



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

**Parliamentary Joint Committee on Intelligence and Security**

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
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- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) regarding its inquiry into the the following three provisions:
  - the stop, search and seizure powers provided for under Division 3A of Part IAA of the *Crimes Act 1914* (Cth) (**Crimes Act**);
  - the control order (**CO**) regime provided for under Division 104 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**), and
  - the preventative detention order (**PDO**) regime provided for under Division 105 of the Criminal Code.
2. Part 1AA, division 3A of the Crimes Act allows police to stop, question, search, enter and seize in Commonwealth Places or a prescribed zone without a warrant in emergency circumstances where an officer suspects on reasonable grounds that material relevant to a terrorism offence is on the premises, or there is a risk to a person's life, health or safety.
3. Under Division 104 of the Criminal Code, a CO can be made by a federal court on the application of the Australian Federal Police (**AFP**) to impose potentially far-reaching obligations, prohibitions and restrictions on a controlee, but these 'controls' fall short of actual detention. The objects of a CO are to protect the public from a terrorist act and to prevent the provision of support for, or the facilitation of either a terrorist act or the engagement in a hostile activity in a foreign country.
4. Under Division 105 of the Criminal Code, a PDO can be made to prevent the occurrence of a terrorist act that is capable of being carried out and could occur within the next 14 days or preserve evidence of or relating to a recent terrorist act. Division 105 allows a person to be detained for a short period of time, namely, no more than 48 hours.
5. The Law Council notes that the PJCIS's inquiry follows the release of the recent Independent National Security Legislation Monitor's (**INSLM**) reports on *Review of division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers*<sup>1</sup> and *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders*.<sup>2</sup>
6. While accepting that the above laws are necessary, proportionate, have the capacity to be effective and should continue for a further five years,<sup>3</sup> the INSLM has made several recommendations to improve the operation of the provisions. Many of these recommendations are consistent with Law Council recommendations to the INSLM,<sup>4</sup> and previously, to the PJCIS.<sup>5</sup>

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<sup>1</sup> Dr James Renwick SC, *Review of division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers* (7 September 2017) (**The First Report**).

<sup>2</sup> Dr James Renwick SC, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (7 September 2017) (**The Third Report**).

<sup>3</sup> The First Report, p. 39 [9.4].

<sup>4</sup> Law Council of Australia, *Stop, search and seizure powers, declared areas, preventative detention orders and continuing detention orders* (12 May 2017).

<sup>5</sup> Law Council of Australia, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (12 October 2016).

7. Should the above laws remain, the Law Council supports the implementation of the INSLM's recommendations aimed at the improvement of the laws for the reasons outlined in the INSLM's reports. However, it also considers that:
- there should be an express power for the INSLM to report on a matter or matters within the statutory mandate but more urgently or particularly than by the annual report. The INSLM's statutory mandate should include an ability to review a range of legislation to the extent that they may impact on national security matters (e.g. the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIA Act**), *Telecommunications Act 1997* (Cth), *Surveillance Devices Act 2004* (Cth) (**SD Act**), Part IAAB of the *Crimes Act 1914* (Cth), relating to the monitoring of compliance with control orders);
  - the *Independent National Security Legislation Monitor Act 2010* (Cth) (**INSLM Act**) be amended to require a prompt Government response - for example, within six to twelve months;
  - the existing avenues to obtain a warrant should be scrutinised and carefully examined by the INSLM to ensure that they are effective and may be obtained in times of emergency to reduce any future potential reliance on stop, search and seizure powers under Division 3A of Part IAA of the *Crimes Act*;
  - there should be an obligation on the Minister to periodically review the necessity of a declaration under section 3UJ of the *Crimes Act* within the 28 day period over which the declaration for a prescribed security zone is in force;
  - the CO regime should be repealed. If this is not accepted, then the regime should be amended as set out in this submission;
  - in regards to COs, an inference should only be drawn if it is the only rational inference;
  - the previous INSLM's recommendations relating to COs should be implemented;
  - the Law Council supports the appointment of special advocates to be administrated by a legal aid commission or similar body and maintains its views that special advocates should be given administrative support and should be properly remunerated;
  - subsection 105.4(5) of the Criminal Code should be amended and narrowed such that instead of reading 'a terrorist act is one that...is capable of being carried out, and could occur, within the next 14 days' it provides that 'a terrorist act is one that...is likely to occur within the next 14 days';
  - an independent review should be conducted as to the appropriateness of exemptions of certain decisions from the *Administrative Decisions (Judicial Review) Act 1977* (**ADJR Act**) relating to terrorism cases;
  - the provisions of the monitoring warrants regime for COs be amended as set out below;
  - the test for a post-sentence continuing detention order (**CDO**) should be that the court is satisfied that there are reasonable grounds to suspect that the person will engage in a Part 5.3 offence, rather than the 'unacceptable risk' test;

- the Attorney-General should be required to be satisfied in an application for a CDO that there is no other less restrictive measure (for example, a CO or an extended supervision order – **ESO**) that would be effective in preventing the unacceptable risk of a serious Part 5.3 offence if the offender is released into the community;
- the Attorney-General's decision to make an application for a CDO should be required to be made on the basis of information which is sworn or affirmed by a senior AFP member with an explanation as to why each of the possible obligations, prohibitions or restrictions or a combination of such for a CO or an ESO would not be effective;
- the Attorney-General should also be required to have regard to matters similar to those outlined in section 105A.8 of the Criminal Code;
- the INSLM give consideration to the adequacy of the Notice to Admit procedures in both the Federal Court and the Federal Circuit Court in CO proceedings (if the latter court is to be retained as an issuing authority); and
- detainees should be afforded targeted and appropriate rehabilitative programs as soon as possible after their sentence of imprisonment commences.

## INSLM's remit

8. The INSLM Act should be reformed as noted by the first INSLM, Mr Bret Walker SC.<sup>6</sup> That is, there should be an express power for the INSLM to report on a matter or matters within the statutory mandate but more urgently or particularly than by the annual report. The INSLM's statutory mandate should include an ability to review a range of legislation to the extent that they may impact on national security matters (e.g. the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIA Act**), *Telecommunications Act 1997* (Cth), *Surveillance Devices Act 2004* (Cth) (**SD Act**), Part IAAB of the *Crimes Act*, relating to the monitoring of compliance with control orders).
9. The Law Council considers that it is critical that the INSLM has the ability to review the full suite of legislation as it relates to national security and to conduct own motion reports in this respect.
10. The Law Council notes that Government responses to INSLM reports and implementation of INSLM recommendations have been ad hoc.<sup>7</sup> The Law Council considers that this ad hoc approach highlights a need for the INSLM Act to be strengthened by requiring the Government to provide a prompt public response to the INSLM's recommendations – for example, within six to twelve months. The Law Council therefore recommends the INSLM Act should be amended in this regard.

### Recommendations:

- **There should be an express power for the INSLM to report on a matter or matters within the statutory mandate but more urgently or particularly than by the annual report. The INSLM's statutory mandate should include an ability to review a range of legislation to the extent that they may impact on national security matters (e.g. the *Telecommunications (Interception and Access) Act 1979* (Cth), *Telecommunications Act 1997* (Cth), *Surveillance Devices Act 2004* (Cth), Part IAAB of the *Crimes Act 1914* (Cth), relating to the monitoring of compliance with control orders).**
- **The *Independent National Security Legislation Monitor Act 2010* (Cth) should be amended to require a formal and prompt Government response to INSLM reports (for example, within six to twelve month timeframe).**

<sup>6</sup> Independent National Security Legislation Monitor, *Annual Report 28 March 2014*, pp. 2-3.

<sup>7</sup> Independent National Security Legislation Monitor, *Annual Report 7 November 2013*, p. 6; reiterated in Independent National Security Legislation Monitor, *Annual Report 28 March 2014*, p. 2.

## Stop, search and seizure

### Logistics

11. Under section 3UEA of the Crimes Act, a police officer may enter a premises and search and seize a thing he or she finds there without a warrant, where the police officer suspects on reasonable grounds that it is necessary to exercise:
  - a) such powers in order to prevent a thing that is on the premises from being used in connection with a terrorism offence; and
  - b) it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.
12. The Law Council initially preferred the reform of existing measures to obtain a warrant, particularly by telephone or fax in emergency situations, noting that if these existing measures did not operate effectively in emergency situations, consideration should first be given to improving the logistics of how and to whom a warrant application can be made in an emergency before introducing a warrantless entry power.
13. On this issue, the INSLM discussed how the warrantless entry power is justified in situations where there is a terrorist threat in an emergency situation involving a serious and imminent threat to a person's life, health of safety and insufficient time to obtain a warrant.<sup>8</sup>
14. The Law Council maintains that the existing avenues to obtain a warrant should first be scrutinised and carefully examined by the INSLM, to ensure that they are effective and may be obtained in times of emergency. This will minimise the possibility of use of the emergency powers without a warrant in Division 3A, Part IAA of the Crimes Act. In the Law Council's view, if the existing avenues of obtaining a warrant to enter a premises and search and seize a thing are time consuming, then regard should be had to streamlining the procedures, given the breadth of the powers. The warrant system ensures that police search and seizure powers are subject to independent and external supervision and may only be satisfied when prescribed statutory criteria are satisfied. Circumventing this process is a significant matter that should not be lightly permitted by the law.

#### **Recommendation:**

- **The existing avenues to obtain a warrant should first be scrutinised and carefully examined by the INSLM to ensure that they are effective and may be obtained in times of emergency.**

### Requirement for Minister to periodically review prescribed security zone

15. Under section 3UJ of Division 3A of the Crimes Act, the Minister may declare a Commonwealth place to be a prescribed security zone if certain conditions are met. Once a Commonwealth place is declared to be a prescribed security zone, the powers under subdivision B (aside from s 3UEA) are enlivened, regardless of whether the police officer separately suspects on reasonable grounds that the targeted person

<sup>8</sup> The First Report, pp. 31-32 [8.9]-[8.16].



might have just committed, might be committing or might be about to commit, a terrorist act. The declaration remains in force for 28 days unless earlier revoked

16. The broad power of the Minister to declare an area to be a 'prescribed security zone' and thus engage the special search and seizure powers has the potential to impact upon the liberty and security of individuals. Moreover, there is no ongoing obligation on the Minister to review the necessity of a declaration within the 28 day period the declaration is in force. This may lead to situations where the liberty of an individual is unnecessarily compromised. In the absence of a mechanism requiring the Minister to consciously decide whether to revoke or extend a declaration, the period imposes a potentially unnecessary and disproportionate intervention upon liberty and security.
17. The Australian Human Rights Commission (**AHRC**) echoed these concerns in their submission to the INSLM, noting the lack of meaningful review of ministerial power to prescribe a security one, and noting that the breadth of the ministerial power in Division 3A is not insignificant.<sup>9</sup> In addition, the AHRC was of the view that it was unclear what matters a minister will take into account in prescribing a security zone, or to revoke a prescription.<sup>10</sup>
18. The Law Council previously recommended that Division 3A be amended so that:
  - a) reasons are published for why a prescribed security zone has been so declared. This would go some way towards addressing the concerns raised by the AHRC about there not being criteria used by a minister in declaring a zone to be a prescribed security zone; and
  - b) the Minister is required to regularly (such as daily or weekly) consider whether to revoke a declaration of a prescribed security zone made under section 3UJ.<sup>11</sup>
19. The INSLM did not recommend any such changes to section 3UJ of Division 3A because he considered that the existing power under section 3UJ was not unfettered, was subject to parliamentary and committee scrutiny by reason of the requirements to publish a statement on any such declaration and could be subject to scrutiny in court proceedings brought under the ADJR Act by a person aggrieved by such a decision, although he conceded that it is unlikely that any such court challenge could be heard and determined during the period in which the declaration was in effect.<sup>12</sup>
20. Nevertheless, the Law Council maintains that the Minister at the very least should be required to regularly review whether to revoke a declaration of a prescribed security zone made under 3UJ in order to strike the balance between responding to terrorist threats swiftly and ensuring that the freedom and liberty of persons is protected and not unnecessarily encroached upon.

**Recommendation:**

- **There should be an obligation on the Minister to periodically review the necessity of a declaration under section 3UJ of the Crimes Act within the 28 day period over which the declaration for a prescribed security zone is in force.**

<sup>9</sup> The First Report, p. 38 [8.49].

<sup>10</sup> Ibid.

<sup>11</sup> Law Council of Australia, *Anti-Terrorism Reform Project* (October 2013), pp. 92-93.

<sup>12</sup> The First Report, p. 38 [8.53].

## Control orders

21. The CO regime is set out in Division 104 of part 5.3 of the Criminal Code. Broadly speaking, a CO is a court order that imposes restrictions, prohibitions or obligations on a person for the purposes of protecting the public from a terrorist act, preventing the provision of support for or the facilitation of a terrorist act or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.<sup>13</sup> An application for a CO requires the consent of the Attorney-General<sup>14</sup> and the Federal Court or Federal Circuit Court can impose a control order only if it is satisfied of the matters set out in subsection 104.4(1). A CO cannot be made in relation to a person who is under the age of 14<sup>15</sup> and, where a person between the ages of 14 and 17 does not have a lawyer, the Court is required to appoint one.<sup>16</sup>
22. The Law Council has previously raised concerns in relation to the CO regime and indeed has previously recommended its repeal.<sup>17</sup> This recommendation is maintained, and accords with the view of the former INSLM, Bret Walker SC.<sup>18</sup> The Law Council also understands that only six COs have been issued. Three were uncontested. Two of them – Hicks and Thomas – date back to 2007- 8 and were based on previous conduct overseas rather than imminent acts in Australia. The sixth – Causevic – involved allegations that the controlee planned to carry out a terrorist act on Anzac Day. He had been arrested, charged, was imprisoned for 3 months before the charges were dropped by the Commonwealth Director of Public Prosecutions for want of evidence that he had any knowledge of the planned attack. The AFP then obtained a CO (including a tracking device on his ankle) on the basis that he did have such knowledge. However, at the confirmation hearing, the AFP was unable to produce any such evidence, despite a vast amount of surveillance material. The case illustrates the potential dangers of such powers.
23. In contrast, there appears to have been a growth in the prosecutions relating to preparatory terrorism offences. This may also indicate that, in practice, COs are not needed or have little operational utility.
24. The Law Council does not support the continuation of the CO scheme. However, if the CO regime is to be retained, it requires revising and updating to ensure that it is a necessary and proportionate response to the threat of terrorism.
25. The INSLM Report contained a number of recommendation which the Law Council supports, including for example:
  - (a) The power to vary interim Cos;
  - (b) Retention of the Rules of Evidence;
  - (c) Provision of legal aid; and
  - (d) Abolition of costs.

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<sup>13</sup> *Criminal Code Act 1995* (Cth), ss 104.1, 104.5(3).

<sup>14</sup> *Ibid.*, ss 104.2, 104.10.

<sup>15</sup> *Ibid.*, 104.28(1).

<sup>16</sup> *Ibid.*, 104.28(4).

<sup>17</sup> Law Council of Australia, *Anti-Terrorism Reform Project* (October 2013), 104.

<sup>18</sup> Independent National Security Legislation Monitor, *Annual Report* (28 March 2014), 67-70.

26. The INSLM did not accept the Law Council submission that the burden of proof should be at the beyond reasonable doubt standard. However, it did not deal with the Law Council's separate submission that an inference should only be drawn if it is the only rational inference (c.f. civil evidence rule that the inference is more probable than not).<sup>19</sup> Given that the inferences in CO cases often relate to future conduct and arise in volatile scenarios, a conservative approach is justified.

**Recommendation:**

- **The CO regime should be repealed. If this is not accepted, the regime should be improved as set out in this submission.**
- **In regards to COs, an inference should only be drawn if it is the only rational inference.**

## **Outstanding former INSLM recommendations must be addressed**

27. In addition to the implementation of the current INSLM's recommendations regarding COs, the Law Council considers that it is essential that the outstanding recommendations of the second INSLM be implemented. Specifically, the second INSLM:

- accepted recommendation 28 of the COAG Review Committee that only the Federal Court have jurisdiction to make control orders, but recommended in turn that it be given the power to remit a request for an interim control order to the Federal Circuit Court;<sup>20</sup>
- supported recommendation 33 of the COAG Review Committee that s 104.5(3)(a) be amended to ensure that a control imposed by a control order not constitute a relocation order, noting that the current wording 'would literally permit de facto relocation by excluding the place of residence of the controlee';<sup>21</sup>
- recommended early consideration to including an overnight residence requirement, similar to that provided for in the United Kingdom (see sch 1 pt 1 to the *Terrorism Prevention and Investigation Measures Act 2011* (UK));<sup>22</sup>
- supported a variation of recommendation 37 of the COAG Review Committee (advocating a least interference test) to the effect that the issuing court be required to consider 'whether the combined effect of all of the proposed restrictions is proportionate to the risk being guarded against' in addition to the existing requirement to assess each restriction individually;<sup>23</sup> and

<sup>19</sup> In a criminal case: *Shepherd v R* (1990) 170 CLR 573 at 578. In civil cases: *Richard Evans & Co Ltd v Astley* [1911] AC 674 at 687.

<sup>20</sup> INSLM, *Control Order Safeguards – Part 2* (April 2016) [6.7].

<sup>21</sup> *Ibid* [10.5].

<sup>22</sup> *Ibid* [11.3].

<sup>23</sup> *Ibid* [13.7]-[13.8].

- recommended that withholding national security information from the controlee be dealt with only by the NSI Act, and that div 104 be amended accordingly.<sup>24</sup>
28. The Law Council welcomes the support of these recommendations by the current INSLM,<sup>25</sup> which are consistent with its own.
29. The first INSLM also made the following recommendations which have not been addressed:
- if COs are to be retained in general, the onus of showing that grounds exist and, if challenged, that they existed when a control order was first made, should clearly be imposed on the authorities applying for confirmation of an interim control order (Recommendation II/1);
  - If COs are to be retained in general, the prerequisites for making an interim control order, including on an urgent basis, should include satisfaction that proceeding ex parte is reasonably necessary in order to avoid an unacceptable risk of a terrorist offence being committed were the respondent to be notified before a control is granted (Recommendation II/2); and
  - If control orders are to be retained in general, the provisions governing confirmation hearings should expressly impose, perhaps by a presumption, the onus on the AFP to show the control order should continue in force (Recommendation II/3).
30. The Law Council supports the above outstanding recommendations of the first and second INSLM and recommends that they be implemented.

**Recommendation:**

- **The previous INSLM's recommendations relating to COs should be implemented.**

## Special advocates

31. The Law Council supports the inclusion of special advocates in the CO regime and for applications under Division 105A (relating to CDOs and possibly in future ESOs) as an important safeguard: they are a component of the balance struck between measures necessary to respond to counter-terrorism and national security threats on the one hand, and protecting the rights of individuals on the other.<sup>26</sup> The Law Council originally recommended that special advocates be appointed by a body independent of government, such as the INSLM itself.
32. The INSLM considered that it would not be compatible with the functions of the INSLM to appoint special advocates and he, additionally, commented that from a pragmatic perspective, the office was 'not appropriately resourced for this task.'<sup>27</sup>

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<sup>24</sup> Ibid [8.11].

<sup>25</sup> The Third Report, p. 85 [11.12].

<sup>26</sup> Ibid, p. 64 [8.73].

<sup>27</sup> Ibid.

33. The Law Council acknowledges this submission and, therefore, suggests that there would be merit in utilising the existing framework of legal aid commissions through appointment to a panel.<sup>28</sup> However, legal aid commissions would not be in apposition to oversee the necessary security clearance procedures. The Law Council maintains its views that special advocates should be given appropriate administrative support and should be properly remunerated. This will ensure that there is a sufficiently large pool of special advocates to assist with CO cases.

**Recommendation:**

- **The Law Council supports the appointment of special advocates to be administrated by a legal aid commission or similar body and maintains its views that special advocates should be given administrative support and should be properly remunerated.**

## Monitoring warrant regime

34. The Law Council notes that the INSLM's reports do not appear to have examined in detail the monitoring warrant regime for COs because the regime has not yet been used.
35. The Counter-Terrorism Legislation Amendment Act (No 1) Bill 2015 (Cth) introduced a number of measures by which a person who is the subject of a CO may be extensively monitored. The amendments allow law enforcement agencies broad powers to search premises and persons the subject of a CO, intercept telecommunications and install surveillance devices in the absence of any suspicion or evidence that the order is not being complied with and/or any intelligence to suggest terrorist activity.
36. The Law Council retains some of its previously expressed concerns in relation to the monitoring powers, namely, that:
- Sections 3ZZOA and 3ZZOB of the Crimes Act, which enable a constable to apply for a warrant in relation to a premises and a person respectively, should be amended to require that there must be at least a 'reasonable suspicion' that the CO is not being complied with or that the individual is engaged in terrorist-related activity;
  - If entry into premises of a person subject to a control order is with an occupier's consent, a constable must leave the premises if the consent ceases to have effect.<sup>29</sup> In this regard, the Law Council's view is that subsection 3ZZNA(1) of the Crimes Act be amended to include the words 'or express consent subject to limitations' to reflect the position that an occupier may refuse consent or express consent subject to limitations. This will help to ensure that an occupier is properly informed of his or her rights to refuse or express consent to having their premises searched by a police officer;
  - The following provisions are unnecessary and should be repealed:

<sup>28</sup> Law Council of Australia, Letter to Dr James Renwick dated 1 June 2017, *INSLM 2017 Statutory Review*, p. 2.

<sup>29</sup> Section 3ZZKA Crimes Act, read in conjunction with s 3ZZNA Crimes Act.

- subparagraph 3ZZKF(2)(b) of the Crimes Act, which enables a constable who has entered premises, where the entry is authorised by a monitoring warrant, to conduct an ordinary search or a frisk search of a person; and
  - subsection 3ZZLC(2), which enables a constable conducting a search authorised by a monitoring warrant to seize things found in the course of the search.
- Subsection 3ZZNF(4) of the Crimes Act, which sets out the way in which compensation for damage to electronic equipment is determined, should be amended to insert 'were given the opportunity to provide any known appropriate warning or guidance on the operation of the equipment and if so' before the words 'provided any appropriate warning or guidance'; and
  - The provisions of the SD Act that enable informers to use a surveillance device without a warrant for the purpose of monitoring CO compliance should be repealed.<sup>30</sup>

## Preventative detention orders

### Threshold test

37. The Law Council considered that subsection 105.4(5) of the Criminal Code is too broad and may not ensure that only situations where there is a real risk of a terrorist act occurring are captured. Accordingly, the Law Council initially recommended that subsection 105.4(5) of the Criminal Code ought to be amended and narrowed such that, instead of reading 'a terrorist act is one that...is capable of being carried out, and could occur, within the next 14 days', it should provide that 'a terrorist act is one that...is likely to occur within the next 14 days'.
38. The Attorney-General's Department submitted to the INSLM that the amendments made in 2016 remained appropriate, suggesting that, in the current climate, where a person could move from thought to action in, potentially, days, a requirement to prove that *there would be an attack* within a 14-day period would be unnecessarily difficult.<sup>31</sup>
39. The Law Council considers that a requirement to show that a terrorist act is 'likely to occur' is not the same as having to show that it *would* occur.
40. The INSLM did not support this recommendation, finding that 'the test in section 105.4 of the Criminal Code is appropriately formulated' suggesting that the Law Council's proposed test was would not be practical given 'the threat of terrorist activity in the present day'.<sup>32</sup>
41. The Law Council is of the view that practicability should only be one factor when determining the appropriate test for a PDO. Other factors which are critical include the potential intrusiveness of such an order on a person's liberty. The current test does not appear to balance the intrusion on a person's liberty against the low

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<sup>30</sup> Law Council of Australia, *Stop, search and seizure powers, declared areas, preventative detention orders and continuing detention orders* (12 May 2017) pp. 20-21 and pp. 26-27.

<sup>31</sup> The Third Report, p. 82 [10.22].

<sup>32</sup> *Ibid.*



possibility of a terrorist attack occurring. A more appropriate balance needs to be struck.

42. The Law Council maintains its previous recommendation.

**Recommendation:**

- **Subsection 105.4(5) of the Criminal Code be amended and narrowed such that instead of reading ‘a terrorist act is one that...is capable of being carried out, and could occur, within the next 14 days’ it provides that ‘a terrorist act is one that...is likely to occur within the next 14 days’.**

## Judicial review

43. Schedule 1 of the ADJR Act provides for certain decisions which are exempt from review under that Act including all decisions under division 105 of the Criminal Code.
44. The Law Council originally considered that the exercise of powers under division 105 of the Criminal Code be subject to judicial review under the ADJR Act<sup>33</sup> because the exemption, coupled with inadequate access to information and limited access to legal representation, may make it difficult for a detainee to ascertain the true basis for the order being made, challenge the legality of the order, or challenge the conditions of their detention.<sup>34</sup>
45. The INSLM did not recommend removing the exemption for division 105 in schedule 1 of the ADJR Act, finding that existing avenues of review and scrutiny were sufficient, namely, the avenues of judicial review in the Federal Court or the original jurisdiction of the High Court, the merits review provision in division 105, and the provision for statutory judicial review of a Commonwealth order by a state or territory court, where an order under state or territory legislation is also in force (section 105.52). The INSLM also considered that a person is able to pursue any allegation of wrongful detention in a civil action, and a person is also able to make complaints to standing oversight and accountability bodies including the Ombudsman and the Inspector-General of Intelligence and Security.<sup>35</sup>
46. In principle it seems anomalous that judicial review under the ADJR Act is excluded in relation to decisions which could at least *prima facie* be the subject of applications to the High Court under paragraph 75(v) of the Australian Constitution or to the Federal Court under section 39B of the Judiciary Act.
47. However, the issue is best considered as part of an overall review of the exemption of decisions relating to matters involving terrorism cases.

**Recommendation:**

- **An independent review should be conducted as to the appropriateness of exemptions of certain decisions from the ADJR Act relating to terrorism cases.**

<sup>33</sup> Law Council of Australia, *Stop, search and seizure powers, declared areas, control orders, preventative detention orders and continuing detention orders* (12 May 2017), p. 30 [98].

<sup>34</sup> *Ibid* p. 29 [90].

<sup>35</sup> The Third Report, p. 83 [10.27]-[10.28].

## Interoperability with high risk terrorist offender's legislation

### Unacceptable risk test

48. The Law Council originally considered that the unacceptable risk test in relation to making a CDO should be amended in a manner more consistent with the PDO test.<sup>36</sup>

49. By way of contrast, the INSLM recommended that:

*The 'unacceptable risk' test as applied by a state and territory supreme court is a constitutionally valid and (now) regularly used test. There is no reason why it cannot equally be used to consider whether the court should grant a CDO, or the less intrusive ESO, or neither.*<sup>37</sup>

50. The Law Council maintains its view that the 'unacceptable risk' standard is a problematic one, particularly in light of the lack of accurate risk predicting tools for terrorist behaviour.<sup>38</sup> While work is currently underway to develop a risk assessment tool, the Law Council understands that there still remains a lack of data and longitudinal studies for a court to be in a position to make an accurate assessment as to this issue. This may lead to circumstances where courts are not able to make a determination on the basis of very limited or arguable evidence. This stands in contrast to predictive methodologies for sex offenders which have been established for a period of many years. The Law Council considers that in the absence of such tools the laws themselves are not able to operate effectively.

51. The Law Council also notes that the test for CDOs is inconsistent with the test for PDOs. That test focuses on the probability that a person will commit a terrorist act and requires reasonable grounds to suspect that the person will engage in a terrorist act. It is suggested that this is a more certain standard and that the test for a CDO should be at least as strict as that for a PDO, given the former may involve a far lengthier period of detention.<sup>39</sup>

#### Recommendation:

- **The test for a CDO should be that the court is satisfied that there are reasonable grounds to suspect that the person will engage in a Part 5.3 offence.**

### Monitoring warrant regime

52. The Law Council supports in-principle the desirability of consistent monitoring regimes when a CO or ESO is in place.<sup>40</sup> However, the Law Council is concerned about extending the problematic CO monitoring warrant regime (as noted above) to the proposed ESO regime (as recommended by the INSLM). The above problematic

<sup>36</sup> Law Council of Australia, *Stop, search and seizure powers, declared areas, control orders, preventative detention orders and continuing detention orders* (12 May 2017), p. 8 [12].

<sup>37</sup> The Third Report, p. 75 [9.35].

<sup>38</sup> Law Council of Australia, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (12 October 2016) p. 19.

<sup>39</sup> Law Council of Australia, *Stop, search and seizure powers, declared areas, control orders, preventative detention orders and continuing detention orders* (12 May 2017), p. 33 [110].

<sup>40</sup> The Third Report, p. 86 [11.13]-[11.17].



features of the monitoring warrant regime should be addressed prior to extending it to ESOs.

## Timeframe for an extended supervision order

53. The Law Council notes that the INSLM's recommendation that State and Territory Courts be given jurisdiction to make an ESO (while still retaining jurisdiction to make a CDO) for a period of up to three years (at a time) is consistent with the duration of a CDO. However, the three year timeframe is not consistent with the timeframe for the maximum duration for a CO which is 12 months with the possibility of renewal.
54. The Law Council is concerned that there will then be a suggestion that, for consistency, the maximum period for COs should then be extended to up to three years.
55. Given the intrusive nature of a CO, particularly with the monitoring warrant regime, the Law Council does not consider that it would be necessary or proportionate to allow a CO to be extended for a three year period.
56. The Law Council would not oppose a period for *up to* three years (emphasis added) for an ESO provided that there are appropriate powers for review applications during the duration of the ESO. The ability of a court to impose such an ESO may ensure that a court has an ability to impose the least intrusive option rather than post-sentence detention.

## Satisfaction by Attorney-General

57. The Law Council originally recommended that the Attorney-General should be required to be satisfied in an application for a CDO that there is no other less restrictive measure (for example, a CO) that would be effective in preventing the unacceptable risk of a serious Part 5.3 offence if the offender is released into the community.<sup>41</sup>
58. The Law Council also considered that the Attorney-General's decision to make an application for a CDO should be required to be made on the basis of information which is sworn or affirmed by a senior AFP member with an explanation as to why each of the possible obligations, prohibitions or restrictions or a combination of such for a CO would not be effective.<sup>42</sup> This consideration should also apply in the case of an ESO.
59. The Attorney-General should also be required to have regard to appropriate matters as outlined in section 105A.8. Briefly stated, these include for example the safety and protection of the community; any reports from relevant experts or reports in relation to the extent to which the offender might be managed in the community; any treatment or rehabilitation programs the offender has participated in and the offender's level of participation; the level of compliance with parole or CDO obligations; and any prior convictions for relevant offences.<sup>43</sup>

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<sup>41</sup> Law Council of Australia, *Stop, search and seizure powers, declared areas, control orders, preventative detention orders and continuing detention orders* (12 May 2017), pp. 36-37.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

60. The INSLM agreed that the Attorney-General would be the appropriate applicant in relation to an ESO,<sup>44</sup> but made no comment on the existing way in which the Attorney-General considers applications for CDOs. In light of this, the Law Council maintains its original position.

**Recommendations:**

- the Attorney-General should be required to be satisfied in an application for a CDO that there is no other less restrictive measure (for example, a CO) that would be effective in preventing the unacceptable risk of a serious Part 5.3 offence if the offender is released into the community;
- the Attorney-General's decision to make an application for a CDO should be required to be made on the basis of information which is sworn or affirmed by a senior AFP member with an explanation as to why each of the possible obligations, prohibitions or restrictions or a combination of such for a CO or an ESO would not be effective; and
- the Attorney-General should also be required to have regard to matters as outlined in section 105A.8.

## Other recommendations

61. Some of the recommendations initially made by the Law Council do not appear to have been addressed by the INSLM. The Law Council maintains its position on these recommendations, namely, the following:

**Recommendations:**

- the INSLM give consideration to the adequacy of the Notice to Admit procedures in both the Federal Court and the Federal Circuit Court in CO proceedings (if the latter court is to be retained as an issuing authority); and
- detainees should be afforded targeted and appropriate rehabilitative programs as soon as possible after their sentence of imprisonment commences.

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<sup>44</sup> The Third Report, p. 76 [9.42].