

29 April 2024

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

Dear Secretary

Review of the Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024

The Australian Human Rights Commission (Commission) welcomes the opportunity to make a submission in relation to the Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024 (Cth) (Declared Areas Bill).

The Commission notes that the effect of the Declared Areas Bill would be to:

1. extend for a further three years the offence contained within section 119.2 of the *Criminal Code Act 1995* (Cth) (Criminal Code), to 7 September 2027
2. insert a sunset provision on the power for the Minister for Foreign Affairs to declare an area for the purpose of the offence in section 119.2 of the Criminal Code, which would also cease to have effect on 7 September 2027
3. amend the *Intelligence Services Act 2001* (Cth) to repeal paragraph 29(1)(bbaa).

The Commission has previously outlined, including to this Committee, its concerns regarding the declared areas provisions. The Commission remains of the view that the provisions to be extended by the Declared Areas Bill are

inconsistent with human rights, and are not necessary or proportionate to achieving a legitimate objective.

The behaviour sought to be captured by the provisions is not ‘inherently criminal’, yet attracts a high penalty. The onus of proof is on the accused to establish that the purpose of their travel is legitimate, and the Commission has concerns about the limited scope for permissible reasons for travel. In its submission to the Committee in 2021, the Attorney-General’s Department said that it would ‘continue to consider the need for additional exceptions at such time when it becomes apparent that there are further legitimate reasons for travel to a declared area, that are not addressed by the existing exceptions’. The Commission is concerned that such an approach allows Australian citizens and residents to become ‘test cases’ for the legitimacy of reasons for travel by exposing them to prosecution.

The Commission is also concerned that the declaration of an area by the Foreign Affairs Minister under s 119.3 of the Criminal Code may be made only on the basis of their satisfaction that a terrorist organisation is engaging in a hostile activity in that area of the country. For many parts of the world, this is a low bar to be met, and so has the potential to ‘cast the net’ too widely.

The Commission notes that the PJCIS, in its last review, recommended that the Criminal Code be amended to allow a person to request an exemption from the Minister for Foreign Affairs to travel to a declared area. This recommendation has not been adopted in the Declared Areas Bill.

These concerns remain the view of the Commission, and the recommendations made most recently in the submission dated 28 August 2020, when the declared areas provisions were last extended, remain valid.

These recommendations are as follows:

Recommendation 1

The declared areas provisions should be repealed as they are not justified as necessary and proportionate to achieving a legitimate aim.

Recommendation 2

In the event that recommendation 1 is not accepted, s 119.3 of the Criminal Code should be amended so that the Foreign Affairs Minister may declare an

area only if the Minister is satisfied that a listed terrorist organisation is engaging in a hostile activity to a significant degree in that area.

Recommendation 3

In the event that recommendation 1 is not accepted, the exception contained in s 119.2(3) of the Criminal Code should be amended so that s 119.2(1) does not apply to a person if that person enters, or remains in, an area solely for a purpose or purposes not connected with engaging in hostile activities.

Recommendation 4

In the event that recommendation 3 is not accepted:

- a) Detailed consideration be given to expanding the list of legitimate reason for travel to declared areas in s 119.2(3) of the Criminal Code to include, for instance, visiting friends, transacting business, retrieving personal property and attending to personal or financial affairs. This list should be made as comprehensive as possible
- b) Section 119.2 of the Criminal Code be amended so that it is a defence to a charge of entering or remaining in a declared area if a person establishes they were in a country for a purpose other than engaging in a hostile activity.

Recommendation 5

In the event that recommendation 1 is not accepted, as previously recommended by the PJCIS, the Criminal Code be amended to allow Australian citizens to request an exemption from the Minister for Foreign Affairs to travel to a declared area for reasons not listed in section 119.2, but which are not otherwise illegitimate under Australian law.

Accordingly, the Commission attaches for the Committee's consideration, copies of the following submissions:

- Review of the 'declared areas' provisions, submission to the PJCIS, dated 28 August 2020
 - Review of the 'declared areas' provisions, submission to the PJCIS, dated 3 November 2017
 - Independent National Security Legislation Monitor (INSLM) Statutory Deadline Review, submission to the Acting INSLM, dated 15 May 2017.
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The Commission would be pleased to provide any additional information or explanation to the Committee if requested.

Yours sincerely

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Emeritus Professor Rosalind Croucher AM FAAL
President

A handwritten signature in black ink that reads "L. Finlay". The signature is written in a cursive, flowing style.

Lorraine Finlay
Australian Human Rights Commissioner



Australian
Human Rights
Commission

Review of the 'declared areas' provisions

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION
TO THE PARLIAMENTARY JOINT COMMITTEE ON
INTELLIGENCE AND SECURITY**

28 August 2020

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its review of the 'declared areas' provisions contained in Division 119 of the *Criminal Code* (Cth).
2. The 'declared areas' provisions were last subject to a legislatively mandated review by the PJCIS in 2017. The Commission made a submission to that inquiry in October 2017. The Commission also made a supplementary submission in November 2017, to address several matters arising from the relevant report of the Independent National Security Legislation Monitor (INSLM) dated 7 September 2017 and released to the public on 16 October 2017.
3. In those submissions the Commission undertook a detailed human rights analysis of the declared areas provisions, as they appeared at the time. While recognising the legitimacy, and importance, of Australia having robust national security legislation, the Commission expressed strong concerns about these provisions, and proposed several amendments to strengthen the law's human rights protections.
4. Since the last review, minor changes have been made to these provisions. The Commission welcomes these, most notably the creation of an exception to the declared areas offence for individuals performing an official duty for the International Committee of the Red Cross and enhanced oversight of the PJCIS to monitor and review the basis of the Minister's declaration of a prescribed security zone.
5. However, in the absence of any other substantive legislative amendments, the Commission remains of the view that the limitations on human rights resulting from these provisions are neither necessary nor proportionate to achieving an identified legitimate objective.
6. Consequently, the Commission draws the Committee's attention to its previous submissions to the PJCIS. With some minor changes, the Commission reiterates the substance of the recommendations it made in its last submission to the PJCIS and to the INSLM. They are annexed to this submission for reference.
7. In summary, the Commission's continuing concerns include the following:
 - The provisions criminalise conduct that is not in itself wrongful or 'inherently criminal' in nature. Despite that fact, the offence attracts a very high penalty.
 - In making a declaration about an area, the Foreign Minister is not required to form a view about the extent of hostile activity that is occurring in a particular area.
 - The list of 'legitimate' purposes for travel to a declared area is very short. There are therefore likely to be many innocent reasons a person might

wish to enter or remain in a declared area which do not fall within a recognised exception.

- The exception applies only if travel is ‘solely’ for a legitimate purpose specified in s 119.2(3) or the relevant Regulations. That requirement has the effect that a person who enters a declared area primarily for a purpose falling within a recognised exception (such as visiting a parent) but also with a secondary innocent purpose (such as attending a friend’s wedding), will commit an offence.
- The Explanatory Memorandum prepared in relation to the Bill did not identify an adequate justification for the provisions. It stated that division 119 was designed to

equip law enforcement and prosecutorial agencies with the tools to arrest, charge and prosecute those Australians who have committed serious offences, including associating with, fighting, or providing other support for terrorist organisations overseas.¹

- The Commission considers that this explanation does not justify criminalising entry into an area without having committed any other offence or intending to perform any wrongful conduct.
- The exception in s 119.2(3) places an evidential burden on an accused. Once a person is accused of entering or remaining in a declared area (or attempting to do so), it is necessary for them to adduce evidence that they were in a declared area solely for one or more specified legitimate purposes.
- The Commission considers that it is likely to be difficult, if not impossible, to formulate in advance a comprehensive list of legitimate reasons for travel to a declared area. This will render persons who do not intend to undertake any inherently wrongful conduct liable to prosecution. While the Commission acknowledges that the Attorney-General may choose to withhold consent to the commencement of a particular prosecution, and similarly the Director of Public Prosecutions may exercise a discretion not to prosecute, this is a weak protection against the prosecution of conduct that is not inherently wrongful.² It does not conform with the foundational principle of the rule of law that such a protection would rely on the exercise of a personal discretion by a senior government official.
- By potentially capturing a wide range of innocent conduct, and making that conduct subject to a severe criminal penalty, in the absence of a demonstrated compelling need, the declared area provisions are likely to infringe impermissibly the freedom of movement (protected by article 12 of the International Covenant on Civil and Political Rights) and other human rights, such as the right to family life (protected by article 23)³.
- Finally, the Commission considers it important to acknowledge the implication of Covid-19 on the operation of this legislation. The declared areas provisions in particular will alter in their practical effect due to the steps that have been taken by governments in response to the pandemic,

such as the closing of Australia's borders, and this should be a factor taken into account in the present review.

2 Recommendations

8. The Commission considers that the declared areas provisions place significant restrictions on the human rights of persons affected by them. To date, no compelling evidence has been provided to demonstrate that they are necessary and proportionate to achieving the objectives as stated in the Explanatory Memorandum to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (which introduced the provisions).
9. The Commission therefore repeats the substance of its recommendations made in its INSLM Submission and its supplementary submission to the PJCIS in its last review.

Recommendation 1

The declared areas provisions should be repealed as they are not justified as necessary and proportionate to achieving a legitimate end.

Recommendation 2

In the event that recommendation 1 is not accepted, s 119.3 of the Criminal Code should be amended so that the Foreign Affairs Minister may declare an area only if the Minister is satisfied that a listed terrorist organisation is engaging in a hostile activity to a significant degree in that area.

Recommendation 3

In the event that the PJCIS is satisfied that the declared areas provisions are necessary and proportionate and should not be repealed, the exception contained in s 119.2(3) of the Criminal Code should be amended so that s 119.2(1) does not apply to a person if that person enters, or remains in, an area solely for a purpose or purposes not connected with engaging in hostile activities.

Recommendation 4

In the event that recommendation 3 is not accepted:

- a) Detailed consideration be given to expanding the list of legitimate reasons for travel to declared areas in s 119.2(3) of the Criminal Code to include, for instance, visiting friends, transacting business, retrieving personal property and attending to personal or financial affairs. The list should be made as comprehensive as possible; and
- b) Section 119.2 of the Criminal Code be amended so that it is a defence to a charge of entering or remaining in a declared area if a person establishes they were in a country for a purpose other than engaging in a hostile activity.

¹ Explanatory Memorandum to the Foreign Fighters Bill 2014 (Cth), p 139 [827].

² Parliamentary Joint Committee on Intelligence and Security, Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (October 2014), 104 [2.384]. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/CounterTerrorism_Legislation_Amendment_Foreign_Fighters_Bill_2014/Report1 (viewed 17 August 2020).

³ International Covenant on Civil and Political Rights (ICCPR), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).



Australian
Human Rights
Commission

Review of the 'declared areas' provisions

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUPPLEMENTARY SUBMISSION TO THE PARLIAMENTARY
JOINT COMMITTEE ON INTELLIGENCE AND SECURITY**

3 November 2017

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1 Introduction

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to make this supplementary submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its review of the ‘declared areas’ provisions contained in Division 119 of the *Criminal Code* (Cth).
2. The purpose of this submission is to address several matters arising from the relevant report of the Independent National Security Legislation Monitor (INSLM) dated 7 September 2017 and released to the public on 16 October 2017.¹
3. The Commission has previously provided the PJCIS with a copy of its submission made to the INSLM in relation to the reviews resulting in his recent reports (the Commission’s INSLM Submission).² That submission contains a discussion of the provisions under review, the human rights they engage, and the appropriate test to apply in determining whether the limits these provisions impose on human rights are justified. The Commission relies on its INSLM Submission and does not reproduce its content in full here. Rather, this submission focusses on the question whether, in light of the INSLM’s recent reports, the identified limitations on human rights have been demonstrated to be justified.
4. In the Commission’s view, the present INSLM report serves two core functions. The first is to provide a synthesis of evidentiary material relevant to the specific counter-terrorism and national security issues that are currently at issue. This is the most valuable function of the INSLM reports because the INSLM’s role is unique in a critical sense. That is, the INSLM is privy to classified and security-sensitive information that other bodies—including legislators; other oversight bodies; the Commission itself and civil society organisations—are not. As such, the INSLM reports present a vital component of the evidentiary basis that these other bodies rely on to draw conclusions about Australia’s counter-terrorism and national security framework.
5. The second function of these reports is to communicate the INSLM’s own assessment of the evidentiary basis vis-à-vis the relevant provisions of the *Crimes Act 1914* (Cth) (Crimes Act) and Criminal Code. That assessment is made with reference to the matters set out in s 6(1) of the *Independent National Security Legislation Monitor Act 2010* (Cth) (INSLM Act), which inter alia directs the INSLM to conduct what amounts to an orthodox analysis of the relevant legislation as against international human rights law.
6. In fulfilling this second function, the INSLM performs an important, but not unique, role. The INSLM’s views in respect of this second function carry significant weight, but in the Commission’s view that weight should be no greater than the views of other expert bodies that have assessed the security-sensitive or classified information that the INSLM has summarised in respect of the first function referred to above.
7. With this context, the Commission notes that the present INSLM has provided an important summary of the relevant evidentiary basis and has found that all of the provisions under review are:

- consistent with a range of international obligations and contain appropriate safeguards for protecting the rights of individuals;
 - proportionate to the current threats of terrorism and to national security; and
 - necessary.
8. In this submission, the Commission has analysed the evidentiary base set out in the INSLM's reports as well as the INSLM's application of the relevant human rights-related criteria to the legislative provisions under review. The Commission respectfully concludes that, collectively, these are insufficient to establish that the limitations on human rights that result from these provisions are necessary and proportionate. Consequently, the Commission repeats, with some minor changes, the substance of the recommendations it made in its INSLM Submission.

2 Recommendations

Recommendation 1

In the event that the PJCIS is not satisfied that the declared areas provisions are necessary and proportionate to achieving a legitimate end, it should recommend that they should be repealed.

Recommendation 2

In the event that the PJCIS is satisfied that the declared areas provisions are necessary and proportionate and should not be repealed, s 119.3 of the Criminal Code should be amended so that the Foreign Affairs Minister may declare an area only if she is satisfied that a listed terrorist organisation is engaging in a hostile activity to a significant degree in that area.

Recommendation 3

In the event that the PJCIS is satisfied that the declared areas provisions are necessary and proportionate and should not be repealed, the exception contained in s 119.2(3) of the Criminal Code should be amended so that s 119.2(1) does not apply to a person if that person enters, or remains in, an area solely for a purpose or purposes not connected with engaging in hostile activities.

Recommendation 4

In the event that recommendation 3 is not accepted:

- a. Detailed consideration be given to expanding the list of legitimate reasons for travel to declared areas in s 119.2(3) of the Criminal Code to include, for instance, visiting friends, transacting business, retrieving personal property and attending to personal or financial affairs. The list should be made as comprehensive as possible; and

- b. Section 119.2 of the Criminal Code be amended so that it is a defence to a charge of entering or remaining in a declared area if a person establishes they were in a country for a purpose other than engaging in a hostile activity.

3 Permissible limitations on human rights

9. A more detailed discussion of the principles that are to be applied in assessing whether legislative measures that limit human rights may be justified is contained in the Commission's INSLM Submission. In summary, it is permissible for a measure to limit human rights where the measure is expressed in clear and unambiguous terms, is directed towards a legitimate aim, is necessary to achieve that aim, and is proportionate. A measure which limits a human right may not 'jeopardise the essence of the right concerned'. Limitations on human rights must not be arbitrary.
10. There is some overlap between a number of these criteria.³ In particular, the concept of 'arbitrariness' in human rights law includes notions of 'inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality'.⁴
11. Any assessment as to the necessity of a limitation is to be made on objective considerations. The burden of justifying a limitation of a human right lies with the State.⁵
12. The Commission provides the following further comments about some aspects of the proportionality analysis that are relevant to matters discussed in the recent INSLM reports.

3.1 Legitimate aims

13. Human rights may be limited where that is necessary and proportionate to achieving a legitimate aim.
14. It is not in dispute that protecting the human rights of citizens endangered by acts of terrorism is a legitimate aim.
 - (a) *'National security'*
15. A number of the human rights protected in the *International Covenant on Civil and Political Rights* (ICCPR)—for example, the right to freedom of movement enshrined in article 12—contain a list of the legitimate aims that may justify their limitation.⁶ One example is that rights may be limited to protect national security. Limitations for this purpose must meet the criteria above, including those of necessity and proportionality.
16. The term 'national security', as used in the ICCPR, relates to matters which threaten the existence of the State, its territorial integrity or political independence.⁷ This is a high threshold and not every law criminalising conduct can properly be described as protecting national security simply because the conduct prohibited is designated a 'terrorist' act in the relevant

statute. (Such measures may, of course, be justified in the same way as other criminal laws, if they are necessary and proportionate to some other legitimate aim such as protecting the rights of others or protecting public safety.)

3.2 Necessity

17. A measure which restricts human rights cannot be justified unless it is necessary. For the purposes of human rights law, a measure will not be necessary unless it responds to a pressing public or social need. Nor can it be regarded as necessary for the achievement of a specified purpose if the purpose could be achieved through alternative, less restrictive means. Similarly, a restrictive measure cannot be said to be necessary if it essentially duplicates existing measures. Claimed justifications for measures, such as that they 'provide an additional tool in the toolbox',⁸ are not on their own sufficient to satisfy this criterion. They must be closely scrutinised to determine whether they go beyond being potentially useful, to reach the threshold of necessity.
18. There is a real risk that human rights will be limited to a greater degree than is necessary through what some refer to as 'legislative creep', whereby intrusive powers become normalised, each set of extraordinary powers is used as a precedent to justify subsequent powers, and rather than new, more targeted, powers leading to the repeal of existing powers, the number of counter-terrorism powers is continually multiplied. The proportionality of limits on human rights effected by counter-terrorism powers must be considered not just with respect to each counter-terrorism power, but in the context of the totality of counter-terrorism powers.
19. The newly-appointed Special Rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism recently explained:

Limitations on rights are not open-ended and not absolute; they must always be legitimate, proportionate and necessary and must never impair the essence of the right.

....

Temporary arrangements have a peculiar tendency to become entrenched over time and thus normalised and made routine.

....

There is a grave danger that where national security powers are piled up, essentially in a constant state of ratcheting powers upwards, government will take as its starting point the experience of extraordinary powers and authority granted and exercised during previous emergencies rather than judging the needs of new challenges in light of a sober assessment of the capacity of ordinary legal process to cope. Much like the need to gradually increase the dosage of a heavily used medication in order to experience the same level of relief, so too with respect to national security powers: the perception may be that new, more radical powers are needed every time to fight impending crises. In turn, new extraordinary counter-terrorism measures confer an added

degree of ex post legitimacy and respectability, as well as a sense of normality, to previously used, less drastic emergency measures. What were deemed exceptional emergency actions in the past may now come to be regarded as normal, routine, and ordinary, in light of more recent and more dramatic counter-terrorism powers.⁹

3.3 Proportionality

20. Assessing whether limitations on human rights are proportionate to the pursuit of a legitimate objective requires an assessment to be made of both the nature and extent of any limitation on human rights, the urgency of the objective, and the degree to which the rights-limiting measure is likely to achieve that objective.
21. It follows that two key issues in determining whether counter-terrorism and national security measures are consistent with human rights are the nature and extent of the risk to the community and the nation posed by terrorism, and the likely effectiveness of the measures in reducing that risk. An informed assessment of those issues will necessarily depend to some degree on consideration of classified security material. The INSLM is therefore uniquely placed to provide an evidentiary basis that the PJCIS, and others, can consider in assessing the proportionality of the relevant provisions. In this submission, the Commission draws on the discussion of these matters contained in the recent INSLM reports.
22. It is important to note that an examination of the nature and extent of risks relating to terrorism and the potential effectiveness of counter-terrorist legislation is not the end of the relevant inquiry. It is also necessary to consider the nature and extent of the impact the measures will have on human rights.

4 The functions and findings of the INSLM

23. The INSLM has recommended that all of the provisions under review be retained for a further period of five years, subject to certain further recommendations.
24. These recommendations are informed by the INSLM's findings that all of the provisions are:
 - a. consistent with Australia's human rights, counter-terrorism and international security obligations, and contain appropriate safeguards for protecting the rights of individuals
 - b. proportionate to the current threats of terrorism and to national security
 - c. necessary.¹⁰
25. These findings mirror the wording of the INSLM's functions under s 6(1)(b) of the INSLM Act, as informed by s 8 of that Act.

26. These findings address some of the key factors relevant to assessing whether the counter-terrorism measures under review impermissibly burden human rights. However, the Commission considers that the evidence summarised by the present INSLM is insufficient to establish that the resultant limitations on human rights are necessary and proportionate. In the event that there may be further evidence supporting the INSLM's conclusions, the Commission submits that the PJCIS should scrutinise it closely to consider whether the laws are necessary and proportionate, applying the human rights analysis in the Commission's INSLM submission and the present submission.
27. The Commission submits it is not always clear how the INSLM has reached his conclusions that restrictions on the human rights he identifies are proportionate to the need to protect the community from terrorism. Further, there are reasons to think that the assessment of necessity and proportionality undertaken by the present INSLM in exercising his functions differs to some extent from the required approach under human rights law. For example:
- a. The onus is on the State to demonstrate that limitations on human rights are justified. Persuasive and objective reasons are needed to justify such limitations. It is therefore not enough for the government to 'make the case' for interference with rights. In the Commission's view, the INSLM's reports do not appear to establish that the government has adduced sufficiently persuasive and objective reasons.
 - b. The INSLM's apparent focus on whether various provisions are susceptible to arbitrary application is a relevant consideration.¹¹ However, it is also necessary to consider whether the measures themselves constitute an arbitrary or disproportionate means to achieve their objective.
 - c. It is not clear that in assessing the 'necessity' of the provisions, the INSLM has considered whether each of the provisions is the least intrusive method available to satisfactorily address a relevant aspect of the risk posed by terrorism.
28. In conclusion, the Commission considers that the discussion of the current security situation contained in the recent INSLM reports, and the discussion of the justifications for the provisions contained in them, are, without more, insufficient to support a finding that all of the provisions under review are necessary and proportionate responses to terrorist threats by reference to the human rights law considerations adverted to in s 6(1) of the INSLM Act.

4.1 Assessment of security landscape

29. The current INSLM states that he is entitled to form his own opinion on the counter-terrorism and national security landscape.¹² The Commission supports this. It is vital to the independence of the INSLM, and indeed of the PJCIS, that each must form their own view of the matters within their jurisdiction – informed, but not restricted, by the assessments made by Australia's intelligence agencies and others.

4.2 The current security landscape

30. The present INSLM has summarised the current security landscape as follows:
- 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.¹³
31. The principal change to the threat posed by terrorism that is identified in the recent INSLM reports is that there is an increased risk of terrorist acts by lone actors, using simple but deadly weapons, with little if any warning. If the retention of counter-terrorism powers is to be justified by this change, it must be demonstrated that the powers are necessary and proportionate to addressing the identified increased risk.
32. The present INSLM observes that there can be no guarantee that all terrorist attacks will be detected and prevented.¹⁴ This is cited by the INSLM as a factor supporting the retention of, at least, the control order regime.¹⁵ However, this fact is, of itself, neutral as to the necessity and proportionality of counter-terrorism measures, considered either separately or as a whole. The corollary of this observation is that, while it is important to ensure that intelligence and law enforcement agencies have appropriate powers to prevent and respond to acts of terrorism, it is not possible to entirely eliminate the risk that these attacks may occur, no matter what laws may be enacted. Further, the fact that current powers may not have prevented certain attacks is not, of itself, a justification for more extensive powers. The likely effectiveness of each power, and its intrusiveness on the rights of individuals, must be assessed on its own merits.

5 Declared areas

33. As the present INSLM observes,¹⁶ UN Security Council Resolution 2178¹⁷ states that all States must establish criminal offences to penalise nationals who travel internationally to engage in terrorist acts, including partaking in planning, preparation and training related to such acts.
34. When the provisions were first introduced, the relevant Explanatory Memorandum stated that the provisions were intended to
- equip law enforcement and prosecutorial agencies with the tools to arrest, charge and prosecute those Australians who have committed serious offences, including associating with, fighting, or providing other support for terrorist organisations overseas.¹⁸

35. It is uncontroversial that deterring Australians from travelling abroad to engage in terrorism is a legitimate objective. As the INSLM also observes, the declared areas provisions cannot readily be characterised as implementing Resolution 2178.¹⁹ Neither engaging in terrorist activity nor intent to engage in terrorist activity is an element of the offence created by s 119.2 of the Criminal Code.
36. In assessing whether the limits the declared areas provisions place on human rights can be justified, it is first necessary to identify whether they are directed to a legitimate objective, and then to ask whether they are necessary and proportionate to achieving that objective.
37. The Commission has previously expressed its concern that the declared areas provisions criminalise conduct that is not related to terrorism, and are therefore not necessary and proportionate to combating their stated goal.²⁰
38. The INSLM report identifies a number of other purposes the legislation is said to serve. The Commission submits that it is not clear that the material discussed by the INSLM supports the conclusion that the declared areas provisions, and their concomitant restriction of human rights, are necessary and proportionate to achieving any legitimate objective. The Commission makes the following observations about a number of objectives identified by the INSLM that the provisions are said to serve.

5.1 *Protecting children at risk of being taken to declared areas by their parents*

39. While the protection of the best interests of the child is clearly a legitimate objective, the INSLM report does not refer to evidence in support of the claim that the declared areas provisions are likely to be effective in achieving this goal. It is not self-evident that a parent willing to take their child to an extremely dangerous area will be deterred from doing so by s 119.2. That is particularly so in cases where the parent is motivated by an extremist ideology.
40. Further, the INSLM has not referred to evidence that supports the view that this objective could not be achieved in less restrictive ways. Even if a criminal provision were warranted, a specific provision prohibiting taking children to particularly dangerous areas would appear to be less restrictive and better adapted to achieving its objective.
41. In response to a question taken on notice in the course of the present INSLM's review of the declared areas provision, the Human Rights Commissioner, Edward Santow, stated:

The Commission recognises the importance and validity of the objective of child protection. The preamble to the *Convention on the Rights of the Child* (CRC) states that in light of their physical and mental immaturity, children have special need of safeguards, care and protection. Further, article 3 of the CRC provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The policy objective of child protection clearly would be a legitimate aim of government and an important consideration in the human rights analysis of this counter-terror measure. As a general observation, declared areas have been assessed by the Australian Government to be highly dangerous places and, while there might be exceptions, generally taking a child into a highly dangerous place would be contrary to the child's best interests.

The Commission does not have access to the Australian Government's evidence base supporting this stated policy objective. However, even if the INSLM is of the opinion that there is cogent evidence of a widespread risk to children currently resident in Australia of being removed to a declared area, the Commission does not consider a broadly defined counter terrorism offence with inadequate safeguards for human rights protection to be a well-targeted or proportionate response.

It is rare that the best way of protecting a person's human rights is to criminalise their, or their parent's or guardian's, behaviour. The Commission considers the best interests of the child would be more appropriately and effectively addressed with a more targeted measure within the context of Australia's child protection framework, in particular, the National Framework for Protecting Australia's Children (National Framework). This would provide a more considered, longer-term and practical approach to managing any such risk and thereby better considering and protecting the rights of the child. The Commission considers that the National Children's Commissioner, as well as the Commonwealth Minister for Social Services and the State and Territory Ministers for the portfolio of child protection (who contribute to overseeing the overall direction of the National Framework), should be consulted on this matter.

The Commission's recommendations in relation to the declared area offence, therefore, as articulated in its written submission, remain unchanged.

Further, in weighing up this policy justification for the offence, the INSLM should also consider the particular vulnerability of children at risk of removal to a declared area and the adverse impact on them of any subsequent prosecution of their parent or guardian. As stated in the Commission's written submission, the breadth of this offence, with limited grounds of defence, means that potentially innocent conduct will be captured. Given the severe penalties for breach of the declared area offence, a successful prosecution will have a significant impact on the family unit, likely to involve separating a child from their parent. This is a relevant, and important factor that should also be considered when assessing the human rights impact of the declared area offence provisions.

42. The Commission reiterates those views.

5.2 *Protecting individuals from harm, by deterring them from travelling to dangerous places*

43. The present INSLM notes submissions by the Australian Federal Police and the Attorney-General's Department that the declared areas provisions have
- the potential to protect the personal safety of individuals by discouraging or deterring them from travelling to areas where terrorist organisations are engaged in hostile activity.²¹
44. As noted above, it is rare that the best way of protecting a person's human rights is to criminalise their behaviour. The Commission has not seen a compelling justification that the most appropriate means of protecting people from themselves, in these circumstances, is to criminalise their behaviour with a risk of life imprisonment. The INSLM report does not address what would appear to be a common-sense alternative approach: that the Government adopt less draconian measures—such as education campaigns and travel warnings—to deter or dissuade people with no intention of becoming 'foreign fighters' from travel to relevant areas. It is difficult to see how the declared areas provisions can be characterised as proportionate to the objective of protecting would-be innocent travellers from harm.

5.3 *Overcoming difficulties in proving other offences*

45. The Commission acknowledges that there may be significant difficulties in obtaining evidence that people who have travelled abroad have engaged in terrorist activities. It is plausible to say that these difficulties will be amplified in the case of travel to areas of conflict or areas controlled by terrorist organisations. However, it does not follow that maintaining an offence that potentially criminalises innocent conduct is a proportionate response to this difficulty.

5.4 *Conclusion and recommendations*

46. The Commission considers that the INSLM's recent report does not contain compelling evidence demonstrating that the declared areas provisions are necessary and proportionate to achieving an identified legitimate objective. The Commission repeats the substance of the recommendations made in its INSLM Submission.

Recommendation 1

In the event that the PJCIS is not satisfied that the declared areas provisions are necessary and proportionate to achieving a legitimate end, it should recommend that they should be repealed.

Recommendation 2

In the event that the PJCIS is satisfied that the declared areas provisions are necessary and proportionate and should not be repealed, s 119.3 of the Criminal Code should be amended so that the Foreign Affairs Minister may

declare an area only if she is satisfied that a listed terrorist organisation is engaging in a hostile activity to a significant degree in that area.

Recommendation 3

In the event that the PJCIS is satisfied that the declared areas provisions are necessary and proportionate and should not be repealed, the exception contained in s 119.2(3) of the Criminal Code should be amended so that s 119.2(1) does not apply to a person if that person enters, or remains in, an area solely for a purpose or purposes not connected with engaging in hostile activities.

Recommendation 4

In the event that recommendation 3 is not accepted:

- a. Detailed consideration be given to expanding the list of legitimate reasons for travel to declared areas in s 119.2(3) of the Criminal Code to include, for instance, visiting friends, transacting business, retrieving personal property and attending to personal or financial affairs. The list should be made as comprehensive as possible; and
- b. Section 119.2 of the Criminal Code be amended so that it is a defence to a charge of entering or remaining in a declared area if a person establishes they were in a country for a purpose other than engaging in a hostile activity.

¹ Dr James Renwick SC, Sections 119.2 and 119.3 of the Criminal Code: Declared Areas (7 September 2017) (3rd INSLM Declared Areas Report). This submission also refers to Dr James Renwick SC, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers* (7 September 2017) (3rd INSLM SSS Report) and Dr James Renwick SC, *Review of Divisions 104 and 105 of the Criminal Code (including the Interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (7 September 2017) (3rd INSLM CO & PDO Report).

² The Commission's INSLM Submission was attached to its submission to the PJCIS in relation to the present inquiry dated 22 September 2017.

³ United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* UN Doc E/CN.4/1985/4, Annex (1985), (Siracusa Principles), [2].

⁴ UN Human Rights Committee, *General Comment 35—Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35, (2014), [12].

⁵ Siracusa Principles, [12].

⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁷ Siracusa Principles, [29]-[32].

⁸ Cf the submission of the Australian Federal Police cited in the 3rd INSLM Declared Areas Report, [8.10].

⁹ Fionnuala Ní Aoláin, Special Rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Promotion and protection of human rights and fundamental freedoms while countering terrorism* (Advance Unedited Version), (27 September 2017), UN Doc A/72/43280, [14]-[16].

¹⁰ 3rd INSLM CO & PDO Report, [11.21]; 3rd INSLM SSS Report, [9.4]; 3rd INSLM Declared Areas Report, [9.7].

¹¹ 3rd INSLM SSS Report, [5.30]; CO & PDO Report [5.38], Declared Areas Report [5.32].

¹² 3rd INSLM SSS Report, [2.1]; CO & PDO Report [2.1], Declared Areas Report [2.1].

¹³ 3rd INSLM SSS Report, [2.8]; CO & PDO Report [2.9], Declared Areas Report [2.8].

¹⁴ 3rd INSLM Declared Areas Report, [2.8].

¹⁵ 3rd INSLM CO & PDO Report, [8.13.d].

¹⁶ 3rd INSLM Declared Areas Report [5.4].

¹⁷ Adopted 24 September 2014, UN Doc S/RES/2178 (2014).

¹⁸ Explanatory Memorandum to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, p 139 [827].

¹⁹ INSLM declared areas [5.36]

²⁰ See the Commission's INSLM Submission, [33]-[45]; also Australian Human Rights Commission, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014—Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Intelligence and Security* (2 October 2014) available at

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Counter-Terrorism_Legislation_Amendment_Foreign_Fighters_Bill_2014/Submissions (viewed 29 October 2017).

²¹ 3rd INSLM Declared Areas Report, [8.11].



Australian
Human Rights
Commission

Independent National Security Legislation Monitor (INSLM) Statutory Deadline Review

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE ACTING INSLM**

15 May 2017

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Acting Independent National Security Legislation Monitor (INSLM) in relation to the inquiry being held in relation to a number of ‘statutory deadline reviews’ (the Inquiry). The INSLM is currently reviewing the following areas of counter-terrorism and national security legislation:
 - a. [Division 3A](#) of Part IAA of the *Crimes Act 1914* (Cth) (the Crimes Act) (stop, search and seizure powers relating to terrorist acts and terrorism offences)
 - b. Offences relating to entering and remaining in ‘declared areas’ under [Division 119](#) (foreign incursions and recruitment) of the *Criminal Code* (Cth) (Criminal Code)
 - c. Divisions [104](#) and [105](#) of the Criminal Code (control orders and preventive detention orders), including the interoperability of the control order regime and the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth) (High Risk Terrorist Offenders Act).
2. Pursuant to s 6(1B) of the *Independent National Security Legislation Monitor Act 2010* (Cth) (the INSLM Act), the INSLM is required to review these provisions by 7 September 2017.
3. On 16 March 2017, the INSLM informed the Commission of the Inquiry and invited it to provide a submission.
4. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). It is Australia’s national human rights institution.
5. Part of the role of the INSLM under the INSLM Act is to review the operation, effectiveness and implications of Australia’s counter-terrorism and national security legislation on an ongoing basis. This includes considering whether the laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to any threat of terrorism or threat to national security or both, and remain necessary. In performing his or her functions, the INSLM is required to have regard to Australia’s international human rights obligations.¹ That is consistent with the objects of the INSLM Act, one of which is to ensure that Australia’s national security legislation is consistent with Australia’s international human rights obligations.²

2 Summary

6. The Commission recognises the vital importance of ensuring that intelligence and law enforcement agencies have appropriate powers to protect Australia’s national security and to protect the community from terrorism. Indeed, such steps are consistent with Australia’s obligations under international law, pursuant to United Nations Security Council Resolutions,³ and the obligation to protect the right to life of persons within

Australia's jurisdiction. This right is itself a human right, enshrined in Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR).⁴

7. Human rights law assumes that these agencies will be granted sufficient powers to fulfil their legitimate mandate. Human rights law also accepts, subject to certain conditions, that the exercise of those powers might impinge to some extent on individual rights and freedoms. Critically, any such limitation on human rights must be:
 - clearly expressed
 - unambiguous in its terms
 - necessary and proportionate in how it responds to potential harm.
8. As the United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR) has observed, 'the purpose of security measures is, fundamentally, to protect freedom and human rights.'⁵ It is therefore essential that fundamental human rights are protected in the struggle against terrorism.⁶
9. The laws the subject of this current Inquiry place significant restrictions on the human rights of persons affected by them. The Commission urges the INSLM to closely scrutinise claims that the laws under review impose the minimum necessary restrictions on human rights.

3 Recommendations

10. The Australian Human Rights Commission makes the following recommendations:

Recommendation 1

That the INSLM consider whether there is sufficient evidence to justify the continued retention of expanded legislative powers to stop, search and seize.

Recommendation 2

That the INSLM consider whether there the retention of broad unfettered Ministerial powers to prescribe security zones can be justified.

Recommendation 3

In the event that the INSLM is not satisfied that the declared area provisions are necessary and proportionate to achieving a legitimate end, he should recommend that they should be repealed.

Recommendation 4

In the event that the INSLM is satisfied that the declared area provisions are necessary and proportionate and should not be repealed, s 119.3 of the

Criminal Code should be amended so that the Foreign Affairs Minister may declare an area only if she is satisfied that a listed terrorist organisation is engaging in a hostile activity to a significant degree in that area.

Recommendation 5

In the event that the INSLM is satisfied that the declared area provisions are necessary and proportionate and should not be repealed, the exception contained in s 119.2(3) of the Criminal Code should be amended so that s 119.2(1) does not apply to a person if that person enters, or remains in, an area solely for a purpose or purposes not connected with engaging in hostile activities.

Recommendation 6

In the event that recommendation 5 is not accepted:

- a. Detailed consideration be given to expanding the list of legitimate reasons for travel to declared zones in s 119.2(3) of the Criminal Code to include, for instance, visiting friends, transacting business, retrieving personal property and attending to personal or financial affairs. The list should be made as comprehensive as possible; and
- b. Section 119.2 of the Criminal Code be amended so that it is a defence to a charge of entering or remaining in a declared zone if a person establishes they were in a country for a purpose other than engaging in a hostile activity.

Recommendation 7

In the absence of compelling evidence that the provisions are necessary and proportionate to achieving a legitimate objective, Division 105 of Part 5.3 of the Criminal Code should be repealed.

Recommendation 8

In the absence of compelling evidence that the control order regime is necessary and proportionate to preventing serious acts of terrorism, this regime should be amended to comply with international human rights law, paying particular regard to the aspects of the regime that engage the ICCPR rights identified at paragraphs 67 and 70 of this submission. If the INSLM considers the control order regime cannot be amended to ensure it complies with Australia's international human rights obligations, the control order regime should be repealed.

Recommendation 9

Where an application is made for a continuing detention order, and the court considering the application believes a less restrictive measure (including a control order) could adequately mitigate the relevant risk posed by an individual, the relevant court should have jurisdiction to implement that less

restrictive measure, or to transfer the proceedings to a more appropriate jurisdiction.

4 Background to the present Inquiry

11. The INSLM is required to conduct the present Inquiry by s 6(1B) of the INSLM Act. That provision was introduced into the INSLM Act by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Foreign Fighters Act).
12. The stop, search and seizure powers in Division 3A of Part IAA of the Crimes Act and the control order and preventative detention order regimes in Divisions 104 and 105 of Part 5.3 of the Criminal Code were introduced by the *Anti-Terrorism Act (No. 2) 2005* (Cth) (Anti-Terrorism Act (No. 2)).⁷ Those provisions entered into force on 14 December 2005.⁸ They were all made subject to ‘sunset’ provisions, and were to cease operation after 10 years.⁹ The Senate Legal and Constitutional Legislation Committee, as it then was, said in its report resulting from its inquiry into the Bill which became the Anti-Terrorism Act (No. 2):

Extraordinary laws may be justifiable but they must also be temporary in nature. Sunset provisions ensure that such laws expire on a certain date. This mechanism ensures that extraordinary executive powers legislated during times of emergency are not integrated as the norm and that the case for continued use of extraordinary executive powers is publicly made out by the Government of the day.¹⁰
13. The Foreign Fighters Bill 2014 (Cth) (Foreign Fighters Bill) was introduced in the Senate on 24 September 2014. It contained provisions that would have extended the operation of the above sunset provisions by 10 years. The Bill was referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) for inquiry and report, with an inquiry period that did not allow for a thorough review of the ongoing justification for the provisions.¹¹ The PJCIS recommended that the sunset provisions be extended by a shorter period and that a review of the provisions be conducted in that time. Those recommendations led amongst other things to the insertion of s 6(1B) in the INSLM Act.¹²
14. The current declared areas provisions of the Criminal Code were inserted by the Foreign Fighters Act. At the time of insertion the provisions were made subject to review by the INSLM and subject to sunset at the same time as the provisions referred to above.¹³
15. Despite the mechanisms that have been put in place to review these various provisions since the passage of the Foreign Fighters Act, the control order and preventative detention order regimes have been modified and extended. The Commission is concerned that that has occurred in circumstances

where the existence of the powers themselves is supposedly subject to review.

16. Some aspects of the control order regime have recently been reviewed by the previous INSLM. This submission focuses on matters that have not been the subject of recent review by the INSLM.

5 Human Rights and Counter-Terrorism Laws

5.1 Protected ICCPR rights

17. The provisions subject to this Inquiry affect a number rights protected by the ICCPR.

18. Article 9 of the ICCPR relevantly provides:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- ...
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

19. Article 12 of the ICCPR provides:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those 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.
4. No one shall be arbitrarily deprived of the right to enter his own country.

20. Article 17 of the ICCPR provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

5.2 Terrorism and limitations of human rights

21. None of the rights described above is absolute. However, any limitation of human rights to protect the public from acts of terrorism must be carefully crafted to ensure it is necessary and proportionate.
22. The then UN High Commissioner for Human Rights in her report dated 27 February 2002 included a statement entitled 'General Guidance: Criteria for the Balancing of Human Rights Protection and the Combating of Terrorism'.¹⁴ In this statement the High Commissioner advised that counter-terrorism laws authorising restrictions on human rights should use precise criteria and may not confer unfettered discretion on those charged with their execution.¹⁵
23. The High Commissioner also advised that for limitations of rights to be lawful, they must:
 - be prescribed by law
 - be necessary for public safety or public order, the protection of public health or morals, or for the protection of the rights and freedoms of others, and serve a legitimate purpose not impair the essence of the right
 - be interpreted strictly in favour of the rights at issue
 - be necessary in a democratic society
 - conform to the principle of proportionality
 - be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function
 - be compatible with the objects and purposes of human rights treaties;
 - respect the principle of non-discrimination
 - not be arbitrarily applied.¹⁶
24. The OHCHR has recently stated, in relation to the right to privacy:

[A] limitation must be necessary for reaching a legitimate aim, as well as in proportion to the aim and the least intrusive option available. Moreover, the limitation placed on the right (an interference with privacy, for example, for the purposes of protecting national security or the right to life of others) must be shown to have some chance of achieving that goal. The onus is on the authorities seeking to limit the right to show that the limitation is connected to a legitimate aim. Furthermore, any limitation to the right ... must not render the essence of the right meaningless and must be consistent with other human rights, including the prohibition of discrimination. Where the limitation does not meet these criteria, the limitation would be unlawful and/or the interference with the right to privacy would be arbitrary.¹⁷
25. These remarks apply equally to the limitation of other rights in the ICCPR, including articles 9 and 12.¹⁸

26. Legislation may validly restrict human rights to protect national security, or to protect the human rights of other citizens, provided that the restrictions meet these requirements.

6 Stop, Search and Seize Powers

27. This section of the submission considers Division 3A of Part IAA of the Crimes Act (Stop, Search and Seize Powers). These provisions were inserted in the Crimes Act by the Anti-Terrorism Act (No. 2).
28. Division 3A of Part IAA of the Crimes Act creates special police stop, search and seizure powers which relate to terrorist acts and terrorism offences. Police officers are authorised to exercise these powers in ‘Commonwealth places’ if the officers reasonably suspect that a person might have just committed, be committing, or be about to commit a terrorist act.¹⁹ Officers may also exercise the powers in ‘prescribed security zones’. The Minister is empowered to declare that an area is a prescribed security zone if he or she considers that a declaration would assist:
- (a) in preventing a terrorist act occurring; or
 - (b) in responding to a terrorist act that has occurred.²⁰
29. These powers involve restrictions on the freedom of movement (protected by article 12 of the ICCPR) and the right to privacy (protected by article 17 of the ICCPR).
30. In his 2011 annual report, then INSLM Bret Walker SC noted the following features of the Division 3A powers:
- a. The powers are enlivened when a police officer ‘reasonably suspects’ that a person ‘might’ have just committed, be committing or be about to commit a terrorist act. That language introduces ‘another layer of permissible uncertainty’ that the former INSLM observed was ‘perhaps disquieting’.²¹
 - b. The Minister has a very broad power to prescribe security zones that may in practice not be susceptible to meaningful review (particularly with respect to revoking a decision to prescribe a zone).²²
31. The Commission agrees with the former INSLM that the breadth of the expanded stop, search and seize powers is an issue of concern. The creation of broad policing powers that engage civil and political rights is not uncommon in the context of counter-terrorism legislation. In determining whether the Division 3A powers are a proportionate response to the legitimate need to protect public safety, the INSLM may wish to consider in the first instance whether there is sufficient evidence of their effective use. While it is sometimes argued that retaining a rarely-used criminal offence can be justified for the purpose of deterrence, there can be no such justification for retaining intrusive policing powers. If the INSLM receives evidence that these powers are rarely if ever used, this would appear to indicate that the extensive pre-

existing powers of stop, search and seize at the federal and state and territory level are sufficient to fulfil the important aim of preventing terror attacks.

32. In addition, the INSLM may also wish to consider the former INSLM's concern regarding the lack of meaningful review of the Ministerial power to prescribe a security zone. The breadth of the Ministerial prescription power in Division 3A is not insignificant. It is unclear what matters a Minister will take into account in prescribing a security zone, or indeed to revoke a prescription. The concentration of unfettered power compares unfavourably, for example, when considering the detailed scrutiny a court undertakes in judicially reviewing administrative decision-making, where a specified range of detailed information about the decision-making process is considered. Accordingly, the INSLM may wish to again consider whether the exercise of ministerial power to prescribe security zones can be justified.

Recommendation 1: That the INSLM consider whether there is sufficient evidence to justify the continued retention of expanded legislative powers to stop, search and seize.

Recommendation 2: That the INSLM consider whether the retention of broad unfettered Ministerial powers to prescribe security zones can be justified.

7 Declared areas

33. This section of the submission considers offences relating to entering and remaining in 'declared areas' under Division 119 of Part 5.5 of the Criminal Code. In particular, this submission addresses ss 119.2 and 119.3 of the Criminal Code. The requirement for this review has its origin in a recommendation made by the PJCIS as a result of its inquiry into the Foreign Fighters Bill prior to its passage. In recommending that the declared areas provisions be inserted in the Criminal Code, but that they be made the subject of an early sunset date and review, including by the INSLM, the PJCIS stated:²³

The Committee notes that 'declared area' offences of the kind proposed in the Bill do not exist in any comparable jurisdictions overseas. It will therefore be particularly important that the laws be reviewed at an appropriate time after their implementation to ensure they are operating as intended. The Committee considers that a reduction in the proposed sunset clause from 10 years to two years after the next Federal election would provide a more timely opportunity for the Parliament to review and consider amendments to the regime after an initial period of operation.

It is further recommended that this Committee be given the opportunity to conduct a public inquiry into the operation of the provisions, including the list of 'legitimate purposes', well before the legislation's sunset. It would assist the Committee if this inquiry was informed by a review of the provisions by the INSLM, prior to its commencement.

34. The declared areas provisions in Division 119 of Part 5.5 of the Criminal Code were introduced by the Foreign Fighters Act and came into force on 1 December 2014.

35. Under s 119.3, the Foreign Affairs Minister may, by legislative instrument, declare an area if he or she is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country. Declarations are subject to disallowance by the PJCIS, and in any event expire three years after they are made.
36. To date, two areas have been declared under s 119.3 of the Criminal Code, namely Al Raqqa Province in Syria and Mosul District in Iraq.²⁴
37. If a declaration is in force with respect to an area, section 119.2 makes it an offence for a person (if they are an Australian citizen, resident, visa holder, or under the protection of Australia) to enter or to remain in that area, unless they do so solely for a 'legitimate' purpose. Section 119.2(3) specifies a limited number of permissible purposes, namely:
- (a) providing aid of a humanitarian nature;
 - (b) satisfying an obligation to appear before a court or other body exercising judicial power;
 - (c) performing an official duty for the Commonwealth, a State or a Territory;
 - (d) performing an official duty for the government of a foreign country or the government of part of a foreign country (including service in the armed forces of the government of a foreign country), where that performance would not be a violation of the law of the Commonwealth, a State or a Territory;
 - (e) performing an official duty for the United Nations or an agency of the United Nations;
 - (f) making a news report of events in the area, where the person is working in a professional capacity as a journalist or is assisting another person working in a professional capacity as a journalist;
 - (g) making a bona fide visit to a family member;
 - (h) any other purpose prescribed by the regulations.
38. To date, no other purposes have been prescribed by the regulations within the scope of s 119.2(3)(h).
39. The offence of entering a declared area is punishable by imprisonment for 10 years. It is not necessary for a person to enter or remain in a particular area for the purposes of committing any further terrorist act or hostile activity. Criminal liability is established once the individual has entered a declared area, regardless of their intent in doing so, unless the individual can establish they entered the declared area for one of the permissible purposes in s 119.2(3).
40. When these provisions were introduced in the Foreign Fighters Bill, the Commission expressed concern at the following:
- a. The provisions criminalise conduct that is not in itself wrongful or 'inherently criminal' in nature. Despite that fact, the offence attracts a very high penalty.

- b. In making a declaration about an area, the Foreign Minister is not required to form a view about the extent of hostile activity that is occurring in a particular area. It would, at least in theory, be open to the Minister to make a declaration with respect to an area in which very little hostile activity was occurring.
- c. The list of 'legitimate' purposes for travel to a declared area is very short. There are therefore likely to be many innocent reasons a person might wish to enter or remain in a declared area which do not fall within a recognised exception. Such purposes include visiting friends, transacting business, retrieving personal property or attending to personal or financial affairs.
- d. The exception applies only if travel is 'solely' for a legitimate purpose specified in s 119.2(3) or the regulations. That requirement has the effect that a person who enters a declared area primarily for a purpose falling within a recognised exception (such as visiting a parent) but also with a secondary innocent purpose (such as attending a friend's wedding), will commit an offence.
- e. The explanatory memorandum prepared in relation to the Bill did not identify an adequate justification for the provisions. It stated that division 119 was designed to

equip law enforcement and prosecutorial agencies with the tools to arrest, charge and prosecute those Australians who have committed serious offences, including associating with, fighting, or providing other support for terrorist organisations overseas.²⁵

The Commission did not consider this explanation to justify criminalising entry into an area without having committed any other offence, or intending to perform any wrongful conduct.

- f. The exception in s 119.2(3) places an evidential burden on an accused. Once a person is accused of entering or remaining in a declared area (or attempting to do so), it is necessary for them to adduce evidence that they were in a declared area solely for one or more specified legitimate purposes.

41. These concerns were expressed in the Commission's submission to the PJCIS in relation to the Foreign Fighters Bill.²⁶

42. The Commission considers that it is likely to be difficult, if not impossible, to formulate in advance a comprehensive list of legitimate reasons for travel to a declared area. This will render persons who do not intend to undertake any inherently wrongful conduct liable to prosecution. To the extent it may be claimed that this outcome may be avoided by the Attorney-General withholding consent to the commencement or a particular prosecution, or to the Director of Public Prosecutions exercising a discretion not to prosecute, that is insufficient protection.²⁷ Relying on executive discretion not to commence a prosecution cannot be a satisfactory protection against arbitrary interference with a human right. It is likely to have a chilling effect

on the enjoyment of the rights to freedom of movement and association: a reasonable person considering whether to undertake travel in these circumstances would be well advised not to travel if their sole protection against prosecution is an expectation of ministerial or prosecutorial discretion.

43. By potentially capturing a wide range of innocent conduct, and making that conduct subject to a severe criminal penalty, in the absence of a demonstrated compelling need the provisions are likely to impermissibly infringe the freedom of movement and a number of other human rights. The declared area provisions limit the freedom of movement (protected by article 12 of the ICCPR). They are also likely to limit various other human rights, for instance the right to family life (protected by article 23). As noted above, for a limitation on a human right to be justified it must be both necessary and proportionate to achieving a legitimate end.
44. The Commission urges the INSLM to scrutinise closely the following matters:
- a. why ss 119.2 and 119.3 are said to be necessary, given the existence of ss 119.1 and 119.4 of the Criminal Code (which make in an offence to enter, or make preparations to enter, a foreign country with the intention of engaging in hostile activity)
 - b. any evidence said to support the claim that ss 119.2 and 119.3 are necessary to achieve a legitimate objective
 - c. whether the limits on the freedom of movement imposed by s 119.2 are proportionate to achieving any legitimate objective. In considering that question, the following matters may be relevant:
 - i. how many people are said to be affected by the provisions
 - ii. how many prosecutions have been commenced under the provisions, and the outcome of those prosecutions
 - iii. whether experience indicates that the list of legitimate purposes in s 119.2(3) is sufficient, or whether innocent conduct is being captured by s 119.2.
45. In the event that the INSLM is not satisfied that the declared area provisions are necessary and proportionate to achieving a legitimate end, the Commission recommends that they be repealed.

Recommendation 3: In the event that the INSLM is not satisfied that the declared area provisions are necessary and proportionate to achieving a legitimate end, he should recommend that they should be repealed.

46. In the event the INSLM is satisfied that the declared area provisions are necessary and proportionate to achieving a legitimate end, the Commission repeats the following recommendations, made to the PJCIS in relation to its inquiry into the Foreign Fighters Bill prior to its passage:

Recommendation 4: In the event that the INSLM is satisfied that the declared area provisions are necessary and proportionate and should not be repealed, s 119.3 should be amended so that the Minister may declare an area only if she is satisfied that a listed terrorist organisation is engaging in a hostile activity to a significant degree in that area;

Recommendation 5: In the event that the INSLM is satisfied that the declared area provisions are necessary and proportionate and should not be repealed, the exception contained in s 119.2(3) should be amended so that s 119.2(1) does not apply to a person if that person enters, or remains in, an area solely for a purpose or purposes not connected with engaging in hostile activities.

Recommendation 6: In the event that recommendation 5 is not accepted:

- c. Detailed consideration be given to expanding the list of legitimate reasons for travel to declared zones in s 119.2(3) of the Criminal Code to include, for instance, visiting friends, transacting business, retrieving personal property and attending to personal or financial affairs. The list should be made as comprehensive as possible; and
- d. Section 119.2 be amended so that it is a defence to a charge of entering or remaining in a declared zone if a person establishes they were in a country for a purpose other than engaging in a hostile activity.

8 Control Orders, Preventive Detention Orders and the High Risk Terrorist Offenders Act

47. This section of the submission considers Divisions 104 and 105 of Part 5.3 of the Criminal Code (which contain the control order and preventative detention order regimes), including the interoperability of the control order regime and the High Risk Terrorist Offenders Act.

48. As noted above, both the control order (CO) and preventative detention order (PDO) regimes were introduced into the Criminal Code by the Anti-Terrorism Act (No. 2)). Each was initially subject to a 10-year sunset provision. The relevant sunset dates were extended by the Foreign Fighters Act until 7 September 2018. That was to allow for a review of the operation of those provisions to be conducted, including the present review.²⁸

49. Both the control order and preventative detention order regimes have been the subject of criticism. The Commission has previously expressed the view that these regimes:

- may allow for the arbitrary detention of individuals, contrary to article 9(1) of the ICCPR

- may result in arbitrary interference with a number of other rights of those subjected to such orders, such as the right to privacy, and the rights to freedom of movement, expression and association (articles 17, 12, 19 and 22 of the ICCPR respectively)
- do not provide effective review procedures.²⁹

50. Despite that fact, and the fact that the recommended reviews have not been completed, both the control order and the preventative detention order regimes have been extended or had thresholds lowered since the passage of the Foreign Fighters Act. Those amendments are discussed further below.

8.1 Preventative Detention Orders

51. Preventative Detention Orders are made under Division 105 of Part 5.3 of the Criminal Code.

52. The original stated object of the Commonwealth PDO regime was to enable police to detain a person for a 'short period of time' to prevent an imminent terrorist act occurring or to preserve evidence of, or relating to, a recent terrorist act. Commonwealth PDOs may be granted for a period of up to 48 hours. Separate State and Territory laws provide for similar orders involving preventative detention to be made. Those State and Territory orders can be made for up to 14 days.

53. Applications for PDOs are made by members of the Australian Federal Police (AFP). An initial PDO may be granted by a Senior AFP officer, and may be made for a period of time of up to 24 hours. A subsequent application for a further, 'continuing' PDO may be made to an issuing authority, who must be a judge or member of the Administrative Appeals Tribunal authorised by the Minister under s 105.2(1) of the Criminal Code. The total length of time for which a person may be detained under a PDO issued under the Criminal Code is 48 hours. However, a person may be then be detained under a PDO issued under the various State or Territory statutes. As noted above, those corresponding State and Territory statutes provide for a longer maximum period of preventative detention – up to 14 days.

54. Commonwealth PDOs are not judicial orders; they are made by the executive. A judge acting as an issuing authority does so in their personal capacity.³⁰

55. The PDO regime places very severe restrictions on the human rights of those subject to them. In particular, the PDO regime:

- a. Does not require the subject of a PDO to be informed of the reasons for their detention, impinging significantly on article 9(2) of the ICCPR. Applications for a PDO are made *ex parte* and key information supporting the PDO application may be withheld on national security grounds.

- b. Does not allow for meaningful review of the merits of the issuance of a PDO by a competent judicial authority while the PDO remains in force. The subject of the PDO, therefore, has no meaningful opportunity to challenge their detention, contrary to article 9(4) of the ICCPR.
 - c. Arguably infringes the right to a fair trial in a suit at law, contrary to article 14(1) of the ICCPR. The subject of a PDO is, in effect, being restricted by punitive measures without ever having been convicted of a criminal offence. The opportunity to challenge the information supporting the order is restricted, if not impossible. The subject of a PDO also has limited opportunity to speak with a legal representative and such communication is not protected by legal professional privilege.
 - d. Imposes severe restrictions on the rights of the subject of a PDO to communicate with others, with the added possibility of a prohibited contact order preventing the subject from communicating with designated persons at all. These features of the regime severely limit the freedom of expression contained in article 19 of the ICCPR. Restrictions on communication also apply to PDO subjects who are under the age of 18.
56. The Commission made detailed submissions about the human rights implications of the PDO regime in its submission to the Senate Legal and Constitutional Legislation Committee in its inquiry into the Anti-Terrorism Bill (No 2) 2005.³¹
57. The PDO regime is an extraordinary one. It allows for executive detention of individuals without charge, or contemplated charge. It is unconnected with the investigation of criminal conduct.
58. In his 2012 annual report, the former INSLM, Bret Walker SC, recommended that the preventative detention regime be repealed.³² In particular, he stated:
- There is no demonstrated necessity for these extraordinary powers, particularly in light of the ability to arrest, charge and prosecute people suspected of involvement in terrorism. No concrete and practical examples of when a PDO would be necessary to protect the public from a terrorist act because police could not meet the threshold to arrest, charge and remand a person for a terrorism offence have been provided or imagined.
- Police should instead rely on their established powers to take action against suspected criminals through the arrest, charge, prosecution and lengthy incarceration of suspected terrorists.³³
59. In 2013, the Council of Australian Governments (COAG) Review of Counter-Terrorism Legislation also recommended that the preventative detention order regime be repealed, finding that the provisions were unlikely to be used, and that the purposes of the PDO regime could be achieved 'by traditional methods of arrest, interrogation and charge.' Consequently, the PDO regime was 'neither effective nor necessary.'³⁴

60. Despite these recommendations, in 2016 the threshold for applying for a PDO was reduced. Formerly, in the case of anticipated conduct, a member of the AFP could apply for a PDO, and an issuing authority could grant one, only if they were satisfied that there were reasonable grounds to suspect that a terrorist attack was ‘imminent.’ The *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth) removed the requirement for imminence, and replaced it with a requirement that the applicant and the issuing authority be satisfied that there are reasonable grounds to suspect that a person will carry out a terrorist attack that could occur, and is capable of being carried out within 14 days. (It remains a requirement that an issuing authority be satisfied that a PDO would substantially assist in preventing a terrorist attack).
61. The previous reviews by the former INSLM and the COAG Committee indicate that the PDO regime is not necessary or proportionate to achieving a legitimate objective. In the absence of compelling evidence to the contrary, the Commission recommends that it be repealed.

Recommendation 7: In the absence of compelling evidence that the provisions are necessary and proportionate to achieving a legitimate objective, Division 105 of Part 5.3 of the Criminal Code should be repealed.

8.2 Control Orders

62. Control orders may be granted under Division 104 of Part 5.3 of the Criminal Code.
63. Control orders allow obligations, prohibitions and restrictions to be imposed on a person in order to:
- a. protect the public from a terrorist act
 - b. prevent the provision of support for or the facilitation of a terrorist act
 - c. prevent the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.³⁵
64. The kinds of obligations, prohibitions and restrictions that can be imposed pursuant to a control order relate to:³⁶
- a. the areas a person can go
 - b. not travelling overseas
 - c. curfews
 - d. wearing a tracking device
 - e. communicating or associating with particular people
 - f. accessing certain telecommunications or technology (including the internet)
 - g. possessing or using certain articles or substances
 - h. carrying out specified activities (including working in particular jobs)

- i. regular reporting
- j. being photographed
- k. having fingerprints taken
- l. participating in counselling or education.

65. Unlike PDOs, control orders are granted by certain courts. As at April 2016, 6 control orders had been granted.³⁷

66. Interim control orders are granted by certain federal courts, and may be issued on behalf of the Commonwealth without the other party present. A control order is confirmed by a court following a civil hearing.

(a) *Human rights concerns*

67. Control orders may limit a number of human rights protected by the ICCPR. In particular:

- a. The conditions of a control order may amount to detention. That may raise questions about whether the prohibition on arbitrary detention in article 9(1) of the ICCPR is engaged
- b. Restrictions on association may interfere with the right to family life (protected by articles 17 and 23 of the ICCPR) and the right to freedom of association (protected by article 22 of the ICCPR)
- c. Warrants issued to monitor compliance with control orders will interfere with the right to privacy protected by article 17 of the ICCPR
- d. The ‘chilling effect’ of monitoring may interfere with the right to expression contained in article 19 of the ICCPR
- e. Restrictions on the material that may be made available to the respondent to control order proceedings may interfere with the right to fair trial protected by article 14(1) of the ICCPR

(b) *Previous review by former INSLMs and COAG Committee*

68. Former INSLM Bret Walker SC criticised the control order regime.³⁸ In particular, he concluded that ‘control orders in their present form are not effective, not appropriate and not necessary’. The Monitor recommended that the provisions of Div 104 of Part 5.3 of the Criminal Code be repealed.³⁹

69. The 2013 COAG Review of Counter-Terrorism Legislation concluded that the control order regime should be retained but with additional safeguards and protections included.⁴⁰ Former INSLM, the Hon Roger Gyles AO QC, completed a review of the various 2013 COAG recommendations about the control order regime in January and April 2016.⁴¹ He recommended that a number of the COAG recommendations be implemented. The Commission does not again address these matters here. If the control order regime is retained, the Commission considers that the recommendations should be

implemented. The Commission notes that Mr Gyles expressly did not consider the question whether the control order regime should be abolished, leaving that question for the present review.⁴²

(c) *Recent extensions of the control order regime*

70. Despite the foregoing, and the fact that the recommended reviews of the control order regime (including the present review) are ongoing, that regime has been extended in a number of ways since the passage of the Foreign Fighters Act in 2014. In particular:

- a. The grounds upon which a control order can be requested, issued or varied were expanded to include prevention of the provision of support or the facilitation of a terrorist act; or engagement in a hostile activity in a foreign country⁴³
- b. The minimum age for the subject of a control order was lowered from 16 to 14⁴⁴
- c. A suite of amendments were made to allow the grant of warrants to allow monitoring of persons subject to control orders. Those include the introduction of a new class of Monitoring Warrants under the Crimes Act, and amendments to the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2004* (Cth). Once a control order has been granted, the threshold for the grant of these types of warrant is low. These provisions have greatly increased the intrusiveness of the grant of a control order on the privacy of its subject⁴⁵
- d. Amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) allow for the use of intelligence material in control order proceedings without disclosing that material to the controlee⁴⁶

71. The recent amendments to the control order regime, including the new classes of warrant that may be issued to monitor compliance with control orders, have exacerbated the extent to which the grant of a control order will interfere with the human rights of its subject. In particular, the new warrant provisions will be particularly intrusive on the right to privacy of the subject of a control order and persons with whom they associate.

72. The Commission urges the INSLM to consider whether, in light of all available evidence, 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. In the absence of compelling evidence that the regime is necessary and proportionate to that goal, the Commission recommends that there be significant amendment to the control order regime to ensure Australia complies with its obligation under international human rights law to ensure that all counter-terror legislative measures are both necessary to achieve a legitimate aim and proportionate to achieving that aim. If the INSLM is of the view that the regime cannot be amended to

achieve human rights compliance, the control order regime should be repealed.

Recommendation 8: In the absence of compelling evidence that the control order regime is necessary and proportionate to preventing serious acts of terrorism, this regime should be amended to comply with international human rights law, paying particular regard to the aspects of the regime that engage the ICCPR rights identified at paragraphs 67 and 70 of this submission. If the INSLM considers the control order regime cannot be amended to ensure it complies with Australia’s international human rights obligations, the control order regime should be repealed.

8.3 The control order regime and the High Risk Terrorist Offenders Act.

73. The Commission understands that this Inquiry is considering the interoperability of the control order regime and the High Risk Terrorist Offenders Act.
74. If the INSLM were to find that the continuation of the control order regime is not justified, further inquiry into that issue would not be required. The following discussion therefore is predicated on the assumption that this Inquiry finds the maintenance of the control order regime in the Criminal Code is justified, in either its current or an amended form.
75. The High Risk Terrorist Offenders Act received Royal Assent on 7 December 2016. In the absence of any earlier proclamation, its operative provisions will come into effect on 7 June 2017.⁴⁷
76. On commencement, the High Risk Terrorist Offenders Act will amend the Criminal Code to allow the continued detention of people convicted of a range of terrorism-related offences after the expiration of their sentences in circumstances where those people are assessed as posing an unacceptable risk to community safety and that risk cannot be managed in a less restrictive way. These provisions will be in new Division 105A of Part 5.3 of the Criminal Code.
77. The Commission has a number of concerns about whether continuing detention orders have been shown to be justified, including whether appropriate tools exist or can be developed to assess the risk posed by affected individuals with sufficient accuracy to demonstrate that continuing preventive detention after the conclusion of a criminal sentence is warranted.⁴⁸
78. The Commission understands that the threshold question whether the High Risk Terrorist Offenders Act is itself justified is beyond the scope of the present inquiry, which is limited to the ‘interoperability’ of the control order regime with the High Risk Terrorist Offenders Act. Nevertheless, the interoperability questions that are the subject of this Inquiry cannot be answered properly without a full understanding of the practical and other difficulties that arise under the High Risk Terrorist Offenders Act. For

example, if the problems that have already been identified regarding the tools available to assess risk of further terrorist offending are not solved prior to the executive branch of government wishing to seek an order under that Act, there will be greater urgency to find alternative ways of reducing the relevant risk of terrorism.

79. The Commission prepared a detailed submission to the PJCIS in relation to its inquiry into the High Risk Terrorist Offenders Bill. As the Commission noted in that submission, continuing detention orders potentially engage the right not to be subject to arbitrary detention, protected by article 9(1) of the ICCPR.
80. Preventative detention may, in some circumstances, be justified, if it is demonstrated to be necessary and proportionate to achieving a legitimate objective. As the Commission observed in its submission to the PJCIS, for continuing detention to be free from arbitrariness it is necessary to demonstrate that there are no less restrictive means available to protect the public. This principle is recognised, if not perfectly implemented, in the High Risk Terrorist Offenders Act. Pursuant to s 105A.7(1) of the Criminal Code, a relevant court will only be able to make a continuing detention order if:
- (b) ... the Court 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; and
 - (c) the Court is satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.
81. Where a person is assessed to pose an unacceptable risk of committing a serious Part 5.3 offence, that risk may be mitigated by the grant of a control order. While the conditions of a control order may in some cases amount to detention, a control order will still necessarily be a less restrictive measure than a continuing detention order. It is therefore likely that before a court can be satisfied that no other less restrictive measure would be effective in preventing a particular unacceptable risk, it will need to consider whether that risk could be addressed by the grant of a control order. However, continuing detention orders will be made by State or Territory Supreme Courts. Those courts do not have jurisdiction to issue control orders.
82. This will potentially place a judge hearing an application for a continuing detention order, who is satisfied that a person currently under sentence poses a significant risk of committing a further terrorism offence, in the invidious position of having to decide between making a continuing detention order, or dismissing an application (and therefore making no order to address the risk an individual may pose). It would then be a matter for the Commonwealth to commence a separate proceeding in an appropriate federal jurisdiction to seek a control order. That will potentially duplicate aspects of the initial proceedings.
83. 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.

84. For these reasons, the Commission considers that a coherent regime should be established so that where an application is made for a continuing detention order, and the court considering the application considers that some less restrictive measure (including a control order) could adequately mitigate the relevant risk posed by an individual, the relevant court has jurisdiction to implement that less restrictive measure, or to transfer the proceedings to a more appropriate jurisdiction.
85. In its submission to the PJCIS in relation to the High Risk Terrorist Offenders Bill, the Commission made a number of recommendations addressing the manner in which the risk a person may pose to the community may be assessed.⁴⁹ These recommendations were as follows.
- a. That an expert's report under s105A.6, relevant to a Continued Detention Order (CDO) being made, should include any limitations on the expert's assessment of the risk of the offender committing a serious terrorism offence if released into the community, as well as the expert's degree of confidence in that assessment.
 - b. That an independent risk management body be established to, among other things, accredit individuals seeking to be appointed as 'relevant experts' for the purpose of CDO proceedings; development best-practice risk-assessment and risk-management processes, guidelines and standards; and provide education and training for risk assessors. As an alternative, the Commission recommended an office of Risk Management Monitor be established with similar functions.
86. In addition, the Commission recommends that consideration be given to amending the control order regime to allow for the use of these risk assessments in control order proceedings, both to assess whether it is appropriate that a control order be granted, and whether each obligation, prohibition or restriction sought in relation to a control order is justified.

Recommendation 9: Where an application is made for a continuing detention order, and the court considering the application believes a less restrictive measure (including a control order) could adequately mitigate the relevant risk posed by an individual, the relevant court should have jurisdiction to implement that less restrictive measure, or to transfer the proceedings to a more appropriate jurisdiction.

¹ *Independent National Security Legislation Monitor Act 2010* (Cth) s 8(a)(i).

² *Independent National Security Legislation Monitor Act 2010* (Cth) s 3(c)(i).

³ United Nations Security Council, Resolution 1373 (2001), 4385th meeting, [UN Doc. S/RES/1373 \(2001\)](#) (28 September 2001); United Nations Security Council, Resolution 2249 (2015), 7565th meeting, [UN Doc. S/RES/2249 \(2015\)](#) (20 November 2015).

- ⁴ *International Covenant on Civil and Political Rights (ICCPR)*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- ⁵ Mary Robinson, UN High Commissioner for Human Rights, *Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective On Counter-Terrorist Measures* (23 September 2002), 1. At http://www.un.org/en/sc/ctc/docs/rights/2002_09_23_ctcchair_note.pdf (viewed 28 April 2017).
- ⁶ Human Rights and Equal Opportunity Commission (as the Commission was then known), Submission No 158, 158A and 158B to Senate Legal and Constitutional Legislation Committee, *Inquiry into the Anti-Terrorism Bill (No 2) 2005*, 11 November 2005. At <http://www.humanrights.gov.au/submission-anti-terrorism-bill-no-2-2005> (viewed 28 April 2017); Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008). At <https://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws> (viewed 28 April 2017).
- ⁷ *Anti-Terrorism Act (No. 2) 2005* (Cth), Sch 5 Item 10 inserted Division 3A of Part IAA into the *Crimes Act 1914* (Cth), Sch 4 Item 24 inserted ss 104.32 and 105.53 into *The Criminal Code* (Cth).
- ⁸ *Anti-Terrorism Act (No. 2) 2005* (Cth), s 2.
- ⁹ *Terrorism Act (No. 2) 2005* (Cth), Sch 3 item 24 cl 104.32 (CO), Sch 4 item 24 cl 105.53 (PDO), Sch 5, Item 10, CI 3UK
- ¹⁰ Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No. 2) 2005* (November 2005) 9, [2.27].
- ¹¹ For example, the Commission provided a written submission to the PJCIS review on 2 October 2014 and appeared at a hearing the next day.
- ¹² *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), Sch 1 Item 131A.
- ¹³ *The Criminal Code* (Cth), s 119.2(6); *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1B).
- ¹⁴ Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights - Human rights: a uniting framework*, Submitted pursuant to UNGA Resolution 48/41, 48th session of the Commission on Human Rights, Agenda Item 4, UN Doc. E/CN.4/2002/18 (2002), (27 February 2002) Annex. At <http://repository.un.org/handle/11176/238906> (viewed 28 April 2017).
- ¹⁵ Commission on Human Rights, n 14 above.
- ¹⁶ Commission on Human Rights n 14 above
- ¹⁷ Office of the United Nations High Commissioner for Human Rights, *The Right to Privacy in the Digital Age*, Human Rights Council, 27th session, Agenda Items 2 and 3, [UN Doc A/HRC/27/37](http://www.unhcr.org/refugees/UN%20Doc%20A/HRC/27/37) (2014) (30 June 2014), [23].
- ¹⁸ Office of the United Nations High Commissioner for Human Rights, *The Right to Privacy in the Digital Age*, Human Rights Council, 27th session, Agenda Items 2 and 3, [UN Doc A/HRC/27/37](http://www.unhcr.org/refugees/UN%20Doc%20A/HRC/27/37) (2014) (30 June 2014), [23].
- ¹⁹ *Crimes Act 1914* (Cth), s 3UB.
- ²⁰ *Crimes Act 1914* (Cth), s 3UJ.
- ²¹ Bret Walker SC, Independent National Security Legislation Monitor Annual Report 2011, (2011) 43. At <https://www.inslm.gov.au/reviews-reports/annual-reports/independent-national-security-legislation-monitor-annual-report-2011> (viewed 3 May 2017) 43.
- ²² Bret Walker SC, Independent National Security Legislation Monitor Annual Report 2011, (2011) 44. At <https://www.inslm.gov.au/reviews-reports/annual-reports/independent-national-security-legislation-monitor-annual-report-2011> (viewed 3 May 2017) 44.
- ²³ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014), 108 [2.396]-[2.397]. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Counter-Terrorism_Legislation_Amendment_Foreign_Fighters_Bill_2014/Report1 (viewed 27 April 2017).
- ²⁴ *Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014—Al-Raqqa Province, Syria* (4 December 2014); *Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2015—Mosul District, Ninewa Province, Iraq* (2 March 2015).
- ²⁵ Explanatory Memorandum to the Foreign Fighters Bill 2014 (Cth), p 139 [827].
- ²⁶ Australian Human Rights Commission, Submission No 7 to the Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 2 October 2014. At <https://www.humanrights.gov.au/submissions/inquiry-counter-terrorism-legislation-amendment-foreign-fighters-bill-2014-0> (viewed 28 April 2017).
- ²⁷ Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014), 104 [2.384]. At

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Counter-Terrorism_Legislation_Amendment_Foreign_Fighters_Bill_2014/Report1 (viewed 27 April 2017).

²⁸ Prior to the sunset date of 7 September 2018, in addition to the INSLM review, under s 29(1)(bb) of the *Intelligence Services Act 2001* (Cth) the Parliamentary Joint Committee on Intelligence and Security has a function of review of Division 3A of Part IAA of the *Crimes Act 1914* (Cth), Divisions 104 and 105 and section s119.2 and 119.3 of the *Criminal Code*.

²⁹ See for example: Human Rights and Equal Opportunity Commission (as the Commission was then known), Submission No 158, 158A and 158B to Senate Legal and Constitutional Legislation Committee, *Inquiry into the Anti-Terrorism Bill (No 2) 2005*, 11 November 2005. At <http://www.humanrights.gov.au/submission-anti-terrorism-bill-no-2-2005> (viewed 28 April 2017); Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008). At <https://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws> (viewed 28 April 2017).

³⁰ *Criminal Code* (Cth), s 105.18.

³¹ Human Rights and Equal Opportunity Commission, Submission No 158, 158A and 158B to Senate Legal and Constitutional Legislation Committee, *Inquiry into the Anti-Terrorism Bill (No 2) 2005*, 11 November 2005. At <http://www.humanrights.gov.au/submission-anti-terrorism-bill-no-2-2005> (viewed 28 April 2017).

³² Independent National Security Legislation Monitor, *Declassified Annual Report* (2012), Chapter III, Recommendation III/4 At <https://www.inslm.gov.au/reviews-reports/annual-reports> (viewed 27 April 2017).

³³ Independent National Security Legislation Monitor, *Declassified Annual Report* (2012), 67. At <https://www.inslm.gov.au/reviews-reports/annual-reports> (viewed 27 April 2017)

³⁴ *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) 69-71 [269]-[276]. At <https://www.ag.gov.au/Consultations/Pages/COAGReviewofCounter-TerrorismLegislation.aspx> (viewed 27 April 2017).

³⁵ *Criminal Code* (Cth), s 104.1.

³⁶ *Criminal Code* (Cth), s 104.5(3).

³⁷ Independent National Security Legislation Monitor, *Control Order Safeguards – Part 2*, 5 (April 2016). At <https://www.inslm.gov.au/reviews-reports/control-order-safeguards-0> (viewed 28 April 2017).

³⁸ Independent National Security Legislation Monitor, *Declassified Annual Report* (2012), Chapter II. At <https://www.inslm.gov.au/reviews-reports/annual-reports> (viewed 28 April 2017).

³⁹ Independent National Security Legislation Monitor, *Declassified Annual Report* (2012), 40. At <https://www.inslm.gov.au/reviews-reports/annual-reports> (viewed 28 April 2017).

⁴⁰ *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013), 54 [215] (available at <https://www.ag.gov.au/Consultations/Pages/COAGReviewofCounter-TerrorismLegislation.aspx>.)

⁴¹ Roger Gyles AO QC Independent National Security Legislation Monitor, *Control Order Safeguards – Part 1 (INSLM Report) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (January 2016); Roger Gyles AO QC Independent National Security Legislation Monitor, *Control Order Safeguards – Part 2* (April 2016). (Available at <https://www.inslm.gov.au/reviews-reports/control-order-safeguards-0>).

⁴² Independent National Security Legislation Monitor, *Control Order Safeguards – (INSLM Report) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (January 2016), 1-2, [1.5]. (Available at <https://www.inslm.gov.au/reviews-reports/control-order-safeguards-0>).

⁴³ *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* (Cth).

⁴⁴ *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth).

⁴⁵ *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth). See the remarks of the former INSLM Roger Gyles AO QC in his report *Control Order Safeguards – (INSLM Report) Special Advocates And The Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (January 2016), 3 [2.4]; Australian Human Rights Commission, Submission No 5 to the Parliamentary Joint Committee on Intelligence and Security (PJCIS), *PJCIS Inquiry into the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, 9 December 2015, at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/CT_Amendment_Bill_2015/Submissions (viewed 1 May 2017).

⁴⁶ *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth).

⁴⁷ *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth), Sch 2 Item 2.

⁴⁸ Australian Human Rights Commission, Submission No 8 to the Parliamentary Joint Committee on Intelligence and Security, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, 12

October 2016, [61]-[86]. At <http://www.humanrights.gov.au/submissions/criminal-code-amendment-high-risk-terrorist-offenders-bill-2016> (viewed 27 April 2017).

⁴⁹ Australian Human Rights Commission, Submission No 8 to the Parliamentary Joint Committee on Intelligence and Security, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, 12 October 2016, 18-21. At <http://www.humanrights.gov.au/submissions/criminal-code-amendment-high-risk-terrorist-offenders-bill-2016> (viewed 27 April 2017).