9 September 2020

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Review of AFP Powers

Thank you for the opportunity to make a submission to this review of the operation, effectiveness and implications of provisions under Division 3A of Part IAA of the *Crimes Act 1914* (Cth) (*Crimes Act*), and Divisions 104, 105 and 105A of the *Criminal Code Act 1995* (Cth) (*Criminal Code*). This is a joint submission by legal academics from: Law School, Durham University; Faculty of Law, University of New South Wales; and Law School, University of Western Australia. We are solely responsible for the views and content contained therein.

The arguments set out in this submission substantially replicate those we have previously made to parliamentary and independent inquiries. They have, however, been updated to refer to the recommendations made by the former Independent National Security Legislation Monitor (INSLM), James Renwick SC, in 2017, and the Parliamentary Joint Committee on Intelligence and Security (this Committee) in 2018, as well as to their partial implementation by way of the *Counter-Terrorism Legislation Amendment Act (No 1) 2018* (Cth). Amongst other things, that Act extended the sunset clause applying to Division 3A of Part IAA of the *Crimes*

Act 1914 (Cth), and Divisions 104 and 105 of the *Criminal Code*, for three years (to 7 September 2021).

Please do not hesitate to contact Dr Nicola McGarrity on n.mcgarrity@unsw.edu.au should you have any queries about this submission or require any additional information.

Yours sincerely

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Division 3A of Part IAA of the *Crimes Act* – Stop, Search and Seizure

Division 3A of Part IAA of the *Crimes Act* was introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth), and established 'a new regime of stop, question, search and seize powers that will be exercisable [by members of the Australian Federal Police (AFP) or of a State or Territory police force][1] at airports and other Commonwealth places to prevent or respond to terrorism'.[2] These powers may be exercised in two circumstances. First, if a person is in a Commonwealth place and the officer suspects on reasonable grounds that they might have just committed, might be committing, or might be about to commit, a terrorist act.[3] Second, if a person is in a Commonwealth place in a 'prescribed security zone'.[4] The Minister may declare a Commonwealth place to be a prescribed security zone if they consider it would assist in preventing a terrorist act occurring or in responding to a terrorist act that has occurred.[5] A declaration remains in effect for 28 days or until revoked by the Minister.[6] In either of these circumstances, a person may be obliged to give their name, address, evidence of their identity and reason for being in that particular Commonwealth place to a police officer.[7] They may also be subjected to a personal search, a search of any vehicle which is operated or occupied by them, or a search of any thing that is under their immediate control or which an officer suspects they have brought into the Commonwealth place.[8]

Division 3A has been reviewed on four prior occasions: in 2013, by the Council of Australian Governments (COAG) Review of Counter-Terrorism Legislation;[9] in 2014, by the Parliamentary Joint Committee on Human Rights;[10] in 2017, by the former INSLM, James Renwick SC;[11] and

[1] *Crimes Act 1914* (Cth) s 3UA.
[2] Explanatory Memorandum to the Anti-Terrorism Bill (No 2) 2005.
[3] *Crimes Act 1914* (Cth) s 3UB(1)(a).
[4] Ibid s 3UB(1)(b).
[5] Ibid s 3UJ.
[6] Ibid
[7] Ibid s 3UC.
[8] Ibid s 3UD.
[9] Council of Australian Governments Counter-Terrorism Review Committee, *Review of Counter-Terrorism Legislation* (2013).
[10] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fourteenth Report of the 44th Parliament* (2014).
[11] James Renwick SC, Independent National Security Legislation Monitor, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers* (2017). Brief attention was also given to Division 3A in Bret Walker SC, Independent National Security Legislation Monitor, *2011 Annual Report* (2012).

in 2018, by this Committee.[12] On each occasion, the reviews concluded that the powers in Division 3A were appropriate. However, three specific aspects of the Division were the subject of criticism in submissions to those inquiries. These will be dealt with in turn below.

Reasonable suspicion

The first issue was the appropriateness of the powers being exercised based on reasonable suspicion (rather than reasonable belief). Whilst this has been criticised by the Joint Councils for Civil Liberties as imposing too low a standard,[13] we acknowledge that all previous parliamentary and independent reviews have concluded that it is appropriate in light of the purpose of the powers in Division 3A. This Committee, for example, noted the intention of the Division as being 'to allow police to respond rapidly to terrorist incidents. … The application of the "reasonable grounds to suspect" standard allows police to act in the most expeditious manner when a threat is suspected'.[14] Importantly, this standard is not a subjective one. As explained by Renwick, 'idle speculation … [which] has no foundation on the facts' would be insufficient.[15] This standard 'requires facts which are sufficient to induce that state of mind in a reasonable person'.[16] Ultimately, we agree that the standard of reasonable suspicion is appropriate for the exercise of powers under Division 3A. However, we are concerned about the effect of this standard operating in combination with the criterion of '*might* have just committed, *might* be committing or *might* be about to commit, a terrorist act' (emphasis added). The inaugural INSLM, Brett Walker SC, noted that this 'inserts another layer of permissible uncertainty. Given the use of the word "suspects", it is perhaps disquieting that this relaxation of a safeguard prerequisite was regarded as necessary'.[17] Whilst we do not reach any definitive conclusions on this issue, we urge this Committee to direct its attention not only to the appropriateness of the standard and the criteria

[12] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Police Stop, Search and Seizure Powers, the Control Order Regime and the Preventative Detention Order Regime* (2018).
[13] Joint Council for Civil Liberties, Submission to the Parliamentary Joint Committee on Intelligence and Security's Review of Police Stop, Search and Seizure Powers, the Control Order Regime and the Preventative Detention Order Regime, 31 October 2017, 6-7.
[14] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Police Stop, Search and Seizure Powers, the Control Order Regime and the Preventative Detention Order Regime* (2018) 26.
[15] James Renwick SC, Independent National Security Legislation Monitor, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers* (2017) 33.
[16] Ibid.
[17] Bret Walker SC, Independent National Security Legislation Monitor, *2011 Annual Report* (2012) 43.

individually, but also to their cumulative effect, in determining whether to recommend any amendments.

Prescribed security zones

The second issue is the power of the Minister to declare a Commonwealth place to be a 'prescribed security zone'. Whilst not explicit in Division 3A, Mr Walker concluded that it would likely be interpreted by the courts to require the Minister 'to act reasonably, albeit with full appreciation of the emergency nature of the situation'.[18] The significance of a declaration is that it enables the stop, search and seizure powers to be exercised by federal, State and Territory officers in the absence of reasonable suspicion. Whilst powers that are dependent upon ministerial declarations are understandably controversial, we acknowledge Mr Walker's suggestion that this may be preferable to 'extraordinary powers … becom[ing] available by reason of one police officer's mental processes'.[19] We therefore refrain from reaching any definitive conclusions in relation to the appropriateness of declarations per se.

We do, however, urge this Committee to examine whether sufficient transparency and accountability has been built into the declaration process. We are particularly concerned about two aspects of this process. One is a lack of clarity about 'what matters a Minister will take into account in prescribing a security zone, or indeed to revoke a prescription'.[20] The absence of a legislative list (albeit necessarily an inclusive one) is particularly anomalous given the clear evidence previously given to this Committee as to what information the AFP would include in any brief to the Minister. This includes: 'the seriousness of the threat or attack, the credibility of the threat, the imminence of the attack, and the nature of the intelligence relied on'.[21] Whilst we agree that requiring the Minister to give reasons for their decision is likely to

[18] Ibid 44.
[19] Ibid.
[20] Australian Human Rights Commission, Submission to the Parliamentary Joint Committee on Intelligence and Security's Review of Police Stop, Search and Seizure Powers, the Control Order Regime and the Preventative Detention Order Regime, 22 September 2017, 10.
[21] Attorney-General's Department and Australian Federal Police, Response to Questions from the Parliamentary Joint Committee on Intelligence and Security during the Review of Police Stop, Search and Seizure Powers, the Control Order Regime and the Preventative Detention Order Regime, <https://www.aph.gov.au/DocumentStore.ashx?id=5447abfd-97eb-4433-8253-7e955db74537&subId=561854> (accessed September 2020).

be inappropriate for operational reasons, it is difficult to see what possible objections there could be to the inclusion in Division 3A of a list of matters which must be taken into account in making that decision.

The other aspect of the declaration process about which we are concerned is the absence of any 'ongoing obligation on the Minister to review the necessity of a declaration within the 28 day period the declaration is in force'.[22] We appreciate the arguments previously made to this Committee about the inefficiency of the AFP being required to provide ongoing briefings to the Minister and that, in any event, best practice required that 'if the AFP has information that would support revocation of a declaration, a brief outlining that information would be provided to the Minister'.[23] In its final report, this Committee went so far as to conclude that 'there would … be a public expectation for the Minister to revoke any declaration that is no longer required'.[24] In our opinion, any inefficiency is outweighed by the significant impact of the stop, search and seizure powers upon the rights to liberty and privacy. To ensure that a declaration does not remain in effect longer than is necessary or proportionate to the threat to national security, Division 3A should clearly outline the obligations upon the AFP and the Minister to regularly review the situation. It does not seem to be overly onerous for the AFP to be required to bring to the Minister's attention any information which is relevant to the making or revoking of a declaration, and for the Minister to be required to consider this information. Including these obligations in legislation is preferable to relegating them to being matters of internal AFP policy or relying upon the public to bring pressure to bear upon the Minister.

[22] Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security's Review of Police Stop, Search and Seizure Powers, the Control Order Regime and the Preventative Detention Order Regime, 3 November 2017, 9.

[23] Attorney-General's Department and Australian Federal Police, Supplementary Submission to the Parliamentary Joint Committee on Intelligence and Security's Review of Police Stop, Search and Seizure Powers, the Control Order Regime and the Preventative Detention Order Regime, 2 <https://www.aph.gov.au/DocumentStore.ashx?id=21ad9998-5d4e-422e-8f72-cdc0623e1d4b&subId=561854> (accessed September 2020).

[24] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Police Stop, Search and Seizure Powers, the Control Order Regime and the Preventative Detention Order Regime* (2018) 24.

Warrantless searches

The third, and final, aspect of Division 3A which has been the subject of criticism is the warrantless search power in s 3UEA. This section was introduced by the *National Security Legislation Amendment Act 2010* (Cth), and allows a member of a federal, State or Territory police force to conduct a warrantless search of premises where they reasonably suspect that it is necessary to: (a) prevent a thing that is on the premises from being used in connection with a terrorism offence; and (b) exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety. We have consistently expressed strong opposition to this power. Searches of private property violate the rights to home and privacy. For this reason, and in order to limit the potential for misuse of power by a police officer, it is important that searches are subject to judicial oversight. In each case, it should be for a magistrate or judge to weigh any evidence of a criminal offence having been committed, or being imminent, and determine whether that evidence is sufficiently strong to justify a violation of the rights to home and privacy.

A compelling justification should be demonstrated before a police officer is permitted to conduct a search of private property without judicial supervision. The most detailed (albeit still vague) explanation of the need for warrantless searches was set out by the then Rudd Labor Government in the National Security Legislation Discussion Paper released in August 2009. The Government stated that the power is 'intended to address operational issues that have emerged in law enforcement operations'.[25] In addition, '[t]he availability to the AFP of wider emergency powers has become increasingly necessary particularly in the area of counter-terrorism operations. An emergency entry power is necessary to supplement existing search, entry and seizure powers which only give police partial coverage for emergency situations'.[26] The then Commonwealth Attorney-General, Robert McClelland, also stated that there will be some circumstances in which the police do not have the time to obtain a warrant from a magistrate or judge.[27] In our opinion, the AFP should only be given the power to conduct warrantless searches as a last resort. We note that police officers are already able to

[25] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 147.
[26] Ibid 151.
[27] *7:30 Report*, Australian Broadcasting Corporation, 12 August 2009.

obtain a search warrant by a variety of means (including phone and fax) at short notice. Another option that might be explored in preference to warrantless searches is the establishment of a duty judge system whereby applications for search warrants could be received and considered on an expedited basis. There is no evidence that such a system would be insufficient to respond to McClelland's concerns.

One safeguard built into the warrantless search regime is that no more than 24 hours after the entry, a police officer must notify the occupier of the premises of entry or, if this is not practicable, leave a written notice of the entry at the premises. Such notification presumably allows the occupier of the premises to challenge the validity of the warrantless search. However, in our opinion, it is inappropriate to place the onus upon the occupier. This is so not only because that person is generally entitled to the rights to home and privacy, but also because it is easy to envisage circumstances where the person may not become aware of the search in a timely manner, for example, where they are travelling overseas or interstate. Instead, if the warrantless search power is to be retained, we recommend that the police officer conducting the search should be required to go before a magistrate or judge as soon as possible afterwards to obtain an ex post facto warrant. Such a warrant would be issued on the basis that there were some reasonable grounds for the member to suspect that: (a) a thing is on the premises that is relevant to a terrorism offence, whether or not the offence has occurred; (b) it is necessary to exercise the warrantless search power in order to prevent the thing from being used in connection with a terrorism offence; and (c) it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.[28] If an ex post facto search warrant is not granted, this should have the consequence that any evidence identified by the police officer in the course of the search is inadmissible in court. The effect of this amended regime would be to place the onus of justifying the search upon the police officer, as opposed to requiring the occupier of the premises to prove that it was invalid.

[28] Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security's Review of Police Stop, Search and Seizure Powers, the Control Order Regime and the Preventative Detention Order Regime, 3 November 2017, 8.

Division 105 of the *Criminal Code* – Preventative Detention Orders

Division 105 of the Criminal Code provides that a person may be detained under a preventative detention order (PDO) for up to 48 hours in order to prevent a terrorist act which could occur within the next 14 days from occurring (the first basis on which a PDO may be issued) or to preserve evidence relating to a recent terrorist act (the second basis on which a PDO may be issued).[29] This period of detention can be extended up to a maximum of two weeks under State legislation.[30] For a PDO to be issued to prevent a terrorist act, an issuing court must be satisfied, on application by an AFP officer, that there are reasonable grounds to suspect that a person will engage in a terrorist act, possesses a thing connected with preparation for a terrorist act, or has done an act in preparation for a terrorist act.[31] The issuing court must also be satisfied that 'making the order would substantially assist in preventing a terrorist act occurring' and 'detaining the subject for the period for which the person is to be detained under the order is reasonably necessary' for this purpose.[32] The detainee is not entitled to contact any person except a family member, employer or similar to let them know that they are 'safe but … not able to be contacted for the time being.'[33]

Division 105 clearly infringes the freedoms of movement, association and from arbitrary detention. It also infringes client legal privilege as any communication between the person and a lawyer must be capable of being monitored.[34] The infringement of these rights is unjustified. The former INSLM, Bret Walker SC, described the powers in his 2012 Annual Report as being 'at odds with our normal approach to even the most reprehensible crimes'.[35] The COAG Review remarked that such powers 'might be thought to be unacceptable in a

[29] *Criminal Code Act 1995* (Cth) s 105.1.
[30] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) pt 2; *Terrorism (Police Powers) Act 2002* (NSW) pt 2A; *Terrorism (Emergency Powers) Act 2003* (NT) pt 2B; *Terrorism (Preventative Detention) Act 2005* (Qld) pt 2; *Terrorism (Preventative Detention) Act 2005* (SA) pt 2; *Terrorism (Preventative Detention) Act 2005* (Tas) pt 2; *Terrorism (Community Protection) Act 2003* (Vic) pt 2A; *Terrorism (Preventative Detention) Act 2006* (WA) pt 2
[31] *Criminal Code Act 1995* (Cth) s 105.4(4)(a).
[32] Ibid s 105.4(4).
[33] Ibid s 105.35(1).
[34] Ibid s 105.38.
[35] Bret Walker SC, Independent National Security Legislation Monitor, *2012 Annual Report* (2013) 47.

liberal democracy'.[36] Both recommended that the PDO regime be repealed.[37] Importantly, their recommendations were based not only on human rights, but also practical, considerations.

Multiple submissions by federal, State and Territory police forces to the INSLM and the COAG Review indicated that law enforcement is unlikely to use the PDO provisions because other, more suitable, detention powers are available.[38] Mr Walker therefore concluded in relation to the PDO regime that 'no material or argument demonstrated that the traditional criminal justice response to the prevention and prosecution of serious crime through arrest, charge and remand is ill-suited or ill-equipped to deal with terrorism'.[39] This is clear from an examination of the two bases identified above on which a PDO may be issued.

First, where evidence is available to support the first basis on which a PDO may be issued (i.e. to prevent a terrorist attack which could occur in the next 14 days from occurring), one would expect a range of alternative measures to be available. These include: questioning under the pre-charge detention regime in Part IC of the *Crimes Act 1914* (Cth); laying of charges for preparatory or other terrorism offences (especially in combination with the inchoate offences of attempt, conspiracy and incitement); obtaining control orders over relevant persons; or, finally, applying for an Australian Security Intelligence Organisation Questioning Warrant. Each of these measures is likely to be far more effective in preventing terrorism because it permits questioning of the subject. Of concern to both Walker and the COAG Review was that the PDO regime would ultimately be counter-productive to the overarching aim of preventing terrorist acts because detainees cannot be questioned.[40]

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[36] Council of Australian Governments Counter-Terrorism Review Committee, *Review of Counter-Terrorism Legislation* (2013) 68.

[37] Bret Walker SC, Independent National Security Legislation Monitor, *2012 Annual Report* (2013) 67 (Recommendation III/4); Council of Australian Governments Counter-Terrorism Review Committee, *Review of Counter-Terrorism Legislation* (2013) 68 (Recommendation 39).

[38] See examples in: Bret Walker SC, Independent National Security Legislation Monitor, *2012 Annual Report* (2013) 55-59; and, Council of Australian Governments Counter-Terrorism Review Committee, *Review of Counter-Terrorism Legislation* (2013) 69-70.

[39] Bret Walker SC, Independent National Security Legislation Monitor, *2012 Annual Report* (2013) 52.

[40] Ibid 59; Council of Australian Governments Counter-Terrorism Review Committee, *Review of Counter-Terrorism Legislation* (2013) 68-70.

Secondly, where evidence is available to support the second basis on which a PDO may be issued (i.e. to preserve evidence relating to a recent terrorist attack), it is arguably easier to appreciate the function that a PDO may serve. However, even though it aims to assist criminal investigations, detention of individuals – without any requirement of wrongdoing or even *suspicion* of wrongdoing on their part – is an extraordinary measure. It may potentially allow detention of large groups of people from 'suspect communities' based upon crude racial profiling in the wake of a terrorist incident. This occurred in the United States after September 11, with many people held under 'material witness' provisions.[41] This is a highly undesirable way in which to conduct efficient police investigations that respect the rights of innocent people. Ultimately, we submit that PDOs are only capable at best of filling a very slight gap in Australia's anti-terrorism measures. That is, they are valuable in permitting the detention of a person as part of a criminal investigation which does not necessarily involve him or her directly. This is starkly at odds with basic criminal justice and rule of law values.

No PDOs have been issued under the federal regime since its introduction 15 years ago. However, as set out in the table on the next page, there have been four occasions on which PDOs have been issued under the New South Wales and Victorian legislation:

[41] United States Civil Society Organizations and Advocations, *Memorandum to the United Nations Human Rights Committee*, 29 August 2005, 4-5 <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ICCPR_issues.doc> (accessed September 2020).

Name	Date of issue	Date of detention	Date order lifted	Issuing court	Grounds
Unnamed	17/9/2014	18/9/2014	19/9/2014	NSW Supreme Court	Non-publication order prevents disclosure of any information
Unnamed	17/9/2014	18/9/2014	19/9/2014	NSW Supreme Court	Non-publication order prevents disclosure of any information
Unnamed	17/9/2014	18/9/2014	19/9/2014	NSW Supreme Court	Non-publication order prevents disclosure of any information
Harun Causevic	17/4/2015	18/4/2015	21/4/2015 [2015] VSC 248	Victorian Supreme Court	Reasonable grounds to suspect that Causevic had been planning to engage in a terrorist act in the next 14 days

This record is consistent with public statements by federal agencies that 'they would be more likely to arrange for an application for a PDO under complementary state legislation than the Commonwealth framework'.[42] The AFP gave evidence to the former INSLM, James Renwick SC, that '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'.[43] The INSLM went on to conclude that 'there is a real question as to whether [that regime] will ever be used in preference to a state or territory PDO. … [I]ts 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'.[44]

[42] New South Wales Department of Justice, New South Wales Government, *Statutory Review: Terrorism (Police Powers) Act 2002* (2018) 45.
[43] James Renwick SC, Independent National Security Legislation Monitor, *Review of Divisions 104 and 105 of the Criminal Code (Including the Interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017) 80.
[44] Ibid.

On none of the listed occasions were PDOs used as a means of preserving evidence relating to a recent terrorist attack. Instead, they were issued on the ground of preventing an imminent terrorist attack from occurring. All four uses of the PDO regime appear to have occurred when the police already had sufficient evidence for an arrest. Causevic was arrested immediately following his release from detention under a PDO and charged with the offence of planning a terrorist attack (charges which were later withdrawn). The three unnamed men detained under PDOs on 18 September 2014 had been arrested by the AFP as part of Operation Appleby. The PDOs were only issued when the men exercised their right to silence.[45] This raises the question as to whether the PDOs in this case were used as a punitive, rather than a preventive, measure. All four cases, however, demonstrate the overlap between the PDO regime and police powers of arrest.

In light of the broad powers already existing, which enable charging or questioning of persons before any terrorist act has occurred, and the extreme impact of detention as a means of preserving evidence, we submit that Division 105 is unnecessary and should be repealed in its entirety.

[45] 'Gaughan said: "We already have questioning powers when we arrest somebody for an offence prior to the issuance of the PDO. I suppose the example I can give in reality is what occurred in Sydney last month with Operation Appleby, where we took a number of people into custody for questioning. One person exercised his right to silence and then he was issued with a PDO. A couple of others continued to talk with us for a while"': see Paul Farrell, 'Preventative Detention Orders "Used as a Tool to Break Terrorism Suspects",' *The Guardian*, 8 October 2014.

Division 104 of the *Criminal Code* – Control Orders

We have consistently argued for the repeal of control orders in Division 104 of the *Criminal Code*. This was a view shared by the former INSLM, Bret Walker SC, in his 2012 Annual Report[46] (albeit rejected by subsequent INSLMs).[47] Mr Walker's recommendation was not implemented by the then Gillard Labor government, nor by the subsequent Rudd Labor, and Abbott and Turnbull Coalition governments. Instead, over the past decade, Division 104 has been significantly expanded in two respects. First, new grounds upon which a control order may be obtained have been added.[48] Second, the regime now applies to minors aged between 14 and 16 years.[49]

Since 7 September 2018, when Division 104 was last renewed, nine control orders have been issued. The table below provides details of each of these control orders:

[46] Bret Walker SC, Independent National Security Legislation Monitor, *2012 Annual Report* (2013) 44.

[47] Roger Gyles AO QC, Independent National Security Legislation Monitor, *Control Order Safeguards – (INSLM Report) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (2016); Roger Gyles AO QC, Independent National Security Legislation Monitor, *Control Order Safeguards Part 2* (2016); James Renwick SC, Independent National Security Legislation Monitor, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017).

[48] When Division 104 was introduced, a senior AFP member could only seek the Attorney-General's consent if he or she: (a) considered on reasonable grounds that the order would substantially assist in preventing a terrorist act; or, (b) suspected on reasonable grounds that the person had provided training to, or received training from, a listed terrorist organisation. Following amendments made by the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* (Cth) and the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), the Attorney-General's consent under s 104.2(2) may now be sought if the senior AFP member suspects any of the following on reasonable grounds: (a) that the order would substantially assist in preventing a terrorist act; (b) that the person has provided training to, received training from or participated in training with a listed terrorist organisation; (c) that the person has engaged in a hostile activity in a foreign country; (d) that the person has been convicted in Australia of a terrorism offence; (e) 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; (f) that the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or (g) that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country.

[49] *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth) Schedule 2.

Name	Case name(s)	Date interim order issued	Date order confirmed	Date order expires	Ground(s) on which interim order made	Other information
EB	McCartney v EB [2019] FCA 183 (30 January 2019)	30 January 2019	Unknown	Unknown	• s 104.4(1)(c)(iv) (respondent has been convicted in Australia of an offence relating to terrorism) • s 104.4(1)(c)(vii) (respondent has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country)	Convicted under section 119.4(1) of the *Criminal Code Act 1995* (Cth), term of imprisonment expired on 2 February 2019
Zainab Abdirahman-Khalif	McCartney v Abdirahman-Khalif [2019] FCA 2218; McCartney v Abdirahman-Khalif (No 2) [2020] FCA 1002 (17 July 2020)	22 November 2019	17 July 2020	21 November 2020	• s 104.4(1)(c)(i) (order would substantially assist in preventing • a terrorist act) • s 104.4(1)(c)(vi) (order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act)	Convicted on 17 September 2018 under s 102.2(1) of the *Criminal Code Act 1995* (Cth), released from prison on 31 October 2019 after the Court of Criminal Appeal ordered that the guilty verdict be set aside and that a verdict of acquittal be entered
Alo-Bridget Namoa	Booth v Namoa (No 1) [2019] FCA 2213; Booth v Namoa (No 2) [2020] FCA 73 (3 February 2020)	19 December 2019	3 February 2020	18 December 2020	• s 104.4(1)(c)(iv) (respondent has been convicted in Australia of an offence relating to terrorism)	Convicted under ss 11.5(1) and 101.6(1) of the *Criminal Code Act 1995* (Cth), sentenced to 3 years 9 months imprisonment expiring 22 December 2019 with a non-parole period of 2 years and 10 months (parole not granted)

Murat Kaya	Booth v Kaya [2020] FCA 25; Booth v Kaya (No 2) [2020] FCA 1119 (29 July 2020)	22 January 2020	29 July 2020	21 January 2021	• s 104.4(1)(c)(iv) (respondent has been convicted in Australia of an offence relating to terrorism)	Arrested on 10 May 2016 and convicted under s 119.4(1) of the *Criminal Code Act 1995* (Cth) by virtue of s 11.2A (joint participation) of the *Criminal Code Act 1995* (Cth), sentenced to 3 years and 8 months imprisonment, with a non-parole period of two years and nine months, sentence expired 23 January 2020 (parole not granted)
Ahmad Saiyer Naizmand	Booth v Naizmand [2020] FCA 244 (27 February 2020)	27 February 2020	Not yet confirmed	Not yet confirmed	• s 104.4(1)(c)(iv) (respondent has been convicted in Australia of an offence relating to terrorism)	Convicted under s 104.27 of the *Criminal Code Act 1995* (Cth), for contravening prior control orders made in 2015 by a judge of the Federal Circuit Court of Australia, sentenced to 4 years imprisonment after pleading guilty, released 28 February 2020
Shayden Jamil Thorne	Booth v Thorne [2020] FCA 445; Booth v Thorne (No 2) [2020] FCA 1196 (17 August 2020)	6 March 2020	17 August 2020	5 March 2021	• s 104.4(1)(c)(iv) (respondent has been convicted in Australia of an offence relating to terrorism)	Arrested on 10 May 2016 and convicted under s 119.4(1) of the *Criminal Code Act 1995* (Cth) by virtue of s 11.2A (joint participation) of the *Criminal Code Act 1995* (Cth), sentenced to 3 years and 10 months imprisonment with non-parole period of 2 years and ten-and-a-half months (parole not granted)

Paul James Dacre	Booth v Dacre [2020] FCA 751 (14 May 2020)	14 May 2020	Not yet confirmed	Not yet confirmed	• s 104.4(1)(c)(iv) (respondent has been convicted in Australia of an offence relating to terrorism)	Arrested on 10 May 2016 and convicted under s 119.4(1) of the *Criminal Code Act 1995* (Cth) by virtue of s 11.2A (joint participation) of the *Criminal Code Act 1995* (Cth), sentenced to 4 years, with a non-parole period of 3 years, sentence expired 8 May 2020 (parole not granted)
Kadir Kata	Booth v Kadir Kaya [2020] FCA 764 (28 May 2020)	28 May 2020	Not yet confirmed	Not yet confirmed	• s 104.4(1)(c)(iv) (respondent has been convicted in Australia of an offence relating to terrorism)	Arrested on 10 May 2016 and convicted under s 119.4(1) of the *Criminal Code Act 1995* (Cth) by virtue of s 11.2A (joint participation) of the *Criminal Code Act 1995* (Cth), sentenced to 4 years, with a non-parole period of 3 years, sentence expired 8 May 2020 (parole not granted)
Antonio Alfio Granata	Booth v Granata [2020] FCA 768 (29 May 2020)	29 May 2020	Not yet confirmed	Not yet confirmed	• s 104.4(1)(c)(iv) (respondent has been convicted in Australia of an offence relating to terrorism)	Arrested on 10 May 2016 and convicted under s 119.4(1) of the *Criminal Code Act 1995* (Cth) by virtue of s 11.2A (joint participation) of the *Criminal Code Act 1995* (Cth), sentenced to 4 years, with a non-parole period of 3 years, sentence expired 8 May 2020 (parole not granted)

Of the nine control orders issued since Division 104 was last renewed by the Parliament (September 2017), eight have been imposed on the ground '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)'.[50] In these cases, the control order was imposed shortly after the individual was released from prison at the end of their sentence. The ninth control order was issued after the individual's guilty verdict for terrorism offences was set aside by the South Australian Court of Criminal Appeal. In this instance, the control order was also imposed shortly after the individual was released from prison. In his 2012 Report, Mr Walker was concerned about 'the ability to use COs in addition to the normal trial process and as a "second attempt" at restraining a person's liberty where there has been a criminal trial but no conviction'.[51] We share this concern and submit that control orders should not be available for use following the acquittal of an individual on criminal charges.

The use of control orders in the past two years suggests that they are almost exclusively being used as a post-sentence measure. As we further explain in the section below in relation to Division 105A of the *Criminal Code* and its interoperability with the control order regime, this is not our preferred approach. In his 2012 Annual Report, Mr Walker recommended that in place of the existing control order regime, post-sentence '*Fardon* type provisions' be introduced.[52] These provisions would provide for continuing detention of 'terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness.'[53] In 2016, the federal Parliament introduced a post-sentence continued detention scheme for 'high risk' terrorist offenders.[54] However, in contrast to what was proposed by Mr Walker as a more targeted alternative to the original control order scheme, that scheme (contained in Division 105A of the *Criminal Code*) now exists *alongside* an expanded Division 104. We do not, as a matter of principle, oppose the use of post-sentence restraints in certain circumstances (which we will outline below). However, in keeping with

[50] *Criminal Code Act 1995* (Cth) s 104.4(1)(c)(iv).
[51] Bret Walker SC, Independent National Security Legislation Monitor, *2012 Annual Report* (2013) 17.
[52] Ibid 34 (n 113).
[53] Ibid 44. Walker identified two conditions for issuing a control order post-sentence: 'propensity … in relation to like offences for which he or she has been convicted', and that have been proven to the standard of *beyond a reasonable doubt*; and 'current dangerousness', proved on the *balance of probabilities* (ibid 37).
[54] *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth).

Mr Walker's proposal, we believe that control orders are not the appropriate tool for imposing such restraints. Instead, any post-sentence restraints should be exclusively contained in Division 105A of the *Criminal Code*. Transferring the post-sentence restraints currently facilitated by control orders to that Division would enable the crafting of a regime of extended supervision orders that complements the power to order continued detention.

We now turn to the remaining grounds for issuing a control order and whether they justify the retention of a more limited control order regime. In our view, there is a great deal to be said for the removal from Division 104 of the grounds relating to conduct that is covered by various terrorism offences under which the individual could be charged and prosecuted. This would amount to the repeal of s 104.4(1)(c)(ii), (iii), (v), (vi) and (vii). We have long argued, across many submissions to various review bodies since the introduction of control orders in 2005, that the extensive range of preparatory terrorism offences in Australian law has meant that preventative control orders (as distinguished from any post-sentence function they may serve) are unnecessary. This continues to be borne out by the extremely limited use of this aspect of the regime since its introduction 15 years ago.[55] This demonstrates that the emphasis which is often placed upon the need to address situations in which there is insufficient evidence to lay charges is, in practice, insignificant and does not provide any meaningful support for the retention of control orders.

Removing these grounds and transferring any post-conviction restraints to Division 105A would leave only one ground upon which a control order could be made, namely, that doing so 'would substantially assist in preventing a terrorist act' (s 104.4(1)(c)(i)). This vague and open-ended ground presents a stark challenge to the limits upon the power of the State to

[55] In total, fifteen control orders have been issued since the regime was introduced in 2005. Nine have been issued in the past two years (see table above). The other six consist of three orders which lapsed at the interim stage and only three which were confirmed. Two of these six control orders were issued against Jack Thomas and David Hicks shortly after Division 104 was introduced. No further control orders were issued until 2014, when the regime was amended in response to the threat posed by foreign terrorist fighters. Four (two interim and two confirmed orders) were then issued between 2014 and September 2017 (when Division 104 was last renewed). The two interim control orders were issued against unknown persons in December 2014 and were vacated a year later without confirmation: *Neil Gaughan v BXO15 & Anor* FILE NO: (P)SYG3493/2014 (23 December 2015). One of the two confirmed control orders lapsed at the end of the one-year period: *Gaughan v Causevic (No 2)* [2016] FCCA 1693. The other order remained in force whilst its subject served a four-year prison sentence for breach of the order: *R v Naizmand* [2016] NSWSC 836. Naizmand is currently subject to a new control order, details of which are included in the table above.

curtail individual liberty in the interests of collective security. Given this, and the far from compelling rationale for the retention of a control order regime based on this one ground alone, we submit that Division 104 should be repealed in its entirety. In support of this position, we refer to Mr Walker's statement that:

> The flaws and problems of the CO provisions … are most evident and pressing in cases where COs are proposed to be made against persons before charge and trial, after trial and acquittal or who will never be tried. … [T]he proper response need not and should not involve COs in their present form. Instead, the twofold strategy obtaining elsewhere in the social control of crime should govern. First, investigate, arrest, charge, remand in custody or bail, sentence in the event of conviction, with parole conditions as appropriate. Second, and sometimes alternatively, conduct surveillance and other investigation with sufficient resources and vigour to decide whether the evidence justifies arrest and charge. (And, meantime, surveille as intelligence priorities justify.)[56]

The scenarios referred to by Mr Walker in the first sentence of this extract – and his preferred response to them in what follows – speak to the redundancy of Division 104 as an effective or meaningful tool in Australia's national security legislative framework. That redundancy is demonstrated by an examination of the operation of the Division over 15 years, and its marginal significance to the work of the Australian agencies involved in the prevention of terrorism. The value of maintaining the Division has long been unclear. However, the potential for Division 105A to serve the same purpose in a clearer and more efficient way, and the confusion associated with the existence of parallel regimes, provides the strongest reasons to date for its repeal.

[56] Bret Walker SC, Independent National Security Legislation Monitor, *2012 Annual Report* (2013) 43.

Division 105A of the *Criminal Code* – Continuing Detention Orders

The continuing detention order regime for 'terrorist offenders' commenced operation as Division 105A of the *Criminal Code* in June 2017.[57] The Minister may apply to a State or Territory Supreme Court for a continuing detention order (CDO) that commits a terrorist offender to detention in prison at the end of his or her prison sentence.[58] The Supreme Court may issue a CDO 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' and 'that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.'[59] An example of a less restrictive measure provided in the *Criminal Code Amendment (High Rights Terrorist Offenders) Act 2016* (Cth) is a control order.[60]

To fall within the definition of a 'terrorist offender' in s 105A.3, the person must have been convicted of a terrorism-related offence. Such offences are defined as: international terrorist activities using explosive or lethal devices; a Part 5.3 offence that carries a maximum penalty of at least 7 years imprisonment; and, finally, a foreign incursions or recruitment offence. The person must be either in custody serving a sentence of imprisonment for the terrorism-related offence, serving sentences for non-terrorism-related offences and have 'been continuously detained in custody since being convicted of'[61] a terrorism-related offence, or in custody pursuant to an interim or continuing detention order. The person must be at least 18 years old when the sentence ends.

The effect of a CDO is to commit the offender to detention in prison for the period of time that the order is in force,[62] which may be no more than three years.[63] There is no legislative

[57] *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth) s 2.
[58] *Criminal Code Act 1995* (Cth) s 105A.3(2).
[59] Ibid s 105A.7(1)(b) and (c).
[60] Ibid s 105A.7(1) (Note 1)
[61] Ibid s105A.3(1)(b)(ia) (inserted by *Counter-Terrorism Legislation Amendment (2019 Measures No.1) Act 2019* (Cth)).
[62] Ibid s 105A.3(2).
[63] Ibid s 105A.7(5).

restriction on the number of successive continuing detention orders that the court can make against a terrorist offender.[64]

As we have previously submitted to this Committee,[65] we acknowledge that the objective of Division 105A is legitimate. It seeks to prevent those who have served sentences for terrorism offences – but have not been rehabilitated during that period – from being released into the community. However, the fact that the CDO regime has not yet been used raises questions about its necessity. In June 2017, the Attorney-General's Department gave evidence to this Committee that '[at] present, the earliest an application could be made is mid-2018, and the earliest an order could commence is mid-2019.'[66] According to the Annual Reports prepared by the Minister for Home Affairs (as required by s 105A.22), no application for a CDO was made in either the 2017-18 or 2018-19 financial years.[67]

Putting the necessity of Division 105A to one side, it is our view that the relationship between the control order and CDO regimes should be clarified as a matter of urgency. The confusion generated by the existence of parallel regimes is highlighted by the following example. As already noted above, a CDO may only be issued as a matter of last resort, that is, where all other less restrictive measures, including a control order, would be ineffective in preventing the unacceptable risk. To ensure that this was the case, Division 104 was amended by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) to enable a control order to be issued against an incarcerated person. The problem with this system is that a court considering whether to issue a CDO cannot issue a less restrictive control order

[64] Ibid s 105A.7(6).

[65] Rebecca Ananian-Welsh, Nicola McGarrity, Tamara Tulich and George Williams, Submission to the Parliamentary Joint Committee on Intelligence and Security's Inquiry into the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, 12 October 2016; Jessie Blackbourn, Andrew Lynch, Nicola McGarrity, Tamara Tulich and George Williams, Submission to the Parliamentary Joint Committee on Intelligence and Security's Review of Police Stop, Search and Seizure Powers, the Control Order Regime and the Preventative Detention Order Regime, 22 September 2017; Rebecca Ananian-Welsh, Nicola McGarrity, Tamara Tulich and George Williams, Submission to the Parliamentary Joint Committee on Intelligence and Security's inquiry into Counter-Terrorism Legislation Amendment Bill 2019, 8 March 2019.

[66] Attorney-General's Department, Australian Government, *Post-Sentence Preventative Detention of High Risk Terrorist Offenders: Report to Parliamentary Joint Committee on Intelligence and Security* (2017) 2.

[67] Minister for Home Affairs, Australian Government, *2017-18 Annual Report: Control Orders, Preventative Detention Orders, Continuing Detention Orders, and Powers in Relation to Terrorist Acts and Terrorism Offences* (2018); Minister for Home Affairs, Australian Government, *2018-19 Annual Report: Control Orders, Preventative Detention Orders, Continuing Detention Orders, and Powers in Relation to Terrorist Acts and Terrorism Offences* (2019).

as an alternative. This is, in very simple terms, because each order is issued by a different court. A control order is made by an 'issuing court', defined by the *Criminal Code* as the Federal Court of Australia or the Federal Circuit Court of Australia.[68] A CDO, by contrast, is issued by a Supreme Court of a State or Territory. As a Supreme Court has no discretion to impose a control order as an alternative to a CDO**,** a separate application would need to be made by the AFP to an issuing court.

In its previous review of AFP Powers in February 2018, this Committee concluded that 'it is essential to resolve the interoperability issues in order for continuing detention orders under Division 105A and control orders under Division 104 to operate effectively and without duplication'.[69] We strongly support this conclusion, as well as Recommendation 10 that:

> [T]hat the C*riminal Code Act 1995* be amended as required to implement an Extended Supervision Order (ESO) regime which would include any of the controls that can be imposed under a control order, similar review mechanisms, and other associated changes consistent with the model recommended by the Independent National Security Legislation Monitor at paragraphs 9.40 to 9.47 of his 2017 review. This will address interoperability issues between Division 104 and 105A.[70]

Amendment of Division 105A in line with this Committee's recommendation would render the post-conviction grounds for issuing a control order either redundant (at best) or confusing and ineffective (at worst). The imposition of post-conviction restraints upon a person who poses an unacceptable risk to the community are best dealt with within a single unified system for addressing future harm. This would remove the problem identified above, namely, competing regimes being pulled in different directions because of the reliance on different process and the allocation of different responsibilities to different actors. Furthermore, leaving post-conviction restraints – both continuing detention and extended supervision – to be dealt with by Division 105A would have the following positive effects. First, it would give

[68] *Criminal Code Act 1995* (Cth) s 100.1.
[69] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Police Stop, Search and Seizure Powers, the Control Order Regime and the Preventative Detention Order Regime* (2018) 78.
[70] Ibid 79.

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'. Second, it would empower those same courts to issue an ESO in the alternative to a CDO, avoiding the duplication of effort on the part of the executive that is required by the existence of two distinct sets of procedures. Third, the issuing of an ESO would occur against the higher threshold test of the CDO regime rather than that of the control order regime. Fourth, a holistic approach would support the inclusion of a requirement that the Minister for Home Affairs, in making an application for a CDO, be satisfied that no other less restrictive measure would be effective (this was called for by the submission on the HRTO Bill made by the Law Council of Australia and is consistent with the New South Wales high-risk offender regime).[71] Fifth, and finally, greater protections for individuals exist under Division 105A than Division 104, including a lack of reliance on *ex parte* hearings, and stronger appeal and review rights. ESOs are also more justifiable than control orders because, as former INSLM Bret Walker pointed out, the former rely upon the existence of a proven offence and apply exclusively to 'terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness.'[72] The only caveat to this is that ESOs – if developed consistently with the existing provisions in Division 105A – would apply for three years. It is our view that a more appropriate length of time for an ESO to apply is, subject of course to the possibility of a subsequent application being made, one year. This is in keeping with the length of time that post-conviction restraints currently apply for under a control order.

For these reasons, we would recommend that any post-conviction restraints be dealt with solely in Division 105A. Having said that, we reiterate the concerns we expressed previously about the satisfaction of two prerequisites for an effective and proportionate system of post-sentence restraints. One of those prerequisites is a validated terrorism-specific risk assessment tool upon which to base determinations by the court of unacceptable risk. The other is appropriate and effective rehabilitation programs which are designed for terrorist offenders in jail. We appreciate that the HRTO Implementation Working Group has made progress in responding to these concerns. However, considerable work is needed before either of these prerequisites can possibility be satisfied and, until such time, we continue to

[71] *Crimes (High Risk Offenders) Act 2006* (NSW), ss 18CA and 18CC.
[72] Bret Walker SC, Independent National Security Legislation Monitor, *2012 Annual Report* (2013) 44.

have doubts about the consistency of post-sentence detention and supervision with fundamental human rights. Such consistency can only be achieved where restraints are limited to what is necessary and proportionate to respond to the threat that the person poses.