Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders

Dr James Renwick SC
The Independent National Security Legislation Monitor

The Independent National Security Legislation Monitor Act provides for the appointment of the INSLM. The INSLM independently reviews the operation, effectiveness and implications of national security and counter-terrorism laws; and considers whether the laws contain appropriate protections for individual rights, remain proportionate to terrorism or national security threats, and remain necessary. In conducting the review the INSLM has access to all relevant material, regardless of national security classification, can compel answers to questions, and holds public and private hearings. INSLM reports are provided to the Prime Minister and are tabled promptly in Parliament. The INSLM does not deal with complaints but welcomes submissions on the reviews. The INSLM is a part-time role and is supported by a small permanent staff located in Canberra. More information and contact details can be found at www.inslm.gov.au.

There have been three INSLMs since the role began in 2010: Bret Walker SC, the Hon Roger Gyles AO, QC and the current INSLM, Dr James Renwick SC (pictured).
Dear Prime Minister,

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

As required by section 6(1B) of the Independent National Security Legislation Monitor Act 2010 (Cth) (INSLM Act), I am pleased to present my report on the review of divisions 104 and 105 of the Criminal Code (Cth), including the interoperability of divisions 104 and 105A. As the report is unclassified, and does not include information of the kind referred to in subsection 29(3) of the INSLM Act, it is suitable to be presented in this form to each House of the Parliament.

Yours sincerely

James Renwick
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<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
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<tr>
<td>ACLEI</td>
<td>Australian Commission for Law Enforcement Integrity</td>
</tr>
<tr>
<td>ADJR Act</td>
<td><em>Administrative Decisions (Judicial Review) Act 1977 (Cth)</em></td>
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<tr>
<td>AFP</td>
<td>Australian Federal Police</td>
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<td>AGD</td>
<td>Commonwealth Attorney-General’s Department</td>
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<td>AHRC</td>
<td>Australian Human Rights Commission</td>
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<td>ALHR</td>
<td>Australian Lawyers for Human Rights</td>
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<td>ASIO</td>
<td>Australian Security and Intelligence Organisation</td>
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<td>ASPI</td>
<td>Australian Strategic Policy Institute</td>
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<td>CDO</td>
<td>Continuing Detention Order</td>
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<td>CDO regime</td>
<td>Regime for the making of CDOs established by div 105A of the Criminal Code</td>
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<td>CDPP</td>
<td>Commonwealth Director of Public Prosecutions</td>
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<td>COAG</td>
<td>Council of Australian Governments</td>
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<td>COAG Review Committee</td>
<td>Committee chaired by the Hon Anthony Whealy QC commissioned by COAG to review Australia’s counter-terrorism legislation</td>
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<td>Crimes Act</td>
<td><em>Crimes Act 1914 (Cth)</em></td>
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<td>Criminal Code</td>
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<td>CRC</td>
<td><em>Convention on the Rights of the Child</em></td>
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<td>ESO</td>
<td>Extended Supervision Order</td>
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<td>Term</td>
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<td>Foreign Fighters Act</td>
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<td>Foreign Fighters Bill</td>
<td>Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth)</td>
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<td>HRC</td>
<td>UN Human Rights Committee</td>
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<td>HRTO Act</td>
<td>Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016 (Cth)</td>
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<tr>
<td>HRTO Bill</td>
<td>Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth), the Bill that became the HRTO Act</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>INSLM</td>
<td>Independent National Security Legislation Monitor</td>
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<td>INSLM Act</td>
<td>Independent National Security Legislation Monitor Act 2010 (Cth)</td>
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<td>JCTT</td>
<td>Joint Counter-Terrorism Taskforce</td>
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<td>LCA</td>
<td>Law Council of Australia</td>
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<td>NSI Act</td>
<td>National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)</td>
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<td>PDO</td>
<td>Preventative Detention Order</td>
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<td>PJCIS</td>
<td>Parliamentary Joint Committee on Intelligence and Security</td>
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<td>PJCHR</td>
<td>Parliamentary Joint Committee on Human Rights</td>
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<td>SD Act</td>
<td>Surveillance Devices Act 2004 (Cth)</td>
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<td>TIA Act</td>
<td>Telecommunications (Interception and Access) Act 1979 (Cth)</td>
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<td>UN</td>
<td>United Nations</td>
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EXECUTIVE SUMMARY

Introduction

This is one of three reports provided simultaneously to the Prime Minister as required by s 6(1B) of the INSLM Act. Each report concerns counter-terrorism legislation which, unless renewed, is due to expire by 7 September 2018.

The INSLM Act requires me to provide reports of these reviews by 7 September 2017 so that the PJCIS can undertake its own review of the same laws within six months (s 6(1B)).

Each report is self-contained, although there are some common chapters concerning the national security and counter-terrorism landscape, relevant human rights and other obligations and constitutional and inter-governmental arrangements.

My recommendations can only be fully understood by considering each report as a whole; however for the convenience of readers, I now provide a brief summary of my conclusions detailed in this report.

Division 104 of the Criminal Code concerns control orders. Division 105 concerns PDOs. Division 105A concerns CDOs: it was inserted by the HRTO Act and commenced on 7 June 2017.

To be clear, this review directly concerns divs 104 and 105 rather than div 105A. However, I have been asked to consider issues concerning the interoperability of divs 104 and 105A and have done so in the present review. The issues addressed in this report are detailed in table 1 in the next chapter (para 1.15), which outlines the scope of the present review.

The three divisions concern different matters and I deal with them separately.

Control orders (division 104)

A control order is an order made by a federal court on the application of the AFP. Control orders impose potentially far-reaching obligations, prohibitions and restrictions on a controlee, but these ‘controls’ fall short of detention.

The objects of a control order are variously to:

- protect the public from a terrorist act
- prevent the provision of support for, or the facilitation of, either:
  - a terrorist act, or
  - the engagement in a hostile activity in a foreign country.

Although recommendations have been made for repeal of div 104, including by the first INSLM, that has not occurred. Instead, Parliament has amended div 104 to:

- broaden the basis for obtaining a control order
- strengthen the capacity of authorities to monitor compliance by a controlee
• improve the rights of the controlee by introducing a regime of special advocates who can
access classified material that is otherwise denied to the controlee.

While only six control orders have ever been obtained, the AFP (supported by ASIO and AGD)
argues that control orders should be retained, even if they are rarely used, because there will
always be a gap between the generally desirable aim of criminally prosecuting a terrorist suspect,
and the situation where a prosecution cannot be achieved but the public still needs the protection
from the individual. The AFP contends that control orders are a remedy always considered in a
counter-terrorist operation.

The retention of control orders either in their current form or in a modified form is contested.

**Continuing detention orders (division 105A)**

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.

There is obvious overlap with control orders which are a less restrictive measure that may address
the risk the offender poses. There is scope to reduce this overlap.

**Preventative detention orders (division 105)**

PDOs are different from control orders and CDOs. Division 105 allows the AFP to apply to a current
or former judge,1 acting, for constitutional reasons, *persona designata*, to order a person to be
detained, effectively incommunicado, for up to 48 hours, to prevent a terrorist act which is capable
of occurring within that period or to preserve evidence of, or relating to, a recent terrorist act.
Questioning of the detainee is forbidden.

PDOs remain controversial, even while unused. The first INSLM recommended repeal, the COAG
Review Committee by majority did so, but the government and the PJCIS have not accepted that
PDOs should be abolished.

The states and territories have similar legislation, authorising detention for longer periods and at
least in some cases permitting the detainee to be questioned. Some states have invoked those
provisions. The AFP has never applied for a PDO under div 105.

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1 The application may also be made to the President or a Deputy President of the AAT.
Summary of conclusions

I conclude that divs 104 and 105 should be renewed for a further period of five years subject to acceptance of various recommendations in relation to div 104. These include recommendations that:

- div 104 be amended to allow for variations of an interim control order
- there should be no costs orders in control order proceedings, and the adequacy of legal aid for controlees should be considered by the Attorney-General
- there be further consideration of any outstanding recommendations made by the second INSLM in his review of control order safeguards.

In relation to interoperability between divs 104 and 105A, I recommend that:

- state and territory supreme courts be given jurisdiction to make an ESO (while still retaining jurisdiction to make a CDO)
- while a div 105A order is in force a control order under div 104 may not be sought or made
- the Attorney-General should continue to be the applicant under div 105A
- the extended monitoring powers (each available in relation to div 104 control orders) should be available under div 105A
- consideration be given to making the special advocates regime available for applications under div 105A.

As to the matters in s 6(1)(a) of the INSLM Act, I conclude that the laws have the capacity to be effective (noting that control orders are rarely made under div 104 and no PDOs have been made under div 105). As to the matters in s 6(1)(b) of the INSLM Act, I have considered Australia’s human rights, counter-terrorism and international security obligations, and intergovernmental agreements within Australia, and I conclude that the laws are:

- consistent with the obligations referred to above and contain appropriate safeguards for protecting the rights of individuals
- proportionate to the current threats of terrorism and to national security
- necessary.

Finally, consistent with s 6(1)(d) of the INSLM Act, I have considered whether the legislation considered in this review is being used for any matter unrelated to counter-terrorism and national security. In the conduct of this review there was no evidence to suggest this.
1. CONTEXT

1.1. When I was appointed, the Prime Minister, the Hon Malcolm Turnbull, said this:

The Independent National Security Legislation Monitor is an important and valued component of Australia’s national security architecture, responsible for ensuring that national security and counter-terrorism legislation is applied in accordance with the rule of law and in a manner consistent with our human rights obligations.

In particular, as it becomes more important than ever for the Government to continue modernising and strengthening our laws to address the growing and evolving terrorist and espionage threat at home and abroad, the relevance of the independent reviewer becomes similarly important. This will help ensure that our individual freedoms that underpin the Australian way of life are balanced against the need to fight terrorism and other threats with every tool at our disposal.²

1.2. Finding that ‘balance’ can be difficult, and fair-minded, informed, people may disagree as to how the balance is to be struck. In 2004, a discussion paper prepared by the United Kingdom Home Office suggested the following way of viewing what it described as a ‘challenge’:

There is no greater challenge for a democracy than the response it makes to terrorism. The economic, social and political dislocation which sophisticated terrorist action can bring threatens the very democracy which protects our liberty. But that liberty may be exploited by those supporting, aiding or engaging in terrorism to avoid pre-emptive intervention by the forces of law and order. The challenge, therefore, is how to retain long-held and hard-won freedoms and protections from the arbitrary use of power or wrongful conviction whilst ensuring that democracy and the rule of law itself are not used as a cover by those who seek its overthrow.³

1.3. The INSLM Act sets out my functions and jurisdiction, and gives me guidance as to how to review counter-terrorism and national security laws in a way which strikes the balance referred to in these two quotes.

1.4. This is a report of my review of divs 104 and 105 of the Criminal Code. I have carried out the review under s 6(1)(a) of the INSLM Act, as required by s 6(1B) of the Act.

1.5. Section 6(1) confers on me the following functions:

(a) to review, on his or her own initiative, the operation, effectiveness and implications of:

(i) Australia’s counter-terrorism and national security legislation; and

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CONTROL ORDERS & PREVENTATIVE DETENTION ORDERS

(a) without limiting subparagraph (i), Division 105A of the Criminal Code and any other provision of that Code as far as it relates to that Division; and

(ii) any other law of the Commonwealth to the extent that it relates to Australia’s counter-terrorism and national security legislation;

(b) to consider, on his or her own initiative, whether any legislation mentioned in paragraph (a):

(i) contains appropriate safeguards for protecting the rights of individuals; and

(ii) remains proportionate to any threat of terrorism or threat to national security, or both; and

(iii) remains necessary;

(c) if a matter relating to counter-terrorism or national security is referred to the Monitor by the Prime Minister—to report on the reference;

(d) to assess whether Australia’s counter-terrorism or national security legislation is being used for matters unrelated to terrorism and national security.

1.6. Section 8 of the INSLM Act requires me, when performing my functions (including carrying out a review under s 6(1)(a)), to have regard to Australia’s obligations under international agreements, as well as to arrangements agreed from time to time between the Commonwealth, the states and the territories to ensure a national approach to countering terrorism. These matters are considered in detail in chapter 5 of this report.

1.7. I must also be conscious of the limitations of my functions by operation of s 6(2), which provides:

(2) To avoid doubt, the following are not functions of the Independent National Security Legislation Monitor:

(a) to review the priorities of, and use of resources by, agencies that have functions relating to, or are involved in the implementation of, Australia’s counter-terrorism and national security legislation;

(b) to consider any individual complaints about the activities of Commonwealth agencies that have functions relating to, or are involved in the implementation of, Australia’s counter-terrorism and national security legislation.

1.8. I am also required by s 10(1) of the INSLM Act to have regard to the functions of other agencies and officials relating to the legislation under review. For the present review, the relevant agencies are ASIO, the AFP and AGD. Section 10(2) of the Act lists a number of agencies and officials with which or with whom I may consult when performing my functions. For the present review, I have had the advantage of consulting with, and hearing evidence from, the Human Rights Commissioner, Mr Edward Santow.

1.9. Although not required by s 6(1B) to consider the matters in s 6(1)(b), I have decided that it is appropriate to do so in conducting the present review. Section 6(1)(b)(i) is obviously informed by Australia’s obligations under international agreements, especially human rights obligations, to which I must have regard when performing my functions by virtue of
s 8(a) of the INSLM Act. The question of proportionality to the threat of terrorism, referred to in s 6(1)(b)(ii), is interlinked with the issue of the necessity of the legislation under review, referred to in s 6(1)(b)(iii).

1.10. This is a report of my review of divs 104 (control orders) and 105 (PDOs) of the Criminal Code as required by s 6(1B) of the INSLM Act. The review, particularly in relation to control orders, is complex because there have been many reviews of, and recent amendments to, these statutory regimes (as detailed in chapters 3 and 7 of this report). Although very rarely used, control orders and PDOs (which have never been used) remain controversial.

1.11. Recommendations by the first INSLM for the abolition of control orders and PDOs have evidently not been accepted. Rather, they have been retained, and in the case of control orders, the basis for making them has been widened, as has the legal capacity to monitor compliance with them. Chapter 4 of this report details the legislative history of divs 104 and 105, and the table at appendix B highlights relevant reviews by the INSLM and the COAG Review Committee and the fate of their respective recommendations.

1.12. Section 6(1B) of the INSLM Act requires me to review not only divs 104 and 105 of the Criminal Code, but also ‘any other provision of the Criminal Code Act 1995 as far as it relates to those Divisions’. In this regard, a few important points need to be made:

   a. First, the 2016 Amendment Act introduced monitoring and special advocates regimes. These regimes impact on the control order regime, but are established outside the Criminal Code Act 1995 (as discussed in chapter 4 of this report). While it is within my functions at any time to review the operation, effectiveness and implications of the legislation establishing these regimes pursuant to s 6(1)(a)(ii) of the INSLM Act, and I received some submissions as to these matters, I have decided not to include these regimes within the scope of the present review (with the exception of one issue raised by the LCA concerning the appointment of special advocates). To date, neither of these regimes has been used, and indeed no control order has been made or been in force since their introduction. Accordingly, there is very limited capacity for me to review the operation and effectiveness of these regimes ahead of a statutory requirement to do so. In particular, I cannot bring to bear a key strength of my statutory role which is to examine the practical operation of the laws.

   b. Second, this is not a review of div 105A of the Criminal Code, which establishes a regime for the continuing detention of high-risk terrorist offenders (CDO regime). While it is within my functions at any time to review the operation, effectiveness and implications of div 105A of the Criminal Code, and I received some submissions addressing these matters, it would be premature for me to conduct such a review now. The relevant legislation has not yet been used (and cannot be used before 2019 when the first ‘terrorist offender’ becomes eligible for release). Moreover, under the amendments to the INSLM Act introduced by the HRTO Act, the INSLM is required to complete that review by 7 December 2021, once it has been given the opportunity to operate in practice.  

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4 INSLM Act s 6(1C).
CONTROL ORDERS & PREVENTATIVE DETENTION ORDERS

1.13. Nevertheless, I have decided to include within the scope of the present review the discrete issue of the interoperability between the control order and CDO regimes. I do so because of the suggestion by the PJCIS, in its review of the HRTO Bill, that the present review would ‘provide an opportunity to more broadly consider the interoperability between the two regimes and the complexities that may arise’.5

1.14. Given the number of reviews of, and legislative amendments to, the control order and PDO regimes, it is understandable that the submissions that I received for the present review addressed matters that are beyond the scope of the present review. It is also understandable that the submissions generally did not address the totality of issues that have been raised in previous reviews of these regimes (as detailed in chapter 7 below). Accordingly, in the present review, I have considered some matters that were not addressed in the submissions, while taking on notice for possible future reviews, matters that were addressed in the submissions.

1.15. For clarity, the following table provides a ready-reckoner of issues that are addressed in the present report, as well as key issues that are not.

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1.16. In due course, if the PICIS agrees with my recommendation that divs 104 and 105 continue for a further period of five years and the laws are in fact extended and used, a future INSLM

Table 1: Issues addressed in this report

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will be in the position to consider those issues that are not covered in this report with the advantage of reviewing how those laws operate in practice.

1.17. In carrying out the review of divs 104 and 105, and the interoperability between divs 104 and 105A, I have:
   a. considered the legislative history of divs 104 and 105
   b. considered previous commentary on, and parliamentary scrutiny of, the provisions
   c. issued a series of questions and requests for information and documents to ASIO, the AFP and AGD, each of which has a role in the administration and operation of divs 104 and 105
   d. invited, received and considered submissions from these agencies, as well as from other interested parties, including the LCA and the AHRC
   e. sought views from experts in terrorism and law enforcement, notably Dr Rodger Shanahan6 and Mr John Lawler AM APM7
   f. held private and public hearings to explore information and submissions received.

1.18. A summary of the review process and a list of the submissions received are set out in appendix A. The submissions themselves are, except when confidential, available on the INSLM website www.inslm.gov.au.

1.19. I wish to thank the Commonwealth agencies and other interested parties for their contribution to this review. I also wish to thank for their assistance in carrying out the review and preparing this report my Principal Adviser, Mr Mark Mooney, my Counsel Assisting, Ms Anna Mitchelmore, my Solicitors Assisting, Messrs Anthony Hall and Alexander Kunzelmann who were on part-time secondment from the Office of General Counsel in the Australian Government Solicitor, and my Executive Officer, Ms Karen Thornton.

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6 PhD in Arab and Islamic Studies from the University of Sydney, currently a Research Fellow at the Lowy Institute.
7 Former CEO of the Australian Crime Commission, former Deputy Commissioner of the AFP.
2. NATIONAL SECURITY AND COUNTER-TERRORISM LANDSCAPE

2.1. Although I am entitled to form my own opinion on the national security and counter-terrorism landscape, in this instance, I acknowledge and accept the expert views of others in government, especially ASIO in its most recent unclassified annual report (2015-16), relevant portions of which state:

Australia’s National Terrorism Threat Level is PROBABLE—credible intelligence, assessed to represent a plausible scenario, indicates an intention and capability to conduct terrorist attacks in Australia.[…]

The principal terrorist threat in Australia emanates from the small number of Australia-based individuals who remain committed to anti-Western violent Sunni Islamist extremist ideology. This group presents a direct threat as well as a secondary threat due to their ability to influence others.[…]

The changing nature of terrorism provides challenges to the early identification and detection of threats. While large-scale attacks, including coordinated attacks by multiple individuals, are still occurring around the world, there has been a trend towards simpler attacks that require minimal preparation perpetrated by lone actors.[…]

The four onshore attacks since 2014 were all conducted by single individuals using relatively simple weapons (two with knives and two with firearms). While symbols of government and authority – including military, police and security agencies – remain attractive targets, indiscriminate attacks against the public align with the objectives of terrorists. ISIL, and to a lesser degree al-Qa’ida, continues to endorse and celebrate indiscriminate attacks against innocent citizens so as to reinforce their message and incite fear.8

2.2. Since the ASIO unclassified annual report was tabled on 13 October 2016 there has been a further terrorist attack within Australia (the Brighton siege) and a number of terrorist attacks around the world. For instance, the United Kingdom has seen four serious terrorist attacks over a period of just three months this year, namely:

a. Westminster Bridge on 22 March 2017
b. Manchester Arena on 22 May 2017
c. London Bridge/Borough Markets on 3 June 2017
d. Finsbury Park on 19 June 2017.

Three of these attacks (the Manchester attack being the exception) met the profile of simple weapons used indiscriminately against the general population, at least one of which (Westminster Bridge) was apparently a lone actor. The very recent attack in Spain, on 18 August 2017, continued this pattern of simplistic and indiscriminate violence.

2.3. In his evidence before me during the public hearing, the Director-General of Security, Mr Duncan Lewis AO, DSC, CSC said:

8 ASIO, Annual report 2015-16, 17-19.
The threat we face is self-sustaining easily drawing in vulnerable individuals who are swiftly radicalised and able to undertake simple but deadly attacks. Our ability to counter these individuals is further challenged by the operating environment, from the continuing spread and increased uptake of technologies, including encrypted internet communications and device security, as well as the shift from complex methodologies to simple but very difficult to detect and prevent low sophisticated attacks.

Now, all of these factors mean that intelligence and law enforcement agencies have to evolve their approaches to be more innovative, integrated and agile in order to identify and disrupt would-be attackers.9

I accept that evidence.

2.4. Further, AFP Deputy Commissioner, Mr Michael Phelan APM gave evidence at the same hearing as follows:

The terrorist threat continues to adapt and evolve.

In 2005, when specialist counter-terrorism powers were introduced the primary terrorism threat involved the long-term planning for large-scale mass casualty attacks. At the time Operation PENDENNIS was the longest running and largest CT investigation undertaken in Australia. The two groups were engaged in activities over a sustained period. This included ideological instruction, team building, training, fund raising, gathering supplies and planning an attack.

The decision to go to resolution was made to minimise the risk to the public. Even so, after much planning, the groups had not identified a specific target for the attack. The PENDENNIS style threat [of] long-range planning for mass casualty attacks has not gone away. But we are seeing a major increase in the threat of smaller-scale opportunistic attacks by lone actors. The very short flash to bang, so to speak, time from radicalisation to violent action creates significant challenges for police and intelligence agencies.

Unfortunately, since mid-2014 rapid radicalisation and low-complexity plots have become the norm. The result is police have very little lead time or none at all to prevent spontaneous attack. The new threat environment means police have had to change the way in which we respond to disrupt terrorism. The pace at which plots develop, coupled with the potentially catastrophic consequences of a terrorist attack, mean police need to act fast to disrupt terrorist activity.

Where possible, we disrupt terrorist plots using traditional criminal justice methods. Protection of human life is always the AFP and, indeed, state polices’, paramount priority. But early overt action can mean insufficient evidence has been collected to support charging people with an offence. Since there is often strong intelligence to indicate the person poses a continuing terrorist threat, preventative measures may be necessary to manage that threat.10

I also accept that evidence.

2.5. On 3 August 2017, charges were laid against two men for acts done in preparation for, or planning, a terrorist act, contrary to s 101.6 of the Criminal Code.11 It has been alleged that

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9 Transcript of Proceedings, Public Hearing, Canberra, 19 May 2017, 5 (Duncan Lewis).
10 Ibid 6 (Michael Phelan).
they attempted to smuggle onto an aircraft an improvised explosive device, and planned to build and smuggle onto an aircraft a hydrogen sulphide bomb. The Deputy Commissioner during a press conference said it was ‘one of the most sophisticated terror plots attempted on Australian soil’, which supports his view, quoted above (para 2.4) that ‘planning for mass casualty attacks has not gone away’.

2.6. According to information that I received from the AFP, 84 charges have been laid against 51 persons since December 2014 for preparatory offences. Of these, a total of 41 charges resulted in conviction, a further 36 are the subject of ongoing prosecution, and seven have been withdrawn (for a range of reasons, including a lack of admissible evidence or advice from the CDPP that there is a different charge that better reflects the totality of the criminal conduct).

2.7. I similarly acknowledge and accept the expert views of the authors of the 2017 Independent Intelligence Review report, Mr Michael L’Estrange AO and Mr Stephen Merchant PSM, on the national security and counter-terrorism landscape. Relevantly:

Australia’s national security circumstances have been re-shaped by the realities of extremism with global reach.

Economic globalisation over recent decades has dramatically accelerated the international movement of people, goods, money and ideas. This phenomenon has had a remarkably positive and empowering impact on states and individuals. It has been vital in bringing more people out of poverty more quickly than at any other time in history. This greater freedom of international movement and sense of global connectedness has been enabled through communications, financial and physical networks. But these transforming influences have also had a negative impact through their facilitation of the illegal and destabilising transfer of goods, money, weapons and people. This has broadened the potential for extremism, sectarian fundamentalism, radicalisation and terrorism to take root and have their destructive impact. It has also raised expectations, especially among Australians living and working abroad, that their government will protect them from such dangers or support them if those dangers directly affect them.

Extremism with global reach has important consequences for Australian society. It accentuates the urgency and constancy of the need to counter terrorist influences and ambitions in Australia.

In our view, extremism with global reach will continue and diversify over the coming decade. Fundamentalist advocacy of violence in the name of religion will continue to inspire attacks, especially from Islamist terrorist organisations. Radicalisation and terrorist acts will continue to be enabled by increasingly internationalised networks and encrypted communications. The prominence and power of individual groups such as the Islamic State of Iraq and the Levant (ISIL) may wane but many of the forces of deep alienation, ruthless hostility and ideologies of violence that have brought these groups to prominence will remain. Individuals inspired by ISIL will outlive any demise of the organisation. Al-Qaida and its affiliates will remain a threat. Those groups and other splinter organisations that may emerge will aim to give effect to ambitions for

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12 42 charges relate to offences against s 101.6 of the Criminal Code (resulting in 13 convictions so far), 29 charges relate to offences against s 7 of the now repealed Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth) (resulting in 28 convictions so far), and 13 charges relate to offences against s 119.4 of the Criminal Code (no convictions so far).
mass casualty attacks and random violence. Such groups will continue to draw on local grievances to support their regional and global agendas.

These realities of Australia’s national security environment will continue as a vital focus for the work of the intelligence agencies over the coming decade and beyond. Particular challenges will emerge and others will evolve. These will include the activities and networks of Australian ‘foreign fighters’ involved in international extremist and terrorist causes, the rise of ‘lone wolf’ assaults and the scope for low-technology terrorism attacks often facilitated online. The time taken between radicalisation and terrorist attack is shortening, further challenging intelligence agencies’ detection and response capabilities.

In our view, the terrorist and extremist threats to Australia and Australian interests will continue to grow in scale and complexity. Detecting and countering such threats will be increasingly challenging for our intelligence and law enforcement agencies. The greater numbers of Australians travelling and living overseas, as well as the international movement of radicalised individuals, will magnify the security threats Australia faces.13

2.8. These views are entitled, because of the standing and expertise of their authors, to considerable respect. They present a consistent picture of the national security and counter-terrorism landscape and are highly relevant in considering whether the legislation under review is proportionate to the threats, and necessary.

2.9. What I take from the above analyses is that:

a. the credible threat of one or more terrorist attacks will remain a significant factor in the Australian national security and counter-terrorism landscape for the reasonably foreseeable future

b. while more complex or extensive attacks cannot be ruled out, and must be prepared for, attacks by lone actors using simple but deadly weapons, with little if any warning, are more likely

c. there can be no guarantee that the authorities will detect and prevent all attacks.

2.10. There is also the risk of opportunistic if unconnected ‘follow-up’ attacks in the immediate aftermath of a completed attack at a time when police and intelligence agencies are fully occupied in obtaining evidence and returning the attacked locality to normality. During the public hearing, Mr Lawler noted that:

If a multifaceted terrorist attack on a large scale occurs in Australia, the authorities responding will be under the most extreme pressure that one could possibly imagine. We know from even lone actor attacks, [like] the Lindt Café Siege, the huge number of police and security and other agencies involved into the many, many hundreds, as I understand it.14

2.11. Furthermore, I consider that it is better to have a carefully thought out counter-terrorism legal structure in place before an attack: while legislating in an emergency is possible, it is generally undesirable, not least as it may lead to a disproportionate response.

2.12. I consider the necessity of the legislation under review, and its proportionality to these threats, bearing these matters in mind.

13 2017 Independent Intelligence Review (June 2017) [1.11]-[1.16].
3. **EXPLANATION OF STATUTORY PROVISIONS**

**Summary of division 104 of the Criminal Code**

**What is a control order?**

3.1. A control order allows obligations, prohibitions and restrictions to be imposed on a person. The objects section of div 104 provides that these controls may be imposed for one or more of the following purposes:

a. protecting the public from a terrorist act
b. preventing the provision of support for, or the facilitation of, a terrorist act
c. preventing the provision of support for, or the facilitation of, the engagement in hostile activities in a foreign country.¹⁵

**How is a control order made?**

3.2. Both the Federal Court and the Federal Circuit Court have the power to make a control order. In this capacity, they are referred to as the ‘issuing court’.¹⁶ A senior AFP member may make a request for a control order. Save for circumstances involving urgency,¹⁷ the senior AFP member must first obtain the written consent of the Attorney-General (s 104.2).

3.3. In the first instance, if the issuing court makes a control order, it does so on an interim basis, in *ex parte* proceedings (interim control order) in the absence of the controlee.¹⁸ The interim control order is then subject to confirmation in *inter partes* proceedings.¹⁹

3.4. Division 104 deems proceedings in relation to a request for an interim control order to be interlocutory proceedings (s 104.28A). Accordingly, the request can be supported by hearsay evidence, provided that the source of that evidence is identified.²⁰

3.5. The issuing court must specify the date for confirming the control order in the interim control order (s 104.4(1)(e)). The specified date ‘must be as soon as practicable, but at least 72 hours, after the order is made’ (s 104.5(1A)).

3.6. A confirmation proceeding will only take place if the senior AFP member who requested the order elects to confirm the order pursuant to s 104.12A (s 104.14(1A)). The senior AFP member must make the election at least 48 hours before the date specified for the confirmation hearing, and give written notification to the issuing court (s 104.12A(1)).

3.7. If the senior AFP member elects not to confirm the control order, and the order has already been served on the person, then the order immediately ceases to be in force (s 104.12A(4)).

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¹⁵ Criminal Code s 104.1.
¹⁶ See definition of ‘issuing court’ in s 100.1(1).
¹⁷ Criminal Code div 104 subdiv C.
¹⁸ Ibid div 104 subdiv B.
¹⁹ Ibid div 104 subdiv D.
²⁰ Evidence Act 1995 (Cth) s 75.
To whom can a control order apply?

3.8. A control order may be made in relation to any person who is 14 years of age or older. There is a special regime for young people between 14 and 17 year of age, notably, in such cases, each confirmed control order cannot last for more than three months, although successive orders may be sought (s 104.28(2)). In this report, I refer to the person in relation to whom a control order is made as the ‘controlee’.

When may a control order be made?

3.9. Section 104.4 of the Criminal Code stipulates a number of preconditions to the making of a control order. The court may only make the order if the request has been made in accordance with s 104.3, and the court has received and considered such further information as it requires. The court must also be satisfied on the balance of probabilities as to at least one of the following:

a. Making the order would substantially assist in preventing a terrorist act.

b. The person has provided training to, received training from, or participated in training with a listed terrorist organisation.

c. The person has engaged in a hostile activity in a foreign country.

d. The person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation, or a terrorist act.

e. The person has been convicted in a foreign country of an offence that is constituted by conduct that would constitute a terrorism offence (within the meaning of s 3(1) of the Crimes Act 1914 (Cth)) if engaged in in Australia.

f. Making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act.

In this report, I refer to these as the ‘grounds’ for making a control order.

3.10. Further, the court must be satisfied, on the balance of probabilities, that each of the obligations, prohibitions and restrictions to be imposed on the person is reasonably necessary, and reasonably appropriate and adapted, for the purposes which are stipulated in s 104.1 of the Criminal Code (see para 3.1 above). In determining that question, the court must take into account each of the following:

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21 The control order regime originally provided for a control order to be made in relation to a person who was 16 years of age or older. The age was lowered to 14 years on 30 November 2016 pursuant to the 2016 Amendment Act. The Revised Explanatory Memorandum to the Counter-Terrorism Legislation Amendment Bill (No 1) 2016 (Cth) explains the rationale for the change (at [107]-[108]).

22 Criminal Code ss 104.28(2) and (3).

23 For the purposes of s 104.4(1)(c) and (d) of the Criminal Code, the reference to ‘terrorist act’ includes a reference to a terrorist act that does not occur, a reference to a specific terrorist act and a reference to more than one terrorist act (s 104.4(4)).

24 Criminal Code s 104.4(1)(c).
CONTROL ORDERS & PREVENTATIVE DETENTION ORDERS

a. as a paramount consideration in all cases – the objects of div 104 (see para 3.1 above)
b. as a primary consideration in the case where the controlee is 14 to 17 years of age – the best interests of that person (see s 104.4(2A))
c. as an additional consideration in all cases – the impact of the obligation, prohibition or restriction on the controlee’s circumstances (including financial and personal circumstances).

What restrictions, prohibitions, and obligations may be imposed?

3.11. The following types of restrictions, prohibitions and obligations may be imposed on the controlee (see s 104.5(3) of the Criminal Code):

a. a prohibition or restriction on the controlee being in areas or places specified in the order
b. a prohibition or restriction on the controlee leaving Australia
c. a requirement that the controlee remain at specified premises between specified times each day, or on specified days, but for no more than 12 hours within any 24 hours
d. a requirement that the controlee wear a tracking device (if such an obligation is imposed, additional obligations specified in s 104.5(3A) must also be imposed)
e. a prohibition or restriction on the controlee communicating or associating with specified individuals (if such a prohibition or restriction is imposed, the exceptions specified in s 104.5(4) and (5) apply)
f. a prohibition or restriction on the controlee accessing or using specified forms of telecommunication or other technology (including the internet)
g. a prohibition or restriction on the controlee possessing or using specified articles or substances
h. a prohibition or restriction on the controlee carrying out specified activities (including in respect of his or her work or occupation)
i. a requirement that the controlee report to specified persons at specified times and places
j. a requirement that the controlee allow himself or herself to be photographed
k. a requirement that the controlee allow impressions of his or her fingerprints to be taken
l. a requirement that the controlee participate in specified counselling or education – this obligation is subject to the person agreeing to participate in the counselling or education (see s 104.5(6)).

In this report, I refer to the various restrictions, prohibitions and obligations imposed by a control order as ‘controls’.
3.12. While the full range of controls may be very onerous, they do not amount to executive detention. They may be removed upon confirmation of the control order (s 104.14(7)(b)), or subsequently on application of either the controlee or the AFP Commissioner to vary the confirmed control order (s 104.20(1)(b)). The court may remove a control if it is satisfied as to one or more of the matters set out in para 3.9 above, but is not satisfied on the balance of probabilities, at the relevant time, of the matters set out in para 3.10 above.

3.13. There is no provision for the court to vary an interim control order. Given the lengthy delays in some cases between the making of the interim control order and confirmation, there should be an opportunity for the controlee to apply to vary the interim control order (an issue that I consider further in para 8.62).

3.14. A control may be added to a confirmed control order on the application of the AFP Commissioner (s 104.23). In deciding whether to add a control, the issuing court considers the same matters to which it is required to have regard when it is initially deciding whether to make a control order and what conditions to impose (compare ss 104.24 and 104.4).

**What is the duration of a control order?**

3.15. A control order is in force from when it is served on the person to whom it relates (s 104.5(1)(d)) and continues in force for up to 12 months after the day on which the interim order was made (ss 104.5(1)(f) and 104.16(d)). If the controlee is under 18, the order is be in force for up to 3 months after that day (ss 104.28(2)).

3.16. A control order ceases to be in force immediately upon the occurrence of each of the following events:
   a. The senior AFP member who requested the interim control order elects not to confirm the control order pursuant to s 104.12A(1) (s 104.12A(4)).
   b. The issuing court revokes the control order at confirmation pursuant to s 104.14(7)(a) (s 104.15(2)).
   c. The issuing court subsequently revokes the confirmed control order on application of either the controlee or the AFP Commissioner pursuant to s 104.20(1)(a) (s 104.20(2)).

A control order in force at the end of the sunset date (currently 7 September 2018) will also cease to be in force at that time (s 104.32(1)).

3.17. Given the lengthy delays in some cases between the making of the interim control order and confirmation, there may not be much further time for the order to operate before it ceases to be in force (or a request for a new control order must be made). This was demonstrated in the *Causevic* case, where the control order was made on 15 September 2015 but was not confirmed until 8 July 2016, with just over two months remaining.\(^{26}\)

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\(^{25}\) Note that this provision refers to the duration of the confirmed control order, not the duration of the interim control order, even though at the relevant time, the control order has not (yet) been confirmed.

\(^{26}\) *Gaughan v Causevic (No 2)* [2016] FCCA 1693.
CONTROL ORDERS & PREVENTATIVE DETENTION ORDERS

How are control orders enforced?

3.18. It is a criminal offence for a controlee to contravene the control order. The maximum penalty is imprisonment for a period of five years (s 104.27).

3.19. The serious consequences for contravening a control order are demonstrated by the Naizmand case. In that case, the controlee was sentenced to four years imprisonment with a three year non-parole period for breaching a prohibition on accessing electronic media depicting propaganda and promotional material for a terrorist organisation. The controlee contravened this prohibition by accessing three ISIL propaganda videos on YouTube.

Process for obtaining a control order

3.20. The process for obtaining a control order is summarised in part 2 of the second INSLM’s report on control order safeguards.

Sunsetting

3.21. The control order regime ceases at the end of 7 September 2018 (s 104.32). What this means is that:

a. As noted above (para 3.16), any control order in force ceases to be in force at that time (s 104.32(1)).

b. A control order may not be requested, made or confirmed after that time (s 104.32(2)).

Summary of division 105 of the Criminal Code

What is a preventative detention order (PDO)?

3.22. The object of div 105 is to allow a person to be detained for a short period of time (no more than 48 hours) in order to do either of the following:

a. prevent the occurrence of a terrorist act that is capable of being carried out, and could occur, within the next 14 days

b. preserve evidence of, or relating to, a recent terrorist act (s 105.1).

How is a PDO made?

3.23. Division 105 makes provision for:

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29 This date was chosen in response to a recommendation by the PJCIS that the powers in div 104 ‘sunset 24 months after the date of the next Federal election’: PJCIS, Parliament of Australia, Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (17 October 2014) recommendation 13. In view of the uncertainty surrounding this date, a date of two years after the third anniversary of the (then) last general election (which occurred on 7 September 2013) was set: Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 [804].
CONTROL ORDERS & PREVENTATIVE DETENTION ORDERS

a. initial preventative detention orders (initial PDOs) (s 105.7)
b. continued preventative detention orders (continued PDOs) (s 105.11).

3.24. An AFP member may apply for an initial PDO to a senior AFP member.

3.25. Applications for a continued PDO may be made to persons appointed by the Attorney-General who hold the position of Judge of the Federal Court, Federal Circuit Court, or a state or territory supreme court, or President or Deputy President of the AAT. Persons who formerly held the position of judge of a ‘superior court’ (ie the High Court, Federal Court, state or territory supreme court or district court) may also be appointed (s 105.2). That is, in contrast to divs 104 and 105A where the application is made to a court, here the applications are made to a current or former member of a court (or tribunal) acting persona designata.

3.26. In contrast with control orders, neither an application for an initial PDO nor an application for a continued PDO requires the consent of the Attorney-General.

To whom may a PDO apply?

3.27. A PDO may be made in relation to any person who is 16 years of age or older (s 105.5).

When may a PDO be made?

3.28. In order to make a PDO, the issuing authority must be satisfied that there are reasonable grounds to suspect that one of the following applies (s 105.4):

a. the subject will engage in a terrorist act, (which the issuing authority is satisfied there are reasonable grounds to suspect is capable of being carried out, or could occur, within the next 14 days)
b. the subject possesses a thing that is connected with the preparation for, or the engagement of a person in, such a terrorist act
c. the subject has done an act in preparation, or planning, for such a terrorist act.

3.29. Additionally, as for the AFP member applying for the PDO, the issuing authority must be satisfied that making the order would substantially assist in preventing a terrorist act occurring, and that detaining the subject for the period for which he or she is to be detained under the order is reasonably necessary for that purpose (s 105.4).

3.30. A PDO may also be made in relation to the subject if the issuing authority is satisfied that each of the following applies (s 105.4(6)):

a. A terrorist act has occurred within the last 28 days.
b. It is reasonably necessary to detain the subject to preserve evidence of, or relating to, the terrorist act.
c. Detaining the subject for the period for which the person is to be detained under the PDO is reasonably necessary for preserving that evidence (see s 105.4(2) and (6)).
Scope of a PDO

3.31. A PDO authorises the subject to be taken into custody by a ‘police officer’ (ie an AFP member or a member of a state or territory police force) and detained (s 105.19) for a period of:

a. in the case of an initial PDO, up to 24 hours (ss 105.8(3) and (5))
b. in the case of a continued PDO, up to 48 hours (ss 105.12(3) and (5)).

3.32. The police officer has the same powers and obligations as the officer would have if arresting the subject, or detaining the subject, for an offence against the law of the relevant jurisdiction (s 105.19(2)). The police officer also has certain ancillary powers to carry out the PDO (see subdiv C generally).

3.33. However, the police officer must not question the subject while he or she is detained, except for the purposes of determining whether the person is the person specified in the order, or ensuring the person’s safety and well-being, and allowing the officer to comply with a requirement of the division regarding the person’s detention under the PDO (s 105.42).30

3.34. In this regard, the PDO regime is to be contrasted with the investigative detention regime that has recently been introduced in NSW (as discussed at paras 3.40-3.43 below). It almost certainly means that the JCTT in NSW would use NSW Police officers and the NSW regime in preference to a PDO unless, say, there was a disagreement where the NSW authorities declined to seek an order under the NSW legislation but the AFP decided nevertheless to seek a PDO.

3.35. The subject may have contact with a family member or lawyer (ss 105.35 and 105.37), but only if:

a. The contact is conducted in such a way that it can be monitored by the police officer (s 105.38).
b. The contact is not prohibited pursuant to a ‘prohibited contact order’ made under ss 105.15 or 105.16 (s 105.40).

3.36. The subject may also have contact with:

a. the Commonwealth Ombudsman or AFP Commissioner or appointee for the purposes of making a complaint under s 7 of the Ombudsman Act 1976 (Cth) and s 40SA of the Australian Federal Police Act 1979 (Cth) (respectively) (s 105.36)
b. if the subject is under 18 years of age or incapable of managing their own affairs – a parent, guardian, or other person able to represent the subject’s interests (s 105.39).

3.37. The subject must not contact any other person. It is a criminal offence, with a maximum penalty of imprisonment for five years, for the subject to disclose to such other person details of their detention (s 105.41). It is also an offence for the subject to disclose details to a family member other than in cases where the contact is authorised under s 105.39.

30 See discussion by the first INSLM of the prohibition on questioning in his second annual report: Declassified Annual Report (20 December 2012) § III.8.
What is the duration of a PDO?

3.38. The PDO takes effect when it is made (ss 105.9(1) and 105.13(1)) and ceases to have effect in either of the following cases:

a. in the case of an initial PDO, if the subject is not taken into custody within 48 hours (s 105.9(2))

b. in the case of either an initial PDO or a continued PDO, either:
   – at the end of the period of detention (ss 105.9(3)(a) and 105.13(2)(a)), or
   – upon being revoked pursuant to s 105.17 (ss 105.9(3)(b) and 105.13(2)(b)).

Sunsetting

3.39. The PDO regime ceases at the end of 7 September 2018 (see s 105.53).

Complementary state and territory regimes

3.40. Finally, it is worth mentioning that the PDO regime operates alongside complementary regimes under state and territory legislation. These regimes differ from the Commonwealth regime in that they provide for detention of up to a total of 14 days. Like the Commonwealth regime, they prohibit the questioning of the subject.

3.41. In NSW, a new type of pre-charge detention regime was introduced into Pt 2AA of the Terrorism (Police Powers) Act 2002. The regime – referred to as ‘investigative detention’ – commenced on 16 May 2016. Like the PDO regime under Pt 2A of the Act, the investigative detention regime comprises two phases: first, the detention without a warrant (up to 4 days from arrest); second, the continued detention (up to 14 days from initial arrest) with a warrant issued by an ‘eligible judge’ acting persona designata. Unlike the PDO regime, the investigative detention regime provides for the questioning of the subject (see s 25G).

3.42. As then-Premier Mike Baird noted in his second reading speech for the Terrorism (Police Powers) Amendment (Investigative Detention) Bill 2016, the new regime was designed to address perceived shortcomings in the NSW PDO regime:

Since using the preventative detention provisions in applications during Operation Appleby, New South Wales police have identified some critical operational gaps in our counterterrorism provisions and we must address these operational gaps.

3.43. The NSW model for investigative detention was considered by COAG at its meeting on 1 April 2016, several weeks before the relevant Bill was introduced into the NSW parliament. COAG agreed, in-principle, to the NSW model ‘as the basis for a strengthened nationally consistent pre-charge detention scheme for terrorism suspects, with the ACT...
reserving its position’.  

I understand that Victoria is currently considering introducing a similar regime.  

I note that the second INSLM recommended that the adoption of an investigative detention regime based on the NSW model be ‘kept under active consideration’.  

34 COAG Meeting Communiqué (1 April 2016).  


36 INSLM, Certain Questioning and Detention Powers in relation to Terrorism (October 2016) recommendation 6.
4. HISTORY OF LEGISLATION UNDER REVIEW

Original enactment

4.1. Divisions 104 and 105 were introduced into the Criminal Code in the aftermath of the terrorist attacks in London in July 2005, pursuant to the Anti-Terrorism Act (No 2) 2005 (Cth).

4.2. As it involved an amendment to Pt 5.3 of the Criminal Code, the Commonwealth first consulted with states and territories pursuant to the Intergovernmental Agreement on Counter-Terrorism Laws. At a special COAG meeting on counter-terrorism on 27 September 2005, the various jurisdictions agreed on broad parameters for the establishment of a control order regime. 37

4.3. The Anti-Terrorism Bill (No 2) 2005 was introduced into Parliament on 3 November 2005. In his second reading speech, the then-Attorney-General described the Bill as ensuring ‘the strongest position possible to prevent new and emerging threats, to stop terrorists carrying out their intended acts’. 38 On that same day, the Bill was referred by the Senate to the Senate Legal and Constitutional Legislation Committee (as it then was) for inquiry and report. 39 The inquiry attracted significant public interest and involved a detailed examination of the provisions of the Bill. The Committee recommended that the Senate pass the Bill, subject to amendments which were intended to clarify or strengthen procedural safeguards in the issuing process. The then government supported a number of the Committee’s recommendations and introduced legislative amendments.

4.4. In the Senate, Senator Brandis spoke of the purpose behind the Bill generally:

This is not a debate about law enforcement; it is a debate about interdiction and prevention. If we get to the stage of criminal law enforcement too often, the terrorist outrage will have been committed. The obligation of the government to protect its citizens will not have been discharged. So most of the provisions in this bill, the introduction of new measures largely unfamiliar to us, such as preventative detention orders and control orders, are not about prosecuting people for crimes; they are about prevention of terrorist conduct by interdiction and surveillance and equipping the security agencies and the Australian Federal Police as fully as they need to be equipped. 40

4.5. On 6 December 2005, the Bill passed the Senate. On 7 December 2005, the House agreed to the Senate’s amendments. On 14 December 2005, the Anti-Terrorism Act (No 2) 2005 received Royal Assent.

4.6. On 2 August 2007 the High Court declared div 104 to be constitutionally valid. 41

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37 COAG Communiqué: Special Meeting on Counter-Terrorism (27 September 2005) attachment.
38 Commonwealth, Parliamentary Debates, House of Representatives, 3 November 2005, 102 (Philip Ruddock).
40 Commonwealth, Parliamentary Debates, Senate, 5 December 2005, 19 (George Brandis).
4.7. Since their enactment, divs 104 and 105 have been substantively amended on several occasions by a number of the ‘tranches’ of national security legislation that were enacted by the 44th and 45th (current) Parliaments. These amendments are shown in the table at appendix C.

**Second tranche**

4.8. In 2014, divs 104 and 105 were amended pursuant to the Foreign Fighters Act. Among other things, these amendments:

a. expanded the grounds for making a control order (namely, where the person has engaged in hostile activity in a foreign country (s 104.4(1)(c)(iii)), or has been convicted of terrorist-related offences in Australia or abroad (ss 104.4(1)(c)(iv) and (v))

b. provided a uniform threshold that the senior AFP member ‘consider’ on reasonable grounds that a ground for making a control order exists in order to seek the Attorney-General’s consent to a request for the control order

42  When originally enacted, s 104.2 set different thresholds depending on whether the control order was being sought to assist in preventing a terrorist act, or against a person who has provided training to, or received training from, a listed terrorist organisation. For the former, the threshold was ‘considers on reasonable grounds’; for the latter, it was ‘suspects on reasonable grounds’. The COAG Review Committee recommended that the latter be raised to ‘considers on reasonable grounds’, noting that ‘[m]ere suspicion should not suffice’. It added that ‘there should be uniformity between the statutory pre-conditions for a senior AFP member’s approach to the Attorney-General for written consent’: Report of the Council of Australian Governments Review of Counter-Terrorism Legislation (1 March 2013) [229].

43  This amendment implemented recommendation III/3 of the first INSLM in his second annual report: Declassified Annual Report (20 December 2012).

44  Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 [159].

c. lowered the threshold for making a PDO to preserve evidence of a recent terrorist act from ‘necessary’ to ‘reasonably necessary’ (s 105.4(6)(b))

d. provided for an oral application for an initial PDO and prohibited contact order where the relevant AFP member considers it necessary due to urgent circumstances (ss 105.7(2)(a)(ii), 105.15(1A) and 105.16(1A))

e. pushed back the sunset date for both divisions, from 16 December 2015 to 7 September 2018 (see para 3.21 above), ‘in recognition of the enduring nature of the terrorist threat and the importance of providing law enforcement agencies with the necessary tools to respond proactively to the evolving nature of the threat presented by those wishing to undertake terrorist acts against Australia’.

**Third tranche**

4.9. In 2014, div 104 was further amended pursuant to the Counter-Terrorism Legislation Amendment Act (No 1) 2014 (Cth). Among other things, these amendments:

a. further expanded the grounds for making a control order (namely, where the control order would substantially assist in preventing the provision of support for or the
facilitation of a terrorist act (s 104.4(c)(vi)), or where the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country (s 104.4(1)(c)(vii))

b. reduced the scope of information that the senior AFP member needs to provide to the Attorney-General when seeking the latter’s consent to request an interim control order.

Fifth tranche

4.10. In 2016, divs 104 and 105 were further amended pursuant to the 2016 Amendment Act. These amendments:

a. lowered the minimum age for a controlee from 16 to 14 years of age (see discussion at para 3.8 above)

b. changed the test for making a PDO to focus on the capability to carry out a terrorist act (s 105.4(5)) – previously, the test focused on when the terrorist act was expected to occur rather than capacity to carry out a terrorist act.45

Sixth tranche

4.11. Division 104 was further amended pursuant to the HRTO Act to clarify that a control order can be requested and made in relation to a person who is in prison, but that the controls imposed will not apply until the person is released. The amendment was consequential upon the enactment, pursuant to the HRTO Act, of the CDO regime.

Related legislative amendments

4.12. In addition to amendments to div 104 of the Criminal Code, there have been a number of recent legislative amendments which impact upon the control order regime without amending div 104 directly. While these amendments are beyond the scope of the present review, it is useful to detail them as they provide context to the present review.

Special advocates

4.13. The 2016 Amendment Act amended the NSI Act in two relevant respects:

a. First, it made provision, in an amended s 38J, for the court to make orders, the consequences of which may include the withholding of sensitive information from the controlee (and their legal representative) and their exclusion from the proceeding when the court considers that information should be withheld.

b. Secondly, it enacted a regime for the use of special advocates in control order proceedings.

45 As noted in the Revised Explanatory Memorandum, the change introduced ‘a threshold that focusses on the capability of a person to commit a terrorist act as opposed to the specific time the terrorist act is expected to occur’: Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2016 [157]. This amendment is consistent with recommendation III/2 of the first INS LM in his 2012 annual report: Declassified Annual Report (20 December 2012).
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The first of the amendments commenced on 30 November 2016. At the time of writing, the second of the amendments had not yet commenced, but was due to commence on 30 November 2017 at the latest.

4.14. The second of the amendments responded to a recommendation of the COAG Review Committee for the appointment of a special advocate where information is the subject of an order under the revised s 38J of the NSI Act (s 38PA). The Explanatory Memorandum to the Counter-Terrorism Legislation Amendment Bill (No 1) 2016 observed that the special advocate would be given the sensitive national security information that the Attorney-General is either seeking to protect under an order under s 38J, or has obtained protection for as a result of a revised s 38J order. The special advocate would have the powers necessary to represent the interests of the controlee effectively, in closed hearings, namely (s 38PB):

a. making submissions to the court at any stage of a hearing in the proceeding during which the party and his or her legal representative are not entitled to be present

b. adducing evidence and cross-examining witnesses in that part of the hearing

c. making written submissions to the court.

4.15. The special advocate will generally be able to communicate without restriction with the controlee and their legal representative before the advocate receives the sensitive information (s 38PD). However, following receipt of the information, the advocate will only be able to communicate with the controlee in writing and with the court’s approval (s 38PF), so as to avoid the risk of inadvertent disclosure of classified information.

4.16. I note that, in part 1 of his report on control order safeguards, the second INSLM considered that a contradictor (ie a person who tests the opponent’s case where no positive defence can be put forward on behalf of the accused or respondent) plays a vital role in any decision-making, particularly judicial or quasi-judicial decision-making. He did not doubt the utility of the role of special advocate in control order proceedings, even if access to the controlee is limited.46

Monitoring compliance with control orders

4.17. The 2016 Amendment Act also introduced a series of measures to overcome what the Explanatory Memorandum described as ‘impediments’ to monitoring a controlee’s compliance with a control order.47

Part IAAB of the Crimes Act

4.18. The 2016 Amendment Act inserted pt IAAB of the Crimes Act (titled ‘monitoring of compliance with control orders’). If a control order is in force, pt IAAB confers power on a ‘constable’ (ie a member or special member of the AFP or a member of a state or territory police force or police service) to:

46  INSLM, Control Order Safeguards – (INSLM Report) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (January 2016) [4.1].

47  Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2016 [10].
a. enter premises with which the controlee has a ‘prescribed connection’ (see s 3ZZJC),
either with the controlee’s consent as occupier or pursuant to a monitoring warrant
and exercise ‘monitoring powers set out in ss 3ZZKB, 3ZZKC and 3ZZKD’, and the other
powers set out in ss 3ZZKF (see div 2)
b. independently of entry to premises, to conduct an ordinary search or a frisk search of
the controlee, and exercise the monitoring powers set out in s 3ZZLB, either with the
controlee’s consent or pursuant to a monitoring warrant (s 3ZZLA) (see div 3).

4.19. The powers with respect to entry of premises and conducting personal searches are
conferred for the following expressly enumerated purposes (see s s3ZZKA(1) and 3ZZLA
respectively):
   a. the protection of the public from a terrorist act
   b. preventing the provision of support for, or the facilitation of, a terrorist act
   c. preventing the provision of support for, or the facilitation of, the engagement in a
hostile activity in a foreign country
   d. determining whether the control order has been, or is being, complied with.

4.20. The available ‘monitoring powers’ where a constable enters premises by consent or
pursuant to a monitoring warrant include the power to (ss 3ZZKB,3ZZKC and 3ZZKD):
   a. search the premises and anything on the premises
   b. take samples of things found at the premises
   c. examine or observe any activity conducted on the premises
   d. inspect any document on the premises, and take extracts from, or copies of, any such
document
   e. operate electronic equipment on the premises and use a disk, tape or other storage
device on the premises that can be used with the equipment or is associated with it
   f. where ‘relevant data’ is found in operating electronic equipment, being information
relevant to the enumerated purposes for which premises may be entered, operating
the electronic equipment to put the relevant data in documentary form and remove
the documents so produced, or to use a disk, tape or other storage device (with the
occupier’s consent) to transfer the relevant data and then remove it from the premises
   g. secure electronic equipment for a period of 24 hours (subject to extension) if the
constable suspects on reasonable grounds that there is relevant data on the premises
which may be accessible by operating equipment but only with expert assistance, and
the data may be destroyed, altered or otherwise interfered with if the constable does
not take action.
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4.21. A constable may also ask the occupier any questions, and ask the occupier to produce any
document, that is likely to assist in the purposes identified in para 4.19 above (s 3ZZKE).\(^{48}\)
Answers to questions may only be used for those purposes.

4.22. The available monitoring powers with respect to an ordinary or frisk search under s 3ZZLA
include the power to search things found in the possession of the person and to search any
recently used conveyance. The constable may also record fingerprints from things found,
and take samples from those things (s 3ZZLB).

4.23. Division 5 of pt IAAB makes provision for a constable to apply for a monitoring warrant, the
‘issuing officer’ for which is a magistrate (s 3ZZJB).

4.24. In order to issue a monitoring warrant for the search of premises, the issuing officer must
be satisfied, by information on oath or affirmation, that (s 3ZZOA(2)):

   a. A control order is in force in relation to the person.

   b. The person has a ‘prescribed connection’ with the premises (which term is defined to
      include, for example, where the person: is the legal or beneficial owner of the
      premises; occupies or resides on the premises; has possession or control of the
      premises; or is employed at or carries on a business on the premises (s 3ZZJC)).

   c. Having regard to the nature of the person’s prescribed connection, one or more of the
      matters set out in s 3ZZOA(4)(a) to (f), and the matter set out in s 3ZZOB(4)(g), and
      such other matters (if any) as the issuing officer thinks relevant, it is reasonably
      necessary that one or more constables should have access to the premises for the
      purposes enumerated in para 4.20 above.

4.25. To issue a monitoring warrant for the search of a person (which may be sought by
telephone or other electronic means in circumstances of urgency (s 3ZZPA)), the issuing
officer must be satisfied, by information on oath or affirmation, that (s 3ZZOB(2)):

   a. A control order is in force in relation to the person.

   b. Having regard to one or more of the matters set out in s 3ZZOB(4)(a) to (f), and the
      matter set out in s 3ZZOB(4)(g), and such other matters (if any) as the issuing officer
      thinks relevant, it is reasonably necessary that a constable should conduct a frisk
      search of the person for the purposes enumerated in para 4.20 above.

4.26. The matters to which the issuing officer is to have regard in s 3ZZOA(4)(a) to (g), are the
same as the matters in s 3ZZOB(4)(a) to (g). The mandatory consideration, in s 3ZZOA(4)(g)
and s 3ZZOB(4)(g) respectively, is:

   a. In the case of a monitoring warrant to search premises, ‘whether allowing one or more
      constables to have access to the premises, and exercise the monitoring powers in
      relation to the premises and the powers set out in section 3ZZKF in relation to the
      premises, would be likely to have the least interference with any person’s liberty and
      privacy that is necessary in the circumstances’.

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\(^{48}\) Where entry is pursuant to a monitoring warrant, conditions are imposed on the constable asking
questions or requiring the production of documents (see s 3ZZKE(3)).
b. In the case of a monitoring warrant to search a person, ‘whether allowing one or more constables to conduct an ordinary search or a frisk search of the person, and exercise the monitoring powers in relation to the person and the powers set out in section 3ZZLC in relation to the person or a recently used conveyance, would be likely to have the least interference with any person’s liberty and privacy that is necessary in the circumstances’.

**Control order warrants under the TIA Act**

4.27. The 2016 Amendment Act also inserted a ‘control order warrant’ regime into the TIA Act. A ‘control order warrant agency’ (ie the AFP, ACLEI, Australian Crime Commission, and authorised state agencies) may apply for a warrant in respect of a particular telecommunications service (s 46(4)); alternatively, they may apply for a named person warrant (s 46A(2A)).

4.28. In order to enliven the discretion to issue such a warrant, the judge or nominated AAT member must be satisfied, on the basis of the information given, that (s 46(4)):

a. Division 3 (which prescribes the requirements for an application) has been complied with in relation to the application.

b. There are reasonable grounds for suspecting that a particular person is using, or is likely to use, the service, and that person is a controlee, or a controlee is likely to communicate with that person using the service.

c. Information that would be likely to be obtained by intercepting, under a warrant, communications made to or from the service, would be likely to substantially assist in connection with:

   i. the protection of the public from a terrorist act
   
   ii. preventing the provision of support for, or the facilitation of, a terrorist act
   
   iii. preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country
   
   iv. determining whether the control order, or any succeeding control order, has been, or is being, complied with.

d. Having regard to the matters referred to in subsection (5) (see para 4.29 below), and to no other matters, the judge or nominated AAT member should issue a warrant authorising such communications to be intercepted.

4.29. The matters to which the judge or nominated AAT member must have regard are (s 46(5)):

a. how much the privacy of any person or persons would be likely to be interfered with by intercepting under a warrant communications made to or from the service referred to in subsection (4)

b. the degree to which the information would be likely to assist in connection with protecting the public from a terrorist act, or preventing the provision of support for, or the facilitation of, a terrorist act or engagement in a hostile activity, or determining whether a control order is being complied with
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c. the extent to which methods for effecting those purposes, that do not involve
intercepting communications, have been used by, or are available to, the agency, and
how much the use of those methods would be likely to assist, or, alternatively,
prejudice (whether because of delay or any other reason), those purposes
d. whether intercepting under a warrant communications made to or from the service
referred to in subsection (4) would be the method that is likely to have the least
interference with any person’s privacy
e. the possibility that the controlee has done, is doing, or will do any of the following:
   i. engage in a terrorist act
   ii. provide support for a terrorist act
   iii. facilitate a terrorist act
   iv. provide support for the engagement in a hostile activity in a foreign country
   v. facilitate the engagement in a hostile activity in a foreign country
   vi. contravene the control order (or will contravene a succeeding control order)

4.30. Additionally, where the warrant is sought with respect to the telecommunications service
of a person who is not a controlee, the judge or nominated AAT member must not issue a
warrant unless he or she is satisfied that (s 46(6)):

a. The agency has exhausted all other practicable methods of identifying the
telecommunications services used, or likely to be used, by the person to whom the
control order referred to in subparagraph (4)(d)(ii) relates.
b. Interception of communications made to or from a telecommunications service used
or likely to be used by that person would not otherwise be possible.

4.31. By contrast to a warrant sought under s 46(4) of the TIA Act, monitoring via a named
person warrant can only occur where a control order is in force in relation to the named
person (s 46A(2A)(d)). Otherwise the matters which the judge or AAT member must
consider, and be satisfied of, are very similar between a control order warrant for a
telecommunications service or a named person warrant.

*Control order warrants under the Surveillance Devices Act*

4.32. The 2016 Amendment Act also inserted provisions in the SD Act which establish procedures
for law enforcement officers to obtain:

a. warrants for the installation and use of surveillance devices where a control order is in
force and the use of the device would be likely to substantially assist in:
   i. protecting the public from a terrorist act
   ii. preventing the provision of support for, or the facilitation of, a terrorist act
   iii. preventing the provision of support for, or the facilitation of, the engagement in a
   hostile activity in a foreign country
iv. determining whether the control order, or any succeeding control order, has been, or is being, complied with

b. a tracking device authorisation for the use of tracking devices in cases where a control order is in force in relation to a person, and the use of a tracking device is to obtain information relating to the person for any of the purposes identified for control order warrants.

4.33. To apply for the issue of a surveillance device warrant in respect of a controlee, the law enforcement officer must suspect on reasonable grounds that the use of a surveillance device to obtain information relating to the person would be likely to substantially assist in any of the four respects identified in para 4.32 above (s 14(3C)).

4.34. To issue the control order warrant, the eligible Judge or nominated AAT member must be satisfied that a control order is in force and that the use of a surveillance device to obtain information relating to the person would be likely to substantially assist in those same respects (s 16(1)(bc)). In determining whether to issue the warrant, the eligible judge must also have regard to:

a. the likely value of the information sought to be obtained in the identified respects

b. whether the use of the surveillance device in accordance with the warrant would be the means of obtaining the evidence or information sought to be obtained, that is likely to have the least interference with any person’s privacy

c. the possibility that the controlee has done, is doing, or will do any of the following:

i. engage in a terrorist act

ii. provide support for a terrorist act

iii. facilitate a terrorist act

iv. provide support for the engagement in a hostile activity in a foreign country

v. facilitate the engagement in a hostile activity in a foreign country

vi. contravene the control order (or will contravene a succeeding control order)

4.35. If a control order is in force in relation to a person, and one of the controls is the wearing of a tracking device, a law enforcement officer may, with the written permission of an appropriate authorising officer, use a tracking device without a warrant to obtain information relating to the person for any of the specified purposes (s 39(3B)). For the purposes of obtaining the permission of an appropriate authorising officer, the law enforcement officer wishing to use that device must apply, orally or in writing, to the appropriate authorising officer; and must address, in that application, the matters that would be required to be addressed if the law enforcement officer were making an application for a surveillance device warrant (s 39(9)).

Continuing detention of high risk terrorist offenders

4.36. Division 105A into 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 Part 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 in *Fardon v Attorney-General* (Qld).*49*

4.37. Under div 105A, a state or territory supreme court may make a CDO in relation to a ‘terrorist offender’ on the application of the Commonwealth Attorney-General. A ‘terrorist offender’ is a person who has been convicted of a ‘serious Part 5.3 offence’, which is defined as an offence against Part 5.3 of the Criminal Code, the maximum penalty for which is 7 or more years of imprisonment (s 105A.2). All of the offence provisions in divs 101, 102 and 103 of Part 5.3 meet that description save for one, s 102.8, associating with terrorist organisations. A terrorist offender is also a person who has been convicted of international terrorist activities using explosive or lethal devices, and foreign incursions and recruitment offences (excluding the offence of publishing recruiting advertisements).*50*

4.38. The terrorist offender must either be detained in custody and serving a sentence of imprisonment for the offence (and be 18 years of age when that sentence ends), or be the subject of a CDO or interim CDO that is in force (s 105A.3). This latter class acknowledges that successive CDOs may be made in respect of the terrorist offender, a matter expressly provided for in s 105A.7(6).

4.39. The CDO regime involves two court hearings with the Attorney-General as applicant and the terrorist offender as respondent:

a. a preliminary hearing, after the application is made, for the court to determine whether to appoint one or more relevant experts (s 105A.6(1)): The court may appoint such an expert at that hearing, or at any later time in the proceedings, if it ‘considers that doing so is likely to materially assist the Court in deciding whether to make a continuing detention order in relation to the offender’ (s 105A.6(3)). If an expert is appointed, he or she must conduct an assessment of the risk of the offender committing a serious pt 5.3 offence if released into the community and provide a report of the assessment to the court, the Attorney-General, and the offender (s 105A.6(4)). The range of matters that may be included in the report are prescribed in s 105A.6(7).

b. a hearing for the court to consider whether to make a CDO under s 105A.7(1): If an application has been made in accordance with s 105A.5, the court may make a CDO if, having regard to matters in accordance with s 105A.8:

i. it is ‘satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community’

ii. it is ‘satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk’ - a note to this condition cites a control order as an example of a less restrictive measure.

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*50* See div 72 subdiv A and pt 5.5. The foreign incursion offences include offences under the now repealed *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).
4.40. Additionally, the Attorney-General may apply for an interim CDO (s 105A.9), which the court may make if satisfied that the sentence of imprisonment (or an interim order) will come to an end before the CDO application is determined, and that ‘there are reasonable grounds for considering that a continuing detention order will be made in relation to the offender’ (s 105A.9).

4.41. The matters to which the court must have regard for the purposes of making a CDO (and, presumably, an interim order), include (s 105A.8):

a. the safety and protection of the community
b. any report received from a relevant expert under s 105A.6
c. the results of any other assessment conducted by a relevant expert of the risk of the offender committing a serious pt 5.3 offence
d. any report relating to the extent to which the offender can reasonably and practicably be managed in the community, that report being prepared by the relevant state or territory corrective services institution or another person or body competent to undertake that assessment
e. the offender’s history of any prior convictions for, or findings of guilt made in relation to, any offence referred to in s 105A.3(1)(a)
f. the views of the sentencing court at the time any sentence for any offence referred to in s 105A.3(1)(a) was imposed.

4.42. The matters listed in s 105.8(1) are without limitation to other matters the court considers relevant (s 105A.8(2)).

4.43. The period for which the court may make a CDO is no more than three years (although successive CDOs for periods of up to three years may be sought (s 105A.7(6)), with the length being determined by the court’s satisfaction as to what is ‘reasonably necessary to prevent the unacceptable risk’ (s 105A.7(5)). Where the order is of more than one year’s duration, the court must review it, on the application of the Attorney-General, before the end of the period of 12 months after the order began in force (s 105A.10(1A) and (1B)). An offender to whom a CDO applies may also apply for review (s 105A.11). The Attorney-General bears the onus of proof in review proceedings (s 105A.12(6)).

4.44. The rules of evidence and procedure for civil matters apply during a CDO proceeding (which is defined to include the three hearings listed above and review hearings) (s 105A.13(1)).
5. INTERNATIONAL OBLIGATIONS AND CONSTITUTIONAL ARRANGEMENTS

5.1. As noted above, I am obliged to have regard to Australia’s obligations under international agreements when performing my statutory functions. I am also obliged to have regard to arrangements agreed between the Commonwealth, the states and the self-governing territories to ensure a national approach to countering terrorism.

International obligations

5.2. For his 2011 annual report, the first INSLM carried out a survey of Australia’s obligations under international agreements in the areas of counter-terrorism and human rights. These two areas remain the focus of Australia’s international obligations that are engaged by the measures that are subject to the present review.

International obligations in the area of counter-terrorism

5.3. In the area of counter-terrorism, the first INSLM focused on Resolution 1373 (2001) of the UN Security Council, made in the immediate aftermath of the attacks in New York and Washington DC on 11 September 2001 (the ‘September 11 attacks’). By virtue of Art 25 of the Charter of the United Nations, Australia is under an international obligation to ‘accept and carry out’ such resolutions. Relevantly, Resolution 1373 contains the following decisions of the UN Security Council:

a. that all States ‘[t]ake the necessary steps to prevent the commission of terrorist acts’ (para 2(b))

b. that all States ‘[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice’ (para 2(e))

c. that all States ‘ensure that... such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts’ (para 2(e)).

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51 INSLM Act s 8(a).
52 INSLM Act s 8(b).
54 [1945] ATS 1. Article 25 of the Charter provides that ‘[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’.
Resolution 1373 does not define the term ‘terrorist act’, nor does any other decision of the Security Council.\(^{55}\)

### International obligations in the area of human rights

**ICCPR**

5.4. In the area of human rights, the first INSLM understandably focused on the ICCPR.\(^{56}\) The ICCPR recognises an array of civil and political rights,\(^{57}\) and obliges Australia, as a State Party, to ‘respect’ those rights and to ‘ensure [those rights] to all individuals within its territory and subject to its jurisdiction’.\(^{58}\)

5.5. The first INSLM divided his discussion of the ICCPR into two parts: first, he focused on the rights of individuals that were threatened or violated by terrorism; and secondly, he focused on the rights of individuals who were accused of terrorism or otherwise caught up in its prevention or investigation. This division is instructive, because sometimes commentary on the human rights impact of terrorism tends to focus on the latter and not on the former.

5.6. In other words, within limits, counter-terrorism laws which restrict the human rights of criminal suspects to protect the human rights of victims of terrorist acts, operate as envisaged by, and in a manner consistent with, the ICCPR.\(^{59}\) This was a point helpfully emphasised by the AHRC in its submission to all of these reviews.

5.7. With regard to rights threatened or violated by terrorism, the first INSLM referred to the following rights:

   a. the right to life (Art 6(1))

   b. the right to liberty and security of person (Art 9(1)).

5.8. With regard to rights of individuals accused of terrorism or otherwise caught up in its prevention or investigation, the first INSLM referred to:

   a. the right to freedom from torture and from cruel, inhuman or degrading treatment of punishment (Art 7)

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\(^{55}\) See INSLM, *Declassified Annual Report* (20 December 2012) 113. As noted by the first INSLM, Resolution 1566 provides some guidance on the definition of terrorism as a criminal act. Specifically, para 3 of the resolution refers to ‘criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act’.


\(^{57}\) ICCPR, Arts 6 to 27.

\(^{58}\) Ibid Art 2(1).

\(^{59}\) A similar view was expressed by then Attorney-General, Philip Ruddock, when he delivered his second reading speech for the Anti-Terrorism Bill 2004: ‘Security is not an anathema to freedom and liberties. I might say, if you read the Universal Declaration of Human Rights, it gives primacy, amongst other matters, to the responsibility of governments to secure a person’s right to life – a person’s entitlement to live in a situation of safety and security’: *Parliamentary Debates*, 24 June 2004, 31701.
b. the right to liberty and security of person and the right to freedom from arbitrary arrest or detention (Art 9(1))

c. the right to judicial review of the lawfulness of detention (Art 9(4))

d. the right of everyone lawfully within the territory of a State to freedom of movement within that territory (Art 12(1))

e. the right to equality before the courts and to a fair trial (Art 14(1))

f. the right to be presumed innocent until proven guilty (Art 14(2))

g. the right to certain minimum guarantees in the determination of any criminal charge (Art 14(3))

h. the right to freedom of thought, conscience, and religion (Art 18(1))

i. the right to freedom of expression (Art 19(2))

j. the right to peaceful assembly (Art 21)

k. the right to freedom of association (Art 22(1))

l. the right to equality before the law and to equal protection of the law without discrimination (Art 26)

m. the right of persons belonging to ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practise their own religion, and to use their own language (Art 27).60

5.9. Other rights that were not referred to by the first INSLM, but which are significant to the present review, include:

a. the right to certain minimum guarantees in the treatment of persons deprived of their liberty (Art 10)

b. the right to privacy (Art 17)

c. the right to the protection of family life (Art 23).

5.10. In considering Australia’s obligation to respect the rights recognised in the ICCPR, it is relevant to make two further observations. The first observation is that Art 4(1) of the ICCPR confers on States Parties the right to take measures that derogate from their obligations under the ICCPR in time of an officially declared public emergency which threatens the life of the nation. A State may only take such measures ‘to the extent strictly required by the exigencies of the situation’, and ‘provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin’. Moreover, no derogation may be made with respect to certain ‘non-derogable rights’. From the list in para 5.8 above, the following rights are non-derogable:

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60 The first INSLM also referred to the requirement that the law prohibit any propaganda for war (ICCPR Art 20(1)), and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (ICCPR Art 20(2)).
a. the right to life (Art 6(1))

b. the right to freedom from torture and from cruel, inhuman or degrading treatment of punishment (Art 7)

c. the right to freedom of thought, conscience and religion (Art 18(1)).

5.11. I am not aware of Australia ever exercising its right of derogation, nor of any occasion on which Australia has characterised the measures subject to the present review as a derogation from its obligations under the ICCPR.61

5.12. It is relevant to note that, in the wake of the coordinated terrorist attacks in Paris on 13 November 2015 (sometimes referred to as the ‘Bataclan attacks’) and subsequent state of emergency, France did exercise its right of derogation.62 The United Kingdom also exercised this right for a time in the wake of the September 11 attacks.63

5.13. The absence of any Australian derogation at present is an important indication that, while the National Terrorism Threat Level is ‘probable’, Australia does not face a threat of the scale justifying the most serious imaginable steps.

5.14. The second observation is that many of the rights recognised in the ICCPR are not absolute, in the sense that the ICCPR itself recognises that some limits may be placed on them (and therefore that a State does not contravene its obligation under Art 2(1), or need to derogate from those obligations pursuant to Art 4, if such limits are imposed). Most of the rights listed in para 5.8 above may be subject to certain limits. For example:

a. Art 9(1), which recognises the right to liberty and security of person and the freedom from arbitrary arrest or detention, also acknowledges that a person may be deprived of their liberty (whether by arrest or detention) ‘on such grounds and in accordance with such procedure as are established by law’ (provided that it is not ‘arbitrary’)

b. Art 12(1), which recognises the right to freedom of movement, also acknowledges that the right may be subject to restrictions ‘which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant’

c. Art 17, which recognises the right to privacy, also acknowledges that a person’s privacy may be subject to interferences that are not ‘arbitrary or unlawful’

d. Art 18, which recognises the right to freedom of thought, conscience, and religion (Art 18(1)), also acknowledges that the right to freedom to manifest one’s religion, which is part of the right to freedom of religion, may be subject to ‘such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’ (Art 18(3))


e. Art 19, which recognises the right to freedom of expression (Art 19(2)), also acknowledges that the right may be subject to such restrictions ‘as are provided by law’, and which are necessary ‘for respect of the rights or reputations of others’, and ‘for the protection of national security or of public order (ordre public), or of public health or morals’ (Art 19(3))

f. Art 21, which recognises the right to peaceful assembly, also acknowledges that the exercise of this right may be subject to restrictions that are ‘imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others’

g. Art 22, which recognises the right to freedom of association (Art 22(1)), also acknowledges that the exercise of this right may be subject to restrictions that are ‘prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others’.

5.15. It follows from these examples that limitations designed to address national security or public order concerns are capable of being consistent with a range of rights under the ICCPR if the limitations are prescribed by law, are not arbitrary, and conform to the principle of proportionality.64

5.16. UN agencies have reviewed Australia’s counter-terrorism legislation and practices against Australia’s obligations under the ICCPR on several occasions. In 2006, the then-UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Professor Martin Scheinin, produced a report of a study of Australia’s counter-terrorism laws and practices.65 Among other things, the study considered the control order and PDO regimes that are the subject of the present review.

5.17. In 2009, the HRC, a body set up under pt IV of the ICCPR to monitor its implementation, considered Australia’s counter-terrorism legislation in its consideration of the fifth periodic report submitted by Australia under Art 40 of the ICCPR. The HRC noted that Australia should ‘ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant’, 66 but did not consider the legislation that I am considering as part of the present review.

5.18. The human rights impact of divs 104 and 105 have also been considered in domestic reviews. These reviews are considered in more detail in the next section of this chapter.

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64  See, eg, HRC, General Comment No 27, UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999) [14].
5.19. The civil and political rights recognised in the ICCPR are enjoyed by children, and indeed the ICCPR makes special provision for children. The CRC, to which Australia is party, recognises similar rights for children (up to the age of 17) and makes special provision for the protection of children. For example:

a. Art 37(b) deals with the right to freedom from unlawful or arbitrary deprivation of liberty and provides that arrest, detention, or imprisonment must only be used as a ‘measure of last resort and for the shortest appropriate period of time’

b. Art 37(c) establishes certain minimum guarantees in the treatment of children deprived of their liberty.

5.20. Article 2(1) of CRC obliges Australia, as a State Party, to ‘respect’ these rights and to ‘ensure [those rights] to each child within [its] territory’. Article 3(2) also obliges Australia to ‘ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her’.

5.21. A key provision of the CRC is the best interests principle. It is formulated in Art 3(1) of the CRC as an obligation on each State Party that the best interests of the child be a ‘primary consideration’ in all actions concerning children, including actions taken by the courts or administrative authorities.

5.22. Australia is party to the ICESCR, which recognises an array of economic, social, and cultural rights. The ICESCR obliges Australia to ‘respect’ those rights and to ‘take steps… with a view to achieving progressively the full realization’ of those rights. Unlike the ICCPR, the ICESCR contains a general limitation clause in Art 4, which provides:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

5.23. ICESCR is not often invoked with respect to counter-terrorism measures, which are generally seen as limiting the civil and political rights recognised in the ICCPR. Nevertheless, Australia’s obligations under ICESCR, in particular with respect to the right to work, the right to education, and the right to participation in cultural life, which are recognised in Arts 6, 13 and 15 of ICESCR respectively, are relevant to the control order regime.

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67 ICCPR Art 14(4), which requires criminal procedure in the case of juveniles to ‘be such as will take account of their age and the desirability of promoting their rehabilitation’. Article 24(1) also requires every child to have ‘the right to such measures of protection as are required by [their] status as a minor, on the part of his family, society and the State’.


70 ICESCR Arts 6 to 27.

71 Ibid Art 2(1).
International obligations engaged by divisions 104 and 105 of the Criminal Code

5.24. The human rights impact of divs 104 and 105 of the Criminal Code has been considered domestically by:
   a. the Senate Legal and Constitutional Legislation Committee, in its inquiry into the provisions of the Anti-Terrorism Bill (No 2) 200572
   b. the COAG Review Committee, in its review of Australia’s counter-terrorism legislation73
   c. the PJCHR, in its review of the several tranches of national security legislation that have amended the control order regime.74

5.25. In its review of the Anti-Terrorism Bill (No 2) 2005, the Senate Legal and Constitutional Legislation Committee received submissions that the control order proceedings infringed the right to a fair trial, and that the controls imposed by a control order may infringe several rights (including the right to liberty and security of person, right to freedom of movement, right to privacy, right to freedom of association, right to freedom of religion, and the right to freedom of expression). The Committee did not express a view on the human rights impact of the control order regime, but did recommend a range of amendments to the Bill with a view to clarifying and strengthening procedural safeguards for the issuance of control orders.75

5.26. The Senate Legal and Constitutional Legislation Committee also received submissions that PDOs risked constituting arbitrary detention in violation of the right to liberty and security of person. It also received submissions that div 105 did not fulfil the right to judicial review of the lawfulness of detention (Art 9(4)), and engaged the right to a fair trial (Art 14(1)), the right to freedom from torture and from cruel, inhuman or degrading treatment of punishment (Art 7), and the right to certain minimum guarantees in the treatment of persons deprived of their liberty (Art 10). Again, the Committee did not express a view on the human rights impact of the regime, but did recommend a range of amendments to the Bill with a view to clarifying and strengthening safeguards.76

5.27. For its part, the COAG Review Committee noted that all of the submissions that it received on the control order regime ‘stress[ed] the potential for a clash between the protection of the community and the need for Australia to adhere to its international human rights

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76 Ibid, 53-56.
obligations, especially the duty to provide a fair trial’.77 The additional safeguards recommended by the COAG Review Committee regarding special advocates and minimum standard of disclosure of information, were largely motivated by concerns for respecting the right to a fair trial. The Committee also recommended that any controls imposed on the controlee ‘constitute the least interference with the person’s liberty, privacy or freedom of movement that is necessary in all the circumstances’.78 This recommendation was clearly motivated by human rights concerns.

5.28. The COAG Review Committee declined to draw any conclusions as to the compliance of Div 105 with Australia’s international human rights obligations. It stated:

The Committee does not consider it necessary to come to a conclusion about the more difficult question as to whether the preventative detention legislation infringes Australia’s obligations at an international human rights level. This is a question that is specifically the province of the INSLM[.] It is only indirectly involved in our review. While we acknowledge the force of the arguments put forward by civil liberties groups and academics, we also acknowledge the Government’s assurances that it believes that Division 105 does not breach Australia’s international obligations.79

5.29. More recently, the PJCHR has noted that the control order regime and PDO regime involve ‘very significant limitations on human rights’.80 The PJCHR has accepted on several occasions that the control order regime pursues a legitimate objective of providing law enforcement agencies with the necessary tools to respond proactively to the evolving nature of the threat presented by those wishing to undertake terrorist acts in Australia.81 It has also acknowledged that the control order regime establishes certain safeguards that mitigate the human rights impact of the control order regime.82 Nevertheless, the PJCHR has concluded that the regime ‘may not satisfy the requirement of being reasonable, necessary and proportionate in pursuit of [its] legitimate objective’,83 and that it is likely that the regime is incompatible with the various human rights engaged.84 As for Div 105, the PJCHR concluded that the PDO regime is also likely to be incompatible with the various human rights engaged.

5.30. The PJCHR considered that the expanded grounds introduced in 2014 (discussed at paras 4.8 to 4.9 above and reviewed at para 8.28 below) were likely to be incompatible

78 Ibid [246].
79 Ibid [275].
80 Fourteenth Report of the 44th Parliament (28 October 2014) [1.73], [1.100].
82 The PJCHR identified here: (a) the requirement (in s 104.4(1)(d)) that the court be satisfied that each control is reasonably necessary and reasonably appropriate and adapted to the purposes of the control order regime; (b) the notification requirements (eg, s 104.12); and (c) the controlee’s right (under s 104.18) to apply for a control order to be varied.
83 Fourteenth Report of the 44th Parliament (28 October 2014) [1.74].
with human rights. With regard to the grounds introduced by the third tranche of national security legislation, it noted:

by extending the grounds to acts that ‘support’ or ‘facilitate’ terrorism, the bill would allow a control order to be sought in circumstances where there is not necessarily an imminent threat to personal safety. The protection from imminent threats has been a critical rationale relied on by the government for the need to use control orders rather than ordinary criminal processes.

The PJCHR subsequently noted that, in the absence of such an imminent threat, ‘it is difficult to justify as proportionate the imposition of a significant limitation on personal liberty without criminal charge’. It also noted that it was difficult to assess this limitation as proportionate in the absence of a requirement that the controls be the least restrictive measures to protect the public, citing the COAG Review Committee’s similar ‘least interference’ recommendation referred to above (para 5.27).

5.31. The PJCHR noted that the control orders regime also engaged several rights recognised in the ICESCR, namely the right to work (insofar as the control order prevents the person from carrying out activities with respect to their work or occupation) and the right to social security and adequate standard of living (presumably insofar as the control order thereby prevents the person from earning a living). In a similar vein, it is conceivable that a control order could also engage others rights recognised in the ICESCR, including the right to education, and the right to participate in cultural life. The PJCHR did not assess further the impact of the control order regime on these rights, including whether any limitation on the rights were consistent with the general limitation clause in Art 4 of ICESCR.

5.32. Finally, the PJCHR considered the human rights impact of lowering the minimum age at which a control order may be imposed from 16 to 14 years of age, a measure introduced by the 2016 Amendment Act. Specifically, the PJCHR expressed ‘serious concerns’ as to whether applying the control order regime to young persons was proportionate in the absence of any requirement that the AFP, in requesting a control order, or the Attorney-General, in consenting to the request, consider the best interests of the child in a particular case. In this sense, applying the control order regime to young persons not only risked being incompatible with the rights of the child that were common with those engaged for adults, but also with the specific obligation on Australia to ensure that the best interests of the child is a ‘primary consideration’ in all actions taken under the control order regime. At the same time, the PJCHR acknowledged that the requirement (now in s 104.4(2)(b)) that the issuing court, in determining whether each control to be imposed by a control order is reasonably necessary, and reasonably appropriate and adapted, take into account the best interests of the child as a primary consideration ‘would allow the court greater scope to also ensure that the terms of the control order are in the best interest of

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89 Report 7 of 2016 (11 October 2016) [1.256].

90 Ibid [1.279].
the child’, and would ‘improve the proportionality of the measure’.91 The PJCHR also noted that div 104 was to be amended to provide a number of safeguards that apply only to young persons. In particular, it noted that the requirement for the court to appoint a lawyer to act for the person in relation to control order proceedings (now in s 104.28(4)) ‘is compatible with the right of the child to be heard in judicial and administrative proceedings and may promote that right’.92

5.33. As noted above (para 5.16), the control order and PDO regimes were considered by the then-UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in a 2006 report. The Special Rapporteur welcomed the control order mechanism as a measure that is ‘capable of protecting the public which fall short of actual detention’.93 He urged Australia to ensure that any restrictions, prohibition or obligation is proportionate and imposed only ‘for as long as strictly necessary’, and cautioned that such controls ‘not cumulate so as to be tantamount to detention’.94 He also recommended that Australia ensure that ‘control orders do not unduly interfere with the rights to family life, employment and education’,95 and urged Australia to reconsider the means by which sensitive information is protected in control order proceedings ‘so that such protection would be compatible with the right to a fair hearing’.96 Similar concerns about the right to a fair trial were expressed with regard to the PDO regime.97

5.34. On the issue of detention, the Special Rapporteur noted that house arrest ‘is only permissible during the course of a criminal investigation; while awaiting trial or during a trial; or as an alternative to a custodial sentence’.98 I wish to add that nothing in Australia’s obligations under the ICCPR with respect to the right to liberty and security of person prevents Australia from placing a controlee under house arrest (or rather imposing a curfew

91 Ibid [1.278].
92 Ibid [1.288].
93 Martin Scheinin, Special Rapporteur, Australia: Study on Human Rights Compliance While Countering Terrorism, UN Doc A/HRC/A/26/Add.3 (14 December 2006) [37].
94 Ibid [37].
95 Ibid [37].
96 Ibid [39].
97 Ibid [45].
98 Ibid [37].
for such a period of time that is tantamount to detention), provided that it does so on such
grounds and in accordance with such procedure as is prescribed by law and not arbitrary.
Executive or administrative counter-terrorism detention is not per se contrary to Art 9(1),
although the HRC has stated that such detention would only overcome the prohibition on
arbitrary detention ‘under the most exceptional circumstances’ where there is a ‘present,
direct and imperative threat’ and there are no alternative measures available that are less
restrictive.99 It is important to stress here a difference between the right recognised in
Art 9(1) of the ICCPR and the corresponding right recognised in Art 5 of the European
Convention on Human Rights, which lists exhaustive grounds on which a person may be
deprived of their liberty, none of which cover instances of terrorist threats in the absence
of conviction or suspicion of having committed a crime. Accordingly, while the courts in the
United Kingdom have found curfews imposed by control orders made under the now
repealed Prevention of Terrorism Act 2005 violated Art 5 of the ECHR,100 it does not follow
that such curfews would violate Art 9(1) of the ICCPR. In any case, s 104.5(3)(c) now
provides that curfew imposed by a control order be ‘for no more than 12 hours within any
24 hours’.

5.35. It is worth noting that the control order regime was also raised before the HRC in a
communication submitted by David Hicks that alleged violation of a range of rights
recognised in the ICCPR in connection with his detention in the United States and Australia
and subsequent control order.101 Specifically, Hicks claimed that the confirmation
proceedings in the Federal Magistrates Court (as it then was)102 violated the right to a fair
trial, and that the restrictions imposed by the control order violated the right to freedom of
movement, right to privacy, right to freedom of expression, and right to freedom of
association. Ultimately, the HRC found that none of these claims was admissible, and did
not deal with their substance: with respect to the right to a fair trial, the HRC found that the
claim related essentially to how the court evaluated the evidence rather than any failure to
disclose evidence to Hicks or to offer him the opportunity to submit evidence; with respect
to the other rights, the HRC found that Hicks had ‘failed to substantiate his claims
sufficiently for the purposes of admissibility’.103

5.36. In the context of the present review, I have received a number of submissions relating to
the human rights impact of the control order and PDO regimes. For instance:

a. The Joint Academic Submission noted that the PDO regime ‘clearly infringes the
freedoms of movement, association and from arbitrary detention’.104

99 HRC, General Comment 35, UN Doc CCPR/C/GC/35 (16 December 2014) [15].
100 See, eg, Secretary of State for the Home Department v JJ [2008] AC 385; Secretary of State for the
101 Under the (first) Optional Protocol to the International Covenant on Civil and Political Rights [1991]
ATS 39, an individual claiming to be a victim of a violation by a State Party to the Protocol of any
right recognised in the ICCPR may submit a communication to the HRC for its consideration and
views.
102 Jabbour v Hicks [2008] FMCA 178.
104 Joint Academic Submission, 4.
b. Liberty Victoria submitted that a control order ‘trespasses upon the subject’s basic rights and freedoms, including personal liberty, freedom of movement, freedom of expression and association, and the right to privacy’.105

c. ALHR submitted that the control order and PDO regimes ‘have the potential to violate a number of human rights’, including the right to liberty and security of person, the right to freedom of movement, the right to privacy, the right to freedom of association, the right to freedom of expression, and the right to freedom of thought, conscience, and religion.106 It also submitted that both regimes violate the right to a fair trial.107

d. The AHRC submitted that both regimes may allow for the arbitrary detention of individuals contrary to the right to liberty and security of person, and may result in the arbitrary interference with a number of other rights, such as the right to privacy, the right to freedom of movement, the right to freedom of association, and the right to freedom of expression.108 With regard to the control order regime, the AHRC noted that:

i. the conditions of a control order may amount to detention, raising questions as to whether the right to liberty and security of person is engaged

ii. restrictions on association may interfere with the right to family life and the right to freedom of association

iii. restrictions on the material that may be made available to the controlee in control order proceedings may interfere with the right to a fair trial.109

5.37. I accept that the control order and PDO regimes engage a range of human rights. The types of controls that a court may impose clearly involve restrictions of the controlee’s rights, including the right to liberty and security of person, the right to freedom of movement, the right to privacy and family life, the right to freedom of expression, and the right to freedom of association. Such controls may also involve restrictions of the controlee’s right to education and work. Many of these rights are also restricted by the detention of an individual under a PDO. That, however, is only the first part of the analysis.

5.38. As noted above (para 5.14), none of these rights is absolute. Given that controls imposed by a control order and detention under a PDO are provided for in law, an assessment of whether they comply with the various rights engaged – and are therefore consistent with Australia’s international obligation to respect those rights – ultimately depends on whether the controls and detention are necessary to protect national security, and the risk of them being imposed arbitrarily. In each case, proportionality between the nature and scope of the controls and detention and the national security interests sought to be protected will

105 Liberty Victoria, Submission to the INSLM, Statutory Deadline Reviews, 28 April 2017, [37].
106 ALHR, Submission to the INSLM, Statutory Deadline Reviews, 12 May 2017, [5.5].
107 Ibid [5.7], [5.16].
108 AHRC, Submission to the INSLM, Statutory Deadline Reviews, 15 May 2017, [49].
109 Ibid [67].
be an important factor.\textsuperscript{110} Reviewing divs 104 and 105 having regard to Australia’s human rights obligations (as required by s 8(a) of the INSLM Act) therefore merges with my function under s 6(1)(b) of the INSLM Act. As noted above (para 1.9), I have decided to carry out this function in conducting the present review under s 6(1)(a) of the INSLM Act.

5.39. Admittedly, no limits may be placed on the right of a controlee to a fair trial, and access by a controlee to information on which a control order is made is fundamental to respecting that right in control order proceedings.\textsuperscript{111} Access to information in control order proceedings has recently been reformed by the introduction of a regime for the use of special advocates. As explained above (para 1.12), that regime is beyond the scope of the present review, and therefore considerations of the impact of the control order regime on the right to a fair trial is best left to a later review.

### Constitutional arrangements

5.40. This is not the occasion for a treatise on the Constitution. The key points for present purposes are that:

a. The Commonwealth does not have capacity to legislate generally with respect to criminal matters.

b. Rather, an express head of power or an implied power must be found under the Constitution; the former includes the possibility of a reference from the states under s 51(xxxvii) of the Constitution, as occurred in the case of div 104, a topic mentioned by some members of the High Court in \textit{Thomas v Mowbray}.\textsuperscript{112}

b. Section 8(b) of the INSLM Act recognises that counter-terrorism is a national issue that requires coordination between the various Australian jurisdictions. The types of arrangements contemplated relevantly include arrangements reflected in the National Counter-Terrorism Plan,\textsuperscript{113} as well as arrangements between police forces.

5.41. The control order and PDO regimes are the product of such arrangements. As noted above (para 4.2), the broad parameters for the establishment of the control order and PDO regimes were agreed by COAG at a special meeting on counter terrorism on 27 September 2005, which also agreed that the Commonwealth would implement them by amendment to the Criminal Code. Because they are established by pt 5.3 of the Criminal Code, any amendment to the regime is subject to the Intergovernmental Agreement on Counter-Terrorism Laws, which sets out a procedure for consultation and agreement between the Commonwealth, States and Territories for any such amendment. The reason for this is that:

\begin{itemize}
  \item \textsuperscript{110} The HRC has acknowledged that the concept of ‘arbitrariness’ in Arts 9(1) and 17(1) of the ICCPR comports an element of proportionality. For Art 9(1), see \textit{General Comment No 35}, UN Doc CCPR/C/GC/35 (16 December 2014) [12]. For Art 17(1), see \textit{Toonen v Australia}, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994) [8.3].
  
  \item \textsuperscript{111} The HRC has observed that ‘[t]he right to equality before courts and tribunals also ensures equality of arms’, and demands that ‘each side be given the opportunity to contest all the arguments and evidence adduced by the other party’: \textit{General Comment No 32}, UN Doc CCPR/C/GC/32 (23 August 2007) [13].
  
  \item \textsuperscript{112} [2007] HCA 33; (2007) 233 CLR 307.
  
  \item \textsuperscript{113} National Counter-Terrorism Committee, \textit{National Counter-Terrorism Plan} (3rd ed) 2012.
\end{itemize}
a. Pt 5.3 of the Criminal Code, in which divs 104 and 105 are located, was enacted in reliance, at least in part, on the power in s 51(xxxvii) of the Constitution to legislate with respect to matters referred to the Parliament by the parliament of a state.

b. Relevantly for divs 104 and 105, the parliaments of each state have referred to the (Commonwealth) Parliament ‘the matter of terrorist acts, and actions relating to terrorist acts’, but only to the extent that these matters are legislated by way of amendment to pt 5.3 of the Criminal Code.114

c. At a meeting on 5 April 2002, COAG agreed that any amendment to pt 5.3 based on a referred matter ‘will require consultation with and agreement of States and Territories’ – this requirement is reflected in s 100.8(2) of the Criminal Code.

5.42. As for the PDO regime, it is relevant for the purposes of s 8(b) of the INSLM Act to recall (see para 3.40 above) that div 105 operates alongside complementary regimes under state and territory legislation, and decisions as to the use of these regimes are a matter for the JCTT in each jurisdiction.

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6. **USE OF CONTROL ORDERS AND PREVENTATIVE DETENTION ORDERS**

**Control orders previously made**

6.1. The AFP has obtained six control orders since the control order regime was introduced.\(^{115}\)

6.2. The circumstances of the first two control orders (namely in relation to Jack Thomas and David Hicks) are discussed in detail in the first INSLM’s 2012 annual report.\(^ {116}\) Details of the more recent control orders are set out in part 2 of the second INSLM’s report on control order safeguards.\(^ {117}\)

6.3. No control orders have subsequently been made.\(^ {118}\) A timeline of control orders made under div 104 is set out in appendix C.

**PDOs previously obtained**

6.4. No PDO has been made under div 105. However, I understand that:

   a. three PDOs have been made under complementary legislation in NSW\(^ {119}\)

   b. one PDO has been made under complementary legislation in Victoria.\(^ {120}\)

6.5. The complementary state and territory PDO regimes permit detention pursuant to a PDO for up to 14 days, a far longer period than the maximum 48 hours permitted under div 105.\(^ {121}\)

6.6. In its submission to the present review, the AFP explained that, under the JCTT model, decisions are made jointly between Commonwealth and relevant state and territory law enforcement agencies as to how to proceed with any particular matter. Decisions are taken after considering the full suite of available options.\(^ {122}\)

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\(^{115}\) INSLM, *Control Order Safeguards – Part 2* (April 2016) [3.5].


\(^{118}\) AGD, Submission to the INSLM, *Statutory Deadline Reviews*, 16 May 2017, 11.


\(^{120}\) Re Application for a Preventative Detention Order in respect of Causevic [2015] VSC 248.

\(^{121}\) See, eg, *Terrorism (Police Powers) Act 2002* (NSW) s 26K.

\(^{122}\) AFP, Submission to the INSLM, *Statutory Deadline Reviews*, 2 May 2017, attachment, 11.
7. PREVIOUS CONSIDERATION

7.1. Divisions 104 and 105 of the Criminal Code, both as originally enacted, and as amended, have been reviewed by the Senate Legal and Constitutional Legislation Committee, the PJCIS, and the PJCHR. The divisions have also been reviewed in various ways by my predecessors, and by the COAG Review Committee.

Control orders

7.2. In his 2012 annual report, the first INSLM recommended that div 104 be repealed.\(^{123}\) In his opinion, the transgression constituted by proven terrorist crime presented ‘ample justification’ for control orders against terrorist convicts where they could be shown to present unacceptable risks if unconstrained on release.\(^{124}\) (I note that this supports the retention of div 105A, which had not been legislated at the time.) The same could not be said, however, of control orders which were sought in relation to persons ‘before charge and trial, after trial and acquittal or who will never be tried’.\(^{125}\)

7.3. In its 2013 report, the COAG Review Committee took the view that there was a genuine risk of terrorist activity in Australia, and that whilst its level should not be exaggerated, control orders were, for the time being, necessary and justified in the counter-terrorism legislative scheme.\(^{126}\) Despite the views expressed by the first INSLM, the Committee recommended that the control order regime be retained for all potential categories of person, including persons who had not yet been charged or, alternatively, had been charged and acquitted. At the same time, the Committee considered that the safeguards included in the regime at that time were inadequate and that additional safeguards and protections should be introduced, in particular, to ensure a fair hearing for a controlee.\(^{127}\)

7.4. The safeguards that the COAG Review Committee recommended were, in turn, reviewed by the second INSLM.\(^{128}\) The second INSLM did not, however, have cause independently to review the existing control order regime directly. Nevertheless, he did make a number of observations and recommendations that are relevant to the present review (see discussion at para 8.75 below).

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\(^{124}\) Ibid 44.

\(^{125}\) INSLM, *Declassified Annual Report* (20 December 2012) 43.


\(^{127}\) Ibid recommendation 26.

Preventative detention orders

7.5. Despite the short period in which a PDO can operate, reviews of div 105 of the Criminal Code have consistently recommended their repeal.

7.6. In his 2012 annual report, the first INSLM recommended the repeal of div 105 on the basis that there was no demonstrated necessity for the ‘extraordinary powers’ that it conferred. In the absence of any practical examples of when a PDO would be necessary to protect the public from a terrorist act because the police could not meet the applicable thresholds for arrest, charge and remand, the first INSLM considered that the police could and should rely on those established powers.129

7.7. Division 105 was considered by the COAG Review Committee in 2013. The Committee acknowledged that:

the unpredictability of serious terrorist action requires a high level of preparedness and a strong legislative framework to support investigations and to maintain public confidence in the ability of policing organisations to investigate and successfully prosecute offences.130

At the time of the review three of the state police submissions - Victoria, South Australia and Western Australia - unequivocally suggested that, from an operational perspective, they would be unlikely to use the Commonwealth PDO regime.131 As noted in para 6.4 above, NSW and Victoria have since invoked their respective PDO regimes.

7.8. The COAG Review Committee recommended, by majority, that div 105 be repealed, as should the complementary state and territory PDO regimes.132

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131 Ibid [269]-[272].
132 Ibid [276].
8. REVIEW OF DIVISION 104 – CONTROL ORDERS

8.1. There are a number of issues for consideration in this review of the control order regime (I deal separately with questions of the interoperability between divs 104 and 105A in the next chapter):

a. First, should div 104 be repealed (or allowed to sunset)?
b. Secondly, should the additional grounds for issuing control orders introduced in 2014 be repealed?
c. Finally, what, if any, amendments should be made to the procedures involved, and the standard of proof required in, requesting and confirming a control order under div 104, or in any other way?

Repeal of division 104

Submissions and evidence received

8.2. A number of submissions that I received for this review continued to advocate for the repeal of the control order regime, relying, among other things, on the recommendation of the first INSLM (mentioned at para 7.2 above).133

8.3. In its submission, the LCA referred to the small number of control orders that have been made, and the increase in prosecutions relating to preparatory terrorism offences, as potentially indicating that control orders are not needed or have little operational utility in practice.134 Liberty Victoria and the Joint Academic Submission also relied on the existence of preparatory offences as undermining the rationale for control orders.135

8.4. In light of the human rights concerns that it raised relating to the process of making control orders and to the controls thereby imposed (as outlined in para 5.36 above), the AHRC urged me to consider whether the control order regime is ‘necessary and proportionate to the legitimate objective of reducing the risk to the Australian community posed by potential terrorist acts’. If the evidence as to this is not compelling as far as I am concerned, the AHRC recommended significant amendment to the regime to ensure Australia complies with its human rights obligations under international law, or, if the provisions cannot be so amended, repeal of the regime.136

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133 LCA, Submission to the INSLM, Statutory Deadline Reviews, 12 May 2017, [44]; Joint Academic Submission, 6; Liberty Victoria, Submission to the INSLM, Statutory Deadline Reviews, 28 April 2017, [50].
134 LCA, Submission to the INSLM, Statutory Deadline Reviews, 12 May 2017, [44].
135 Liberty Victoria, Submission to the INSLM, Statutory Deadline Reviews, 12 May 2017, [42]-[45]; Joint Academic Submission, 12.
136 AHRC, Submission to the INSLM, Statutory Deadline Reviews, 15 May 2017, [72], recommendation 8.
8.5. I note that some of the concerns raised by the AHRC relate to the monitoring regime. As explained above (para 1.12), the monitoring regime is beyond the scope of the present review.

8.6. The Joint Academic Submission also recommended the repeal of div 104 in the context of the enactment of the CDO regime. That is a subject that I will address in further detail below.

8.7. The case for the retention of control orders was principally advanced by the AFP and AGD, with ASIO’s evidence being relevant to the question of proportionality.

8.8. At the public hearing, 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. The AFP Deputy Commissioner, Mr Phelan elaborated further on this issue in the following exchange:

MR PHELAN: [...] The mere fact that we have not used a lot of control orders certainly does not mean that they are not required, because each of the individual investigations, when we plan for them, either instruction or whilst we’re investigating them, control orders are taken into consideration as we go through that process.

But the reason we haven’t used a lot of control orders is because the threat has been mitigated by other actions; either they’ve been arrested and charged because there’s been sufficient evidence to do so, or there just hasn’t been enough information to put forward a control order and they haven’t met the thresholds that are required.

DR RENWICK: Or there’s been some other disruptive strategy used perhaps.

MR PHELAN: That’s right, normally arrest or you’ve taken other people out, arrested others and the plots have just dissipated and the threat no longer exists from those individuals. We are very discerning in whether or not we use them because we know it’s a very intrusive power and we do use it when required. I can guarantee you that it’s not something that’s certainly off our radar. Of the 70-odd investigations that we’ve got currently on foot within the JCTTs, it is part of their planning for all of their investigations. But it may not be used.

It’s at the top end of the spectrum because we do prefer to disrupt, charge, put people before the courts if we can first, but if there is an enduring threat from an individual, then we’ll move to control orders and we won’t hesitate to make an application if the circumstances require it.

8.9. AGD echoed these sentiments at the public hearing. Responding to the contention that the existence of preparatory offences undermines the necessity for control orders, it accepted that prosecution for a terrorism offence, including a preparatory offence, would be the preferred option over seeking a control order. At the same time, however, it noted that there had to be sufficient evidence to prosecute, which had to be assessed against a higher standard of proof. In AGD’s view, the control order regime provided an appropriate

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137 Joint Academic Submission, recommendation 5.
138 Transcript of Proceedings, Public Hearing, Canberra, 19 May 2017, 6-7 (Michael Phelan).
139 Ibid 16-17.
140 Transcript of Proceedings, Public Hearing, Canberra, 19 May 2017, 8, 18 (Katherine Jones). See also AGD, Submission to the INSLM, Statutory Deadline Reviews, 16 May 2017, 3.
and useful measure to address the risk posed to the community by a person for whom there was insufficient evidence to support a prosecution.\textsuperscript{141}

8.10. While the effectiveness of particular controls will depend on the nature of each identified risk, speaking generally, the AFP submitted that monitoring a controlee’s movements, limiting internet access, and prohibiting associations between specified individuals can assist both in limiting avenues for ongoing radicalisation and in disrupting attack planning.\textsuperscript{142} The AFP stated that the four control orders that have been made since 2014 were ‘used very specifically to thwart potential plots’, with the controls aimed at disrupting communications between individuals, including how the individuals could communicate, and where they could go.\textsuperscript{143}

8.11. In his evidence to the public hearing, Mr Lawler also supported the retention of the control order regime.\textsuperscript{144} In his opinion, informed by significant experience in the area of counter-terrorism operations, the availability of preventative responses such as control orders and PDOs is necessary because criminal prosecution is not always the most efficient and effective response to a threat.\textsuperscript{145} When asked about the difficult decisions that have to be made by police in an emerging multifaceted situation such as a complex terrorist attack of a series of attacks, noting the evidence of the Director-General of Security that ASIO had approximately 400 high priority terrorist investigations underway, Mr Lawler stated:

It’s not hard to envisage that resources will be under very, very acute strain [...], which is why areas such as control orders and preventative detention orders that can be activated very quickly [are needed] ... [for] some of those 400 at least we need to just make sure you don’t pose a threat while we’re actually trying to deal with another event.

I think that’s, in my view, a very legitimate use of those preventative measures. Where we have such large scale [attacks], if it were ever to happen – hopefully not – then these are some of the things that would need to be able to be put in place very, very quickly, because if they can’t be put in place quickly, then, of course, the risks are amplified, in my view.\textsuperscript{146}

Discussion

8.12. Section 6(1)(b) of the INSLM Act requires me to consider whether div 104 ‘remains necessary’ and ‘remains proportionate to any threat of terrorism or threat to national security’. These two matters are interrelated.

8.13. First, the current nature and extent of terrorist threats, which I have set out in chapter 2 above, is of great and ongoing concern. In particular:

a. The terrorism threat level remains at ‘probable’. Since the threat was set at that level, there have been four attacks carried out, and thirteen thwarted, in Australia.

\textsuperscript{141} AGD, Submission to the INSLM, Statutory Deadline Reviews, 16 May 2017, 17.
\textsuperscript{142} AFP, Submission to the INSLM, Statutory Deadline Reviews, 2 May 2017, attachment, 1-2
\textsuperscript{143} Transcript of Proceedings, Public Hearing, Canberra, 19 May 2017, 19, (Michael Phelan).
\textsuperscript{144} Ibid 42 (John Lawler).
\textsuperscript{145} Ibid 39 (John Lawler).
\textsuperscript{146} Ibid 45 (John Lawler).
b. As the Director-General of Security put it in evidence, the overall security and operational environment is ‘steadily worsening’, with ‘a range of ongoing threats to Australia’s national security’, 147 notably, in this context, Islamist extremism, and the subjects of counter-terrorism investigations have greatly increased in number, reduced in age and diversified in ethnicity and gender. 148

c. Attacks are often planned by individuals whom the Director-General of Security described as vulnerable, ‘swiftly radicalised and able to undertake simple but deadly attacks’. 149

d. It is not possible to guarantee that all attacks can be prevented by the authorities.

e. As AFP Commissioner Andrew Colvin said in a speech to the National Press Club on 31 May 2017:

   On any level, the last two and a half years has seen an exponential rise in terrorist activity in Australia, and the AFP – and our State and Territory partners – have had to react and respond like never before. In fact, if we simply look at the rise in operations conducted by the AFP and our partners over the past three years, the figure is alarming. In 2014 we had approximately 19 terrorism investigations and by 2016 that number had risen to 72 investigations. 150

f. Although many recent attacks or threatened attacks can be described as opportunistic, by lone actors using everyday objects as weapons, complex or sophisticated terrorist attacks are still being planned for in Australia and can be seen to have taken place overseas in such a way as might be attempted here.

8.14. Second, set against those threats, I consider that the objects of div 104 are all legitimate, important and presently relevant policy aims, namely:

   a. protecting the public from a terrorist act
   b. preventing the provision of support for or the facilitation of a terrorist act
   c. preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

8.15. Third, while everyone who has participated in the review accepts that criminal prosecution is the generally desirable course, that is not the end of the matter. Law enforcement agencies have repeatedly given assurances that they prefer to arrest, charge, prosecute and obtain convictions, rather than seeking a control order. In the public hearing, a representative of the AGD stated:

   Where there is sufficient evidence to prosecute a person for a terrorism offence, including a preparatory offence, this will be the preferred option over seeking a control order. 151

147 Ibid 4 (Duncan Lewis); see also Andrew Colvin, ‘Policing for a safer Australia’ (Speech delivered at the National Press Club, Canberra, 31 May 2017).
149 Ibid 5.
150 Andrew Colvin, ‘Policing for a safer Australia’ (Speech delivered at the National Press Club, Canberra, 31 May 2017).
151 Transcript of Proceedings, Public Hearing, Canberra, 19 May 2017, 8 (Katherine Jones).
Similar views were given in evidence to the PJCIS in its recent inquiry into the HRTO Bill.\textsuperscript{152} The PJCIS itself has previously stated that it ‘strongly agrees that arrest, charge and prosecution under criminal offences is always preferable’.\textsuperscript{153}

8.16. Fourth, while controlling the movements, associations and communications of individuals outside the criminal justice system by court order may not have been a novel measure in 2005 (particularly in view of pre-existing state and territory regimes addressing domestic violence), such measures have become an even more widely used and accepted tool (though still at times controversial) in the Australian legal landscape. The following explanation by the former Chief Justice of NSW of the apprehended violence order regime in NSW might also be said to be analogous to the underpinnings of the control order regime:

The legislative scheme for apprehended violence orders serves a range of purposes which are quite distinct from the traditional criminal or quasi-criminal jurisdiction of the Local Court. The legislative scheme is directed to the protection of the community in a direct and immediate sense, rather than through mechanisms such as deterrence. Individuals can obtain protection against actual or threatened acts of personal violence, stalking intimidation and harassment. Apprehended Violence Orders constitute the primary means in this State of asserting the fundamental right to freedom from fear. The objects served by such orders are quite distinct from those that are served by civil adversarial proceedings or proceedings in which an arm of the State seeks to enforce the criminal law.\textsuperscript{154}

8.17. Fifth, on the evidence before me, the rarity of a control order being sought does not mean the law is a dead letter. I have the evidence set out above from the AFP that, although control orders are rarely sought, they are always considered as a possible option in counter-terrorism investigations. They are referred to, for example, in the ‘pocketbook guide’ that is published by the AFP for employees and special members who are involved in counter-terrorism investigations.\textsuperscript{155} Both the AFP and AGD submitted to me that control orders will be used to meet a particular risk profile.\textsuperscript{156}

8.18. I accept that there are logical and realistic ‘gaps’ in achieving the desired aim of prosecution rather than obtaining a control order. As the COAG Review Committee concluded, in terms with which I agree:

The Committee considers that control orders presently have three possible areas of operation. These are:

(a) where a person has been convicted of a terrorist offence, has served his or her sentence, but where upon release his or her renunciation of extremist views has not been demonstrated;

(b) where a prosecution for a terrorist offence is not a feasible or possible alternative; or

\textsuperscript{152} See, eg, Evidence to the PJCIS, Parliament of Australia, Canberra, 14 October 2016, 25-26 (Neil Gaughan).

\textsuperscript{153} PJCIS, Parliament of Australia, \textit{Advisory Report on the Counter-Terrorism Legislation Amendment (No 1) Bill 2014} (20 November 2014) [2.60].

\textsuperscript{154} \textit{John Fairfax Publications Pty Ltd v Ryde Local Court} (2005) 62 NSWLR 512, [20] (Spigelman CJ).


\textsuperscript{156} AGD, Submission to the INSLM, \textit{Statutory Deadline Reviews}, 16 May 2017, 10; AFP, Submission to the INSLM, \textit{Statutory Deadline Reviews}, 2 May 2017, attachment, 8.
(c) where a person has been acquitted of a terrorist offence on a purely technical ground, or where the intelligence/evidence pointing to terrorist activity has been rejected otherwise than on the merits.\textsuperscript{157}

8.19. Sixth, recent cases of control orders made by the courts demonstrate their effectiveness in pursuing the objects of the regime. For instance, in the \textit{Causevic} case, Judge Hartnett observed that the control order had had ‘a deterrent effect’, and that the counselling and education in which the controlee participated under the control order had had a ‘beneficial impact’.\textsuperscript{158} Indeed, by all accounts, the controls imposed in that case (leaving aside the control requiring the wearing of a tracking device, which was a focal point of the confirmation hearing, and was ultimately removed when the order was confirmed), the control order had the effect of diverting the controlee from radicalisation. Conversely, the \textit{Naizmand} case demonstrates how a control order can be used to protect the community from individuals who are intent on acting on extremist ideologies.\textsuperscript{159} In that case, the control order allowed law enforcement agencies to take action to thwart such acts through the monitoring and enforcement regimes that are available once a control order is in force.

8.20. Finally, I am conscious that Parliament, rather than repealing div 104, has instead, and only quite recently, made significant amendments to div 104 and related legislation, including the revised s 38J of the NSI Act and the special advocates regime, along with the monitoring regime in the Crimes Act, TIA Act and SD Act. In those circumstances, it may be that control order requests will now become more frequent.

8.21. For these reasons, I find that div 104 is ‘necessary’ to reduce the risk to the Australian community posed by potential terrorist acts and that it has the capacity to be effective.

8.22. On the question of proportionality, I recognise that a control order can impose significant constraints upon the controlee’s movements and associations, the information that they can access and by what means, and the methods of communication that are available to them, in circumstances which include where the controlee has not been, and may never be, charged with, or convicted of, a criminal offence, let alone a serious terrorism offence. It is a serious matter to so interfere with individual rights outside of the normal constraints and protections of the criminal justice system. It requires the case to be made for such interference.

8.23. Nevertheless, subject to the amendments that I recommend below, I find that div 104 is proportionate to the terrorist threat. I do so, on the basis of the reasons set out above for my finding of necessity, and because of the following matters:

a. At both the interim and confirmation stage, the making of the control order is a matter for a court (presently the Federal Court or the Federal Circuit Court).

b. At both the interim and confirmation stage, the issuing court must be satisfied, on the balance of probabilities, that each of the controls to be imposed by the control order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of, for

\textsuperscript{157} \textit{Report of the Council of Australian Governments Review of Counter-Terrorism Legislation} (1 March 2013) [216].

\textsuperscript{158} \textit{Gaughan v Causevic (No 2)} [2016] FCCA 1693, [135].

\textsuperscript{159} See sentencing remarks of Scotting J in \textit{R v Naizmand} [2017] NSWDC 4, [61]-[62].
example, protecting the public from a terrorist act.\textsuperscript{160} In carrying out that assessment, the court must take into account in all cases, as a paramount consideration, the objects of div 104; it must also take into account the impact of each control on the person’s circumstances (s 104.4(2)(a) and (c)). Where the person is between 14 and 17 years of age, the court must also take into account the best interests of the person as a primary consideration (s 104.4(2)(b) and (2A)).

c. These provisions require the issuing court to strike a balance between the purpose for which the particular controls are sought and the interests of the controlee. Where the court is not satisfied in accordance with s 104.4(1)(d), the court must not make the control order.\textsuperscript{161} Critically, an onerous control is only imposed where the issuing court is satisfied that is proportionate to the protective purpose.

d. Vesting this evaluative task in the hands of a court ensures an independent judicial assessment of the case for the controls, which are tailored to the purpose of the order and the personal circumstances of the controlee. It ensures that the order addresses the threat as revealed by the evidence.

8.24. Insofar as concerns have been raised regarding the fairness of a hearing from which the controlee is likely to be excluded, the special advocates regime is likely to ameliorate some of those concerns. Further to my remarks above (para 5.39), I would want to assess the special advocates regime once it is operating before I reached a position on the appropriateness of repealing div 104 on the basis of issues of procedural fairness.

8.25. Again, I am conscious that, in the face of recommendations – including by the first INSLM – for the repeal of div 104, Parliament has retained and strengthened the provisions, while adding an important safeguard in the form of the special advocates regime.

8.26. Provided the amendments that I recommend below (see paras 8.61, 8.63, 8.65, 8.76) are made, I recommend that div 104 be continued for a further period of five years.

8.27. I expect to be carefully monitoring the use, and consideration of the use of control orders during my term as INSLM, that is, over the next three years. A period of that duration should enable assessment of the impact of the amendments to the control orders regime and related legislative amendments outlined in chapter 4 above and those recommended in this report.

**Should the grounds for making a control order introduced in 2014 be repealed?**

8.28. As noted above (paras 4.8 and 4.9), div 104 was amended in 2014 by:

a. the Foreign Fighters Act – to provide for a control order to be made in relation to a person who has engaged in hostile activity in a foreign country (s 104.4(1)(c)(iii)), or who has been convicted of terrorist-related offences in Australia or abroad (ss 104.4(1)(c)(iv) and (v))

\textsuperscript{160} Criminal Code ss 104.4(1)(d) and 104.14(7).

\textsuperscript{161} Criminal Code s 104.4(3).
CONTROL ORDERS & PREVENTATIVE DETENTION ORDERS

b. the Counter-Terrorism Legislation Amendment Act (No 1) 2014 – to provide for a control order to be made where it would substantially assist in preventing the provision of support for or the facilitation of a terrorist act (s 104.4(c)(vi)), or where the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country (s 104.4(1)(c)(vii)).

8.29. Prior to those amendments, div 104 provided for a control order to be made only in relation to a person who had provided training to, received training from or participated in training with a listed terrorist organisation (s 104.4(1)(c)(ii)), or in circumstances where the control order would substantially assist in preventing a terrorist act (s 104.4(1)(c)(i)).

Submissions and evidence received

8.30. A number of submissions to the present review advocated that, even if div 104 were otherwise retained, the grounds for obtaining a control order should be returned to their pre-2014 state.

8.31. In addition to submitting that a control order should not be made on the grounds that the person has been convicted of a terrorist-related offence, due to the need for interoperability with div 105A (addressed below), the Joint Academic Submission expressed the view that all of the other grounds for making a control order introduced in 2014 be repealed. The submission relied in this respect upon the ‘extensive range of preparatory terrorism offences in Australian law’.163

8.32. The Joint Academic Submission echoes serious concerns voiced by the first INSLM (and others) that the control order regime ushers in a second form of criminal liability in cases falling short of a case beyond reasonable doubt that is supported by admissible evidence. As the first INSLM noted in his 2012 annual report:

A [control order] can be pursued in lieu of prosecution or following prosecution. A [control order] may be pursued in lieu of a prosecution where the CDPP has advised there is no reasonable prospect of conviction. A [control order] can be pursued following a conviction being set aside on appeal, acquittal, withdrawal of charges, nolle prosequi or a permanent stay of proceedings. A [control order] may also be pursued as an adjunct to prosecution eg following conviction, incarceration and unsuccessful rehabilitation. It should be a matter of concern that [control orders] can be imposed on a terrorist suspect without following the normal criminal law process of arrest, charge and prosecution.

As a matter of principle and policy, restraints on the liberty of a person charged and pending trial should be a question of remand or bail and nothing else. Were it otherwise, the bail system for all offences should in principle be called into question, which is not on any sensible agenda.164

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162 As noted above (para 4.9), the grounds for issuing a control order were further expanded by the Counter-Terrorism Legislation Amendment Act (No 1) 2014, which provided for a control order to be made where it would substantially assist in preventing the provision of support for, or the facilitation of, a terrorist act (s 104.4(c)(vi)), and where the person had provided support for, or otherwise facilitated, the engagement in a hostile activity in a foreign country.

163 Joint Academic Submission, [3].

For completeness, I note my observations above (para 8.15) as to the preference of law enforcement agencies for arresting, charging, prosecuting and obtaining convictions, rather than for seeking a control order.

8.33. Concerns about the expanded grounds for review were expressed by the LCA and AHRC to the PJCIS in its review of the Foreign Fighters Bill and the Counter-Terrorism Legislation Amendment Bill (No 1) 2014.165 These concerns were not expressly raised in their submissions to the present review.

8.34. In its submission to the review of the Foreign Fighters Bill, the LCA submitted that making a control order solely on the ground of a prior terrorism conviction was ‘hard to justify’ without the additional requirement of ‘proven continuing dangerousness and unsatisfactory prospects for rehabilitation’.166

8.35. In the context of the review of the Counter-Terrorism Legislation Amendment Bill (No 1) 2014, the AHRC submitted that the grounds should not be expanded in view of the first INSLM’s recommendations, and without introducing any of the additional safeguards recommended by the COAG Review Committee.167 Similarly, the LCA questioned the necessity for expanding the grounds, suggesting instead that individuals engaging in the threshold activities (ie support for or facilitation of a terrorist act or of engagement in a hostile activity in a foreign country) be ‘arrested, charged and prosecuted’ for existing terrorism offences in the Criminal Code, including preparatory offences, foreign incursion offences, and advocacy offences.168 The LCA also drew attention to a number of factors, including:

a. the lowering of the arrest threshold for terrorism offences under the Foreign Fighters Act to reasonable suspicion, rather than belief

b. amendments to ensure that foreign evidence may be more easily adduced under the Foreign Fighters Act

c. broad investigative and surveillance powers which are available to support the investigation of possible terrorism offences, including the new delayed notification search warrant scheme.169

It noted that the ground in s 104.4(1)(c)(vi) (assisting in prevention of the provision of support for or the facilitation of a terrorist act) was ‘too low a threshold’ to justify the imposition of controls on the individual.170

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166 LCA, Submission No 12 to the PJCIS, Parliament of Australia, Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 3 October 2014, [22].

167 AHRC, Submission No 14 to the PJCIS, Parliament of Australia, Inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, 11 November 2014, [19].

168 LCA, Submission No 16 to the PJCIS, Parliament of Australia, Inquiry into the Counter-Terrorism Legislation Amendment Bill (No.1) 2014, 11 November 2014, [22].

169 Ibid.

170 Ibid [31].
8.36. Since the introduction of these additional grounds, four control orders have been issued (see table at appendix C). The most recent control order, in the Causevic case, was made on the pre-amendment grounds in s 104.4(1)(c)(i).\(^{171}\) Based on information provided by the AFP, each of the other control orders was issued on the same ground. Accordingly, no control order has yet been issued on the grounds introduced in 2014. In this same period, there have been 77 prosecutions brought for preparatory offences.\(^{172}\)

8.37. In contrast, the PJCIS positively supported the expanded grounds introduced by the Foreign Fighters Bill, noting that the existing (pre-2014) grounds were ‘unnecessarily narrow’ and did not ‘adequately capture the range of circumstances where a person may present a risk’.\(^{173}\) With respect to the grounds proposed to be introduced by the Counter-Terrorism Legislation Amendment Bill (No 1) 2014, the PJCIS recognised that they represented ‘a substantial expansion’ of the existing regime, but did not recommend any winding back.\(^{174}\)

**Discussion**

8.38. The 2014 amendments responded to operational issues identified following counter-terrorism raids in Operation Appleby. The new grounds do relate to real and continuing threats. As the Revised Explanatory Memorandum to the Counter-Terrorism Legislation Amendment Bill (No 1) 2014 reasoned:

a. Of the ground in s 104.4(1)(c)(vi) ‘[t]he provision of support and the facilitation of terrorist acts represent a real threat to the safety and security of Australians because without that support and facilitation, it may be impossible for the intended perpetrator to undertake the terrorist act’.

b. Of the ground in s 104.4(1)(c)(vii), ‘a person who has actually provided support or facilitated a hostile activity in a foreign country has not only a demonstrated ability but also a demonstrated propensity to engage in conduct in support or facilitation of conduct akin to a terrorist act’.\(^{175}\)

8.39. There may be circumstances in which intelligence from abroad supports preventative action, such as a control order, against a foreign fighter who has returned to Australia but this intelligence is not sufficient to mount a prosecution. In his 2014 annual report, the first INSLM acknowledged the difficulties of obtaining evidence regarding activities abroad.\(^{176}\)

8.40. Finally, while there are expanded grounds, an additional safeguard still exists in s 104.4(d) before the control order can be made. That is, the court must be satisfied on the balance of probabilities that each of the controls imposed on the controlee is reasonably necessary, 

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171 See Gaughan v Causevic (No 2) [2016] FCCA 1693, [3]-[4].
172 See statistics cited in para 2.6 above.
175 Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (No 1) Bill 2014 [115]-[116].
and reasonably appropriate and adapted, to achieve the objects of the control order regime.

8.41. For the reasons set out above, I conclude that the expanded grounds for making a control order do address counter-terrorism threats distinguishable from the original grounds and meet the tests of necessity and proportionality. **I do not recommend** that the grounds for making a control order be returned to their pre-2014 state.

**Other issues regarding division 104**

**Standard of proof**

8.42. Control order proceedings, not being ‘criminal proceedings’ as defined in the Evidence Act 1995 (Cth), are ‘civil proceedings’. Section 140 of the Act, which applies in the issuing court, provides:

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
  - (a) the nature of the cause of action or defence; and
  - (b) the nature of the subject-matter of the proceeding; and
  - (c) the gravity of the matters alleged.

8.43. This approach was confirmed by the High Court in *Thomas v Mowbray* and followed more recently by the Federal Circuit Court in *Gaughan v Causevic (No 2).*

8.44. The LCA submitted that the criminal standard of proof should apply in control order confirmation proceedings, in particular in relation to the drawing of inferences. The rule in *Jones v Dunkel* provides that, in civil proceedings, ‘adverse inferences may be drawn from the failure of a party to adduce particular evidence where such evidence would reasonably have been expected.’ This submission is driven at least in part by a concern on the part of the LCA that the application of this rule may place respondents in a difficult position, ‘particularly where, for example, giving evidence may re-enliven charges’.

8.45. In response to the LCA’s submission, AGD submitted that use of the criminal standard of proof would be inappropriate in the context of the control order regime:

If the AFP had evidence to meet the criminal standard threshold then AFP officers would arrest and charge a person for an offence, rather than seek the imposition of a control order. Raising

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177 *Evidence Act 1995 (Cth)* Dictionary.
178 Ibid.
183 LCA, Submission to the INSLM, *Statutory Deadline Reviews*, 12 May 2017, [79]-[80].
the threshold for confirming a control to a criminal standard would defeat the purpose of the
control order regime.184

8.46. While I accept that the rule in Jones v Dunkel may be a practical problem for a controlee
who does not wish to give evidence at the confirmation hearing, this problem is not unique
to control order proceedings. It does not justify such a significant change. Moreover, it
seems open to a controlee to contest inferences that may otherwise be drawn by
application of the rule in Jones v Dunkel by relying on the privilege against self-exposure to
a penalty in the form of controls imposed by the control order.

8.47. I agree that requiring a criminal standard of proof in control order proceedings would likely
defeat the preventative purpose of the control order regime. The division was intended to
extend to cases where the AFP may not have sufficient admissible evidence to charge a
person but nonetheless have a strong concern that the person poses a significant risk to
community safety for one or more of the specified reasons, and where the court is acting to
protect the public, not to punish the respondent.

8.48. There are also practical safeguards. As noted above (para 8.42), the court will apply the
tests stated in s 140(2) of the Evidence Act 1995 (Cth), and by the High Court in Briginshaw
v Briginshaw that:

the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given
description, or the gravity of the consequences flowing from a particular finding are
considerations which must affect the answer to the question whether the issue has been
proved.185

8.49. I do not recommend any change to the standard of proof.

**Rules of evidence**

8.50. Division 104 does not expressly state that confirmation proceedings are civil proceedings
for the purposes of the rules of evidence, nor does it specify the rules of evidence and
procedure that are to apply. In part 2 of his report on control order safeguards, the second
INSLM expressed the view that the proceedings were civil in character, that the role of the
court was the same as for all federal civil proceedings, and that the rules of evidence in civil
rather than criminal proceedings, as prescribed in the Evidence Act 1995 (Cth), applied to
their resolution.186 I agree generally with this proposition.

8.51. As noted above (para 3.4), a request for an interim control order may be supported by
hearsay evidence, provided that the source of that evidence is identified.187 This allowance
does not apply at the confirmation stage.

8.52. The AFP submitted that the rules of evidence should not apply at either the interim or
confirmation stage.188 I understand this to mean that the AFP would like the allowance for
hearsay evidence at the interim stage to apply at the confirmation stage. In its submission,

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184 AGD, Submission to the INSLM, Statutory Deadline Reviews, 16 May 2017, 18.
185 [1938] HCA 34; (1938) 60 CLR 336, 362 (Dixon J).
187 See Evidence Act 1995 (Cth) s 75.
188 AFP, Submission to the INSLM, Statutory Deadline Reviews, 2 May 2017, 10-11.
the LCA argued that the rules of evidence should continue to apply at the confirmation stage. I agree. The consequences for a controlee are of such significance that the ‘full’ rules of evidence in civil proceedings should apply to confirmation proceedings.

8.53. That said, there is a tension between the application of the rules of evidence and the obligation on the court to ‘consider’ the original request. This tension was highlighted by the AFP in its submission based on its experience from the confirmation proceedings in the Causevic case.

8.54. Section 104.14(1) of the Criminal Code provides that evidence may be adduced and submissions may be made at the confirmation hearing by a range of parties, including the senior AFP member who requested the interim control order and the controlee or their representative. Section 104.14(3) then provides that the court must not only consider the evidence and submissions, but also ‘the original request for the interim control order’. Section 104.3(a) contemplates that the original request will comprise information that is sworn or affirmed by the senior AFP member who requested the interim control order. While this information may be admissible for the purposes of requesting an interim control order given the allowance for hearsay evidence, it may not be admissible at the confirmation stage.

8.55. The requirement for the issuing court, in the confirmation proceedings, to consider the original request, which was given to it in the interim proceedings, appears to be motivated by a presumption that making the interim control order and confirming the control order are two stages in the same proceedings, and that a control order would be confirmed (or otherwise dealt with) within a short period of time after the interim order is made. This presumption is reflected in ss 104.5(e) and 104.5(1A), which provide that the interim control order must specify a day for the controlee to attend court to confirm the order, which day must be ‘as soon as practicable, but at least 72 hours’ after the order is made. If the issuing court is to take action at the confirmation stage within a short period of time after it makes the interim control order, there is some sense in requiring the court to consider the material that was given to it at the interim stage.

8.56. This presumption has not been borne out by the practical operation of div 104.

8.57. For two of the three control orders that have so far been confirmed, over six months elapsed between issuance and confirmation (as illustrated in the table at appendix C). In the Causevic case, it was over nine months. During such a period, it is conceivable that circumstances will change and these changes have the potential to affect the court’s assessment of the matters of which it must be satisfied in order to confirm the order (s 104.14(7)). The court’s assessment must take into account any evidence adduced during the confirmation proceedings, which may relate to facts and circumstances since the interim control order was made. This is what happened in the Causevic case, and in this regard, Judge Hartnett made the following comment:

189 LCA, Submission to the INSLM, Statutory Deadline Reviews, 12 May 2017, [9], [79].
190 AGD, Submission to the INSLM, Statutory Deadline Reviews, 16 May 2017, 15.
191 AFP, Submission to the INSLM, Statutory Deadline Reviews, 2 May 2017, 4.
192 Gaughan v Causevic (No 2) [2016] FCCA 1693.
At the time of the confirmation proceedings the Court must grapple with what evidence is before it as to the Respondent’s current state of mind and behaviours to assess firstly the question of risk.  

8.58. In the Causevic case, the AFP tendered into evidence the affidavit that was sworn by the senior AFP member who requested the interim control order, and which comprised the request for the interim control order. In its submission to the present review, the AFP suggested that adducing the request as evidence is the only way in which the court can consider the information comprising the request as it is required to do under s 104.14(3)(a). As such, the information would be subject to challenge on the basis of the rules of evidence, such as relevance and the hearsay and opinion rules, as was the case in the Causevic case, where a considerable amount of time was taken up at the confirmation hearing with cross-examining the senior AFP member.

8.59. Aware of this issue, AGD suggested that I consider:

whether it is appropriate to allow the court to consider the content of the interim control order request even if it does contain hearsay evidence, on the condition that the court be able to give whatever weight it considers appropriate to the request.

8.60. As proceedings in relation to a request for an interim control order are treated as interlocutory proceedings, it is unclear as a matter of principle why the original request would need to be tendered as evidence in confirmation proceedings, rather than being judicially noticed as the originating court document, with the applicant at the confirmation hearing tendering admissible evidence (which may or may not be new) to seek to satisfy the issuing court of the matters in s 104.4(c) and (d). This appears to be the intention of s 104.14(3), which distinguishes between evidence tendered on the one hand, and the original request on the other. Because of the seriousness of confirmation proceedings, the issuing court should only act on the basis of evidence received in accordance with the Evidence Act 1995 (Cth).

8.61. For these reasons, I do not recommend any amendment to div 104 regarding the applicable rules of evidence. However, I recommend that s 104.14 be amended to clarify that:

a. The original request need for an interim control order need not be tendered as evidence of the proof of its contents.

b. The issuing court may take judicial notice of the fact that an original request in particular terms was made, but it is only to act on evidence received in accordance with the Evidence Act 1995 (Cth).

Varying an interim control order

8.62. Both the AFP and LCA submitted that div 104 should be amended to provide for an interim control order to be varied. There is currently no express capacity for the controlee to

193 Ibid [134].
194 Evidence Act 1995 (Cth) ss 56, 59 and 76.
195 AGD, Submission to the INSLM, Statutory Deadline Reviews, 16 May 2017, 15.
196 AFP, Submission to the INSLM, Statutory Deadline Reviews, 2 May 2017, 4, LCA, Submission to the INSLM, Statutory Deadline Reviews, 12 May 2017, [81].
apply to vary an interim control order. This is despite the fact that, of the six control orders that have been made:

a. three were never confirmed (and the interim control order was in force for the full year)
b. two involved a delay of over six months between the interim order being made and confirmation of the order.

The reason for this delay is largely due to the time required to prepare for, and participate in, confirmation proceedings. During this time, the parties may agree to vary the controls imposed on the controlee, which the court ostensibly has no power to effect.

8.63. I recommend that div 104 be amended so that:

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

**Costs, legal aid and resource implications**

8.64. The LCA raised concerns about funding arrangements for legal aid for controlees in control order proceedings, observing that the current arrangements are ‘seriously inadequate’. It recommended that special Commonwealth funding be allocated to ensure that legal aid is available in control order proceedings, akin to the arrangements for complex criminal cases.  

8.65. Although div 104 involves civil proceedings, the proceedings are matters of great seriousness for the controlee as, if an interim order is made or confirmed, significant obligations, prohibitions and restrictions may be placed on a controlee, breach of which are potentially punishable by imprisonment.

8.66. It is not appropriate that any controlee is additionally at any risk of an adverse costs order and I recommend that div 104 provide that there is to be no order as to costs made by the issuing court in such proceedings.

8.67. For the same reasons, and also to ensure there is proper assistance to the court and some ‘equality of arms’ in the proceedings, I recommend that the Attorney-General give consideration to the adequacy of legal aid for controlees in control order proceedings.

8.68. Another issue of which I am aware, though not directly raised in the submissions to this review, is the significant time and resource implications for law enforcement agencies during both the control order application process and ongoing monitoring.

8.69. In evidence given to the PJCIS in its review of the HRTO Bill, Assistant Commissioner Neil Gaughan gave the following testimony regarding the time and costs involved in applying for, and monitoring, control orders:

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197 LCA, Submission to the INSLM, *Statutory Deadline Reviews*, 12 May 2017, [9], [82], [83].
In relation to the volume of information, the folders for those briefs were literally from where you are sitting to me, and that was extremely resource intensive. I think I had about four lawyers and about six investigators involved in pulling that together. Then, obviously, Jamie [Lowe, Attorney-General’s Department] had to read it and she had to agree with our position. Then it had to go to the Attorney-General for his endorsement and then to a court. The whole process, in reality, took us over a month and that was one that we were expediting based on the current risk and threat that we were facing.

[…]. Then, of course, once we have obtained it, it becomes more resource intensive because to determine a breach we actually have to put resources on the individual to determine the fact that they have committed a breach of the order... It is expensive and it is very resource intensive.198

8.70. Deputy Commissioner Phelan testified that the costs of monitoring a single control order could exceed $4 million:

All of those things that can go on in order to monitor the restrictions that may be put on in a control order are extremely resource and cost intensive to an organisation like ours. I am more than happy in a confidential submission to go into the details of how much those things do cost, but I can say that they are north of $3 million to $4 million per person.199

8.71. As noted above (para 8.27), I expect to be carefully monitoring the use, and consideration of the use, of control orders during my tenure as INSLM. As a part of my on-going monitoring I will consider the resource implications of seeking, or monitoring, a control order to the extent that these implications have the capacity to impact on the effectiveness of the legislation (see INSLM Act s 6(1)(a)).

INSLM appointment of special advocates

8.72. The LCA submitted that special advocates should be appointed by the INSLM.200 It reasoned that, given that special advocates will be required to represent the interests of clients in adversarial proceedings against government departments, it is critical that they be appointed by a body independent of government.201 While the special advocates regime is beyond the scope of this review (see para 1.12 above), I feel that it is necessary for me to respond to this submission.

8.73. Special advocates have been included in the control order regime as a safeguard; they are a component of the balance struck between measures necessary to respond to counter-terrorism and national security threats on the one hand, and protecting the rights of individuals on the other. It is a function of my office to review this balance and I will be closely considering the operation and effectiveness of the special advocates regime once it is operational. But it would be incompatible with the functions of my office to appoint special advocates, which are a component of the statutory regime that it is my responsibility to review independently. Additionally, from a pragmatic perspective, my office is not appropriately resourced for this task.

198 Evidence to the PJCIS, Parliament of Australia, Canberra, 14 October 2016, 47-8 (Neil Gaughan).
199 Ibid 45 (Michael Phelan).
200 LCA, Submission to the INSLM, Statutory Deadline Reviews, 12 May 2017, [47].
201 Ibid attachment, 2.
8.74. For these reasons, I do not recommend that the INSLM be given the function to appoint special advocates.

Outstanding issues from safeguards review

8.75. As noted in the previous chapter (para 7.4), the second INSLM made a number of observations and recommendations in his review of control order safeguards that are relevant to the present review. Specifically, the second INSLM:

a. accepted recommendation 28 of the COAG Review Committee that only the Federal Court have jurisdiction to make control orders, but recommended in turn that it be given the power to remit a request for an interim control order to the Federal Circuit Court.\(^ {202}\)

b. supported recommendation 33 of the COAG Review Committee that s 104.5(3)(a) be amended to ensure that a control imposed by a control order not constitute a relocation order, noting that the current wording ‘would literally permit de facto relocation by excluding the place of residence of the controlee’.\(^ {203}\)

c. recommended early consideration to including an overnight residence requirement, similar to that provided for in the United Kingdom (see sch 1 pt 1 to the Terrorism Prevention and Investigation Measures Act 2011 (UK)).\(^ {204}\)

d. supported a variation of recommendation 37 of the COAG Review Committee (advocating a least interference test) to the effect that the issuing court be required to consider ‘whether the combined effect of all of the proposed restrictions is proportionate to the risk being guarded against’ in addition to the existing requirement to assess each restriction individually.\(^ {205}\)

e. recommended that withholding national security information from the controlee be dealt with only by the NSI Act, and that div 104 be amended accordingly.\(^ {206}\)

8.76. Insofar as the government has not yet responded to them, these observations and recommendations stand as the views of my Office. For the purposes of this review, I have not reconsidered the issues to which the observations and recommendations relate.

8.77. Another issue that was addressed, albeit in passing, by the second INSLM was that of applying the control order regime to young persons. As noted above (para 4.10), the minimum age at which a control order may be imposed was lowered from 16 to 14 years of age by the 2016 Amendment Act. The second INSLM noted that the issue was ‘controversial’ and would ‘require careful monitoring’.\(^ {207}\) None of the submissions to the present review raised this issue. Moreover, no control orders have been made since the introduction of the relevant amendments, let alone against a young person.

\(^ {202}\) INSLM, Control Order Safeguards – Part 2 (April 2016) [6.7].

\(^ {203}\) Ibid [10.5].

\(^ {204}\) Ibid [11.3].

\(^ {205}\) Ibid [13.7]-[13.8].

\(^ {206}\) Ibid [8.11].

\(^ {207}\) INSLM, Control Order Safeguards – (INSLM Report) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (January 2016) [2.2].
8.78. According to the Revised Explanatory Memorandum to the Counter-Terrorism Legislation Amendment Bill (No 1) 2016, the minimum age was lowered to:

respond to incidents in Australia and overseas that demonstrate persons as young as 14 years of age are organising and participating in terrorism related conduct. With school-age students being radicalised and engaging in radicalising others and capable of participating in activity that poses a threat to national security, the age limit of 16 years is no longer sufficient if control orders are to be effective in preventing terrorist activity.\(^{208}\)

One of these ‘incidents’ was the October 2015 fatal shooting of NSW Police employee Curtis Cheng by Farhad Mohammad, who was 15 years of age at the time.

8.79. I understand the argument that a control order may offer a tool to assist authorities in diverting young people from violent extremism, thereby avoiding their early and possibly interminable involvement with the criminal justice system. This argument is supported by the Revised Explanatory Memorandum, which states:

> It is appropriate and important that all possible measures are available to avoid a young person engaging with the formal criminal justice system and to mitigate the threat posed by violent extremism. Consequently, the ability to use control orders to influence a person’s movements and associations, thereby reducing the risk of future terrorist activity, addresses a substantial concern.[\(^{209}\)]

8.80. However, I agree with the concerns of the PJCHR that the control order regime should not be used solely as a form of behavior management or supervision, as to do so would be to take the regime outside its stated objectives. The mere fact that a young person is at risk does not mean that these objectives – or the thresholds in s 104.4(c) and (d) that give effect to them in the making of a control order – are satisfied. Moreover, the making of a control order, which exposes the controlee to significant criminal penalties for breaching a control order, does not necessarily avoid the controlee becoming involved in the criminal justice system.

8.81. Overall, I am persuaded by the evidence and information that I have received for this review that persons aged 14 to 17 years of age contribute to the threat picture described above (chapter 2 and para 8.13). Accordingly, for the reasons given, I find that applying the control order regime to these persons remains a necessary and proportionate response to the terrorist threat. That being said, and as noted above (para 8.27), I will be carefully monitoring the use, and consideration of the use, of control orders during my term as INSLM, and will play particularly close attention to any control orders made in relation to persons aged 14 to 17. In this regard, part of any such review will be to see how the interests of the child are taken into account by the AFP and Attorney-General in taking steps prior to the request for a control order.

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\(^{208}\) Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2016 [303].

\(^{209}\) Ibid [108].
9. INTEROPERABILITY BETWEEN DIVISIONS 104 AND 105A

Background

9.1. The operation of div 105 of the Criminal Code is summarised in chapter 4 above (para 4.36). As I emphasised above (para 1.12.b), this is not a review of div 105A. However, at the suggestion of the Attorney-General and the PJCIS, I am considering the discrete issue of the interoperability of divs 104 and 105A. The most important issue of interoperability concerns the fact that the state or territory court considering a div 105A application can detain or release but cannot release conditionally.

9.2. There are presently 20 persons who are incarcerated for terrorist offences in respect of whom consideration may be given to making an application under div 105A. Given the level of terrorist investigations and charges, it may be expected over time that further people will join the group of terrorist offenders. If history is any guide, there are likely to be significantly more applications made over time under div 105A as compared to div 104.

9.3. With the introduction of the div 105A, concerns have been expressed as to whether it is possible satisfactorily to predict future terrorist offending. As noted above (para 9.1) I do not propose to consider these concerns or div 105A in detail in this report; I simply make three points here.

9.4. First, I respectfully adopt what was said by Gleeson CJ in *Thomas v Mowbray* where his Honour, albeit in a constitutional law context, rejected the suggestion that there was ‘something about the threat of terrorism, or the matters of inference and prediction involved in considering terrorist threats and control orders, that renders this subject non-justiciable, or in some other way inherently unsuited to be a subject of judicial decision’.  

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210 In its review of the HRTO Bill 2016, the PJCIS noted concerns about the interoperability between the proposed CDO regime and the control order regime, primarily in view of different applicants, issuing authorities, and threshold requirements involved: PJCIS, Parliament of Australia, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (4 November 2016). It received a submission from the Attorney-General that, in light of the present review and corresponding review by the PJCIS of the control order regime, ‘it may be better to defer a detailed consideration of how the control order regime and the regime under the HRTO Bill might better interact with each other until those reviews occur’. The PJCIS accepted this suggestion, adding that the two reviews ‘provide an opportunity to more broadly consider the interoperability between the two regimes and the complexities that may arise’: ibid [3.183]. To this end, it recommended that the government consider whether the control order regime could be ‘further improved to most effectively operate alongside the proposed [CDO] regime’ and develop any potential changes in time to be considered as part of the present review: ibid recommendation 16.

211 Although there are 21 persons presently in custody for terrorism offences, according to the evidence of AGD at the public hearing, one person has been sentenced for an offence that does not fall within s 105A.3(1)(a): *Transcript of Proceedings*, Public Hearing, Canberra, 19 May 2017, 18 (Katherine Jones).

9.5. Second, the assessments are not inherently dissimilar to those made already by the same courts concerning the risk posed by convicted serious sex offenders, which is where the test ‘unacceptable risk’ comes from. In each case:
   a. There is a conviction by a jury for an offence at least analogous and perhaps identical to the feared future offending.
   b. There are remarks on sentence by the sentencing judge which will in part consider protection of the community by reference to a prediction as to re-offending.213
   c. The court can or does order an expert report (see, eg, s 105A.6(3)).
   d. There will be evidence of the behaviour of the offender while in custody.

9.6. Third, as the rules of evidence apply to the receipt of the expert report, it follows that if, for example, the expert expresses an opinion outside any field of specialised knowledge, or the opinion is not substantially based upon expert knowledge, then the report will be inadmissible because it fails to meet the legal test set out in s 79 of the Evidence Act 1995 (Cth) as explained, for example, by Heydon JA in Makita (Australia) Pty Ltd v Sprowles.214 No doubt the agencies are aware of these requirements and it can be expected that resources will be put into meeting this standard by 2019.

9.7. Division 105A of the Criminal Code is modelled on state and territory legislation dealing with high-risk offenders who are coming to the end of a custodial sentence, where concerns remain about the risk that they pose to the safety of the community. As noted in the Explanatory Memorandum to the HRTO, a majority of states and territories ‘have enacted schemes which attempt to manage dangerous offenders through post-sentence controls including extended supervision or in some cases continuing detention’.215 In New South Wales and South Australia, the legislative regimes cover both sex offenders and violent offenders.216 Queensland, Victoria, Western Australia, and the Northern Territory have schemes that apply only to sex offenders.217

9.8. A common feature of all of the state high-risk offender legislation is the availability, under the various Acts, of orders for continuing detention or conditional release: in other words the court may continue detention, permit release on conditions, or release unconditionally. Some of the legislative regimes require, as a condition of making a CDO, that the court is satisfied that adequate supervision will not be provided under an ESO.218

9.9. By contrast, div 105A makes provision only for CDOs. However, the test for making a CDO mirrors the provision in the New South Wales legislation that makes both CDOs and ESOs available. The court is thus left in a situation where it is required to be satisfied that there is no other less restrictive measure that would be effective in preventing the identified

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214 (2001) 52 NSWLR 705, [85].
215 Explanatory Memorandum, HRTO Bill [5].
216 Crimes (High Risk Offenders) Act 2006 (NSW); Criminal Law (High Risk Offenders) Act 2015 (SA).
217 Serious Sex Offenders Act 2013 (NT); Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld); Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic); Dangerous Sexual Offenders Act 2006 (WA).
218 See, eg, Crimes (High Risk Offenders) Act (NSW) s 5D(1).
unacceptable risk; but no such measure is available or otherwise addressed in div 105A beyond a statutory note that a control order (by definition only available from a federal court) may be a less restrictive measure.

9.10. It is not entirely clear from the terms of div 105A whether the state or territory court has to be satisfied as to the likelihood (or actuality) of a control order being made in the particular case, or whether it is sufficient that the court be satisfied that a control order would, if made, be effective to manage the identified risk.

9.11. The Explanatory Memorandum to the HRTO Bill stated that consideration of control orders in the context of the less restrictive measure criterion ‘will not require an application for a control order to be made or for the court to consider whether the threshold for obtaining a control order would be met’. However, there is nothing in the Act to this effect; and it is difficult to conceive of how there is to be consideration of the capacity of the less restrictive measure to meet the identified risk that occurs without either consideration of the prospect of obtaining that measure, or seeking to obtain it.

9.12. It is established law that the words in a statute must be considered in context, which context includes legislative history and extrinsic materials, but that such materials cannot displace the clear meaning of the text. It may be that this is a case where the intent of the Explanatory Memorandum is not achieved by the statutory language, properly construed. At the least there is, in my view, unsatisfactory ambiguity.

9.13. While I am concerned at the ambiguity in the provision, my recommendation that the state or territory court may also grant an ESO (see para 9.40 below) is independent of the ambiguity. The inefficiency, extra cost to both parties and the potential unfairness to the controlee/respondent are obvious.

Submissions and evidence received

9.14. The submissions made to this review, and evidence given to the public hearing, noted the difficulties, for both parties, to any likely application associated with the parallel operation of the HRTO and control order regimes for high-risk terrorist offenders.

9.15. First, the present regime will require a state or territory supreme court, in determining an application for a CDO, to inquire into the applicability and effectiveness of a regime in respect of which it has no jurisdiction, and in respect of which the applicable test is quite different. As just noted, despite the words of the Explanatory Memorandum, the literal words may require an adjournment of the div 105A proceedings while another application is made to a federal court and determined.

9.16. Second, the bifurcation may require the preparation of two applications: one under div 105A, for which the Attorney-General is responsible, and one under div 104, for which the AFP is responsible but which must be submitted to the Attorney-General for approval.

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219 Explanatory Memorandum, HRTO Bill [21].

The work involved in the applications is such that in the case of a high-risk terrorist offender, neither agency is likely to be able to leave preparation of the second application to await the outcome of the first. There will be extra cost (and may be some duplication between the two applications) in terms of the supporting material, as they are necessarily focused on meeting different statutory criteria.

9.17. Third, the controlee/respondent may have to face simultaneous or overlapping proceedings in two courts, which is oppressive.

9.18. Fourth, in modern times, and subject to constitutional limits, Parliament generally seeks to ensure that a single court can grant all relief in the one matter.

9.19. Fifth, this issue has already been the subject of an apt PJCIS recommendation. In reporting on the HRTO legislation, the PJCIS referred to the inherent duplication of effort involved in applying for an interim control order in a different court where an application for a CDO is unsuccessful. It also noted that there was both a financial and time cost in running two separate proceedings, including on the courts, the government and the offender. It recommended that further consideration be given to improving the interoperability of the two regimes, at the same time positing the following as an appropriate solution:

>[T]he application process for the existing control order regime be retained for preventative cases. In addition, a separate application process could be introduced for post-sentence control orders that aligns more closely to the CDO regime.221

9.20. Sixth, as the AHRC submitted, the state or territory court hearing an application under div 105A, if satisfied that a person currently under sentence poses a significant risk of committing a further terrorism offence, will have to decide between making a CDO, or dismissing an application (and therefore making no order to address the risk an individual may pose).222 The AFP would then have to marshal its resources to make an application under div 104. As the AHRC observed:223

>It will almost certainly lead to inefficiency and additional burdens on any individual against whom an order is being sought as well as on the relevant government authorities seeking such orders. If the national security or counter-terrorism risk that the government is seeking to avert is particularly urgent, this will also detract from the government’s ability to respond adequately to that urgency.

9.21. Seventh, the LCA’s submission was also supportive of an approach which permits the court to make a control order in the alternative to a CDO, so as to assist ‘efficiencies in the judicial process for all parties concerned’.224

9.22. Eighth, the Joint Academic Submission recommended that div 105A be substantially amended to provide for a regime of ESOs. It argued that this option would:

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222 AHRC, Submission to the INLSM, *Statutory Deadline Reviews*, 15 May 2017, [81]-[82].

223 Ibid [83].

CONTROL ORDERS & PREVENTATIVE DETENTION ORDERS

a. give those courts with the power to issue a CDO an ability to directly consider the availability of a ‘less restrictive measure that would be effective in preventing the unacceptable risk’

b. empower those same courts to issue an ESO in the alternative to a CDO

c. ensure that the control of terrorist offenders would occur against the higher threshold test of the CDO scheme rather than that of the control order regime.

9.23. The AGD identified the main issue with the operation of the two schemes as being the inability of the supreme court to make a control order where it decides not to make a CDO under the HRTO scheme, meaning that a senior member of the AFP would have to make a separate application in the Federal Court or Federal Circuit Court for a control order. The AGD submitted that allowing the supreme court to make an order ‘in the alternative’ to a CDO would address the duplication issue, but would give rise to other issues which require consideration.

9.24. The issues that the AGD identified in this context were ‘the legal threshold that would apply to making such orders, how sensitive information would be protected in light of the recently introduced special advocates scheme for control orders, and whether the Attorney-General would need to make an application for the making of the order’. I have considered each of these issues.

Discussion

Duplication

9.25. The current position is that divs 104 and 105A of the Criminal Code potentially give rise to the need for different applicants to make separate applications in respect of the same offender, in different courts, and seeking to satisfy different tests. That is not in the interests of the offender, the agencies responsible for making the respective applications, or the multiple courts which may have to hear them, hence my recommendation that a single court can make a CDO or alternatively an ESO. Of course over the possible three year period it may first grant a CDO and then decide an ESO is appropriate: the reverse may also occur, if for example, ESO conditions were breached.

9.26. The question which next arises is how to rationalise the two regimes. The submissions raise two broad options:

a. amend div 105A of the Criminal Code to introduce an ESO for high risk terrorist offenders, so that when considering a CDO the state and territory supreme courts have jurisdiction to make an ESO in the alternative, if satisfied that it will provide adequate protection against the identified risk – this option was advanced by the Joint Academic Submission, and appears to align with the views of the PJCIS; or

b. amend divs 104 and 105A of the Criminal Code so that a state or territory supreme court has jurisdiction to make a control order as an alternative to a continuing detention order – this option was advanced by the LCA and the AHRC.

225 AGD, Submission to the INSLM, Statutory Deadline Reviews, 16 May 2017, 15.
9.27. Insofar as both options involve vesting jurisdiction in state and territory supreme courts, the enlistment of those courts to exercise jurisdiction that is currently conferred on federal courts under div 104 presents no legal or practical difficulty.226

9.28. There is no significant difference between the controls that can be placed on a person by a control order under div 104 and those that can be imposed on a person by an ESO under state and territory high-risk/serious sex offender legislation with which state and territory courts will be familiar. A comparison of s 104.5(3) of the Criminal Code and the applicable provisions of the state and territory legislation indicates a substantial, albeit not entire, overlap in terms of the available conditions. If an ESO regime were incorporated into div 105A, I recommend that the conditions to which such an order may be subject should be the same as the terms of s 104.5(3).

Threshold

9.29. There are, however, significant differences between the thresholds for making a control order under div 104 and those for making a CDO under div 105A (and an ESO should it be amended as submitted by the Joint Academic Submission and the PJCIS), and the type of assessment that is required by the court in determining whether these thresholds are met. These differences are demonstrated in the following table.

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226 In addition, Dr David Neal SC and Mr Tim Game SC, who appeared at the public hearing on behalf of the LCA, did not express any difficulty with state courts making orders in the nature of control orders: Transcript of Proceedings, Public Hearing, 19 May 2017, 58 (David Neal), 61 (Tim Game).
Threshold for making a control order (s 104.4(c) and (d))

The court is **satisfied on the balance of probabilities** of any of the following matters:

- that making the order would substantially assist in preventing a terrorist act;
- that the person has provided training to, received training from or participated in training with a listed terrorist organisation;
- that the person has engaged in a hostile activity in a foreign country;
- that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation (within the meaning of subsection 102.1(1)) or a terrorist act (within the meaning of section 100.1);
- that 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 (within the meaning of subsection 3(1) of the *Crimes Act 1914*); or
- that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or
- that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country.

The court is **satisfied on the balance of probabilities** that each of the controls to be imposed on the controlee is reasonably necessary, and reasonably appropriate and adapted, for any of the purposes of the objects of the control order regime.

Threshold for making a CDO (s 105A.7(1))

The court is **satisfied to a high degree of probability** that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community.

The court is satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.

<table>
<thead>
<tr>
<th>Table 2: Control order and CDO thresholds</th>
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<tbody>
<tr>
<td><strong>Threshold for making a control order</strong> (s 104.4(c) and (d))</td>
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<tr>
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<tr>
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</tr>
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</table>
9.30. The difference in thresholds and associated assessment is consistent with the differing nature of the risk that the respective regimes are designed to address.

9.31. The threshold for a CDO is that an offender ‘poses an unacceptable risk of committing a serious Part 5.3 offence’. This does not require the court to be satisfied as to the commission of a particular offence; rather, it requires the court to evaluate the risk of the offender committing an offence of that nature to determine that it is ‘unacceptable’.

9.32. The court will ask and answer those questions by reference to mandatory considerations set out in s 105A.8 of the Criminal Code (as outlined in para 4.41), the focus of which is the past conduct, the disposition, and the state of mind of the offender. As Fullerton J observed in *New South Wales v Bugmy*, relying on the reasons of Beazley P in *Lynn v State of NSW*,227 Ultimately, the determination as to whether a risk is unacceptable is an evaluative judgment to be undertaken according to the individual circumstances of each case. That evaluative judgment must ultimately be directed to an assessment of risk in the context of endeavouring to provide for the community to be secure from the risk of harm as distinct from guaranteeing its safety and protection.228

9.33. By contrast, in deciding whether to make a control order, the focus of the issuing court’s assessment is on specific features and outcomes. For the purposes of s 104.4, whether the requisite state of satisfaction is reached rests on whether a person’s circumstances satisfy particular criteria (such as a prior conviction for specified offences), or on broader preventative scenarios, such as whether making the control order will ‘substantially assist in preventing a terrorist act’. The statutory elaboration of the reference to a terrorist act, which includes a reference to a terrorist act that does not occur, a reference to a specific terrorist act, and a reference to more than one terrorist act (s 104.4(4)), highlights that both the control order and the controls imposed are targeted towards protecting the public from particular terrorism-related events.

9.34. The LCA submitted that maintaining the control order regime for high-risk terrorist offenders is more consistent with the counter-terrorism legislative framework.229

9.35. However, I am persuaded by the Joint Academic Submission and the recommendations of the PJCIS that it is appropriate for controls on high-risk terrorist offenders that are released into the community to be imposed under the CDO regime. In my view:

a. There is wide acceptance of the policy basis for div 105A, namely, that is it relates to persons found guilty of serious terrorist offences, it takes a constitutionally valid, closely analogous model which has been operating widely in Australia now for some years, and vests jurisdiction in courts which customarily exercise those types of powers and make those types of predictions of future conduct.

b. Further, as noted above, the number of eligible terrorist offenders means that the jurisdiction is likely to be used with some frequency.

228  [2017] NSWSC 855, [42].
229  LCA, Submission to the INSLM, *Statutory Deadline Reviews*, 12 May 2017, [124].
c. That being so, it makes sense to confer on those state and territory supreme courts power to grant complete relief, including an ESO.

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

Management of sensitive information

9.36. The CDO regime raises issues for the management of national security information and the balance that must be struck between the protection of this sensitive information and ensuring that the rights of the individual who is the subject of an application for a CDO are protected. This issue is not novel and, for the control orders regime, has been addressed by the introduction of the special advocates regime. I consider that this system is (in principle) equally capable of striking the correct balance for CDOs, and if introduced, for ESOs.

Extension of the monitoring regime

9.37. If an ESO regime is introduced, monitoring compliance with the controls imposed by the ESO will be key to ensuring the effectiveness of the regime. For this reason, it is appropriate for the monitoring regime for control orders (discussed at paras 4.17-4.35) to be extended to ESOs.

Applications by the Commonwealth Attorney-General

9.38. In the context of this review considering the merits of authorising the supreme court of a state or territory to make an order in the alternative to a CDO the AGD submission raised the issue of whether or not the Commonwealth Attorney-General would be the applicant.

9.39. In my view the Attorney-General would be the appropriate applicant. In reaching this conclusion I considered AGD’s comments on the role of the Attorney-General in relation to interim control orders:

The role of the Attorney-General in the control order regime is to provide an extra level of scrutiny of applications for interim control orders. [...] As first law officer, and with national security responsibilities, the Attorney-General is able to provide an informed view on what measures are appropriate and adapted.

It is equally as important for the Attorney-General to perform this role where an application is made in the supreme court of a state or territory and in relation to an ESO, if introduced.

231 Division 105A contemplates that national security information may be involved in CDO proceedings (see s 105A.5(5)).
232 AGD, Submission to the INSLM, Statutory Deadline Reviews, 16 May 2017, 15.
**Recommendations**

9.40. For the reasons discussed above, I recommend that state and territory supreme courts be authorised to make an ESO which would include any of the controls that can be imposed by a control order under div 104.

9.41. I also recommend that div 105A be amended to allow the state and territory supreme courts, on the application of the Commonwealth Attorney-General, to make either a CDO or an ESO for a period of up to three years (at a time) if satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community without either of those orders being made. The court should only to make a CDO if satisfied that an ESO would not be effective in preventing the identified risk.

9.42. I further recommend that:

   a. the Commonwealth Attorney-General also be the applicant for an ESO
   b. there be no new pre-conditions before the Attorney-General commences div 105A proceedings for an ESO
   c. an application may be made for an ESO in relation to a person who is already the subject of a CDO or ESO
   d. the same controls and monitoring regime be available for an ESO made under div 105A as a control order made under div 104
   e. the government consider making the special advocates regime available for applications under div 105A.

9.43. This does not mean that the control order regime should be altogether inapplicable to terrorist offenders. The fact that a person has been convicted of an offence relating to terrorism is currently a ground for making a control order (ss 104.4(1)(c)(iv) and 104.14(7)). And as noted earlier in this chapter (para 8.41), I do not recommend any amendments to the grounds for making a control order.

9.44. That said, there is scope to reduce overlap between div 104 and div 105A proceedings. First, the Attorney General should refrain from consenting to any AFP request for an interim control order while div 105A proceedings are underway (bearing in mind that the Attorney-General is the applicant in div 105A proceedings). Second, assuming that the AFP will be able to apply for an interim control order in relation to a person who is the subject of a CDO or ESO before such orders come to an end, s 104.5(1)(d) should be amended to provide that the control order does not begin to be in force until the CDO or ESO has ceased to be in force. Third, s 104.3 should be amended to require the senior AFP member to give the issuing court a copy of any judicial findings in div 105A proceedings against the proposed controlee.

9.45. Admittedly, the effectiveness of these measures will only be known once div 105A is put to use. As noted above (para 1.12), div 105A is not expected to be used until 2019, when the first qualifying ‘terrorist offender’ becomes eligible for release.
9.46. I therefore further **recommend** that:

a. the Attorney-General be unable to give consent under s 104.2 while div 105A proceedings are pending

b. in requesting an interim control order in relation to a person, the senior AFP member be required to give the issuing court a copy of any div 105A application made in relation to that person, and any order (including reasons) of the relevant court in respect of that application

c. no control order may be in force in relation to a person while a CDO or ESO is in force in relation to that person.

9.47. Based on these recommendations, I envisage divs 104 and 105A operating as follows:

![Diagram of Proposed Interoperability between div 104 and div 105A](image-url)

- High risk terrorist offender
- Attorney-General applies to a State or Territory Supreme Court for a CDO or an ESO
- Is the court satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious pt 5.3 offence if released into the community?
  - Yes: Court makes CDO
  - No: Senior AFP Member applies to a federal court for a control order (court provided with details of any prior div 105A application)
    - Is the court satisfied on the balance of probabilities as to the matters in s104.4(1)(c) and (d)?
      - Yes: Court makes control order (but control order not to be in force while any CDO or ESO is in force in relation to the controlee)
      - No: No control order
10. REVIEW OF DIVISION 105 – PREVENTATIVE DETENTION ORDERS

Repeal of division 105

10.1. In circumstances where no PDOs have been made under div 105 of the Criminal Code, the key issue for consideration, and the focus of submissions received for this review, is whether the division should be repealed. As the COAG Review Committee observed (while also considering state and territory PDOs, which can last for 14 days as opposed to a div 105 PDO, which can only last for 48 hours), the issue of repeal involves two, ‘perhaps irreconcilable’, considerations:

[F]irst, the prevention of an imminent and serious terrorist attack by means of executive detention, though an extreme measure, can, at least in an emergency, be seen as a genuinely valuable protective measure. Certainly, the community under threat might think it so. Secondly, the concept of police officers detaining persons ‘incommunicado’ without charge for up to 14 days, in other than the most extreme circumstances, might be thought to be unacceptable in a liberal democracy. There are many in the community who would regard detention of this kind as inappropriate.

10.2. The submissions that I received for this review reflected this division of views.

Submissions and evidence received

10.3. The majority of the submissions that addressed PDOs advocated for the repeal of div 105. In taking that position, the submissions relied, among other things, upon the views expressed by the first INSLM and the COAG Review Committee. Aside from the fact that the PDO regime had not been invoked at the Commonwealth level, and only sparingly at the state and territory level, specific matters on which the submissions relied in this context included:

a. in the case of preventing an imminent terrorist attack from occurring, the availability of alternative measures, including questioning under pt IC of the Crimes Act, laying charges for preparatory or other terrorism offences, obtaining a control order or applying for an ASIO questioning warrant

b. in the case of preserving evidence relating to a recent terrorist attack, the disproportionality between the assistance that a PDO would afford and the extraordinary nature of the measure.

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235 See, eg, AHRC, Submission to the INSLM, Statutory Deadline Reviews, 15 May 2017, [51]-[61], recommendation 7; Liberty Victoria, Submission to the INSLM, Statutory Deadline Reviews, 28 April 2017, [67], recommendation 3; Joint Academic Submission, 4.
236 Joint Academic Submission, 4; Liberty Victoria, Submission to the INSLM, Statutory Deadline Reviews, 28 April 2017, [60]-[62].
c. the alleged inadequacy of the safeguards associated with a PDO, such as the circumscribed nature of external communication and disclosure.237
d. concerns about the potential for a PDO to apply where the conduct of a person was not unlawful at the time it occurred.238

10.4. In contrast, AGD and the AFP advocated for the retention of the PDO regime at the Commonwealth level. In a brief submission, the NSW Department of Premier and Cabinet also supported the retention of div 105 of the Criminal Code, noting that the position of NSW Police was that the provisions were appropriate and remained necessary.

10.5. In their submissions to the review, and in their evidence at the public hearing both the AFP and AGD focused on the value of the PDO as a disruptive mechanism in the context of an imminent terrorist attack.239 AGD described the regime as ‘a useful and necessary measure to detain a person to prevent an imminent terrorist act occurring, or to preserve evidence of or relating to a recent terrorist act’. At the public hearing, the AFP Deputy Commissioner outlined the utility of a PDO by reference to Operation Appleby, when a number of State PDOs were applied for:

"Given the circumstances of that particular operation where you’ve got multiple search warrants across multiple places with a number of people you want to speak to and keeping them separate and so on, those are the sort of situations where you can envisage it would be used. A lot of the times it’s going to be quick where we don’t have a lot of notice."240

10.6. As noted above, the AFP conceded at the public hearing that the AFP would more likely arrange for an application for a PDO under the complementary state legislation given their extended duration.241

10.7. However, neither the AFP nor AGD considered that the absence of any application for a PDO under div 105 should be determinative of the question whether the provisions should be allowed to lapse.242 Although the PDO regime is not one that is used by ASIO, the Director-General of Security described it as important to have ‘the facility and the ability to bring about what is essentially a critical disruption to a complicated and potentially several groups connected or several individuals connected’.243 In his evidence to the public hearing, Mr Lawler echoed that sentiment.244

Discussion

10.8. I agree with the views of the AFP and AGD, echoed by the Director-General of Security at the public hearing, that a conclusion of redundancy does not automatically follow from the non-use of a particular law enforcement tool.

237 Liberty Victoria, Submission to the INSLM, Statutory Deadline Reviews, 28 April 2017, [59].
238 ALHR, Submission to the INLSM, Statutory Deadline Reviews, 12 May 2017, [5.18].
239 AGD, Submission to the INSLM, Statutory Deadline Reviews, 16 May 2017, 16; AFP, Submission to the INSLM, Statutory Deadline Reviews, 2 May 2017, attachment, 11.
241 Ibid.
242 Ibid 5-6 (Michael Phelan).
243 Ibid 21 (Duncan Lewis).
244 Ibid 39 (John Lawler).
10.9. I place particular weight on the submissions of the AFP, as the responsible law enforcement agency, as to the need for the continuing availability of the provisions in div 105 despite no PDOs having been sought or made. In light of what the Deputy Commissioner of the AFP described at the public hearing as ‘the major increase in the threat of smaller-scale opportunistic attacks by lone actors’, with the concomitant risk of little to no lead time to prevent a spontaneous attack, the need to act quickly to disrupt terrorist activity, and prevent potentially catastrophic consequences, may call for the invocation of the PDO regime in div 105.

10.10. However, and as the AFP acknowledged at the public hearing, the PDO regime in div 105 is of significantly less utility than the complementary regimes which are in force pursuant to state and territory legislation. 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.

10.11. The prospect of the PDO regime in div 105 being invoked needs to be considered against the significant infringement on the liberty of the subject that a PDO represents. Despite the high threshold to obtain a PDO, and the limited maximum period available, at its core a PDO involves the non-criminal detention of a person. The person so detained is not entitled to contact any person, except a family member, employer or similar, to let them know that he or she is ‘safe but ... not able to be contacted for the time being’ (s 105.35(1)); and any communications with a lawyer must be capable of being monitored (s 105.38).

10.12. The threshold test in s 105.4 of the Criminal Code was amended in 2016 so as to remove the requirement to establish the occurrence of an attack within 14-day window; but the removal of that practical impediment has not had any impact in terms of applications for PDOs. Although it may be said that the continued non-application of div 105 constitutes an appropriate recognition on the part of law enforcement agencies of the significance of that intrusion, the first INSLM’s statement, in his 2012 annual report, remains highly pertinent:

> The combination of non-criminal detention, a lack of contribution to CT investigation and the complete lack of any occasion so far considered appropriate for their use is enough to undermine any claim that PDOs constitute a proportionate interference with liberty.246

10.13. Like COAG, I find the issue to be finely balanced and difficult, even dealing with a 48-hour limit. But in view of the nature and extent of current terrorist threats, I find that a preventative detention regime in terms of div 105 is necessary and proportionate to that threat. There is also adequate protection of individual rights. As to that threat, I repeat what I have earlier said above about div 104; as to its necessity I am not prepared to reject what has been said by the AFP, AGD, ASIO and Mr Lawler, noting also the support of the NSW Police. The significant changes both in the modus operandi of terrorist attacks and those carrying them out warrant, in my view, some form of preventative detention regime.

10.14. Accordingly, I **recommend** that div 105 be continued for a further period of five years. This is subject to an important qualification, namely that I am not convinced that div 105

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245 Ibid 76 (Michael Phelan).
adequately responds to this need. This is particularly so given the existence of complementary state and territory regimes, which have already been invoked on several occasions (as noted in para 6.4 above), and which the AFP concedes are more likely to be invoked given their extended duration. The PDO regime under div 105 has never been invoked and its use is likely to be limited to a case where there is a disagreement between the AFP and relevant state police force as to the need for a PDO (or, in the case of NSW, investigative detention).

10.15. I am also mindful that COAG itself appears to be moving away from the PDO model towards an investigative detention model as recently introduced in NSW as a means to strengthen Australia’s counter terrorism laws. As noted above (para 3.43), this model was considered by COAG at its meeting on 1 April 2016, which agreed, in principle, to the model ‘as a basis for a strengthened nationally consistent pre-charge detention scheme for terrorism suspects, with the ACT reserving its position’. COAG is expected to consider this model further at its next special counter-terrorism meeting that is scheduled for 5 October 2017.

10.16. The PJCIS, in its complementary review mandated by s 29(1)(bb)(iii) of the Intelligence Services Act 2001 (Cth), should be in a better position than I am to consider the implications for div 105 of any COAG decision concerning a national investigative detention regime.

Ancillary issues regarding preventative detention orders

10.17. Without specifically recommending its repeal, the LCA took issue with the following aspects of the PDO regime:

a. First, the LCA considered the test in s 105.4(5) for making a PDO to prevent a terrorist act which is capable of occurring is too broad, and may not ensure that only situations where there is a real risk of a terrorist act occurring are captured.

b. Secondly, the LCA raised concerns about the limitations on a person who is the subject of a PDO accessing legal representation, and the absence of the availability of review of a PDO under the ADJR Act.

10.18. The LCA recommended that there be a reversion to the test for a PDO whereby the question is whether an attack is likely to happen within a 14-day period. It also recommended that the making of a PDO should be subject to ADJR Act review.

10.19. In response to the LCA’s submission regarding the test, AGD submitted that the amendments made in 2016 remained appropriate. In the current climate, where a person could move from thought to action in, potentially, days, a requirement to prove that there would be an attack within a 14-day period would be unnecessarily difficult.

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247 COAG Meeting Communiqué (1 April 2016).
248 LCA, Submission to the INSLM, Statutory Deadline Reviews, 12 May 2017, [88].
249 LCA, Submission to the INSLM, Statutory Deadline Reviews, 12 May 2017, [89]-[90]. Liberty Victoria also raised the unavailability of ADJR Act review in its submission (Submission to the INSLM, Statutory Deadline Reviews, 28 April 2017, [59]), as did ALHR (Submission to the INSLM, Statutory Deadline Reviews, 12 May 2017, [5.17]).
250 LCA, Submission to the INSLM, Statutory Deadline Reviews, 27 April 2017, [88], [90].
251 Transcript of Proceedings, Public Hearing, 19 May 2017, 22 (Katherine Jones).
The test in s 105.4

10.20. As noted above (para 4.10), the 2016 Amendment Act changed the test for making a PDO. Previously, the terrorist act had to be one that was imminent and, in any event, expected to occur in the next 14 days. The current test (as introduced by the 2016 Amendment Act) is that the terrorist act has to be one that is capable of being carried out, and could occur, within the next 14 days.

10.21. The change in the test is consistent with a recommendation made by the first INSLM in his 2012 annual report. As the first INSLM there observed, the degree of precision in respect of the 14-day timeframe limited the efficacy of the PDO regime. Referring to the acknowledgment of AGD that the 14 day figure was not determined according to any extrinsic substantiation, the INSLM’s concern was as a practical matter, a police officer ‘cannot simply attest that a terrorist act is expected to occur within a fortnight irrespective of any intervening event’.252

10.22. The test that the LCA advocates imposes a less onerous requirement than the original provision, formulated as it is in terms of likelihood. Nonetheless, it requires a higher level of certainty than is, to my view, practical in view of the threat of terrorist activity in the present day. Subject to the views that I have expressed above regarding the availability of PDOs more generally, I am satisfied that the test in s 105.4 of the Criminal Code is appropriately formulated; if div 105 remains in force, it should remain in place.

Availability of judicial review

10.23. Schedule 1 to the ADJR Act contains decisions which are exempt from review under the Act including, in para (dac), all decisions made under div 105 of the Criminal Code.

10.24. In its 2013 report, the COAG Review Committee recommended that para (dac) be removed from sch 1.253 In doing so, it endorsed the recommendation of the Administrative Review Council (ARC) to the same effect in its report, published in September 2012, titled *Federal Judicial Review in Australia*. In that report, the ARC considered that there seemed to be ‘little utility’ in exempting decisions under div 105 from ADJR Act review, noting that, ‘as a general proposition, administrative decisions made in relation to criminal investigation processes where proceedings have not yet commenced are not excluded from review’.254

10.25. Referring to these passages, the COAG Review Committee added that the availability of ADJR Act review gives an aggrieved person the ability to apply for a statement of reasons from the decision-maker. The Committee considered that the right to seek such a statement was appropriate in the context of a PDO, and could be of value, even if the statement was redacted to protect sensitive national security information.255

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10.26. COAG did not accept the Committee’s recommendation. In its response to the report, COAG considered that the existing rights of review conferred by div 105 struck an appropriate balance between procedural fairness and security interests, having regard to the time critical and emergency circumstances in which preventative detention orders are issued, and their limited maximum duration of 48 hours.

10.27. In this regard, COAG referred to the avenues of judicial review in the Federal Court or in the original jurisdiction of the High Court, the merits review provision in div 105 (s 105.51) and the provision for the statutory judicial review of a Commonwealth order by a state or territory court, where an order under state or territory legislation is also in force (s 105.52).

10.28. These avenues were additional to a person’s rights to pursue any allegations of wrongful detention in a civil action, and to make complaints to standing oversight and accountability bodies including the Ombudsman and the Inspector-General of Intelligence and Security.

10.29. I agree with COAG that these avenues of judicial and merits review together with the capacity to complain to independent agencies are adequate protections for the exercise of div 105 powers. I do not recommend removing the exemption for div 105 in sch 1 to the ADJR Act.

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11. CONCLUSIONS

11.1. In his 2011 annual report, the first INSLM wrote:

The functions of the INSLM and the object of the 2010 Act may be paraphrased as the review of the effectiveness and appropriateness of the CT [counter-terrorism] Laws. The specific words of secs 3, 6 and 8 of the 2010 Act govern, but the paraphrase serves to emphasize the twin poles between which the CT Laws are to be considered.

As to whether the CT Laws are effective, the question concerns their part in deterring and preventing, and responding to, terrorism and terrorism – related activity including that which threatens Australia’s security.

As to whether the CT Laws are appropriate, the question concerns, first, their consistency with Australia’s international obligations including human rights obligations, counter-terrorism obligations and international security obligations. Second, it concerns the safeguards contained in them for protecting the rights of individuals. Third, it concerns their proportionality to any threat of terrorism or threat to national security or both.

Linking the questions whether the CT Laws are effective and appropriate is a further question drawing on all these inquiries. It is whether the legislation comprising the CT Laws ‘remains necessary’. Those two words in subpara 6(1)(b)(iii) of the 2010 Act compress all the issues to be examined by the INSLM. They seek a conclusion based on principle as well as overall policy.257

11.2. I agree.

Division 104 – Control Orders

11.3. I do not recommend that the grounds for making a control order be returned to their pre-2014 state (see para 8.41).

11.4. I do not recommend any change to the standard of proof (see para 8.49).

11.5. I do not recommend any amendment to div 104 regarding the applicable rules of evidence (see para 8.61).

11.6. I recommend that s 104.14 be amended (see para 8.61) to clarify that:

a. The original request for an interim control order need not be tendered as evidence of the proof of its contents.

b. The issuing court may take judicial notice of the fact that an original request in particular terms was made, but it is only to act on evidence received in accordance with the Evidence Act 1995 (Cth).

11.7. I recommend that div 104 be amended (see para 8.63) so that:

a. The controlee may apply to vary an interim control order prior to confirmation of the control order.

b. The court has power to amend an interim control order if the AFP Commissioner and controlee agree.

11.8. I recommend that div 104 provide that there is to be no order as to costs made by the issuing court in confirmation proceedings (see para 8.66).

11.9. I recommend that the Attorney-General give consideration to the adequacy of legal aid for controlees in control order proceedings (see para 8.67).

11.10. Provided the amendments that I recommend above are made, I recommend that div 104 be continued for a further period of five years (see para 8.26).

Appointment of special advocates

11.11. I do not recommend that the INSLM be given the function to appoint special advocates (see para 8.74).

Outstanding issues from safeguards review

11.12. The second INSLM made a number of observations and recommendations about the control order regime that are relevant to the present review. For the purposes of this review, I have not reconsidered the issues to which the observations and recommendations relate. Insofar as the government has not yet responded to them, these observations and recommendations stand as the views of my office. Specifically (see para 8.75):

   a. accepted recommendation 28 of the COAG Review Committee that only the Federal Court have jurisdiction to make control orders, but recommended in turn that it be given the power to remit a request for a control order to the Federal Circuit Court.258

   b. supported recommendation 33 of the COAG Review Committee that s 104.5(3)(a) be amended to ensure that a control imposed by a control order not constitute a relocation order, noting that the current wording ‘would literally permit de facto relocation by excluding the place of residence of the controlee’259

   c. recommended early consideration to including an overnight residence requirement, similar to that provided for in the United Kingdom (see sch 1 pt 1 to the Terrorism Prevention and Investigation Measures Act 2011 (UK))260

   d. supported a variation of recommendation 37 of the COAG Review Committee (advocating a least interference test) to the effect that the issuing court be required to consider ‘whether the combined effect of all of the proposed restrictions is proportionate to the risk being guarded against’ in addition to the existing requirement to assess each restriction individually261

   e. recommended that withholding national security information from the controlee be dealt with only by the NSI Act, and that div 104 be amended accordingly.262

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258 INSLM, Control Order Safeguards – Part 2 (April 2016) [6.7].
259 Ibid [10.5].
260 Ibid [11.3].
261 Ibid [13.7]-[13.8].
262 Ibid [8.11].
**Interoperability between Divisions 104 and 105A**

11.13. I recommend that state and territory supreme courts be authorised to make an ESO which would include any of the controls that can be imposed by a control order under div 104 (see para 9.40).

11.14. If an ESO regime were incorporated into div 105A, I recommend that the conditions to which such an order may be subject should be the same as the terms of s 104.5(3) (see para 9.28).

11.15. I also recommend that div 105A be amended to allow the state and territory supreme courts, on the application of the Commonwealth Attorney-General, to make either a CDO or an ESO for a period of up to three years (at a time) if satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community without either of those orders being made. The court should only to make a CDO if satisfied that an ESO would not be effective in preventing the identified risk (see para 9.41).

11.16. I recommend that (see para 9.42):

   a. the Commonwealth Attorney-General also be the applicant for an ESO
   
   b. there be no new pre-conditions before the Attorney-General commences div 105A proceedings for an ESO
   
   c. an application may be made for an ESO in relation to a person who is already the subject of a CDO or ESO
   
   d. the same controls and monitoring regime be available for an ESO made under div 105A as a control order made under div 104
   
   e. the government consider making the special advocates regime available for applications under div 105A.

11.17. I recommend that (see para 9.46)):

   a. the Attorney-General be unable to give consent under s 104.2 while div 105A proceedings are pending
   
   b. in requesting an interim control order in relation to a person, the senior AFP member be required to give the issuing court a copy of any div 105A application made in relation to that person, and any order (including reasons) of the relevant court in respect of that application
   
   c. no control order may be in force in relation to a person while a CDO or ESO is in force in relation to that person.

**Division 105 – Preventative Detention Orders**

11.18. I do not recommend removing the exemption for div 105 in sch 1 to the ADJR Act (see para 10.29).

11.19. I recommend that div 105 be continued for a further period of five years, subject to the implementation of a national investigative detention regime (see para 10.14-10.16).
INSLM Act considerations

11.20. In making the findings and recommendations set out in this report, I have considered the matters in s 6(1)(a) of the INSLM Act and I conclude that the laws have the capacity to be effective (noting that no PDOs have been made under div 105).

11.21. As to the matters in s 6(1)(b) of the INSLM Act, I have considered Australia’s human rights, counter-terrorism and international security obligations, and intergovernmental agreements within Australia, and I conclude that the laws are:

a. consistent with the obligations referred to above and contain appropriate safeguards for protecting the rights of individuals

b. proportionate to the current threats of terrorism and to national security

c. necessary.

11.22. Finally, consistent with s 6(1)(d) of the INSLM Act, I have considered whether the legislation considered in this review is being used for any matter unrelated to counter-terrorism and national security. In the conduct of this review there was no evidence to suggest this.
CONTROL ORDERS & PREVENTATIVE DETENTION ORDERS

Public Hearing, Canberra, 19 May 2017
APPENDIX A – CONDUCT OF THE REVIEW

An advertisement calling for submissions was placed in the following newspapers:

- The Australian on 22 and 25 of March 2017
- The Canberra Times on 22 and 25 March 2017
- The Age on 22 and 25 March 2017

Public submissions were received from (in order of receipt):

- the Rule of Law Institute of Australia
- the LCA
- Dr Jessie Blackbourn, Professor Andrew Lynch, Dr Nicola McGarrity, Dr Tamara Tulich and Professor George Williams AO
- the CDPP
- Liberty Victoria
- Centre for Military and Security Law, ANU
- NSW Department of Premier and Cabinet
- Australian Transaction Reports & Analysis Centre
- ALHR
- ASIO
- AHRC
- AFP
- AGD
- ASPI.

I held a public hearing on 19 May 2017. A transcript of the proceedings is available on the INSLM website www.inslm.gov.au.

I also held private consultations with the AFP, AGD, ASIO and the CDPP.
APPENDIX B – PREVIOUS CONTROL ORDER RECOMMENDATIONS

First INSLM


<table>
<thead>
<tr>
<th>Recommendation</th>
<th>Response</th>
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<tbody>
<tr>
<td>If control orders are to be retained in general, the onus of showing that grounds exist and, if challenged, that they existed when a control order was first made, should clearly be imposed on the authorities applying for confirmation of an interim control order. (Recommendation II/1)</td>
<td>☑ The government has not formally responded to this recommendation, and no amendment has been made to div 104 to give effect to it.</td>
</tr>
<tr>
<td>If control orders are to be retained in general, the prerequisites for making an interim control order, including on an urgent basis, should include satisfaction that proceeding ex parte is reasonably necessary in order to avoid an unacceptable risk of a terrorist offence being committed were the respondent to be notified before a control is granted. (Recommendation II/2)</td>
<td>☑ The government has not formally responded to this recommendation, and no amendment has been made to div 104 to give effect to it.</td>
</tr>
<tr>
<td>If control orders are to be retained in general, the provisions governing confirmation hearings should expressly impose, perhaps by a presumption, the onus on the AFP to show the control order should continue in force. (Recommendation II/3)</td>
<td>☑ The government has not formally responded to this recommendation, and no amendment has been made to div 104 to give effect to it.</td>
</tr>
<tr>
<td>The provisions of div 104 should be repealed. Consideration should be given to replacing them with <em>Fardon</em>-type provisions authorising control orders against terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness. (Recommendation II/4)</td>
<td>☑ The government has not formally responded to this recommendation, and no amendment has been made to div 104 to give effect to it (implicitly, the repeal recommendation has been rejected). However, div 105A has been enacted subsequently, which provides for <em>Fardon</em> type provisions authorising CDOs (but not control order-like measures) for high risk terrorist offenders.</td>
</tr>
</tbody>
</table>
**COAG Review Committee**

Report of the review of counter-terrorism legislation (1 March 2013)

**COAG**

Response to the COAG Review Committee (14 October 2014)

**Second INSLM**

Report on control order safeguards (January-April 2016)

<table>
<thead>
<tr>
<th>COAG Review Committee recommendation</th>
<th>Second INSLM recommendation</th>
<th>Response</th>
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</thead>
<tbody>
<tr>
<td><strong>Retention of control orders</strong></td>
<td></td>
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<tr>
<td>The control order regime should be retained with additional safeguards and protections included. (Recommendation 26)</td>
<td>The second INSLM did not consider this recommendation as it had been accepted by the government.</td>
<td>🟢 COAG supported the recommendation of the Review Committee in principle. In line with the recommendation, the sunset clause was pushed back from 15 December 2015 to 7 September 2018 by the Foreign Fighters Act.</td>
</tr>
<tr>
<td><strong>Basis for seeking Attorney-General’s consent to apply for an interim control order</strong></td>
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<tr>
<td>Section 104.2(2)(b) should be amended to require that the second basis on which a senior member of the AFP seeks the Attorney-General’s written consent to request an interim control order be that he or she ‘considers on reasonable grounds that the person has provided training, or received training from, a listed terrorist organisation’. (Recommendation 27)</td>
<td>The second INSLM did not press this recommendation.</td>
<td>🟢 COAG did not support the recommendation of the Review Committee. In fact, the Foreign Fighters Act amended the first basis on which the Attorney-General’s consent may be sought (s 104.2(2)(a)) to require that he or she ‘suspects on reasonable grounds’, thereby taking the opposite approach to that recommended by the COAG Review Committee (see note 42 above).</td>
</tr>
<tr>
<td><strong>Definition of ‘issuing court’</strong></td>
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</table>
### COAG Review Committee recommendation

The definition of ‘issuing court’ in s 100.1 should be amended to read ‘the Federal Court of Australia’ (ie removing the Family Court and Federal Circuit Court from the definition).

(Recommendation 28)

### Second INSLM recommendation

The second INSLM accepted this recommendation, but recommended that the Federal Court be empowered to remit a matter to the Federal Circuit Court.

### Response

- **COAG** supported the recommendation of the Review Committee in part.
  - It considered it appropriate to remove the Family Court from the definition of ‘issuing court’.
  - Conversely, it supported retaining the inclusion of the Federal Circuit Court, noting the Federal Circuit Court and Federal Court ‘have broad general federal law jurisdictions’ and are therefore ‘more familiar with the type of processes and powers required to administer the [control order] regime’.
  - Consequently, the 2016 Amendment Act only removed Family Court from the definition of ‘issuing court’ in 100.1 of the Criminal Code.

### Control orders as a last resort

Investigating agencies, prior to the AFP requesting consent from the Attorney-General to seek an interim control order, should provide the CDPP with the material in their possession so that the Director may, in light of the Prosecution Policy of the Commonwealth, consider or reconsider the question of prosecution in the criminal courts.

(Recommendation 29)

The COAG Review Committee noted that this recommendation did not

The second INSLM noted that no further action was required.

- **COAG** supported the recommendation of the Review Committee in principle.
  - It noted that, in practice, there is appropriate consultation and cooperation between the AFP and the CDPP when control orders are under consideration. Retaining this approach as a matter of practice, rather than as a statutory obligation, ensures appropriate flexibility and discretion in individual cases.
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<tr>
<th>COAG Review Committee recommendation</th>
<th>Second INSLM recommendation</th>
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<td>necessarily require legislative incorporation.</td>
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**Special advocates**

The government should give consideration to amending the legislation to provide for the introduction of a nationwide system of ‘special advocates’ to participate in control order proceedings.

(Recommendation 30)

The second INSLM supported this recommendation in principle.

The second INSLM further recommended that div 104 be amended to ensure that withholding of national security information from a controlee is dealt with only by the NSI Act (and not the Criminal Code).

- Initially, COAG did not support the recommendation of the Review Committee. It noted that the Commonwealth had ‘significant reservations’ about introducing such a regime. Despite these reservations, a special advocates regime was subsequently introduced by the 2016 Amendment Act (as note in para 4.13 above, this regime has not yet commenced).

COAG also noted that a majority of jurisdictions considered that the NSI Act was the ‘preferable means of protecting national security information in federal judicial proceedings, including those in relation to control orders’. However, div 104 continues to contain provisions that deal with withholding national security information from a controlee, notably:

- section 104.5(2A) (withholding information in the summary of grounds set out in the control order, which is required to be served on the controlee under s 104.12)
- section 104.12A(3)(a) (withholding information in the information required to be served on the controlee under s 104.12A when the senior AFP member elects to...
COAG Review Committee recommendation | Second INSLM recommendation | Response
--- | --- | ---
confirm the control order)  
- section 104.23(3A)  
(withholding information in the documents required to be served on the controlee under s 104.23 when the AFP Commissioner wishes to vary the controls imposed by the control order).

Minimum standard of disclosure of information to controlee

The legislation should provide for a minimum standard concerning the extent of the information to be given to a controlee in an application for the confirmation of a control order, or an application for a variation or revocation of a control order.

The minimum standard should be: ‘the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations.’

This protection should be

The second INSLM observed that the substance of this recommendation was adequately reflected in sch 15 to the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 if:

- if a system of special advocates is introduced
- the withholding of national security information in control order proceedings is governed by the NSI Act and not the Criminal Code

Initially, COAG did not support the recommendation of the Review Committee. It noted that a majority of jurisdictions considered existing provisions in div 104 to be sufficient and appropriate. It added that the proposed new minimum standard ‘imports an inappropriately broad and subjective standard in relation to the ‘sufficiency’ of information disclosed, the application of which may delay the hearing of confirmation applications and prejudice security interests’.

Despite these concerns, s 38K of the NSI Act, as introduced by the 2016 Amendment Act, provides for the court to make and order withholding information where ‘the court is satisfied that the relevant

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263 Schedule 15 to the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 contained provisions establishing the special advocates regime in the NSI Act. The second INSLM based his observation of the provision in the Bill (new s 38J(1)(c)) that an order to withhold information from the controlee could not be made unless ‘the court is satisfied that the relevant person has been given notice of the allegations on which the control order request was based’ if the relevant person has been given notice of the information supporting those allegations’. This provision was subsequently revised and enacted by the 2016 Amendment Act. Section 38J(1)(c) now provides for the court to make an order where ‘the court is satisfied that the relevant person has been given sufficient information about the allegations on which the control order request was based to enable effective instructions to be given in relation to those allegations’.
<table>
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<tr>
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<th>Response</th>
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| enshrined in div 104 wherever necessary. (Recommendation 31) | (ie the two parts of the INSLM’s response to recommendation 30). | person has been given sufficient information about the allegations on which the control order request was based to enable effective instructions to be given in relation to those allegations’.

**Information concerning appeal rights**

Section 104.12 should be amended to provide that the information to be given to a person the subject of an interim control include information as to all appeal and review rights available to that person or to the applicant in the event that an interim order is confirmed, varied or revoked. (Recommendation 32)

The second INSLM did not consider this recommendation as it had been implemented (in the Counter-Terrorism Legislation Amendment Bill (No 1) 2015).

- COAG supported the recommendation of the Review Committee.

In line with the recommendation, s 104.12(1)(b)(iiia) was inserted by the 2016 Amendment Act.

**Relocation condition**

Section 104.5(3)(a) should be amended to ensure that a prohibition or restriction not constitute – in any circumstances – a relocation order. (Recommendation 33)

The second INSLM supported this recommendation.

- Despite COAG supporting the recommendation of the Review Committee, no such amendment has yet been made.

**Curfew condition**

A prohibition or restriction under s 104.5(3)(c) – a curfew order – should be generally no greater in any case than 10 hours in one day.

The second INSLM concluded that this recommendation did not need to be pursued. Instead, he recommended that early consideration be

- COAG supported the recommendation of the Review Committee in part. It supported an indicative maximum curfew of 12 hours within a 24-hour period.

In line with this modification,
<table>
<thead>
<tr>
<th>COAG Review Committee recommendation</th>
<th>Second INSLM recommendation</th>
<th>Response</th>
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<tbody>
<tr>
<td>(Recommendation 34)</td>
<td>given to including an overnight residence requirement.</td>
<td>s 104.5(3)(c) was amended by the Foreign Fighters Act to add the words ‘but for no more than 12 hours within any 24 hours’.</td>
</tr>
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</table>

**Communication restrictions**

Other than in any exceptional case, the prohibitions or restrictions under s 104.5(3)(f) should permit the controlled person to have access to one mobile phone, one landline, and one computer with access to the internet.

(Recommendation 35)

The second INSLM did not support this recommendation.

**COAG** did not support this recommendation. No amendment has been made to s 104.5(3)(f) to implement the recommendation.

**Limit on duration**

For the present time, there should be no change to the maximum duration of a control order, namely a period of 12 months.

(Recommendation 36)

The second INSLM did not consider this recommendation as it had been accepted by the government.

**COAG** supported the recommendation of the Review Committee.

The duration of a control order remains one year (ss 104.5(1)(f) and 104.16(d)).

**Terms of an interim control order**

Section 104.5 should be amended to ensure that, whenever a control order is imposed, any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person’s liberty, privacy or freedom of movement that is necessary in all the circumstances.

The second INSLM supported a variation of this recommendation in principle.

This variation is that the issuing court consider whether the combined effect of all of the proposed controls is proportionate (in addition to requirement in s 104.4(1)(d) that the court consider the proportionality.

**COAG** did not support this recommendation.
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<tr>
<th>COAG Review Committee recommendation</th>
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<tr>
<td>(Recommendation 37)</td>
<td>of each proposed control)</td>
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### Oversight by Ombudsman

The Commonwealth Ombudsman should be empowered specifically to provide general oversight of interim and confirmed control orders.

The second INSLM concluded that this recommendation was not necessary.

- COAG did not support this recommendation.
## APPENDIX C – CHRONOLOGY OF THE CONTROL ORDER REGIME

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
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<tbody>
<tr>
<td>14 December 2005</td>
<td>Div 104 inserted by the <em>Anti-Terrorism Act (No 2)</em> 2005</td>
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<tr>
<td><strong>2006</strong></td>
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<td><strong>2007</strong></td>
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<tr>
<td>27 August 2006 – 28 August 2007</td>
<td>First control order in force</td>
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<tr>
<td>21 December 2007 – 22 December 2008</td>
<td>Second control order in force</td>
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<td><strong>2008</strong></td>
<td></td>
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<tr>
<td><strong>2009</strong></td>
<td></td>
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<tr>
<td><strong>2012</strong></td>
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For an explanation of the different ‘tranches’ of national security legislation, see chapter 4 under ‘subsequent amendments’.
CONTROL ORDERS & PREVENTATIVE DETENTION ORDERS

2013

2014

2015

2016

2017

1 December 2014
Second tranche

30 November 2016
Fifth tranche

9 January 2015
Third tranche

7 June 2017
Sixth tranche

Monitoring regime

CDO regime

17 December 2014 – 18 December 2015
Third and fourth control orders in force
(neither confirmed)

5 March 2015 – 6 March 2016
Fifth control order in force
(confirmed 30 November 2016)

10 September 2015 – 11 September 2016
Sixth control order in force
(confirmed 8 July 2016)

20 December 2012
First INSLM reports on his review of the control order regime, recommending repeal

1 March 2013
COAG Review Committee reports on its review of counter-terrorism legislation, recommending additional safeguards

10 October 2014
COAG responds to the Review Committee’s recommendations

20 November 2014
PJCIS recommends that the INSLM be tasked with considering whether the safeguards recommended by the COAG Review Committee should be introduced

15 February 2016
PJCIS supports the introduction of a special advocates regime

26 January 2016 – 13 April 2016
Second INSLM reports on control order safeguards