Powers) Act 2002* (NSW) (s26ZK); *Terrorism (Preventative Detention) Act 2005* (Qld) (s53); *Terrorism (Preventative Detention) Act 2005* (SA) (s42); *Terrorism (Preventative Detention) Act 2005* (Tas) (s39); *Terrorism (Community Protection) Act 2003* (Vic) (s13ZK); *Terrorism (Preventative Detention) Act 2006* (WA) (s47)

<sup>168</sup> With the exception of the powers conferred in WA, as noted above

78.1.2. Detaining the person is reasonably necessary to achieve the preventative purpose (emphasis added);<sup>169</sup>

79. It is generally true that traditional powers of arrest are reactive, in that the offence must have been committed or in the process of being committed, whereas PDOs are preventative<sup>170</sup> as they seek to intercept a potential offender and prevent the offence from occurring. However, as noted above, the jurisdiction of Western Australia has adopted a power of preventative arrest by authorising the arrest of a suspect who is 'just' about to commit an offence. In the Western Australian regime, the utilisation of the qualifier 'just' imposes a temporal limitation on the exercise of this power, similar to the temporal limitation that is in place with respect to the requirement that, before a PDO may be granted, the terrorist act must be 'imminent' and will occur within the next 14 days. However, it is likely that as a matter of interpretation that the Western Australian regime imports a greater degree of immediacy by utilisation of the qualifier 'just' as opposed to 'imminent'.
80. Detention periods under State and Federal traditional arrest regimes (with the exception of ASIO powers for a Questioning and Detention Warrant) and the Federal issuing of a PDO are, broadly, comparable, though the Federal regime allows for a greater detention period (following judicial application) of up to 48 hours. However, working in concurrence with the complementary State PDO detention regimes, PDOs can effectively permit detention for up to 14 days which is significantly longer than the investigation periods allowed for under all State and Federal traditional arrest regimes that have been examined.
81. It can be concluded therefore that (excluding ASIO powers for a Questioning and Detention Warrant), as a preliminary matter, the threshold for a PDO is substantially different to the threshold for detention under the traditional State and Federal arrest and detention regimes detailed above. This allows for detention in substantially different circumstances to the State and Federal traditional arrest regimes detailed above (except for the comparative ability of officers in WA to detain and question before the commission of an offence).<sup>171</sup>
82. The limitations that would allow an ASIO Questioning and Detention Warrant (which, for present purposes, is most comparable to a PDO given the detention component) requires, amongst other things, reasonable grounds for believing that the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence. Alternatively, a PDO requires, amongst other things, reasonable

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<sup>169</sup> Though this could reasonably be compared to the safeguards imposed in most jurisdictions that arrest and detention should generally only be used as a mechanism of last resort where it is necessary to secure attendance at court and to prevent interference with the investigation or destruction of evidence.

<sup>170</sup> Obviously this applies primarily with respect to PDOs issued for the purposes of disrupting a potential future terrorist act. As noted, PDOs can be issued as a response to a terrorist act in order to prevent evidence or the investigation being interfered with. Nevertheless, whilst the trigger is reactive, in that the power responds to the commission of an offence, the aim of the order still operates on a preventative basis in that it seeks to prevent a potential future, consequential act from occurring, namely, the interference with the investigation or the destruction of evidence.

<sup>171</sup> WA Act s 128(2)

grounds to believe a PDO would substantially assist in prevention and reasonably necessary to achieve a particular purpose. To this extent, although bearing perhaps more similarity than as between PDOs and traditional powers of arrest; the thresholds for PDOs and ASIO Questioning and Detention Warrant are materially different. The result can be expected to be materially different purpose for use; a PDO for preventative and disruption purposes (though, with amendment, could allow for the gathering of intelligence and evidence) whereas the Questioning and Detention Warrant is solely for the purposes of gathering intelligence.

83. The differences in these purposes have a material impact upon the practical operational effectiveness of both regimes. Any answers provided in response to questioning undertaken pursuant to a Questioning and Detention Warrant will be considered involuntary given the compulsory nature of the operation of the warrant. Accordingly, any answers elicited would not be admissible against the suspect; answers provided could only be utilised for intelligence purposes but not in a subsequent criminal prosecution. This has limited (but not entirely unhelpful) usefulness to a law enforcement agency. This provides limitations upon the use of information obtained pursuant to such a warrant that would not apply with respect to voluntary answers elicited from questions asked of a person subject to a PDO (if such an amendment were made).
84. Further, no doubt due to the involuntary and compulsory operation of the Questioning and Detention Warrant that overrides traditional common law right to silence and right against self-incrimination, significant safeguards operate as a pre-condition to the exercise of such a power. In this case, as has been outlined above, the Director-General of the Organisation (as opposed to an officer) must seek Ministerial approval before making an application to a quasi-judicial figure to issue such a warrant. Whilst such safeguards are, due to the compulsive powers being exercised, appropriately proportionate to the rights being safeguarded, they are significantly greater than those that operate with respect to PDOs.
85. For the reasons outlined above, due to the differences in thresholds and corresponding difference in purpose, the consequential evidentiary differences arising from both regimes and the operational safeguards imposed as a consequence of the necessary protection of rights, Questioning and Detention Warrants fill a different role to PDOs and would not act as a suitable substitute. It is submitted below that PDOs with questioning, for the reasons outlined below, would fill an existing vacancy in the powers available to law enforcement agencies which are not currently satisfied by the operation of either traditional powers of arrest, nor Questioning with Detention Warrants.

### **Part 3 - Submission**

86. At the time of introducing the *Anti-Terrorism (No. 2) Bill 2005* (Cth) to the Federal Parliament, the then Attorney-General, the Hon. Philip Ruddock, acknowledged that there was support within the Parliament to allow for a person, subject to reasonable



safeguards, to be questioned whilst the subject of a PDO.<sup>172</sup> This possibly was to be the subject for consideration at a future meeting of the COAG.

87. In 2013 COAG undertook a review of existing counter-terrorism legislation, including the effectiveness of Division 105 of the Code. During the course of that review, the Committee observed the following broad propositions:<sup>173</sup>

- 87.1. The concept of police officers detaining persons ‘incommunicado’ without charge for up to 14 days might be thought to be unacceptable in a liberal democracy, other than most extreme circumstances;<sup>174</sup>
- 87.2. The power to prevent an imminent and serious terrorist attack by means of executive detention can, in an emergency situation, be seen as a genuinely valuable protective measure;<sup>175</sup>
- 87.3. As a general proposition, the unpredictability of serious terrorist action requires a high level of preparedness and a strong legislative framework to support investigations and to maintain public confidence in the ability of policing organisations to investigate and successfully prosecute offences;<sup>176</sup> and
- 87.4. In the absence of a preventative detention scheme, arrest without reasonable prospects of conviction may expose the police to criticism.<sup>177</sup>

88. One common theme inherent in the Police responses to the COAG Review at both State and Federal level was the existence of an operationally unsatisfactory situation arising from the inability to interrogate a person detained under a PDO.<sup>178</sup> It was noted in the publicly available submissions that:

- 88.1. The regime “*does not make any provision for the procedure to be followed if a detainee volunteers information. The restriction on questioning does not apply if the person is released from detention, but the time that would be consumed by administrative processes would be a possible obstacle in a time-critical situation*”<sup>179</sup>
- 88.2. “*The ability to quickly question the supporting actors on a voluntary basis to obtain information about the location of the primary actor, on multiple occasions over a short period, may have taken up valuable time. This increased the complexity of the operation by the need for police to go through a process of un-*

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<sup>172</sup> Second Reading Speech, *Anti-Terrorism Bill (No. 2) 2005* (Cth), *Parliamentary Debates*, House of Representatives, 3 November 2005, 103

<sup>173</sup> Commonwealth of Australia, Council of Australian Governments, “*Review of Counter-Terrorism Legislation*,” 2013

<sup>174</sup> COAG Review page 68

<sup>175</sup> COAG Review page 68

<sup>176</sup> COAG Review page 69

<sup>177</sup> COAG Review page 69

<sup>178</sup> Submissions made to the COAG Review from the Australian Federal Police and Queensland Police were publicly available for review. Submissions made from remaining jurisdictions were made *in camera* and were not available.

<sup>179</sup> Submission to the COAG Review made on behalf of the State of Western Australia

*detaining, questioning and re-detaining each time police needed to speak to one or more of the supporting actors.”<sup>180</sup>*

88.3. *“There may be situations in which a person detained under a [PDO] may be willing to assist police with their inquiries. However the legislation would appear to preclude this. If questioning during detention was permitted, it could elicit important information which could better direct police resources in preventing a terrorist attack, or could assist police to determine whether the continued detention of the person is necessary (ensuring that persons are only detained for the minimum amount of time)”<sup>181</sup>*

89. On contemplation of the submission detailed above, the COAG Committee recommended the abolition of Division 105 of the Code on the basis that the existing regime was neither effective, nor necessary. This conclusion appears to have been reached in substantial measure because three of the police submissions highlighted the diminished effectiveness of PDOs absent an ability to question the detained person.<sup>182</sup>

The same submission suggested that, from an operational perspective, the relevant submitting States would be unlikely to use the preventative detention regime due to the following four reasons:

89.1. The complexities of preparing an initial detention application, compliance with the law and securing an initial order could be considered unduly onerous and cumbersome;

89.2. The thresholds were, to some, impractical, particularly with respect to the temporal proximity requirement. The Committee noted, as an example, the difficulty that might occur in a scenario where intelligence suggested an attack in the next ‘few weeks’ rather than specifically within the 14 days. Alternatively, difficulty would also logically arise if the intelligence indicated uncertainty as to precisely when the attack was to occur exactly but still nevertheless indicated that it was to occur ‘soon’;

89.3. There was overall agreement that the inability to question a detained suspect, even if that suspect was obviously willing to provide information, was seriously limiting to the operational effectiveness of the PDO regime; and

89.4. At a practical level, some submissions noted that if there was sufficient material to found a detention order, there would ordinarily be sufficient material to warrant a conventional arrest and charge. Following charge, the usual bail considerations would apply with the belief that bail thresholds would ordinarily result in most charged suspects remaining in custody.

90. In full consideration of the 4 difficulties with the PDO regime set out above, it is presently submitted that the PDO regime still remains a relevant tool in the powers available to investigative authorities, particularly given its recent use for the first time and the evolving nature of terrorist threats in Australia. This is because the PDO allows for detention before the commission of an offence so that, in at least some circumstances, a PDO would allow detention where traditional powers of arrest and

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<sup>180</sup> Submission to the COAG Review made on behalf of the Minister for Police and Community Safety (Qld)

<sup>181</sup> Submission to the COAG Review made on behalf of the Commissioner for Australian Federal Police

<sup>182</sup> Victoria, South Australia and Western Australia

detention would not apply. It is further submitted that, in the present circumstances, a far better course of action to abandoning the PDO system because of identified limitations is to improve the PDO system by addressing some or all of the identified criticism. The potential utility of the PDO system in the present circumstances, notwithstanding its limitations, is as a proposition that appears to have been accepted as a consequence of the extension of the sunset clause to allow continuation of the PDO regime. Whilst it is accepted that use of these powers, to date, has been rare, the value of these powers should not be assessed on the frequency of their application due to the fact that there is a legitimate expectation that use of these powers would be extremely rare.

91. Support for the ongoing operation of the regime can be justified by noting that:
- 91.1. As detailed above, there may be occasions where traditional powers of arrest and detention will not allow for an arrest on the state of the evidence available to law enforcement authorities but detention could be sought under a PDO;
  - 91.2. The PDO regime empowers law enforcement authorities to react rapidly in time critical situations to disrupt, and thereby prevent, a terrorist attack from occurring and given the potential seriousness and consequence of a terrorism offence, there needs to be sufficient and broad operational flexibility to allow intervention before an incident happens;
  - 91.3. The existence of the PDO regime allows for law enforcement intervention rather than enforcement agencies being forced to adopt the dangerous position of waiting until there is sufficient evidence to authorise an arrest. This is particularly important in light of the fact that such situations often can unfold rapidly; predicting the precise time that a terrorist attack may occur can often be inexact.
92. The Independent National Security Legislation Monitor ('INSLM'),<sup>183</sup> when examining the operation of PDOs as part of his report dated 20 December 2012,<sup>184</sup> made the following generalised observations regarding the operation of the PDO regime and the problems arising from the prohibition on questioning from a policing and intelligence gathering perspective, which he noted could not be 'overstated':
- 92.1. Intelligence gathering and disruption are important objectives of pre-charge detention and questioning. Questioning of a person will not always elicit information...a person may choose to exercise their right to remain silent. However, this does not outweigh the benefits of having questioning available;<sup>185</sup>
  - 92.2. If someone is subject to a PDO they will no doubt hold information of great interest to the police and intelligence agencies. Without the ability to question a person who is detained under a PDO, the opportunity to gain valuable information and further lines of inquiry is lost. Police and intelligence agencies

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<sup>183</sup> Mr Brett Walker SC

<sup>184</sup> A number of the recommendations provided in the INSLM report form the foundation of the legislative amendments proposed as part of the current Bill under consideration, see explanatory memorandum

<sup>185</sup> INSLM report page 58; this observation was made in the context of comparing the Australian regime of preventative detention with the regime of pre-charge detention of terrorist suspects under the UK regime

- cannot obtain information to further their criminal or security investigations or admissible evidence to put before the court in a criminal trial;<sup>186</sup>
- 92.3. By preventing discussion with a person detained under a PDO the detained person does not have the opportunity to provide potentially exculpatory evidence which could not only assist police and intelligence agencies in refocussing their investigations but, more importantly, in could result in the rescission of the PDO;<sup>187</sup>
- 92.4. That there may be occasions in which a person who has been detained under a PDO may be willing to assist police in their enquiries by volunteering information. Under the present legislative regime, this would appear to be precluded.<sup>188</sup>
93. In addition to the matters raised by the INSLM, there have been two further practical justifications<sup>189</sup> for allowing questioning during the course of detention pursuant to a PDO, namely:
- 93.1. Where secondary actors are identified as being potentially involved in, or assisting in, the potential commission of a terrorist offence but the traditional arrest threshold has not been achieved and the primary actor is unable to be identified or located. In this circumstance the secondary actors detained under the PDO could be voluntarily questioned in order to obtain intelligence regarding the apprehension of the primary actor; or
- 93.2. Where secondary actors have been identified and the arrest threshold is present; police may still prefer to detain pursuant to a PDO rather than traditional arrest because the detained person could be detained *incommunicado* for a period longer than the traditional arrest period in order to prevent the secondary actors alerting the primary actor to the fact that he or she is the subject of an investigation and, therefore, preventing the ongoing integrity of that operation being compromised.
94. In the scenarios outlined above, beyond obtaining any evidence which may be later admissible in criminal proceedings, by allowing questioning of a person detained under a PDO, that questioning could allow for important intelligence to be elicited, permitting police to better direct limited resources to prevent a terrorist attack in circumstances where time is often constrained.
95. For the several reasons detailed above, it is submitted that consideration ought to be given to allowing the questioning of detained persons on a voluntary basis, principally for intelligence purpose, but also for evidentiary purposes. The right to silence would be preserved due to the voluntary nature and participation in the questioning (unlike the compulsive power exercised by ASIO pursuant to questioning warrants). Whilst it is not suggested that additional safeguards would be required beyond the question of

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<sup>186</sup> INSLM report page 58

<sup>187</sup> INSLM report age 58

<sup>188</sup> INSLM report page 58; this observation was made in the context of a submission provided by the AFP

<sup>189</sup> These scenarios were advanced by the Queensland Police in the submission put forward by the Minister for Police and Community Safety (Qld)

voluntariness, if a contrary view is taken, State legislative regimes have made it clear that safeguards can be put in place to protect against any suggestion of involuntariness.

96. The issue as to the constitutionality of 'Control Orders'<sup>190</sup> under the Cth Criminal Code was considered in *Thomas v Mowbray*<sup>191</sup> whereby the High Court concluded the making of such an order did not infringe the separation of powers and was a valid exercise of judicial power. The Court held that *"The power to restrict or interfere with a person's liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what the person has done, which involves interfering with legal rights, and creating new legal obligations, rather than resolving a dispute about existing rights and obligations, is in truth a power that has been, and is, exercised by courts in a variety of circumstances."*<sup>192</sup> By majority, the Court concluded that the making of such orders was not exclusively administrative and therefore not incompatible with the exercise of judicial power.
97. The Court concluded that the implementation of the control order regime was a valid exercise of legislative power under both s51 (VI) ('the Defence Power') and supplemented, to the extent necessary, by s51 (xxix) ('the External Affairs Power'). Hayne J observed that *"[W]hat the defence power will enable the Parliament to do" in response to the possibility of actions by groups that are not themselves (and are not the proxies of) nation states "depends upon what the exigencies of the time may be considered to call for or warrant."*<sup>193</sup>
98. What was central to the majority reasoning was identification of the purpose of the proposed regime and whether that was consistent with a valid exercise of the Defence Power. To this end, the purpose of the regime was characterised as being for the purposes of providing *"measures directed to preventing the application of force to persons or property in Australia that is sought to be applied for the purpose of changing the federal polity's foreign policies."*<sup>194</sup>
99. Based upon the findings made by the Court, with particular reference to the observations made by Hayne J as to the breadth of the Defence Power for these purposes (as referred to above), is difficult to see that any constitutional infringement would occur should the prohibition on questioning be lifted, nor how this would be an impermissible conferral of executive power upon a judicial organ.
100. There has been some limited judicial support for the proposition that the Constitution imports, by operation of Chapter III and the concept of 'judicial power' a constitutional right to a fair trial.<sup>195</sup> The possession by a prosecuting authority of admissions of a

<sup>190</sup> Conferred under Division 104 of the Cth Crimes Act and, for the purposes of the present submission, analogous to PDOs

<sup>191</sup> [2007] HCA 33

<sup>192</sup> Per Gleeson CJ at pg 6

<sup>193</sup> Per Hayne J at pg 165 citing with approval *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 195

<sup>194</sup> Per Hayne J at pg 165

<sup>195</sup> See *Dietrich v The Queen* (1992) 177 CLR 292

defendant elicited involuntarily may fundamentally affect the nature of a criminal trial and give rise to a potential miscarriage of justice.<sup>196</sup> However, this in itself will not give rise to incompatibility with Ch III but simply elicit judicial remedy, such as a permanent stay.

101. Without detailed submission, it is unclear how suggested amendments to the PDO regime to allow questioning and voluntary answers would be:

101.1. Beyond the exercise of a specific power as granted to the Federal Parliament by operation of the Constitution;

101.2. Incompatible with Ch III of the Constitution; or

101.3. In contravention of an express or implied right as provided by operation of the Constitution.

**The Hon. Christian Porter MP**  
**Member for Pearce**

**Mr Jason Wood MP**  
**Member for La Trobe**

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<sup>196</sup> *Lee v The Queen* [2014] HCA 20