Parliamentary Joint Committee on Intelligence and Security

Review of the operation, effectiveness and implications of Division 3A of Part IAA of the *Crimes Act 1914*, and Division 104 and 105 of the *Criminal Code* – police stop, search and seizure powers, the control order regime and the preventative detention order regime

Questions to the Attorney-General's Department and the Australian Federal Police

Stop, search and seizure powers – Division 3A of Part IAA of the Crimes Act 1914

1. **The AFP's submission states that the stop, search and seizure powers in Division 3A are of 'critical importance'. However, the powers have not been used since they were introduced in 2005. Could you please provide the Committee with hypothetical examples, realistic in the current threat environment, in which each of the powers in Division 3A would be used? For each example provided, please explain why other police powers, including those available at the state or territory level, could not be relied upon.**

Necessity of Stop, Search and Seize Powers

The powers in sections 3UC, 3UD and 3UE (respectively, requirement to provide name etc., stopping and searching, and seizure of terrorism related items and serious offence related items) are modelled on Division 4 of Part II of the *Australian Federal Police Act 1979*, and may only be exercised in a Commonwealth place. To date, a successful attack has not been carried out on a Commonwealth place. Should the AFP become aware of any potential plot directed at targets situated within a Commonwealth place, consideration will be given to invoking these powers. The primary objective will always be to try to prevent or disrupt a terrorist attack, away from the target location. For these reasons the powers in sections 3UC, 3UD and 3UE have not yet been used, and the AFP does not anticipate them being used frequently.

Division 3A ensures there is a set of nationally consistent counter-terrorism powers that apply to every Commonwealth place regardless of the State in which it is located. At the time of introduction, the Government acknowledged the powers would provide a common approach for police operating in Commonwealth places throughout Australia.[1] This approach ensures that AFP officers located at Commonwealth places have access to powers which are familiar and well understood. While States and Territories have special counter-terrorism powers, they differ from jurisdiction to jurisdiction.

[1] Explanatory memorandum, *Anti-Terrorism Bill (No. 2) 2005*.

When the legislation was introduced, the Government indicated the Division 3A powers were intended to dovetail with equivalent State and Territory stop, question and search powers. This reflected the intention of the 2005 Council of Australian Governments (COAG) decision which provided that:

> State and Territory leaders agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including … question and search powers in areas such as transport hubs and places of mass gatherings. COAG noted that most States and Territories already had or had announced stop, question and search powers.[2]

Hypothetical examples

In the current terrorism environment, an attack on a Commonwealth place is not unlikely. Internationally there have been a number of attacks at major airports, including:

- **2016 Brussels Airport:** Two suicide bombers carrying explosives in suitcases attacked an airport departure hall. A third suicide bomber was prevented from detonating his own vest by the force of the initial explosion.
- **2016 Istanbul Airport**: Two suspects approached an airport security checkpoint and opened fire before detonating suicide vests. A third attacker detonated a suicide bomb in a parking lot across the street from the terminal.
- **2007 Glasgow Airport:** Vehicle loaded with propane canisters was driven to the entrance to Glasgow Airport and set ablaze.

Domestically, Operation SILVES in July 2017 was an investigation into a planned improvised explosives device attack on a flight departing Sydney Kingsford Smith Airport, which is a Commonwealth place.

Threats against Australian Defence Force bases are also a concern in the current environment. In 2009, Operation NEATH investigated a Melbourne-based terrorist cell which planned to attack Holsworthy Army Barracks in Sydney.

A series of hypothetical examples where Division 3A powers might be used is set out below:

Hypothetical example – Garden Island Navy base

AFP provides a Uniformed Protection Function at Garden Island Defence Precinct (NSW). The AFP's function in that regard is to provide for the safety and security of the Precinct and its population along with providing a first response capability in the event of a critical incident.

In this hypothetical example, intelligence indicates that an unidentified person is planning to commit an edged weapon terrorist attack at Garden Island Navy base. A suspect is identified loitering in the public area for a prolonged period of time, constantly keeping his

[2] Council of Australian Governments' Special Meeting on Counter-Terrorism 27 September 2005.

hands in his pocket and trying to secret himself from view of CCTV cameras with a black and white flag visible in his rear pocket.

In this scenario reasonable grounds to suspect the person might be about to commit a terrorist act exist to exercise powers under Division 3A. The suspect is approached and required to provide their name and reason for being at the Defence Precinct under section 3UC. The person provides their name and shows a NSW driver's licence. Intelligence checks identify that they are an associate of a known terrorism suspect. Meanwhile, police search the person under section 3UD, and seize a knife and Islamic State flag found in their possession. The person is arrested on suspicion of planning a terrorist act.

Hypothetical example – Non-Commonwealth place

As per subsection 3UB(2), the emergency entry power in relation to terrorism (section 3UEA) is not limited to Commonwealth places. In this hypothetical example, the National Security Hotline receives a tip off about an improvised explosive device hidden in a large shopping centre in Sydney central business district. The device is believed to be controlled by a remote detonator and could be detonated at any moment.

The NSW JCTT must act immediately to prevent the device from exploding. This is a serious and imminent threat to lives in the shopping centre. A delay for the purpose of obtaining a section 3E search warrant (even as an urgent telephone application) would potentially take too long.

The NSW JCTT radios the closest NSW police units to the shopping centre, who exercise emergency entry powers under section 3UEA (noting the Division 3A powers may be exercised by State and Territory police officers, as well as AFP members). Using subsection 3UAE(6), police use reasonable force against persons and things obstructing entry, including breaking doors to enter non-public parts of the shopping centre.

The device is located and secured by NSW police first responders (and the shopping centre evacuated). A police bomb response team is deployed to disable the device, which is then seized under subsection 3UEA(2)(b). Within 24 hours of entry, police notify the occupier of the shopping centre that entry has taken place and provide notice of the item seized.

Hypothetical example – Sydney Kingsford Smith Airport

The AFP is the primary law-enforcement agency at Sydney Kingsford Smith Airport. AFP Airport Operations officers provide immediate response to policing matters within the airport precincts as well as a coordinated approach to the deterrence of and response to

terrorist threats.

In this hypothetical example, the AFP has received credible intelligence indicating that a group of individuals is planning to detonate an improvised explosive device on an international plane departing Sydney Airport in the next few hours. Police only have a general description of the perpetrators and do not know their exact whereabouts. As a result of that intelligence, the Minister makes a declaration under section 3UJ covering Sydney Airport.

Using section 3UM, police systematically approach persons located at Sydney Airport to confirm their identities. Because the airport is now a prescribed security zone, police do not need to establish reasonable suspicion to use the powers in Division 3A.

When approached by police at the check-in counter, one person makes comments about ISIS and infidels. The person is arrested on suspicion of planning a terrorist act. A person-search on arrest reveals the improvised explosives device.

2. With the exception of section 3UEA, the powers under Division 3A are limited to 'Commonwealth places', as defined in the *Commonwealth Places (Application of Laws) Act 1970*. Could you please provide some examples of Commonwealth places in which the Division 3A powers may be used?

A 'Commonwealth place' is a place acquired by the Commonwealth for public purposes for which the Commonwealth has exclusive powers to legislate and includes most major Australian airports, some defence establishments, and immigration detention centres.

3. What are some examples of situations in which it is envisaged that a 'prescribed security zone' may be declared under section 3UJ of the *Crimes Act 1914*?

A prescribed security zone declaration provides powers to prevent and respond to terrorist attacks at Commonwealth places and is designed to only be used in exceptional circumstances.

The AFP anticipates that it would apply to the Minister to declare a prescribed security zone in a situation where there is strong intelligence of an imminent terrorism threat directed at a Commonwealth place, or where an attack on a Commonwealth place has just occurred.

For example, if there was an attack at a Commonwealth place, the AFP would consider applying to the Minister for a declaration under section 3UJ. Such a declaration would enable police to systematically stop and search individuals within the relevant Commonwealth place, and request evidence of their identity. These powers would be critical in enabling police to contain the scene of the attack, locate perpetrators, and preserve evidence.

If there was a threat of an imminent attack on a Commonwealth place, the AFP would consider applying to the Minister for a declaration under section 3UJ. Such a declaration would enable police to systematically stop and search individuals within the relevant Commonwealth place. Significant police activity of this nature may assist in identifying the perpetrators, or deterring the commission of a crime.

a) Have there been any past instances in which a prescribed security zone has been applied for by the police and/or has been actively considered for declaration?

To date, the AFP has not applied to the Minister for a declaration that a Commonwealth place be declared as a prescribed security zone. This is due to the reasons outlined in response to Question One, above. For the same reasons, the AFP has not actively considered applying for a declaration.

To date, there have been three disrupted attacks on Commonwealth places (a planned attack on Holsworthy Barracks in 2009; a planned attack on Garden Island Defence Precinct in 2015; and a planned attack on a flight departing Sydney Airport in July 2017). In each of these instances police were able to disrupt the attacks before it became necessary to exercise powers at the target location (the Commonwealth place).

b) Section 3UJ states that a Minister may declare a prescribed security zone if he or she considers that a declaration would assist in 'preventing a terrorist act from occurring' or 'responding to a terrorist act that has occurred'. Are there any other factors that a Minister would need to consider before declaring a prescribed security zone?

Subsection 3UJ(1) does not outline other specific criteria that the Minister must consider when determining whether to declare a Commonwealth place to be a prescribed security zone.

In briefing the Minister to make a decision under section 3UJ, the AFP would provide the Minister with a brief outlining all operational information relevant to the question of whether a declaration would assist:

(a) in preventing a terrorist act occurring; or

(b) in responding to a terrorist act that has occurred.

The content of that information would depend on the circumstances of the threat or attack, but could include information relating to:

- the seriousness of the threat or attack;
- the credibility of the threat;
- the imminence of the attack; and
- the nature of the intelligence relied on.

4. At least one submitter to the Committee's inquiry has called for the maximum duration of a Minister's declaration of a prescribed security zone to be reduced to 14 days from the current 28 days.

a) What, if any, would be the practical implications if the maximum duration of prescribed security zones was reduced to 14 days?

Subsection 3UJ(3) provides that a declaration of a Commonwealth place as a prescribed security zone ends 28 days after the declaration is made, unless the declaration is revoked by the Minister before then.

A reduction of the period for which a declaration is in force to 14 days may prove insufficient for the purposes of mitigating a terrorist threat. If the Minister is required to make a further declaration for another 14 days, this may cause a delay which prevents law enforcement agencies from acting swiftly to prevent, or respond to, terrorist threats and terrorist acts.

The duration of 28 days for a declaration is subject to an important safeguard. Under subsection 3UJ(4), the Minister must revoke a declaration made under paragraph 3UJ(1)(a)

or (b) if he or she is satisfied there is no longer a terrorism threat justifying the declaration being continued or, where the declaration is no longer required. This ensures that declarations last no longer than necessary to mitigate the risk posed by a terrorist threat, or mitigate the threat to the community in the aftermath of a terrorist act.

In the 2013 Council of Australian Governments Review of Counter-Terrorism Legislation (COAG Review), the COAG Committee noted that '[it] is cautious about recommending any such change in the absence of any evidence to suggest the 28 day period is unreasonable'[3].

b) Under what type of circumstances would a declaration lasting up to 28 days be necessary? Could two 14-day declarations be made successively in order to cover such circumstances?

Division 3A is targeted at safeguarding Commonwealth places such as airports and defence establishments. There may be instances when a terrorist threat in relation to a Commonwealth place could last for an extended duration, which requires the Minister to make a declaration that a Commonwealth place be a prescribed security zone for up to 28 days.

For instance, where police are aware of a terrorist threat in relation to an airport, but are uncertain as to the exact timing of a planned attack or the full scope of individuals involved in the plot, it may be appropriate to seek a declaration from the Minister in relation to the airport (or part of an airport) for the purpose of preventing a terrorist act occurring (s3UJ(1)(a)). A declaration that lasts up to 28 days may be justified on the basis that the threat, and police investigations associated with the threat, are ongoing.

Throughout the course of the 28 day period, the Minister must revoke a declaration, if satisfied the terrorist threat has been mitigated, as paragraph 3UJ(4)(a) requires the Minister to revoke a declaration where there is no longer a terrorism threat that justifies the declaration being continued.

Seeking successive 14 day declarations may cause delays that prevent the police from acting swiftly to prevent, or respond to, terrorist threats and terrorist acts. It may require a diversion of resources from operational agencies whose priority during this period will be the prevention of a terrorist act.

Noting the ongoing attractiveness of Commonwealth places as a target for a terrorist act, especially those which are locations of mass gathering, a declaration that lasts up to 28 days, which is subject to ongoing review by the Minister, is not unreasonable.

[3] Council of Australian Governments Review of Counter-Terrorism Legislation (2013), para 317, p. 84.

5. What would be the practical implications (if any) if the 'reasonable grounds to suspect' threshold for the exercise of Division 3A powers was to be strengthened to 'reasonable belief', as recommended by at least one submitter to the Committee's inquiry?

The threshold for the exercise of Division 3A powers needs to be considered in light of the purpose of the power. The powers in Division 3A are not directed toward the collection of evidence for offences generally, but are intended to enable the prevention of a terrorist attack which may involve a large number of casualties. For this purpose the threshold is set at an appropriate level.

Currently, the police may exercise stop, search and seize powers in Subdivision B of the Division 3A where an individual is in a Commonwealth place, and the police officer 'suspects on reasonable grounds' that the person might have just committed, might be committing, or might be about to commit, a terrorist act (paragraph 3UB(1)(a)).

The powers authorised under Division 3A are designed to be exercised swiftly in response to emergency scenarios, which makes the threshold of 'suspects on reasonable grounds' appropriate. In emergency scenarios, it may not be appropriate or in the public interest for police to delay the exercise of stop, search and seize powers in Commonwealth places (particularly places of mass gathering) until sufficient information has been obtained to meet the higher threshold of 'believes on reasonable grounds'.

State and Territory stop, search and seize power regimes also apply the threshold of 'suspects on reasonable grounds' or 'reasonably suspects'. It is appropriate that the same threshold be applied in relation to the use of these emergency powers in Commonwealth places. In the current operational environment, where low capability techniques may be employed to carry out terrorist acts in a short timeframe, the ability of police officers to respond swiftly to prevent terrorist acts is critical. The effectiveness of the emergency powers in Division 3A may be undermined by increasing the threshold for application to 'reasonable grounds to believe'.

As noted by the INSLM, the threshold of 'suspects on reasonable grounds' has a substantial body of case law to clearly identify when the threshold may be satisfied. As the INSLM notes:

> 8.26 The facts which reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. Where a suspicion arises from idle speculation and has no foundation in facts, it is not a reasonable one.
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> 8.27 In *Queensland Bacon Ptd Ltd v Reeds*, Kitto J observed that '[a] suspicion that something exists is more than mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a "slight opinion, but without sufficient evidence"'. [4]

[4] INSLM report on Stop, Search and Seize Powers, pp. 33-34.

The INSLM also notes that the threshold of 'suspects on reasonable grounds' is used in other provisions in the *Crimes Act 1914*. The INSLM adopted the view of the COAG Review, which found that:

> There is no empirical evidence to satisfy the Committee that this distinction has led to the misuse of police powers, nor that it has operationally altered police behaviour. In the absence of such evidence, the Committee is unwilling to recommend any change to the standard.[5]

6. Do you have any comments on the Independent National Security Legislation Monitor's recommendation for the addition of reporting requirements (akin to the existing requirements for delayed notification search warrants) to the relevant minister, the Commonwealth Ombudsman, the PJCIS and the office of the INSLM so that each such body can review any exercise of the Division 3A powers, including the making of a ministerial declaration?

The additional reporting requirements suggested by the INSLM are proposed to be modelled on reporting obligations that apply in respect of the delayed notification search warrant (DNSW) regime under Part IAAA of the *Crimes Act 1914*. The DNSW regime contains extensive oversight requirements, including:

- the requirement to provide the Commonwealth Ombudsman, as soon as practicable after every 6 months commencing on 1 January or 1 July, with details of the number of DNSWs applied for, issued and executed (section 3ZZFC)
- the requirement that the Ombudsman must from time to time, and at least once in each 6-month period starting on 1 January or 1 July, inspect the records of the AFP to determine the extent of compliance with the requirements of Part IAAA (section 3ZZGB)
- the requirement that the Ombudsman must, as soon as practicable after each 6-month period starting on 1 January or 1 July, provide the Minister with a report on the outcome of each inspection (section 3ZZGH), and
- the requirement that the Minister table the Ombudsman's report in both Houses of Parliament within 15 sitting days of having received the report (subsection 3ZZGH(3)).

These extensive oversight requirements are tied to the covert nature of the DNSW regime. For instance, the DNSW regime can allow for up to 6 months delayed notification of the execution of a warrant so as to not compromise ongoing operations. In such instances, the Commonwealth Ombudsman's oversight is important to ensure the fair and appropriate application of these powers by the AFP.

In contrast, the powers in Division 3A can only be exercised overtly. Even where premises are entered without a warrant under the emergency entry powers in section 3UEA, the occupier of the premises must be notified within 24 hours of the entry. A further distinction between the DNSW regime and Division 3A is that while the powers under the DNSW

[5] Council of Australian Governments Review of Counter-Terrorism Legislation (2013), para 323.

regime can only be exercised by the AFP, the powers under Division 3A may be exercised by the AFP, and State and Territory police.

There are also existing oversight mechanisms that operate generally in relation to the actions of police, such as the AFP. For instance, if there was a concern about the use of Division 3A powers by the AFP, this could be investigated by the Commonwealth Ombudsman or the Australian Commission for Law Enforcement Integrity. Similarly, the use of these powers by State and Territory police can be reviewed by the appropriate jurisdictional oversight bodies, such as State and Territory Ombudsman.

In addition, the *Independent National Security Legislation Act 2010* (INSLM Act) already provides the INSLM with the mandate to review the operation of counter-terrorism legislation. This includes the power to request information or produce documents for the purposes of performing the INSLM's function (section 24 of the INSLM Act). This enables the INSLM to seek information and review documents associated with the exercise of powers by the AFP under Division 3A.

Accordingly, while there may be merit in requiring reporting on the use of the powers under Division 3A to enhance transparency, the DNSW regime may not be the most suitable model for determining reporting requirements. Given that it is not anticipated that the powers under Division 3A will be utilised frequently, it may be appropriate that, in addition to the annual report requirement noted below in Question 7, the AFP must also provide a report to the AFP Commissioner as soon as practicable where they have exercised Division 3A powers. The AFP Commissioner could then provide a copy of the report to the Minister, the Commonwealth Ombudsman and the INSLM.

7. Would the AFP have any concerns if the total number of times that each power under Division 3A has been used was required to be reported publicly in an annual report?

The AFP would not object to a requirement to publicly report on the number of times that each power under Division 3A is used, for example in an annual report, with appropriate safeguards for sensitive information and ongoing operations.

Control order regime – Division 104 of the Criminal Code

8. What is the role and purpose of the control order regime in Australia's counter-terrorism efforts, in comparison to other prevention and disruption measures such as arrest and charge; preventative detention; surveillance; and countering violent extremism programs?

The control order regime is one of a number of measures in Australia's counter-terrorism legislative framework which are designed to protect the community from terrorist acts. The existence of special preventative powers, including control orders, recognises the potentially catastrophic consequences of a terrorist attack and the importance of prevention.

In circumstances where there is enough evidence to formally charge and prosecute a person, the AFP will always take this approach over seeking the imposition of a control order. The control order regime plays an important role in circumstances where an investigation has not yet progressed to the point where there is sufficient evidence to arrest and charge, and yet the suspect presents an unacceptable risk to the community. In this situation, the control order regime is a way of mitigating the risk presented by the individual while the AFP continues to collect admissible evidence for a criminal prosecution.

The control order regime plays a different role in Australia's counter terrorism legislative framework to other key preventative measures, such as preventative detention orders, surveillance and countering violent extremism programs, as it allows a court to place tailored obligations, prohibitions and restrictions on an individual for a period of up to 12 months (and it is an offence to breach these conditions). In contrast:

- The preventative detention order regime allows police to detain a person for a short period to prevent an imminent terrorist act occurring, or to preserve evidence of or relating to a recent terrorist act. A preventative detention order can be used to mitigate risk of an attack in the short-term while police consider whether there is sufficient evidence to arrest and/or charge the person. Preventative detention orders also have a role in enabling police to act quickly to preserve evidence in the aftermath of an attack.

- Surveillance measures facilitate the gathering of evidence against a person so that the person (and/or others) can be prosecuted for an offence. Surveillance may also be used in conjunction with a control order.

- Countering violent extremism programs aim to prevent crime by identifying 'at-risk' individuals and preventing them from going down the pathway of violent extremism, but also to rehabilitate those who have already gone down that path.

There are a number of other legislative schemes which are designed to mitigate the threat of terrorism. For example, where a person is charged and prosecuted for a terrorism offence, the provisions relating to bail and non-parole periods will apply.[6] The new continuing detention order (CDO) regime, which commenced on 7 June 2017, may also apply to a

[6] Refer to sections 15AA and 19AG of the *Crimes Act 1914*.

person where they are serving a sentence of imprisonment for a terrorism offence (subject to the criteria listed in 105A.3(1)).

9. **Parliament has approved a variety of changes to the control order regime since 2014, including expanding the grounds upon which a control order may be sought and issued; lowering the minimum age for a controlee; introducing a monitoring regime; and making changes to the NSI Act, along with the introduction of special advocates. To what extent have these amendments enhanced the operation and effectiveness of the control order regime as a prevention and disruption tool? Are any further enhancements needed?**

Control orders have been obtained since 2014, however, to date, the substantive changes that were made to the control order regime since 2014 have not been required to be used. This reflects the sparing use of the provisions in general. The special advocate provisions will not commence until 29 November 2017. It should also be noted that the cumulative effect of counter-terrorism amendments, including lowering the threshold for arrest in relation to terrorism offences, have aided the AFP in progressing criminal prosecutions, over control orders.

The amendments were necessary to ensure that the regime remains appropriate and adapted in the current threat environment. For example, the *Counter Terrorism Legislation Amendment Act (No. 1) 2016* lowered the age for which a control order can be requested from 16 to 14 years of age (with appropriate safeguards). This change was necessary to respond to an increasing trend for school-age students to become radicalised and be capable of participating in activities which pose a threat to national security.

10. **The AFP's submission notes that 'operational experience has demonstrated that the current process [for obtaining a control order] is complex and resource intensive'.**
    a) **Could you expand on this statement?**
    b) **To what extent (if any) do the current complexities adversely impact on the AFP's ability to respond to threats in a timely manner?**
    c) **How would you recommend that the process be improved?**
    d) **Do the INSLM's recommendations regarding the rules of evidence for civil proceedings resolve your concerns?**

In its submission to the PJCIS the AFP notes that the current control order process is 'complex and resource intensive'. In particular, experience has demonstrated that in order to meet the control order threshold a significant body of police holdings must be produced and converted into an admissible form. For example, a person's online communications over a long period of time may cumulatively demonstrate their ideology and it may not be possible to convince a court to issue a control order unless all of that information is presented. Further detail on the AFP's concerns is outlined in the AFP's submission to the INSLM.

In particular:

(i) There is no ability under the current legislation to amend the conditions of an interim control order. Under paragraph 104.14(7)(b) when a control order is confirmed, the order can be varied by removing a condition at the time of confirmation. The Criminal Code does not permit it to be varied by amending the condition, for example where a respondent seeks to amend particulars in order to facilitate a change of residential, educational or employment arrangements.

(ii) It is not clear the extent to which the Federal Court Rules apply to control order proceedings, and there are instances where the Rules appear to be in conflict with the procedures articulated for control orders in the Criminal Code. For example, there is uncertainty about whether evidence should be led by affidavit or in person, and whether the respondent is required to comply with rules regarding notices to admit and agreed statements of facts.

(iii) The full civil rules of evidence do not apply to interim control order proceedings, but do apply to confirmation proceedings. This is problematic because:

- At confirmation stage, the court is required under sub-section 104.13(3) to consider the material put forward in the interim proceedings; but as the court cannot take into account information not in admissible form, the exact status of this material in the confirmation proceedings is unclear. This creates a tension for the court.

- Control orders are a preventative measure designed to protect the community where there is strong intelligence and information to suggest that the person poses a risk. Operational sensitivities surrounding the capability, methodology or nature of intelligence or other information means certain information or intelligence may not be available in admissible form.

As outlined in response to questions 11 and 13, the INSLM made two recommendations seeking to address the concerns raised by the AFP in paragraphs (i) and (iii) above. The INSLM's recommendations would clarify the issues raised by the AFP. However, the INSLM did not make any specific recommendations addressing the concerns raised by the AFP in paragraph (ii) above.

11. Do you have any comments on the INSLM's view that the rules of evidence for civil proceedings should apply to control order confirmation proceedings, but that it be clarified that the issuing court 'may take judicial notice of the fact that the original request in particular terms was made'?

The INSLM recommended that section 104.14 be amended to clarify that in a confirmation proceeding:

- The original request for an interim control order need not be tendered as evidence of the proof of its contents.
- The issuing court may take judicial notice of the fact than an original request in particular terms was made, but it is only to act on evidence received in accordance with the *Evidence Act 1995*.

The INSLM made this recommendation because of a perceived tension with the current control order provisions. Under paragraph 104.14(3)(a), the court is required to consider the original interim control order request before deciding whether to confirm that control order. An interim control order proceeding is an interlocutory proceeding for the purposes of the *Evidence Act 1995* and not all the rules of evidence apply. That is, the Court may rely on the sworn testimony (usually by affidavit), which contains indirect evidence. In contrast, a confirmation proceeding is not an interlocutory proceeding and the rules of evidence apply, meaning a Court may only consider admissible evidence put before the court in a proceeding. This means that although the court is required under paragraph 104.13(3)(a) to consider the interim control order request, as it is not in an admissible form and likely to contain hearsay (to which exceptions to the hearsay rule are unlikely to apply), there is uncertainty as to the role of the interim control order request in the confirmation hearing and the weight or level of judicial notice which may be given to that request in accordance with paragraph 104.13(3)(a).

The INSLM's recommendation would clarify this issue. In practice, this is consistent with the approach that the AFP already adopts in relation to control order confirmation proceedings. That is, the AFP does not seek to rely on the interim control order request in confirmation proceedings, instead, leading admissible evidence to support its submissions in a confirmation proceeding.

12. The INSLM has noted that, while section 104.5 provides that a confirmation hearing will take place 'as soon as practicable, but at least 72 hours' after an interim control order is made, the practical operation of the regime has been that at least six months has passed between issuance and confirmation (if the order has proceeded to confirmation at all) in all instances.

If a court makes an interim control order, the order must specify a day on which the person who is the subject of the order may attend court for the court to confirm the order, declare it void, or revoke the order (the confirmation hearing). Under subsection 104.5(1A), this day must be as soon as practicable, but at least 72 hours after the order is made.

In 2014, the *Counter Terrorism Legislation Amendment Act (No. 1) 2014* inserted subsection 104.5(1A) into the Criminal Code. This subsection provides that when specifying a day for the purposes of a confirmation hearing, the issuing court must take into account that a party may need to prepare in order to adduce evidence or make submission to the court in a confirmation proceeding (and any other matter the court considers relevant). The purpose of subsection 104.5(1A) is to provide additional protection to the subject of an interim control order who may, for example, need time to obtain the assistance of a legal representative or contact witnesses.

a) Has the relatively short minimum 72 hours period stated in the Act caused any difficulties for the AFP?

To date, an interim control order has not been issued with a 72 hour period before confirmation proceedings are to take place.

If an issuing court were to specify the minimum 72 hour period between issuing an interim control order and the confirmation proceedings, the AFP would have difficulty preparing a confirmation application in time. This is particularly the case because of the challenges involved in converting intelligence and other material into evidentiary form for confirmation proceedings.

Furthermore, both interim and confirmation control order applications tend to be very lengthy, due to the seriousness of the restrictions involved. As an example, the Causevic interim control order application was over 140 pages long and attached over 2000 pages of annexures containing primary materials. This material needed to be considered to prepare approximately 15 affidavits for the confirmation hearing. Preparation of material for the confirmation hearing involved one to two AFP lawyers and three investigators working full time between interim and confirmation stages. In the three months prior to the confirmation proceedings, the Australian Government Solicitor (AGS), junior counsel and senior counsel were also engaged in preparation of the confirmation application.

b) To what extent did amendments passed in 2014, which provided that the issuing court must take into account the time needed for parties to prepare to adduce evidence and make submissions (and other relevant matters) when specifying the date of a confirmation hearing, reduce these difficulties?

The amendments in the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* have helped to mitigate the challenges described in response to question 12a.

However, the minimum 72 hour period specified in section 104.5(1A) still creates some difficulty for the AFP. This is because it is always open for a court to specify a date for confirmation proceedings that is as little as 72 hours after the date of the interim order. As a model litigant, it is incumbent on the AFP to be prepared to progress a confirmation application after 72 hours, if ordered by the Court. To mitigate the risk of not being prepared to make a confirmation order, the AFP needs to be in a reasonable position to make a confirmation application when applying for the interim order. This can delay the AFP's decision to apply for an interim order, and undermines the intended purpose of the interim control order process (as a preventative power).

c) Should an extension to the minimum period between issuance and confirmation be considered, in order to provide greater certainty to all parties?

In determining the minimum period between issuance and confirmation, consideration should be given to balancing several factors. A respondent should be subject to an interim control order for as short a period of time as practicable prior to a confirmation hearing. However this period should include sufficient time for the respondent to review documents

and prepare for the proceedings, noting the significant volume and complexity of materials needed to support a confirmation application.

Practically speaking, a period of less than 14 days between interim and confirmation proceedings would create significant challenges for the AFP for the reasons outlined in the response to question 12b, above. It may also create challenges for the respondent in preparing for the confirmation proceeding.

13. Do you have any comments on the INSLM's recommendation to allow interim control orders to be varied on application by the controlee? Should interim control orders also be able to be varied on application by the AFP?

Under the control order regime an interim control order cannot be varied. This is because when the provisions were originally introduced it was anticipated that the confirmation proceeding would follow soon after the interim control order was made. If the conditions in an interim control order needed to be varied it was intended that the changes could be made in the confirmation process. Any subsequent variations could be made using the variation provisions under Subdivision E or F of Division 104 of the Criminal Code.

However, as noted by the INSLM, experience to date has shown that the confirmation proceeding can occur many months after the interim control order is made. This means that if the obligations, prohibitions or restrictions in an interim control order are no longer appropriate there is no way to vary those conditions. For example, if there is a requirement in the control order that the person remain at their home between specified times, and the person decides to move home.

To resolve this issue, the INSLM recommended that Division 104 be amended so that:

- The controlee may apply to vary an interim control order prior to confirmation of the control order.
- The court has power to amend an interim control order if the AFP Commissioner and controlee agree.

Allowing an interim control order to be varied would allow some flexibility to be applied to the conditions imposed by the order where those conditions are no longer appropriate. Given the broad range of possible circumstances where it may be appropriate to vary an interim control order, it would seem reasonable for both the subject of the interim control order and the AFP to be able to apply to vary the order. However, care would need to be taken to ensure that the court is not burdened with an unreasonable number of applications for variation.

14. Do you have any comments on the INSLM's recommendation that there be no order as to costs made by the issuing court in control order proceedings?

In his report, the INSLM noted that a control order imposes significant obligations, prohibitions and restrictions on a controlee. He was of the view that it was not appropriate

that the controlee also be at risk of an adverse costs order. Consequently, he recommended that no costs order should be made by the issuing court in control order proceedings.

Of the six control orders issued, no adverse costs orders have been made against the subject of a control order proceeding. It is anticipated that this approach will continue in relation to any future control order proceedings.

However, there may be a rare occasion where it is appropriate that an adverse costs order be made against a person who is the subject of a control order application. For example, a person subject to a control order application may unreasonably and excessively delay proceedings causing the Commonwealth to incur significant legal costs. The Court should always have discretion to make costs orders should they consider such an order appropriate in all the circumstances.

15. Do you have any comments on the INSLM's recommendation concerning the adequacy of legal aid for controlees in control order proceedings?

Under the National Partnership Agreement on Legal Assistance Services 2015-20 (the Agreement), the Commonwealth provides funding for state and territory legal aid commissions and community legal centres to deliver frontline legal assistance services to vulnerable and disadvantaged Australians.

Under the Agreement, legal assistance service providers should prioritise their services to people experiencing financial disadvantage and who fall within one or more priority client groups, including children and young people, people in custody and prisoners, people who are culturally and linguistically diverse, people with a disability or mental illness, and people with low education levels.

Legal aid commissions and community legal centres determine eligibility for their legal services and the extent of assistance they will provide in individual cases.

The Attorney General and the Attorney General's Department cannot intervene in, or influence, individual decisions made by a legal aid commission or community legal centre.

16. Do you have any comments on the INSLM's recommendation for a state or territory Supreme Court, when considering a continuing detention order, to be able to make an extended supervision order in the alternative, with

d) the same 'unacceptable risk' test to be applied as for a continuing detention order;

e) the same conditions and the same monitoring regime able to be applied as for a control order;

f) the Attorney-General being the applicant; and

g) a maximum period of three years?

There would be merit in enabling a state or territory Supreme Court, when considering a continuing detention order, to make an extended supervision order in the alternative.

As noted by the INSLM the control order regime employs a lower threshold than that of the high risk terrorist offenders (continuing detention order) scheme. However it is appropriate for the 'unacceptable risk' threshold test to be used when a court is considering granting a continuing detention order or extended supervision order. Generally State and Territory high risk offender schemes allow a court, when considering an application for a continuing detention order, to make an extended supervision order in the alternative using the same 'unacceptable risk' test to be applied for a continuing detention order.

The obligations, prohibitions and restrictions currently available under the control order regime would be appropriate in the extended supervision order context. Relevant state and territory extended supervision order legislation is slightly more flexible. In addition to core conditions which the court must impose and suggested conditions which the court must consider imposing, most schemes also allow the Court to impose any condition it thinks appropriate to manage the risk.

Making monitoring powers currently available in respect of control orders will ensure the efficacy of any extended supervision order scheme. The control order monitoring regimes include important safeguards including the threshold for issuing warrants, ministerial and other reporting requirements, and independent oversight by the Commonwealth Ombudsman.

If introduced it is appropriate for the same Minister to also be the applicant for an extended supervision order. Having one applicant will allow for efficient court processes which is beneficial to all parties.

If the 'unacceptable risk' test is used for any extended supervision order scheme, it is appropriate that an extended supervision order has a maximum period of three years.

17. Do you have any comments on the INSLM's additional recommendation that

- **a) the Attorney-General be unable to consent to a control order while continuing detention order or extended supervision order proceedings are underway;**
- **b) a control order cannot be in force while a continuing detention order or extended supervision order is in force; and**
- **c) the AFP be required to give the issuing court for a control order a copy of any continuing detention order or extended supervision order application made and any order (including reasons) of the relevant court in respect of that application?**

The INSLM's recommendations would reduce overlap between control order continuing detention/extended supervision order proceedings and would ensure that the respondent is not subject to two simultaneous proceedings.

Preventative detention orders – Division 105 of the Criminal Code

18. What do preventative detention orders (PDOs) achieve that cannot be achieved by other powers available to the authorities, including the pre-charge detention powers now available under Part IC of the *Crimes Act 1914* and the range of preparatory terrorism offences in Part 5.3 of the *Criminal Code*?

The purpose of detaining a person under a PDO is to protect the public from harm by detaining an individual for the purposes of:

- preventing a terrorist act that is capable of being carried out, and could occur, within the next 14 days, or
- preserving evidence of, or relating to, a recent terrorist act.

In contrast, the purpose of detaining a person post-arrest, under Part IC of the *Crimes Act 1914* (pre-charge detention) is to investigate whether a person has committed an offence.

The Commonwealth pre-charge detention regime, to the extent it applies to the investigation of terrorism offences, becomes applicable only once an individual has been arrested under section 3WA of the *Crimes Act 1914* in relation to the commission of an offence. Under section 3WA, a constable can arrest an individual where he or she 'suspects on reasonable grounds' that the individual has committed or is committing a Commonwealth terrorism offence (including preparatory offences under Part 5.3 of the *Criminal Code*). The purpose for detention under Part IC is to investigate the individual in relation to the offence for which they have been arrested, or any other Commonwealth offence that the investigating official reasonably suspects that the person has committed, prior to the individual being charged. Detention under Part IC serves an investigative purpose. In contrast, detention under a PDO serves a preventative purpose.

To obtain a PDO, it is not necessary that an individual be arrested pursuant to section 3WA. However, nothing prevents an individual who has been detained under a PDO from being later arrested on suspicion of having committed a Commonwealth terrorism offence and being transferred to detention under Part IC.

In the current threat environment, where there is an increase in the threat of smaller-scale opportunistic attacks by lone actors, and where there is less time for law enforcement agencies to respond to an attack, the PDO is a valuable tool which enables police to disrupt terrorist activity. Where there is little to no lead time to disrupt a terrorist act, there may not be sufficient information available on the individual(s) to meet the arrest threshold under section 3WA of the *Crimes Act 1914*. Under such circumstances, a PDO will enable police to detain an individual for up to 48 hours, in order to prevent a terrorist act.

19. Are you aware of any overseas jurisdictions that have powers equivalent to the PDO regime?

Comparable overseas jurisdictions such as the United Kingdom, Canada, New Zealand and the United States do not have powers directly equivalent to the PDO regime. However, they have other mechanisms, with similar effect, allowing police to detain, control and monitor

individuals suspected of conducting terrorism acts prior to charging those individuals. For example, the United Kingdom permits up to 14 days of investigative detention without charge for individuals suspected of committing terrorism offences, or individuals concerned in the commission or preparation of terrorist acts. The Canadian *Criminal Code* also has preventative arrest provisions which allow for a peace officer to arrest and detain an individual if it is likely to prevent terrorist activity.

20. Noting the potential for overlap with the current role of the PDO regime, could you outline the features of the enhancements to Commonwealth pre-charge detention regime under Part IC of the Crimes Act 1914 that were agreed to at a recent COAG meeting?

At the recent counter-terrorism Council of Australian Governments (CT COAG) meeting on 5 October 2017, First Ministers agreed to enhancing the existing Commonwealth pre-charge detention regime under Part IC of the *Crimes Act 1914*. As noted in Question 18, the Commonwealth pre-charge detention regime does not overlap with the PDO regime. The Commonwealth pre-charge detention regime requires an individual to be arrested under section 3WA of the *Crimes Act 1914* on the basis that a police officer 'suspects on reasonable grounds' that the individual has committed a Commonwealth terrorism offence. Under the PDO regime, there is no requirement than an individual be arrested.

The key features of the proposed model to enhance the Commonwealth pre-charge detention model are:

- an initial detention period of 8 hours[7]
- a maximum overall detention period of 14 days, based on a tiered extension application process that enables:
    i. magistrate approved extensions for up to 7 days based on the existing extension application criteria under section 23DF, and
    ii. magistrate approved extensions for a further 7 days based on a magistrate being satisfied to a higher threshold that ongoing detention is necessary.[8]
- removing disregarded and specified time provisions for Commonwealth terrorism offences, and creating a clear cap on the maximum period of detention.

[7] Currently, the initial investigation period for terrorism offences in 4 hours (subsection 23DB(5)).
[8] Currently, the total investigation period for terrorism offences is 24 hours. However, this excludes certain categories of time, known as 'disregarded time', during which the arrested individual cannot be questioned (subsection 23DB(9)). This includes time to allow the person to receive medical attention, and time to allow the person to rest or recuperate. The investigation period also excludes certain magistrate approved categories of time, known as 'specified disregarded time', during which the accused cannot be questioned. This includes time to collate evidence from sources other than questioning the arrested individual. The magistrate can grant up to 7 days of specified disregarded time (subsection 23DB(11)). Accordingly, it may be possible for an individual arrested for a Commonwealth terrorism offence to be detained for up to 9 or 10 days.

21. Would a Commonwealth PDO regime still be necessary if a pre-charge 'investigative detention' regime, modelled on the current New South Wales legislation, were to be applied nationally? Why or why not?

On 1 April 2016, COAG agreed 'in principle, to the NSW [pre-charge detention] model as the basis for a strengthened nationally consistent pre-charge detention scheme for terrorism suspects, with the ACT reserving its position'. The investigative detention model proposed by NSW came into effect on 16 May 2016.

At the recent CT COAG meeting on 5 October 2017, First Ministers agreed to enhance the existing Commonwealth pre-charge detention regime under Part IC of the *Crimes Act 1914*. This latest agreement by COAG may mean that States and Territories no longer find it desirable to implement a model similar to the NSW investigative detention regime. The enhanced Commonwealth pre-charge detention model will apply uniformly to all States and Territories, and continued reliance on this regime would support national consistency and interoperability in the investigation of Commonwealth terrorism offences.

22. Some participants in the Committee's inquiry have questioned the utility of the PDO regime on the basis that a person held under a PDO may not be questioned.

- **What are the reasons for the current prohibition on questioning persons held under a PDO?**

The purpose of a prohibition on the questioning of an individual detained under a PDO is to ensure there is a clear demarcation between police powers which are preventative in nature, and those which are investigative in nature.

The PDO regime serves a preventative purpose by ensuring that police officers have a disruption tool available where there is not sufficient evidence to arrest an individual in relation to a Commonwealth terrorism offence. Where an individual is arrested on suspicion of having committed a Commonwealth terrorism offence under section 3WA of the *Crimes Act 1914*, they may be detained under Part IC and questioned for the purposes of laying charges.

A clear demarcation between preventative and investigative police powers ensures that there is clarity for law enforcement agencies in the application of these powers. It ensures that at any point in time during the course of detention, both police officers and the detainee are aware of the purpose of detention.

- **What (if any) would be the impediments to this prohibition to be lifted?**

If questioning were permitted under a PDO regime for the purpose of investigating a terrorist act or the commission of a terrorism offence, there are two important implications.

Firstly, consideration would need to be given to the purpose of the questioning. That is, would questioning be for the purpose of preventing a terrorist act, or would it relate to the investigation of a Commonwealth terrorism offence. If the questions are investigative in nature, this would cast doubt as to the purpose of detaining persons after arrest under Part

IC of the *Crimes Act 1914*, which First Ministers at the CT COAG recently agreed to enhancing.

The recent Victorian *Expert Panel Report on Terrorism and Violent Extremism Prevention and Response Powers* (the Expert Panel Report) proposes enhancements to the Victorian PDO regime under the *Terrorism (Community Protection) Act 2003*. Recommendation 2 of the Expert Panel Report proposes providing police the power to question a detained person regarding a terrorist act in relation to which the person was detained. The Commonwealth understands that the Commonwealth pre-charge detention regime under Part IC will still be used once an individual has been arrested for a Commonwealth terrorism offence. It is unclear at this stage what the precise scope of the questioning power proposed under the enhanced Victorian PDO regime is, i.e. whether questioning must be for the purposes of preventing a terrorist act, or whether it can relate to investigating a terrorism offence. These are important considerations that will have significant implications for how counter-terrorism operations are conducted under the existing JCTT model.

Secondly, if questioning was permitted under a PDO, it would also need to be supported by a range of important safeguards, such as those currently found in Division 3 of Part IC. Part IC has necessary safeguards and procedures in place which strike the appropriate balance between the power of the police and the rights of the suspect. These safeguards include the right to be cautioned, the right to remain silent, the right to have a legal practitioner (this right is provided in a limited capacity under section 105.37 of the Criminal Code). Similar to Division 3 of Part IC, regard will also need to be given to ensuring that there are special rules for individuals of Aboriginal and Torres Strait Islander background, and rules relating to the recording of information, confessions and admissions. These safeguards ensure that the same protections that apply to arrested individuals under Part IC are provided to individuals under a PDO. Without appropriate safeguards, allegations of police impropriety or concerns about reliability could result in a court considering the evidence obtained under the PDO as being inadmissible in a prosecution.

23. What are the constitutional constraints that have reportedly restricted Commonwealth PDO's from being applied longer than 48 hours, compared to 14 days in the states and territories?

The PDO regime provides for executive detention for the purposes of preventing a terrorist act, or preserving evidence in relation to a recent terrorist act. It would not be appropriate to provide or disclose legal advice on the constitutional basis for the regime.

24. The AFP's submission notes that Commonwealth PDOs complement state and territory PDO powers, and that the Joint Counter Terrorism Team (JCTT) model allows law enforcement to utilise the best tools available in any particular investigation. The INSLM has noted that

> **Given the significant degree of cooperation between law enforcement agencies at the Commonwealth and state and territory level, in particular through the JCTT, there is a real question as to whether the regime in div 105 will ever be used in preference to a state or territory PDO, should circumstances arise which call for a PDO.**

a) **Do modern JCTT arrangements render Commonwealth PDO powers unnecessary?**
b) **If not, in what circumstances would they be used?**

The Commonwealth PDO powers were passed in 2005, in response to a Council of Australian Governments (COAG) agreement, in which all First Ministers agreed to pass laws to restrict the movement of those who pose a terrorist risk to the community. State and Territory leaders agreed to enact PDO powers for a longer period of 14 days, noting constitutional constraints on the Commonwealth. JCTT arrangements provide police with the full range of State/Territory and Commonwealth powers and offences, including PDO powers.

However, there are a number of reasons why Commonwealth PDO powers are not rendered unnecessary by these arrangements. State and Territory PDO regimes are not uniform, and Commonwealth PDOs have the benefit of applying consistently across Australia. Furthermore, State and Territories may review and amend their powers as they see fit. Given AFP counter-terrorism teams work across all jurisdictions, Commonwealth PDOs provide an important baseline level of national consistency for the AFP.

Given the differences in PDO regimes across the State and Territory jurisdictions there are some hypothetical scenarios in which the JCTTs may consider using Commonwealth PDO powers. For example, NSW interim PDOs can only be issued by the NSW Supreme Court, whereas a Commonwealth PDO may be issued by a senior AFP member (an AFP member of, or above, the rank of Superintendent). In a scenario where the NSW JCTT needed a PDO to be issued very urgently, it would likely be faster to apply for a Commonwealth PDO. This would of course be balanced by the different periods of detention available under the State and Commonwealth regimes.

As another example, in the ACT, a PDO cannot be issued for a child under the age of 18 years, whereas Commonwealth PDOs may be issued in relation to a person who is 16 years of age or older. In circumstances where the AFP needed to detain a 16 or 17 year old for preventative purposes, the AFP would consider applying for a Commonwealth PDO.

25. In addition to preventing a terrorist act, PDOs may be issued, including for non-suspects, for the purpose of preserving evidence of, or relating to, a terrorist act that has occurred within the last 28 days.

a) **Under what circumstances would the AFP consider issuing a PDO for the purpose of preserving evidence (please provide a hypothetical scenario)?**
b) **Under what circumstances would such a PDO be issued for a non-suspect?**
c) **What other, less restrictive, powers could be considered in these circumstances?**

The AFP would consider applying for a PDO for the purpose of preserving evidence in a situation where there are reasonable grounds to suspect an individual possesses a thing that is connected to a terrorist act. As a hypothetical example, the AFP may consider applying for a PDO in a situation where a terrorist suspect has given a bag containing an explosive device to a second person who is believed to have no knowledge of its contents and refuses to cooperate with police.

In order to apply for a Commonwealth PDO, the applicant must be satisfied that detaining the subject for the specified period is reasonably necessary for the purpose for which the PDO has been applied for. Where a less restrictive power is available and appropriate, it is unlikely the AFP would satisfy the test for a Commonwealth PDO. The availability of other, less restrictive powers would depend on the specific circumstances of the case, including the degree of information available to support use of other powers including arrest, and for a non-suspect, whether that person is cooperating voluntarily with police directions. Where an individual is not a suspect and is cooperating with police, it is unlikely that police would apply for a PDO.