AFP submission to the

COAG review of counter terrorism legislation

October 2012

EXECUTIVE SUMMARY

a) The threat of terrorism against Australia and its citizens remains real and has not diminished since the introduction of expanded counter terrorism legislation in 2002 and 2005.

b) The specific risk that terrorism poses, and the inherent difficulties in counter terrorism investigations, justifies the continued existence of specialised counter terrorism legislation. Law enforcement must have the appropriate powers to prevent, disrupt and punish terrorism activity through a variety of means, both through the traditional criminal justice system and other extraordinary powers.

c) The AFP, in conjunction with its national security, State and Territory counterparts, has been at the forefront of counter terrorism efforts in Australia. To date, practical experience has shown that Australia is a hostile environment for terrorist organisations to operate in, and efforts at disrupting and preventing terrorist attacks have been very successful.

d) However, the terrorism threat environment is fluid and constantly evolving and it is important that the counter terrorism legislative framework is able to keep pace. While the AFP supports the retention of the offences under review, this submission raises a range of examples to strengthen the criminal justice framework including the need for additional offences to:

- capture dealing with terrorist material online
- ensure those who negligently provide funds to, or collect funds for, terrorist purposes do not escape prosecution
- ensure that there are offences that capture situations in which it is reasonably suspected that funds were provided to or collected for a terrorist purpose, and
- ensure that those who travel overseas to engage in hostile activities are appropriately caught by the foreign incursions offences.

e) The AFP also supports the retention of extraordinary powers that were created specifically for the counter terrorism environment, including emergency stop and search powers, and the control order and preventative detention order regimes. Although these powers have not been extensively applied, this is more as a result of strong preventative actions, and not a statement as to the utility of the powers themselves. The submission outlines several areas where these special powers could be enhanced, and opportunities to ensure traditional powers (such as notices to produce, search and arrest powers) can be effectively used in the fight against terrorism.

f) The AFP welcomes the COAG Review as it will ensure that all counter terrorism legislation is appropriate and constantly evolving within a rapidly changing environment, ensuring balance between adequate investigatory capabilities for law enforcement and national security agencies, protecting the Australian community from risk and maintaining individual freedoms to the greatest extent possible and meeting human rights obligations.

INTRODUCTION

The AFP welcomes the opportunity to make a submission to the COAG Review of counter terrorism laws. The AFP considers that the COAG Review is vitally important to ensure that the law remains adequate to combat those who are committed to engaging in violent and destructive terrorist activities.

The terrorist threat environment

2. The AFP's ability to effectively respond to terrorist threats depends on there being an appropriate suite of offences and powers in place that can be applied to achieve the best prevention outcomes, commensurate with the level of risk posed to the Australian community

3. Australia's counter terrorism legislative framework was largely established with the introduction of a number of Acts in 2002 and 2005 and enhanced by subsequent amendments. The most important aspects were the creation of specific terrorism offences, including offences of committing terrorist acts, being involved in the activities of terrorist organisations and the financing of terrorism. Other important features of Australia's counter terrorism regime include specific police powers for the investigation and prevention of terrorist acts, extended detention investigation periods, the availability of control and preventative detention orders, emergency stop and search powers and unique information gathering powers.

4. Terrorism is a unique crime type, both in its potential consequences for the community and the difficulties faced in preventing and investigating terrorist attacks and offences. Preventative terrorism investigations take place in complex, evolving, uncertain and rapidly changing circumstances and may involve: comprehensive intelligence and evidence gathering and forensic analysis, extensive engagement with domestic and international partner agencies, intensive physical and technical surveillance, and overcoming the challenges associated with the need to quickly and accurately translate across multiple languages as well as managing advancements in technology and communication capabilities and their access and use by criminal and terrorist groups.

5. The very nature of the terrorist threat to public safety requires a response which is proactive and prevention-focussed. The ability of the AFP to move swiftly in this prevention role is particularly important given that terrorist attacks can be planned and executed rapidly. It will not always be appropriate for police to delay action until sufficient evidence has been obtained to meet relevant evidentiary thresholds. Accordingly, a need remains for special preventative powers to operate alongside traditional criminal justice processes in order to effectively respond to the terrorist threat.

6. The terrorist threat environment is becoming increasingly complex and dynamic. Terrorist groups continue to adapt their methods and tactics in order to evade detection or exploit vulnerabilities. Islamist extremism remains the principle source of threat to Australia, although an undercurrent of low level threat exists as a result of diaspora communities with links to terrorist groups.

7. There is a growing issue with the number of Australians who are travelling overseas to engage in violent and terrorist activity or receiving terrorist training with a view to using such training within Australia. With Australia more than ever a multicultural society, many sectors of the community may have links to conflicts occurring world-wide, which increases the risks that more individuals will participate in these conflicts and other terrorist activity.

8. There is also an increasing threat, both in Australia and internationally from 'lone wolf' attackers who adhere to extremist ideology and engage in isolated attacks. These individuals or small groups pose unique challenges because they are unpredictable, rely on readily accessible weapons and are difficult to identify and interdict. Safe and effective management of these potential offenders requires a range of disruptive and preventative options.

9. Home grown Islamic extremists are assessed as the most likely source of terrorist attacks in Australia with attack planning likely to be basic, involving simple tactics, limited training and a relatively short planning cycle. Since the introduction of the terrorism offences in 2002, 38 people have been prosecuted and 23 people have been convicted of committing terrorism offences in Australia. Of the 38 people prosecuted, 37 are Australian citizens, and 20 were born in Australia, clearly indicating that home grown terrorism is a threat in Australia. This trend demonstrates the need to build upon and foster ongoing engagement with community leaders in order to enhance relationships of trust and encourage community members to come forward and report concerning activities to police.

National cooperative approach

10. Combatting terrorism requires a national response with close cooperation between Commonwealth, State and Territory partners. Collaboration is particularly important in the early stages of target identification; managing the transition of investigations from State-based offences or other crime types into a counter terrorism investigation; and ensuring that officers can operate under the different requirements of each jurisdiction involved (noting that there are often inconsistencies in police powers across jurisdictions, and the need for Commonwealth procedures to apply to Commonwealth terrorism investigations).

11. Relationships between agencies involved in fighting terrorism are institutionalised in Australia through Joint Counter Terrorism Teams (JCTTs). The JCTTs operate under a nationally consistent governance framework, which adopts a broad definition of counter terrorism operations to maximise operational consultation and collaboration between law enforcement and security/intelligence operations. The contribution of the JCTTs to pre and post-terrorist incident criminal investigations form a significant part of Australia's National Counter Terrorism Plan arrangements.

12. The JCTTs were established between the Commonwealth and each Australian jurisdiction during 2002-03 and comprise members from the AFP, State and Territory Police, and officers of the Australian Security Intelligence Agency (ASIO). This recognises the role of intelligence agencies in cooperating with law enforcement agencies in counter terrorism operations of mutual interest. There is scope for representatives from other agencies to participate in JCTTs where required (for example, the NSW Crime Commission participates in the NSW JCTT).

13. The aim of the JCTTs is to work closely with other domestic agencies, the broader intelligence community and international partners to identify and investigate terrorist activities in Australia, including terrorist financing, with a focus on preventative operations. The primary objective of the JCTTs is to investigate terrorist groups and their associates with the intention of bringing criminal prosecutions against those persons for breaches of Commonwealth terrorism legislation and any other relevant Commonwealth, State or Territory laws.

14. The JCTTs do not work in isolation, but draw on the resources and capabilities of the AFP, and domestic and foreign partner agencies. Working together with agencies facilitates greater intelligence sharing and ensures that JCTTs have access to investigative support tools (including forensic analysis and technical equipment). Through the co-location of law enforcement and intelligence agencies, and a collaborative approach to counter terrorism investigations, JCTT partners are able to access a broad range of resources which serves as a force multiplier in the national security environment.

TERRORISM RELATED OFFENCES

Criminal Code offences

15. Laws introducing specific terrorism offences in the Criminal Code (Cth) in 2002 were enacted during a time of significant global and domestic terrorist activity and high terrorist threat environment; the terrorist threat has not abated.

16. Since 2002, 38 persons have been convicted for terrorism offences, including those offences under consideration by the COAG Review Committee, such as:

- Section 101.5 (collecting or making documents likely to facilitate terrorist acts) - Belal KHAAZAL, whose conviction was recently upheld by the High Court of Australia.
- Section 101.6 (acts done in preparation for or planning terrorist acts) - Wissam Mahmoud FATTAL, Sandy Edow AWEYS and Nayef EL SAYED for conspiracy to attack the Holsworthy Army Base in Sydney.
- Section 102.6 (getting funds to or from a terrorist organisation) – Aimen JOUD, Ahmed RAAD and Ezzit RAAD, who were arrested as part of Operation PENDENNIS in Victoria.

17. The AFP continues to support the need for specific offences to target those who finance, plan, facilitate, prepare for or commit terrorist activity, or are otherwise engaged in illegal dealings with terrorist activity. The preparatory offences are particularly important to the AFP's preventative efforts, ensuring that law enforcement can intervene well before a terrorist act is perpetrated.

18. The terrorism offences in the Criminal Code not only implement Australia's international obligations under various multilateral instruments, but send a strong message that the Australian Government does not tolerate terrorist activity and that Australia will not be a safe haven for terrorists. Specific comments on the offences under review by the COAG Review Committee are set out below.

Terrorist act offences

19. The individual terrorist offences contained within the Criminal Code were inserted, in part, to ensure Australia's compliance with international agreements which condemn terrorist activities. The offences ensure that the actions of individual terrorists, and those that support terrorism, are specifically criminalised. The high penalties which attach to these offences reflect the community's abhorrence of terrorist activities and the devastating impacts a terrorist act can inflict on a society across several dimensions.

20. Prior to their introduction, the criminal justice framework did not adequately provide for the prevention and punishment of particular terrorist acts, such as terrorist training or financing activities. The introduction of terrorist act offences was particularly important in criminalising preparatory behaviour, increasing the ability of the police to take preventative action.

21. The following terrorist act offences (contained in Division 101 of the Criminal Code) are subject to review by the COAG Review Committee: sections 101.2, 101.4, 101.5 and 101.6. These offences respectively criminalise: providing or receiving training connected with terrorist acts; possessing things connected with terrorist acts; collecting or making documents likely to facilitate terrorist acts; and other acts done in preparation for or planning terrorist acts.

22. The AFP continues to support the retention of these offences. However, based on operational experience to date, the AFP is concerned that activity related to dealing in terrorist material that falls below the threshold for a section 101.5 offence may not be adequately captured by the Criminal Code. This is discussed further below.

Terrorist material

23. Under section 101.5 of the Criminal Code it is an offence for a person to collect or make a document, knowing (or reckless to the fact) that the document is connected with preparation for, the engagement of a person in, or assistance with a terrorist act. The maximum penalties for this offence are 15 years imprisonment (knowledge), and 10 years imprisonment (recklessness). A defence applies where the collection or the making of the document was not intended to facilitate preparation for, engagement of a person in, or assistance in a terrorist act (subsection 101.5(5)).

24. The offence of collecting or making documents to further terrorist activity carries significant penalties and reflects the dangerous nature of this kind of behaviour as illustrated by the case of Khazaal.

25. In Khazaal, the prosecution alleged that in 2003, the defendant had selected, compiled and edited material downloaded from the Internet and published a document titled Provisions on the Rules of Jihad- Short Judicial Rulings for Fighters and Mujahideen Against Infidels online. This document included advice on techniques of assassination and listed categories of targets for assassination. This 'assassination manual' urged Muslims to engage in a holy war against several specific nations. Kazhaal was convicted, by a jury, of knowingly making a document connected with a terrorist act. On 10 August 2012, the High Court upheld the original conviction. [1]

26. Khazaal was sentenced on 25 September 2009 to 12 years imprisonment. In setting the sentence towards the upper limits of the maximum penalty (15 years imprisonment) the NSW Supreme Court considered the gravity of the offending by Khazaal. In particular, the Court took into account: the sufficient specificity of instruction on terrorist activity; the nature and extent of the significant harm (e.g. death) that could be caused by carrying out the suggested assassination techniques; and the nature and extent to which the document, having been published over the Internet could rapidly be disseminated to a wide audience. [2]

[1] *The Queen v Khazaal* (2012] HCA 26.
[2] *R v Khazaal* (2009] NSWSC 1015 at paras 19-21.

Accessing terrorist material online

27. The AFP is concerned, however, that there is currently no offence which would capture behaviour at the lower end of the spectrum, which over time could lead to radicalisation and engagement in terrorist activity (for example, accessing terrorist material online). Indeed, the Internet is providing greater opportunities for individuals to access extremist material which could, over time, encourage more active engagement in terrorist activity.

28. The AFP considers that the COAG Review provides an opportunity to consider whether specific offences should be created to address dealing with terrorist material online. Such offences would need to have a clear link to terrorist activity, and would not be intended to prohibit access to such material by journalists or academics for legitimate purposes, or to prevent public debate about terrorism issues. Further, because the offences would be targeting behaviour at the lower end of the spectrum, they should carry a lower penalty. The value of specific terrorist material offences would ensure that law enforcement could interdict in activities which could, if left unchecked, escalate into preparation for or the carrying out of a terrorist act.

29. The offences in Division 474 of the Criminal Code provide precedent for prohibiting dealing with certain kinds of material, such as child pornography or suicide material. In the case of child pornography material, offences apply for accessing, transmitting or soliciting material via a carriage service, reckless to the fact that the material is child pornography material (section 474.19). There is also an offence of possessing such material for use through a carriage service (section 474.2). Sections 474.29 and 474.30 respectively make it an offence to use a carriage service to access, transmit or distribute suicide material, or to possess such material for use over a carriage service.

30. No further physical or fault element is required for the offence in section 474.19 because of the illegal nature of child pornography material in and of itself. In relation to section 474.29, to be found guilty of an offence, it must be proven that the person intended to use the material to attempt/commit suicide, or that others would so use the material.

31. The AFP considers that these offences represent opposite ends of the spectrum, and are not necessarily appropriate for a specific terrorist material offence. Instead, the AFP proposes that an additional physical/fault element apply to situations in which accessing terrorist material was linked to furthering a terrorist cause. Such an offence would need to be framed carefully to ensure it captured situations which fell below encouraging a person to engage in a terrorist act, but would not criminalise the mere accessing of terrorist material.

32. The AFP further considers that the specific defences which apply to access/possession of the child pornography material may be useful in framing the scope of a new terrorist material offence. The defences in-474.21 apply where the access/possession is for the public benefit, such as enforcing the law, or conducting approved research. Further, section 474.30 makes it clear that a person is not guilty of an offence where the suicide material is accessed etc. for the purposes of engaging in debate about euthanasia. Following this approach may also be useful in ensuring that a new terrorist material offence does not prevent legitimate access to or discussion of terrorism in general.

33. The AFP also suggests that any new offences should take into account the distribution of such material by post (see for example the offences in sections 471.16 and 474.17 which mirror the child pornography offences in sections 474.19 and 474.20). Further, it may also be useful to explore criminalising the possession of terrorist material, without the need to link it to either a carriage service or postal service.

Proscription of terrorist organisations

34. The proscription provisions in the Criminal Code are a key component of the counter terrorism legislative framework. The proscription of terrorist organisations contributes to creating a hostile environment for terrorists seeking to operate in Australia by:

- ensuring that that the illegitimate activities of those organisations are appropriately criminalised
- raising public awareness of those organisations involved in terrorist activity, and sends a clear message to the Australian community that engaging with or supporting those organisations will not be tolerated, and
- signalling to the international community that Australia rejects any claims to legitimacy by these organisations.

35. The process for proscribing terrorist organisations (contained in section 102.1of the Criminal Code) is subject to review by the COAG Review Committee. An organisation can be proscribed as a terrorist organisation once the Minister is satisfied on reasonable grounds that the organisation is engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act (regardless of whether the terrorist act occurs or will occur).

36. Once proscribed, the prosecution does not have to prove, in relation to the offences in Divisions 102 and 103 of the Criminal Code, that an organisation is a terrorist organisation. Further, training with a proscribed terrorist organisation is also a condition upon which a control order can be sought under Division 104 of the Criminal Code.

37. The proscription regime in the Criminal Code has been previously subject to independent review, including by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in 2007. The PJCIS review examined many aspects of the prosecution regime and found the proscription regime to be an important element in Australia's counter terrorism efforts.

38. The AFP supports the retention of the proscription regime. The proscription of terrorist organisations can have a deterrent effect on persons associated with such groups, reducing the support of, and financing for, terrorist acts and making Australia a hostile environment for terrorist recruitment activities. It is therefore important that the prosecution regime remains flexible enough to ensure that all organisations that present or promote threats to Australia cannot operate with the support of Australians. The AFP considers that the COAG review presents an opportunity to confirm that the proscription process continues to be an effective tool against a constantly changing terrorist threat.

Terrorism organisation offences

39. The terrorism organisation offences contained within the Criminal Code prohibit people coming together to progress a terrorist cause, and are intended to remove the support (financial or otherwise) to such groups which could ultimately facilitate the perpetration of terrorist acts.

40. The following terrorist act offences (contained in Division 102 of the Criminal Code) are subject to review by the COAG Review Committee: sections 102.5, 102.6 and 102.8. These offences respectively criminalise: training a terrorist organisation or receiving training from a terrorist organisation; getting funds to or from a terrorist organisation; and associating with terrorist organisations.

41. The AFP continues to support the retention of these offences. However, based on operational experience to date, the AFP has some concerns about the operation of section 102.6, which for convenience is dealt with below as part of the discussion on financing of terrorism offences.

Financing of terrorism

42. Strong counter terrorist financing measures, including specific financing of terrorism offences:

- remove the means for terrorist groups to obtain the resources and materials to carry out successful, large scale attacks
- enable investigators to trace the actions of terrorist and their supporters after an attack, allowing police to bring to justice all those involved, and
- deter individuals from becoming directly or indirectly involved in such activity (eg funding a known terrorist organisation, or funding a legitimate organisation to carry out terrorist activities).

43. The following financing of terrorism offences (contained in Divisions 102 and 103 of the Criminal Code) are subject to review by the COAG Review Committee: sections 102.6, 103.1and 103.2. These offences criminalise financing a terrorist organisation, a terrorist act or a terrorist respectively.

44. The AFP continues to support the retention of these offences. However, the AFP raises the following issues below for consideration as part of the COAG Review. In doing so, the AFP notes that these issues are yet to be tested by a court.

The need for additional offences

45. Section 102.6 makes it an offence to receive funds from, make funds available to, or collect funds for an organisation, where the person knows or is reckless as to whether the organisation is a terrorist organisation. The maximum penalty is 25 years imprisonment (knowledge) or 15 years imprisonment (recklessness).

46. Section 103.1 makes it an offence for a person to intentionally provide or collect funds reckless as to whether those funds will be used to facilitate or engage in a terrorist act. The maximum penalty is imprisonment for life. Section 103.2 makes it an offence to make funds available to, or collect funds for another person ('the terrorist') reckless as to whether the terrorist will use the funds to facilitate or engage in a terrorist act. The maximum penalty is imprisonment for life.

47. There are several challenges which may be encountered in investigating and prosecuting financing of terrorism offences. These are discussed further below.

48. It can be difficult to gather sufficient evidence to prove that the funds have been received by a particular terrorist group. Terrorist financing operations tend to be cash-based, involve loosely regulated entities, and multiple jurisdictions. While the ultimate destination for the funds may be a terrorist organisation, the funds may move through a number of intermediaries and third parties making it difficult to track or prove continuity of a money trail. Evasive measures can include infiltrating legitimate organisations, diverting only minimal amounts of money to a terrorist organisation so as to avoid detection, and using technology to conceal transactions. Further, the final funds received by the terrorist organisation may be in a very different form to what was originally provided (for example cash may be converted into property, such as arms or munitions).

49. Particular investigative challenges arise where the terrorist organisation is based overseas. The AFP does not have the jurisdiction to use its investigative powers to collect evidence located overseas. Any operational activities undertaken by the AFP outside of Australia can only be done with the consent of the foreign jurisdiction, in accordance with local laws and procedures, and in accordance with Australian law. Obtaining evidence must be done pursuant to formal mechanisms for international crime cooperation (mutual legal assistance).

50. In addition, many key target countries for terrorist financing lack efficient and effective regulation and enforcement frameworks. Indeed, even in highly regulated countries there have been instances of private entities deliberately withholding information from regulators about irregular and illegal transactions.[3]

[3] For more information see: Walters, J., Smith, RG., Davis, B., et al (2012) *The anti-money laundering and counter-terrorism financing regime in Australia: Perceptions of regulated businesses in Australia,* Research and Public Police Series No,l17, Australian Institute of Criminology, Canberra.

51. As a consequence of these evidential issues, the case against the defendant may be circumstantial. The prosecution must therefore prove, beyond reasonable doubt, that the only rational inference that can be drawn from the evidence is that person engaged in financing terrorism. That is, that the evidentiary circumstance bear no other reasonable explanation. It will be open to the defendant to raise competing inferences, established by adducing or pointing to evidence that suggests a reasonable possibility that the matter does or does not exist (the standard of proof required to discharge the evidential burden on the defendant). The prosecution must then disprove that competing inference beyond reasonable doubt (the standard of proof required to discharge the legal burden on the prosecution).

52. Further, it is unclear how the judgement in the Lodhi case will be applied to the financing of terrorism offences in Division 103. In Lodhi, the court held that in prosecuting an offence which refers to a terrorist act, the elements of that act must be pleaded. This is because, "In each case knowledge of the terrorist act is fundamental to the offence and accordingly, particulars of the terrorist act are essential factual ingredients and must be pleaded."4 In some cases, while the AFP may have collected evidence that the funds would allow an organisation to plan for or carry out a terrorist act, it may be difficult to prove that the person was reckless as to the nature of the terrorist activity itself (for example, funds were provided to a group or individual to generally support a terrorist purpose).

53. The AFP considers that the COAG Review provides an opportunity to address these issues by exploring whether additional terrorist financing offences should be created so as to create a graded continuum of offences, capturing both high and lower culpability situations.

54. The money laundering offences in Division 400 of the Criminal Code provide a precedent for creating tiered offences to deal with the spectrum of criminal behaviour. The various offences in Division 400 follow a similar format, applying where a person intends, is reckless or negligent as to whether money or property of a particular value will be used as proceeds of crime. The highest penalty applies where intention is proven, with lower penalties attaching to cases where the person was reckless or negligent.

55. Section 5.5 of the Criminal Code provides that a person is negligent with respect to a physical element of an offence (eg that the funds are collected for a terrorist organisation) where his or her conduct involves:

- such a great falling short of the standard of care that a reasonable person would exercise in the circumstances, and
- such a high risk that the physical element exists or will exist, that

the conduct merits criminal punishment for the offence.

[4] *Lodhi v R* [2006] NSWCCA 121 at para 108.

56. The AFP understands that from a policy perspective, negligence can be used where it is appropriate for a person's criminal liability to be determined with reference to an objective standard, rather than the individual's own subjective mental state. Further, the AFP understands that negligence may be appropriate where a person who was not aware of the relevant risks or circumstances is deserving of criminal punishment if they fa ll seriously short of the requisite standard. Given the ramifications of terrorist activity on the community, the AFP considers that offences similar to those found in Division 400 could be created to complement existing terrorism financing offences. Namely, offences which would capture situations in which a person is negligent as to whether the funds are for a terrorist organisation, terrorist act or terrorist.

57. Section 400.9 of the Criminal Code makes it an offence for a person to deal with money or property of a particular value where is reasonable to suspect that the money/property is proceeds of crime. Subsection 400.9(2) specifies a range of activity which is taken to satisfy the reasonable suspicion element of the offence. The AFP suggests that additional financing of terrorism offences could also be created to apply where it is reasonably suspected that the funds are for a terrorist organisation, terrorist act or terrorist. One of the circumstances in which it could be taken to be reasonably suspect that the funds were for a terrorist act etc. is where the organisation is a proscribed under section 102.1.

58. The penalties for any new negligence or 'reasonably suspected' offences would be lower than the current penalties for financing of terrorism offences involving knowledge or recklessness.

Crimes (Foreign Incursions and Recruitment) Act 1978 offences

59. There are a number of conflicts around the world involving a variety of countries. The engagement of Australians in hostile foreign activities is becoming an increasing problem, particularly for Australians travelling to these destinations. The Crimes (Foreign Incursions and Recruitment) Act 1978 (the Foreign Incursions Act) targets the activities of Australian citizens and persons ordinarily resident in Australia who seeks to engage in certain foreign hostile acts. The offences are designed to prevent Australians from becoming involved in armed conflict overseas.

60. Section 6 of the Foreign Incursions Act is subject to review by the COAG Review Committee. Section 6 makes it an offence to: enter a foreign State with the intention of engaging in hostile activity in that State; or to engage in hostile activity in a foreign State. The maximum penalty for the offence is 20 years imprisonment. The extensions of criminal responsibility under the Criminal Code apply to section 6, making it an offence to incite persons to engage in foreign incursions (the maximum penalty that would apply would be seven years imprisonment, see section 11.4 of the Criminal Code).

61. In addition, the Foreign Incursions Act also criminalises: preparations for incursions into foreign States for the purpose of engaging in hostile activities (section 7); and recruiting persons to join organizations engaged in hostile activities against foreign governments (section 8). These offences carry maximum penalties of 10 and seven years imprisonment respectively.

62. The AFP continues to support the retention of the offences under sections 6, 7 and 8 of the Foreign Incursions Act. The AFP does, however, raise the following issues as set out below for consideration by the COAG Review.

Section 6 – Intention to engage in hostile activity in a particular State

63. The AFP has observed that an increasing number of Australians are travelling overseas with the intention to engage in hostile activity. In such cases, individuals may have a general desire or intention to fight for a 'cause', but are not concerned with (nor have they turned their mind to) the country in which that fighting might occur. That is, the person travels to State X with the intention of engaging in hostile activity somewhere (but not necessarily State X, or even State Y). The prosecution would not be able to prove either that person intended to engage in hostile activity in the State he or she entered, or intended to engage in hostile activity in a particular foreign State.

64. To address these kinds of situations, the AFP suggests that consideration be given to amending the offence so that it applies to situations in which a person intends to travel overseas in order to engage in hostile activity in a foreign State without needing to prove the specific foreign State in which the hostile activity was intended to occur.

Section 7 – preparations supporting non-Australians

65. While the AFP appreciates that section 7 of the Foreign Incursions Act is beyond the remit of the COAG Review, the following issue is raised because of its connection with the offence in section 6 of the Act.

66. Sections 6 and 7 only apply to persons who are Australian citizens, persons who are ordinarily resident in Australia, or persons who were present in Australia for a purpose connected with the foreign incursion. That is, while an Australian could be prosecuted for an offence of training another Australian to commit a foreign incursion offence (paragraph 7(1)(c)), it is not clear that the offence would apply where the training was provided to a non-Australian, particularly if that training was provided outside Australia. This is because the acts in preparation criminalised by section 7, only apply where the preparation is linked to the offence in section 6, which is limited to Australians and persons present in Australia. The AFP considers that it would be useful to explore this issue further, with the aim of rectifying any gaps in the law.

POWERS TO PREVENT AND INVESTIGATE TERRORISM

67. Terrorism is a unique crime type, in terms of both the devastating consequences that it can have on society, the differing types of potential offenders (eg sophisticated networks, lone wolf actors), and the breadth of methodologies which may be employed to carry out attacks. Given the fluid and evolving nature of terrorist activity it is essential that police are able to draw on a suite of traditional and special powers in order to effectively prevent, disrupt and investigate terrorism and mitigate risks to the community. The AFP therefore offers the following comments on police powers which are relevant to the COAG Review's consideration of the adequacy of Australia's legislation to prevent and investigate terrorism.

Crimes Act powers

Division 3A, Part IAA

68. Division 3A of Part IAA of the Crimes Act 1914 is subject to review by the COAG Review and provides police with special powers in relation to terrorist acts and terrorism offences. Under Division 3A, police can exercise these powers where the person is in a Commonwealth place and is suspected on reasonable grounds to have committed or be about to commit a terrorist act, or where the person is in a prescribed security zone. The powers relate to: compelling a person to provide identity information and the reason for being in the place (section 3UC); stopping and searching a person or vehicle (section 3UD); seizing terrorist related items (section 3UE); and emergency entry to premises without warrant (section 3UEA).

69. The fact that the powers in Division 3A have not yet been used does not support any argument for their repeal. The trends of terrorism and the challenges for law enforcement attach greater importance to the utility of these tools in emergency situations. To date, because of the efforts of law enforcement and intelligence agencies, such situations have not eventuated. The AFP supports the retention of Division 3A.

Powers to investigate financing of terrorism

70. While the terms of reference for the COAG Review do not include the power in section 3ZQN of the Crimes Act, this power is highly relevant to the operational utility of the financing of terrorism offences discussed above.

71. Section 3ZQN provides police with the power to obtain documents relating to serious terrorism offences. The power is exercised through a written notice which compels a person to produce documents relevant to the investigation of a serious terrorism offence. Section 3ZQP sets out the matters to which the notice must relate and includes, for example determining whether an account is held by a specific person with a specified financial institution. It is an offence to fail to comply with the notice (see section 3ZQS).

72. The legislation does not, however, stipulate the timeframe for compliance with the notice, only requiring that the person comply as soon as practicable. This can lead to significant delays in documents being produced. Such delays can hamper investigations, increasing the risk of a terrorist act being committed and precluding the successful prosecution of a financing of terrorism offence. The AFP suggests that consideration be given to establishing a more specific timeframe within which a notice must be complied with in order to expedite the production of documents.

73. The AFP also suggests that consideration be given to creating additional powers to facilitate the investigation of financing of terrorism offences, including the ability to compel financial institutions to provide yes/no responses to questions in order to more appropriately direct section 3ZQN notices and other investigation resources to substantial leads. Currently, institutions may be reluctant to provide such information without protection from breaching any existing laws (such as privacy obligations).

74. Further, the AFP does not have a clear basis on which to actively monitor bank accounts suspected of being linked to terrorist groups or activities. Requests for financial information are usually made across the major banks and financial institutes at set intervals. This can lead to gaps in information, and reduce the AFP's ability to gather evidence in a timely manner. The AFP suggests that consideration be given to the creation of monitoring powers, to allow information to be collected on an ongoing basis in relation to suspect bank accounts. Such powers could be modelled on those provided in the Proceeds of Crime Act 2002, and would provide a valuable additional tool for financing of terrorism investigations. The AFP notes that there is international precedent for such monitoring powers (see for example Schedule 6A of the Terrorism Act 2000 (UK)).

Powers to investigate foreign incursions offences

75. Again, while the terms of reference for the COAG Review do not include the power in section 3ZQN of the Crimes Act, this power is relevant to the operational utility of the foreign incursions offence discussed above. Namely, section 3ZQN notices can only be issued for serious terrorism offences, and cannot be used for investigations for offences against the Foreign Incursions Act. Instead, where the AFP wishes to compel documents in relation to foreign incursions, officers would need to seek an order from a Federal Magistrate under section 3ZQO of the Crimes Act.

76. Given the need to act urgently in relation to persons embarking overseas to engage in hostile activities, the AFP considers that the power in section 3ZQN should be available for the investigation of foreign incursions offences. This would also recognise that the risks to national security at which Australia's counter terrorism efforts are directed are criminalised across a range of legislation, and are not limited to those terrorism offences set out under the Criminal Code.

Arrest threshold

77. While the AFP understands that general arrest powers are not specifically included in the terms of reference for the COAG Review, such powers are an integral part of the toolkit available to law enforcement in investigating the terrorism offences under review. The AFP therefore raises the need to lower the threshold for arrest, in relation to terrorism offences, for consideration by the COAG Review Committee.

78. Currently, section 3W of the Crimes Act provides that the threshold test for arrest without warrant is reasonable grounds to believe that a person has committed or is committing an offence. However, the physical and fault elements of a terrorism offence are complex, and it may not be possible for police to gather sufficient evidence to form a reasonable belief that a person is about to commit an offence before an intervention, through arrest, is possible.

79. The AFP notes that in several Australian jurisdictions (New South Wales, Queensland, Western Australia, South Australia and the Australian Capital Territory) the threshold for arrest without warrant is reasonable grounds to suspect the commission of an offence. 5 In the United Kingdom, the threshold for arrest is reasonable grounds to suspect the commission of an offence (section 24 of the Police and Criminal Evidence Act 1984 (UK)) or reasonable grounds to suspect that person is a terrorist (section 41 of the Terrorism Act 2000 (UK)). AFP notes this legislation is consistent with Article 5 of the European Convention on Human Rights, which sets 'reasonable grounds to suspect' as the appropriate threshold test for arrest.

80. The AFP suggests that consideration be given to lowering the threshold for arrest in the Crimes Act, specifically in relation to terrorism offences, to reasonable grounds to suspect. Lowering the threshold would allow the AFP to intervene and disrupt terrorist activities at an earlier point than would be possible where the threshold is reasonable grounds to believe.

Covert search warrants

81. Similarly, while the AFP understands that general search powers are not specifically included in the terms of reference for the COAG Review, such powers are an integral part of the toolkit available to law enforcement in investigating the terrorism offences under review. The AFP is concerned that the lack of covert search warrant powers at the Commonwealth level represents an impediment to terrorism investigations, and therefore raises the following matters for the COAG Review Committee's consideration.

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[5] Section 99 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); section 365 *Police Powers and Responsibilities Act 2000* (Qld); section 128 *Criminal Investigation Act 2006* (WA); Section 75 *Summary Offences Act 1953* (SA); section 212 *Crimes Act 1900* (ACT).

82. During the execution of an ordinary search warrant, the occupier of the premises being searched must be given a copy of the warrant (see section 3H of the Crimes Act). The execution of ordinary search warrants immediately notifies suspects of police interest in their activities, and provides an opportunity for persons to: destroy or relocate evidence; change planned criminal activities; relocate criminal operations, and adopt counter-surveillance measures. Notification of the search may also alert associates who are not known yet to police allowing them to take active measures to avoid detection.

83. While notification of a search will generally be appropriate for the investigation of many crime types, there are situations in which it is necessary for law enforcement to be able to gather evidence while keeping the existence of an investigation confidential. This is particularly so in the case of terrorism investigations, and is illustrated by the Operation PENDENNIS example set out further below.

84. While there are a range of tools available to police to collect evidence covertly (including telecommunications interception, surveillance devices, physical surveillance and controlled operations) such tools are subject to limitations. For example, surveillance devices do not allow police to physically search for or interrogate physical evidence at premises.

85. The AFP suggests that serious consideration be given to allowing AFP officers to conduct covert search warrants, which allow searches to be conducted (under warrant issued by an independent authority such as a judge) without notification being given to the occupier at the time of the search. Under some covert schemes, notification of the search is delayed for a period of up to six months (which can be extended under particular circumstances). The use of covert search warrants for terrorism offences is widely accepted within Australia, with New South Wales, Victoria, Queensland, Northern Territory and Western Australia enacting covert or delayed notification search warrant legislation.

86. The use of covert search warrants, executed under NSW and Victorian legislation during Operation PENDENNIS, was highly effective in allowing investigators to determine the level of terrorist activity occurring at various stages, from planning, acquisition of chemicals, manufacture and execution. The evidence produced from these warrants allowed investigators to continuously build their brief of evidence and prioritise resources on a risk based strategy. The use of ordinary search warrants were not an appropriate option during these preliminary stages of the investigation as notification of police interest in the group would have compromised the operation and potentially put the public at risk.

87. The AFP considers that it is important that the lack of covert search warrants at the Commonwealth level is addressed in order to ensure national consistency of police powers across jurisdictions. The AFP further considers that in addition to allowing police to enter premises without the occupier's knowledge, any covert warrant scheme also allow police to: impersonate another person for the purpose of executing the warrant; to remove a thing and replace it with a substitute; re-enter premises to return things that are removed or to retrieve anything substituted on the premises; copy, photograph or record things, or access the warrant premises covertly through adjourning premises. It would of course be important that such power be accompanied by appropriate safeguards and oversight to ensure that they are only used in appropriate circumstances, and are protected from misuse.

88. The AFP notes that a delayed notification search warrant scheme was proposed in the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006, which was introduced into Parliament in November 2006 but lapsed with the 2007 federal election.

Criminal Code powers

89. The initiation of criminal proceedings through arrest is the most appropriate response to a terrorist threat where there is sufficient evidence available to prove the commission of a relevant offence. However, a traditional law enforcement response will not always be adequate to address the terrorist threat in all cases. Accordingly, alternative measures must be available to police to ensure that, commensurate with the level of risk posed to the Australian community, the best prevention outcomes are achieved.

90. The introduction of control orders and preventative detention orders in 2005 recognised the limitations of the criminal justice framework in dealing with the unique and unpredictable nature of the terrorist threat, and the potentially catastrophic consequences of a terrorist attack.

91. The Commonwealth control order and preventative detention order regimes in Divisions 104 and 105 of the Criminal Code respectively provide the police with additional preventative powers which could be considered and used to protect the public in situations which could not appropriately be addressed by a traditional law enforcement response. Such situations include where police must take overt action to prevent harm to the community, but the investigation is at a stage in which there is insufficient evidence to support the arrest, charge and prosecution of a person for a terrorism offence.

92. The AFP supports preventative measures (such as control orders and preventative detention orders) which fall outside the traditional criminal justice response remaining as part of the counter terrorism toolkit. The value of these powers should not be assessed on frequency of application because the expectation is their use would be rare. Any decision to repeal these powers compromises the purpose of preventative options to respond to extraordinary events, such as terrorism on the scale of the September 11and Anders Breivik attacks. This is even more relevant today due to the current trends of terrorist attacks, making it more difficult for police and security agencies to maintain success in identifying and disrupting domestic terrorism plots.

Control orders

93. The control order regime contained in Division 104 of the Criminal Code is under review by the COAG Review and provides a mechanism for the AFP to apply to a court to have obligations, prohibitions and restrictions imposed on a person for the purpose of protecting the Australian community from a terrorist act. Control orders are a preventative measure aimed at substantially assisting in the prevention of a terrorist act by controlling the behaviour of an individual which could otherwise present or contribute to a terrorism threat to the public.

94. The advantage of the control order regime is that it is a preventative measure which has the flexibility to be tailored (through specifically imposed conditions) to the individual suspected of being involved in terrorist activity, and the particular risk posed by that individual to the community.

95. Control orders can be considered for use in a range of circumstances, including:

- Where there is credible intelligence that a person is planning a terrorist act, but there is insufficient information to initiate criminal proceedings (for example, because the intelligence could not be used as evidence without compromising human sources or operational methodology).
- Where there is credible evidence that a person is planning a terrorist act, but there is insufficient evidence that the attack is imminent to justify applying for a preventative detention order.
- Where there are reasonable grounds to suspect that a person has received training from a proscribed terrorist organisation.

96. The use of control orders in appropriate circumstances allows police to more effectively monitor the person's movements and minimising the risk of future terrorist activity. Control orders can also be used to: prohibit the person from possessing certain articles that might be used in a terrorist attack, alienate the person from associates involved in terrorist activity, removing the ability, and possibly the impetus, of the person to perpetrate an offence. Control orders may also lead to the person and their associates taking risks which make their activities more susceptible to detection and intervention by law enforcement.

97. A control order is a disruptive measure that is preventative and not punitive in nature, and is not intended to be used as a substitute for prosecution. Control orders have been considered in conjunction with criminal prosecution options but have not been sought where sufficient evidence exists to support a criminal charge and subsequent criminal proceedings.

98. The AFP considers that control orders remain a necessary and proportionate preventative measure and form an important part of the counter terrorism toolkit. The removal of the control order regime would create a substantial vacuum in counter terrorism options, reducing the tools available to police to respond to the evolving trends of terrorist planning and modes of attack and increase the risk to community safety.

99. However, based on its experience with the control order regime to date, the AFP considers that the COAG Review provides an opportunity to explore whether the regime is operating, and will continue to operate, as intended. Possible areas for focus by the COAG Review Committee include: the way in which, on a practical level, the evidential burden for obtaining a control order can be discharged by law enforcement and the need for specific powers to monitor and enforce compliance with control order conditions. In posing these issues for consideration, the AFP continues to support the need for stringent safeguards to ensure control orders are only used in appropriate circumstances and does not propose changes that would detract from important accountability mechanisms.

Evidential burden

100. Control order proceedings are to be determined on the lower, civil standard of proof and were not intended to be conducted in the same way as a criminal prosecution. However, in the AFP's experience, control order proceedings may be conducted in a way akin to a criminal trial.

101. The AFP accepts that the allegations to support a control order are of a serious nature and the consequences for the respondent (for example restrictions or prohibitions on liberty and associations) are significant. However, the AFP is concerned that the court should not place an unnecessary burden on law enforcement to prove matters to a threshold much higher than originally intended. Courts may focus too heavily on the terrorism offence and possible criminal prosecution elements of the scheme, rather than the preventative aspects. This may lead to under-emphasising the risk to the community, which should be the overriding factor in the consideration of control order applications. It is therefore important that the AFP has sufficient flexibility in the kinds of evidence presented to the court (information that is credible and trustworthy in the circumstances) and is not bound by the principles or rules governing the admission of evidence.

102. The AFP understands that the control order legislation was intended to operate so that the more onerous an obligation, or stringent a prohibition or requirement, the greater the burden on the AFP to demonstrate why the control order condition should be imposed.

103. However, the obligation to establish that a control order would "substantially assist" in the prevention of a terrorist act operates as an exceptionally high threshold test. In particular, the court may seek evidence on the specific need for the particular restrictions and the community protection benefits conferred by those restrictions. Other offences within the Criminal Code, such as planning a terrorist act or providing or receiving training connected with terrorist act (section 101) do not require the added threshold of "substantially".

Monitoring and enforcement

104. Compliance with some of the possible conditions of a control order can be enforced with minimal resources. For example, one of the possible conditions of a control order is requiring an individual to report to specified persons at specified times. Failure of the individual to report on time to the specific person will trigger an alert to police that a control order condition has been breached.

105. However, other control order conditions, requiring monitoring, are more resource-intensive, such as restrictions on communicating with certain persons or using the technology such as the Internet. This is because control orders fall outside the traditional criminal justice framework, and the ordinary overt and covert police powers to investigate offences (such as searching premises or using surveillance devices) are not available. Police can only access such investigative powers where there is evidence of the commission, or likely commission, of an offence and where that evidence meets the relevant threshold requirements.

106. Consequently, the only available measure for monitoring compliance with a control order is physical surveillance, which is significantly resource intensive and less effective. This creates a significant burden on law enforcement and will likely redirect resources from other higher priority counter terrorism investigations.

107. The AFP considers that, for control orders to be effective in preventing a terrorist act, police need access to powers that allow compliance to be monitored in a way that is less resource intensive. Additional monitoring options such as: non-scheduled entry powers, appearance on attendance at prescribed addresses, Internet monitoring and stringent reporting conditions during increased risk situations could be considered.

Preventative detention orders

108. The preventative detention order regime contained in Division 105 of the Criminal Code is under review by the COAG Review and provides a mechanism for the AFP to apply to an issuing authority for a person to be taken into custody and detained for a short period of time in order to prevent an imminent terrorist act occurring, or to preserve evidence of, or relating to, a recent terrorist act.

109. Preventative detention orders are preventative measures, aimed at protecting the public from potentially catastrophic harm by removing a person (or persons) from the prospect of supporting or participating in a terrorist attack. The advantage of the preventative detention order regime is that it allows police to react rapidly, in time critical situations, to disrupt (and ultimately prevent) a terrorist attack from occurring. Preventative detention orders can also prevent persons from destroying evidence following a terrorist incident; evidence which may be crucial to ensuring that perpetrators are brought to justice.

110. Preventative detention orders are directed at situations in which the risk of a terrorist attack occurring in the near future is very high, and there needs to be sufficient operational flexibility to intervene before an incident happens. For example, there may be credible intelligence that a terrorist attack is imminent, and that certain persons are involved. However, this intelligence does not provide a sufficient basis for police to form a reasonable belief that a particular persons is about to commit an offence (and therefore police cannot exercise their powers of arrest).

111. In such situations, it is important that police can intervene with a preventative detention order, rather than waiting to the point at which there is sufficient evidence to arrest the person. Such preventative action is necessary because these situations can unfold rapidly, and predicting the precise point in time that a terrorist attack will take place is an inexact science. Using a preventative detention order can not only disrupt the planned attack, but can also give police an opportunity to locate and intercept other persons, preventing related attacks.

112. A preventative detention order is a disruptive measure that can only be used in limited circumstances and is not intended to be used as a substitute for prosecution. Preventative detention orders have not been sought where there has been sufficient evidence available to support commencement of criminal proceedings with an arrest. A decision to seek a preventative detention order, rather than to arrest and charge the person with a terrorist offence, will be assessed by the AFP on a case by case basis taking into account the prevailing circumstances and need to safely navigate an impending incident jeopardising safety and security, and the admissibility of available evidence to support a criminal prosecution.

113. The existence of a preventative detention order will not preclude the continuation of an ongoing investigation to enable an arrest. This arrest will be executed when sufficient evidence has been obtained to meet the burden of proof with reasonable prospects of successful prosecution and could occur while the person was subject to preventative detention.

114. Since the introduction of the preventative detention order regime in 2005, neither the AFP nor another Australian police force has applied for a preventative detention order. There are a number of reasons for the AFP not pursuing detention orders.

115. Firstly and fortunately, there have been no circumstances necessitating use of this particular preventative power because it is restricted to the most extraordinary of circumstances and there has existed comprehensive law enforcement and intelligence coverage of planned terrorist operations domestically. This should not be an ongoing expectation as the evolving terrorist threat and trends may require law enforcement to enact these powers.

116. Secondly, the AFP has adopted a prudent and cautious approach to preventative detention order applications – balancing risk to the community against successful preventative action by interdiction, underpinned by the strength of evidence to support a prosecution. The fact that, after due consideration, preventative detention orders have not been necessary does not

support the argument that a need for such orders will not arise in the future. The trends of terrorism and the challenges for law enforcement, as previously described, attach greater relevance to the importance and utility of these tools in emergency situations.

117. Despite their lack of application, the AFP considers that preventative detention orders remain relevant within the suite of preventative measures to counter the terrorist threat. The removal of the preventative detention order regime would create a substantial gap in counter terrorism options to thwart an impending terrorist attack where disruption by arrest is not viable. The AFP considers this void in pre-emptive action would present an unacceptable risk to community safety without any alternative offered to replace preventative detention measures.

118. The AFP considers that the current construct of the legislation and process of preventative detention orders could benefit from review and simplification to remove complexity and uncertainty in its application. Further areas for focus for the COAG Review Committee could include: the need for a process to make emergency applications; and whether voluntary questioning of detained persons should be permitted. These issues are discussed further below. Again, the AFP supports the retention of safeguards ensuring preventative detention is only used in appropriate circumstances, and does not propose that important accountability mechanisms be weakened in any way.

Complexity of legislation

119. The AFP is concerned that the depth, complexity and significant technicalities of the legislation may impede the efficient and effective use of preventative detention orders. Such complexities include: the multiple levels of authorisation required (especially when compared to the police powers of arrest); potential inconsistencies in referencing particular 'terrorist acts'; and the requirement for the terrorist act to be prevented be 'imminent' and within 14 days. The latter is particularly important because the need to present evidence that a terrorist act will occur within 14 days requires the AFP to rule out competing inferences that the terrorist act could occur after this 14 day period.

120. The AFP is concerned that in order to meet the high level of judicial scrutiny of preventative detention order applications, it would be very difficult and time consuming to draft an application for an order which addressed all of the relevant criteria and met the relevant thresholds. The AFP is particularly concerned about the time critical environments in which such applications would need to be prepared, and seeks to ensure that the utility of the scheme is not undermined.

Emergency applications

121. Both the application for and the initial preventative detention order must be in writing. During longer term investigations, the use of preventative detention orders is continually assessed and draft submissions (for an order) are prepared in parallel with evidence collection to allow adequate response where there is a critical spike in operational tempo and risk. However, there is no mechanism for making an urgent application for a preventative detention order. The AFP is therefore concerned that, in serious and urgent circumstances, the inability to make an urgent application for a preventative detention order could undermine the preventative objective of the regime.

122. Given the critical and restricted timings of the situations in which a preventative detention order may need to be sought, the AFP suggests that consideration be given to introducing a streamlined mechanism for seeking, and making, an emergency initial preventative detention order. Such a mechanism would be consistent with other Commonwealth legislation which allows urgent applications to be made in relation to the exercise of police powers (including applications for telephone intercepts, search warrants and controlled operations authorisations under Commonwealth legislative provisions). Allowing for emergency applications would also be consistent with many other State and Territory preventative detention order provisions, such as subsection 26G(2) of the Terrorism (Police Powers) Act 2002 (NSW).

Questioning in detention

123. The questioning of persons detained under a preventative detention order is expressly prohibited by the legislation, unless the questioning relates to: determining the identity of the person, ensuring the safety and well-being of the person, or allowing police to comply with a requirement relating to the person's detention.

124. There may be situations in which a person detained under a preventative detention order may be willing to assist police with their inquiries. However, the legislation would appear to preclude this. If questioning during detention was permitted, it could elicit important information which could better direct police resources in preventing a terrorist attack, or could assist police to determine whether the continued detention of the person is necessary (ensuring that persons are only detained for the minimum amount of time).

125. The AFP suggests that consideration be given to allowing the questioning of detained persons on a voluntary basis, principally for intelligence purposes to allow response measures to mitigate risk to the public. The right to silence would be preserved as participation in initial questioning process would be voluntary.