Statutory review of police counter-terrorism powers

Legal Aid NSW submission to the Parliamentary Joint Committee on Intelligence and Security

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Legal Aid NEW SOUTH WALES

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority, Drug Court and the Youth Drug and Alcohol Court.

The Criminal Indictable Section provides representation in trials, sentences and short matters listed at the Downing Centre District Court, complex committals in Local Courts throughout NSW, Supreme Court trials and sentence proceedings throughout NSW, fitness and special hearings in the District and Supreme Courts, and high risk offender matters in the Supreme Court. The Commonwealth Crime Unit is a specialist unit within the Criminal Law Division at Legal Aid NSW. The CCU provides legal advice and representation to people charged under Commonwealth criminal laws. Assistance is provided in matters including importation of border controlled substances, child sexual exploitation and terrorism.

Legal Aid NSW welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security in relation to the statutory review of police counter-terrorism powers. Should you require any further information, please contact

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Introduction

Legal Aid NSW welcomes the opportunity to contribute to the Parliamentary Joint Committee on Intelligence and Security's review of:

- the stop, search and seizure powers provided for under Division 3A of Part IAA of the Crimes Act 1914 (Cth) (the Crimes Act)
- the control order regime provided for under Division 104 of the Criminal Code Act 1995 (the Criminal Code)
- the preventative detention order regime provided for under Division 105 of the Criminal Code, and
- the declared area provisions under sections 119.2 and 119.3 of the Criminal Code.

Legal Aid NSW acknowledges the serious threat posed by terrorism, as outlined in the recent report of the Independent National Security Legislation Monitor (**INSLM**).[1] We also acknowledge the need to balance public security with the rights of the individual and the rule of law, including compliance with Australia's international obligations. As the INSLM noted, the rights recognised in the *International Covenant on Civil and Political Rights* (**ICCPR**) are not absolute, but may be subject to limits when those limits are prescribed by law, are not arbitrary, and conform to the principle of proportionality.[2]

Legal Aid NSW is concerned that the powers under review go beyond what is needed to address the threat of terrorism, and are therefore disproportionate. We are also concerned that these powers could have a particularly disproportionate impact on vulnerable people, including young people, people from non-English speaking backgrounds and people with mental illness or cognitive impairments. Details of our concerns follow.

Stop, search and seizure powers

Division 3A of Part IAA of the Crimes Act enables police officers to stop and search a person in a Commonwealth place, and seize items found in that search, if the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit, a terrorist act; or if the person is in a prescribed security zone. The Minister may declare a Commonwealth place a 'prescribed security zone' where the Minister considers that doing so would assist in preventing a terrorist act occurring or assist in responding to a terrorist act that has occurred. The declaration remains in force for 28 days.

[1] Independent National Security Legislation Monitor, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers* (2017) 4–7.
[2] Independent National Security Legislation Monitor, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers* (2017) [5.15].

Legal Aid NSW considers that these powers go beyond a proportionate response to the security threats faced by Australia in the following ways:

- All individuals in a prescribed security zone are subject to police stop, search, questioning and seizure powers, irrespective of whether or not the police officer has reasonable grounds to believe a person may be involved in the commission, or attempted commission, of a terrorist act. Detention and search merely because an individual is present in a particular place arguably contravenes article 9 of the ICCPR which prohibits arbitrary arrest and detention.
- There is no obligation on the Minister to review the necessity of the declaration during the 28 day period the declaration is in force.
- There is no obligation on the Minister to publish reasons for declaring a prescribed security zone and no mechanism for independent review of these powers.
- Section 3UEA of the Crimes Act gives police officers the power to enter premises and search without a warrant, in contrast to the ordinary requirement that law enforcement officers obtain a warrant issued by a judge or magistrate to exercise such powers. The requirement to obtain a warrant ensures that police search and seizure powers are subject to independent scrutiny and reduces the risk that the powers will be misused. In light of the ability to obtain a warrant by telephone in urgent cases,[3] and the fact that the section 3UEA powers have not been used in five years,[4] retention of these powers is not justified.

We refer to the Law Council of Australia's submission to the INSLM for further detail about these concerns.[5] We also note that the UN Special Rapporteur has urged reconsideration of the 28-day life of declarations, saying that:

> *They impose a potentially unnecessary or disproportionate interference upon liberty and security, and could impact on the right to undertake lawful demonstrations.*[6]

The search and seizure powers in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) include a general power for a police officer to stop, search and detain a person if the police officer suspects on reasonable grounds that a person has in his or her possession anything intended to be used in connection with the commission of an offence.[7] Legal Aid NSW considers that these powers more appropriately balance the

[3] *Crimes Act 1914* (Cth) s 3R.
[4] Independent National Security Legislation Monitor, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers* (2017) [6.2].
[5] Law Council of Australia, *Stop, search and seizure powers, declared areas, control orders, preventive detention orders and continuing detention orders* Submission to INSLM 12 May 2017, [14]–[23]. See also Law Council of Australia *Anti-terrorism reform project* [5.3.1].
[6] Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism, UN Doc A/HRC/4/26/Add.3 (2006), [30].
[7] *Law Enforcement (Powers and Responsibilities) Act* s 21.

need to prevent terrorist acts with the protection of fundamental rights to privacy and freedom from arbitrary arrest and detention. Further powers to search persons, vehicles and premises are available in the *Terrorism (Police Powers) Act 2002* (NSW).

In light of these powers, the extended powers regarding searching people in a 'prescribed security zone' are unnecessary and should be allowed to expire. If they are renewed, the recommendations of the INSLM regarding new safeguards in the form of reporting requirements to the relevant Minister, the Commonwealth Ombudsman, the Parliamentary Joint Committee on Intelligence and Security and the INSLM should be implemented. This would enable these bodies to review any exercise of these extraordinary powers.

Control orders

Division 104 of Part 5.3 of the Criminal Code allows a court to make a control order with regard to a person, if the court is satisfied, on the balance of probabilities, that:

- making the order would substantially assist in preventing a terrorist act
- the person has provided training to, received training from or participated in training with a listed terrorist organisation
- the person has engaged in a hostile activity in a foreign country
- the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act
- the person has been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence
- making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act, or
- the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country.[8]

The court must also be satisfied that, on the balance of probabilities, each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.[9] The controls that can be imposed do not include detention, but do include significant restrictions on the person's freedom of movement and association, such as a requirement to wear a tracking device, prohibition on use of the internet, and reporting requirements.[10]

[8] Criminal Code s 104.4(1)(c).
[9] Criminal Code s 104.4(1)(d).
[10] Criminal Code s 104.5(3). In the case of *Gaughan v Causevic* (No 2), the requirement to wear an ankle bracelet arguably undermined the rehabilitative efforts of Mr Causevic as it was a severe impediment to him finding employment: *Gaughan v Causevic* (No 2) [2016] FCCA 1693 [174]

Professors Andrew Lynch and George Williams described the control order scheme as 'an attempt to avoid the accepted judicial procedures for testing and challenging evidence in criminal trials that are normally applied before a person is deprived of their liberty'.[11]

The control order scheme undermines the right to a fair trial and the presumption of innocence. Prior to this scheme, generally speaking, restrictions on liberty could be imposed only after a fair trial, with all its safeguards, and a conviction for an offence. The control order scheme replaces this process with a civil process that allows restrictions on liberty

- in the absence of a charge, trial or conviction, or even the suspicion of an offence
- based on findings made on the civil standard, rather than the criminal standard, and
- based on information that is not fully disclosed to the person subject to the order.

We are concerned that recent changes to the Crimes Act have further strengthened the capacity of authorities to monitor compliance with an order and significantly infringe upon both the liberties of the individual subject to the order, as well as people associated with them.[12] For example, monitoring warrants can be obtained in relation to premises with which the person has a connection, including his/her school, workplace, or the home of an acquaintance.[13] Occupiers of those premises can also be required to answer questions and produce documents.[14]

Legal Aid NSW considers that the need for such extraordinary powers has not been demonstrated, and they are therefore disproportionate. We are particularly concerned about the potential impact of control orders on young people and people who are vulnerable because of mental illness, cognitive impairment or socio-economic disadvantage.

Since 2016, it has been possible to impose a control order on children as young as 14. The imposition of a control order on such a young person is arguably contrary to Australia's obligations under the *Convention on the Rights of the Child*, which requires the best interests of children to be a primary consideration in all decisions that affect them.[15] Many young and vulnerable people find it difficult to comply with the conditions imposed on bail and parole, because of their stage of cognitive development and because their lives are sometimes chaotic and unstructured. Legal Aid NSW anticipates that a young person subject to a control order would be at risk of breaching the order even absent any

[11] Andrew Lynch and George Williams *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (2006)
[12] *Crimes Act 1914* (Cth) Pt IAAB
[13] *Crimes Act 1914* (Cth) s 3ZZJC
[14] *Crimes Act 1914* (Cth) s 3ZZJE
[15] *Convention on the Rights of the Child* art 3

malicious intent. Contravention of a control order carries a penalty of imprisonment for up to five years.[16]

Further, Legal Aid NSW is concerned that there is potential for a person to be subject to duplicate proceedings: for a control order in the Federal Court and for an extended supervision order in the NSW Supreme Court pursuant to the *Crimes (High Risk Offenders) Act 2006* (NSW). The interaction between these two Acts should be clarified.

Legal Aid NSW agrees with the recommendation of the former INSLM in his 2012 report that Division 104 should be repealed,[17] or allowed to expire. If the provisions in Division 104 are continued, the recommendations of the second INSLM regarding safeguards on the power to make control orders, which have been endorsed by the current INSLM, should be implemented.[18] These include:

- ensuring that a control order cannot exclude the person from remaining at his or her place of residence, and
- requiring the issuing court to consider whether the combined effect of all of the restrictions is proportionate.

Preventative detention orders

Division 105 of the *Criminal Code* allows a person to be detained for up to 48 hours where the issuing authority is satisfied that:

1. there are reasonable grounds to suspect that the person will engage in a terrorist act, possesses a thing connected with the preparation for a terrorist act, or has done an act in preparation for a terrorist act
2. making the order would substantially assist in preventing a terrorist act occurring, and
3. detaining the subject is reasonably necessary.[19]

Senior Australian Federal Police (**AFP**) officers can issue initial preventative detention orders (**PDOs**) which must not exceed 24 hours, but can be extended for 24 hours. An application for a continued PDO can be made to a judge of a State or Territory Supreme Court, a judge of the Federal Court or Federal Circuit Court, a retired judge or the President or Deputy President of the Administrative Appeals Tribunal. During the period of detention the person is not entitled to disclose the fact that a PDO has been made or that they have been detained, and are only allowed to tell family members and certain other people that they are 'safe but not able to be contacted for the time being'.[20] If an

[16] *Criminal Code Act 1995* (Cth) s 104.27.
[17] Independent National Security Legislation Monitor *Declassified Annual Report* (2012) Rec 11/4.
[18] Independent National Security Legislation Monitor *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017) [8.75].
[19] *Criminal Code Act 1995* (Cth) s 105.4(4).
[20] *Criminal Code Act 1995* (Cth) s 105.35.

order is made, it will include a summary of the grounds on which the order is made unless that information is likely to prejudice national security.[21]

The person subject to the order has no right to appear personally or through legal representation at the hearing of the application for the initial or the continuing PDO. They are allowed to contact a lawyer, but are only allowed to obtain advice regarding a limited range of topics, and their communications with their lawyer may be monitored.[22]

The Parliamentary Joint Committee on Human Rights has noted that the control order regime and the PDO regime involve 'very significant limitations on human rights', may not be reasonable, necessary and proportionate, and are likely to be incompatible with the various human rights engaged. [23] Legal Aid NSW has particular concerns about the following:

- A person can be detained under Division 105 when there is no emergency or imminent threat of a terrorist attack.
- Division 105 does not contain any requirement to show a link between the person subject to the order and the planned commission of a particular offence.
- Detention is based on suspicion that a person might commit an offence, rather than detention based on a charge or conviction.
- Access to legal advice is limited, and client legal privilege may be infringed.
- Access to the information upon which the application for an order is made, is limited.

The first INSLM recommended the repeal of Division 105 on the basis that there was no demonstrated necessity for the extraordinary powers that it conferred. The powers have not yet been used. We note the joint submission to the Committee by Dr Jessie Blackbourn et al which details alternative measures that are available to prevent terrorism, and which are in some cases more effective and less intrusive on human rights.[24]

As the current INSLM notes, the powers are unlikely to be used, as most states have powers to detain that extend for up to 14 days.[25] In New South Wales, the 'special powers to prevent terrorism' in the *Terrorism (Police Powers) Act 2002* (NSW) permit a terrorism suspect to be detained if a terrorist act occurred in the last 28 days, or the police officer has reasonable grounds to suspect that a terrorist act could occur in the next 14 days, and the police officer is satisfied that the detention will assist in responding to or preventing

[21] *Criminal Code Act 1995* (Cth) s 104.5
[22] *Criminal Code Act 1995* (Cth) s 105.38
[23] *Fourteenth Report of the 44th Parliament (28 October 2014) [1.73], [1.100].*
[24] Dr Jessie Blackbourn, Prof Andrew Lynch, Dr Nicola McGarrity, Dr Tamara Tulich, Prof George Williams, submission to Parliamentary Joint Committee on Intelligence and Security, 22 September 2017.
[25] Independent National Security Legislation Monitor *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* [7.7], [10.14].

the terrorist act.[26] Division 105 should be allowed to expire as these powers are an unnecessary and disproportionate response to the threat of terrorism.

Declared areas

Under section 119.2 of the Criminal Code, it is an offence for a person to enter, or remain in, an area in a foreign country that has been declared by the Foreign Affairs Minister under section 119.3 of the Code. The offence is punishable by up to ten years imprisonment. There are a number of exceptions to the offence, including where the sole purpose for entering or remaining in a declared area is providing aid of a humanitarian nature, visiting family members, performing official duties, working as a professional journalist, or serving in the armed forces of a foreign country. To date, two areas have been declared by the Minister: the al-Raqqa province in Syria and the Mosul district in Iraq.

Legal Aid NSW has a number of concerns about these provisions, including that they appear to amount to a significant interference with freedom of movement. We are particularly troubled by the reversal of the onus of proof, in that a person accused of being in a declared area has an evidentiary burden to establish that they were in the area solely for one of the specified reasons. This reversal of the onus is concerning as it can be difficult to lead evidence about matters that have occurred in a foreign country. The AFP submitted to the INSLM that:

> … *obtaining foreign evidence remains a challenge. This is particularly the case where evidence is being sought from a conflict zone which may not have full operational government in place*.[27]

Obtaining foreign evidence is likely to be even more challenging for an Australian citizen charged with such an offence, and Legal Aid NSW does not consider the difficulty of obtaining evidence to be a satisfactory justification for casting the evidentiary burden on the defendant in criminal proceedings.

Further, if a person is in the area for one of the specified reasons, but also for another reason, the person would have committed an offence and be subject to up to ten years imprisonment. Many Australians have family, personal and business links in Syria and Iraq, but if they travel to the declared areas for reasons including visiting friends, doing business, retrieving property, attending to personal or financial affairs or undertaking a religious pilgrimage, they will have committed an offence.[28]

[26] *Terrorism (Police Powers) Act 2002* (NSW) s 25E.
[27] Independent National Security Legislation Monitor *Sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (2017) [8.10].
[28] See ALRC *Traditional Rights and Freedoms* Final Report [7.83].

The Australian Law Reform Commission recently found that the declared area provisions laws should be further reviewed because of their interference with freedom of movement and because liability is imposed on behaviour that may have no malicious purpose.[29]

Legal Aid NSW considers that these provisions should be allowed to expire. If they are renewed, Legal Aid NSW supports the amendments proposed by the Australian Human Rights Commission, as follows:

- The exception contained in s 119.2(3) of the Criminal Code should be amended so that s 119.2(1) does not apply to a person if that person enters, or remains in, an area solely for a purpose or purposes not connected with engaging in hostile activities.
- In the event that the above recommendation is not accepted:
    - Detailed consideration be given to expanding the list of legitimate reasons for travel to declared zones in s 119.2(3) of the Criminal Code to include, for instance, visiting friends, transacting business, retrieving personal property and attending to personal or financial affairs. The list should be made as comprehensive as possible; and
    - Section 119.2 of the Criminal Code be amended so that it is a defence to a charge of entering or remaining in a declared zone if a person establishes they were in a country for a purpose other than engaging in a hostile activity.[30]

Legal Aid NSW also considers that the provision should be amended so that the evidentiary burden of proof is on the prosecution to prove all elements of the offence.

[29] ALRC *Traditional Rights and Freedoms* Final Report [10.78]–[10.83].
[30] Australian Human Rights Commission submission to INSLM *Statutory Deadline Review* 15 May 2017, Recommendations 5 and 6.