



Australian
Human Rights
Commission

Review of certain police powers, control orders and preventative detention orders

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

3 November 2017

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

Table of Contents

	<i>Australian Human Rights Commission Supplementary Submission to the Parliamentary Joint Committee on Intelligence and Security</i>	<i>1</i>
1	Introduction.....	3
2	Recommendations.....	4
3	Permissible limitations on human rights	5
3.1	<i>Legitimate aims</i>	<i>5</i>
(a)	<i>‘National security’</i>	<i>6</i>
3.2	<i>Necessity</i>	<i>6</i>
3.3	<i>Proportionality.....</i>	<i>7</i>
4	The functions and findings of the INSLM.....	7
4.1	<i>Assessment of security landscape.....</i>	<i>9</i>
4.2	<i>The current security landscape</i>	<i>9</i>
5	Stop, search and seize powers.....	10
6	Control orders.....	10
6.1	<i>Monitoring powers</i>	<i>11</i>
6.2	<i>Factors said to justify the retention of the control order regime.....</i>	<i>12</i>
(a)	<i>Limiting radicalisation and disrupting planning of terrorist acts</i>	<i>12</i>
(b)	<i>Insufficient evidence to prosecute for a criminal offence</i>	<i>12</i>
(c)	<i>Increase in legislation imposing non-criminal control of the individual</i>	<i>12</i>
(d)	<i>Recent extension of control order regime</i>	<i>13</i>
(e)	<i>Proportionality of control order regime</i>	<i>13</i>
6.3	<i>Interaction between the control order regime and the Criminal Code (High Risk Terrorist Offenders) Act 2016 (Cth).....</i>	<i>13</i>
6.4	<i>Recommendations made by the 2013 COAG Review, the second INSLM, and the present INSLM</i>	<i>14</i>
7	Preventative Detention Orders	14

1 Introduction

1. The Australian Human Rights Commission welcomes the opportunity to make this supplementary submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its review of:
 - a. the terrorism-related stop, search and seize powers in Division 3A of Part IAA of the *Crimes Act 1914* (Cth) (Crimes Act)
 - b. the control order and preventative detention order regimes contained in Divisions 104 and 105 of the *Criminal Code* (Cth).
2. The purpose of this submission is to address several matters arising from the relevant reports 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 reports serve 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 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

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

Recommendation 2

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

Recommendation 3

In the event the stop, search and seize powers are retained, the recommendations of the present INSLM for oversight by the Commonwealth Ombudsman and annual reporting to the Minister be implemented.

Recommendation 4

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 the Commission's INSLM Submission. If the PJCIS 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 5

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. In principle, the Commission considers that the Extended Supervision Order regime recommended by the INSLM could, if properly drafted, satisfy this recommendation.

Recommendation 6

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.

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. As the present INSLM acknowledges,¹⁴ his views about whether the provisions under review remain justified differ in some significant respects from views expressed by the first INSLM and the Council of Australian Governments’ 2013 Review of Counter-Terrorism Legislation (COAG Review). The relevant human rights have not altered since those bodies made their reports. It is therefore reasonable to conclude that the different view arrived at by the present INSLM is primarily the result of changes to the nature and/or extent of the terrorist threat, or to further experience gained by law enforcement agencies in responding to terrorist plots or incidents.
32. 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.
33. The present INSLM observes that there can be no guarantee that all terrorist attacks will be detected and prevented. 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 Stop, search and seize powers

34. The present INSLM has recommended that these powers be retained for a further five years, because he considers they ‘have the capacity to be effective’, and they are ‘truly “emergency” powers’.¹⁶
35. For the powers to be justified, it would also have to be shown that they are necessary to prevent or respond to terrorist acts. The Commission therefore repeats to the PJCIS the substance of the recommendations it made in its INSLM Submission.
36. The Commission particularly urges the PJCIS to scrutinise closely any claims that the retention of these provisions is justified by changes to the security landscape. For instance, it is not self-evident that the Attorney-General’s power to prescribe areas is likely to assist in preventing or responding to terrorist offences by lone actors using simple weapons.
37. In the event that the powers are retained, the Commission endorses the INSLM’s recommendations that increased scrutiny and reporting requirements be implemented.¹⁷

Recommendation 1

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

Recommendation 2

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

Recommendation 3

In the event the stop, search and seize powers are retained, the recommendations of the present INSLM for oversight by the Commonwealth Ombudsman and annual reporting to the Minister be implemented.

6 Control orders

38. The Commission considers that the recent INSLM report does not conclusively demonstrate that the retention of the control order regime, and the restrictions on human rights it entails, is necessary to reduce the risk of terrorism and proportionate to that end. The Commission urges the PJCIS to evaluate the

evidence before it, including classified material (or other in-camera evidence), in considering whether the provisions should be allowed to lapse.

39. The Commission makes the following observations about the discussion of control orders in the recent INSLM report.

6.1 Monitoring powers

40. The Commission's INSLM submission refers to the control order monitoring powers introduced by the *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth). The Commission acknowledges the present INSLM's observation that these powers did not fall directly within the scope of his recent reviews.¹⁸ However, the Commission submits that the existence of these monitoring powers cannot be disregarded in assessing whether the limits on human rights effected by the control order regime are necessary and proportionate to the legitimate aim of protecting the community from terrorism.

41. These monitoring powers are potentially extremely intrusive. As the Commission submitted when the Bill introducing these powers was first considered by the PJCIS, the threshold for obtaining relevant warrants is low. For instance, control order warrants under the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2004* (Cth) may be granted where the issuing authority is satisfied that they would 'be likely to substantially assist in determining whether a control order has been or is being complied with'. There is no requirement for any evidence that a control order is in fact not being complied with.¹⁹

42. The relevance of these observations is that the availability of these monitoring powers, and the criteria governing their exercise, are such that they should be regarded as altering the nature of a control order. To be subject to a control order is to be subject to these highly intrusive monitoring powers. That is a relevant factor in considering whether the impact a control order has on the human rights of an affected person (and in particular, the right to privacy) is proportionate to the need to protect the community from terrorism. As the second INSLM observed:

Monitoring compliance seems a reasonable concept, but reading these schedules [ie the schedules of the Bill which introduced the current control order monitoring powers] brings home forcibly the extent of intrusion into life and liberty by the making of a control order. The mere existence of the order is a trigger for monitoring. The details of the potential monitoring blur, if not eliminate, the line between monitoring and investigation. The case for control orders is weakened if control orders are of little utility without such far reaching surveillance. It is difficult to imagine such provisions being applied to an accused on bail. The significance for present purposes is to emphasise the seriousness of the impact upon a person of the grant of a control order if these changes come into force and the consequent necessity for proper safeguards of the interests of a potential controlee.²⁰

43. The greater the limits that control orders place on the human rights of those subject to them, the more compelling the evidence in support of the need for control orders must be.

44. These observations are not affected by the fact that no control orders have been made, and no control order warrants granted, since these monitoring powers came into effect.²¹

6.2 Factors said to justify the retention of the control order regime

45. As the present INSLM notes, the first INSLM recommended that the regime be repealed. The COAG Review recommended that it be retained.²²

46. The present INSLM has cited a number of justifications for the control order regime referred to by intelligence and law enforcement agencies.

47. The Commission makes the following observations about aspects of the INSLM's discussion, and in particular about the factors he discusses as relevant to the necessity and proportionality of the control order regime.

(a) Limiting radicalisation and disrupting planning of terrorist acts

48. The present INSLM states that control orders may be useful to limit radicalisation and disrupt planning of terrorist attacks.²³ These are legitimate aims of the control order regime. The INSLM also refers to the increased risk of terrorism.²⁴

49. To the extent that it may be argued that the retention of the control order regime is justified by the changed security landscape, it is not self-evident that this justification is particularly relevant to the increased risk posed by lone actors, rapidly radicalised, carrying out simple attacks. In those circumstances, there is, *ex hypothesi*, limited if any warning that an attack will occur (and hence also of the fact that a person may be liable to radicalisation). There is also limited planning to be disrupted.

(b) Insufficient evidence to prosecute for a criminal offence

50. The present INSLM notes that criminal prosecution is, where possible, preferable to resort to the control order regime. However, he appears to accept that one factor that supports the retention of the regime is that sufficient evidence may not be available to prove relevant conduct to the criminal standard and that, in those circumstances, it would be possible to obtain a control order which need only be proved to the civil standard.

51. The Commission is concerned that control orders may be considered as an alternative to criminal prosecution, on the basis of evidentiary concerns. As the former UN Special Rapporteur Martin Scheinin has stated, while it is conceivable that control orders could be justified on these grounds, it could only be so in cases where there is an urgent need for them to prevent a terrorist attack.²⁵

(c) Increase in legislation imposing non-criminal control of the individual

52. The present INSLM states:

[W]hile controlling the movements, associations and communications of individuals outside the criminal justice system by court order may not have been a novel measure in 2005 (particularly in view of pre-existing state and territory regimes addressing domestic violence), such measures have become an even more widely used and accepted tool (though still at times controversial) in the Australian legal landscape.²⁶

53. From the point of view of human rights law, the fact that human rights have been limited in one sphere cannot of itself justify further limitations in another sphere. As discussed in paragraph 19 above, care must be taken to ensure that legislators and citizens do not inadvertently accept a circular argument for the retention or expansion of particular counter-terrorism measures, and the consequent erosion of fundamental rights and liberties. The necessity and proportionality of each proposed limitation of human rights must be independently assessed.

(d) *Recent extension of control order regime*

54. In support of his view that the control order regime is necessary to reduce the risk posed to the Australian community by terrorism, the present INSLM states:

Parliament, rather than repealing div 104, has instead, and only quite recently, made significant amendments to div 104 and related legislation, including the revised s 38J of the NSI Act and the special advocates regime, along with the monitoring regime in the Crimes Act, TIA Act and SD Act. In those circumstances, it may be that control order requests will now become more frequent.²⁷

55. It appears that this passage is intended to respond to the criticism that the relatively low use of the control order regime is an indication that that regime is not necessary to respond to the risk of terrorism. The Commission submits that the passage should not be read as suggesting that the government's decision to extend rather than repeal Division 104 can amount to evidence that the provisions are effective, necessary or proportionate.

(e) *Proportionality of control order regime*

56. The present INSLM notes the extent of the restrictions that a control order may have on the rights of an affected individual. This 'requires the case to be made for such interference'.²⁸ As noted above, the relevant question for the purposes of human rights law is whether the government has demonstrated that there is compelling and objective justification for the measures, including the proportionality of the limitation on rights in light of the likely efficacy of the measure and the magnitude of the risk it responds to.

6.3 *Interaction between the control order regime and the Criminal Code (High Risk Terrorist Offenders) Act 2016 (Cth)*

57. The Commission's INSLM submission contains a recommendation that courts considering an application for a continuing detention order should be empowered to make, where appropriate, a less restrictive order (such as a

control order), or to transfer the proceedings to another court that has relevant jurisdiction. The Commission considers that, in principle, the present INSLM's recommendation that relevant courts be empowered to make extended supervision orders would satisfy this recommendation.

58. The Commission notes that if courts were empowered to make extended supervision orders, one of the justifications for the retention of the control order regime identified by the COAG Review would no longer be relevant.²⁹ The Commission submits that the PJCIS should consider whether the implementation of an extended supervision order regime would allow for the abolition of the control order regime.

6.4 Recommendations made by the 2013 COAG Review, the second INSLM, and the present INSLM

59. In the event that the operation of the control order regime is extended, the Commission considers that the recommendations of the second INSLM (considering the recommendations made by the COAG Review), as endorsed by the present INSLM, should be implemented.³⁰

Recommendation 4

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 the Commission's INSLM Submission. If the PJCIS 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 5

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. In principle, the Commission considers that the Extended Supervision Order regime recommended by the INSLM could, if properly drafted, satisfy this recommendation.

7 Preventative Detention Orders

60. The present INSLM has recommended that the PDO regime should be retained for a further five years. In arriving at that view, he notes that both the first INSLM and the COAG Review recommended that the regime be repealed. In his view, the retention of the PDO regime is justified by 'the significant changes both in the modus operandi of terrorist attacks and those carrying them out'.³¹ These changes are:

[a] major increase in the threat of smaller-scale opportunistic attacks by lone actors', with the concomitant risk of little to no lead time to prevent a spontaneous attack, the need to act quickly to disrupt terrorist activity, and prevent potentially catastrophic consequences....³²

61. The INSLM's discussion of the need for PDOs is brief. The Commission submits that it remains unclear why PDOs are necessary and well-adapted to respond to an increased risk of attacks by lone actors using simple weapons.
62. PDOs may be granted to disrupt a terrorist attack which might occur at any moment, or to preserve evidence. These considerations would appear to be much more relevant to responding to complex plots involving multiple parties and significant planning than to simple attacks by lone actors. That view is borne out by the following evidence of the Director-General of ASIO, cited by the INSLM in his recent report:

The Director-General of Security described it as important to have 'the facility and the ability to bring about what is essentially critical disruption to a complicated and potentially several groups connected or several individuals connected'.³³

63. As has been pointed out by the first INSLM³⁴ and the COAG Review,³⁵ police have extensive powers to arrest and detain persons suspected of terrorism offences for extended periods of time before charge. A person may be arrested where a police officer suspects on reasonable grounds they have committed or are committing a terrorism offence. The list of inchoate (ie preparatory) terrorism offences includes: receiving training, possessing relevant things, collecting or making documents, and doing 'any act' in preparation for, engagement in and assistance in a terrorist act, even if a terrorist act does not occur, or no specific terrorist act is planned or contemplated.³⁶
64. Where a person is arrested on suspicion of having committed one of these offences, they may, with the approval of a Magistrate, be held for a period of up to eight days before charge for the purpose of investigation. They may be questioned for a total of up to 24 hours during that period.³⁷
65. It remains unclear why these powers are insufficient to address the identified increase in risk posed by lone actors using simple weapons with minimal planning.
66. In the absence of some further compelling justification for the retention of the PDO regime, the Commission recommends that the regime be repealed.

Recommendation 6

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.

¹ 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); 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). This submission also refers to Dr James Renwick SC, *Sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (7 September 2017) (3rd INSLM Declared Areas 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 CO & PDO Report, [7.1]-[7.8].

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

¹⁶ 3rd INSLM SSS Report, xi, [9.3]

¹⁷ 3rd INSLM SSS Report, [7.3], [7.10].

¹⁸ 3rd INSLM CO & PDO Report, [1.12].

¹⁹ See the Commission's submission to the PJCIS inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, available at

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/CT_Amendment_Bill_2015/Submissions.

²⁰ The Hon Roger Gyles AO QC, *Control Order Safeguards—(INSLM Report) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (January 2016), [2.4].

²¹ 3rd INSLM CO & PDO Report, [1.12.a].

²² 3rd INSLM CO & PDO Report, [7.2]-[7.4].

²³ 3rd INSLM CO & PDO Report, [8.10].

²⁴ 3rd INSLM CO & PDO Report, [8.13.b, c, e].

²⁵ Martin Sheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism—Australia: Study on Human Rights Compliance while Countering Terrorism*, UN doc A/HRC/4/26/Add.2 (14 December 2006), [38].

²⁶ 3rd INSLM CO & PDO Report, [8.16].

²⁷ 3rd INSLM CO & PDO Report, [8.20].

²⁸ 3rd INSLM CO & PDO Report, [8.22].

²⁹ Council of Australian Governments, *Council of Australian Governments Review of Counter-Terrorism Legislation* (1 March 2013), (COAG Review) [216(b)], cited in 3rd INSLM CO & PDO Report, [8.18].

³⁰ The Hon Roger Gyles AO QC, *Control Order Safeguards – Part 2* (April 2016) [6.7]; 3rd INSLM CO & PDO Report, [8.75].

³¹ 3rd INSLM CO & PDO Report, [10.13].

³² 3rd INSLM CO & PDO Report, [10.9].

³³ 3rd INSLM CO & PDO Report, [10.7].

³⁴ Bret Walker SC, *Declassified Annual Report* (20 December 2012), Chapter III.

³⁵ COAG Review, [270]-[271].

³⁶ See generally Division 101 of the *Criminal Code*.

³⁷ *Crimes Act 1914* (Cth), Part IC, Division 2, Subdivision B.