Submission to Parliamentary Joint Committee on Intelligence and Security

Inquiry into the AFP Powers

10 September 2020

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A Introduction

1. The Muslim Legal Network (NSW) Inc (MLN (NSW)) welcomes the opportunity to provide submissions on existing legislation by the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) review of "AFP powers" with specific reference to the operation, effectiveness and implications of Division 3A of Part IAA of the *Crimes Act 1914* (which provides for police powers in relation to terrorism) and any other provision of the *Crimes Act 1914* as it relates to that Division*;* Divisions 104 and 105 of the *Criminal Code Act 1995* (which provide for control orders and preventative detention orders in relation to terrorism) and any other provision of the *Criminal Code Act 1995* as it relates to those Divisions. The PJCIS further expanded its enquiry to include the review of the operation, effectiveness and implications of Division 105A of the *Criminal Code* (which provides for continuing detention orders) and any other provision of that Code as far as it relates to that Division.

2. The proposed inquiry seeks to understand whether existing statutory regimes are in fact effective and should continue prior to the expiration of the sunset provision on 7 September 2021.

3. The submissions by MLN (NSW) focus on the proposed inquiry and seek to clarify that neither regime should be extended at the end of the prescribed sunset clause. The MLN (NSW) has made every effort to show the PJCIS that these regimes are not necessary when regard is had to the public interest and the national security of Australia especially in light of the fact that similar if not duplicate legislative regimes already exist.

4. The MLN (NSW) also notes that the timeframe for submissions provides an inadequate opportunity for relevant civil society actors to provide meaningful submissions or alternative drafting.

B Review of Police Powers related to Terrorism matters

Part IAA: Division 3A of the *Crimes Act 1914*:

5. The last review of Division 3A of the *Crimes Act 1914* (Cth) by the PJCIS acknowledged the extraordinary nature of the warrantless, stop, search and seizure powers granted to the Australian Federal Police (AFP) as well as the broad Ministerial discretion to declare a Commonwealth place a 'prescribed security zone'. The PJCIS emphasised the importance of oversight of these powers by the PJCIS and the Independent National Security Legislation Monitor (INSLM).[1]

[1] Parliament of the Commonwealth of Australia. *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime, Division 3A of Part IAA of the Crimes Act 1914; Divisions 104 and 105 of the Criminal Code.* Parliamentary Joint Committee on Intelligence and Security, February 2018 at para. 2.71-2.90 https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024127/toc_pdf/Reviewofpolicestop,searchandseizurepowers,thecontrolorderregimeandthepreventativedetentionorderregime.pdf;fileType=application%2Fpdf (accessed 9 September 2020)

6. Furthermore, the inclusion of a sunset clause (section 3UK) prohibiting the exercise of the powers under the Division 3A (except for section 3UF) after 7 September 2021 is a recognition of the need to periodically review these exceptional powers balanced with the need to protect the Australian community from the risk of terrorism.

7. In particular, it is important to revisit the policy issues surrounding the granting of such powers due to their extraordinary nature as well as to consider whether they have been effective in achieving their objective.

Division 3A, Subdivision B: Stop, Search and Seizure Powers

8. Under section 3UEA of the *Crimes Act 1914* (Cth) ("the Commonwealth Act"), a police officer may enter premises without a warrant and search and seize a thing he or she finds, where the police officer suspects on reasonable grounds that:

   a) it is necessary to do so 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.

9. This is in contrast to the provisions for search warrants under Division 2 of Part IAA, particularly section 3E of the Commonwealth Act. Police officers can only enter premises when there are reasonable grounds for suspecting that there is or will be material found relevant to proving the alleged offence.

10. The requirement for police to obtain a search warrant is well established in common law. In *New South Wales v Corbett*,[2] Justices Callinan and Crennan articulated this principle as follows:

> The concern of the common law courts to avoid general warrants and to strictly confine any exception to the principle that a person's home was inviolable is the original source of common, although differently expressed, statutory requirements. These requirements have as their purpose the proper identification of the object of a search by reference to a particular offence. This in turn limits the scope of the search authorised by the search warrant.[3]

11. In the recent case of *Smethurst v Commissioner of Police*,[4] a search warrant obtained by the AFP was deemed invalid because it had misstated the substance of the alleged Commonwealth offence and also stated the offence with insufficient precision. As a result, the entry, search and seizure powers relied upon under section 3E of the Commonwealth Act were deemed unlawful. In the decision, the special nature of the power to search was reiterated:

> The power to search has always been regarded as an exceptional power, to be exercised only under certain justifying conditions. One essential condition, found in statutes authorising the issue of warrants for search and seizure, both Commonwealth and State

[2] (2007) 230 CLR 606
[3] Ibid, 632 [104]
[4] [2020] HCA 14

and Territory, is that the object of the search be specified by reference to a particular offence.

In *George v Rockett*, the Court observed that in prescribing conditions governing the issue of search warrants the legislature has sought to balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasion of their privacy. A person's interest in privacy is recognised in all modern bills of rights and it has achieved a status in international human rights law.[5]

12. One of the most important checks and balances on the investigative powers of police is the requirement to obtain a search warrant before entering a private property or place. However, section 3UEA seeks to justify granting a warrantless entry power to police in the event of an emergency situation involving a terrorist act where there is not enough time to obtain a warrant through conventional means. The power is also not limited to a "Commonwealth place" such as a Federal airport. The power goes beyond the State and Territory police powers that deal with terrorism threats. Critically, these Federal powers under Division 3A of the Commonwealth Act may also be exercised by State and Territory police officers.

13. The MLN (NSW) agree with the views expressed by the Australian Law Council in its submission to the PJCIS in 2017.[6] If the conventional procedures for obtaining a warrant in order to enter premises and search and seize material related to a criminal investigation are too time consuming, especially when a threat of terror is imminent, then efforts should be made to streamline the current procedures. For example, in an urgent situation, section 3R of the Commonwealth Act allows for an Officer to make an application to a duty judge for a warrant by telephone, telex, fax or other electronic means. Such processes provide accountability and community confidence in the Australian police force.

14. Another concern is the broad, stop and search powers under section 3UD of the Commonwealth Act. The 'stop and search' powers apply where a police officer may stop and detain a person for the purposes of conducting a search for a terrorism related item. The permissible searches are set out in subsection 3UD(1)(b) of the Commonwealth Act, namely:

    (i) an ordinary search or a frisk search of the person;
    (ii) a search of anything that is, or that the officer suspects on reasonable grounds to be, under the person's immediate control;
    (iii) a search of any vehicle that is operated or occupied by the person;
    (iv) a search of anything that the person has, or that the officer suspects on reasonable grounds that the person has, brought into the Commonwealth place.

[5] *Ibid* [23]-[24]

[6] Australian Law Council, *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. 3 November 2017 https://www.lawcouncil.asn.au/publicassets/7d6b1b91-a2c2-e711-93fb-005056be13b5/3365%20-%20PJCIS%20Stop%20Seach%20Seize%20COs%20and%20PDOs.pdf (accessed 8 September 2020)

15. The concern of the MLN (NSW) is the abuse of this power by police against minority groups. This often takes the form of racial profiling with descriptions such as "Middle Eastern" appearance and also the targeting of people who are dressed or appear in a certain way (usually a recognisable form of Islamic dress). Research by the Police Stop Data Working Group suggests that at the State level, the exercise of stop and search powers based on racial or religious profiling is of concern and thus the recommendation to better monitor racial profiling. Specifically:

> The Victorian Crime Statistics Agency already releases quarterly crime reports linking crime rates to places of birth. The release of these statistics has resulted in negative press about ethnic communities. In contrast however, monitoring racial profiling is focused on police initiated contact, and does not involve referencing ethnic crime rates. Racial profiling research monitors the rates of disproportionate and unjustified policing by ethnicity. Policing without suspicion has nothing to do with crime rates. But it does waste police time, resources and actively degrades community police relationships.[7]

16. One of the consequences of police potentially abusing such powers is the community's increasing distrust of the authorities. For example, the Muslim community feel targeted by the authorities in a climate of increasing Islamophobia. The approach by authorities often reinforces the community perception that authorities consider all terrorists to be Muslim and that anti-terrorism measures are aimed at their community, creating a climate of suspicion.[8] These perceptions are further reinforced when police display a lack of cultural sensitivity and awareness in their interactions with Muslims.[9]

Division 3A, Subdivision C: Ministerial Discretion to Declare a Commonwealth Place a "Prescribed Security Zone"

17. Under section 3UJ, the Minister may declare a Commonwealth place to be a prescribed security zone if a declaration would assist;

    (a) in preventing a terrorist act occurring; or
    (b) in responding to a terrorist act that has occurred.

18. Once the declaration is made, it is in force for 28 days unless the declaration is revoked by the Minister. This extraordinary power exercised by the Minister is not subject to an independent review at the time of declaration. Even the requirement under section 3UJ(5) of the Commonwealth Act for a public announcement of the declaration by the Minister is not enforced in that the declaration is not made ineffective if the announcement is not made (section 3UJ(6)).

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[7] Police Stop Data Working Group. *Monitoring Racial Profiling: Introducing a scheme to prevent unlawful stops and searches by Victorian Police.* 2017 at 57 - https://www.policeaccountability.org.au/wp-content/uploads/2017/08/monitoringRP_report_softcopy_FINAL_22082017.pdf (accessed 9 September 2020)

[8] Parliament of the Commonwealth of Australia. *Review of Security and Counter Terrorism Legislation. Parliamentary Joint Committee on Intelligence and Security.* December 2016 at 24.

[9] Sydney Morning Herald. *Police officers' arrest and humiliation of two women in hijabs over seatbelt 'appalling'* https://www.smh.com.au/politics/nsw/police-officers-arrest-and-humiliation-of-two-women-in-hijabs-over-seatbelt-appalling-20191101-p536ot.html (accessed 9 September 2020)

19. Any oversight is limited to an annual report by the Minister of the use of his powers and those exercised by the AFP (section 3UJB). There is a genuine concern of using the declaration beyond the period needed to respond to a terrorism threat or terrorist act and thus limiting the liberty of people in the prescribed security zone.

Use and Necessity of the Powers under Division 3A

20. The most recent information indicates the key powers under Division 3A, of the Commonwealth Act were not exercised by the AFP between 1 June 2018 and 31 May 2019.[10] Furthermore, when a review of the power under Division 3A was last conducted by INSLM in 2017, section 3UEA had not been used in 5 years.[11]

21. In light of the limited use of the power over an extensive period of time, the question arises as to whether the powers are necessary, especially in light of the other available State and Federal police powers that deal with the threat of terrorism. The MLN (NSW) submits that the sunset clause under Division 3A should be allowed to expire rather than renewed. The threat of terrorism, whether it be from foreign sources or based on home-grown ideologies, such as the Australian far-right extremist responsible for the Christchurch terrorist attack in 2019, is a serious threat to the community however, our counter-terrorism laws should not result in the weakening of the legal protections which are fundamental to our democratic society.

C Division 104: Control Orders pursuant to the *Criminal Code Act 1995*

22. Division 104 of the *Criminal Code Act 1995* ("the Code") encapsulated the Control Order regime. The objects of this Division are to allow obligations, prohibitions and restrictions to be imposed on a person through the imposition of a Control Order for an individual who is 18 years and above.[12] It should be noted that interim control orders can be made for an individual who is at least 14 years of age.[13] The type of obligations, prohibitions and restrictions that can be imposed on a person, are contained in Division 104.5 (3) and Subdivision F of the Code.

23. The Attorney-General must consent to an initial Interim Control Order which is ultimately granted by the Federal Court. It only becomes a confirmed Control Order upon the Federal Court's approval, following a hearing at which the person subject of the order is allowed to rebut the evidence against him or her. The court must consider the conditions are r*easonably necessary, and reasonably appropriate and adapted,*[14] by looking at the

[10] Parliament of the Commonwealth of Australia, *Annual Report of Committee Activities 2018-2019*, Parliamentary Joint Committee on Intelligence and Security, November 2019 at 53 - https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024257/toc_pdf/AnnualReportofCommitteeActivities2018-2019.pdf;fileType=application%2Fpdf (accessed 8 September 2020)

[11] Independent National Security Legislation Monitor. *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers*. 2017 at [6.2] - https://www.inslm.gov.au/sites/default/files/rpt-stop-search-seize-powers.pdf (accessed 9 September 2020)

[12] Section 104.2 *Criminal Code Act 1995*

[13] *Ibid* Section 104.28

[14] *Ibid* Section 104.4(2)

impact that such an order would have on a person as well as their financial and personal circumstances.

24. Generally a Control Order is limited for 12 months (except it is limited to 3 months in the case of a young person aged between 14-17 years[15]), however the Code does not limit the number of successive control orders that may be imposed on the same person.[16] Subdivision C allows the making of urgent control orders without the consent of the AFP Minister. However, if consent is not obtained within 8 hours of an urgent order being granted, the Order ceases to be in force.[17]

25. Subdivision H, section 104.28 deals with special rules for young people. Specifically, section 104.28(5) is of some concern, considering a young person may not have understood or appreciated the seriousness of the application. The MLN (NSW) opines that this subsection should be repealed or in the alternative, amended to compel a lawyer to be engaged at all times.

26. The Control Order regime is also subject to annual reporting requirements as stipulated in section 104.29 of the Code. The most recent published report related to the year 2018-2019[18] recorded no orders issued by the Court pursuant to this division. No annual report is available for the year ending 30 June 2020. To date there have been a very limited number of orders issued pursuant to this provision and although the AFP will argue this relates to their conservative use of the provisions, one would also suggest that the provision is not necessary.

Division 104 Annual Reporting Figures

● 1 July 2008- 30 June 2009	Nil orders issued
● 1 July 2009 -30 June 2010	Nil orders issued
● 1 July 2010 - 30 June 2011	Nil orders issued
● 1 July 2011 - 30 June 2012	Nil orders issued
● 1 July 2012 - 30 June 2013	Nill orders issued
● 1 July 2013 - 30 June 2014	Nill orders issued
● 1 July 2014 - 30 June 2015	3 Interim Control Orders issued[19]
● 1 July 2015 - 30 June 2016	1 Interim Control Order and 1 Control Order[20]
● 1 July 2016 - 30 June 2017	1 Control Order [21]

[15] *Ibid* Subdivision H, section 104.28. Limited to 3 months, unless subject to subsequent applications.

[16] Section 104.5 (1) (f) and (2) *Criminal Code Act 1995*

[17] *Ibid* Section 104.10

[18] Control Orders, Preventative Detention Orders, Continuing Detention Orders, and Powers in Relation to Terrorist Acts and Terrorism Offences: Annual Report 2018-2019. https://www.nationalsecurity.gov.au/Media-and-publications/Annual-Reports/Pages/default.aspx

[19] The Federal Circuit Court issued two interim control orders on 17 December 2014 and one interim control order on 5 March 2015. Control Orders and Preventative Detention Orders Annual Report 2014-2015.

[20] The Federal Circuit Court issued one interim control order on 10 September 2015 and confirmed and varied an interim control order on 30 November 2015.

[21] The Federal Circuit Court confirmed and varied a control order on 8 July 2016. The confirmed control order was in force until 11 September 2016.

- 1 July 2017 - 30 June 2018 Nill orders issued
- 1 July 2018 - 30 June 2019 Nill orders issued
- 1 July 2019 - 30 June 2020 Nil records

27. Since the first INSLM was appointed, there has been a continued push for this division to be repealed.[22]

28. At a public hearing on 19 May 2017, the AFP stated that the 'infrequent use of control orders was not evidence of their lack of utility, but rather was evidence of the AFP's conservative use of the measures, resorting to them only where traditional justice methods cannot address the threat'.[23] The Attorney General's Department submitted 'the control order regime provided an appropriate and useful measure to address the risk posed to the community by a person for whom there was insufficient evidence to support a prosecution'.[24]

29. The AFP in their submissions to Parliament in the inquiry into AFP powers have argued:

> "... the resourcing required to monitor control orders is having a significant impact on the AFP and its Commonwealth and State and Territory partners. The increased experience and use of these orders has identified a number of challenges to law enforcement in applying for, monitoring and enforcing the orders."[25]

30. Furthermore, the AFP have acknowledged existing regimes in place which duplicate the scheme in Division 104, namely, "This experience has informed the development of Extended Supervision Orders (ESOs) as part of the High Risk Terrorist Offenders (HRTO) scheme, on which the AFP has been working closely with the Department of Home Affairs and the Attorney-General's Department."

31. The AFP mention in their submissions that the section is restrictive in its application, however they fail to identify why. They further mention some risks cannot be controlled, however fail to identify or list what they are. The Australian Security Intelligence Organisation (ASIO) has identified that the rise of right-wing extremism has increased and poses a greater threat to the security of Australia. The MLN (NSW) have reservations about how the regime under Division 104 has or is being used to protect the Australian community from this right-wing threat, if at all.

32. As early as February this year Mr Burgess, the Director General of ASIO commented on right-wing extremism being on the "rise in activity and strengthening." He further warned Australians of small cells regularly meeting in suburbs around Australia to "salute Nazi flags, inspect weapons, train in combat and share their hateful ideology". However, despite stating these right-wing groups will remain an 'enduring threat', he dismissed the need for a centralised office to investigate such right-wing extremism. The

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[22] Dr James Renwick SC. 'Commonwealth of Australia, Independent National Security Legislation Monitor, *Control Orders and Preventative Detention Orders*.'3RD INSLM Report no.3 September 2017.

[23] *Transcript of Proceedings*, Public Hearing, Canberra, 19 May 2017, 6-7 (Michael Phelan).

[24] Dr James Renwick SC. 'Commonwealth of Australia, Independent National Security Legislation Monitor, *Control Orders and Preventative Detention Orders*.'3RD INSLM Report no.3 September 2017 at [8.8].

[25] Submission by the Australian Federal Police, August 2020 at 5.

Commissioner for Police, Mick Fuller and his colleagues at a community meeting the day after the 2019 Christchurch shooting, acknowledged that there was no specific hate crime unit amongst the police force focused on white supremacy which had a growing public and online following, especially against the Muslim community. It should be noted that the 'hate crime unit' is significantly underfunded and run by up to two officers as at 2019. Despite ASIO acknowledging the increased threat and "growing concern", Australia has not listed any right-wing terror groups. Shadow home affairs minister Ms Kennealy has called for the PJCIS to reassess and review the process and framework of listing a terrorist organisation as "fit for purpose". The Minister emphasised a bipartisan approach where parliamentarians do not "play politics or engage in culture wars over such issues".[26] The Global Terrorism Index 2019, stated "security and intelligence services should be paying closer attention" to right-wing extremism.[27]

33. Importantly, a breach under the Control Order regime, may result in the commission of an offence that carries a maximum penalty of 5 years imprisonment.[28] When comparing this regime to breaches of bail,[29] section 104.27 of the Code is severe in its penalty. A person subject to a Control Order is not necessarily subject to any current charges or convictions, however is closely monitored for one or more reasons mentioned in section 104.2 of the Code. The Gilbert and Tobin Centre, the Australian Human Rights Commission and the Australian Law Reform Commission have all raised concerns as to the restrictive nature of Division 104 and the importance of the right to freedom of movement and association in circumstances where an individual may never be subject of criminal charges and may never appear before a court in relation to the concerns subject to the Control Order.[30]

34. The AFP's concerns about section 104.12A(2)(ii) are not well founded.[31] A subject should have the right to know the evidence against them in order to properly defend their case and to be offered a fair hearing. The concern is no different to defendants in custody receiving copies of brief material or legal documents which inherently carry the risk of a third party viewing the content. Furthermore, correctional centres have internal disciplinary regimes in place to hold any offenders accountable for being in possession of another inmates documentation

35. It is the MLN (NSW)'s view that for the reasons addressed above, Division 104 should be repealed at the expiration of the upcoming sunset date.

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[26] Karp, P. 15 March 2020. *Labor says Australia must take rightwing extremist threat 'seriously' and review terror list.* The Guardian. https://www.theguardian.com/australia-news/2020/mar/15/labor-calls-for-review-of-terror-listings-after-asio-warns-of-far-right-threat (accessed 9 September 2020)

[27] Institute for Economics & Peace. *Global Terrorism Index 2019: Measuring the Impact of Terrorism*, Sydney, November 2019. http://visionofhumanity.org/reports (accessed 9 September 2020)

[28] Section 104.27 of the *Criminal Code Act 1995*

[29] For which a term of imprisonment does not exceed 3 years, s 79 failing to appear *Bail Act 2013.*

[30] Australian Law Reform Commission 12 January 2016. *Laws that interfere with freedom of movement.* https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/7-freedom-of-movement/laws-that-interfere-with-freedom-of-movement-2/ (accessed 8 September 2020)

[31] Submissions by the Australian Federal Police, August 2020

D Division 105: Preventative Detention Orders pursuant to the *Criminal Code Act 1995*

36. The Preventative Detention Order (PDO) regime exists so to provide a mechanism under Australian criminal law to address terrorism concerns. Essentially, a PDO permits the detention of a person for a short period in order to prevent an imminent terrorist act from occurring or to preserve evidence relating to a recent terrorist act.

37. Under Division 105, the allocation of an initial or interim PDO can come about after an application is made from one AFP officer to a senior AFP member. The continuing PDO would need to be sought from an issuing authority.

38. The power of the PDO exists to allow a person to be placed in detention in the absence of an act which would warrant the removal of personal freedoms. Furthermore, this detention need not be based on reasonable evidence that the investigating officer may hold.

39. Perhaps even more alarmingly, and contrary to the requirements of the control order regime, the PDO does *not* require the consent of the Attorney-General either for the initial or the continuing PDO. Practically speaking, this process is open for abuse by AFP officers who could be inexperienced or otherwise incapable of making such a significant assessment as to an individual's behaviour, communications or simply public interactions as they related to potential terrorist activities.

40. It is important to note that the PDO regime has historically come under significant criticism. The Australian Human Rights Commission has highlighted that the Commonwealth regime:[32]

    - Infringes on the freedom of expression as it prevents persons from freely communicating with others;
    - Does not require the detainee to be informed of the reasons for their detention;
    - Does not allow for meaningful review of the merits of the issuance of a PDO by a competent judicial authority.

41. Another issue with PDOs is that such orders infringe on legal professional privilege because a person's communication with their lawyer must be monitored effectively by police, which hampers the full and frank disclosure of salient information afforded to an individual. Secondly, the common law principle of 'innocence until proven guilty' is non existent.

[32] Australian Human Rights Commission. *Independent National Security Legislation Monitor (INSLM) Statutory Deadline Review - Australian Human Rights Commission Submission to the Acting INSLM*. 15 May 2017 at [55] - https://humanrights.gov.au/our-work/legal/submission/australian-human-rights-commission-submission-acting-inslm-2017#Heading324 (accessed 10 September 2020)

E Division 105A The Continuing Detention Orders Regime

42. The background to the Continuing Detention Orders (CDO) regime is helpfully summarised in the 2017 report by the INSLM, Dr James Renwick, SC:[33]

    Division 105A of the Criminal Code was enacted pursuant to the HRTO Act and commenced on 7 June 2017. The object of the division is 'to ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders who pose an unacceptable risk of committing serious pt 5.3 offences if released into the community' (s 105A.1). Division 105A is largely based upon state and territory serious sex offenders legislation, the prototype for which was found to be constitutionally valid by the High Court in Fardon v Attorney-General (Qld).

    CDOs can only be made in relation to persons who have already been found guilty by a jury of serious terrorist offences and who are detained in custody serving a sentence of imprisonment (or are committed to detention under an existing CDO).

    A CDO is made by a state or territory supreme court on the application of the Commonwealth Attorney-General. CDOs provide for the detention to continue for up to three years at a time. The supreme court makes the order on the basis of evidence, including expert evidence, to continue to detain or to release.[34]

43. In that same 2017 report by INSLM, there was a recognition that there existed an overlap between State and Commonwealth offences and ostensibly, this provision has been superseded by section 34 of the *Terrorism (High Risk Offenders) Act 2017.*

44. While the regime is designed to prevent the commission of new terrorism-related offences, MLN (NSW) is concerned that the practical effect of continuing detention orders will be punitive and result in offenders being punished more than once for a single offence, contravening the well established principle of double jeopardy. This is particularly concerning in light of research suggesting that similar regimes enacted in respect of sex crimes do not necessarily reduce recidivism. The CDO regime makes no provision for rehabilitation of prisoners as an alternative to detention and the various recommendations in reports to the PJCIS have been similarly silent.

45. From a practical perspective, offenders who have been serving a sentence for a terrorism related offence in NSW for example, will more than likely be serving that sentence in high security facility, largely at the High Risk Management Unit at Goulburn Correctional Centre under severely restrictive conditions. This necessarily makes applications for parole, which often require completion of certain programs and good behaviour whilst in custody near impossible. The net effect is that many offenders in New South Wales become or will become subject to an ESO[35] due in part to their inability to participate in helpful rehabilitation programs through no fault of their own. On

[33] Dr James Renwick SC. 'Commonwealth of Australia, Independent National Security Legislation Monitor, *Control Orders and Preventative Detention Orders*.' 3rd INSLM Report no.3 September 2017 at p. xi.

[34] 'Commonwealth of Australia, Independent National Security Legislation Monitor, Control Orders and Preventative Detention Orders.'

[35] Constained in Part 2 of the *Terrorism (High Risk Offenders) Act 2017*

14 October 2016, the MLN (NSW) in the PJCIS public hearing emphasised to Parliament at that time the importance of rehabilitation as an alternative to such schemes.[36]

46. It is also important, in the context of reviewing the CDO regime, the PJCIS should have regard to the legislation's compatibility with international obligations as well as general civil liberties and human rights obligations. The CDO regime, in our view, infringes Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR),[37] which provides for the right to liberty and security of a person and prohibits arbitrary arrest or detention. Arbitrary detention is a potential consequence of the regime. By enabling the detention of a person who has completed a term of imprisonment for an offence, to be detained for a further period of time, without the commission of a new crime is contrary to Australia's obligations.

47. Whilst the detention of offenders under a CDO has been proposed as being preventative rather than punitive, the MLN (NSW) is concerned that in practical terms, the effect will be punitive. The extended period of detention after a sentence has been served, infringes Article 15 of the ICCPR, which prohibits the imposition of "*a heavier penalty … than the one that was applicable at the time when the criminal offence was committed*".

48. An Australian study[38] into the use of similar post sentencing regimes for serious sex-offenders for example, highlighted concerns about the increased risks they created, including issues relating to the targeting of only known offenders and not working to reduce recidivism. The impact on safety is minimal and the study suggested the regime provided the community with a false sense of belief that they were safer and protected from the sex offender.

49. Finally, it is relevant to note that the CDOs, as provided for under Division 105A have **not** been used since the regime's inception.

50. The MLN (NSW) support the concerns raised by Legal Aid NSW in its submissions to the PJCIS [39] about the interoperability of post sentence terrorist offender schemes. Legislative instruments capable of duplicitous measures or punishment should not exist.

F Conclusion

The MLN (NSW) thanks the PJCIS for its consideration of the above submissions.

[36] Commonwealth of Australia, Parliamentary Debates, Parliamentary Joint Committee on Intelligence and Security, 14 October 2016 *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016,* at 31-32.
[37] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999 at 171, as also mentioned in Section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth).
[38] Keyzer P & McSherry B, *The Preventative Detention of "Dangerous" sex offenders in Australia: Perspectives at the Coalface* pp296-305, Centre for Law, Bond University
[39] Review of AFP Powers, August 2020 at 8-11.