Council of Australian Governments
Review of Counter-Terrorism Legislation
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Acknowledgements

The Committee thanks the Commonwealth Attorney-General’s Department for the significant assistance and resources it has provided through its staff and secretariat services. The Committee wishes to thank especially Ms Felicity Smart (and more latterly Hayley Taylor) for the multitude of organisational tasks which were carried out so efficiently and helpfully during the Review process. The Committee also thanks Ms Julia Galluccio, Principal Legal Officer of the National Security Law and Policy Division at the Commonwealth Attorney-General’s Department, for her steadfast oversight. Finally the Committee acknowledges the substantial contribution made by Mr Surya Gopalan, Researcher to the Chair. His research and assistance was of significant benefit to the deliberations of the Committee and to the finalisation of this Report.
Members of the Committee

Chair of the Committee – Hon. Anthony Whealy QC, retired Judge from the New South Wales Court of Appeal

Committee Members

- Mr Richard Bingham, South Australian Ombudsman
- Assistant Commissioner Mike Condon, State Crime Operations Command, Queensland Police
- Mr Graeme Davidson, Deputy Director, Commonwealth Director of Public Prosecutions
- Judge David Jones AM, retired Victorian County Court Judge and current Victorian Law Reform Commissioner
- Assistant Commissioner Justine Saunders APM, Manager Counter Terrorism Domestic, Australian Federal Police
### List of Abbreviations

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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>AAT</td>
<td>Administrative Appeals Tribunals</td>
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<td>AFP</td>
<td>Australian Federal Police</td>
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<tr>
<td>AGD</td>
<td>Attorney-General’s Department</td>
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<td>ASIO</td>
<td>Australian Security Intelligence Organisation</td>
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<tr>
<td>AUSTRAC</td>
<td>Australian Transaction Reports and Analysis Centre</td>
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<tr>
<td>CDPP</td>
<td>Commonwealth Director of Public Prosecutions</td>
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<tr>
<td>CEPS</td>
<td>Centre for Excellence in Policing Studies</td>
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<td>COAG</td>
<td>Council of Australian Governments</td>
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<tr>
<td>DFAT</td>
<td>Department of Foreign Affairs and Trade</td>
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<tr>
<td>DPP</td>
<td>Department of Public Prosecutions</td>
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<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>GT Centre</td>
<td>Gilbert and Tobin Centre for Public Law</td>
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<td>HRLC</td>
<td>Human Rights Law Centre</td>
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<tr>
<td>INSLM</td>
<td>Independent National Security Legislation Monitor</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>LTTE</td>
<td>Liberation Tigers of Tamil Eelam</td>
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<tr>
<td>PJCIS</td>
<td>Parliamentary Joint Committee on Intelligence and Security</td>
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<tr>
<td>TPIM</td>
<td>Terrorism Prevention and Investigation Measure (United Kingdom)</td>
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<tr>
<td>UNSCR</td>
<td>United Nations Security Council Resolution</td>
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The Council of Australian Governments tasked the Committee to review an extensive range of new and amended counterterrorism laws passed by Commonwealth, State and Territory Parliaments in 2005. The accompanying Report discusses the relevant legislation in considerable detail. It is convenient, however, to set out in this section the entirety of the recommendations made by the Committee.

**RECOMMENDATION 1:** *Criminal Code – Section 100.1 – Definition of a terrorist act – threat of action*  
The Committee recommends that ‘threat of action’ be removed from the definition and a separate offence of ‘threatening to commit a terrorist act’ be created.

**RECOMMENDATION 2:** *Criminal Code – Section 100.1 – Definition of a terrorist act – hoax threat*  
The Committee recommends that an additional offence be inserted into Part 5.3 of the *Criminal Code* to provide for a ‘hoax threat’ to commit an act of terrorism.

**RECOMMENDATION 3:** *Criminal Code – Section 100.1 – Definition of a terrorist act – meaning of ‘harm’*  
The Committee recommends that ‘harm’ in subsection 100.1(2) be amended to allow the harm contemplated by the Act to extend to psychological harm, together with any consequential amendment, for example, to subsection 100.1(3)(b)(i).

**RECOMMENDATION 4:** *Criminal Code – Section 100.1 – Definition of a terrorist act – hostage taking*  
The Committee recommends that ‘hostage-taking’ be included in subsection 100.1(2).

**RECOMMENDATION 5:** *Criminal Code – Section 100.1 – Definition of a terrorist act – United Nations and its agencies*  
The Committee recommends that subsection 100.1(1)(c)(i) extend to include reference to the United Nations, a body of the United Nations, or a specialised agency of the United Nations.

**RECOMMENDATION 6:** *Criminal Code – Section 100.1 – Definition of a terrorist act – Interaction with the law of armed conflict*  
The Committee recommends that consideration be given to incorporating in the legislation an amendment to the effect that Part 5.3 of the *Criminal Code* will not apply to acts committed by parties regulated by the law of armed conflict.
RECOMMENDATION 7: *Criminal Code* – Section 100.1 – Definition of a terrorist act – Exemption for Australian forces
The Committee recommends that consideration be given to excluding from the definition an act done by a person in the course of, and as part of, his or her service in any capacity with the Australian armed forces.

RECOMMENDATION 8: *Criminal Code* – Section 101.2 – Providing or receiving training connected with terrorist acts
The Committee does not recommend any change to this section.

RECOMMENDATION 9: *Criminal Code* – Section 101.4 – Possessing things connected with terrorist acts
The Committee recommends that section 101.4 be amended to make it clear that ‘a thing’, by its very nature, is capable of being connected with preparation for, the engagement of a person in, or assistance in a terrorist act.

RECOMMENDATION 10: *Criminal Code* – Section 101.5 – Collecting or making documents
The Committee recommends that section 101.5 be amended to make it clear that ‘a document’, by its very nature, is capable of being connected with preparation for, the engagement of a person in, or assistance in a terrorist act.

RECOMMENDATION 11: *Criminal Code* – Section 101.6 – Doing an act in preparation for, or planning, a terrorist act
The Committee does not recommend any change to this section.

RECOMMENDATION 12: *Criminal Code* – Section 102.1 – Proscription of terrorist organisations
The Committee does not recommend that the present method of proscription of a terrorist organisation be changed.

RECOMMENDATION 13: *Criminal Code* – Subsection 102.1(1A) – Definition of ‘advocates’
The Committee recommends that subsection 102.1(1A) be amended to omit (c). This subsection deals with a situation where an organisation directly praises the doing of a terrorist act.

RECOMMENDATION 14: *Criminal Code* – Section 102.1A – Commencement of listing a terrorist organisation
The Committee recommends that the Government give consideration to postponing commencement of a listing until after the Parliamentary disallowance period has expired.

RECOMMENDATION 15: *Criminal Code* – Communication of proscription decisions
The Committee recommends that the Attorney-General’s Department should consider whether it is able to enhance its communication methods to ensure that communities are more effectively notified when an organisation has been proscribed. Such methods should be effectively responsive and personal to the specific information needs of ethnic and religious communities.
RECOMMENDATION 16: Criminal Code – Section 102.5 – Training unconnected with terrorist activities
The Committee recommends that section 102.5 be amended to include specific exemptions for providing training to or receiving training from a terrorist organisation for purposes unconnected with the commission of a terrorist act.

RECOMMENDATION 17: Criminal Code – Section 102.5 – ‘Participation’ in training
The Committee recommends the offence in section 102.5 be amended to include ‘participation’ in training.

RECOMMENDATION 18: Criminal Code – Section 102.5 – Strict liability in respect of proscribed terrorist organisations
The Committee recommends the repeal of subsections 102.5(2) – (4).

RECOMMENDATION 19: Criminal Code – Subsection 102.6(3) – Reduction of the burden on the defendant
The Committee recommends that the legal burden in the note in subsection 102.6(3) be reduced to an evidential one.

RECOMMENDATION 20: Criminal Code – Subsection 102.6(3) – Exception for lawyers’ receipt of funds from a terrorist organisation
(i) The Committee recommends subsection 102.6(3)(a) be amended to exempt the receipt of funds from a terrorist organisation for the purpose of legal advice or legal representation in connection with criminal proceedings or proceedings relating to criminal proceedings (including possible criminal proceedings in the future) and in connection with civil proceedings of the following kind:

(ii) Proceedings relating to whether the organisation in question is a terrorist organisation, including the proscription of an organisation, a review of any proscription, or the de-listing of an organisation; or

(iii) A decision made or proposed to be made under Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 (Cth), or proceedings relating to such a decision or proposed decision; or

(iv) A listing or proposed listing under section 15 of the Charter of the United Nations Act 1945 (Cth) or an application or proposed application to revoke such a listing, or proceedings relating to such a listing or application or proposed listing or application; or

(v) Proceedings conducted by a military commission of the United States of America or any proceedings relating to or arising from such a proceeding; or

(vi) Proceedings for a review of a decision relating to a passport or other travel document or to a failure to issue such a passport or other travel document (including a passport or other travel document that was, or would have been, issued by or on behalf of the government of a foreign country).
RECOMMENDATION 21: *Criminal Code* – Section 102.6 – Penalty for knowingly funding a terrorist organisation
The Committee recommends that the penalty for an offence under subsection 102.6(1) be reduced to 15 years.

RECOMMENDATION 22: *Criminal Code* – Section 102.6 – Penalty for recklessly funding a terrorist organisation
The Committee recommends that the penalty for an offence under subsection 102.6(2) be reduced to 10 years.

RECOMMENDATION 23: *Criminal Code* – Section 102.8 – Associating with terrorist organisations
The Committee, by majority, recommends the repeal of this section.

RECOMMENDATION 24: *Criminal Code* – Section 103.1– Financing terrorism
The Committee recommends that this section be repealed and replaced by a graded continuum of offences, capturing both higher and lower culpability situations. The gradation should be:

(i) Providing or collecting funds with the intention or knowledge that they be used to facilitate or to allow engagement in a terrorist act. The Committee recommends this offence attract a maximum penalty of life imprisonment.

(ii) Providing or collecting funds reckless to their use in facilitating or allowing engagement in a terrorist act. ‘Recklessness’ for this purpose is defined in section 5.4 of the *Criminal Code*. The Committee recommends this offence attract a maximum penalty of 25 years.

RECOMMENDATION 25: *Criminal Code* – Section 103.2 – Financing a terrorist
The Committee recommends that consideration be given to the repeal of this section.

RECOMMENDATION 26: *Criminal Code* – Retention of control orders
The Committee considers that the control order regime should be retained with additional safeguards and protections included.

RECOMMENDATION 27: *Criminal Code* – Control orders – Basis for seeking Attorney-General’s consent
The Committee recommends the amendment of subsection 104.2(2) (b) to require that the second basis on which a senior member of the Australian Federal Police seeks the Attorney-General’s written consent to request an interim control order be that he or she “considers on reasonable grounds that the person has provided training, or received training from, a listed terrorist organisation”.

RECOMMENDATION 28: *Criminal Code* – Control orders – Definition of ‘issuing court’
The Committee recommends that the definition of ‘issuing court’ in section 100.1 be amended to read ‘the Federal Court of Australia’.
RECOMMENDATION 29: *Criminal Code* – Control orders as a last resort – Cooperation and information sharing between the Australian Federal Police and the Commonwealth Director of Public Prosecutions

The Committee recommends that investigating agencies, prior to the Australian Federal Police requesting consent from the Attorney-General to seek an interim control order, should provide the Commonwealth Director of Public Prosecutions with the material in their possession so that the Director may, in light of the Prosecution Policy of the Commonwealth, consider or reconsider the question of prosecution in the criminal courts. This recommendation does not necessarily require that it be incorporated in the legislation at this stage. It does, however, emphasise that criminal prosecution is the preferable approach. Control orders should always be sought as a last resort.

RECOMMENDATION 30: *Criminal Code* – Control orders – Special Advocates

The Committee recommends that the Government give consideration to amending the legislation to provide for the introduction of a nationwide system of ‘Special Advocates’ to participate in control order proceedings. The system could allow each State and Territory to have a panel of security-cleared barristers and solicitors who may participate in closed material procedures whenever necessary including, but not limited to, any proposed confirmation of a control order, any revocation or variation application, or in any appeal or review application to a superior court relating to or concerning a control order.

RECOMMENDATION 31: *Criminal Code* – Control orders – Minimum standard of disclosure of information to controllee

The Committee recommends that the legislation provide for a minimum standard concerning the extent of the information to be given to a person the subject of an application for the confirmation of a control order, or an application for a variation or revocation of a control order. This requirement is quite separate from the Special Advocates system. It is intended to enable the person and his or her ordinary legal representatives of choice to insist on a minimum level of disclosure to them. The minimum standard should be: “the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations.” This protection should be enshrined in Division 104 wherever necessary.

RECOMMENDATION 32: *Criminal Code* – Control orders – Information concerning appeal rights

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

RECOMMENDATION 33: *Criminal Code* – Control orders – Relocation condition

The Committee recommends that subsection 104.5(3)(a) be amended to ensure that a prohibition or restriction not constitute – in any circumstances – a relocation order.

RECOMMENDATION 34: *Criminal Code* – Control orders – Curfew condition

The Committee recommends that a prohibition or restriction under subsection 104.5(3)(c) – a curfew order – be generally no greater in any case than 10 hours in one day.
RECOMMENDATION 35: *Criminal Code – Control orders – Communication restrictions*  
The Committee recommends that, other than in any exceptional case, the prohibitions or restrictions under subsection 104.5(3)(f) permit the controlled person to have access to one mobile phone, one landline, and one computer with access to the internet.

RECOMMENDATION 36: *Criminal Code – Control orders – Limit on duration*  
The Committee recommends that, for the present time, there be no change to the maximum duration of a control order, namely a period of 12 months.

RECOMMENDATION 37: *Criminal Code – Control orders – Terms of an interim control order*  
The Committee recommends that section 104.5 should be amended to ensure that, whenever a control order is imposed, any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person’s liberty, privacy or freedom of movement that is necessary in all the circumstances.

RECOMMENDATION 38: *Criminal Code – Control orders – Oversight by the Commonwealth Ombudsman*  
The Committee recommends that the Commonwealth Ombudsman be empowered specifically to provide general oversight of interim and confirmed control orders.

RECOMMENDATION 39: *Criminal Code – Preventative Detention*  
The Committee recommends, by majority, that the Commonwealth, State and Territory ‘preventative detention’ legislation be repealed. If any form of preventative detention were to be retained, it would require a complete restructuring of the legislation at Commonwealth and State/Territory level, a process which, in the view of the majority of the Committee, may further reduce its operational effectiveness.

RECOMMENDATION 40: *Administrative Decisions (Judicial Review) Act 1977 – Schedule 1 Exemptions from review*  
The Committee recommends that paragraph (dab) be retained. If preventative detention remains, the Committee recommends that paragraph (dac) be removed.

RECOMMENDATION 41: *Section 6 Crimes (Foreign Incursions and Recruitment) Act 1978 – Hostile activities in foreign States*  
The Committee recommends an amendment to subsection 6(1)(a) to remove the need to prove an intention to engage in hostile activity in a particular foreign State.

RECOMMENDATION 42: *Section 16 Financial Transaction Reports Act 1988*  
The Committee does not recommend any change to this provision.

RECOMMENDATION 43: *Crimes Act 1914 – Federal stop, search and seizure powers – Emergency entry without a warrant*  
The Committee recommends that the legislation be amended to require the police authorities exercising power under section 3UEA to report annually to the Commonwealth Parliament on the use of this power.
RECOMMENDATION 44: Crimes Act 1914 – Federal stop, search and seizure powers – Sunset provision
If the search and seizure powers in the Crimes Act are renewed in 2016, the Committee recommends amending section 3UK to provide that the relevant provisions should cease to exist as at the expiry date, which will be a five year period.

RECOMMENDATION 45: State and Territory police powers of search, entry and seizure – Judicial authorisation
The Committee recommends that the various jurisdictions amend their legislation to reflect a greater degree of judicial oversight. The legislation in each State or Territory should be based on the current ACT, Tasmanian or Victorian model, requiring authorisation or final authorisation by a judge of the State or Territory Supreme Court.

RECOMMENDATION 46: State and Territory police powers of search, entry and seizure – Privative clauses
The Committee recommends that the various privative clauses in the current legislation be removed.

RECOMMENDATION 47: State and Territory police powers of search, entry and seizure – Reporting
The Committee recommends that there should be a regular reporting function incorporated into each ‘special powers’ statute.
Introduction

1. Following the 11 September 2001 terrorist attacks in the United States, the Council of Australian Governments (“COAG”) agreed to a national framework to combat terrorism. In 2002, legislation was introduced creating a range of terrorist offences in Part 5.3 of the Schedule to the Criminal Code Act 1995 (Cth) (“Criminal Code”). Under the 2002 COAG Agreement the States and Territories had committed:

“To take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation, including rollback provisions, to ensure that the new Commonwealth law does not override State law where that is not intended, and to come into effect by 31st of October 2002. The Commonwealth will have power to amend the new Commonwealth legislation in accordance with provisions similar to those which apply under Corporations arrangements. Any amendment based on the referred power will require consultation with and agreement of States and Territories, and this requirement is to be contained in the legislation.”

2. In 2003, the States enacted legislation to refer power in these matters to the Commonwealth under the Constitution. The Commonwealth in turn enacted the Criminal Code Amendment (Terrorism) Act 2003 (Cth). That Act re-enacted Part 5.3 of the Criminal Code partly in reliance on the referrals of power by the States to the Commonwealth.

3. An Intergovernmental Agreement on Counterterrorism Laws was entered into between the respective parties on 25 June 2004. This Agreement provided for consultation between the Commonwealth and State and Territory Governments on amendments to Federal terrorism offences and on the proscription of terrorist organisations. It also foreshadowed the amendment of Part 5.3 of the Criminal Code with the majority agreement of the States and Territories.

4. Following the London bombings in 2005, the Australian Government, with the cooperation of the States and Territories, enacted legislation designed to strengthen Australian counterterrorism laws to meet more effectively the threat of international and domestic terrorism. Prior to the enactment of this legislation, there had been a Special Meeting held on 27 September 2005 that considered proposals for a range of counterterrorism measures. They included control orders, preventative detention orders, access to airline information, stop search and question powers at transport hubs and places of mass gathering, changes to the Australia Security Intelligence Organisation (“ASIO”) warrant scheme, the strengthening of existing offences and the creation of new offences. In general terms, these proposals were to form the basis of the 2005 legislation, which came into effect in November and December 2005.

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1 Security Legislation Amendment (Terrorism) Act 2002 (Cth); Suppression of the Financing of Terrorism Act 2002 (Cth).
2 Council of Australian Governments, Commonwealth and States and Territories Agreement on Terrorism and Multi-Jurisdictional Crime, 5 April 2002, paragraph [3].
4 Anti-Terrorism Act (No. 1) 2005 (Cth); Anti-Terrorism Act (No. 2) 2005 (Cth).
5. At the Special Meeting on counterterrorism on 27 September 2005, COAG reached further agreement that “it was appropriate for newly introduced counterterrorism laws to be formally reviewed after a period of five years.” Subsequently, at a COAG meeting on 10 February 2006, agreement was reached on the details of the scope, form and process of the proposed review of counterterrorism legislation, which was, at that time, scheduled to commence in 2010.

6. The purpose and scope of the Review were stated as follows:

“In broad terms, the Committee should review and evaluate the operation, effectiveness and implications of the relevant amendments in each jurisdiction. In conducting the review, the Committee should take into account the agreement of COAG leaders at the Special Meeting on Counter-Terrorism on 27 September 2005, that any strengthened counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse, such as Parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence-led and proportionate”.

7. The Review Committee was expressly required to take into account the outcome of reviews or monitoring activities conducted in accordance with individual State and Territory legislation. In conducting the Review, the Committee was required to provide for public submissions and public hearings. The Committee was required to provide a written report to COAG within six months of commencing the Review.

8. In general terms, the legislation to be covered by the Review included:

- Schedule 1 of the Anti-Terrorism Act 2005 (No. 1) (Cth);
- Schedules 1, 3 and 5 of the Anti-Terrorism Act 2005 (No. 2) (Cth);
- State and Territory legislation enacted to provide for preventative detention;
- State and Territory legislation enacted to provide for enhanced stop, question and search powers in areas such as transport hubs and places of mass gatherings; and
- further amendments made to the Commonwealth, State and Territory legislation described in the Reference.

Attachment A sets out more precisely the legislation to be reviewed. The Schedule to the report sets out the text of the relevant Commonwealth legislation under review.

The Conduct of the Review

9. As it happened, and for reasons unnecessary to recount, this Review did not commence until August 2012. On 9 August 2012, Prime Minister Gillard announced the commencement of the COAG Review of counter-terrorism legislation. The Prime Ministerial announcement confirmed that the Review tasks would require the Committee to examine control orders, preventative detention orders and the police emergency stop, question and search powers Federal, State and Territory. The Committee’s report was initially required by February 2013, but, due to the substantial number of submissions received, this was later extended to 1 March 2013.

5 Council of Australian Governments, Communique, Special Meeting on Counter-Terrorism, 27 September 2005, p. 3.
6 Council of Australian Governments, Communique, Meeting, 10 February 2006.
7 Council of Australian Governments, Communique, Meeting, 10 February 2006, Attachment G.
10. A website for the COAG Review was established. Public announcements and invitations were made, extending over a wide range of potentially interested persons. The Review sought and received a wide range of written submissions from individuals and organisations throughout Australia. These included governments and enforcement agencies, civil liberty organisations and academic and research scholars both at an individual and organisational level. There were individual submissions received and submissions from both Jewish and Muslim organisations. 

Attachment B sets out the names of individuals and organisations who provided written submissions to the Review. Public hearings were advertised and conducted at various locations in Brisbane, Melbourne, Sydney, Adelaide, Perth, and Canberra. Attachment C sets out the names of persons and organisations who provided oral submissions at these public hearings.

11. Throughout its Review, the Committee was conscious of the important role being played by Mr Bret Walker SC, the Independent National Security Legislation Monitor (“INSLM”) and of the current report being prepared by the Monitor. The Committee Chair had several informal meetings with the INSLM to discuss areas where there was crossover between the Committee’s tasks and the Monitor’s report. The Committee wishes to express its thanks to Mr Walker SC for the time he gave so generously, and the valuable insight these meetings provided to the work of the Review. Because of the timing of the presentation of the INSLM’s Report, regrettably, the Committee has not been able to have the benefit of the Monitor’s final views (as expressed in his Report) before finalising this Review.

12. In addition, once again through its Chair, the Committee consulted with Mr David Anderson QC, the United Kingdom Independent Reviewer of Terrorism Legislation, and with Professor Clive Walker of the University of Leeds. The latter performs the role of ‘Special Adviser’ to Mr Anderson QC. The views of each of these persons was of considerable help in understanding the terrorism legislation in the United Kingdom and in thereby securing a valuable comparative insight into the Australian counter-terrorism legislation.

13. The Committee was also conscious of the work being done by the Parliamentary Joint Committee on Intelligence and Security (“PJCIS”) at the present time. However, the need to complete the review within six months did not allow the opportunity to liaise with the PJCIS.

14. In coming to its conclusions, and especially in relation to the preparation of this report, the Committee has made reference to a number of the submissions received by it. The Committee wishes to stress, however, that it has had careful regard to each and every submission, both oral and in writing, that it has received. Each submission has been of value to the performance of our important task. It has, however, not been possible to refer to each submission in the body of our report. Any omission to do so should not be taken as a discourtesy. As we have said, very careful consideration has been given to all the submissions and arguments, and we acknowledge the substantial contribution they have made to the Committee’s deliberations and conclusions.

15. The Committee also received private background briefings from the Australian Federal Police (“AFP”) and from ASIO. In addition, a public submission was made both orally and in writing by the AFP, and in writing by ASIO. The importance of the information provided in these meetings, and by way of submissions, was critical to the Committee’s task. The Committee also received insightful assistance through the submissions of Mr Geoff McDonald PSM, First Assistant Secretary to the National Security Law and Policy Division of the Attorney-General’s Department.
A General Statement of the Committee’s Approach

16. The Committee’s Review will be made against the background of the ASIO submission (unclassified). In that document ASIO states as follows: 8

“The threat to Australia — domestically and offshore — from those committed to terrorist activity endures. Terrorist planning and activities have occurred in Australia, and terrorists have attacked Australians and Australian interests overseas. Over 100 Australians have been killed in terrorist attacks in Bali, Jakarta, Mumbai, Istanbul, London and New York. Threats of terrorism can come from extremist groups or from an individual — in particular, individuals committed to a violent jihad ideology continue to regard Australia and Australian interests abroad as legitimate targets. The threat posed by this form of extremism is ongoing, pervasive and persistent.”

17. The Committee has been informed that ASIO is currently conducting over 200 counter-terrorism investigations and is, on an ongoing basis, responding to a large number of counter-terrorism leads. Concern has been expressed as to the rise in the numbers of Australians who wish to support acts in Australia or travel overseas to obtain training or undertake their own particular form of jihad. The submission states: 9

“This is not an abstract or offshore threat; it is real and it is amongst the community.”

18. The Committee was given some detail of the movements of Australians overseas to support or take part in acts of politically motivated violence, and the resultant concerns that have arisen from a security perspective.

19. In relation to intelligence and prosecution activities since 2001, both the AFP and ASIO submissions point out that four potentially very serious attacks, intended to produce mass casualties, have been prevented. Following trial and conviction of terrorism offences a number of persons are serving lengthy prison sentences. In addition, other investigations have disrupted the activities of individuals who have been intent on committing terrorist acts. The ASIO and AFP submissions leave us in no doubt that Australia remains a target for a small range of individuals and groups who would promote their belief systems and seek to destroy our democratic way of life in a violent and irreversible way. Of course, we accept, at the same time, that the threat of a terrorist attack in Australia should not be overstated or exaggerated.

20. The fact that there has not as yet been an attack on Australian soil should not, however, give its citizens any great comfort. Nor should it allow complacency and inertia to dilute the nation’s vigilance. It is against the background of these matters that we now turn to examine and review the legislation. Many of the submissions we have received have argued that, despite the events of September 11, 2001 (and other catastrophic terrorist actions since that time), there was never a need — and hence no justification — for special terrorism laws. The traditional criminal law, it has been suggested, was always good enough. Other submissions, perhaps more moderately, have accepted that there may have been an initial justification for the passage of special laws but argue that, as time has passed, there is no longer such a need. These submissions suggest that, at the very least, it must be shown, based on empirical evidence, that such a need persists if the laws are to be retained.

8 Submission of ASIO to the COAG Review, p. 1.
9 Submission of ASIO to the COAG Review, p. 2.
21. The Committee accepts that, in general terms, the legislation under review should be examined carefully with these submissions in mind. At a practical level, however, we propose to examine the legislation entrusted to our Review section by section. This is because, plainly enough, very different considerations may apply to, for example, the definition of a terrorist act in Division 100 of the *Criminal Code* and, by way of contrast, the provisions for preventative detention in Division 105. The Committee wishes to stress, however, that a factor of the utmost importance in our considerations is our acceptance of the assurance we have received that terrorism remains at the present time a genuine threat to the safety and well-being of the Australian community.
22. The concept of a ‘terrorist act’ is the cornerstone of the catalogue of offences and other protective provisions in Part 5.3 including those in Division 101. Because of this, the definition of this term in section 100.1 has received considerable attention in the process of its development, enactment, and subsequent review.10

23. The definition in section 100.1 captures an action or a threat of action that is intended to:
   - advance a political, ideological or religious cause; and
   - coerce or intimidate an Australian or foreign government or the public or section of the public.

24. The action must also:
   - cause serious physical harm to a person, or cause serious damage to property or;
   - cause a person’s death or endanger a person’s life (other than the person taking the action); or
   - create a serious risk to the health and safety of the public or a section of the public; or
   - seriously interfere with, disrupt or destroy an electronic system that includes but is not limited to
     - a system used for the delivery of essential government services; or
     - a system used for or by an essential public utility or transport system.

Conduct of a non-violent kind that constitutes advocacy, protest, dissent or industrial action is expressly excluded.

25. The history of this definition may be briefly stated. It was inserted into the Criminal Code by the Security Legislation Amendment (Terrorism) Act 2002 (Cth).11 In that form, it reflected agreement between the Federal, States and Territories Governments. It incorporated a number of recommendations of the Senate Legal and Constitutional affairs Committee,12 accepted on a bipartisan basis. The purpose of the Senate recommendations was to align aspects of the definition more closely with those of other jurisdictions, including the United Kingdom and Canada.

26. Two external reviews have considered the definition of a terrorist act in section 100.1: the 2006 Report of the Security Legislation Review Committee (“Sheller Report”) and the 2006 PJCIS Review of Security and Counter Terrorism Legislation (“2006 PJCIS Review”). The INSLM has also identified the definition and is likely to have discussed it at length in his

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11 Schedule 1, section 3.
current report. The 2009 *National Security Legislation Discussion Paper*\(^\text{13}\) included proposals intended to implement a number of recommendations of the two external reviews directed to the following matters:

- clarifying the application of the definition to terrorist threats;
- extending its application to actions or threats directed to international organisations (such as the UN); and
- extending its application to actions or threats which cause mental harm.

27. These proposals, however, were not included in the 2010 security legislation reform package.\(^\text{14}\) As we understand it, the Government considered that these proposed reforms required additional consultation with States and Territories but has stated that it will consider any views expressed by this Committee and the INSLM.

28. Each of the matters identified in the 2009 discussion paper forms part of the submissions received by this Committee. In addition further submissions from interested parties argued that the following changes, inter alia, be recommended:

- the definition should be re-drafted to ensure it is consistent with internationally accepted definitions of ‘terrorist act’;
- the definition should be re-drafted by reintroducing the definite article ‘the’ before ‘terrorist act’ in the offence provisions;
- the *Criminal Code* should be amended to provide that an action is not a terrorist act if it takes place in the context of, and is associated with, an armed conflict; and
- paragraph 100.1 (2)(e) and (f) of the *Criminal Code* should be repealed.

29. There have been two principal arguments, in particular, placed before the Committee. The first is that the Australian definition of ‘a terrorist act’ should coincide with, or at least not substantially extend beyond, international definitions. Liberty Victoria, for example, counselled the adoption of the model definition suggested by Martin Scheinin, the former UN Special Rapporteur for Counter-Terrorism, for governments to consider.\(^\text{15}\) Other submissions on the point suggested even more restricted forms of definition.

30. The second principal argument – one in which there has been considerable division among the submitting parties – raised the question whether the ‘cause’ mentioned in section 100.1 (b) should be retained. This aspect of the definition requires that, for an action to be a terrorist act, the action must be done ‘with the intention of advancing a political, religious or ideological cause.’

31. As to the first matter, the Committee agrees with the statement of Professor Ben Saul that the Australian legal definition of terrorism is among the most tightly drafted and human rights respecting definitions in the domestic laws of any country.\(^\text{16}\) We do not see any justification for limiting the range of actions and harm likely to be caused by such actions as they are set out in the definition. In particular, we see no justification in restricting the notion of harm to death or serious

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\(^{14}\) See *National Security Legislation Amendment Act 2010* (Cth).

\(^{15}\) Submission of Liberty Victoria to COAG Review, p. 5.

\(^{16}\) Submission of Professor Ben Saul to the COAG Review, p. 2.
physical harm to a person or persons. Serious damage to property and the destruction or disruption of systems that are fundamental to the proper functioning of society are properly within the definition. They can be as catastrophic in certain situations as the loss of life. It is incontrovertible that, at an international level, governments have been unable to agree on an appropriate definition. This has principally been because nations are divided as to whether state terrorism should be included and whether uprisings in pursuit of national self-determination should be excluded. Australia has rightly chosen its own course, ignoring these political uncertainties.

32. In relation to the second matter, the Committee is firmly of the view that the intention – ‘with the intention of advancing a political, religious or ideological cause’ – should be retained. We are of course familiar with the contrary views expressed on a preliminary basis by the INSLM on this matter and would expect that his final report for 2012 will embrace the same position.

33. This Committee would respectfully disagree. We are fortified in this conclusion by the fact that bodies such as the Gilbert and Tobin Centre of Public Law (“GT Centre”) and Liberty Victoria, as well as the Hon. Richard Maidment and Professor Ben Saul take the view that retention of this ‘cause’ is warranted. We would once again adopt Professor Saul’s statement:

“[T]he cumulative elements of the definition ensure that it applies to a fairly narrow range of circumstances, and properly identifies the underlying policy objective to target certain forms of publicly oriented (or motivated) violence, thus distinguishing terrorism from other kinds of political or common crime.”

34. The Committee’s view is strengthened in this regard by a number of considerations. First, the legislation in its current form has been considered by appellate courts in Australia on a number of occasions. Its meaning and application, especially in relation to the definition, are relatively clear. Secondly, as we have noted, the inclusion of this motivation distinguishes terrorism offences from other criminal activity. Thirdly, it is part of the United Kingdom definition and it has been extensively scrutinised by the courts in that jurisdiction. Fourthly, there is no bright line between religious, political and ideological motivation. Commonly, the three will run together and evidence of one will illuminate a state of mind that reflects the presence of the others. Fifthly, there is surely no acceptable justification in the tenets of any religion to warrant the unjustified killing of innocent civilians. In that regard, the Committee does not consider that the reference to religious motivation casts an inappropriate emphasis upon proper religious beliefs or activities. Sixthly, the presence of the need to prove this motivation appropriately makes the task of the prosecution more difficult and reflects once again the special nature of a serious terrorism offence, distinguishing it from other crime.

35. The Committee, however, accepts that some changes in the definition of a terrorist act are warranted. In particular, we make the following recommendations.

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17 Submission of the GT Centre to the COAG Review, p. 9; Submission of Liberty Victoria to the COAG Review, pp. 6–7; Submission of the Hon Richard Maidment to the COAG Review, pp. 12–13; Submission of Professor Ben Saul to the COAG Review, p. 2.
18 Submission of Professor Ben Saul to the COAG Review, p. 2.
RECOMMENDATION 1: Criminal Code – Section 100.1 – Definition of a terrorist act – ‘threat of action’

The Committee recommends that ‘threat of action’ be removed from the definition and a separate offence of ‘threatening to commit a terrorist act’ be created.

36. The Committee is aware that there may be a preference to cover the ‘threat’ situation by way of an amendment within the current definition. However, we believe that clarity of expression and certainty of intent would be better served by the procedure we have suggested. We do not believe the proposal will ‘water down’ the current definition, nor (other than appropriately) diminish the seriousness of an intentional and genuine threat made against the Government or the community. Rather, the opposite will have been achieved.

RECOMMENDATION 2: Criminal Code – Section 100.1 – Definition of a terrorist act – ‘hoax threat’

The Committee recommends that an additional offence be inserted in Part 5.3, Criminal Code, to provide for a ‘hoax threat’ to commit an act of terrorism.

37. The Committee recognises that a terrorist-related hoax has the potential to cause significant alarm and distress, and could senselessly divert valuable emergency services and enforcement attention. The penalty, of course, should be significantly less than that applicable to a genuine threat.

RECOMMENDATION 3: Criminal Code – Section 100.1 – Definition of a terrorist act – meaning of ‘harm’

The Committee recommends that ‘harm’ in subsection 100.1(2) be amended to allow the harm contemplated by the Act to extend to psychological harm, together with any consequential amendment, for example, to subsection 100.1(3)(b)(i).

38. The intention here is to extend the notion of harm to include psychological harm. This is a form of injury now well recognised in the medical field. It has a particular resonance in relation to harm suffered by participants in warfare and victims of mass casualty attacks. It would also extend to the harm suffered by hostages, which we will next address.

RECOMMENDATION 4: Criminal Code – Section 100.1 – Definition of a terrorist act – ‘hostage taking’

The Committee recommends that ‘hostage-taking’ be included in subsection 100.1(2).

39. UN Security Council Resolution (“UNSCR”) 1566 (2004)19 requires Member States to prevent and punish acts that are committed with the intention of causing death or serious bodily injury or the taking of hostages. Australia has supported a number of relevant UN Resolutions, including UNSCR 1566 (2004). However, hostage-taking, as a form of terrorist activity

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(exemplified by the recent events in Algeria), may not, arguably, fit precisely into the current definition of a terrorist act. Hostage-taking is rightly condemned and ought be severely punished. For these reasons, the Committee considers that it should be included in the definition as a specific example of a terrorist act where the other relevant purposes are present.

**RECOMMENDATION 5: Criminal Code – Section 100.1 – Definition of a terrorist act – United Nations and its agencies**

The Committee recommends that subsection 100.1(1)(c)(i) extend to include reference to the United Nations, a body of the United Nations, or a specialised agency of the United Nations.

40. A number of proposals received by the Committee suggested that this widening of the definition be recommended. The current definition protects Australian and foreign Governments from coercion or intimidation but does not similarly protect the United Nations. Australian law already provides for a range of offences against the United Nations and associated personnel. As it has been noted, terrorism has commonly attacked the international community of States by targeting its organisations and the fullest repression of terrorism requires their protection. Such an inclusion is also in coherence with the terms of UNSCR 1566 (2004). The Committee accepts that this is a desirable change, reflecting as it does Australia’s broader role in international efforts to control terrorism.

**RECOMMENDATION 6: Criminal Code – Section 100.1 – Definition of a terrorist act – Interaction with the law of armed conflict**

The Committee recommends that consideration be given to incorporating in the legislation an amendment to the effect that Part 5.3 of the Criminal Code will not apply to acts committed by parties regulated by the law of armed conflict.

41. When the law of armed conflict applies, conduct that might, in other circumstances, violate terrorism laws, is regulated in order to protect civilians. Regulation, in this sense, is the law’s ordering of war to ensure that parties to armed conflict are restrained by basic proscriptions which include, for example, observance of the principle of distinction between civilian and military targets, and the principle of proportionality in attack. If crimes are committed in the context of an armed conflict, the proper avenue for criminal prosecution is for war crimes, criminalised in Division 268 of the Criminal Code.

42. In its 2006 Review, the PJCIS recommended that the definition of a terrorist act be amended to include a provision or note that expressly excluded conduct regulated by the law of armed conflict. The Government, in its response, did not support this recommendation. It argued that acts of terrorism may still occur during armed conflict and, consequently, the unqualified exclusion of armed conflict from the definition of terrorism would encourage misapplication of the principles of public international law. The Government further argued that such an amendment would neither add to nor detract from Australia’s international obligations and would be unlikely to add clarity to the operation of relevant Criminal Code provisions.

21 Submission of Professor Ben Saul to the COAG Review, p. 2.
43. The issue has remained a live one since. As noted by the GT Centre, the Attorney-General’s Department indicated in 2007 that a “terrorist act” would not include action legitimately taken by the armed force of a country on the international stage in accordance with what they perceive to be their national interests and international law.” In 2009, Greens Senator Scott Ludlam proposed in the Anti-Terrorism Laws Reform Bill 2009 (Cth) a new subsection (3A) which exempted from the definition of a ‘terrorist act’ action that “takes place in the context of, and is associated with, an armed conflict (whether or not an international armed conflict).” That Bill was ultimately not passed.

44. The Committee considers that principles of the law of armed conflict generate strong incentives capable of compelling parties to an armed conflict to obedience. We accept that acts of terrorism may still occur in the context of armed conflict if carried out by non-parties, or in the earlier stages of a burgeoning conflict where fighting is not yet sufficiently organised or intense to constitute, in legal terms, an ‘armed conflict’. However the Committee considers there is value in removing the prosecutorial discretion attending the duplication of terrorism offences and war crime offences in situations of armed conflict. Equally, there is also value in signalling a transition between the operation of ordinary criminal law and the law of armed conflict in guiding the parties to a conflict to a basic standard of conduct in their operations. The interaction between the two areas of law is complex, but not, the Committee considers, an impossible task for the Parliamentary Counsel.

**RECOMMENDATION 7: Criminal Code – Section 100.1 – Definition of a terrorist act – Exemption for Australian forces**

The Committee recommends that consideration be given to excluding from the definition an act done by a person in the course of, and as part of, his or her service in any capacity with the Australian armed forces.

45. The present definition theoretically encompasses the involvement of Australian forces in authorised military operations abroad. Such a situation is clearly undesirable. Even if an exception from the definition of ‘terrorist act’ is created for when the law of armed conflict applies, Australian forces would only be exempted from the terrorism offences where there are hostilities of a sufficient intensity to be characterised as ‘armed conflict’. For certainty, the Committee considers that conduct done in the course of, and part of, a person’s service in any capacity with the Australian armed forces should be exempted from the definition of terrorism.

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23 Submission of the GT Centre to the COAG Review, p. 5.
25 Schedule 1, section 4, Anti-Terrorism Laws Reform Bill 2009 (Cth).
26 Per Recommendation 6, above.
46. As originally enacted in 2002, the Division 101 offences were:
   - engaging in a terrorist act;
   - providing or receiving training connected with a terrorist act or preparation for a terrorist act;
   - possessing things connected with a terrorist act;
   - collecting or making documents connected with a terrorist act or preparation for a terrorist act; and
   - other acts done in preparation for, or planning, terrorist acts.

47. A handful of parliamentary amendments were made to the original Bill to incorporate various recommendations of the Senate Legal and Constitutional Affairs Committee. These primarily concerned the fault elements in proposed sections 101.2, 101.4 and 101.5, which were originally intended as offences of absolute liability. The draft provisions were amended to include the current tiered approach to the fault elements.

48. The provisions have been amended twice since their enactment. The first amendment in 2003 does not require comment for present purposes. The second amendment was that contained in the Anti-Terrorism Act 2005 (No. 1) (Cth). This amendment clarified that the offences in Division 101 were not limited to preparation for a particular terrorist act, and that it is sufficient for the prosecution to establish that particular conduct was related to ‘a terrorist act’.

49. The policy rationale behind the Division 101 offences (other than the offence of engaging in a terrorist act) is the need to criminalise preparatory conduct. There was a generally held view that it was pointless to threaten life imprisonment against a suicide bomber because he or she would not be deterred by the threat of imprisonment from carrying out the proposed deadly attack. The best way to prevent a serious terrorist attack, with all its horrendous consequences, was to criminalise preparatory conduct. In practical terms, this meant that a person involved in the preparation for a terrorist attack could be arrested and charged with an offence at an early stage. The emphasis was to be on prevention by interrupting the preparatory stages of a terrorist plot.27

50. The Division 101 offences were considered in the Sheller Report and the 2006 PJCIS Review. Notably, both reviews accepted the general policy intent underlying the offences, namely the need to disrupt the preparatory stages of a terrorist act. In particular, the Sheller Report referred to stakeholder concerns about the textual amendments made by the Anti-Terrorism Act 2005 (No 1) (Cth) (changing ‘the’ to ‘a’) but did not recommend any change, noting that the amendments had been subject to a full debate in Parliament, were the subject of pending proceedings, and were of recent origin. Information publicly available at the time suggested that this amendment was made because of concerns with a number of imminent arrests in both Melbourne and Sydney in

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27 See the first instance decision at R v Lodhi [2006] NSWSC 691 and the decision of the NSW Court of Criminal Appeal at Lodhi v R [2006] NSWCCA 121.
connection with Operation Pendennis. As it happened, the New South Wales Court of Criminal Appeal (dealing with the legislation in its unamended form) had adopted a broad reading of the legislation which suggested that the amendments may have been unnecessary. Whether this was so or not may be debatable, but in any event the amended legislation applied to the trials of the men charged in connection with Operation Pendennis/Eden.

51. The Sheller Report (dealing generally with the Division 101 offences) said this:29

“[T]he SLRC does not agree that these provisions are as broad or uncertain as claimed. The SLRC also notes that so far as sections 101.2, 101.3 and 101.4 are concerned, the prosecution has to show beyond reasonable doubt that the defendant either knew, or was reckless as to, the existence of the connection specified in the section. Sections 101.5 and 101.6 specify the offence of engaging in a terrorist act or acting in preparation for or planning a terrorist act. ...The SLRC is satisfied that the offences are described with sufficient certainty. … The SLRC does not recommend any change to the legislation based upon them beyond those that are recommended elsewhere in this report.”

52. A broad range of submissions has been made to this Committee, many of which repeat matters raised before the Security Legislation Review Committee (“Sheller Committee”) in 2006. The Law Council of Australia (“Law Council”), for example, criticised the laws because they attempt “to capture preparatory conduct at a very early stage and give rise to fraught prosecutorial and enforcement discretion”. Further, the laws “are characterised broadly which may lead to difficulties in identifying and comprehending the precise elements of the offences”. The Law Council requested the Committee “review the necessity and effectiveness of the offences in sections 101.2, 101.4 101.5 and 101.6 of the Criminal Code and consider whether those offences should be repealed”.

53. The GT Centre criticised the ‘recklessness’ offence in subsection 101.2 (2).30 Further it was submitted that the scope of the offences in sections 101.4 and 101.5 of the Criminal Code (‘possessing things connected with terrorist acts’ and ‘collecting or making documents likely to facilitate terrorist acts’) should be clarified.31 In particular, it was submitted that it should be made an element of the offences that the possession of the thing, or the making or collecting of the document, was intended to facilitate preparation for, the engagement of the person in, or assistance in a terrorist act. The ‘recklessness’ offences under these headings, it was suggested, should be repealed.

54. The submission from Ms Elizabeth Beaumont criticised what was described as the ‘reverse onus’ aspects of offences in Division 101.32 For example, where a person is charged with possessing a ‘thing’ connected with the planning, preparation or actual occurrence of a terrorist act under section 101.4, that person, it was argued, has the onus of proving that “the thing was not intended to facilitate preparation for, the engagement of a person in, or assistance in, a terrorist act”. The submission argued that this section, in the light of section 13.3 of the Criminal Code, diluted the principle that a person will be innocent until proven guilty. It was submitted that in terrorism cases

29 Sheller Report, p. 60.
30 Submission of the GT Centre to the COAG Review, p. 11.
31 Submission of the GT Centre to the COAG Review, pp. 11–12.
32 Submission of Ms Elizabeth Beaumont to the COAG Review, pp. 15–17.
the burden of conviction should be placed squarely on the shoulders of the prosecution and that
to do otherwise runs the risk of unfair convictions of innocent people. There were many other
submissions expressing similar concerns to those we have identified.

55. As might be expected, a number of the submissions received by the Committee strongly
supported the retention of the preparatory offences. The Committee has received, for example,
submissions from the AFP, State police, State and Territory Governments and, of course, ASIO.
Of particular interest, in connection with the preparatory offences, is one submission from the
Commonwealth Director of Public Prosecutions (“CDPP”). In relation to Division 101, the CDPP
has asked that consideration be given to amending sections 101.4 and 101.5 of the Criminal
Code to make it clear that a thing or document, because of its very nature, is capable of being
connected with preparation for, the engagement of a person in, or assistance in a terrorist act. The
problem identified by the CDPP arises because there is no guidance in the Criminal Code as to
what is required to establish the nature of the connection of the thing or document with a terrorist
act. In Benbrika and Others v The Queen, the defendant was charged under section 101.4 with
possessing things connected with preparation for a terrorist act. The item in question – a CD with
highly radical content on it – was, according to the Victorian Court of Appeal an ‘inanimate object’
which may have been possessed ‘innocuously’. The Court held that the jury should have been
directed that in order to establish guilt the prosecution must prove:

- a terrorist act was proposed or contemplated;
- some activity in preparation for that terrorist act was under way or was proposed; and
- the thing was being used, or was intended to be used, in aid of that preparatory activity.

56. A direction of that kind would have explained more clearly, the Victorian Court of Appeal
said, the concept of ‘connection’ in Division 101. The Court held that the fact that material on the
CD was of a kind which could be used to assist in the preparation of a terrorist act or to incite
persons to participate in the carrying out of a terrorist act could not be sufficient by itself to
establish the connection. In R v Khazaal, the accused was charged under section 101.5 with
making a document connected with assistance in a terrorist act. The High Court said that the
content of the document (an electronic book) was capable of establishing the requisite connection.
That is, connection with assistance in a terrorist act could be found within the document itself. Thus
it will be seen that the contents of the CD in Benbrika & Ors were held as incapable of establishing
the requisite connection, whereas the contents of the electronic book in Khazaal were regarded as
capable of establishing the requisite connection.

57. In view of the uncertainty arising, the CDPP has requested the Committee to recommend
amending the sections in the manner earlier identified.

RECOMMENDATION 8: Criminal Code – Section 101.2 – Providing or receiving training
connected with terrorist acts

The Committee does not recommend any change to this section.

33 Submission of the CDPP to the COAG Review, pp. 4-5.
35 Benbrika & Ors, at [314] (Maxwell P, Nettle and Weinberg JJA).
36 Benbrika & Ors, at [348] (Maxwell P, Nettle and Weinberg JJA).
RECOMMENDATION 9: Criminal Code – Section 101.4 – Possessing things connected with terrorist acts
The Committee recommends that section 101.4 be amended to make it clear that ‘a thing’, by its very nature, is capable of being connected with preparation for, the engagement of a person in, or assistance in a terrorist act.

RECOMMENDATION 10: Criminal Code – Section 101.5 – Collecting or making documents
The Committee recommends that section 101.5 be amended to make it clear that ‘a document’ by its very nature, is capable of being connected with preparation for, the engagement of a person in, or assistance in a terrorist act.

RECOMMENDATION 11: Criminal Code – Section 101.6 – Doing an act in preparation for, or planning, a terrorist act
The Committee does not recommend any change to this section.

58. The Committee agrees with the Sheller Report that there is no warrant at present for repealing or substantially amending the preparatory offences.38 Indeed, the Committee is, we suggest, in a significantly better position to make this judgment than were the members of the Sheller Committee in 2006. We say this principally because we are able to evaluate the effectiveness of the Division 101 offences against the background of a number of significant criminal prosecutions that have been completed between 2006 and 2012.

59. We shall turn to these in a moment. Before doing so however we should dispose of a preliminary matter: we do not accept that the ‘a’ from ‘the’ amendment should be reversed. Although it may not have been necessary, at least in the view of the New South Wales Court of Criminal Appeal, the amendment has put the position beyond doubt. It is now part of the legislative landscape and it has been definitively accepted by the courts. No submission before us has identified any case in which the forebodings presaged by civil libertarians and defence lawyers have been realised. Rather, prosecutions have proceeded on the sensible basis that where a particular target for a plot has not been identified, that situation has been accepted as a proper ameliorating factor on sentence.

60. We attach Attachment D to this report. It is a table of the terrorist-related trials through the entire period from 2000 to the present time. This table shows that 35 persons were charged and 23 convicted of terrorism offences under the Criminal Code. Three others were convicted of offences under the Charter of the United Nations Act 1945 (Cth).39 Perhaps the most significant trials for present purposes are those of Faheem Lodhi, the Pendennis trials in Sydney and Melbourne; and, more recently, the trials emerging from Operation Neath.

61. We turn first to the Lodhi prosecution, the Sydney Pendennis prosecutions and the Neath trials (the Melbourne Pendennis trials, to a substantial degree, were more concerned with the ‘terrorist organisation’ offences). We suggest that the following important points may be made. First, all of these prosecutions had as their foundation the preparatory offences in Division 101. Secondly, the results in those trials demonstrated the effectiveness of the legislation in helping to prevent a terrorist attack or attacks in Australia. Thirdly, a substantial range of penalties was imposed with the consequence that a number of the offenders have, for significant periods of time, been incapacitated from furthering their aims. In practical terms, this has achieved the protection of the public, an important aspect of criminal sentencing, but especially so in terrorism prosecutions.40

62. We recognise, however, that certain qualifications must be expressed. The first of these is that the Sydney convictions and sentences emerging from Operation Pendennis are under appeal. These are likely to be heard in the middle of 2013. In addition, there have been appeals lodged in the Neath matters, with no date as yet set for the appeal. But even if any of these appeals were to succeed in whole or in part, we think it unlikely that the effectiveness of the legislation will be called into question, even though aspects of the trial processes may have been found to be unsatisfactory.

63. The second qualification is raised, for example, in the comprehensive Centre for Excellence in Policing Studies (“CEPS”) submission. This addresses the notion of ‘effectiveness’. What does that term mean? The Committee recognises that the terrorism laws probably will not deter a committed extremist from pursuing his or her ideological fanaticism. General deterrence, though trumpeted loudly in the world of criminology, is always an uncertain outcome. We accept that there is a lack of well-researched evidence to demonstrate whether or not the terrorism laws have had any impact on radicalised extremists in our urban communities. Moreover, we do not know, once again by reason of the absence of available research, whether heavy prison sentences have had any significant impact on the extreme and ideological views of the offenders themselves.

64. Nevertheless, we believe that, from the perspective of the community, these trials and their outcomes would be judged as a clear recognition that the laws themselves have proved effective and indeed necessary. The plain fact is that serious terrorist plots have been foiled. Serious damage to property, infrastructure and possibly the loss of human lives, has been averted and avoided precisely because preparatory offences were available and acted upon promptly and effectively by the enforcement and intelligence agencies.

65. We would add this: the fact that a number of defendants were acquitted in the trials listed in Attachment C is, in a significant way, proof of effectiveness. Effective laws capture and punish the guilty. But they also free the innocent. That this has happened is tangible proof that the criminal justice system is able to accommodate the terrorism laws within its age-old process of fairness and protection of the innocent.

66. We turn then to the issue of ‘recklessness’. The Committee does not consider that this fault element in the preparatory offences should be repealed. ‘Recklessness’ as a fault element is provided for in section 5.4 of the Criminal Code. It is in these terms:

(1) A person is reckless with respect to a circumstance if:
   (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
   (b) having regard to the circumstances known to him or her it is unjustifiable to take the risk.

40 On the protective intent of the legislation, see Lodhi v R [2006] NSWCCA 121 at [66] (Spigelman CJ).
A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

67. It will be immediately apparent that this language creates a high hurdle for the prosecution to clear where recklessness is alleged in a criminal trial. Indeed, it is a hurdle that is significantly higher than the ordinary usage or understanding of the term ‘reckless’ might suggest. A pedestrian who runs across a busy road might, in common parlance, be described as ‘reckless’. But his behaviour, though probably negligent, would not ordinarily satisfy the statutory definition of the ‘recklessness’ fault element which requires actual advertence to the circumstance in question.

68. A higher level of fault element in these preparatory offences is that of ‘knowledge’. For example, Bilal Khazaal ‘made’ an e-book by compiling material on the internet and adding his own contribution. The book contained procedures and methods for assassinating world leaders. The prosecution had to prove that the defendant ‘knew’ that there was a connection between the book he had compiled and the fact it was connected with preparation for, or assistance in, a terrorist act. His conviction by the jury meant that the jury were satisfied that he had knowledge of that connection.

69. By contrast, the element of ‘recklessness’ sets the bar below that of knowledge. If convicted, as might be expected, a person accused of a ‘recklessness’ offence will face a lower penalty than where ‘knowledge’ is alleged. Nevertheless, although the bar is set lower, it remains the task of the prosecution to prove that the defendant was aware of a substantial risk and that, having regard to the circumstances known to him or her, it was unjustifiable to take that risk. With these matters in mind, the Committee is not persuaded that the ‘recklessness’ element should be removed from the preparatory offences.

70. We next consider the issue of ‘reverse-onus’. In fact, sections 101.4 and 101.5 do no more than place an evidential burden on a defendant. They do not shift the onus of proof of the offence from the Crown to the defendant. The nature of this evidential burden in its context, and the ease with which it may be displaced, satisfy the Committee that it is not unfair and that it should not be removed from the legislation.

71. If, for example, a person were found in possession of an explosives vest and knew that the vest was to be used (by somebody else) in a proposed terrorist attack, he would, prima facie, be guilty of an offence of possessing a thing connected with a terrorist act.41 If however, by evidence given by him or other material before the Court, it appeared that there was a possibility that he was, while in possession of the explosives, in the course of taking them to a police station to report those involved, he would have easily displaced the evidential burden. The onus of proof would then fall upon the prosecution to prove beyond reasonable doubt that, notwithstanding this innocent possibility, the defendant himself actually intended to facilitate a terrorist act. If it could not prove this, the prosecution would fail.

72. In Khazaal, the High Court of Australia accepted, or at least acted on the basis, that the evidential burden placed on a defendant by these sections was a “slight one” and might easily be displaced. Indeed it may be sufficient to point to evidence in the prosecution case to satisfy this burden.

41 Section 101.4, Criminal Code Act 1995 (Cth).
73. In general terms, the Committee accepts that the preparatory offences have been shown to be effective and necessary. Their use in the criminal trials we have mentioned has generally been, in terms of due process, satisfactory. In the few instances where the criminal process has been undermined, it was not the laws that were found to be wanting. Rather, it was, in that case, a misunderstanding by intelligence officers of correct investigatory protocol and procedures that led to the charge being withdrawn.

74. The Committee next turns to the request made by the CDPP referred to in paragraph [55]. The Committee has determined to recommend that this request should be accepted. We recommend that sections 101.4 and 101.5 of the Criminal Code be amended to make it clear that a thing or document, because of its very nature, is capable of being connected with preparation for, the engagement of a person in, or assistance in a terrorist act.

75. The decision of the Victorian Court of Appeal in *Benbrika & Ors* is, we would respectfully suggest, an unfortunate one in some respects. It created the need, perhaps unnecessarily, to prove additional matters that do not appear to require proof under the legislation. The fault element in *Benbrika & Ors* was ‘knowledge’. The defendant in that case had to know that the CD in question was ‘connected with preparation for a terrorist act’. The CD, from its content, praised the slaughter of non-believers in the militant Islamist cause and encouraged Muslims to take violent action against innocent persons to persuade foreign governments to remove their troops from Muslim lands. It is difficult, the Committee considers, to see any real distinction between the situation dealt with by the High Court in *Khazaal* and the situation with the CD in *Benbrika & Ors*.

76. The Committee accepts that where the item possessed is, for example, an explosives vest, it may well be that the connection required by the legislation can be seen from the very nature of the thing possessed. That, of course, would not necessarily be the position if a trial concerned possession of, for example, a passport or a cheque-book. The intentions or purposes already required by the legislation, however, will still have to be proved before a person is convicted of the relevant offence. In the case of truly innocuous and passive objects, the Victorian Court of Appeal decision may still have a role to play.

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42 For example, in *R v Ul-Haque* [2007] NSWSC 1251, which involved an ‘organisation’ offence in Division 102 rather than a preparatory offence in Division 101, a critical confession was thrown out on the basis of it being improperly obtained by ASIO officers.
77. Division 102 relates to terrorist organisations. It serves two main purposes. It establishes:

- methods of defining a terrorist organisation, including by listing an organisation in regulations made under subsection 102.1(1); and
- a series of derivative offences, which impose criminal liability on persons who are connected with or associated with a terrorist organisation (sections 102.2 – 102.8).

78. It is obvious that these provisions are an important component of the Commonwealth legislation. The definition enables organisations which engage in, prepare, plan, assist, foster or advocate the doing of a terrorist act to be formally identified as terrorist organisations. This identification is pivotal to the criminalisation of activities which would otherwise see such organisations prosper in Australia.

79. Division 102 was intended to send a clear message to Australian citizens that involvement in or with terrorist organisations will not be permitted at any level. It also sends a clear message to the international community that Australia rejects the legitimacy of terrorist organisations and supports international efforts to suppress terrorism. The question arises for this Review, however, as to whether Division 102 is necessary and effective; and importantly whether the relevant laws are proportionate.

Proscription of Terrorist Organisations

80. The legislation provides two ways for an organisation to be identified as a ‘terrorist organisation’. The first occurs where a person is charged with one of the terrorist organisation offences in relation to an organisation that is directly or indirectly engaged in preparing, planning, assisting or fostering the doing of a terrorist act (whether or not the terrorist act occurs). In this situation, a court will need to determine, based on the evidence before it, whether or not the organisation is a terrorist organisation. Secondly, the Governor-General may make a regulation listing an organisation as a terrorist organisation, provided that certain preconditions are satisfied. In particular, under subsection 102.1(2), the Attorney-General must be satisfied, on reasonable grounds, that the organisation:

- is directly or indirectly engaged in preparing, planning or assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or
- advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

43 In the Victorian Pendennis trials – Benbrika & Ors – it was necessary for the Crown to prove the existence of a ‘home-grown’ terrorist organisation by means of this first limb of the definition.
81. The term ‘advocates’ is defined in subsection 102.1(1A) as meaning:
   • directly or indirectly counselling or urging the doing of a terrorist act; or
   • directly or indirectly providing instruction on the doing of a terrorist act; or
   • directly praising the doing of a terrorist act in circumstances where there is a substantial risk
     that such praise might have the effect of leading a person (regardless of his or her age or any
     mental impairment that the person might suffer) to engage in a terrorist act.

82. The process leading to the promulgation of a regulation listing an organisation as a terrorist
organisation may be briefly summarised. In satisfying himself or herself of the existence of
‘reasonable grounds’, the Attorney-General is provided with and considers an unclassified
Statement of Reasons prepared by ASIO in consultation with the Department of Foreign Affairs
and Trade (“DFAT”). Having considered the Statement of Reasons, and prior to the making of the
listing regulation, the Attorney-General considers, and if satisfied, signs the Statement declaring
that he or she is satisfied that the organisation meets the statutory criteria for listing. The Attorney-
General then writes to the Prime Minister, the Leader of the Opposition and, where appropriate,
State and Territory Governments, advising that he or she is satisfied the organisation meets the
listing criteria and that a regulation may be made proscribing the organisation. The legislation
makes provision for:
   • Gazettilal of regulations which commence in accordance with the provisions of the
     Legislative Instruments Act 2003 (Cth);
   • the sunsetting of regulations three years after commencement; and
   • the de-listing of terrorist organisations by declaration of the Attorney-General where he or
     she is satisfied that the conditions for original listing have ceased to exist;
   • the making of an application by an organisation which has been listed.

This de-listing application may be made on the grounds that there is no basis for the Minister to be
satisfied in accordance with the legislation.

Where such an application is made:
   • the Minister is bound to consider the de-listing application;
   • the PJCIS is to review listing regulations as soon as possible after they are made and
     report to each house of Parliament; and
   • Parliament may disallow the regulations.

83. The proscription of a terrorist organisation is claimed to serve two objectives. The first allows
for the government and the Parliament to identify an organisation as a terrorist organisation. This
subjects the organisation and its members to the offence provisions of Division 102. The second
objective is to provide notification to members of the organisation and the wider community of
the organisation’s proscribed status. This is intended to place members on notice that they may
be subject to criminal liability under Division 102 of the Criminal Code. It creates an incentive
for them to end their association with the organisation, with a view to disbanding the organisation
in Australia. It alerts members of the community generally that they should be very wary of any
dealings whatsoever with such an organisation.

84. Historically, the listing regime applied exclusively to organisations that were identified
in a decision of the United Nations Security Council relating wholly or partly to terrorism.
In 2003, the Australian Parliament enacted separate, organisation-specific legislation to enable the proscription of three organisations that were not the subject of the UN Security Council decision. The requirement of UN listing as a condition precedent to the exercise of listing powers under the Criminal Code was repealed in 2004. The listing regime was subject to further amendments in 2005 and 2010. In particular these amendments:

- inserted the advocacy criterion for listing in subsection 102.1(1A);
- clarified the meaning of ‘advocates’ to make clear that the organisation must directly praise the doing of a terrorist act in circumstances where there is a substantial risk that praise might have the effect of leading a person to engage in a terrorist act; and
- extended the listing period from two to three years.

85. In addition to ongoing Parliamentary scrutiny of listing regulations, the provisions of Division 102 have been considered by the following:

- the Sheller Review;
- the 2006 PJCIS Inquiry;
- the 2007 PJCIS Inquiry into the Proscription of ‘Terrorist Organisations’ Under the Australian Criminal Code (“2007 PJCIS Inquiry”);44 and
- the 2008 Clarke Inquiry into the Case of Dr Mohamed Haneef.45

86. In the course of the 2007 PJCIS Inquiry46 there was discussion, albeit not a final recommendation, considered by the then Government, requiring ASIO and the Attorney-General’s Department to develop an unclassified protocol outlining the key indicators which are taken into consideration when determining whether an organisation meets the statutory test for proscription.47 There was a further recommendation supported by the then Government. This was that the Government give consideration to a proposal to postpone commencement of a listing until after the Parliamentary disallowance period had expired.48

**RECOMMENDATION 12: Criminal Code – Section 102.1 – Proscription of terrorist organisations**

The Committee does not recommend that the present method of proscription of a terrorist organisation be changed.

**RECOMMENDATION 13: Criminal Code – Subsection 102.1(1A) – Definition of ‘advocates’**

The Committee recommends that s 102.1(1A) be amended to omit (c). This subsection deals with a situation where an organisation directly praises the doing of a terrorist act.

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47 2007 PJCIS Inquiry, Chapter 4.

RECOMMENDATION 14: Criminal Code – Section 102.1A – Commencement of listing a terrorist organisation
The Committee recommends that the Government give consideration to postponing commencement of a listing until after the Parliamentary disallowance period has expired.

RECOMMENDATION 15: Criminal Code – Communication of proscription decisions
The Committee recommends that the Attorney-General's Department should consider whether it is able to enhance its communication methods to ensure that communities are more effectively notified when an organisation has been proscribed. Such methods should be effectively responsive and personal to the specific information needs of ethnic and religious communities.

87. The current method of regulatory proscription of an organisation as a terrorist organisation is and has been a contentious issue since its introduction. Principal matters of debate have been whether the process should be determined by the executive or by the judiciary, and whether the notice requirements of administrative law processes should apply.

88. The Sheller Committee was divided on the first issue, but unanimous as to the second. It put forward alternative recommendations. First, if the decision were to be made by the executive, it favoured a system of providing notification to organisations and other persons likely to be affected that proscription was proposed, giving the right to be heard in opposition. Alternatively, if the decision were to be made by a court, it should be the Federal Court and, once again, full prior notice was to be afforded to the organisation or persons concerned, where that was practicable.

89. The notice proposal did not meet with favour by the PJCIS in its 2006 Review. Nor did it meet with Government approval. The proposition has been centrally advanced by the Government, with some force, that notification prior to listing could adversely impact operational effectiveness and prejudice national security. Further, the Government has taken a consistent view that the executive, together with Parliament, is much better placed than the judiciary to make the necessary decisions about organisations that should be proscribed.

90. The debate has continued throughout the hearing of the present Review. Subsidiary issues include whether there should be statutory criteria, setting out explicitly matters to be considered by both ASIO and the Attorney-General; whether more effective notice should be given to the community after listing; and whether there should be an independent listing advisory committee. Particular criticism has been aimed at the ‘advocacy’ basis for proscription, especially that focusing upon ‘praise’ for the doing of a terrorist act. One submission suggested that the provisions of subsection 102(1A)(c) are “likely to have a chilling effect upon free-speech”.

91. The Committee has given careful consideration to the submissions on both sides of the debate. Our conclusions, as reflected in the above recommendations, are these:

(a) We agree that the executive is far better placed than the judiciary to make a decision as to whether an organisation is to be listed as a terrorist organisation. We have, for example, received forceful submissions from two highly regarded Jewish organisations (one made privately) urging

49 Submission of the GT Centre to the COAG Review, p. 15.
us to recommend to the Government that all divisions of Hamas and Hezbollah be proscribed. These submissions, and their political ramifications, reinforce that the decision as to whether to proscribe (or not to proscribe) an organisation may be highly politicised. It is clear that responsibility for such a decision is best left with the executive and Parliament. The judicial process is not well placed to make a decision of this kind.

(b) While the present system of listing without prior notification can scarcely be said to afford procedural fairness to an organisation, no instance has been referred to us that demonstrates the system has in fact operated unfairly at a practical level. At this stage, we would not recommend that prior notification be given to organisations the subject of a potential listing. It is clearly, however, a matter that should be kept under constant future review. To afford a greater level of fairness and accountability, however, we would recommend that the Government give consideration, save in exceptional cases when national security requires otherwise, to postponing commencement of a listing until after the Parliamentary disallowance period has expired. In arriving at its conclusion on the administrative law aspect of this point, the Committee has given particular attention to the existence of judicial review, the de-listing process available under the present legislation, and the obligation cast upon the Attorney-General to de-list where the conditions for the original listing have ceased to apply.

(c) We consider that better communication methods should be adopted to ensure that communities are more effectively notified when an organisation has been proscribed. The Committee had the advantage of submissions from two Muslim organisations. These very helpful submissions made clear to us that the communication process in relation to the listing of a terrorist organisation may not have been effective in reaching all those who should be informed of the process. The Attorney-General’s Department should consider whether it is able to enhance its communication strategy so as to be more effectively responsive and personal to the specific information needs of ethnic and religious communities.

(d) We do not favour the statutory enactment of ASIO criteria or sub-criteria of Ministerial matters for attention. Nor do we see at the present time any justification for the creation of an independent advisory committee. The legislation is perfectly clear as to the matters the Minister must be satisfied about before a listing occurs. The hard decision is made at ministerial level on a very specific basis and the joint Parliamentary oversight that follows provides a proper and rigorous scrutiny of the listing decision.

(e) The Committee does accept, however, that subsection 102.1(1A)(c) should be removed from the definition of ‘advocates’. There is, we accept, room for an ‘advocacy’ limb as one basis for Ministerial satisfaction but it should be confined to the appropriate categories in subsections 102.1(1A)(a) and 102.1(1A)(b). Our reasons are these: while there is undoubted scope for proscription on the basis that an organisation has counselled or urged the doing of a terrorist act, or has provided instruction on the doing of a terrorist act, those considerations (or either of them) should set the boundary for the ‘advocacy’ limb of section 102. Secondly, we believe, as did the Sheller Report, that the concept of ‘praise’ by an organisation for the doing of a terrorist act is simply too broad and indefinite to warrant the attachment of legal consequences. There will be continued discussions in the community of varying kinds (often heated) concerning the many

50 Submission of the Australia Israel Jewish Affairs Council to the COAG Review.
52 See Sheller Report, pp. 70–73.
armed struggles occurring in troubled parts of the world. The subsection has the capacity to cast something of an Orwellian blanket over free and democratic discussion of matters of intense public interest in our multi-racial society. Quite apart from this, subsection (c), as it is presently framed, seems almost impossible to apply in any practical manner. How would the Attorney-General, or anyone else for that matter, determine whether there was a substantial risk that ‘praise’ might lead a person (even if the most gullible and susceptible in our society) to engage in a terrorist act? The Committee considers there can be no satisfactory answer to this question. It is and would remain a matter for pure speculation.

92. Before departing from the definition of ‘advocates’ in subsection 102.1(1A), we should mention the submission of Professor Katharine Gelber of the University of Queensland.\(^53\) This submission, in part, included criticism of the widening of the advocacy basis for proscription by the presence in the section of the phrase ‘directly or indirectly’.\(^54\) The Committee does not accept that the use of this phrase, in the context in which it appears, is too far-reaching. Rather, the Committee accepts that the intention reflected in the language of the section is a legitimate one. The statutory intention is to capture within the ambit of the section an organisation which, for example, urges the doing of a terrorist act, whether it does so by direct means or whether it does so by indirect means.

### Section 102.5 Criminal Code

93. The Committee recommends that this section be amended to exempt a situation where the training criminalised is not sufficiently connected to the commission of a terrorist act. To achieve this, we recommend that the *Criminal Code* include specific exemptions for providing or receiving training to or from terrorist organisations for purposes unconnected with terrorist acts. These purposes might include training in international humanitarian law or in respect of human rights treaties, conflict mediation and resolution, or in basic first aid. The Committee also recommends that participation in training be included as an offence in section 102.5. Finally, the Committee also recommends the removal of strict liability under subsection 102.5(2)(b), and, consequently, the removal altogether of subsections (2), (3), and (4) from section 102.5. We shall comment on each of these matters separately.

#### Training Unconnected with Terrorist Activities

**RECOMMENDATION 16: Criminal Code – Section 102.5 – Training unconnected with terrorist activities**

The Committee recommends that section 102.5 be amended to include specific exemptions for providing training to or receiving training from a terrorist organisation for purposes unconnected with the commission of a terrorist act.

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\(^{53}\) Oral Submission of Professor Katharine Gelber to the COAG Review (Public Hearing, Brisbane Transcript, 23 October 2012), transcript pp. 14–18.

\(^{54}\) See subsections 102.1(1A)(a) and 102.1(1A)(b), *Criminal Code Act 1995* (Cth).
94. Under section 102.5 of the *Criminal Code* it is an offence to provide training to, or receive training from, a terrorist organisation. Section 102.5 creates two separate offences. Subsection 1 makes it an offence to intentionally provide training to, or receive training from, a terrorist organisation, being reckless as to whether the organisation is a terrorist organisation. Subsection 2 relates only to listed terrorist organisations. It makes it an offence to intentionally provide training to, or receive training from, a listed terrorist organisation. Subsection 4 provides that a defendant bears an evidential burden in respect of his or her knowledge of the listing of an organisation. A defendant must be reckless as to the listed status of an organisation to satisfy the requirements of subsection 2. The penalty for the offence in each subsection is 25 years imprisonment.

The ‘Legitimate Training’ Issue

95. The Sheller Report noted that section 102.5 extends beyond the provision of support connected with the engagement in or preparation for a terrorist act and is capable of catching “quite innocent training or teaching of persons who may, unknown to the teacher, be members of a terrorist organisation”. It was recognised that the offences could undesirably (and perhaps unintentionally) capture, for example, the provision of training in the use of office equipment to a terrorist organisation or the delivery of humanitarian aid during times of conflict. The Sheller Report recommended that the policy objective of the provision could be met with an amendment expressed in terms that the training was such as “could reasonably prepare the person to engage in, or assist with, a terrorist act or terrorist acts”. A re-draft of the provision to account for this change was recommended as a matter of urgency.

96. The 2006 PJCIS Review agreed that much of the concern with section 102.5 related to its drafting. It noted approvingly the equivalent section in Title 18 of the US Code: Section 2339D. That provision more narrowly defines military type training as training in methods that can cause death or serious bodily harm, destroy or damage property, disrupt services to critical infrastructure or training in the use, storage, production or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction. Ultimately, the PJCIS agreed with the Sheller Report. It concluded that re-drafting the training offence more precisely would achieve greater certainty and provide a better level of proportionality between the conduct criminalised and the penalty. The PJCIS stated that if the training offence were intended to cover other types of training, this could be identified in the training offence provisions, or by a separate offence with a penalty appropriate to conduct.

97. The Government response – tabled in Parliament on 4 December 2008 – supported, in part, clarification of the provision to avoid criminalising these ‘legitimate’ activities. However, the Government proposed an alternative approach to the problem: the establishment of a Ministerial authorisation scheme “which would allow legitimate and reputable humanitarian aid organisations to be exempt, in limited circumstances, from the offence of providing training to a terrorist organisation”. To the Committee’s knowledge, this scheme was never progressed. The then

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57 *2006 PJCIS Review*, pp. 74–75.
58 *2006 PJCIS Review*, p. 75.
Government, in discussing the alternative, affirmed that the purpose of the terrorist organisation offences is to ensure that terrorist organisations are disbanded noting that in order to achieve this it is appropriate that providing training to, or receiving training from, such organisations be characterised as an offence without the training itself requiring connection to a terrorist act.

98. In its submission to the present Review, the GT Centre reaffirmed the recommendation of the Sheller Report on this issue. It recommended the re-drafting of section 102.5, making it an element of each offence “either that the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist attack”. In his submission, Professor Ben Saul found it “unfathomable” that there was no exception to this offence to encompass training in respect of international humanitarian law or human rights treaties, conflict mediation and resolution, or training in basic medical first aid. Along similar lines, the Law Council recommended that the training offence in this section be amended to better define the type of training targeted.

99. The Committee is persuaded by these submissions and recommends that the Government amend the provision to avoid criminalising these ‘legitimate’ training activities. In this regard, it is preferable that the provision be amended to include exemptions for specified legitimate purposes (such as humanitarian training) rather than limit the training to that which is connected with the commission or possible commission of a terrorist act. The issue with the former approach is that it would inappropriately exclude training that might assist a terrorist organisation undertake activities that are not directly connected to the commission of a terrorist act, for example, the provision of accounting training to enable a terrorist organisation to better control its finances. The Committee does not consider it is sufficient to rely solely on the good sense of prosecutorial discretion. Issues of proportionality suggest that the legislation itself recognise that there should be an exemption for appropriate humanitarian activities.

‘Participation’ in Training

**RECOMMENDATION 17: Criminal Code – Section 102.5 – ‘Participation’ in training**

The Committee recommends the offence in section 102.5 be amended to include ‘participation’ in training.

100. In its submission the CDPP noted that section 102.5 does not necessarily encapsulate the situation of ‘participating’ in training with a terrorist organisation. The CDPP argued that there may be situations where individuals are neither providing nor receiving training from a terrorist organisation but are nevertheless participating in terrorist training. By way of example, the CDPP posited a situation where a group of like-minded individuals decide to meet at a location and engage in weapons training for the purposes of either directly, or indirectly, engaging in preparation, planning, assisting in or fostering the doing of a terrorist act. In this scenario, it was argued, no one individual is either providing or receiving training.

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60 Submission of the GT Centre to the COAG Review, p. 20.
61 Submission of Professor Ben Saul to the COAG Review, p. 7.
62 Submission of the Law Council to the COAG Review, p. 35.
63 Submission of the CDPP to the COAG Review, pp. 5–6.
101. The same suggestion was made by the Sheller Report. The 2006 Sheller Committee was not necessarily persuaded that such an amendment was necessary but, nevertheless, recommended such an addition to remove any doubt. The 2006 PJCIS Review equally recommended that the Government consider whether ‘participation’ should be expressly linked to the purpose of furthering the terrorist aims of the organisation. In its response, the Government rejected this recommendation.

102. The Committee concurs with the Sheller Report. It is difficult to envisage a situation where one would be found to ‘participate’ yet not be found to have ‘received’ training. Nonetheless, for completeness and to remove any doubt, the Committee recommends that the Government reconsider this issue.

**Strict Liability in section 102.5**

**RECOMMENDATION 18: Criminal Code – Section 102.5 – Strict liability in respect of proscribed terrorist organisations**

The Committee recommends the repeal of subsections 102.5(2) – (4).

103. The strict liability aspect of the offence in subsection (2) drew criticism during the Review. As a strict liability element of the offence, the fact that the relevant organisation has been listed by regulation negates any requirement that the prosecution establish intention, knowledge or recklessness on the defendant’s part as to the fact that the organisation is prescribed as a terrorist organisation. Yet, subsection 102.5(4) provides that the offence only applies if the defendant is reckless as to whether the organisation was prescribed as a terrorist organisation. An evidential burden falls upon the defendant in relation to this matter. In other words, the defendant is required to point to evidence that suggests the possibility he or she was not reckless before the prosecution is required to prove this state of mind beyond reasonable doubt. This does not sit easily with the notion of strict liability in relation to the proscription of a terrorist organisation. As a consequence, there is a degree of possible confusion and latent ambiguity inherent in the section.

104. The Sheller Report considered this issue at some length. As the Report noted:

“[E]ven if strict liability applies only to make it unnecessary for the prosecution to prove that the organisation is a terrorist organisation as a result of proscription, the defendant is denied by the process of proscription any opportunity to resist the factual conclusion that it is a terrorist organisation, at any time, either by resisting the process of proscription, which results in the executive act of proscription, or at the trial for the offence.”

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64 Sheller Report, p. 118.
65 2006 PJCIS Review, pp. 74–75.
105. The Sheller Committee noted that, between them, “subsections (3) and (4) are so confused that the operation of section 102.5 and its effectiveness must be in doubt”. The Sheller Report ultimately concluded that it did not accord with justice and proportionality to apply strict liability to an offence under subsection 102.5(2), particularly when the potential penalty was to be imprisonment for 25 years. The Committee recommended that the section be re-drafted without making the offence, or any element of it, of strict liability.

106. The PJCIS did not make any recommendation on the issue. In its response, the Government noted the Sheller Committee’s recommendation and indicated that it would refer the matter for examination by the new national security legislation monitor once appointed. Regrettably, for reasons mentioned earlier, the Committee has not had the opportunity to access the INSLM’s report on this issue.

107. In its submission to the present Review, the GT Centre argued that, given that the offence in subsection 102.5(1), adopts a recklessness fault element, the offence in subsection 102.5(2) should be deleted. A similar point is advanced by the Human Rights Law Centre (“HRLC”) in their submission. The Committee shares these concerns.

108. A simple solution to the problem, once strict liability has been removed, is to recognise that subsections (2), (3), and (4) of section 102.5 are not necessary at all. Section 102.5 will then operate where the organisation is a terrorist organisation by reference to either of the situations in (a) or (b) of section 102.1. In either case the fault element of ‘recklessness’ will apply as to whether the organisation is a terrorist organisation. The onus should be on the Crown throughout to prove ‘recklessness’.

Section 102.6 Criminal Code

Legal Representation

**RECOMMENDATION 19: Criminal Code – Subsection 102.6(3) – Reduction of the burden on the defendant**

The Committee recommends that the legal burden in the note in subsection 102.6(3) be reduced to an evidential one.

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69 Sheller Report, p. 117.
71 Submission of the GT Centre to the COAG Review, p. 20.
72 Submission of the HRLC to the COAG Review, p. 10.
RECOMMENDATION 20: Criminal Code – Subsection 102.6(3) – Exception for lawyers’ receipt of funds from a terrorist organisation

The Committee recommends subsection 102.6(3)(a) be amended to exempt the receipt of funds from a terrorist organisation for the purpose of legal advice or legal representation in connection with criminal proceedings or proceedings relating to criminal proceedings (including possible criminal proceedings in the future) and in connection with civil proceedings of the following kind:

(i) Proceedings relating to whether the organisation in question is a terrorist organisation, including the proscription of an organisation, a review of any proscription, or the de-listing of an organisation; or

(ii) A decision made or proposed to be made under Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979, or proceedings relating to such a decision or proposed decision; or

(iii) A listing or proposed listing under section 15 of the Charter of the United Nations Act 1945 or an application or proposed application to revoke such a listing, or proceedings relating to such a listing or application or proposed listing or application; or

(iv) Proceedings conducted by a military commission of the United States of America or any proceedings relating to or arising from such a proceeding; or

(v) Proceedings for a review of a decision relating to a passport or other travel document or to a failure to issue such a passport or other travel document (including a passport or other travel document that was, or would have been, issued by or on behalf of the government of a foreign country).

109. Section 102.6 fundamentally concerns the intentional receipt, collection or provision of funds – whether directly or indirectly – to or from a terrorist organisation. The section divides into two offences: first, in subsection (1), based on knowledge that the organisation is a terrorist organisation, attracting a penalty of 25 years imprisonment; second, in subsection (2), based on recklessness as to whether the organisation is a terrorist organisation, attracting a penalty of 15 years imprisonment. Subsection (3) provides an exception, stating:

Subsections (1) and (2) do not apply to the person’s receipt of funds from the organisation if the person proves that he or she received the funds solely for the purpose of the provision of:

(a) legal representation for a person in proceedings relating to this division (i.e. division 102); or

(b) assistance to the organisation for it to comply with the law of the Commonwealth or state or territory.

Note: a defendant bears a legal burden in relation to the matter in subsection (3) (see section 13.4).

110. As the Sheller Report noted, the imposition of a legal burden means that if a legal adviser receives funds solely for the purpose of the provision of legal representation, the legal adviser bears the burden, if he or she is charged and seeks to be exonerated, of establishing on the balance of probabilities that the purpose of the provision of legal representation was for a person in proceedings relating to Division 102. 73

73 Sheller Report, p. 119.
111. The Sheller Report identified two key shortcomings in this section. The first concerned the difficulty the legal adviser may face in producing evidence about the nature of legal representation. As the Report noted, communications passing between a client and his or her legal adviser, and made for the purpose of obtaining or giving legal advice, are, in general, privileged from disclosure.\(^\text{74}\) The privilege belongs to the client and can only be waived by the client.\(^\text{75}\) Accordingly, unless the client consents to the legal adviser producing evidence about the nature of the legal representation,\(^\text{76}\) it would be difficult, if not impossible, for the legal adviser to demonstrate that he or she falls within the exception in subsection (3). The legal adviser would then unfairly face the consequence of a significant period of imprisonment.

112. The second concern of the Sheller Report was that no exception had been made in respect of legal representation for the organisation that provides the funds for the purpose, for example, of seeking de-listing, or for review of the Attorney-General’s proscription decision. The Sheller Report suggested that it would be unreasonable to deny an organisation the right to use its own funds to defend itself in proceedings concerned with proscription or with any criminal offence, unless provision is made for an application to the Court for access to the organisation’s funds for that purpose.\(^\text{77}\) The Sheller Report concluded by recommending that, at most, a defendant’s legal representative should bear no more than an evidentiary burden, and that the exception in subsection 102.6(3)(a) should be broadened to encompass legal representation in proceedings under all of Part 5.3 of the \textit{Criminal Code}, not merely Division 102.

113. The PJCIS agreed that the legal burden in the section should be reduced to an evidential one, and went further than the Sheller Report by recommending that the exception in subsection 102.6(3)(a) be widened to embrace the provision of representation in all legal proceedings.\(^\text{78}\)

114. In its response, the Government did not support either recommendation. The Government maintained that the retention of the legal burden on the defendant was preferable because the evidence concerned would be more readily available to them, but not the prosecution.\(^\text{79}\) It is difficult to see how this response answers the principal concern expressed by the Sheller Report and reiterated by the PJCIS in respect of client legal privilege. Offences such as those under consideration, carrying as they do, significant penalties, should not be made unfairly easy of proof, especially by the imposition of legal burdens on a defendant.

115. The Committee agrees with submissions on this point made by the Law Council\(^\text{80}\) and the GT Centre\(^\text{81}\) criticising the legal burden placed on a legal representative as unduly restrictive, and, accordingly, recommends that the burden in subsection 102.6(3) be reduced to an evidential one. This is fundamental in providing a protection to lawyers who may be prosecuted for doing no more than legitimately receiving payment in representing a terrorist organisation or its members. The Committee acknowledges that this will make the offence more difficult to prove but, given the serious nature of the offence and the heavy penalty involved, the reduction of the onus to an evidential one is both reasonable and proportionate.

\(^{74}\) \textit{Sheller Report}, pp. 119–120.
\(^{75}\) See Part 3.10, Division 1, \textit{Evidence Act 1995} (Cth).
\(^{76}\) Subsection 122(1), \textit{Evidence Act 1995} (Cth).
\(^{77}\) \textit{Sheller Report}, p. 120.
\(^{79}\) 2008 Government Response, Response 17.
\(^{80}\) Submission of the Law Council to the COAG Review, p. 33.
\(^{81}\) Submission of the GT Centre to the COAG Review, p. 21.
116. Secondly, the Committee agrees that the exception in subsection 102.6(3)(a) should be broadened. A useful template for the re-drafting of the section is provided by subsection 102.8(4). The Committee recommends that the exceptions to be provided by subsection 102.6(3)(a) extend to all criminal proceedings and to other proceedings of the kind enumerated in subsection 102.8(4). The Committee acknowledges that not all the ‘exceptions’ in the current subsection 102.8(4) may be relevant but, broadly, the exceptions in subsection 102.6(3)(a) should include all criminal proceedings and such of the civil matters in subsection 102.8(4) as are presently in force. We do not recommend that the exceptions extend to all civil proceedings, but rather that they be limited to those listed in subsection 102.8(4), or their contemporary equivalent.

The ‘Benevolent’ Funding Issue – A Broader Issue than Legal Representation

117. In its submission, the GT Centre criticised the “overly-simplistic” focus of section 102.6 in stemming the flow of financial and human resources to terrorist organisations. They argued that not all the activities of organisations regarded as terrorist organisations are related to the commission of terrorist activities. By way of example, it was suggested that when the Liberation Tigers of Tamil Eelam (“LTTE”) controlled the northern part of Sri Lanka, the only means of making humanitarian donations to people within this region was to funnel them through the LTTE. The LTTE not only engaged in terrorist acts against the Sri Lankan government, but also operated a de facto government, including the provision of civilian services, within this region.

118. The GT Centre argued that an offence that punishes the organisation or a person providing funding to that organisation regardless of the purpose to which the funds are to be put represents a disproportionate response to the threat of terrorism. Instead, it was argued, the focus should be upon fund transfers that are related to preparing for, assisting with, or the commission of a terrorist act (and not simply to any financial involvement with a terrorist organisation). In his submission, Professor Ben Saul similarly criticised the lack of any ‘humanitarian aid’ exception. Professor Saul equally drew attention to the fact that it would be an offence to fund the medical services or hospitals run by terrorist organisations, including armed groups controlling territory and administering civilian communities and services in armed conflict. Professor Saul cited the LTTE in Sri Lanka, and the Al-Shabaab in Somalia as examples of such groups.

119. The Committee has given consideration to a recommendation that the section apply only to funds received specifically to promote or undertake terrorist activity, but we see some difficulty in altering the present situation. The need to permit the passage of funds for humanitarian purposes must be set against the fact that the (often) opaque organisational structure of terrorist organisations prevents or at least substantially inhibits certainty in ascertaining the real and ultimate destination of funds. There is a risk that exempting funding for the ‘humane’ operations of terrorist groups could cloak more sinister end purposes for those funds. The Committee’s view is that the Government should be taken to have carefully considered the nature of the organisation during the proscription process, and have determined that any funds to that organisation, for whatever purpose, should attract a criminal offence, providing knowledge or recklessness can be demonstrated. If it emerged at trial that the funds were in fact used for humanitarian purposes, that no doubt might be an ameliorating factor, perhaps a significant one, on penalty.

82 Submission of the GT Centre to the COAG Review, pp. 20–21.
83 Submission of Professor Ben Saul to the COAG Review, p. 7.
The Repeal of ‘Reckless’ Funding of Terrorism

120. The GT Centre highlighted that under subsection 102.6(2), it is sufficient that the person is reckless as to whether the organisation is a terrorist organisation. This means that the person must simply be aware of a substantial risk that the organisation is a terrorist organisation and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk. Subsection 102.6(2) presently attracts a penalty of 15 years imprisonment. The GT Centre submitted that a knowledge or intention fault element is crucial to ensuring that the funding offences do not capture conduct that is unworthy of criminalisation. Under the current law, it was argued, a person, to avoid prosecution, must conduct rigorous investigation into the background of the organisation to which they are providing funds, as well as the purposes to which those funds may be put. This places a very heavy burden – in terms of time, money and resources – upon the person wishing to provide funds. The GT Centre argued that the introduction of an intention or knowledge fault element would reduce the uncertainty about the scope of a person’s legal liability. It was further submitted that the introduction of a knowledge or intention fault element would be necessary to properly implement United Nations Security Council Resolution 1373. Article 1(b) of that Resolution recites that States shall “criminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts…[emphasis added]”.

121. The Committee has earlier (in relation to preparatory offences) discussed the fault element of recklessness. As we pointed out, the task of the prosecution remains a heavy one where recklessness is alleged. We are not persuaded that subsection 102.6(2) requires amendment in this regard. The offences in section 102 are presently graded to reflect the respective seriousness of each offence. However, the Committee accepts, as we shall next discuss, that the penalties should be lowered in each case.

Lowering the Penalties

**RECOMMENDATION 21: Criminal Code – Section 102.6 – Penalty for knowingly funding a terrorist organisation**

The Committee recommends that the penalty for an offence under subsection 102.6(1) be reduced to 15 years.

**RECOMMENDATION 22: Criminal Code – Section 102.6 – Penalty for recklessly funding a terrorist organisation**

The Committee recommends that the penalty for an offence under subsection 102.6(2) be reduced to 10 years.

122. Because of the presence of section 103.1 and section 103.2 – financing terrorism and financing terrorists, and the heavy penalties involved in these offences – the Committee recommends a lowering of the penalties prescribed in section 102.6. For example, 15 years maximum where funds are provided to or received from a terrorist organisation and the person knows the organisation is a terrorist organisation, and a maximum penalty of 10 years when a

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84 For the meaning of ‘recklessness’, see section 5.4, Criminal Code Act 1995 (Cth).
person is simply reckless as to whether the organisation is a terrorist organisation. The justification 
for this suggested change is that under section 102.6, the Crown does not have to prove the use 
to which the funds will or are intended to be put. The mere provision or receipt of the funds to a 
terrorist organisation is sufficient, provided either fault element can be demonstrated. It may be the 
case in many situations that the donor and recipient did not, in any event, personally intend that the 
money be used to facilitate or engage in a terrorist act. If, however, the Crown could prove that the 
provision or receipt of funds was accompanied by such an intention, then a prosecution could be 
brought under section 103.1, a far more serious offence than either of those in section 102.6.

123. The AFP asked the Committee to recommend creating a new offence for providing or 
receiving funds to a terrorist organisation where the fault element was simply that of negligence.\footnote{Submission of the AFP to the COAG Review, pp. 9–11.}
The Committee does not consider that it is appropriate to create a ‘negligence-based’ offence in the 
counter-terrorism legislation.\footnote{See the discussion and conclusions reached in relation to Division 103.}

Section 102.7 Criminal Code

124. Section 102.7 is divided into two subsections, distinguished by the requisite \textit{mens rea}. 
Subsection (1) is a knowledge offence and subsection (2) is a ‘recklessness’ offence. The core of 
each offence, found in paragraphs (a) and (b) respectively, is that the person intentionally provides 
to an organisation support or resources that would help a terrorist organisation to engage in an 
activity described in paragraph (a) of the definition of ‘terrorist organisation’ in Division 102. 
Those activities include – directly or indirectly – engaging in, planning, assisting, or fostering 
the doing of a terrorist act. The penalty for the knowledge offence is 25 years imprisonment. 
The penalty for the recklessness offence is 15 years imprisonment. The Committee has not given 
consideration to this provision as it falls outside the Committee’s terms of reference. We make 
reference to it here because it is relevant to the discussion in relation to section 102.8.

Section 102.8 Criminal Code

RECOMMENDATION 23: Criminal Code – Section 102.8 – Associating with 
terrorist organisations

The Committee, by majority, recommends the repeal of this section.

125. Section 102.8 was inserted into the \textit{Criminal Code} in 2004. It criminalises ‘associating’ with 
terrorist organisations. For the purposes of Division 102, the term ‘associate’ is defined as “a person 
associates with another person if the person meets or communicates with the other person.”\footnote{Subsection 102.1(1), \textit{Criminal Code Act 1995} (Cth).}

As the Sheller Report notes,\footnote{\textit{Sheller Report}, p. 123.} the words so defined would embrace a casual meeting, in the street 
or elsewhere; or a mere casual communication with another person. Neither person need ever have 
met or communicated before. Such an association, provided it happens on two or more occasions, 
can give rise to an offence under subsections 102.8(1) and 102.8(2), subject to the conditions set 
out therein. The conditions in subsection (1) are:

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85 Submission of the AFP to the COAG Review, pp. 9–11. 
86 See the discussion and conclusions reached in relation to Division 103. 
(a) **On two or more occasions:**

   i. the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation; and

   ii. the person knows that the organisation is a terrorist organisation; and

   iii. the association provides support to the organisation; and

   iv. the person intends that the support assist the organisation to expand or to continue to exist; and

   v. the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation; and

(b) The organisation is a terrorist organisation because of paragraph (b) of the definition of terrorist organisation in Division 102 (whether or not the organisation is a terrorist organisation because of paragraph (a) of that definition also).

126. The penalty that flows, if the conditions in subsection (1) are satisfied, is imprisonment for three years. Subsection (2) provides an offence if the person has previously been convicted of an offence under subsection (1) and the conditions enumerated in paragraphs (i) to (v) and (b) in subsection (1), replicated in paragraphs (b) to (g) in subsection (2), apply. Again, the penalty is imprisonment for three years. Subsection (3) provides that strict liability applies to paragraphs (1)(b) and (2)(g) – paragraphs stipulating that the organisation is a terrorist organisation because it is proscribed.

127. Subsection (4) provides for a range of exemptions from criminal liability under subsections (1) and (2). The first of these exemptions in (a) provides “the association is with a close family member and relates only to a matter that could reasonably be regarded (taking into account the person’s cultural background) as a matter of family or domestic concern”. For this purpose, ‘close family member’ is defined in subsection 102.1(1) as:

   (a) the person’s spouse, or de facto partner; or

   (b) a parent, step-parent or grand-parent of the person; or

   (c) a child, step-child or grand-child of the person; or

   (d) a brother, sister, step-brother or step-sister of the person; or

   (e) a guardian or carer of the person.

128. Subsection (4)(b) provides that the section does not apply if “the association is in a place being used for religious worship and takes place in the course of practising religion”. Subsection (4)(c) provides that the section does not apply if “the association is only for the purpose of providing aid of a humanitarian nature”. Subsection 4(d) provides that the section does not apply if “the association is only for the purpose of providing legal advice or legal representation in connection with” and then there follow six sub-paragraphs (i) to (vi). These are:

   i. criminal proceedings or proceedings related to criminal proceedings (including possible criminal proceedings in the future); or

   ii. proceedings relating to whether the organisation in question is a terrorist organisation; or

   iii. a decision made or proposed to be made under Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 [(Cth)], or proceedings relating to such a decision or proposed decision; or
iv. a listing or proposed listing under section 15 of the Charter of the United Nations Act 1945 [(Cth)] or an application or proposed application to revoke such a listing, or proceedings relating to such a listing or application or proposed listing or application; or

v. proceedings conducted by a military commission of the United States of America established under a Military Order of 13 November 2001 made by the President of the United States of America and entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”; or

vi. proceedings for a review of a decision relating to a passport or other travel document or to a failure to issue such a passport or other travel document (including a passport or other travel document that was, or would have been, issued by or on behalf of the government of a foreign country).

129. It may be observed (harking back to the discussion in relation to subsection 102.6) that the Sheller Report notes:89

“Sub-paragraph (i) is expressed in terms wider than section 102.6(3). A note to subsection (4) is to the effect that the defendant bears an evidential burden in relation to the matters in subsection (4). This burden of proof is in stark contrast to a legal burden to apply in section 102.6(3), and adds support to the view that, in 102.6(3), the burden should be amended to an evidential burden as in 102.8(4).”

The Committee respectfully adopts this additional observation of the Sheller Committee.

130. Subsection 102.8(5) provides:

This section does not apply unless the person is reckless as to the circumstances mentioned in paragraph (1)(b) and (2)(g) (as the case requires).

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).

131. As the Sheller Report pointed out, it is not at all clear how subsection (5) operates in light of requirements in subsection (1) and (2) that an accused has knowledge of the fact that the organisation is a terrorist organisation, and knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation.90 The Sheller Committee recommended, at the very least, that subsection (5) be repealed as it did little more than create confusion.

Subsection (6) states that the section does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

132. The Sheller Report recommended the repeal of section 102.8 in its present form. The foundational nature of the Sheller Committee’s criticism centred on the troubling concept of ‘association’ and was expressed as follows:91

“Section 102.8 denies a fundamental human right, namely freedom of association, and, subject to section 102.8(6), the constitutionally guaranteed freedom of political communication implied from the text and structure of the Constitution (Lange v Australian Broadcasting Corporation (1997) 189 CLR 520). The SLRC regards this method of defining an offence as inappropriate, principally

89 Sheller Report, p. 126.
90 Sheller Report, p. 127.
because it is quite unclear to the reader what the ambit of the offence may be. That ambit is described by reference to an unstated constitutional limitation. Put another way, the defendant is told that if the defendant, carrying the evidential burden, can demonstrate that the offence purports to extend outside the unstated constitutional limitation, then to that extent, the subsection does not apply. In short, the measure of the offence can only be determined by challenging its constitutionality. In the opinion of the SLRC, putting other considerations aside, the limits of the offence should be clearly and directly specified in the section.”

133. Various submissions received by the Committee addressed this provision. In general terms, the criticisms argued that the provision cast the net of criminal liability too widely by criminalising persons’ associations, as opposed to their conduct. The HRLC argued that the breadth of the offence may unreasonably or disproportionately limit the freedom of association protected in Article 21 of the International Covenant on Civil and Political Rights (“ICCPR”).92 The Law Council stated that it was unnecessary to expand the scope of criminal liability in the way this provision did, given that existing principles of accessorial liability in Part 2.4 of the Criminal Code already provide for an expansion of criminal responsibility in circumstances of attempt, aiding and abetting, common purpose, incitement and conspiracy.93 It was argued that these established criminal law principles draw a more appropriate dividing line between direct and intentional engagement in criminal activity and peripheral association. The GT Centre argued that the offence is disproportionate because it does not properly target the culpable conduct.94 It was argued that it is the provision of material support to a terrorist organisation that should be criminalised, rather than the mere fact of a person’s association with a member of the organisation. The GT Centre added that such conduct is already criminalised under section 102.7.

134. The Law Council added further that, given the elements of the association offence were so difficult to define and the scope of the offence so broad, it potentially applied indiscriminately to large sections of the community without any clear justification.95 It argued that this gave rise to the risk that the association offence may capture a range of legitimate activities, such as some social and religious festivals and gatherings. The GT Centre agreed, referring to the fact that the offence had been identified by the Australian Government as a major contributor to the unhelpful perception amongst Australian Muslim communities they are being targeted in a discriminatory manner by the counter-terrorism laws.96 The Centre noted:

“This is one of the greatest challenges facing the Commonwealth in achieving an effective counterterrorism strategy. Terrorism is far more likely to emerge from a divided society in which some feel marginalised and disempowered on the basis of their race or religious beliefs. Any factors that may isolate and exclude Muslim communities must be seriously addressed, especially when their value to national security appears negligible.”

135. Both the Law Council and the GT Centre recommended repeal of this provision. This was a position also taken by Professor Ben Saul in his submission. The GT Centre also recommended, as a second-best solution, an alternative to repeal. The Centre recommended that, first, the

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92 Submission of the HRLC to the COAG Review, p. 9.
93 Submission of the Law Council to the COAG Review, p. 34.
94 Submission of the GT Centre to the COAG Review, p. 22.
95 Submission of the Law Council to the COAG Review, pp. 31–32.
97 Submission of the GT Centre to the COAG Review, p. 22.
recklessness fault element should be replaced with an intention or knowledge fault element.
Second, they argued that the ‘constitutional defence’ in section 102.6 should be amended. It was
said to be unjust to place an evidential burden on the defendant to establish that the operation of the
section would infringe the constitutional freedom of political communication. Instead, the limits of
the offence should be clearly stated in the section. With the more clearly expressed (and limited)
offence, law enforcement agencies and members of the community would more easily be able to
determine whether an offence is being, or has been, committed.

136. The majority of the Committee has significant problems with the very existence of the
association offence in section 102.8. It is not open to this Committee to comment on the inventive
suggestion by the Sheller Committee to create a new subsection in section 102.7 to subsume the
object of 102.8, while jettisoning the problematic ‘associating’ element.98 This is because section
102.7, as we have said, is beyond the terms of reference for this Review. The majority of the
Committee is persuaded by the submissions received, however, that section 102.8 contributes
little and poses too great a risk to fundamental human rights and freedoms to meet the test of
proportionality in legislation and, accordingly, recommends its repeal.

137. Fundamentally, the criminalisation of mere association is a troubling concept. It is
perfectly plain that, where mere association transmutes into an action or actions in preparation
for a terrorist act (with the need to prove the statutory intentions and purposes inherent in
that legislative phrase), prosecution will be an appropriate consideration. But the mere fact of
association (as opposed to membership or ‘expanded’ membership99) is too slender a reed to bear
the burden of criminal liability.

138. The Committee is not aware that any prosecutions have been brought under section 102.8.
Professor Kent Roach has suggested, that the offence “may be a deliberately symbolic and
provocative measure” and perhaps intended as “a means to induce those who may associate with
suspected terrorists to cooperate with police or intelligence agencies”.100 Whether this is so or
not, there can be little doubt that enforcement agencies (and the Government) see some value
in a provision of this kind intended to curtail radicalisation and dilute local support for terrorist
organisations. There is no empirical evidence, however, to demonstrate that the presence of the
association offence has had either of these effects. At the same time, there is no empirical evidence
to show that the mere presence of the offence has offended Muslim sensibilities, at least to any
significant extent. Ultimately, however, the majority consider that the section is neither necessary
nor effective. Finally, the Committee would draw attention to the observations of the CDPP:101

“The offences in section 102.8 are extremely complex. It is difficult to define the constituent
elements of the offences and as presently drafted, is likely to give rise to a number of difficulties
in giving directions to a jury.”

139. The majority of the Committee considers that all of these matters warrant the firm
recommendation that the section be repealed.

98 Sheller Report, p. 129.
99 See sections 102.2 – 102.4, Criminal Code Act 1995 (Cth), dealing with intentional membership-type offences.
101 Submission of the CDPP to the COAG Review, p. 6.
RECOMMENDATION 24: Criminal Code – Section 103.1 – Financing terrorism

The Committee recommends that this section be repealed and replaced by a graded continuum of offences, capturing both higher and lower culpability situations. The gradation should be:

(i) Providing or collecting funds with the intention or knowledge that they be used to facilitate or to allow engagement in a terrorist act. The Committee recommends this offence attract a maximum penalty of life imprisonment.

(ii) Providing or collecting funds reckless to their use in facilitating or allowing engagement in a terrorist act. ‘Recklessness’ for this purpose is defined in section 5.4, Criminal Code. The Committee recommends this offence attract a maximum penalty of 25 years imprisonment.

RECOMMENDATION 25: Criminal Code – Section 103.2 – Financing a terrorist

The Committee recommends that consideration be given to the repeal of this section.

140. The Suppression of the Financing of Terrorism Act 2002 (Cth) was enacted to implement Australia’s international legal obligations under the International Convention for the Suppression of Financing of Terrorism102 (“UN Convention on Financing Terrorism”) and UN Security Council Resolutions 1267 (1999) and 1373.103 That Convention is the source of the offence in Section 103 of the Criminal Code in relation to financing terrorism. Section 103.1 was repealed and substituted, in the same terms, by the Criminal Code Amendment (Terrorism) Act 2003 (Cth). The Anti-Terrorism Act (No 1) 2005 (Cth) repealed and substituted subsection 103.1(2) to provide that in addition to a person committing an offence even if a terrorist act does not occur, a person will also commit an offence even if the funds will not be used to facilitate or engage in a specific terrorist act, or the funds will be used to facilitate or engage in more than one terrorist act.

141. In 2005, the Financial Action Task Force found that section 103.1 was inadequate.104 Consequently, Division 103 was amended significantly by changes introduced by the Anti-Terrorism Act (No 2) 2005 (Cth).105

142. Under the present Division 103 of the Criminal Code there are two limbs to the criminalisation of financing terrorism. The first, contained in section 103.1, is the provision or collection of funds, reckless as to their use in facilitating a terrorist act. The second limb, expressed in section 103.2,

105 See generally, Explanatory Memorandum, Anti-Terrorism Bill (No. 2)(Cth).
criminalises making funds available to another person or collecting funds for another person, whether
directly or indirectly, reckless as to whether that other person will use the funds to facilitate or engage
in a terrorist act. A person is capable of committing an offence against section 103.1 or section 103.2
even if a terrorist act does not occur, or the funds will not be used to facilitate or engage in a specific
terrorist act.\textsuperscript{106} The penalty for either offence is life imprisonment.

\textbf{Are Both Offences Necessary?}

143. The GT Centre stated in its submission that there is considerable overlap between section
103.1 and section 103.2.\textsuperscript{107} It was argued that this has the negative effect of diminishing the clarity
and accessibility of the law. In the GT Centre’s opinion, the Financial Action Task Force were
incorrect\textsuperscript{108} to conclude that section 103.1, on its own, was inadequate. It was said:\textsuperscript{109}

\textit{“The only real difference between the offences is that section 103.2 requires funds to be made
available to, or collected for, or on behalf of, another person. That is, the first–mentioned person
must have a particular person in mind when collecting the funds. If anything, this suggests section
103.2 is narrower than section 103.1. The strong likelihood is that the section 103.1 offence would
have covered the situation where funds are provided to, made available to, or collected for, or on
behalf of, an ‘individual terrorist’.\”}

144. As the Sheller Report noted, the enactment of subsection 103.2(1) distinguished making
“funds available” to another person from “providing funds” under subsection 103.1(1)(a),
preumably to another person.\textsuperscript{110} It further distinguished “collecting funds for or on behalf of
another person” from simply “collecting funds”. The Sheller Report noted that on this analysis it
seems that the offence specified in subsection 103.1(1) is wider and embraces the offence specified
in subsection 103.2(1).\textsuperscript{111}

145. Accepting that “it is hard to see where section 103.2 adds anything of substance over and
above section 103.1”, the Sheller Report ultimately recommended that consideration be given to
re-drafting subsection 103.2(1)(b) to make it clear that it is required that the intended recipient
of the funds is a terrorist.\textsuperscript{112} This recommendation emerged from the fact that it may not be the
case that the person on whose behalf funds are made available to, or collected for, be a terrorist.
For example, if the ‘other person’ receiving the funds is an innocent agent, who then recklessly
provides the funds to a terrorist third party, the criminal liability of the initial provider of the funds
becomes increasingly remote and there is a real policy question as to whether criminal liability
should be imposed in such a circumstance.

146. Like the Sheller Committee, the PJCIS also recommended subsection 103.2(1)(b) be
redrafted to make clear that the intended recipient of the funds be a terrorist.\textsuperscript{113} In its response,
the Government rejected this recommendation stating the following:\textsuperscript{114}

\begin{itemize}
\item \textsuperscript{106} Subsection 103.1(2) and subsection 103.2(2), \textit{Criminal Code Act 1995} (Cth).
\item \textsuperscript{107} Submission of the GT Centre to the COAG Review, p. 23.
\item \textsuperscript{108} \textit{FATF Third Evaluation Report}, pp. 32-33.
\item \textsuperscript{109} Submission of the GT Centre to the COAG Review, p. 23.
\item \textsuperscript{110} \textit{Sheller Report}, pp. 159–160.
\item \textsuperscript{111} \textit{Sheller Report}, pp. 159–160.
\item \textsuperscript{112} \textit{Sheller Report}, pp. 162–163.
\item \textsuperscript{113} 2006 PJCIS Review, Recommendation 21.
\item \textsuperscript{114} 2008 Government Response, Response 21.
\end{itemize}
“The inclusion of this term has no definition or point of reference as the term ‘terrorist’ is not used in the Criminal Code. Also, the use of the term ‘terrorist’ instead of ‘person’ in the offence would pre-emptively suggest that it has already been established that the person the subject of the offence is a person who has engaged in a terrorist act.”

147. The Committee is persuaded that section 103.2 adds little, and that the offence contemplated by the section is already catered for in section 103.1. Accordingly, the Committee recommends that consideration be given to the repeal of section 103.2.

The Recklessness Standard and the Severity of the Penalty in Section 103

148. As the Law Council notes, the offence created by section 103.1 contains no requirement that the prosecution prove that a person charged had actual knowledge of circumstances that indicate a connection with a terrorist act, or that they intended to provide funds to be used to facilitate or engage in a terrorist act.115 Rather, the fault element of the offence in relation to whether the funds will be used to facilitate or engage in a terrorist act is satisfied if it can be shown that the person was reckless as to that fact.

149. The Law Council further noted that when the Government introduced this new offence, it was stated that section 103.1 implemented Article 2 of the UN Convention on Financing Terrorism, and paragraph 1(b) of United Nations Security Council Resolution 1373, drawing on the language used in those international instruments.116 However, as the Law Council recognised, Article 2 of the UN Convention on Financing Terrorism contains a requirement of specific intention when attributing criminal liability for the financing of terrorism. Article 2(1) provides that a person commits an offence within the meaning of the Convention if that person by any means “directly or indirectly, unlawfully and wilfully, provides or collect funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part…”

150. The Law Council recommended that subsection 103.1(1)(a) be amended by inserting ‘intentionally’ after ‘person’, and, further, that recklessness be replaced with knowledge in subsection 103.1(1)(b).117 The Sheller Report concurred recommending that section 103.1 be amended by inserting ‘intentionally’ after ‘the person’ in paragraph (a) and removing the notes.

151. The GT Centre also stated that the adoption of a ‘recklessness’ standard makes it impossible for any person to know the scope of their legal liabilities with any certainty.118 It was argued:

“Terrorists obtain financing from a range of sources, including legitimate institutions (such as money laundering through banks), and employ a variety of deceptive means to secure funding. This offence would require every Australian to vigilantly consider where their money might end up before donating to charity, investing in stocks, depositing money with the bank, or even giving money as a birthday present. Therefore, the fault element should be amended, to require intention or knowledge that the funds would be used to facilitate or engage in a terrorist act.”

152. The AFP recognised several challenges that may be encountered in investigating and prosecuting financing of terrorism offences. The challenges noted included the following:119

115 Submission of the Law Council to the COAG Review, p. 37.
116 This much is clear from the Explanatory Memorandum to the Suppression of Financing of Terrorism Bill 2002 (Cth).
117 Submission of the Law Council to the COAG Review, p. 38.
118 Submission of the GT Centre to the COAG Review, p. 23.
119 Submission of the AFP to the COAG Review, pp. 10–12.
(a) It can be difficult to gather sufficient evidence to prove that funds have been received by a particular terrorist group given that terrorist financing operations tend to be cash-based, involve loosely regulated entities, and multiple jurisdictions.

(b) The AFP do not have the jurisdiction to use 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.

(c) Many key target countries for terrorist financing lack efficient and effective regulation and enforcement frameworks.

153. To address these barriers to evidence collection, the AFP requested that the present Review consider whether additional terrorist financing offences should be created so as to create a graded continuum of offences, capturing both higher and lower culpability situations, including the creation of a new ‘negligence’ offence. In this regard, it was suggested that the money-laundering offences in Division 400 of the Criminal Code provide a precedent for creating tiered offences that properly address the spectrum of criminal behaviour in the area. In such a case, it was argued, the penalty for any new negligence offence would be lower than the current penalties attaching to the financing of terrorism, involving knowledge or recklessness.

154. The Committee agrees that there should be a graded continuum of offences within section 103.1. At the higher level, there should be an offence where the fault element is knowledge or intention that the funds provided or collected will be used to facilitate or engage in a terrorist act. This should carry a maximum penalty of imprisonment for life. At the lower level, the offence will be committed where the person provides or collects funds and is reckless as to whether the funds will be used to facilitate or engage in a terrorist act. This should carry a substantial maximum penalty but not imprisonment for life.

155. We do not recommend that there be a third tier of offence where funds are provided or collected in a situation involving negligence on the part of the person as to whether those funds will be used to facilitate or engage in a terrorist act.

156. Our reasons for rejecting the establishment of a negligence offence are these: first, negligence does not appear as a fault element in any other offence under the counter-terrorism legislation. Secondly, such a fault element seems singularly inappropriate in connection with terrorism law.

157. The Criminal Code provides that ‘negligence’ means:

\[
\text{a person is negligent with respect to a physical element of an offence if his or her conduct involves:}
\]

\[(a) \text{ such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and}
\]

\[(b) \text{ such a high risk that the physical element will exist or will exist;}
\]

\[\text{the conduct merits criminal punishment for the offence.} \]

158. It will be immediately apparent that negligence involves the application of the ‘reasonable person’ test. To that extent, it is not necessary to prove that the person actually turned his mind to the circumstance in question, as it is where ‘recklessness’ is the fault element. Rather, the position

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120 Submission of the AFP to the COAG Review, pp. 9–11.
121 Section 5.5, Criminal Code Act 1995 (Cth).
is determined by asking what a reasonable person would do ‘in the circumstances’, and whether the defendant’s behaviour is so great a falling short of that objective standard as to warrant or merit criminal punishment. A number of difficult questions immediately arise: how would a jury determine, for example, what a reasonable person would do in circumstances where donations were sought and made for the benefit of overseas organisations? How would a jury fit into this context the fact that likely defendants are persons of very different religious and cultural backgrounds, many of whom may be immigrants, uneducated, and members or former members of repressed groups in society? How would an objective standard of behaviour in this field be established and how could its limits be defined? These considerations highlight the extent to which the fault element of negligence is quite unsuitable for the offence under consideration.

159. Thirdly, the nature of the offence under section 103.1 is very different from a money-laundering offence. In that situation, the suspicious circumstances of receipt of a large amount of money and the nature of the instructions given for handling it would, it might be thought, naturally influence a reasonable person to harbour suspicions about the transaction from the outset. Moreover, the community would generally understand the standard of reasonable care expected by a person handling large amounts of money in the money-laundering context. We do not think that this, by way of contrast, would be the case in relation to monies being donated, for example, to overseas organisations for a possible multitude of purposes.

160. Fourthly, we recognise that the introduction of a ‘negligence’ fault element would make the task of the enforcement agencies less difficult in terms of proof. However, apart from making the task of the AFP easier, there seems little proportional benefit in creating a new offence based on negligence. There is no evidence that a specific problem exists in relation to this offence (other than difficulties of proof), and there is no real evidence that it would be beneficial to have an offence based on negligence. We have not been pointed to any international instrument that supports the proposed new offence and it is not proposed either by the intelligence agency or the Government.

161. For these reasons we would conclude that a new offence based on negligence as a fault element in section 103.1 (and in section 102.6) is neither necessary nor proportionate. There is no hard evidence to suggest that such an offence would be effective. Indeed, there is a risk that such an offence would be perceived as discriminatory, inflammatory and misdirected. It may quite unintentionally target innocent and otherwise praiseworthy behaviour. Notwithstanding the Committee’s firm position on this point, it would be open to the Government to review the situation at a later stage should operational experience suggest it is necessary to do so.
162. Control orders are dealt with in Division 104, *Criminal Code*. The provisions of the legislation are fully set out in the Schedule. It will be convenient, however, to provide a summary (footnoting omitted) of the principal provisions in the body of our report so that a clear understanding of our recommendations can be appreciated.

163. A control order is intended to allow obligations, prohibitions and restrictions to be imposed upon a person for the purpose of protecting the public from a terrorist act. There are two types of control orders – interim control orders and confirmed control orders. The process begins with a written request by a senior member of the AFP, including a draft of the interim control order and various statements, information and explanations, seeking the Attorney-General’s written consent to request an interim control order on either of two alternative grounds.

164. A senior AFP member may only seek the Attorney-General’s written consent to request an interim control order in relation to a person if the member (a) considers on reasonable grounds that the order would substantially assist in preventing a terrorist act; or (b) suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation.

165. On obtaining the Attorney-General’s consent, the senior AFP member may request an interim control order from an issuing court – being the Federal Court, Family Court or Federal Magistrates Court. The interim control order application is heard ex parte and evidence may be presented on a hearsay basis. For the court to issue an interim control order, it must be satisfied on the balance of probabilities either that the making of the order would substantially assist in preventing a terrorist act, or that the person has provided training to, or received training from, a listed terrorist organisation.

166. In addition, the issuing court must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. In this regard, the court must take into account the impact of the obligation, prohibition or restriction on the person’s circumstances.

167. The legislation establishes a range of matters that the court must include in the interim control order. For example, it must state that the order does not begin to be in force until it is served personally on the person the subject of the order. It must specify a date on which the person must attend for the court to confirm, declare void or revoke the interim order. That day must be as soon as practicable, but at least 72 hours after the order is made. Importantly, it must set out a summary of the grounds on which the order is made.122

168. An interim control order must be served on the person the subject of the order at least 48 hours before the day specified in the order for the confirmation or revocation of the order. The terms of the order must set out all of the obligations, prohibitions and restrictions to be imposed on the person. Those restrictions come into force immediately upon service of the document.

122 But see paragraph [233] of this Report for the restrictions imposed on this requirement by the national security legislation.
169. The obligations that may be imposed are set out in the legislation. They include, for example, a prohibition or restriction on the person leaving Australia, a curfew requirement, an obligation that the person wear a tracking device, prohibitions or restrictions on the person communicating or associating with specified individuals, and prohibitions or restrictions on the person accessing or using specified forms of telecommunication or other technology (including the internet).

170. There is an obligation cast upon the AFP not only to serve the order at least 48 hours before the return day but also to inform the person of the effect of the order and to explain the effect of a number of the provisions of the legislation. The AFP member must ensure that the person understands the information, taking into account the person’s age, language skills, mental capacity and any other relevant factor.

171. The legislation then requires the AFP senior member to make a decision – an election – whether to confirm the order on the return day. If an election to confirm the control order is made, an AFP member must serve personally on the person a number of documents. These include copies of the documents initially given to the Attorney-General when consent to proceed was sought. These documents contain:

- a statement of the facts relating to why the order should be made; and
- an explanation as to why each of the obligations, prohibitions and restrictions should be imposed on the person.

172. In addition, the person must be given “any other details required to enable a person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order”.

173. The legislation then provides that, to avoid doubt, information is not required to be served or given if disclosure of that information is likely to prejudice national security, is likely to be protected by public interest immunity or is likely to put at risk ongoing operations by law enforcement agencies or intelligence agencies, or to put at risk the safety of the community, law enforcement officers or intelligence officers. If the senior AFP member has elected not to confirm the order, then the order immediately ceases to be in force.

174. The legislation deals with the procedure for confirmation or revocation of an interim control order. It specifies who may appear at the hearing and who may aduce evidence and make submissions. The court may declare the interim order to be void if it is satisfied that at the time of making the order there were no grounds on which to make it. It may revoke the order if it is not satisfied, on the balance of probabilities, as to either of the two criteria for the grant of the order. If the court, however, is satisfied as to the statutory criteria, it may confirm the interim order either with or without variation of the interim obligations, restrictions and prohibitions. This second hearing is not an interlocutory hearing so that, in general terms, hearsay evidence is not permissible. If the court confirms the interim control order it must make a corresponding order that specifies all the obligations, prohibitions and restrictions that are to be imposed on the person and must specify a period, not exceeding 12 months after the day on which the interim order was made, during which the order is to be in force.123

123 This “maximum period does not prevent the making of successive control orders in relation to the same person”: subsection 104.16(2), Criminal Code Act 1995 (Cth).
175. A person in relation to whom a confirmed control order is made may apply to an issuing court for the court to revoke or vary the order under section 104.20. In addition, there are provisions requiring the AFP Commissioner to make an application to revoke or vary the order where the Commissioner is satisfied that the grounds on which the order was made have ceased to exist or where he or she is satisfied that the obligations, prohibitions or restrictions should no longer be imposed on the person. However, the AFP Commissioner may also make an application to an issuing court to add further obligations, prohibitions or restrictions to those imposed when the interim order was confirmed.

176. Section 104.27 makes it an offence for a person to contravene a control order. This carries a maximum penalty of five years imprisonment. A control order cannot be made against a person who is under 16 years of age. However, an order can be made against a person who is at least 16 but under 18, although, in this situation, a confirmed control order must not last more than three months following the day on which the interim order was made by the court.

177. The Attorney-General is required on a yearly basis to prepare a report about the operation of Division 104. Details of its operation are to be laid before each House of Parliament within 15 sitting days of that House after the report is completed. There is a sunset provision that effectively brings the Division to an end in 2015.

History of Division 104

178. Division 104 (and Division 105 – Preventative Detention Orders) was enacted in the aftermath of the London terrorist attacks in July 2005. The control order scheme is loosely based on similar provisions enacted in the United Kingdom. Because the control order and preventative detention regimes involved amendments to Part 5.3 of the Criminal Code, the then Government engaged in the consultation process set out in section 100.8 of the Code and pursuant to the Intergovernmental Agreement on Counter-Terrorism Laws made in 2004. As has been said, the various jurisdictions reached a broad agreement to establish the control and preventative detention order regimes at the Special COAG Meeting on Counter-Terrorism on 27 September 2005. It was agreed that the National Counter-Terrorism Committee would settle the details of the amendments within the broad parameters agreed by COAG. The then Government introduced the proposed reforms in the House of Representatives on 3 November 2005 in the Anti-Terrorism Bill (No. 2) 2005 (Cth). The House passed the Bill on 29 November 2005, and it was introduced in the Senate on 30 November 2005. The Bill, as mentioned earlier, was referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report.

179. The Senate Committee Inquiry into the Bill attracted significant public interest, and involved a detailed examination of its provisions. The Committee recommended that the Senate pass the Bill, subject to a series of recommendations, which were intended to clarify or strengthen procedural safeguards in the issuing processes. The then Government supported a number (but not all) of the Committee’s recommendations and introduced Parliamentary amendments. The Bill passed the Senate (with the amendments referred to above) on 6 December 2005. The House of Representatives agreed to the Senate amendments on 7 December 2005, and the Act received Royal Assent on 14 December 2005. Divisions 104 and 105 have not been significantly amended since their enactment.

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Use of Control Orders

180. As at 31 January 2013, only two control orders had been issued. The first related to Joseph Thomas (known as Jack Thomas). The interim order was sought a short time after the Victorian Court of Appeal had reversed Thomas’ conviction for intentionally receiving funds from Al Qaeda, and was in force from August 2006 until August 2007. Thomas’ appeal succeeded on the basis that the trial judge had erred by allowing the jury to consider an involuntary statement extracted from Thomas while he was in custody in Pakistan. Federal Magistrate Mowbray made the interim order on the basis of material contained in a statement from a senior member of the AFP. This material suggested that Thomas had been accepted for jihad training and had actually trained at a Pakistani camp attended by senior Al Qaeda members. There was also evidence from Mr Jack Roche, himself convicted on terrorism related charges. He gave evidence (for the AFP) that he had been targeted and recruited by senior Al Qaeda members because of his Australian nationality and tasked to carry out terrorist acts in Australia. Mr Roche had himself been trained in Afghanistan. On the basis of this and the ‘confession’ made by Thomas, the Federal Magistrate said:

“The respondent has admitted that he trained with Al Qaeda in 2001. Al Qaeda is a listed terrorist organisation. Having received that training... There are good reasons to believe he is now an available resource that can be tapped to assist commit terrorist acts on behalf of Al Qaeda or related terrorist cells. The training has provided him with the capability to execute or assist in the execution directly or indirectly of terrorist acts... The respondent is vulnerable. He may be susceptible to the views and beliefs of persons who will nurture him during his reintegration into the community. Thus his vulnerabilities may be exposed and exploited due to his links with extremists.”

181. The magistrate concluded that the controls in the interim document would “protect the public and substantially assist in preventing a terrorist act.” Without these controls, the magistrate concluded, Thomas’ knowledge and skills “could provide a potential resource for the planning or preparation for a terrorist act.”

182. The control orders imposed on Thomas included a curfew between midnight and 5am, a prohibition upon communication with individuals listed as terrorists, restrictions on travel outside of Australia and a prohibition preventing his possession of explosives. There were also restrictions in relation to his possession and use of communication technology. In making the orders, the magistrate clearly relied on the ‘involuntary’ statements made in Pakistan.

183. No confirmation order was sought by the AFP against Mr Thomas. The parties agreed that the interim control order would have an extended duration of 12 months so that constitutional issues could be resolved before any confirmation. An appeal was lodged on Mr Thomas’ behalf alleging that the control order legislation was unconstitutional. The High Court of Australia, however, affirmed the constitutionality of Thomas’ control order in 2007. The court accepted that control orders to prevent acts of terrorism could be justified under the defence power. The High Court rejected the argument that control orders violated the separation of powers in the Constitution. His Honour Chief Justice Gleeson stressed the similarity between control orders and domestic

protection orders, denials of bail, and dangerous offender designations. The majority of the court concluded that it was within judicial power to make predictive judgements about future threats when deciding whether to impose a control order.

184. At the conclusion of the judicial process, Mr Thomas entered into an Enforceable Undertaking, which was in place from August 2007 to November 2008. The provisions of that Enforceable Undertaking mirrored the provisions contained within the interim control order. The AFP did not seek a further control order against Jack Thomas upon the expiration of the Enforceable Undertaking. The Committee were not privy to any classified material used in the proceedings against him. Nor was any information provided to us concerning his experiences while he was under the prohibitions imposed on him by the interim control order.

185. Australia’s second control order was issued against David Hicks after his return from Guantanamo. The Australian Government under the then Prime Minister John Howard refused to request the United States to return Hicks to Australia. Hicks commenced legal action to force Australia to do so, and the Government lost an application to have the litigation dismissed as a matter that should be left in the political arena. Ultimately, Hicks pleaded guilty in a Military Commission to material support of terrorism. (This offence has recently been held not to be a valid offence existing under international law at the time of Hicks’ guilty plea.) The plea agreement included as a condition that Hicks would not participate in any media interviews for a period of one year. Hicks was sentenced to seven years imprisonment (not taking into account his five years of detention), but all but nine months were suspended. The sentence was suspended on condition that he return to Australia to serve nine months in detention. On 20 December 2007 – shortly before his release – the AFP sought an interim control order against him. Hicks was released from an Adelaide prison on 29 December 2007, having served the balance of his sentence.

186. On 21 December 2007 Federal Magistrate Donald imposed an interim control order on Hicks. He was required to remain at specified premises and a curfew was imposed requiring him to remain within those premises between midnight and 6am each day. He was required to report to a police station three times a week. Restrictions were placed on his being in the possession of weapons or explosives. He was forbidden to use a mobile telephone service other than one approved by the AFP. Similar restrictions applied to a landline telephone service and a designated internet service. There were other restrictions but it is not necessary to detail these.

187. In relation to the restrictions on telephone, sim card, landline, approved internet service provider account and electronic email account, the Magistrate said these restrictions were necessary to “reduce any opportunity Hicks might have to avoid detection of preparation for terrorist acts or inappropriate dissemination of terrorist information.”

188. The interim order was confirmed on 19 February 2008. Hicks did not give evidence at this hearing, although he was represented. This absence of evidence was regarded as of some significance by the Magistrate. The reporting condition was reduced to two times per week, and the curfew was varied to require Hicks to remain at the specified premises between 1am and 5am.

129 See Hicks v Ruddock [2007] FCA 299.
131 Jabbour v Hicks [2007] FMCA 2139.
on any day. Otherwise the conditions originally imposed were, generally speaking, reimposed. The basis on which the confirmatory order was made was two-fold: the Magistrate placed reliance on letters written by Hicks many years earlier in which he had expressed a desire to protect other Islamists from “aggressive non-believers” and “not let them destroy Islam”. This correspondence satisfied the Magistrate that there were sufficient grounds for concern that a terrorist act could be committed either by Hicks or with his assistance. Secondly, the magistrate was satisfied that Hicks had trained with both LET and Al Qaeda (although these were not listed organisations at the time of training). The order was imposed for a 12 month period and it subsequently expired without incident.

Impact of Control Orders

189. The Committee has not received any statement from either Jack Thomas or David Hicks. However, the Committee is aware of public statements made by Hicks concerning the heavy impact the orders had on himself and his family. In addition, the Committee, through its Chair, received a submission in private from Aloysia Brooks, the former wife of David Hicks. Ms Brooks spoke compellingly of the difficulties imposed on her husband and herself by reason of the control order conditions. She claimed that the imposition of the orders was politically based rather than genuinely concerned with terrorist related matters. The Committee accepts that the terms of a control order (such as those we have described above) entail serious disruption not only upon controlled persons but upon their families. It could hardly be otherwise.

The United Kingdom Experience

190. A considerable number of submissions, critical of the control order legislation, have focused on the differences between the UK control order legislation and its Australian counterpart. Attention has also been paid to the legal and political environment which gave rise to the UK legislation. In particular, it has been suggested that, while there may have been sound reasons for the introduction of the control order system in the UK, the situation here was very different and did not justify its creation as part of the Australian counter-terrorism regime. The Committee has accordingly paid particular attention to the 2012 Report on Control Orders by David Anderson QC (“Anderson Report”),133 the UK Independent Reviewer of Terrorism Legislation. It has also gained considerable assistance from the views of Professor Clive Walker of Leeds University who is a special adviser to Mr Anderson QC. It will be convenient at this point to discuss briefly the UK legislation and highlight certain matters raised in the Anderson Report.

191. Control orders imposing restrictions upon persons suspected by the UK Government of involvement in terrorism were made against a total of 52 people between 2005 and 2011. All the controlled persons were men, and the suspicions in each case related to Islamist terrorism. Orders remained in force for a period ranging from a few months to more than four and a half years. Controversy attended control orders throughout the life of the regime because, first, they restricted a range of basic freedoms and, secondly, because the ability of individuals to mount an effective court challenge was diminished by the non-disclosure to them, for national security reasons, of the

detail of allegations upon which their control orders were founded. This was said to contravene their right to a fair trial. Over time, the higher courts of the UK, with assistance from the European Court of Human Rights (“ECHR”) in Strasbourg, produced a body of case law that moderated the legal climate in which control orders operated, although these decisions did not neutralise the objections of those who considered control orders to be fundamentally opposed to British traditions of liberty and fairness.

192. The UK courts made it clear that a control order was neither punitive nor retributive.\textsuperscript{134} The true purpose of the regime, as stated in the Prevention of Terrorism Act 2005 (UK), was simply to protect members of the public from a risk of terrorism by preventing or restricting the controlled person’s involvement in terrorism-related activity (it will be immediately seen, we suggest, that precisely the same purpose, that of protection and prevention, inhabits the Australian model). Mr Anderson QC explains why there was a need in the UK for control orders. He stated:\textsuperscript{135}

“In an ideal world, every person justly suspected of terrorist activity would be prosecuted in the United Kingdom or extradited to face justice elsewhere. This does not always happen. Obstacles include:

- the inadmissibility... of domestic intercept evidence in UK criminal trials
- the prohibition (imposed by Article 3 of the European Convention on Human Rights) on deportation to a country where the deportee risks suffering torture or inhuman or degrading treatment; and
- the prohibition on deportation to a country where the deportee has suffered or risks suffering a “flagrant denial of justice”, destroying the essence of the right to a fair trial.”

193. Mr Anderson QC points out, however, that these specific impediments “do not tell the whole story”.\textsuperscript{136} He points to the fact that, while the intelligence agency may know that an individual or group is planning an attack, the knowledge will often come from intelligence which is “patchy, fragmentary and uncertain”. The information may “fall short of evidence to support criminal charges to bring an individual before the courts”, even though that is “the best solution”. The conclusion reached by Mr Anderson is that in such a situation, unsatisfactory though it may be in some respects, the control order is a legitimate measure. This is so because its aim is to prevent or disrupt terrorist activity by placing fetters upon the person in question, restricting his abilities to act in a terrorist-related way or to be involved in such an action. In this way, it is protective of the public.

194. In general terms, Mr Anderson QC suggests that there is “nothing unique” in international terms about the existence of a regime that imposes significant constraints on the liberty of a person suspected, but not convicted, of terrorist activity. The purely preventative aim of the control order system, its separation from the criminal justice process and the length of time for which an individual could be subject to it, however, “placed it towards the more repressive end of the spectrum of measures operated by comparable western democracies”.\textsuperscript{137}

\textsuperscript{135} Anderson Report, at [2.9].
\textsuperscript{136} Anderson Report, at [2.10].
\textsuperscript{137} Anderson Report, at [2.19].
195. Control orders are now a thing of the past in the UK. They have been replaced by Terrorism Prevention and Investigation Measure (“TPIM”) orders, introduced by the Terrorism Prevention and Investigation Measures Act 2011 (UK). The TPIM order is similar to a control order in many respects. However, it is limited to a maximum duration of two years, a higher evidential test must be satisfied before it can be made (“reasonable suspicion” as a test has been replaced by “reasonable belief”), and it cannot contain the more severe restrictions previously available under the control order regime (such as relocation). Attachment E is attached which provides a comparison between a UK control order and a TPIM order.\(^\text{138}\)

196. Mr Anderson QC gave careful consideration to the UK control order system. He found it to be, in a number of respects, effective and generally enforceable. He was not satisfied it was necessarily counter-productive. He found that the administrative procedure for making and reviewing control orders was “evidence-based and thorough”.\(^\text{139}\) Despite the constraints of a closed-material procedure, the courts, he found, did manage in the period under review to provide a substantial degree of fairness to the controlled person, although he noted that no procedure “can be wholly fair in which a participant is enabled neither to hear nor (therefore) to rebut the detailed evidence adduced against him”. In the latter regard, Mr Anderson QC noted the existence of a minimum requirement (now insisted upon by the English and European Courts):

“The controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.”\(^\text{140}\)

197. Mr Anderson QC’s general conclusions included the following

“[T]he control order came to occupy a small but important niche in the counter-terrorism armoury, useful and indeed necessary ‘for a small number of cases where robust information is available to the effect that the individual in question presents a considerable risk to national security, and conventional prosecution is not realistic’…”\(^\text{141}\)

198. However, the Independent Reviewer expressed the opinion that, notwithstanding its effectiveness and the general endeavour to operate fairly, “there remains something profoundly alien and unsettling about the control order”.\(^\text{142}\) Mr Anderson QC, in this regard, referred to the fact that, particularly in the early years, individuals had been placed under extraordinary and intrusive restrictions without explanation, other than that they were suspected to be a threat to national security. Fortunately, explanations became fuller after AF (No. 3) but relocation of persons became increasingly common, leading to a level of concern. Moreover, at the hearing, controlled persons spent crucial parts of it excluded from the court, oblivious to both the detailed accusations made against them and of the submissions made by Special Advocates who were neither able to communicate fully with them nor ‘in practice’ to call evidence on their behalf.

199. David Anderson QC went on to say –

“Though TPIM’s are in several respects a less severe version of control orders, it is to be hoped that executive orders of this kind, however expertly prepared and reviewed they may be, will never need to be used on a larger scale than has been the case to date. The ideal would be for renewal


\(^{139}\) Anderson Report, Executive Summary, p. 6.

\(^{140}\) SSHD v AF (No. 3) (2009) UKHL 269, at 59 (Lord Phillips) (“AF (No. 3)”), following the judgment of the Grand Chamber of the European Court of Human Rights in AA v UK (2009) 49 ECHR 625, at 220.

\(^{141}\) Anderson Report, at [6.2].

\(^{142}\) Anderson Report, at [6.4].
of the TPIM system beyond its initial five-year currency to be judged unnecessary. Whether or not this proves possible, it is important that efforts continue to improve the amenability of terrorist activity to trial by criminal process, including if it is feasible to do so the admission of the intercept evidence prohibited by the RIP A Act, section 17, but accepted by nearly all other common law countries."143

200. Finally, it is necessary to refer to one particular topic dealt with at length by Mr Anderson QC. This is the topic of the Special Advocate. The background is the problem (shared in both the UK and Australia) in relation to the need to protect national security information. The Committee has no role to play in connection with a review of the national security legislation. However, the UK experience is instructive to address the shared problem. Mr Anderson QC points out that “it is normally considered impossible to inform a prospective controlled person of the full evidence on which the decision to impose a control order was taken”144 This arises because of the need to protect covert human intelligence sources, the need to protect from disclosure sophisticated surveillance techniques, and the need to protect intelligence exchanged between foreign liaison partners.

201. The problem is this: a person who does not know the full details of the case against him, and so is not in a position to contest the evidence relied upon, cannot be said to fully enjoy the right to a fair trial. Further, where crucial evidence is not heard in open court, this may infringe the open justice principle and create prejudice. The solution arrived at in the UK and later applied to the control order regime was that of the “closed material procedure”. In essence, the system operates in the following manner:

- The Secretary of State makes only such disclosure to the controlled person about the reasons for the order as is not contrary to the public interest.
- Full disclosure is however made to a ‘Special Advocate’ chosen by the controlled person from a panel of security-cleared barristers appointed by the Attorney-General and entrusted with representing the interests of the controlled person in litigation.
- The litigation is then conducted partly ‘in closed court’ with the Special Advocate present but the controlled person and his own legal representatives absent.
- The Special Advocate may apply to the court for further disclosure to the controlled person, and may (in theory) call evidence. However, the Advocate may not communicate with or take instructions from the controlled person, save on strict conditions aimed at ensuring that no additional disclosure is inadvertently made to the person.

202. It is against this background that the ECHR decision and the decision in AF (No. 3) intersect with the closed court procedure. The controlee must, at the least, be given the ‘gist’ of the case against him so that he can give instructions to his counsel of choice. However, after confidential disclosure has been made, the Special Advocate, it is intended, will have a far greater knowledge of the detail of the case because of the secret material that has been disclosed to him or her. The task of the Special Advocate is then to bring to bear his or her special expertise so as to detect flaws or weaknesses in the national security information or intelligence and make submissions which rely upon the greater detail he or she has assimilated and analysed.

143 Anderson Report, at [6.5].
144 Anderson Report, at [3.69].
203. As Mr Anderson QC has observed, the Special Advocate system is not without its flaws and imperfections. However, he concluded, based on his extensive discussions with all those involved, that the system “works reasonably well”\(^{145}\). In the last of his comments made on the topic, Mr Anderson QC said:

“That something resembling a fair litigation procedure was fashioned out of PTA 2005 during the six years of its operation is a tribute to the conscientiousness and attention to detail of the judges and advocates who operate the system, and their resourcefulness in seeking to reconcile the terms of the Act with the requirements of Article 6. In one vital respect – the requirement that controlled persons be given a sufficient gist of the allegations against them to enable them to give effective instructions to their Special Advocate – the intervention of the European Court of Human Rights was both crucial and beneficial.

Though it fell well short of the ideal, and for all the uncertainties and delays that it produced, the control order system did manage in the period under review to provide a substantial degree of fairness to the controlled person.”\(^{146}\)

Submissions Received by the Committee

204. As might be expected, the submissions in relation to control orders and preventative detention orders have formed a major portion of the submissions received by the Committee. In the same way, these two topics occupied a considerable portion of the oral submissions heard by the Committee in public session. It is convenient to turn to the AFP submission at the outset. In its submission, the AFP said this:

“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.”

205. Against this background, the AFP submission suggested that 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. The submission suggested that any decision to repeal these powers would “compromise the purpose of preventative options to respond to extraordinary events, such as terrorism on the scale of September 11 and the Anders Breivik attacks”.

206. In relation to the control order regime specifically, the AFP submission argued 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”. The AFP said:\(^{147}\)


\(^{147}\) Submission of the AFP to the COAG Review, p. 19.
“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 so as to justify applying for a preventative detention order; and
- where there are reasonable grounds to suspect that a person has received training from a proscribed terrorist organisation.”

207. The AFP submission argued that a control order is a disruptive measure that is essentially preventative and not punitive in nature. It is not intended to be used as a substitute for prosecution. The Committee has received assurances that control orders have been considered in conjunction with criminal prosecution options but have not been sought wherever sufficient evidence has existed to support a criminal charge and subsequent criminal proceedings. The submission concludes:

“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 counterterrorism 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.”

208. It is not practical to spell out all the detail of the submissions criticising the control order system. Some argue that the system should be repealed altogether, and indeed that it should never have come into existence. Others have argued for substantial amendments. All stress the potential for a clash between the protection of the community and the need for Australia to adhere to its international human rights obligations, especially the duty to provide a fair trial.

209. A helpful starting point, however, is the GT Centre submission, advocated in oral submissions by Professor George Williams. We shall briefly summarise this submission. Professor Williams first pointed out, correctly, that control orders are modelled on the measure of the same name created in the United Kingdom in 2005. This legislation was a response to the (judicial) House of Lords decision in *A & Others v Secretary of State for the Home Department* [2005] UKHL 71. The practical result of this decision was that the Government could not keep foreign nationals in indefinite immigration detention. Nor could they be deported to their home country in view of the possibility of torture and unfair treatment. The question faced by the UK Government was: what should we do with these people? The answer was: control them by Executive Order.

210. Another matter pertinent to the introduction of control orders, a matter addressed by David Anderson QC, was the inability in the UK to make use of intercept material in criminal trials. A third matter relied on in the GT Centre submission was the proposition that in 2005, the UK did not possess a wide range of preparatory offences as did Australian law.

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211. Professor Williams’ essential argument was that the three ‘conditions’ or ‘obstacles’ present in the UK did not exist in Australia. This country had a wide range of preparatory offences, intercept material could be used in criminal trials, and there was no Australian equivalent to the ECHR ruling preventing the deportation of non-citizens. Consequently, far from sustaining the Australian control order regime, the UK precedent, it was argued, actually undermined it. A further argument advanced was that, in the light of the Jack Thomas and David Hicks decisions, there was no evidence to suggest that control orders were a ‘necessary response’ to terrorism.

212. The concluding proposition was:

“Based on the limited Australian experience, the only role which control orders can play in Australia is a dangerous one; permitting the AFP to “forum shop” and impose restrictions on individuals who may have been acquitted of any criminal charges, or to engage in political posturing. If the only role that control orders are likely to play is to subvert the integrity of the anti-terrorism law system, they should be repealed.”

213. A range of submissions from other sources postulated that the control order procedure did not afford a fair hearing in accordance with international human rights obligations. In this regard, attention was focused on the standard of proof – a civil standard rather than the criminal one – and the non-disclosure of essential evidence on the basis that it may be “likely to prejudice national security”. Submissions on this point asked repeatedly: how can a person defend himself or herself if national security concerns prohibit the disclosure of essential material? Concern was also expressed that the ‘terrorist training” basis for a control order “branded a trainee for all times”. A person may have trained with a listed organisation but, many years later, may have altered his or her views altogether. Division 104 made no allowance for this situation. Further, the Government’s decision not to adopt all of the Senate Committee’s recommendations in 2005 was trenchantly criticised.

214. As we have said, it is not practical to spell out the detail of all the submissions we have received on the point. The matters to which we have referred are intended to give some of the flavour of the multitude of criticisms of the control order system placed before the Committee.

**RECOMMENDATION 26: Criminal Code – Retention of control orders**

The Committee considers that the control order regime should be retained with additional safeguards and protections included

215. The Committee has concluded that, based on the material before it, the control order system should continue at the present time. We believe that the clear purpose of protecting the community and preventing a terrorist attack in Australia presently warrants the continuance of the legislation. There remains a genuine risk of terrorist activity in this country, although its level should not be exaggerated. On that basis, control orders are, for the time being, necessary and justified in the counter-terrorism legislative scheme. We consider however that the present safeguards are inadequate and that substantial change should be made to provide greater safeguards against abuse and, in particular, to ensure that a fair hearing is held.

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149 Submission of the GT Centre to the COAG Review, p. 26.
216. The Committee considers that control orders presently have three possible areas of operation. These are:

(a) where a person has been convicted of a terrorist offence, has served his or her sentence, but where upon release his or her renunciation of extremist views has not been demonstrated;
(b) where a prosecution for a terrorist offence is not a feasible or possible alternative; or
(c) where a person has been acquitted of a terrorist offence on a purely technical ground, or where the intelligence/evidence pointing to terrorist activity has been rejected otherwise than on the merits.

217. In relation to category (a), we recognise that it is repugnant to some that an offender who has served his sentence should thereafter be controlled by conditions which involve a form of close surveillance. Nevertheless, we think that the community would expect that a fanatic or extremist who has not renounced his or her terrorist intentions at the conclusion of his sentence should not be left completely uncontrolled, at least for a time, when he or she is at large in the community. However, the control order system should not involve the indefinite ‘warehousing’ of a person to a controlled situation.

218. We accept that the third situation, category (c), is highly contentious and that it is likely to be rejected by the INSLM. However, the Committee considers that, in an exceptional and possibly rare case, there could arise justification for consideration being given to the issue of a control order in this category. Once again, when it is recognised that the control order system is designed to protect the community and prevent the occurrence of a terrorist act there may be, albeit in an exceptional case, justification to control a person who has been acquitted of a criminal offence.

219. Indeed, the UK experience is quite telling in this regard. At least three of the ten persons under current TPIM orders had previously been acquitted on terrorism charges. The Committee does not have the detail to discuss in depth the matters that led to the imposition of TPIM orders on these persons following their acquittal. Nor do we have details of the basis for acquittal in each case. It is in the public domain, however, that one of them, known as ‘AY’, was suggested to have been a principal figure in the Overt plot, a viable plot to commit mass murder by bringing down transatlantic passenger airliners by suicide bombings. When the TPIM review of AY’s case was conducted in 2012, Justice Mitting (a judge of considerable experience in the terrorism field) found a compelling case that AY had been involved in terrorist-related activity.

220. Category (b) is, however, the most realistic and likely category for seeking a control order. In private session, the Committee was provided with material that satisfied us that there is a real risk that Australian citizens presently undergoing training overseas with extremist groups may return to Australia with extremist convictions or terrorist capability, posing a threat that those persons and/or their associates may consider carrying out some form of serious terrorist activity. It may well be the case that the intelligence which demonstrates this threat would not be able to sustain a conviction at trial in a criminal court of law. This may be because the information comes from a source that needs to be protected. It may be in a form that does not easily translate into evidence that satisfies the criminal standard. Again, it may be information that is obtained through intelligence exchanged at the international level, thus embodying a need for confidentiality. Whatever the reason, a prosecution may not be feasible or possible.

221. In these situations, it must be recognised that prosecution, although a clear first choice, cannot always suffice as a single antidote to terrorism risk. As Professor Clive Walker has suggested:
“... Australia should continue to embrace the notion of a comprehensive counter-terrorism code but should constitutionalise it legally and politically so far as possible. The alternative is to leave a vacant field which will for sure be filled with some uglier, more distasteful, version at the hint of a crisis. If not control orders, then something else will come along by way of executive orders.”

222. The recent (and continuing events) in Mali, and the taking of hostages at the natural gas complex of In Amenas in Algeria, demonstrate how quickly a new terrorism situation can arise. Sympathisers and activists with these causes may well exist within Australia. Australia may be asked to take a role, perhaps a limited role, in the developing African situation. It remains to be seen whether Australian citizens will be attracted to aspects of this conflict. Once again, for reasons stated, persons with extremist convictions may return to Australia, but in circumstances where a criminal prosecution is not feasible or possible.

223. We would wish to add some brief remarks concerning a number of the arguments we have earlier identified. While the Committee respectfully acknowledges the force of the GT Centre submissions, we do not think that the three ‘conditions’ or ‘obstacles’ in the UK environment, and their suggested absence in Australia, should lead to a conclusion that the control order system is illegitimate in this country. Indeed, we note that the UK legislation did provide for several preparatory type of offences. Sections 57 and 58 of the *Terrorism Act 2000* (UK), for example, which criminalise the possession of materials or information useful to terrorism, fell into this category. But more importantly, David Anderson QC himself recognised in his 2012 report that these “impediments” did not “tell the whole story”. The real thrust of the UK control order system was the inability, for whatever reason, to prosecute the person who posed a terrorism risk in the community. That, as we see it, is essentially the same basis that underlines and frames the Australian legislation. That is, there is, other than by way of criminal prosecution, a need to protect the community from attack and prevent the carrying out of a terrorist act on these shores.

224. We do accept, however, that the Thomas and Hicks control orders are, in some respects, problematic. We, of course, do not have access to classified material nor have we received any sensitive or confidential briefing on either case. In one sense, we know little more than do the general public, relying as we must on media reports and published legal decisions. In this regard, we are aware of the criticism that was made in the case of Jack Thomas, principally because, to obtain the interim order, reliance was apparently placed upon admissions he had made which, according to the Victorian Court of Appeal, ought to have been excluded from his trial. In the case of David Hicks, we are aware that criticism has been made of the reliance placed upon correspondence written by Hicks many years before the control order was sought. In both cases, additionally, reliance was placed upon overseas training that had occurred a number of years prior to the control order proceedings. With these matters in mind (whatever their force or lack of force), we consider it may be said that perhaps neither case demonstrates the necessity for, or the effectiveness of, the control order system, at least in a significantly persuasive manner. It may well be that the orders made were justified but we are not in a position to make any final assessment on that point.

151 Anderson Report, [2.10].
Nevertheless, for the reasons we have given, the Committee is satisfied that Division 104 is presently necessary and, if utilised in an appropriate case, is likely to be effective, at least in the short term, in preventing or disrupting a terrorist act.

There is one further matter arising from the submissions. We have already referred to the potential unfairness that may arise because a person faces a control order when his or her training with a terrorist organisation occurred many years earlier, and where there is no evidence that he or she presently poses any threat to the community. Why should it be that a person should be severely controlled by either an interim or confirmatory order in those circumstances? Although this situation plainly raises an unfairness issue, it may be, however, that a court faced with this problem could simply refuse to make an interim order, or refuse to confirm an order already made, because it could not be satisfied within the terms of subsection 104.4 (1) (d). Under the terms of this subsection, the court must be satisfied that each of the restrictions to be imposed is reasonably necessary, and reasonably appropriate and adapted, “for the purpose of protecting the public from a terrorist act.” If the court was not satisfied that, in the circumstances of the matter, the public required protection from a terrorist act, notwithstanding that training had occurred at a much earlier point in time, the order surely would not be made.

The Committee has given consideration to whether there should be an amendment to 104.4 to make it clear that the relevant form of training must be reasonably contemporaneous, or at least have occurred within a relatively recent time frame prior to when the order is sought. However, we have concluded that it would be premature at this stage to recommend such an amendment. Although the decisions in Jack Thomas and David Hicks do not fill us with an over-abundance of confidence on this aspect of the training basis for a control order, we nevertheless conclude that the matter having been drawn by this Review into the public domain, that, in the situation we have outlined, a court would not grant a control order, or at least would give very serious consideration as to whether it should be made.

The Committee will now set out the remaining recommendations relating to control orders. The first group will focus on the issue of control orders and threshold matters. The second group will deal with safeguards and protections. The final recommendation will provide for oversight by the Commonwealth Ombudsman.

**RECOMMENDATION 27: Criminal Code – Control orders – Basis for seeking Attorney-General’s consent**

The Committee recommends the amendment of subsection 104.2 (2) (b) to require that the second basis on which a senior member of the Australian Federal Police seeks the Attorney-General’s written consent to request an interim control order be that he or she “considers on reasonable grounds that the person has provided training, or received training from, a listed terrorist organisation”.

An important aspect of the control order scheme is the necessity to obtain the Attorney-General’s consent. As has been noted, the senior AFP member need only suspect on reasonable grounds that the person to be controlled has, for example, received training from a listed terrorist organisation. The Committee considers that the Attorney-General should be asked to consent in a situation where the AFP consider on reasonable grounds that a control order application should be made. Mere suspicion should not suffice. The Committee considers that there should be uniformity between the statutory pre-conditions for a senior AFP member’s approach to the Attorney-General for written consent. It is appropriate that the second basis should require that the AFP member
“considers on reasonable grounds” that the person has provided training to, or received training from, a listed terrorist organisation.

230. When the issuing court is asked by the AFP to make an interim control order, the court must be satisfied on the balance of probabilities, for example, that the person has provided training to, or received training from, a listed terrorist organisation. Given this reasonably high threshold for the making of the order, there seems no warrant for allowing consent to be sought on the basis of mere suspicion. To do so would be inconsistent with the legislation.

**RECOMMENDATION 28: Criminal Code – Control orders – Definition of ‘issuing court’**

The Committee recommends that the definition of ‘issuing court’ in section 100.1 be amended to read ‘the Federal Court of Australia’.

231. The Committee considers that the power to make control orders should be the sole province of the Federal Court. We mean no disrespect to the Federal Magistrates or the Judges of the Family Court, but we think the gravity of the making of a control order requires that this jurisdiction be reposed in the Federal Court itself. The Committee also gave consideration to substituting the Supreme Court of each State or Territory for the Federal Court. However, on balance, we think that judicial comity, fairness and consistency of outcome would best be served by the orders being made in the Federal Court.

**RECOMMENDATION 29: Criminal Code – Control orders as a last resort – Cooperation and information sharing between the Australian Federal Police and the Commonwealth Director of Public Prosecutions**

The Committee recommends that investigating agencies, prior to the Australian Federal Police requesting consent from the Attorney-General to seek an interim control order, should provide the Commonwealth Director of Public Prosecutions with the material in their possession so that the Director may, in light of the Prosecution Policy of the Commonwealth, consider or reconsider the question of prosecution in the criminal courts. This recommendation does not necessarily require that it be incorporated in the legislation at this stage. It does, however, emphasise that criminal prosecution is the preferable approach. Control orders should always be sought as a last resort.

232. The Committee considers that it is fundamental that control orders should always be sought as a last resort, and in circumstances where prosecution is out of the question because it is not a viable response. We have given serious consideration to including this requirement in the legislation at the present time, but in the end, have concluded that it is premature to do so. In the event that control orders are sought more frequently than they have been in the past, there may arise a need to reconsider this issue. The UK legislation has, for example, a statutory safeguard.152 This requires consultation between the Secretary of State and the Chief Officer of the appropriate police force to determine whether there is evidence available that could realistically be used for the purposes of prosecuting the individual for an offence relating to terrorism. The Committee, as we have indicated, does not consider that statutory obligations of this kind are presently required. However, at a practical level, our recommendation suggests that there be consultation between the AFP and the CDPP prior to a control order being sought.

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Special Advocates

**RECOMMENDATION 30: Criminal Code – Control orders – Special Advocates**

The Committee recommends that the Government give consideration to amending the legislation to provide for the introduction of a nationwide system of ‘special advocates’ to participate in control order proceedings. The system could allow each State and Territory to have a panel of security-cleared barristers and solicitors who may participate in closed material procedures whenever necessary including, but not limited to, any proposed confirmation of a control order, any revocation or variation application, or in any appeal or review application to a superior court relating to or concerning a control order.

**RECOMMENDATION 31: Criminal Code – Control orders – Minimum standard of disclosure of information to controllee**

The Committee recommends that the legislation provide for a minimum standard concerning the extent of the information to be given to a person the subject of an application for the confirmation of a control order, or an application for a variation or revocation of a control order. This requirement is quite separate from the Special Advocates system. It is intended to enable the person and his or her ordinary legal representatives of choice to insist on a minimum level of disclosure to them. The minimum standard should be: “the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations.” This protection should be enshrined in Division 104 wherever necessary.

233. There are three situations in Division 104 where the national security legislation has the capacity to threaten the right of a fair trial. The first may occur at the point where the AFP makes a request to the Attorney-General.\(^{153}\) The omission of restricted material at this stage will mean that both the Attorney-General and the issuing court may, in due course, be given limited material. This may be significant where the restricted information is of possible assistance to the person sought to be controlled. The second situation occurs at the interim order hearing.\(^{154}\) The ‘summary’ information to be provided may once again be limited because of national security concerns. The third stage occurs when a confirmation of the interim order is sought. Indeed, at this stage the restrictive net is broader. It is not confined to national security information. It extends to public interest immunity and other matters which put at risk the safety of the community, law enforcement officers or intelligence officers.\(^{155}\) Restriction of disclosure at each of these three stages, plainly enough, has the capacity, unless greater protection is provided, to result in a fair trial not being afforded to the person sought to be controlled.

234. The Committee considers that in these circumstances there is a need to make statutory provision for two levels of protection. First, to provide in the statute for a minimum standard of disclosure, namely that – “the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations”.

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235. In this regard, the legislation, for example, presently requires that a person whose order is to be confirmed must be given “any other details required to enable a person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order”. This formulation is perhaps not far removed from the terminology we prefer. But it is not identical. It is our intention that the formula we have chosen – stemming as it does from the decisions in the ECHR and the House of Lords – should be added to the terminology presently appearing in the relevant sections.

236. The second level of protection is to provide in the legislation for Special Advocates. We recommend that the Government explore, and introduce if feasible, a system for security-cleared advocates to represent, at the Government’s expense, persons the subject of control order applications. The Special Advocates will be entitled, if necessary, to full disclosure of information used in the various stages where national security information is being or has been relied upon or is relevant to the application. The system will be similar to that we have earlier described, subject to adaption to local circumstances. The Special Advocate will have, in a proper case, a limited but important role to play in addition to the role played by the ordinary legal representatives of the controlled person.

237. At the moment, there is, it must be conceded, something of a stand-off between the Government and defence lawyers in relation to national security. Some defence lawyers do not like the idea of Special Advocates. They argue that the ethical and professional standards of a person admitted as a barrister or solicitor throughout Australia should, without more, be sufficient to enable trust to be reposed in that person in relation to national security matters. They dislike the notion of a security clearance and the personal intrusion it entails. However, national security information does exist and it is perfectly understandable that the intelligence agencies and the Government wish to restrict disclosure of that information as much as possible and consistently with its obligations to other countries. That is not an unreasonable position by any means. The narrower the ambit of disclosure, the safer the information will be. Indeed, it is fair to say that the AFP and ASIO both oppose altogether the use of Special Advocates for security and other operational reasons.

238. The Committee believes that both sides need to relent on the issue: an appropriate moderate compromise is the use of the Special Advocates system. We have given consideration to other methods. For example, we have given consideration to a nationwide system of Public Interest Monitors. On balance, however, we think that this would be a more difficult, less effective, and more expensive system to implement on a practical level. For that reason, we recommend the legislative adoption of a Special Advocates system.

239. The Committee is hopeful that, in time, the system will be accepted on both sides of the debate and will operate with perhaps more ease and confidence than is contemplated at the present time. If that proves to be the case, as we hope it will, the use of Special Advocates may become more commonplace, and hence more effective, in other litigation where national security matters arise.
RECOMMENDATION 32: Criminal Code – Control orders – Information concerning appeal rights

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

240. Decisions concerning the issuing of interim and confirmed orders are appellable under legislation governing appeals from decisions of the Federal Court.156 The provisions of Division 104 do not displace, or otherwise circumscribe, the general appellate jurisdiction within the Federal Court structure. The Committee has given consideration as to whether appeal rights under general legislation should be set out in terms in Division 104. This would provide greater clarity and certainty to the subject of an order about his or her appeal rights. However, the Committee has determined that it would be more useful from a practical point of view that information about appeal and review rights should be given directly to the person who is made the subject of an interim or confirmed order. The legislation presently requires that an AFP member must give certain information to a person the subject of an interim order.157 The Committee sees no reason why this information should not extend to a brief summary of the appeal and review avenues available, including those available when an interim order is confirmed.

Nature of Restrictions

RECOMMENDATION 33: Criminal Code – Control orders – Relocation condition

The Committee recommends that subsection 104.5(3)(a) be amended to ensure that a prohibition or restriction not constitute – in any circumstances – a relocation order.

RECOMMENDATION 34: Criminal Code – Control orders – Curfew condition

The Committee recommends that a prohibition or restriction under subsection 104.5(3)(c) – a curfew order – be generally no greater in any case than 10 hours in one day.

RECOMMENDATION 35: Criminal Code – Control orders – Communication restrictions

The Committee recommends that, other than in an exceptional case, the prohibitions or restrictions under subsection 104.5(3)(f) permit the controlled person to have access to one mobile phone, one landline, and one computer with access to the internet.

156 See generally Federal Court of Australia Act 1976 (Cth), Division 2.
157 Subsections 104.12(1)(b) and 104.12(1)(c), Criminal Code Act 1995 (Cth).
RECOMMENDATION 36: Criminal Code – Control orders – Limit on duration

The Committee recommends that, for the present time, there be no change to the maximum duration of a control order, namely a period of 12 months.

241. The Committee makes recommendations 33, 34 and 35 on the basis that they will have the effect of making some of the restrictions or prohibitions on controlled persons less onerous. It is desirable there should be a basic degree of normalcy in the life of a controlled person, wherever that is possible. These recommendations will ensure that there can be no suggestion in any circumstance that a residential order will result in the relocation of a person, that generally any curfew will be no greater in any case than 10 hours in any one day, and that a controlled person has, other than in an exceptional case, a basic right to have access to one mobile phone, one landline and one computer with access to the internet.

242. At this stage we have not thought it necessary to restrict the duration of an order (or orders) beyond the terms contained in the current legislation. The legislation makes it clear that, at present, a control order has a maximum life of 12 months. Where, for example, an interim order is confirmed, subsection 104.16(1)(d) makes it clear that a confirmed order must end within 12 months from the day when the interim order was made.158 However, the legislation states that these sections do not prevent the making of successive control orders in relation to the same person.159

243. The legislation is not explicit as to the basis on which a ‘successive control order’ could be made. Would it be sufficient, for example, for the AFP to simply place reliance on the same material that had grounded the first order? As we have noted, the ‘previous training’ basis for the imposition of a control order is problematic in this regard.

244. The UK legislation, as we have noted, has restricted the life of a TPIM order to two years. Any further order must be based on ‘new’ material; that is material that has arisen since the making of the original order.

245. The Committee has given careful consideration to a possible recommendation that would bring the Australian legislation into line with the UK position. However, we have decided that, at this stage, such a recommendation would be premature. First, the only Australian orders thus far have expired, strictly speaking, at the end of 12 months. No ‘successive’ orders have been sought. Secondly, there are presently statements in the UK context that may suggest the possibility of an extension to the two-year limit, or, at the least, other possible changes. The recent Algerian hostage crisis, and the international interventions in Africa, possibly presage further changes in the UK legislation. Thirdly, and more importantly, the Committee considers that a ‘wait and see’ approach is appropriate at this stage. The issue of duration is an important one, but all that is required at the present time is that a watchful eye be kept on the future use of control orders in Australia.

158 See subsection 104.5(1)(f), Criminal Code Act 1995 (Cth), for the maximum duration of an interim order.
159 See subsections 104.5(2) and 104.16(2), Criminal Code Act 1995 (Cth).
RECOMMENDATION 37: Criminal Code – Control orders – Terms of an interim control order

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

246. The Committee considers that this recommendation is one of considerable importance and fundamental to the protection of the rights of a person made the subject of a control order. The legislation presently provides that the court imposing the order must be “satisfied that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.”\textsuperscript{160} This recommendation addresses a different subject altogether. It should be an additional requirement throughout the legislation designed to ensure that the court which imposes a control order is satisfied that the specific obligations and restrictions to be imposed constitute the least interference with the person’s liberty, privacy and freedom of movement that is necessary in all the circumstances. It will require a court to consider alternatives to those that are initially proposed. It will be a matter for the Parliamentary Counsel and the legislature, if this recommendation is accepted, to craft the precise terminology and adapt Division 104 to accommodate this important requirement wherever it is necessary throughout the legislation.

RECOMMENDATION 38: Criminal Code – Control orders – Oversight by the Commonwealth Ombudsman

The Committee recommends that the Commonwealth Ombudsman be empowered specifically to provide general oversight of interim and confirmed control orders.

247. The Committee notes that under the present preventative detention legislation in Division 105 of the Criminal Code, there is a specific provision entitling a detained person to contact the Commonwealth Ombudsman and to make a complaint about his or her treatment while in detention.\textsuperscript{161} There is no equivalent section in Division 104, although, undoubtedly, a person who is subject to a control order may make a complaint to the Ombudsman. The Committee recommends that there be legislative recognition of the responsibility of the Ombudsman to investigate complaints made by a controlled person regarding the manner of implementation of the control order and its restrictions throughout its duration. The intention is to allow the Ombudsman to be given details of control orders so that he or she can more effectively consider any complaints against the AFP relating to the implementation or enforcement of the control conditions.

\textsuperscript{160} Subsection 104.4 (1) (d), Criminal Code Act 1995 (Cth).
\textsuperscript{161} Section 105.36, Criminal Code Act 1995 (Cth).
248. Preventative detention (or preventive detention as it ought to more accurately be described) is provided for in Division 105. As has been earlier noted, this aspect of the legislation was enacted following the London terrorist attacks in July 2005. Criticism has been made that the 2005 laws were “rushed through” with insufficient time for proper consideration and adequate parliamentary debate.\(^{162}\) The Attorney-General’s Department firmly resists this assertion, pointing to the intense and in-depth consideration given to the draft legislation in the period prior to its enactment.

249. In comparative law terms, preventative detention orders in Australia differ markedly from their counterpart in the UK legislation – ‘preventive warrantless arrests’ – although they each share the concept of an executive administrative order based on prevention and protection of the public.\(^ {163}\) The principal distinction is that preventative detention in the UK is essentially investigative and allows questioning in detention for a limited period of time of a person suspected of terrorism or of endangering security. By contrast, the Australian model does not, except as to formal matters, allow for questioning of the detained person during the period of detention. In that sense, the Australian system is intended to be purely protective.

250. The purposes of Division 105 are to enable a person to be detained for a short period of time to (a) prevent an imminent terrorist attack occurring or (b) preserve evidence of, or relating to, a recent terrorist attack. We shall briefly summarise the principal features of Division 105.\(^ {164}\)

251. First, a high threshold is set. The AFP member (and the issuing authority) must be satisfied of three key matters:

- the terrorist act is imminent (that is, within the next 14 days);
- making the order would substantially assist in preventing an attack; and
- detaining the person is reasonably necessary to achieve the preventative purpose.

252. Secondly, there is a limited duration for the life of a preventative detention order (48 hours maximum with a requirement to seek the approval of an issuing authority for an extension beyond the initial 24 hours).

253. Thirdly, only a senior AFP member may make an initial preventative detention order. This order is limited to a 24-hour period and must, subject to the national security legislation, set out a summary of the grounds on which the order is made.

254. Fourthly, where an order is sought to be made on the preservation of evidence basis, the AFP member (and the issuing authority) must be satisfied that a terrorist act has occurred within the last 28 days, that it is necessary to detain the person to preserve the evidence of or relating to the terrorist act, and that detention for the relevant period is reasonably necessary for the stipulated purpose.

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162 Submission of Dr Greg Carne to the COAG Review, p. 4.
163 See section 41, Terrorism Act 2000 (UK).
164 The full text of the Division appears in the Schedule to this Report.
255. Fifthly, an AFP member may apply to an issuing authority for a continued preventative detention order (in this instance, the issuing authority is a judge, a Federal magistrate, and or an AAT member (each acting in a personal capacity) or a retired judge of a Superior Court). The issuing authority may continue the initial order only after considering afresh the merits of the application and the statutory pre-requisites for the order being made. The period of time for detention (including any initial periods) must not exceed 48 hours. Once again, the extent of the provision of information to the detainee is subject to the restrictions imposed by the national security legislation.

256. Sixthly, the legislation makes provision for the grant of a prohibited contact order where such an order is reasonably necessary to prevent serious harm to a person, to avoid a risk to action being taken to prevent the occurrence of a terrorist attack, and to avoid other risks specified in the legislation. The order is required to name the person who is not to be contacted.

257. Seventhly, the legislation facilitates the release from detention of a person the subject of a preventative detention order to enable the person to be questioned and/or detained under Division 3 of the ASIO legislation. Additionally, provision is made for the release of a person from detention to enable, for example, the arrest and questioning of the person by police under the provisions of the *Crimes Act 1914* (Cth).

258. Eighthly, there are a number of provisions intended to operate beneficially towards a person detained in custody. These include the following:

- the obligation placed on the AFP member to apply for revocation of an order where he or she is satisfied that the grounds on which the order were made have ceased to exist;
- the obligation placed on the AFP member (who applies for a continuing preventative detention order) to place before the issuing authority any material that the subject of the proposed order has given the AFP member;
- the duty on the AFP member to advise the person detained under an interim or continued order of certain statutory matters, including the right to make representations to a senior AFP member, to make a complaint to the Ombudsman, and to contact a lawyer and family members;
- provisions requiring the AFP to notify the Commonwealth Ombudsman of the making and execution of orders to ensure that the Ombudsman has an oversight. (This enables the Ombudsman to decide whether or not to exercise his or her statutory powers of enquiry under the *Ombudsman Act 1976* (Cth));
- an express statutory obligation on persons administering the provisions to treat the subject of the order humanely at all times in detention, under penalty of criminal sanction for non-compliance;
- provision for the detainee to contact a lawyer; and
- provision for the engagement of an interpreter so that obligatory matters may be properly communicated to a detainee who has a poor grasp of English.

259. Ninthly, key review mechanisms include the following:

- the detainee’s right to apply, on the expiration of an order, to the Security Appeals Division of the Administrative Appeals Tribunal (“AAT”) to seek a merits review of decisions to make or extend an order. The AAT is invested with a discretion to award compensation in the event that it declares an order void;
• recognition of the detainee’s right to bring proceedings in court (on the expiration of an order) in relation to an issuing decision, or his or her treatment while in detention. This includes a right to seek judicial review in the original jurisdiction of the Federal Court (under section 39B of the *Judiciary Act 1903* (Cth)) or the High Court (under the Constitution), and a right to seek other general law remedies such as damages for unlawful confinement;

• section 105.52 confers a limited right of review of a Commonwealth order on grounds available in reviews of State and Territory orders. This right is available where a person has been the subject of a Commonwealth order, and a State or Territory order. If the person commences proceedings in a State or Territory Court in respect of the State or Territory order, section 105.52 provides that the same grounds of review and remedies are available for the Commonwealth order (provided that it has expired); and

• annual reporting requirements to Parliament.

260. Finally, the legislation provides, subject to any prohibited contact order, that a person being detained is entitled to contact family members (and certain other persons) to inform them that he or she is safe but not able to be contacted for the time being. There is also a provision for the person to contact the Commonwealth Ombudsman to make a complaint. The contacts with both family members and a lawyer, however, are to be monitored by a police officer exercising authority under the preventative detention order. Communications between the person and his or her lawyer are not admissible in evidence against the person in any proceedings in court and the law of legal professional privilege is specifically preserved.

**State and Territory Legislation**

261. To this point, the Committee has focused on the provisions of Division 105, *Criminal Code*. This, however, tells only part of the story. Fundamentally, there is and has been since 2005, a concern that the preventative detention regime enacted by the Commonwealth might be held to be unconstitutional. The limited duration of the detention period, the use of judges in a retired or personal capacity and the emphasis on the ‘preventive’ aspect of the detention highlight the concern – a legitimate one we consider – that the legislation might be considered punitive in nature and that this and other constitutional issues might be held to undermine its legitimacy. 165

262. It was, the Committee infers, with these matters in mind, that agreement was reached at the COAG meeting on 27 September 2005 to establish a nationally consistent regime for preventative detention orders. It will be immediately apparent that there is a singular difference between State and Federal preventative detention orders. This relates to the maximum length of detention that may be imposed. This difference is essentially a recognition that the State and Territory legislation was designed to complement Division 105; and it is a recognition that, for constitutional reasons, the Commonwealth could not safely enact legislation which provided for detention for up to 14 days. That complementarity is also reflected in section 105.52 referred to earlier, and in the sections which restrict the issue of an initial and continuing detention order under Division 105 where a State or Territory detention is already in force. The overall consequence is that the complementary detention systems effectively permit detention, when they operate together, for a period that may last up to 14 days.

165 The full range of potential arguments made be seen in the submission and accompanying paper by Dr James Renwick SC. See generally the submission of Dr James Renwick SC to the COAG Review.
State and Territory Preventative Detention

263. As a consequence of the foregoing, it is appropriate to say something at this point about the State and Territory legislation dealing with preventative detention. This is particularly so for two reasons: first, obviously enough, the Committee’s task is, in any event, to review the State and Territory detention legislation. (We have not, because of the number of State and Territory statutes and their textual length, included the text of these in the Schedule attached to this report). Secondly, since the State and Territory legislation is rightly seen as part of a complementary and comprehensive scheme intended to provide constitutionally compatible preventative detention, quite separate from the ordinary processes of the criminal law, it should be considered as part and parcel of our review of the Commonwealth scheme represented by Division 105. However, the Committee intends to do no more than sketch briefly the overall features of the State and Territory legislation. Importantly, the following features may be noted:

- The various legislative schemes in place across Australia share many common features. However, as the Law Council submission notes, there are differences between the jurisdictions, particularly in the area of safeguards.

- Preventative detention orders under the State and Territory provisions can be obtained by police officers following an application to an issuing authority. This can be a judicial officer or, in some cases, a senior police officer. The order is designed to prevent an imminent terrorist attack or to preserve evidence of a terrorist attack that has occurred. For example, in Tasmania and Victoria, urgent orders of up to 24 hours detention may be issued by senior police officers. In Queensland, South Australia, Western Australia and the Northern Territory, urgent orders allowing for up to 24 hours detention may be issued by senior police but further orders enabling up to 14 days detention must be issued by judges and, but for South Australia, retired judges appointed consensually to the role of issuing authority. In New South Wales and the ACT, interim orders of up to 48 hours may be issued by the Supreme Court ex parte, whereas orders extending detention up to 14 days may only be issued by the court following a full hearing.

- The State and Territory schemes also empower the relevant Supreme Court to make a prohibited contact order to prevent a detained person contacting specified persons. They also establish a system of monitoring client-lawyer communications.

- The use of the preventative detention powers are generally subject to reporting requirements and oversight by the Ombudsman in each State or Territory.

- In terms of safeguards, the New South Wales legislation, for example, requires the Supreme Court to confirm orders; detainees are entitled to give evidence before a hearing of the court and to apply to have an order revoked. The ACT legislation is suggested as being “model legislation”. It contains more stringent requirements than do other legislative schemes for the issue of preventative detention orders. Where a person is sought to be detained it must be shown that the order is “the least restrictive way of preventing the terrorist act”. Where an order is sought to preserve evidence, it must be shown that detaining the person is the “only effective way of preserving the evidence”. In fact, the ACT legislation appears to reflect the obligation to adhere to human rights standards more rigorously than the legislation of the other States and Territories.

166 Submission of the Law Council to the COAG Review, p. 47.
167 Submission of Dr Greg Carne to the COAG Review, p. 3.
• Some jurisdictions (such as the ACT and Queensland) presently provide a role for a Public Interest Monitor (“PIM”) to be present at the hearing of the application for a detention order, to ask questions of anyone giving evidence to the court and to make any submissions to the court. Victoria has recently appointed a Public Interest Monitor. Under the Victorian legislation, an applicant for a preventative detention order must notify the PIM of the application. As in the ACT and Queensland, the Victorian PIM is empowered to contest the order at the hearing of the application for a PDO.

RECOMMENDATION 39: Criminal Code – Preventative Detention

The Committee recommends, by majority, that the Commonwealth, State and Territory ‘preventative detention’ legislation be repealed. If any form of preventive detention were to be retained, it would require a complete restructuring of the legislation at Commonwealth and State/Territory level, a process which, in the view of the majority of the Committee, may further reduce its operational effectiveness.

264. The preventative detention regime, comprising Federal, State and Territory laws may, when viewed as a whole, be seen as a comprehensive protective measure enabling detention of a person without charge for a maximum period of 14 days where a terrorist act is thought to be imminent and the making of an order (or orders) would ‘substantially assist’ in preventing an attack. Moreover, the various schemes, recognising perhaps the potential shortcomings of detention without questioning, enable the suspension or cessation of detention to permit conventional arrest and questioning by police, or detention and or questioning (intelligence-based) under the ASIO legislation. However, it is not without significance to note that the regime has remained unused since its introduction at both Commonwealth and State level.

265. Two broad points, perhaps irreconcilable, may be made: first, the prevention of an imminent and serious terrorist attack by means of executive detention, though an extreme measure, can, at least in an emergency, be seen as a genuinely valuable protective measure. Certainly, the community under threat might think it so. Secondly, the concept of police officers detaining persons ‘incommunicado’ without charge for up to 14 days, in other than the most extreme circumstances, might be thought to be unacceptable in a liberal democracy. There are many in the community who would regard detention of this kind as quite inappropriate. To some, it might call to mind the sudden and unexplained ‘disappearances’ of citizens last century during the fearful rule of discredited totalitarian regimes. It is not surprising therefore that, in these circumstances, the Committee has received forceful submissions suggesting that the preventative detention legislation should be repealed or that, at the very least, a wide range of additional safeguards should be included. On the other hand, recognising the force of the first point we have made, the Attorney-General’s Department and the AFP, especially, see an important value in retaining Division 105, while accepting at the same time that improvements of various kinds could be made to the schemes at both Federal and State level.

266. One common theme, inherent in the Police response at both State and Federal level, is the operationally unsatisfactory situation arising from the inability to interrogate a detained person. The Australian Government, however, no doubt conscious of the possibility of a constitutional and human rights backlash, has to the present time, set its face against a relaxation of the

168 See Public Interest Monitor Act 2011 (Vic).
‘no questioning’ aspect of this legislation and resolutely stands in opposition to any major change in this regard.\(^\text{169}\) (There is a perhaps an unintended contradictory aspect to this resolute but laudatory attitude: the legislation, as has been noted, does not preclude, and indeed facilitates, the cessation of preventative detention to permit both ASIO and police interrogation of a suspect.)

267. Ultimately, the Committee has determined, by majority, that it should recommend the repeal of both Commonwealth and State and Territory legislation in relation to preventative detention. This, it must be conceded, has not been an easy decision to reach, especially having regard to the force of the minority view. We would wish first to say something about the minority position before expressing the reasons for the majority conclusion.

268. There is, the Committee accepts, a genuine concern at Police and Government level that a terrorist attack may be launched in Australia. Any such attack is thought more likely to be more home-grown and not on a scale of the 9/11 attacks. But nonetheless, a serious attack with fatal consequences is seen as a genuine possibility, not merely a theoretical one. In such a situation, assuming that reliable intelligence/information pinpointed the timing of an attack but could not reveal the precise identity of the attacker, would there not be a value in being able to detain persons associated with the plot for a relatively brief period of time in an effort to disrupt the attack? Again, if the identity of the attacker were known but the evidence fell short of permitting his or her arrest and successful prosecution, would there not be a value in taking the suspect out of action for a brief period? Dr Renwick SC, in his submission, suggested that the availability of such a power, and its use, may have saved lives, and protected the public in the London bombing situation; or at least it may have preserved evidence and assisted investigation more effectively.\(^\text{170}\) As we have intimated, the majority of the Committee acknowledges the force of the arguments demonstrated by these examples. The Committee acknowledges that it is a bold step to deprive those entrusted with the community’s protection of a measure that experienced members of the enforcement agencies consider an important and potentially valuable part of the legislative framework open to them to address terrorist activity. We accept, as a general proposition, that the unpredictability of serious terrorist action requires a high level of preparedness and a strong legislative framework to support investigations and to maintain public confidence in the ability of policing organisations to investigate and successfully prosecute offences. We also accept that, in the absence of a preventive detention scheme, arrest without reasonable prospects of conviction may expose the police to criticism, perhaps a good deal of criticism.

269. The Committee’s task, however, is to consider whether the laws under review are necessary and effective. While we do not place much store in the argument that the detention laws have not been used and are therefore unnecessary, the majority of the Committee is persuaded by a singular and compelling feature revealed in the submissions made to us. While these submissions do not ask for repeal of the detention legislation, three of the police submissions (Victoria, South Australia and Western Australia) have unequivocally suggested that, from an operational perspective, they would be unlikely to use the preventative detention regime.

270. Various reasons have been provided to the Committee as to why this is so. First, the complexities of preparing an initial detention application, compliance with the law and securing an initial order was thought by some to be unduly onerous and cumbersome. Secondly, the ‘thresholds’

\(^{169}\) For example, see Oral Submission of the Attorney-General’s Department to the COAG Review (Public Hearing, Canberra, 14 November 2012), transcript pp. 22–25.

\(^{170}\) Submission of Dr James Renwick SC to the COAG Review, pp. 3–4.
were, to others impractical. (What if, for example, the available intelligence suggested an attack in the next few weeks rather than within 14 days? What if the date of the attack was known as ‘soon’ but nevertheless uncertain?). Thirdly, there was overall agreement that the inability to question a detained suspect, even if he or she were willing to give information, was virtually fatal to operational effectiveness. Finally, the view was expressed that, at a practical level, if there were sufficient material to found a detention order, there would be, more likely than not, sufficient material to warrant conventional arrest and charge. State enforcement agencies, it might be said, were clearly more comfortable with this traditional procedure and much less comfortable with the complexities of the detention procedure.

271. Where a suspected person had been arrested and charged, there would also be the opportunity to question the person while in custody. The high level – exceptional circumstances – for the grant of bail would ensure, in most cases, that the suspected person would remain in custody. Hence, the protective and preventative aspect of the legislation would be achieved by traditional methods of arrest, interrogation and charge.

272. The majority of the Committee concludes, based on these powerful considerations, that the preventative detention scheme is, as presently structured, neither effective nor necessary. A scheme that is not likely to be used could scarcely be regarded as effective; nor could it, for the same reason, be considered necessary. While we are conscious that the Federal/State scheme could be restructured, the majority consider that the additional safeguards that would need to be built into the scheme (to emulate, for example, the ACT model or a substantial part of it) would simply diminish the operational effectiveness of the scheme and lead to an even greater level of reluctance and a determination on the part of police not to use the legislation, even in an emergency situation.

273. The Committee considers that the position in relation to the continuance of Division 105 is well highlighted by part of the South Australian Government and Police submission to the Review:

“Given these constraints and weaknesses, existing law enforcement powers in South Australia would almost certainly be used ahead of the preventative detention legislation... As noted above the preventative detention legislation is complex, restrictive and potentially ineffective... While the special powers are potentially powerful, it is South Australia’s position that the legislation is not usable in its current form and therefore not effective for law enforcement officers. We note the legislation has never been used in any jurisdiction, including those which have disrupted terrorist groups.”

274. Although the Committee’s task does not require it to consider the ASIO Questioning and Detention Warrant System, we are certainly aware of its existence. The presence of those extensive powers suggests, should they remain in force, a further reason why the preventive detention legislation is, in its current format, not presently needed.

275. The Committee does not consider it necessary to come to a conclusion about the more difficult question as to whether the preventative detention legislation infringes Australia’s obligations at an international human rights level. This is a question that is specifically the province of the INSLM, Bret Walker SC. It is only indirectly involved in our review. While we acknowledge the force of the arguments put forward by civil liberties groups and academics,
we also acknowledge the Government’s assurances that it believes that Division 105 does not breach Australia’s international obligations. As with the argument suggesting that the preventative detention legislation may be unconstitutional, so too the argument concerning possible infringement of human rights legislation is, in the Committee’s view, best left to the courts for final determination.

276. The Committee’s recommendation is, by majority, that Division 105 should be repealed, as should the complementary State and Territory legislation dealing with preventative detention.
Recommendation 40: Administrative Decisions (Judicial Review) Act 1977 (Cth) – Schedule 1 Exemptions from review

The Committee recommends that paragraph (dab) be retained. If preventative detention remains, the Committee recommends that paragraph (dac) be removed.

277. The Committee has been tasked with considering the utility of particular exemptions from review under Schedule 1 of the Administrative Decisions (Judicial Review) Act 1977 (“ADJR Act”). These particular exemptions are in paragraphs (dab) and (dac) and were brought into the ADJR Act by the Anti-Terrorism Act (No 2) 2005 (Cth). Paragraph (dab) excludes from review decisions made under section 104.2 of the Criminal Code (a provision concerning the Attorney-General’s issue of consent in seeking control orders from a court). Paragraph (dac) exempts from review under the ADJR Act all decisions made under Division 105 of the Criminal Code (a Division concerning preventative detentions orders generally).

278. The Explanatory Memorandum to the amending legislation states the exempt decisions represent requirements that are not suitable for review in the context of the security environment.\(^\text{172}\) It further indicates that these exemptions are consistent with pre-existing exemptions for decisions made in relation to criminal proceedings, and for decisions made in relation to warrants issued under the Australian Security Intelligence Organisation Act 1979 (Cth) for intelligence gathering purposes.

279. The exemptions in paragraphs (dab) and (dac) of Schedule 1 were examined in the recent Administrative Review Council’s Inquiry into Judicial Review in Australia.\(^\text{173}\) In its report, the Council recommended the retention of the exemption in paragraph (dab) (relating to control orders) and the removal of the exemption in paragraph (dac) (relating to preventative detention orders).\(^\text{174}\) The Council’s reasoning in respect of (dab) was to the effect that the issuing process for control orders incorporates a chain of decisions in which subsequent decision-makers are required to consider the previous decision or decisions, with the final decision made by a court. The Council concluded that ADJR Act review of the Attorney-General’s decision under section 104.2 of the Criminal Code is unnecessary as it would interfere with another court process.\(^\text{175}\)

280. In respect of paragraph (dac), the Council considered that “there seems to be limited utility” in exempting decisions under Division 105 from ADJR Act review.\(^\text{176}\) The Council’s reasoning appears to be informed by a view that, “as a general proposition, administrative decisions made in relation to criminal investigation processes where proceedings have not yet commenced are not excluded from review”.\(^\text{177}\)

\(^{172}\) Explanatory Memorandum, Anti-terrorism Bill (No. 2) 2005 (Cth), pp. 70–71.
\(^{174}\) ARC Report, Recommendations B10 and B11.
\(^{175}\) ARC Report, pp. 208–209.
281. The Committee sees no reason to depart from the recommendation of the ARC that paragraph (dab) be retained. Similarly, if preventative detention remains,\textsuperscript{178} the Committee considers that paragraph (dac) should be removed. We would add the following to the reasoning of the ARC Report. The availability of review under the \textit{ADJR Act} gives an aggrieved person, appropriately in the Committee’s view, the ability to apply for a statement of reasons from the decision-maker.\textsuperscript{179} In practical terms, the re-instatement of a right of review will have the capacity to provide a person in detention with a statement of reasons, albeit, in some cases, a redacted one. While we accept that there may be sensitive national security information concerned, a redacted statement may still be of value. In the absence of review under the \textit{ADJR Act}, it remains open for an applicant to seek ‘common law’ judicial review in the original jurisdiction of a State or Territory Supreme Court or the Federal Court of Australia\textsuperscript{180} once the Commonwealth order has expired.\textsuperscript{181, 182}

\textsuperscript{178} Noting the Committee’s recommendation that it be repealed.
\textsuperscript{179} Section 13, \textit{ADJR Act}.
\textsuperscript{180} In the case of the Federal Court of Australia, this power is conferred by the section 39B, \textit{Judiciary Act 1903} (Cth).
\textsuperscript{181} The fact that judicial review can only take place after the Commonwealth order is expired is a result of the privative clause in 105.51(2). Note, however, that it is probable State courts would retain jurisdiction where there is jurisdictional error, see \textit{Kirk v Industrial Relations Commission of NSW & WorkCover NSW} (2010) 239 CLR 531.
\textsuperscript{182} If original jurisdiction review were sought, an applicant could have the detention quashed or have the decision remitted to a decision-maker with guidance from the court for re-making.
282. Section 6 of the Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth) criminalises entry into foreign states with the intention of engaging in hostile activities. The core of the offence, set out in subsection (1), is that a person shall not:

(a) enter a foreign State with the intent to engage in a hostile activity in the foreign state; or
(b) engage in a hostile activity in a foreign State.

283. The penalty for either offence is imprisonment for 20 years. For the purposes of subsection (1), engaging in a hostile activity in a foreign State consists of doing an act with the intention of achieving any one or more of the following objectives, set out in subsection (3):

(a) the overthrow by force or violence of the government of the foreign State or of a part of the foreign state;

(aa) engaging in armed hostilities in the foreign State;

(b) causing by force or violence the public in a foreign State to be in fear of suffering death or personal injury;

(c) causing the death of, or bodily injury to, a person who:
   (i) is the head of state of the foreign State; or
   (ii) holds, or performs any of the duties of, a public office of the foreign State or of a part of the foreign State; or

(d) unlawfully destroying or damaging any real or personal property belonging to the government of the foreign State or of a part of the foreign State.

284. Subsection (2) imposes a requirement for a nexus to Australia on a prospective defendant. That is, a person cannot be taken to have committed an offence against this section unless at the time of the doing of the act that is alleged to constitute the offence, the person either:

(i) was an Australian citizen, or, not being an Australian citizen, was ordinarily resident in Australia; or

(ii) the person was present in Australia at any time before the doing of that act and, at any time when the person was so present, his or her presence was for a purpose connected with that act, or for purposes that included such a purpose.

285. Subsection (4)(a) exempts from liability under this section any person serving in any capacity in or with the armed forces of the government of a foreign State. Subsection (4)(b) exempts service in any capacity in or with any other armed force in respect of which a declaration by the Minister under subsection 9(2) is in force. Under subsection 9(2) of the Act, the Minister may declare by way of instrument (and publication in the Gazette) that it is in the interests of the defence or international relations of Australia to permit the recruitment in Australia, either generally or in particular circumstances or subject to specified conditions, of persons to serve in or with a specified armed force.
286. Subsections (5) and (6) void the exemption under subsection (4)(a) in certain circumstances. Under subsection (5), paragraph (4)(a) does not apply if a person enters a foreign State with intent to engage in a hostile activity in the foreign State while in or with an organisation and if the organisation is a proscribed organisation at the time of entry. Under subsection (6), paragraph (4)(a) does not apply if the person actually engages in a hostile activity in a foreign State while in or with an organisation and the organisation is a proscribed organisation at the time when the person engages in a hostile activity.

287. Section 6 was not reviewed by the Sheller Review nor by the PJCIS in their 2006 reviews. Since its enactment, the present review is the first time the legislation has been subject to non-Parliamentary scrutiny. Indeed, given the evidence indicating an increasing number of Australians travelling abroad to engage in hostile activity, the Government may wish to consider undertaking a holistic review of the legislation to ensure it keeps pace with the changing nature of conflict. The confinement of review for present purposes to section 6 seems attributable to the fact that section 1 of Schedule 1 of the Anti-terrorism Act (No 2) 2005 (Cth) amended the provision in subsection (7) to attenuate the meaning of a proscribed organisation for the purposes of the Act.

288. In his submission, Professor Saul criticises the operation of subsection 4(b). It was argued that it should not be an offence for an Australian to join a rebel movement overseas, unless that group has been designated by Ministerial declaration. Informing this recommendation is the admonition, as Professor Saul puts it:

"Nothing inherent in an Australian's citizenship or duty of loyalty to Australia implies that good Australia citizens should sit idly by while foreigners are butchered by their governments, in circumstances where the international community has failed to act effectively through the United Nations, humanitarian intervention, or other means."

289. Yet, equally, the involvement of Australians with foreign military movements can render those Australians a threat to Australian citizens or interests abroad. The difficulty lies in the fact that the righteousness of any struggle is an inherently political matter. As it has been said, “one man’s terrorist is another man’s freedom fighter”. The presumptive criminalisation of involvement – subject to a Minister’s declaration under section 9(2) of the Act – seems to the Committee to be the most appropriate way of properly reposing this assessment in the Executive branch of government. The potential threat to Australians posed by trained fighters supports initially criminalising any such conduct, as does the capacity of the CDPP to account for the public interest in commencing proceedings against any individual.

290. In its submission to the Review, the CDPP argued that section 6 would not apply to conduct by an Australian citizen who travels to a foreign country for the purpose of training. It was argued in the following terms:

“The section requires evidence of ‘armed hostilities’, that is fight on the battlefield as opposed to mere military training. Unless it can be established that the organisation with which the person trained was a terrorist organisation in the Criminal Code definition, no offence would be committed where an Australian citizen trains with an insurgent group overseas.

183 Submission of Professor Ben Saul to the COAG Review, pp. 9–10.
184 Submission of the CDPP to the COAG Review, pp. 6–7.
Given the number of armed conflicts in a number of countries in the Middle East and Africa which are attracting support from some Australians, consideration may be given to reviewing the Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth) to include military training in some circumstances.”

291. There is an argument that military training would already be captured by the operation of subsection (3), enumerating, as it does, a number of objectives and criminalising the doing of acts undertaken with the intention of achieving those objectives. The success of this argument would, however, turn largely on evidence available in each case. As a matter of legal principle, evidence that a person was intending to enter a foreign state to engage in military training, or did in fact engage in military training, would not of itself be sufficient to establish one of the prescribed intents in subsection 6(3). Indeed, it may be the case that the intention is to engage in a hostile act in a foreign country, or to use that training for a purpose connected with a terrorist act in Australia or some other purpose. Unless there was sufficient evidence from which the person’s prescribed intention in undertaking that training could be established to the requisite standard, no offence would be committed against Section 6 of the Act.

292. Attracting a penalty of ten years imprisonment, sections 7(1)(c) and 7(1)(d) of the Act state:

(1) A person shall not, whether within or outside Australia:

... 

(c) train or drill or participate in training or drilling, or be present at a meeting or assembly of persons with intent to train or drill or to participate in training or drilling, any other person in the use of arms or explosives, or the practice of military exercises, movements or evolutions, with the intention of committing an offence against section 6;

(d) allow himself or herself to be trained or drilled, or be present at a meeting or assembly of persons with intent to train or drill or to participate in training or drilling, any other person in the use of arms or explosives, or the practice of military exercises, movements or evolutions, with the intention of preparing that other person to commit an offence against section 6.

293. With the existence of these offences, as well as the training offences in sections 101.2 and 102.5 of the Criminal Code, any amendment to the objectives enumerated in subsection 6(3) to account for military training risks unnecessary duplication. Both sections 101.1 and 102.5 have an extended geographical reach under section 15.4 of the Criminal Code. It would also broaden the ambit of the section considerably by criminalising acts undertaken with the intention of ‘achieving’ that training. The CDPP has suggested in communications with the Review Committee that many of the insurgent groups that appear to be attracting Australians are not proscribed as terrorist organisations. It was also said that in such cases it might be unclear as to which group is actually providing the training. In such situations, it remains open to the prosecution to prove that the group is a terrorist organisation within paragraph (a) of the definition in section 102.1. While it may be difficult to obtain admissible evidence about the nature, structure, objectives, purpose and activities of the organisation to establish this, that difficulty alone does not suffice to widen the scope of conduct criminalised.

185 See subsection 101.2(4), and section 102.9, Criminal Code Act 1995 (Cth).
294. A further submission was made in respect of section 7 of the Act. The CDPP argued that no offence will have been committed where, an Australian citizen travels to a foreign country to engage in conduct of a kind enumerated in subsection 7(1) (paragraphs (a) – (h)), with the intention that an offence against section 6 is committed by another person, absent a requisite connection between that other person and Australia. The AFP advanced a similar submission in respect of section 7, arguing that it is not clear whether the offence would apply if training was provided to a non-Australian, particularly if that training was provided outside Australia.

295. However, the CDPP through further correspondence with the Committee withdrew this concern. In particular, it was noted that subsection 7(1A) provides that the commission of an offence against section 6 is a reference to the doing of an act that would constitute, or would, but for subsection 6(2), constitute an offence against section 6. Subsection 7(1A) was inserted into the Act by the Crimes Legislation Amendment Act 1987 (Cth). The Explanatory Memorandum notes that a purpose of the amendment was to remove the requirement that in establishing an offence under section 7 by a person with a requisite connection to Australia, it is necessary to show that an act contravening section 6 was also done by a person satisfying the required nexus to Australia.

296. In the Committee’s view, the amendment appears to address this very issue. In a prosecution where the conduct alleged is that an Australian did an act under section 7 with the intention of assisting another person to commit an offence against section 6, subsection 7(1A) has the effect that subsection 6(2) does not apply to that other person and therefore the person nominally contravening section 6 does not necessarily have to satisfy a connection to Australia.

RECOMMENDATION 41: Section 6, Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth) – Hostile activities in foreign States

The Committee recommends an amendment to subsection 6(1)(a) to remove the need to prove an intention to engage in hostile activity in a particular foreign State.

297. In its submission, the AFP observed that an increasing number of Australians are travelling overseas with the intention of engaging in hostile activity. It noted that in such cases, individuals may have a general desire or intention to fight for a ‘cause’, but may not have formed a sufficient intention as to a particular country in which to pursue a fight for the ‘cause’. The AFP expressed concern that, in such circumstances, the prosecution would not be able to prove either that the person intended to engage in hostile activity in the State he or she entered, or that he or she intended to engage in hostile activity in a particular foreign State. The AFP suggested that consideration be given to amending the offence in section 6 so that it applied to situations in which a person intends to travel overseas in order to engage in hostile activity in a foreign State, without requiring the prosecution prove the specific foreign State in which the hostile activity was intended to occur.

298. Initially the Committee believed that removing the requirement that the prosecution need establish an intention to fight in a specific foreign State would undesirably broaden the scope of liability under section 6. However, after deliberation, the Committee accepted that there is scope for

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186 Submission of the CDPP to the COAG Review, p. 7.
187 Submission of the AFP to the COAG Review, p. 13.
189 Submission of the AFP to the COAG Review, p. 13.
amendment. In most cases, it is difficult to envisage how an intention to engage in hostile activity overseas could be proven without the prosecution establishing some nexus with a specified foreign State. However, there is evidence to suggest that there are individuals, radicalised by a militant ideology, who are desirous of contributing to terrorist activities in various theatres of violence in North Africa and the Middle East. Against this background, investigating agencies are handicapped by the need in the current legislation to prove a particular foreign State as the target destination of hostile activity. It may be that the individual concerned transits in a third country to receive guidance as to his or her ultimate destination. It may even be the case that this individual’s hostile objective is first contemplated at this point.

299. The Act does not allow investigating Australian agencies and the CDPP to intervene at an appropriately preparatory stage. The reality is that evidence illuminating a particular target in a particular foreign State in a relatively porous region may only become apparent at a stage where Australian agencies are forced to rely on collaboration with investigating agencies in these same countries. In these circumstances, it is preferable that where there exists sufficient evidence of an individual’s intention to engage in hostile activity overseas, Australian criminal law can capably intervene prior to that individual’s departure from Australia.

300. It should be noted that section 10 of the Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth) requires the Attorney-General to consent to any prosecutions brought under the Act. In the Committee’s view, an amendment in the terms we have suggested does not protect violent or repressive States from legitimate violence resistance. Rather, it properly reposes the political question of the so-called ‘righteousness’ of any such resistance in the executive branch of government.
RECOMMENDATION 42: Section 16, Financial Transaction Reports Act 1988 (Cth)

The Committee does not recommend any change to this provision.

301. Section 16 of the Financial Transaction Reports Act 1988 (Cth) (“FTR Act”) falls within the Committee’s terms of reference. Section 4 of Schedule 3 of the Anti-Terrorism Act (No 2) 2005 (Cth) amended section 16 of the FTR Act by inserting a new subsection 6(a). That amendment defined ‘financing of terrorism offence’ for the purposes of the FTR Act to be an offence under section 102.6 or Division 103 of the Criminal Code. In general terms, section 16 concerns the obligation upon ‘cash dealers’ to report suspect transactions to the Australian Transaction Reports and Analysis Centre (“AUSTRAC”). AUSTRAC is Australia’s anti-money laundering and counter-terrorism financing regulator and specialist financial intelligence unit.

302. Under subsection 16(1) of the FTR Act, a cash dealer, party to a transaction, if suspicious on reasonable grounds that information he or she has may be relevant to the investigation or prosecution of an offence against a law of the Commonwealth or of a territory, must prepare a report of the transaction and communicate the information contained in that report to the CEO of AUSTRAC. Subsection (1A) more specifically obliges the cash dealer to report to AUSTRAC where he or she has reasonable grounds to suspect that the transaction is preparatory to the commission of the financing of terrorism offence, or relevant to the investigation of, or prosecution of a person for, a financing of terrorism offence. For the purposes of the Act, ‘cash dealer’ is defined in section 3 to be the following:

cash dealer means:

(a) a financial institution;
(b) a body corporate that is, or, if it had been incorporated in Australia, would be, a financial corporation within the meaning of paragraph 51(xx) of the Constitution;
(c) an insurer or an insurance intermediary;
(d) a financial services licensee (as defined by section 761A of the Corporations Act 2001) whose licence covers either or both of the following:
   (i) dealing in securities (as defined by subsection 92(1) of the Corporations Act 2001);
   (ii) dealing in derivatives (as defined by section 761A of the Corporations Act 2001);
(f) a Registrar or Deputy Registrar of a Registry established under section 14 of the Commonwealth Inscribed Stock Act 1911;
(g) a trustee or manager of a unit trust;
(h) a person who carries on a business of issuing, selling or redeeming travellers cheques, money orders or similar instruments;
(i) a person who is a bullion seller.
(k) a person (other than a financial institution or a real estate agent acting in the ordinary course of real estate business) who carries on a business of:

(i) collecting currency, and holding currency collected, on behalf of other persons; or
(ii) exchanging one currency for another, or converting currency into prescribed commercial instruments, on behalf of other persons; or
(iii) remitting or transferring currency or prescribed commercial instruments, or making electronic funds transfers, into or out of Australia on behalf of other persons or arranging for such remittance or transfer; or
(iv) preparing payrolls on behalf of other persons in whole or in part from currency collected; or
(v) delivering currency (including payrolls);

(l) a person (other than a financial institution or a real estate agent acting in the ordinary course of real estate business) who carries on a business in Australia of:

(i) on behalf of other persons, arranging for funds to be made available outside Australia to those persons or others; or
(ii) on behalf of persons outside Australia, making funds available, or arranging for funds to be made available, in Australia to those persons or others;

(m) a person who carries on a business of operating a gambling house or casino; and

(n) a bookmaker, including a totalisator agency board and any other person who operates a totalisator betting service.

303. AUSTRAC may request more information of the cash dealer, and the cash dealer must comply with such requests. Subsections (4A) and (4B) exempt a cash dealer from obligations under subsections (1) and (1A). Under subsection (4A), a cash dealer is not obliged to comply with subsections (1) and (1A) if the cash dealer is a reporting entity, the transaction occurs after 11 March 2010, and the transaction is a ‘designated service transaction’ (within the meaning of that term in the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)). Under subsection (4B), a cash dealer is exempt if he or she complies with section 41 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth), which imposes a similar reporting requirement to AUSTRAC premised on reasonable suspicion of a broader range of criminal activities.

304. The fact that a suspicion has been formed and reported to AUSTRAC must not be disclosed to anyone else. Nor must any other information from which these matters could be reasonably inferred be disclosed. Cash dealers must observe the same confidentiality in respect of further information provided to AUSTRAC by request under subsection (4). Contravention of these obligations of confidentiality is punishable by imprisonment for not more than a two-year period. It is also notable that, by operation of subsection (5D), the reports communicated to AUSTRAC (or documents purporting to set out the information contained in such reports) are not admissible in any legal proceeding (save prosecution for an offence of providing false, misleading or incomplete information in communications to AUSTRAC under subsections 29(1) and 30(1)).

190 Subsection 16(4), Financial Transaction Reports Act 1988 (Cth).
191 Subsection 16(5A)(a) and 16(5A)(b), Financial Transaction Reports Act 1988 (Cth).
193 See subsection 16(5AA), Financial Transaction Reports Act 1988 (Cth).
194 Subsection 16(5B), Financial Transaction Reports Act 1988 (Cth).
305. The Committee did not receive any submissions – whether written or oral – on this provision. The AFP obliquely raised a matter to which the provision relates in their submission. It said:\textsuperscript{195}

“...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.”

306. That point was advanced in relation to section 3ZQN of the \textit{Crimes Act 1914} (Cth), a provision the AFP said is ‘highly relevant’ to the operational utility of the financing of terrorism offences. The Committee does not wish to comment on the merits of the AFP’s submission in relation to section 3ZQN as the provision is not within its terms of reference. The AFP submission is useful however in substantiating the Committee’s view that a continuing high level of cooperation between agencies tasked with investigating suspicious financial transactions and their connection to crime is beneficial. This cooperation does not necessarily require a legislative basis, but could usefully be pursued through greater operational harmony. Beyond this, the Committee does not recommend any change to section 16.

\textsuperscript{195} Submission of the AFP to the COAG Review, p. 15.
307. Sections 3C and 3D, and Division 3A of the *Crimes Act 1914* fall within the present Review’s terms of reference. Part 1AA, Division 3A was introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth), and was said to provide a “new regime of stop, question, search and seize powers that will be exercisable at airports and other Commonwealth places to prevent or respond to terrorism”.\(^{196}\) Division 3A concerns police powers in relation to terrorist acts and terrorism offences. Sections 3C and 3D respectively concern the interpretation and application of Part 1AA.

308. The operational imperatives for provisions of this nature were recognised by the Senate Legal and Constitutional Affairs Committee in its 2005 Inquiry into the amending legislation.\(^ {197}\) The Committee observed the importance of the ‘strong police capabilities’ provided for in the legislation to ‘respond to, and combat, the threat of terrorism’.

309. As expressed in section 3UB, a police officer may exercise the powers under subdivision B if:

(a) the person is in a Commonwealth place (other than a prescribed security zone) and the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit, a terrorist act; or

(b) the person is in a Commonwealth place in a prescribed security zone.

310. A ‘Commonwealth place’ is defined (in section 3UA) to be a Commonwealth place within the meaning of the *Commonwealth Places (Application of Laws) Act 1970* (Cth). A ‘Commonwealth place’ for the purposes of that Act is a place (not being the seat of government) with respect to which the Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth. Traditionally, this has encompassed places such as airports, defence establishments, departmental premises and court buildings. A ‘prescribed security zone’ is defined in section 3UA to be a zone in respect of which a declaration under section 3UJ is in force. Under section 3UJ, a Minister may declare a ‘Commonwealth place’ to be a ‘prescribed security zone’ if he or she considers that a declaration would assist:

(a) in preventing a terrorist act occurring; or

(b) in responding to a terrorist act that has occurred.

311. The substance of the powers afforded are contained within subdivision B in sections 3UC, 3UD, 3UE and 3UEA. Section 3UC allows a police officer to request the following details from a person:

(a) the person’s name;

(b) the person’s residential address;

(c) the person’s reason for being in that particular Commonwealth place;

(d) evidence of the person’s identity.

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Failure to comply with a police request under section 3UC is a criminal offence, carrying a fine of 20 penalty units.

312. Section 3UD concerns ‘Stop and Search’ powers. A police officer may stop and detain a person for the purpose of conducting a search for a terrorism related item. The permissible searches are set out in subsection 3UD(1)(b):

(i) an ordinary search or a frisk search of the person;
(ii) a search of anything that is, or that the officer suspects on reasonable grounds to be, under the person’s immediate control;
(iii) a search of any vehicle that is operated or occupied by the person;
(iv) a search of anything that the person has, or that the officer suspects on reasonable grounds that the person has, brought into the Commonwealth place.

313. A police officer conducting a search of a person under s 3UD must not unreasonably or unnecessarily use more force or subject the person to greater indignity than required to conduct the search. Nor should the police officer detain the person longer than is reasonably necessary for the search to be conducted. If the police officer encounters a ‘thing’ that is a terrorism related item or a serious offence related item in the course of a search under section 3UD, he or she may seize the thing.

**Prescribed Security Zones**

314. A police officer may apply to the Minister for a declaration that a ‘Commonwealth place’ is a ‘prescribed security zone’ under section 3UI. The declaration ceases to have effect at the end of 28 days after it is made, unless the declaration is revoked by the Minister before then. The Minister must revoke a declaration if he or she is satisfied that the declaration is no longer required.

315. The Law Council expressed concern with the power conferred on the Attorney-General by section 3UJ, outlining a number of matters. First, it argued that the power to detain a person and conduct a random search on the basis that the individual is in a particular geographical location poses a risk of arbitrary exercise. It was said that this power was not a proportionate response to the threat of terrorism, and risks offending Article 9 of the ICCPR. Secondly, it criticised the lack of a precise mechanism requiring the Attorney-General to consider whether to revoke or extend a declaration. The effect of this, it was submitted, is that a declaration may remain in force for up to 28 days without review. Thirdly, it expressed concern that the Attorney-General is not required to publish reasons for declaring a prescribed security zone and that there is no mechanism for independent review of this power.

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198 Subsection 3UD(2), *Crimes Act 1914* (Cth).
199 Section 3UE, *Crimes Act 1914* (Cth).
200 Subsection 3UJ(3), *Crimes Act 1914* (Cth).
201 Relevantly, Article 9(1) of the ICCPR states: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
316. The Committee does not accept that searches conducted in prescribed security zones amount to ‘arbitrary’ interferences with liberty. Article 9(1) of the ICCPR recognises that ‘no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law’. The procedure here is established by law and circumscribes the locations for which such a declaration may be made. It also requires the Minister to meet a minimum satisfaction of mind that such a declaration is necessary.

317. Like the Law Council, the HRLC expressed concern\footnote{Submission of the Human Rights Law Centre to the COAG Review, p. 15.} that 28 days was too long a period for a declaration to remain in force without challenge. The HRLC and the Young Lawyers for Law Reform (“\textit{YLLR}”) recommended\footnote{Submission of YLLR to the COAG Review, p. 13; submission of HRLC to the COAG Review, p. 15.} that declarations sunset after 14 days. The Committee recognises the merit in this argument but, at this stage, is cautious about recommending any such change in the absence of any evidence to suggest the 28 day period is unreasonable.

318. Presently, in the course of making a declaration under section 3UJ, the Minister is obliged to publish a statement (broadcast by a television or radio station, in the Gazette, and on the internet) identifying the zone in respect of which a declaration is made.\footnote{Subsection 3UJ(5), Crimes Act 1914 (Cth).} The Committee is not persuaded that the Attorney-General should be required to issue reasons for any declaration of a ‘Commonwealth place’ as a ‘prescribed security zone’. In this regard, the Committee is conscious of the fact that disseminating operational information can endanger its sources and undermine policing efforts. There is, in the Committee’s view, a sufficient signal generated by the making of a declaration of itself that the nature or scale of an event to occur in a Commonwealth place has invited additional security precautions to mitigate any terrorist threat.

**Identification and ‘Stop and Search’ Powers (sections 3UC and 3UD)**

319. The primary criticism that the powers under sections 3UC and 3UD have sustained is that they are susceptible to arbitrary exercise. The corollary of this is the suggestion that the laws themselves arbitrarily interfere with a person’s freedom of movement, and, potentially, his or her privacy. The answer to this suggestion, in the Committee’s view, is a simple one: the powers themselves are not arbitrary. A precondition to their exercise is that the person be in a ‘prescribed security zone’, or a Commonwealth place where a police officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act. In both instances, the powers entrusted to the police require a connection to a perceived terrorist threat. In a practical sense, there is a threshold need to prescribe an area in which there is a need for additional security precautions. While, operationally, this may result in a wider scope of persons questioned and searched in exercise of these powers, the existence of the connection to a perceived threat satisfies the Committee that these provisions are a proportionate legislative response and are not arbitrary. We do not recommend any change to these provisions.
Section 3UEA – Emergency Entry to Premises without Warrant

RECOMMENDATION 43: Crimes Act 1914 – Federal stop, search and seizure powers – Emergency entry without a warrant

The Committee recommends that the legislation be amended to require the police authorities exercising power under s 3UEA to report annually to the Commonwealth Parliament on the use of this power.

320. Section 3UEA has attracted significant attention in the course of the present Review. It was introduced by the National Security Legislation Amendment Act 2010 (Cth). It is notably not limited by section 3UB.206 The power can therefore be used by police outside Commonwealth places and prescribed security zones. The section confers on police the power to conduct an emergency entry onto and search of premises without a warrant. The precondition for the use of this power is set out in subsection (1): the power is afforded by subsection (2) –

(1) A police officer may enter premises in accordance with this section if the police officer suspects, on reasonable grounds, that:

(a) it is necessary to exercise a power under subsection (2) in order to prevent a thing that is on the premises from being used in connection with a terrorism offence; and

(b) it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person’s life, health or safety.

(2) The police officer may:

(a) search the premises for the thing; and

(b) seize the thing if he or she finds it there.

321. If the police officer finds a thing reasonably suspected to be relevant to a summary or indictable offence in the course of conducting a search of premises under section 3UEA, the officer may secure the premises pending the obtaining of a warrant under Part 1AA.207 The police may also seize anything, or do anything to make the premises safe, if they reasonably suspect it is necessary to do so in order to protect a person’s life, health, or safety and that the circumstances are serious and urgent so as to justify the absence of a search warrant.208

322. The power exercisable under this provision, so far as the Committee is aware, has never been used. As some contributors to the Review have noted,209 this makes it difficult to comment on whether these provisions are effective tools to prevent, detect and respond to acts of terrorism, and whether they are being exercised in a way that is evidence-based, intelligence-led and proportionate.

323. The YLLR criticised the standard for exercise of powers under section 3UEA (‘reasonable suspicion’) as “manifestly inadequate” in view of the “gravity of the infringements of rights authorised by section 3UEA”.210 They advocated the threshold be raised to one of “reasonable

206 See subsection 3UB(2), Crimes Act 1914 (Cth).
207 Subsection 3UEA(3), Crimes Act 1914 (Cth).
208 Subsection 3UEA(5), Crimes Act 1914 (Cth).
210 Submission of YLLR to the COAG Review, p. 9.
belief’. There is no empirical evidence to satisfy the Committee that this distinction has led to the misuse of police powers, nor that it has operationally altered police behaviour. In the absence of such evidence, the Committee is unwilling to recommend any change to the standard.

324. The GT Centre argued that it was doubtful whether a clear line could be drawn between searches where the purpose related to seizing a particular item, and general searches undertaken as part of a criminal investigation.\(^{211}\) It was argued that, in each case, a magistrate or a judge should determine whether any evidence of a criminal offence was sufficiently strong to justify police entry into residential premises. The GT Centre further noted that “the police are already able to obtain a search warrant by a variety of means (including phone and fax) at short notice”. The existing capacity to obtain warrants at short notice was also noted by the Law Council.\(^{212}\) The GT Centre suggested the possible establishment of a duty judge system whereby applications for search warrants could be received and considered on an expedited basis.

325. In the alternative to repeal of the provision, the GT Centre advocated the introduction of a specific safeguard, based on retrospective authorisation. The method proposed was a system of ex-post facto search warrants. In this system, the member of the AFP who conducted the search would be required to go before a Magistrate or a Judge as soon as possible after the search had been conducted to obtain a warrant. That warrant would be issued on the basis that there had been reasonable grounds for the member to suspect that:

(a) a thing is on the premises that is relevant to a terrorism offence, whether or not the offence has occurred; and

(b) it is a necessary exercise of the power under this subsection in order to prevent the thing from being used in connection with a terrorism offence; and

(c) it is necessary to exercise the power without the authority of a search warrants because there is a serious and imminent threat to a person’s life, health or safety.

326. If such an ex post facto search warrant were not granted, the GT Centre argued that the consequence should be that any evidence identified and seized by a member of the AFP during the course of the search would not be admissible in court proceedings.

327. The Law Council similarly argued\(^{213}\) that the powers are not accompanied by appropriate safeguards or appropriate oversight provisions, and that the “warrantless” nature of the search increases the risk that such powers would be misused and that individual privacy rights would be breached. While advocating its repeal, the Law Council acknowledged that, if the need for such a power were demonstrated, they would not oppose a narrowly drafted emergency entry power with appropriate safeguards. In this regard, a system of ex post facto search warrants was endorsed.

328. The HRLC said\(^{214}\) that no evidence had been provided that such extended powers were required to protect public safety, and expressed four primary concerns. First, that the power may offend rights existing under Article 17 of the ICCPR.\(^{215}\) Secondly, that the fact that the term ‘thing’...
is not defined makes the provision vague and ambiguous, and could lead to unpredictability in its implementation. Thirdly, that the threshold of ‘reasonable suspicion’ is inadequate given the serious consequences that wrongful exercise of the power could cause. Fourthly, that the level of discretion granted to individual officers is disproportionate to the power to enter private premises.

329. On the other hand, the AFP, in its submission, said that the fact that the powers in Division 3 had not yet been used did not support any argument for their repeal. The trends of terrorism and the challenges for law enforcement, it was argued, attached greater importance to the utility of these tools in genuine emergency situations. The AFP supported the retention of Division 3A.

330. Initially, the Committee believed that there were merits to the proposal that the basis for warrantless entry be scrutinised very soon after the completion of a search under section 3UEA. An *ex post facto* grant of a warrant might confer immediate legitimacy on a search conducted and quickly vindicate any suggestion of an inappropriate violation of privacy. The inquiry would be confined to the basis for entry, and not extend to include the behaviour of police officers in conducting a search. Nor would it deliberate upon the admissibility of any evidence obtained in the course of the search.

331. However, upon further reflection, the Committee has concluded that such a process would not be as valuable as first contemplated. This is principally because the *ex post facto* sanction would take place in an uncontested atmosphere, with no opportunity for the sanctioning authority to understand or take into account possible alternative arguments based upon facts as yet unascertained. The more robust procedure available during a criminal trial – where a challenge is made both as to the issue of a warrant and the manner of its execution – is considered to be more suitable for examination of a warrantless search. Moreover, the valuable provisions of section 138 of the *Evidence Act 1995* (Cth) would then be available to guide the court as to whether to allow or reject the evidence.

332. Consequently, it may well be said that a system of *ex post facto* warrants would accomplish little more than furnish searches conducted under section 3UEA with a “thin veneer of legality”. If the search was not in accordance with the legislation then, no doubt, this is a fact that could be litigated in any proceedings to admit the evidence. If there were no prosecution and the search was not authorised by legislation then the aggrieved party would have a civil action in trespass. In either case, the validity of the search will be tested.

333. It is worth noting here, the terms of section 138 of the *Evidence Act 1995* (Cth). Section 138 states:

*Discretion to exclude improperly or illegally obtained evidence*

1. Evidence that was obtained:
   
   (a) improperly or in contravention of an Australian law; or
   (b) in consequence of an impropriety or a contravention of Australian law;

   is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

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(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence; and
(b) the importance of the evidence in the proceeding; and
(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
(d) the gravity of the impropriety or contravention; and
(e) whether the impropriety or contravention was deliberate or reckless; and
(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

334. In accordance with section 138, in considering whether to reject or allow the evidence, the court will look at the entire circumstances, including the particular reason for suggested invalidity. It is the Committee’s view that reliance upon this existing evidentiary safeguard is preferable to the introduction of a system of *ex post facto* warrants.

335. In overall response to the criticisms advanced, the Committee places particular emphasis on the fact that these are emergency powers intended for use in only genuine emergency situations. In the context of terrorism, we do not consider that there is a need for evidence to justify the conclusion that emergency situations may arise where it is simply impossible or impracticable to obtain a warrant before seizing material that is to be used in connection with a terrorism offence. One has only to contemplate intelligence suggesting the presence of explosives in a house to realise that this is so.

336. The Committee does, however, accept that there is value in ongoing vigilance of the use of emergency entry powers. Accordingly, the Committee recommends the legislation be amended to require the AFP report annually to the Commonwealth Parliament on the use of this power. In this way, the Commonwealth Parliament could remain apprised of the use of the powers and exercise accordingly a degree of oversight.

**Sunset Clause**

**RECOMMENDATION 44: Crimes Act 1914 – Federal stop, search and seizure powers – Sunset provision**

If the search and seizure powers in the *Crimes Act 1914 (Cth)* are renewed in 2016, the Committee recommends amending section 3UK to provide that the relevant provisions should cease to exist as at the expiry date, which will be a five year period.
337. Section 3UK contains a sunset clause stating that “a police officer must not exercise powers or perform duties under [the] Division (other than under section 3UF) after the end of 10 years after the day on which the Division [commenced]”. The Division commenced on 15 December 2005, the day after the Anti-Terrorism Act (No. 2) 2005 (Cth) received Royal Assent. Accordingly, the Division will sunset on 15 December 2015.

338. The GT Centre notes that section 3UK is “an unusual sunset provision”. It argued that, typically, sunset clauses stipulate that certain legislation expires at a particular date. In contrast, section 3UK states that the powers conferred by Division 3A must no longer be exercised at the end of a ten-year period. That is, while non-operational, the Division would remain part of Australian law.

339. The GT Centre said:

“It is inappropriate to leave such legislation on the statute books. Further, there is also a danger that allowing provision (sic) to remain (dormant) on the statute books will enable them to be reactivated and extended without adequate Parliamentary debate. This deprives the sunset clause of much of its potential benefit; these clauses are supposed to guard against legislative inertia and the normalisation of extraordinary, emergency laws, by forcing regular reconsideration of their existence.”

340. The GT Centre submission cautioned that the “inherent speculation” involved in respect of the nature and extent of the terrorist threat required reasonably short sunset periods. It also noted that too short a sunset period would be unwise. An assessment of legislation after only a short period of operation “would likely be based on limited information about the operation of the legislation, and will therefore tend to understate its practical effects and impact upon fundamental human rights”.

341. The GT Centre concluded its analysis of section 3UK by suggesting a sunset period of five years as more appropriate than its current design. It argued that this would enhance scrutiny, but also allow a sufficient time to pass in which evidence as to the Division’s efficacy could accumulate.

342. The Committee agrees with this suggestion. We recommend that, if the search and seizure powers in Division 3A are renewed in 2016, section 3UK be amended to provide that the sunset period should be five years, and that the relevant legislation should, with the exception of the machinery provisions, cease to exist at the expiry of that period.

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218 Section 3UF concerns the service of seizure notices in connection with items seized in the course of ‘stop and searches’ under section 3UD, or emergency entry powers under section 3UEA. The Government explained these exceptions as an acknowledgment of the “machinery type provisions” that needed to continue in operation until their purpose had been met (Explanatory memorandum, Anti-Terrorism Bill (No. 2) 2005).
219 See section 2, Anti-Terrorism Act (No. 2) 2005 (Cth).
220 Submission of GT Centre to the COAG Review, pp. 34–35.
221 Submission of GT Centre to the COAG Review, p. 35.
RECOMMENDATION 45: State and Territory police powers of search, entry and seizure – Judicial authorisation

The Committee recommends that the various jurisdictions amend their legislation to reflect a greater degree of judicial oversight. The legislation in each State or Territory should be based on the current ACT, Tasmanian or Victorian model, requiring authorisation or final authorisation by a judge of the State or Territory Supreme Court.

RECOMMENDATION 46: State and Territory police powers of search, entry and seizure – Privative clauses

The Committee recommends that the various privative clauses in the current legislation be removed.

RECOMMENDATION 47: State and Territory police powers of search, entry and seizure – Reporting

The Committee recommends that there should be a regular reporting function incorporated into each ‘special powers’ statute.

343. The Committee is here concerned with special police powers introduced at State and Territory level pursuant to the 2005 COAG agreement. There are some ten statutes specifically falling into this category. As well, there are laws giving special powers to police at ‘major events’. We shall put these to one side for the moment, focusing particularly on the police terrorism-related special powers legislation, known colloquially as ‘stop, search and seize’ powers.

344. The relevant statutes are identified in Attachment A of this Report. By reason of their length, the text of the individual statutes is not reproduced either in this report or the Schedule. It may be said, however, that while there are differences between the jurisdictions in terms of the procedures for authorising the use of the powers (and differences in safeguards and restrictions), the special police powers conferred under the statutes are broadly similar. Indeed, in a number of respects, they are broadly similar to the powers already discussed under Part 1AA Division 3A of the Crimes Act 1914. They include the following powers:

- a power to require a person to give his or her name and address;
- a power to stop and search a person (and anything in the possession of or under the control of a person) without a warrant;
- a power to stop enter and search a vehicle and anything in or on the vehicle without a warrant;
- a power to enter and search premises without a warrant;
- power to direct a cordon around a target area; and
- a power of seizure and detention (including seizure of a vehicle).
The submission of the Law Council contains a brief but helpful summary of some of the important differences in the authorisation procedures in the State and Territory ‘special powers’ legislation. We reproduce it here, acknowledging the considerable assistance it has given the Committee (citations omitted):223

“Authorisation of the use of special police powers

258. In NSW, the use of these special powers can be authorised by a senior police officer, such as the Commissioner of Police, with the approval of the relevant Minister. The Minister must be satisfied that there are reasonable grounds for believing that there is a threat of a terrorist act occurring in the near future, and that the exercise of those powers will substantially assist in preventing the terrorist act.

259. In Western Australia (WA) and South Australia (SA), a warrant to exercise special powers can be issued by the Commissioner of Police, but only with the prior approval of a judge. When issuing such a warrant, the Commissioner of Police must be satisfied that there are reasonable grounds to believe that a terrorist act has been, is being, or is about to be committed, and that the exercise of the special powers will substantially assist in achieving one or more of these prescribed purposes, which include the prevention of a terrorist act, or carrying out investigations into the terrorist act. In urgent circumstances, prior approval is not necessary and the judge can approve the issue of a warrant up to 24 hours after it has been issued.

260. In Victoria, an interim authorisation for the exercise of special powers can be made by the Chief Commissioner of Police, with the written approval of the Premier. The Chief Commissioner must be satisfied, on reasonable grounds, that a terrorist act is occurring or will occur in the next 14 days and that the exercise of the powers will substantially assist in preventing the terrorist act or reduce the impact of the terrorist act, or of the threat of a terrorist act, on the health or safety of the public or on property. This interim authorisation must then be subject to an application for an order of the Supreme Court authorising the use of the special powers. The terms of an authorisation given by the Supreme Court may be the same as, or different to, the terms of any interim authorisation given by the Chief Commissioner.

261. Under the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) the use of special powers must be authorised by the Supreme Court or the Magistrates Court following an application by the Chief Police Officer approved in writing by the Chief Minister. The court can make a preventative authorisation if satisfied that a terrorist act is happening or will happen sometime within the next 14 days; and that the authorisation will substantially assist in preventing the terrorist act or reducing its impact or both. The court can also make an investigative authorisation if satisfied that a terrorist act has happened within the last 28 days, is happening or will happen sometime within the next 14 days; and that the authorisation would substantially assist in achieving one or more of the following purposes:

- apprehending a person responsible for the terrorist act;
- investigating the terrorist act (including preserving evidence of, or relating to, the terrorist act); and
- reducing the impact of the terrorist act.

262. The Queensland approach differs in adopting a procedure for declaring a ‘terrorist emergency’ for a stated area. An appropriately qualified police officer is appointed to be a ‘terrorist emergency commander’ who can exercise, and authorise the exercise of certain powers in respect of people who are in or are likely to be in the stated area. When a terrorist emergency has been declared, the Minister or the Premier must be contacted by the Commissioner of Police.”

346. It is important to note that the duration of an authorisation under the “special powers” legislation is generally quite limited. For example, in the Terrorism (Police Powers) Act 2002 (NSW), the period of the authorisation to use special powers in circumstances where a terrorist act has not yet taken place but is expected to occur in the near future, lasts up to 7 days, with possible extensions of up to a maximum of 14 days.224 Where a terrorist act has taken place and the authorisation relates to powers to enable the apprehension of the persons responsible, the period of the authorisation is up to 24 hours with a possible extension to a maximum of 48 hours.225

347. Moreover, the statutes (while differing in detail) generally provide limitations on the purpose for which the special powers may be used. Again, taking the NSW model, section 7 provides that a police officer can be authorised to use ‘special powers’ for the following purposes:

- finding a particular person named or described in the authorisation;226
- finding a particular vehicle or a vehicle of a particular kind described in the authorisation;227
- preventing a terrorist act in a particular area, or apprehending in any such area the persons responsible for committing a terrorist act,228 or for any combination of those purposes.

The person, the vehicle and the area are described as ‘targets’ for the purposes of the exercise of the powers.229

348. It is also worthy of note that some jurisdictions contain specific safeguards that are ‘human rights’ based. For example, the Terrorism (Extraordinary Powers) Act 2006 (ACT) contains a requirement that any officers exercising the special powers are to be adequately trained concerning their obligations under human rights legislation applying in the ACT.230 The legislation also requires that searches are to be conducted in a way that preserves both privacy and dignity.231 The South Australian legislation requires that the special powers conferred in that State be exercised in a manner that avoids unnecessary physical harm, embarrassment to persons, and in a manner which respects genuinely held cultural values or religious beliefs.232

349. Most jurisdictions include provisions that require the Commissioner of Police (or other police officers) to report to a senior Minister on the use of the powers and, in particular, to report the results of their exercise. Most jurisdictions also require regular review of the special powers.

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224 Subsections 11(2)(a) and 11(3)(a), Terrorism (Police Powers) Act 2002 (NSW).
228 Subsection 7(1)(c), Terrorism (Police Powers) Act 2002 (NSW).
230 Section 93, Terrorism (Extraordinary Powers) Act 2006 (ACT).
231 Schedule 1, section 1.5, Terrorism (Extraordinary Powers) Act 2006 (ACT).
232 Section 17, Terrorism (Police Powers) Act 2005 (SA).
This has occurred, in fact, in jurisdictions across Australia. The reviews generally have expressed continued satisfaction with the presence of the powers and the importance of their potential for use in a genuine emergency situation. There have been some minor amendments but, in the main, the legislation across the jurisdictions has remained, broadly speaking, in the same form.

350. The Committee has been made aware of one recent use of the ‘special powers’ procedure in Victoria. This is the only actual use of the powers in recent times. The particular operation (during an important visit by overseas dignitaries) was reported as being successful, and the operation was thought to be effective in that no terrorist disruption actually occurred. The exercise of the powers was said to have been restrained, and occasioned no public dissatisfaction or complaint.

351. It is appropriate at this point to refer briefly to submissions received from a number of the State and Territory governments. The New South Wales Government, for example referring to its three reviews of the special powers legislation said this:

"In summary, the three reviews to date have found the TPPA strikes an effective balance between providing special powers to protect the community from terrorism, and the necessary tests and safeguards to ensure these powers are only used in exceptional and appropriate circumstances. The New South Wales government strongly believes the TPPA is working effectively and according to its policy objectives. It continues to meet tests of necessity, effectiveness and proportionality."

352. Similar statements have been received from South Australia and Western Australia. The Chief Police Officer for the ACT, although acknowledging that the special powers had not been used in the Territory, expressed the view that retention of the legislation was necessary. There was no dissent from this proposition in the other jurisdictions.

353. Submissions critical of the ‘special powers’ legislation varied somewhat from jurisdiction to jurisdiction. In general, however, a pattern emerged. The most oft-repeated were the following matters:

- the width of the powers, for example, to randomly stop and search persons and vehicles entering or leaving an area, suggested a risk that such powers could be applied ‘arbitrarily’;
- preference was expressed for a system that only permitted searches of this kind where police had a reasonable suspicion that the person or vehicle was or would be involved in a terrorist act;
- the lack of judicial oversight in some jurisdictions, particularly in relation to the issue of authorisations;

For the most recent reviews, see: Review of the Terrorism (Police Powers) Act 2002 (NSW), Department of Justice and Attorney-General (2010); Review of the Terrorism (Extraordinary Temporary) Powers Act 2006 (ACT), Legislative Assembly for the Australian Capital Territory (2010); Review of the Terrorism (Extraordinary Powers) Act 2005 (WA), Report to the Minister, Legal and Legislative Services, Western Australia Police (2012); Outcome of Review into Terrorism (Emergency Powers) Act 2006 (NT), Northern Territory Police, Fire and Emergency Services (2010).

Private submission of the Victorian Police to the COAG Review Committee, 30 October 2012.
Submission of the NSW Government to the COAG Review, p. 2.
Submission of the Government of South Australia to the COAG Review, p. 3; Submission of the Government of Western Australia to the COAG Review, p. 14.
Submission of the Chief Police Officer of the ACT to the COAG Review, p. 1.
• the presence of privative clauses in some of the statutes was thought to be unfair and in breach of human rights obligations;\textsuperscript{238} and
• review and oversight mechanisms should be strengthened, if the laws are permitted to remain.

354. In addition, the NSW Council for Civil Liberties complained that in New South Wales the qualifying description of a terrorist act “in the near future” was too broad and should be replaced by the word “imminent”.\textsuperscript{239}

355. First, the Committee, while acknowledging that there has been very little use made of the ‘special powers’ legislation, does not regard this as a persuasive argument for their repeal. We accept the arguments advanced by the States and Territories that legislation of this kind is presently warranted and that it should remain ‘on the books’ in the current terrorism climate. Secondly, we have given earlier consideration to the concept of ‘arbitrariness’ when considering the ‘stop, search and seizure’ powers under Division 3A of the \textit{Crimes Act 1914}. The reasoning employed in those considerations has equal weight here. Once again, the Committee considers that the procedure and thresholds established by the legislation appropriately circumscribe the location in which search and other controls are to be conducted and stipulate very clearly the purposes of those searches. Of course, we accept that, in a particular case, it is possible that a police officer may arbitrarily stop and search a person. That is always a possibility. We do not accept, however, that the legislation itself is arbitrary. Moreover, proper police training and the adoption of appropriate standards should be sufficient to prevent an arbitrary approach in practice.

356. The Committee does not recommend that there be absolute consistency between the regimes in the various States and Territories. In theory, a high level of consistency is plainly desirable. However, the Committee recognises the validity of different regimes and appreciates the obvious care that has gone into the construction of these schemes across Australia. We also accept that local differences and different regional considerations need to be taken into account and respected. The Committee notes the difference between the NSW model and other jurisdictions (‘in the near future’) but does not recommend its replacement with the term ‘imminent’. In practice, the different terminology is unlikely to lead to a different outcome.

357. The Committee accepts, however, that there should be consistency in one important area: there is, we think, a compelling argument for a uniform approach to judicial oversight, as critics of the legislative schemes have argued. The Committee appreciates that, on occasion, police will undoubtedly find the need to obtain judicial approval an irksome procedure because it can be resource intensive and time consuming. This is particularly so, no doubt, in an especially urgent matter where time is of the essence. Generally, however, the Committee accepts that where special powers are to be exercised, authorisation by judicial sanction gives the community confidence in the process, especially if the powers to be exercised are invasive or likely to be so. Moreover, we consider that the exercise of judicial sanction gives greater legitimacy and confidence to the individual police officers who are involved in the implementation and exercise of those powers.

\textsuperscript{238} For example, the authorisations in New South Wales are made by a police officer without judicial approval but cannot be challenged or called into question in any legal proceedings. See: \textit{Terrorism (Police Powers) Act 2002} (NSW), section 13.

\textsuperscript{239} Submission of the NSW Council for Civil Liberties to the COAG Review, p. 16.
Our primary recommendation is that there should be judicial approval across the jurisdictions for all authorisations. However, we accept that in the detail of the differing schemes a ‘compromise’ might be acceptable (such as the Victorian system where an interim authorisation is made by the Police Commissioner with the written approval of the Premier, but where the interim authorisation must then be scrutinised by the Supreme Court;240 or in South Australia, where a judicial officer has to sanction the Police Commissioner’s level of belief that an authorisation is warranted.241) As we have said, there is room for the selection of local preferences but there should be, we consider, a general scheme of judicial oversight in relation to authorisations for these special powers.

One consequence of this recommendation is that we can confidently recommend that any privative clauses in the legislation under consideration should be repealed. In the area of jurisdictional error, such clauses are of doubtful legitimacy these days,242 but, in any event, the Committee considers that they are inappropriate in legislation of this kind, and unnecessary if judicial authorisation is introduced in each State and Territory scheme.

Finally, we propose to recommend that there should be a regular reporting function into each ‘special powers’ statute. For example, section 13 of the Terrorism (Emergency Powers) Act 2006 (NT) requires that, as soon as practicable after an authorisation ceases, the Commissioner must provide a report in writing to the Attorney-General and the Police Minister identifying matters that were relied on for the grant of the authorisation, describing generally the powers exercised and the manner in which they were exercised; and setting out the results of the exercise of the powers.243

**Special Events Legislation**

We do not at this stage recommend any changes to State and Territory legislation dealing with ‘special events’. Submissions before the Committee satisfy us these provisions are necessary, are often used and have been effective in their operation. No further safeguards are required.

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240 Sections 21B and 21D, Terrorism (Community Protection) Act 2003 (Vic).
241 Subsections 3(5) and 13(3), Terrorism (Police Powers) Act 2005 (SA).
243 See also section 95, Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT), which has a similar requirement for report and placing before the Legislative Assembly.
The legislation to be covered by the Review is:

- Sections 100.1, 101.2, 101.4, 101.5, 101.6, 102.1, 102.5, 102.6, 102.8, 103.1, 103.2, 103.3, 106.2, 106.3, and Divisions 104 and 105 of the *Criminal Code Act 1995* (Cth)
- Section 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth)
- Sections 3C, 3D and Division 3A of the *Crimes Act 1914* (Cth)
- Section 16 of the *Financial Transaction Reports Act 1988* (Cth)
- Schedule 1 (dab) and (dac) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)
- *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT)
- Division 3.2 of the *Major Events Security Act 2000* (ACT)
- Parts 2 and 2A (and Parts 1, 4 and Schedule 1 insofar as they apply to Parts 2 and 2A) of the *Terrorism (Police Powers) Act 2002* (NSW)
- *Terrorism (Emergency Powers) Act 2006* (NT)
- *Terrorism (Preventative Detention) Act 2005* (Qld)
- Chapter 19, Part 2 of the *Police Powers and Responsibilities Act 2000 (Special Events)* (Qld)
- Part 2A of the *Public Safety Preservation Act 1986* (terrorist emergency powers) (Qld)
- *Terrorism (Preventative Detention) Act 2005* (SA)
- *Terrorism (Police Powers) Act 2005* (SA)
- *Terrorism (Preventative Detention) Act 2005* (Tas)
- *Police Powers (Public Safety) Act 2002* (Tas)
- Parts 2A and 3A of the *Terrorism (Community Protection) Act 2003* (Vic)
- *Terrorism (Preventative Detention) Act 2006* (WA), and
Attachment B – Written submissions

1. Dr James Renwick SC
2. Executive Council of Australian Jewry
3. HH Judge Richard Maidment
4. Officer of the Australian Information Commissioner
5. National Children’s and Youth Law Centre
6. Western Australian Government
7. George Rupesinghe
8. Gilbert and Tobin Centre of Public Law
9. Australian Quaker Peace and Legislation Committee
10. Young Lawyers for Law Reform
11. E J Maddox
12. Australian Research Council Centre of Excellence in Policing and Security
13. Professor Gregory Rose, University of Wollongong
14. Australian Rail Track Corporation
15. NSW Director of Public Prosecutions
16. Law Council of Australia
17. AhLus Sunnah wal Jamaah Association of Australia
18. Australia/Israel Jewish Affairs Council
19. South Australian Government
20. Australian Human Rights Commission
21. Queensland Police Service
22. New South Wales Department of Premier and Cabinet
23. Australian Lawyers for Human Rights
25. Tasmanian State Government
26. Commonwealth Department of Public Prosecutions
27. Dr Greg Carne, University of Western Australia
28. New South Wales Council for Civil Liberties
29. Australian Capital Territory Police
30. Liberty Victoria
31. Australian Security Intelligence Organisation
32. Commonwealth Attorney-General’s Department
33. Human Rights Law Centre
34. National Tertiary Education Union
35. Australia Capital Territory Government
36. Elizabeth Beaumont
37. Professor Ben Saul, University of Sydney
Attachment C – Individuals/organisations who provided oral submissions

Brisbane – 23 October 2012
Mr Benedict Coyne, Australian Lawyers for Human Rights
Associate Professor Katherine Gelber, University of Queensland
Professor Jacqui Ewart, Griffith University
Professor Mark Pearson, Bond University
Ms Karen Carmody, Queensland Public Interest Monitor
Detective Chief Superintendent Gayle Hogan, Queensland Police Service

Sydney – 25 October 2012
Mr Peter Werheim, Executive Council of Australian Jewry
Dr James Renwick SC
Professor Gregory Rose, University of Wollongong
Professor Nicola McGarrity, Gilbert and Tobin Centre for Public Law
Professor George Williams, Gilbert and Tobin Centre for Public Law
Dr Martin Bibby, NSW Council for Civil Liberties
Mr Phillip Boulten SC, Law Council of Australia

Melbourne – 30 October 2012
The Hon. Richard Maidment, Judge of the Victorian County Court
Professor Spencer Zifcak, Liberty Victoria
Nail Aykan, Islamic Council of Victoria
Mr Mustafa Kocak, Ahlus Sunnah Wal Jumaah
Mr Greg Barns, Australian Lawyers Alliance
Dr Colin Rubenstein, Australia/Israel Jewish Affairs Council
Ms Lucy Maxwell, Young Lawyers for Law Reform

Adelaide – 1 November 2012
Professor Simon Bronitt, Australian Research Council Centre for Excellence in Policing Studies
Detective Superintendent Evette Clark, South Australian Police
Mr Ralph Bonig, Past President of the Law Society of South Australia (and a Director of the Law Council Australia)
Perth – 7 November 2012
Dr Greg Carne, University of Western Australia
My Hylton Quail, Law Council of Australia (and former President of Western Australian Law Society)
Assistant Commissioner Bell, Western Australian Police

Canberra – 14 November 2012
Deputy Commissioner Peter Drennan, Australian Federal Police
Geoff McDonald, First Assistant Secretary, National Security Law and Policy Division, Attorney-General’s Department
Bill Rowlings, Chief Executive Officer, Civil Liberties Australia
Kristine Klugman, President, Civil Liberties Australia
Rebecca Prior, Civil Liberties Australia
David Irvine, Director-General, Australian Security Intelligence Organisation
Individuals prosecuted for terrorism offences

This table lists individuals who have been prosecuted with terrorism offences under Australia’s counterterrorism legislative framework. 35 individuals have been prosecuted for terrorism offences. 23 have been convicted of terrorism offences under the Criminal Code; 3 have been convicted of offences under the UN Charter Act.
<table>
<thead>
<tr>
<th>Person Charged</th>
<th>State</th>
<th>Date Arrested</th>
<th>Offences</th>
<th>Plea</th>
<th>Result</th>
<th>Date of plea or conviction/acquittal</th>
<th>Sentence (a/b: a=total, b=non-parole)</th>
</tr>
</thead>
</table>
| Zaky Mallah     | New South Wales| 3 December 2003 | Subsection 101.6(1) *Criminal Code* (doing an act in preparation for, or planning, a terrorist act) – 2 charges  
Section 147.2 *Criminal Code* (threatening to cause serious harm to a Commonwealth public official) | Not guilty    | Acquitted        | 6 April 2005                                | 2.5/1.75yrs                                |
| Mr Faheem Lodhi | New South Wales| 24 April 2004   | Subsection 101.5(1) *Criminal Code* (collecting documents connected with preparation of a terrorist act)  
Subsection 101.6(1) *Criminal Code* (doing an act in preparation for, or planning a terrorist act)  
Subsection 101.4(1) *Criminal Code* (possessing a thing, namely a document connected with preparation for a terrorist act)  
Subsection 101.5(1) *Criminal Code* (making a document connected with the engagement of a person in a terrorist act)  
Subsection 34G(5) *ASIO Act* (giving false or misleading answers under warrant) | Not guilty    | Guilty            | 19 June 2006                                | 10 yrs                                |
<p>|                 |                |                 |                                                                          | Not guilty    | Guilty            | 19 June 2006                                | 20 yrs                                |
|                 |                |                 |                                                                          | Not guilty    | Guilty            | 19 June 2006                                | 10 yrs                                |
|                 |                |                 |                                                                          | Acquitted     |                   | 19 June 2006                                | <strong>Total sentence 20/15yrs</strong>        |
| Mr Belal Khazaal| New South Wales| 2 June 2004     | Section 101.5 <em>Criminal Code</em> (making a document in connection with the engagement of a person in a terrorist act) | Guilty        | Guilty (conviction reinstated by the High Court). | 10 September 2008 (High Court – 10 August 2012) | 12/9 yrs (NSWCCA decision in relation to sentence remains reserved) |</p>
<table>
<thead>
<tr>
<th>Person Charged</th>
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<th>Sentence (a/b: a=total, b=non-parole)</th>
</tr>
</thead>
</table>
| Joseph Terrence Thomas      | Victoria        | 18 November 2004  | Subsection 102.6(1) *Criminal Code* (receiving funds from a terrorist organisation)  
Subsection 102.7(1) *Criminal Code* (providing support or resources to a terrorist organisation) – 2 charges  
Subsection 9A(1)(e) *Passports Act* (possessing a false passport)                                      | Not guilty           | Acquitted (on retrial)  | 23 October 2008         | 9 months                             |
| Izhar U1 Haque              | New South Wales | 18 November 2004  | Subsection 102.5(1) *Criminal Code* (receiving training from a terrorist organisation) | Charge withdrawn      |                         |                                      |                                      |
| Abdul Benbrika              | Victoria        | 8 November 2005   | Subsection 101.4(1) *Criminal Code* (possessing a thing connected with the preparation of a terrorist act)  
Section 102.2 *Criminal Code* (directing activities of terrorist organisation)  
Section 102.3 *Criminal Code* (membership of terrorist organisation)  
Separate trial – section 11.5 and subsection 101.6(1) *Criminal Code* (conspiracy to do acts in preparation for, or planning, a terrorist act) | Not guilty           | Conviction overturned  | 15 September 2008       | 15 yrs                              |
|                            |                 |                   |                                                                          | Not guilty           | Guilty                  | 15 September 2008       | 5 yrs                               |
|                            |                 |                   |                                                                          | Not guilty           | Guilty                  | 15 September 2008       | Total sentence 15/12 yrs             |
|                            |                 |                   |                                                                          | Not guilty           | Proceedings stayed      |                                      |                                      |
| Aimen Joud                  | Victoria        | 8 November 2005   | Subsection 101.4(1) *Criminal Code* (possessing a thing connected with the preparation of a terrorist act) – 2 counts  
Subsection 102.6(1) and 11.1(1) *Criminal Code* (attempting to intentionally make funds available to a terrorist organisation) | Not guilty           | Conviction overturned  | 25 October 2010         | 5 yrs                               |
<p>|                            |                 |                   |                                                                          | Not guilty           | Guilty                  | 15 September 2008       |                                      |</p>
<table>
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<th>Date of plea or conviction/ acquittal</th>
<th>Sentence (a/b: a=total, b=non-parole)</th>
</tr>
</thead>
</table>
| Fadl Sayadi   | Victoria  | 8 November 2005     | Subsection 102.7(1) \textit{Criminal Code} (providing resources to a terrorist organisation)  
        Section 102.3 \textit{Criminal Code} (membership of terrorist organisation)  
        Separate trial – section 11.5 and subsection 101.6(1) \textit{Criminal Code} (conspiracy to do acts in preparation for, or planning, a terrorist act)  
        Separate indictment – subsection 102.7(1) \textit{Criminal Code} (intentionally providing support to a terrorist organisation) – video production charge | Not guilty   | Guilty           | 15 September 2008 | 8 yrs                               |
|               |           |                     |                                                                         | Not guilty   | Guilty           | 15 September 2008 | 4.5 yrs                              |
|               |           |                     |                                                                         | Not guilty   | Proceedings stayed | 15 September 2008 |                                      |
|               |           |                     |                                                                         | Charge not proceeded with |                      |                                          |                                      |
|               |           |                     |                                                                         | Total sentence | 8/6 yrs          |                                          |                                      |
| Abdullah Merhi| Victoria  | 8 November 2005     | Section 102.3 \textit{Criminal Code} (membership of terrorist organisation)  
        Subsection 102.7(1) \textit{Criminal Code} (providing resources to a terrorist organisation) | Not guilty   | Guilty           | 15 September 2008 | 7 yrs                               |
<p>|               |           |                     |                                                                         | Not guilty   | Guilty           | 15 September 2008 | 4.5 yrs                              |
|               |           |                     |                                                                         | Not guilty   | Proceedings stayed | 15 September 2008 |                                      |
|               |           |                     |                                                                         | Charge not proceeded with |                      |                                          |                                      |
|               |           |                     |                                                                         | Total sentence | 7/5 yrs 3 mths   |                                          |                                      |</p>
<table>
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</tr>
</thead>
<tbody>
<tr>
<td>Ahmed Raad</td>
<td>Victoria</td>
<td>8 November 2005</td>
<td>Subsection 102.7(1) <em>Criminal Code</em> (providing resources to a terrorist organisation)</td>
<td>Not guilty</td>
<td>Guilty</td>
<td>15 September 2008</td>
<td>8 yrs</td>
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<td></td>
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<td>Subsections 102.6(1) and 11.1(1) <em>Criminal Code</em> (attempting to intentionally make funds available to a terrorist organisation)</td>
<td>Not guilty</td>
<td>Guilty</td>
<td>15 September 2008</td>
<td>5 yrs</td>
</tr>
<tr>
<td></td>
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<td></td>
<td>Section 102.3 <em>Criminal Code</em> (membership of terrorist organisation)</td>
<td>Not guilty</td>
<td>Guilty</td>
<td>15 September 2008</td>
<td>4.5 yrs</td>
</tr>
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<td></td>
<td></td>
<td>Separate trial – sections 11.5 and 101.6(1) <em>Criminal Code</em> (conspiracy to do acts in preparation for, or planning, a terrorist act)</td>
<td>Not guilty</td>
<td>Proceedings stayed</td>
<td>15 September 2008</td>
<td><strong>Total sentence 8/6 yrs</strong></td>
</tr>
<tr>
<td>Ezzit Raad</td>
<td>Victoria</td>
<td>8 November 2005</td>
<td>Subsections 102.6(1) and 11.1(1) <em>Criminal Code</em> (attempting to intentionally make funds available to a terrorist organisation)</td>
<td>Not guilty</td>
<td>Guilty</td>
<td>15 September 2008</td>
<td>4 yrs</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Section 102.3 <em>Criminal Code</em> (membership of terrorist organisation)</td>
<td>Not guilty</td>
<td>Guilty</td>
<td>15 September 2008</td>
<td>4 yrs</td>
</tr>
<tr>
<td>Amer Haddara</td>
<td>Victoria</td>
<td>8 November 2005</td>
<td>Subsection 101.4(1) <em>Criminal Code</em> (possessing a thing connected with preparation for a terrorist act)</td>
<td>Not guilty</td>
<td>Acquitted</td>
<td>16 September 2008</td>
<td>4 yrs</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Section 102.3 <em>Criminal Code</em> (membership of terrorist organisation)</td>
<td>Not guilty</td>
<td>Guilty</td>
<td>16 September 2008</td>
<td>4 yrs</td>
</tr>
<tr>
<td>Shane Kent</td>
<td>Victoria</td>
<td>8 November 2005</td>
<td>Subsection 101.5(2) <em>Criminal Code</em> (making a document connected with preparation of a terrorist act)</td>
<td>Guilty</td>
<td>Guilty</td>
<td>28 July 2009</td>
<td>2.5 yrs</td>
</tr>
<tr>
<td>Person Charged</td>
<td>State</td>
<td>Date Arrested</td>
<td>Offences</td>
<td>Plea</td>
<td>Result</td>
<td>Date of plea or conviction/ acquittal</td>
<td>Sentence (a/b: a=total, b=non-parole)</td>
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</tr>
<tr>
<td>Izzydeen Atik</td>
<td>Victoria</td>
<td>10 November 2005</td>
<td>Subsection 102.7(1) <em>Criminal Code</em> (providing resources to a terrorist organisation) Section 102.3 <em>Criminal Code</em> (membership of terrorist organisation)</td>
<td>Guilty</td>
<td>Guilty/Charge not proceeded with</td>
<td>5 July 2007</td>
<td>5 yrs</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hany Taha</td>
<td>Victoria</td>
<td>8 November 2005</td>
<td>Subsections 102.6(1) and 11.1(1) <em>Criminal Code</em> (attempting to intentionally make funds available to a terrorist organisation) Section 102.3 <em>Criminal Code</em> (membership of terrorist organisation)</td>
<td>Not guilty</td>
<td>Acquitted</td>
<td>15 September 2008</td>
<td>5.5yrs/4 yrs 1 mth 14 days</td>
</tr>
<tr>
<td>Khaled Cheikho</td>
<td>New South Wales</td>
<td>8 November 2005</td>
<td>Section 11.5 and subsection 101.6(1) <em>Criminal Code</em> (conspiring to do acts in preparation for a terrorist act)</td>
<td>Not guilty</td>
<td>Guilty NB: Appeal lodged</td>
<td>16 October 2009</td>
<td>27/20.25yrs</td>
</tr>
<tr>
<td>Abdul Rakib Hasan</td>
<td>New South Wales</td>
<td>8 November 2005</td>
<td>Section 11.5 and subsection 101.6(1) <em>Criminal Code</em> (conspiring to do acts in preparation for a terrorist act)</td>
<td>Not guilty</td>
<td>Guilty NB: Appeal lodged</td>
<td>16 October 2009</td>
<td>26/19.5yrs</td>
</tr>
<tr>
<td>Mohamed Ali Elomar</td>
<td>New South Wales</td>
<td>8 November 2005</td>
<td>Section 11.5 and subsection 101.6(1) <em>Criminal Code</em> (conspiring to do acts in preparation for a terrorist act)</td>
<td>Not guilty</td>
<td>Guilty NB: Appeal lodged</td>
<td>16 October 2009</td>
<td>28/21yrs</td>
</tr>
<tr>
<td>Person Charged</td>
<td>State</td>
<td>Date Arrested</td>
<td>Offences</td>
<td>Plea</td>
<td>Result</td>
<td>Date of plea or conviction/acquittal</td>
<td>Sentence (a/b: a=total, b=non-parole)</td>
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</tr>
<tr>
<td>Moustafa Cheikho</td>
<td>New South Wales</td>
<td>8 November 2005</td>
<td>Section 11.5 and subsection 101.6(1) <em>Criminal Code</em> (conspiring to do acts in preparation for a terrorist act)</td>
<td>Not Guilty</td>
<td>Guilty NB: Appeal lodged</td>
<td>16 October 2009</td>
<td>26/19.5yrs</td>
</tr>
<tr>
<td>Khaled Sharrouf</td>
<td>New South Wales</td>
<td>8 November 2005</td>
<td>Subsection 101.4(1) <em>Criminal Code</em> (possessing a thing connected with preparation for a terrorist act) Sections 11.5 and 101.6 <em>Criminal Code</em> (conspiring to do acts in preparation for a terrorist act)</td>
<td>Guilty</td>
<td>Charge not proceeded with</td>
<td>3 August 2009</td>
<td>5.25/3 yrs, 11 mths, 7 days</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Guilty</td>
<td>Guilty</td>
<td>12 September 2008</td>
<td>8 yrs each</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Total sentence</td>
<td>14 yrs /10.5 yrs</td>
<td></td>
</tr>
<tr>
<td>Omar Baladjam</td>
<td>New South Wales</td>
<td>8 November 2005</td>
<td>Subsection 101.6(1) <em>Criminal Code</em> (doing an act in preparation for a terrorist act) – 2 counts Subsection 101.4(1) <em>Criminal Code</em> (possessing a thing connected with the preparation of a terrorist act) – 2 counts Sections 11.5 and 101.6 <em>Criminal Code</em> (conspiring to do acts in preparation for a terrorist act)</td>
<td>Guilty</td>
<td>Guilty</td>
<td>3 November 2008</td>
<td>18 yrs 8 mths each</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Guilty</td>
<td>Guilty</td>
<td></td>
<td>8 years for count 1, 7 years for count 2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Total sentence</td>
<td>14 years non-parole</td>
<td></td>
</tr>
<tr>
<td>Person Charged</td>
<td>State</td>
<td>Date Arrested</td>
<td>Offences</td>
<td>Plea</td>
<td>Result</td>
<td>Date of plea or conviction/acquittal</td>
<td>Sentence</td>
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</tr>
</tbody>
</table>
| Mirsad Mulahalilovic    | New South Wales  | 8 November 2005      | Subsection 101.4(1) *Criminal Code* (possessing a thing connected with preparation for a terrorist act)  
Sections 11.5 and 101.6 *Criminal Code* (conspiring to do acts in preparation for a terrorist act) | Guilty  | Guilty                      | 24 October 2008                         | 4 yrs 8 mths/3.5yrs                |
| Majed Raad              | Victoria         | 31 March 2006        | Section 102.3 *Criminal Code* (membership of terrorist organisation)     | Not guilty | Acquitted                  | 15 September 2008                    |                        |
| Shoue Hammoud           | Victoria         | 31 March 2006        | Section 102.6(1) *Criminal Code* (intentionally make funds available to a terrorist organisation)  
Section 102.3 *Criminal Code* (membership of terrorist organisation)     | Not guilty | Acquitted                  | 15 September 2008                    |                        |
| Bassam Raad             | Victoria         | 31 March 2006        | Subsection 102.6(1) *Criminal Code* (intentionally make funds available to a terrorist organisation)  
Section 102.3 *Criminal Code* (membership of terrorist organisation)     | Not guilty | Acquitted                  | 15 September 2008                    |                        |
| Aruran Vinayagamoorthy  | Victoria         | 1 May 2007           | Section 21 *Charter of the United Nations Act* 1945 (intentionally making an asset (funds) available to a proscribed entity) (2 counts)  
Section 102.3 *Criminal Code* (intentionally being a member of a terrorist organisation)  
Subsection 102.6(1) *Criminal Code* (intentionally making funds available to a terrorist organisation) | Guilty  | Guilty                      | 24 December 2009                         | 2 yrs suspended                |
<table>
<thead>
<tr>
<th>Person Charged</th>
<th>State</th>
<th>Date Arrested</th>
<th>Offences</th>
<th>Plea</th>
<th>Result</th>
<th>Date of plea or conviction/aquittal</th>
<th>Sentence (a/b: a=total, b=non-parole)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sivarajah Yathavan</td>
<td>Victoria</td>
<td>1 May 2007</td>
<td>Section 21 Charter of the United Nations Act 1945 (intentionally making an asset (funds) available to a proscribed entity)</td>
<td>Guilty</td>
<td>Guilty</td>
<td>24 December 2009</td>
<td>1 yr suspended</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Section 102.3 Criminal Code (intentionally being a member of a terrorist organisation)</td>
<td></td>
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</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Section 102.6(1) Criminal Code (intentionally making funds available to a terrorist organisation)</td>
<td></td>
<td>Charge not proceeded with</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Subsection 102.7(1) Criminal Code (intentionally providing support or resources (self) to a terrorist organisation)</td>
<td></td>
<td>Charge not proceeded with</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Arumugam Rajeevan</td>
<td>Victoria</td>
<td>10 July 2007</td>
<td>Section 21 Charter of the United Nations Act 1945 (intentionally making an asset (funds) available to a proscribed entity)</td>
<td>Guilty</td>
<td>Guilty</td>
<td>24 December 2009</td>
<td>1 yr suspended</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Section 102.3 Criminal Code (intentionally being a member of a terrorist organisation)</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Section 102.6(1) Criminal Code (intentionally making funds available to a terrorist organisation)</td>
<td></td>
<td>Charge not proceeded with</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Subsection 102.7(1) Criminal Code (intentionally providing support or resources (self) to a terrorist organisation)</td>
<td></td>
<td>Charge not proceeded with</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Person Charged</td>
<td>State</td>
<td>Date Arrested</td>
<td>Offences</td>
<td>Plea</td>
<td>Result</td>
<td>Date of plea or conviction/acquittal</td>
<td>Sentence (a/b: a=total, b=non-parole)</td>
</tr>
<tr>
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</tr>
<tr>
<td>Saney Aweys</td>
<td>Victoria</td>
<td>4 August 2009</td>
<td>Section 11.5 and subsection 101.6(1) Criminal Code (conspiracy to do an act in preparation for, or planning a terrorist act)</td>
<td>Not guilty</td>
<td>Guilty</td>
<td>23 December 2010</td>
<td>18 years (from date of sentence)/ 13 years and 6 months (864 days already served)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Section 11.2 Criminal Code and subsection 6(1) of the Crimes (Foreign Incursions and Recruitment) Act 1914 (aiding, abetting, counselling or procuring a hostile act in a foreign state)</td>
<td></td>
<td>Separate trial ordered – not yet listed</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Subsection 7(1) of the Crimes (Foreign Incursions and Recruitment) Act (conducting preparations for incursions into a foreign state to engage in hostile activities)</td>
<td></td>
<td>Charge not proceeded with NB: Appeal on sentence lodged</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yacqub Khayre</td>
<td>Victoria</td>
<td>4 August 2009</td>
<td>Section 11.5 and subsection 101.6(1) Criminal Code (conspiracy to do an act in preparation for, or planning a terrorist act)</td>
<td>Not guilty</td>
<td>Acquitted</td>
<td>23 December 2010</td>
<td>Acquitted</td>
</tr>
<tr>
<td>Nayef El-Sayed</td>
<td>Victoria</td>
<td>4 August 2009</td>
<td>Section 11.5 and subsection 101.6(1) Criminal Code (conspiracy to do an act in preparation for, or planning a terrorist act)</td>
<td>Not guilty</td>
<td>Guilty NB: Appeal on sentence lodged</td>
<td>23 December 2010</td>
<td>18 years (from date of sentence)/ 13 years and 6 months (864 days already served)</td>
</tr>
<tr>
<td>Wissam Fattal</td>
<td>Victoria</td>
<td>4 August 2009</td>
<td>Section 11.5 and subsection 101.6(1) Criminal Code (conspiracy to do an act in preparation for, or planning a terrorist act)</td>
<td>Not guilty</td>
<td>Guilty NB: Appeal on sentence lodged</td>
<td>23 December 2010</td>
<td>18 years (from date of sentence)/ 13 years 6 months (989 days served)</td>
</tr>
<tr>
<td>Person Charged</td>
<td>State</td>
<td>Date Arrested</td>
<td>Offences</td>
<td>Plea</td>
<td>Result</td>
<td>Date of plea or conviction/acquittal</td>
<td>Sentence (a/b: a=total, b=non-parole)</td>
</tr>
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<td>---------------------------------------</td>
</tr>
<tr>
<td>Abdirahman Ahmed</td>
<td>Victoria</td>
<td>4 August 2009</td>
<td>Section 11.5 and subsection 101.6(1) Criminal Code (conspiracy to do an act in preparation for, or planning a terrorist act) Section 11.2 Criminal Code (aiding, abetting, counselling or procuring a hostile act in a foreign state) and subsection 6(1) of the Crimes (Foreign Incursions and Recruitment) Act 1914</td>
<td>Not guilty</td>
<td>Acquitted</td>
<td>23 December 2010</td>
<td>Acquitted</td>
</tr>
<tr>
<td>Total prosecuted</td>
<td>35</td>
<td>Total convicted</td>
<td>26</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
## Attachment E — Table of differences between control orders and Terrorism Prevention and Investigation Measure’s (UK)

<table>
<thead>
<tr>
<th></th>
<th>Control orders</th>
<th>Terrorism prevention and investigation measures</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legal Test</strong></td>
<td>Legal test for imposition of control order: reasonable suspicion of involvement in terrorism-related activity; order must be necessary to protect the public.</td>
<td>Legal test for imposition of TPIM: reasonable belief of involvement in terrorism-related activity; measures must be necessary to protect the public.</td>
</tr>
<tr>
<td><strong>Duration</strong></td>
<td>Order lasts maximum of 12 months. Renewable if necessary to protect the public; no max number of renewals where necessity test satisfied. Orders have been in place a small number of cases for over 4 years.</td>
<td>Order lasts maximum of 12 months extendable once, giving maximum time limit of 2 years. Evidence of further engagement in terrorism-related activity required to justify a further notice beyond 2 years.</td>
</tr>
<tr>
<td><strong>Obligations (general)</strong></td>
<td>A wide range of obligations can be imposed where they are judged necessary and proportionate to disrupt terrorism-related activity.</td>
<td>A narrower range of obligations could be imposed.</td>
</tr>
<tr>
<td><strong>Curfew/Overnight residence requirement</strong></td>
<td>Maximum curfews of 16 hours for non-derogating control orders with electronic tagging available to monitor compliance.</td>
<td>A requirement to reside overnight at a specified residence – limited stays at other locations allowed with prior permission. Electronic tagging available to monitor compliance.</td>
</tr>
<tr>
<td><strong>Relocation</strong></td>
<td>Option to relocate individuals to Home Office provided accommodation – potentially several hours travel away from current residence.</td>
<td>No power to relocate away from local area without agreement. (There is a power to provide alternative accommodation within the locality of the home address.)</td>
</tr>
<tr>
<td><strong>Communication</strong></td>
<td>Option to have complete prohibition of access to mobile phones, computers and the internet (and associated technology/equipment).</td>
<td>All individuals will have a right to use one mobile phone without internet access and one landline. All individuals will be able to have access to the internet through one home computer. Use of equipment will be subject to necessary controls e.g. regular inspection and notification of passwords.</td>
</tr>
<tr>
<td></td>
<td><strong>Control orders</strong></td>
<td><strong>Terrorism prevention and investigation measures</strong></td>
</tr>
<tr>
<td>---------------------</td>
<td>------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Association</strong></td>
<td>Option to prohibit association with any named individuals where necessary. Option to prohibit prearranged meetings or visitors without prior permission.</td>
<td>Option to prohibit association with named individuals retained. Association with any other person requires notification.</td>
</tr>
<tr>
<td><strong>Work/study</strong></td>
<td>Option to require notification and/or approval of work and study.</td>
<td>Option retained.</td>
</tr>
<tr>
<td><strong>Boundary</strong></td>
<td>Option to impose a very restrictive geographical boundary – limiting the individual to a relatively narrow area and excluding him from areas of significant concern.</td>
<td>No geographical boundaries. Power to exclude from particular places – streets and specified areas or descriptions of places (e.g. Airports).</td>
</tr>
<tr>
<td><strong>Travel abroad</strong></td>
<td>Option to prevent travel abroad.</td>
<td>Option to prevent travel abroad without permission of Secretary of State.</td>
</tr>
<tr>
<td><strong>Police reporting</strong></td>
<td>Option to require daily reporting to the police.</td>
<td>Option retained.</td>
</tr>
<tr>
<td><strong>Financial</strong></td>
<td>Option to prevent transfer of funds abroad.</td>
<td>Option to place restrictions on transfers of property and requirements to disclose details of property.</td>
</tr>
<tr>
<td><strong>Derogation</strong></td>
<td>Derogating control orders possible – if Government was to derogate from orders. Article 5 (right to liberty) of the European Convention on Human Rights – imposing 24 hour curfew (house arrest).</td>
<td>No power to make derogating</td>
</tr>
<tr>
<td><strong>Prospects of prosecution</strong></td>
<td>Police must keep prospects of prosecution under review, consulting CPS as necessary.</td>
<td>Police must keep prospects of prosecution under review, consulting CPS as necessary. Police under statutory duty to inform Home Office of outcome.</td>
</tr>
</tbody>
</table>
Schedule — full text of Commonwealth legislation under review

**Criminal Code Act 1995**

**Part 5.3 — Terrorism**

**Division 100 — Preliminary**

**100.1 Definitions**

(1) In this Part:

- **AFP member** means:
  - (a) a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*); or
  - (b) a special member of the Australian Federal Police (within the meaning of that Act).

- **Commonwealth place** has the same meaning as in the *Commonwealth Places (Application of Laws) Act 1970*.

- **confirmed control order** means an order made under section 104.16.

- **constitutional corporation** means a corporation to which paragraph 51(xx) of the Constitution applies.

- **continued preventative detention order** means an order made under section 105.12.

- **control order** means an interim control order or a confirmed control order.

- **corresponding State preventative detention law** means a law of a State or Territory that is, or particular provisions of a law of a State or Territory that are, declared by the regulations to correspond to Division 105 of this Act.

- **express amendment** of the provisions of this Part or Chapter 2 means the direct amendment of the provisions (whether by the insertion, omission, repeal, substitution or relocation of words or matter).

- **frisk search** means:
  - (a) a search of a person conducted by quickly running the hands over the person’s outer garments; and
  - (b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.
**funds** means:

(a) property and assets of every kind, whether tangible or intangible, movable or immovable, however acquired; and

(b) legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such property or assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, debt instruments, drafts and letters of credit.

**identification material**, in relation to a person, means prints of the person’s hands, fingers, feet or toes, recordings of the person’s voice, samples of the person’s handwriting or photographs (including video recordings) of the person, but does not include tape recordings made for the purposes of section 23U or 23V of the *Crimes Act 1914*.

**initial preventative detention order** means an order made under section 105.8.

**interim control order** means an order made under section 104.4, 104.7 or 104.9.

**issuing authority**:

(a) for initial preventative detention orders – means a senior AFP member; and

(b) for continued preventative detention orders – means a person appointed under section 105.2.

**issuing court** means:

(a) the Federal Court of Australia; or

(b) the Family Court of Australia; or

(c) the Federal Magistrates Court.

**Judge** means a Judge of a court created by the Parliament.

**lawyer** means a person enrolled as a legal practitioner of a federal court or the Supreme Court of a State or Territory.

**listed terrorist organisation** means an organisation that is specified by the regulations for the purposes of paragraph (b) of the definition of **terrorist organisation** in section 102.1.

**ordinary search** means a search of a person or of articles in the possession of a person that may include:

(a) requiring the person to remove his or her overcoat, coat or jacket and any gloves, shoes or hat; and

(b) an examination of those items.

**organisation** means a body corporate or an unincorporated body, whether or not the body:

(a) is based outside Australia; or

(b) consists of persons who are not Australian citizens; or

(c) is part of a larger organisation.
police officer means:
(a) an AFP member; or
(b) a member (however described) of a police force of a State or Territory.

prescribed authority has the same meaning as in Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979.

preventative detention order means an order under section 105.8 or 105.12.

prohibited contact order means an order made under section 105.15 or 105.16.

referring State has the meaning given by section 100.2.

seizable item means anything that:
(a) would present a danger to a person; or
(b) could be used to assist a person to escape from lawful custody; or
(c) could be used to contact another person or to operate a device remotely.

senior AFP member means:
(a) the Commissioner of the Australian Federal Police; or
(b) a Deputy Commissioner of the Australian Federal Police; or
(c) an AFP member of, or above, the rank of Superintendent.

superior court means:
(a) the High Court; or
(b) the Federal Court of Australia; or
(c) the Family Court of Australia or of a State; or
(d) the Supreme Court of a State or Territory; or
(e) the District Court (or equivalent) of a State or Territory.

terrorist act means an action or threat of action where:
(a) the action falls within subsection (2) and does not fall within subsection (3); and
(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
(c) the action is done or the threat is made with the intention of:
   (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
   (ii) intimidating the public or a section of the public.

tracking device means any electronic device capable of being used to determine or monitor the location of a person or an object or the status of an object.
(2) Action falls within this subsection if it:
   (a) causes serious harm that is physical harm to a person; or
   (b) causes serious damage to property; or
   (c) causes a person’s death; or
   (d) endangers a person’s life, other than the life of the person taking the action; or
   (e) creates a serious risk to the health or safety of the public or a section of the public; or
   (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
      (i) an information system; or
      (ii) a telecommunications system; or
      (iii) a financial system; or
      (iv) a system used for the delivery of essential government services; or
      (v) a system used for, or by, an essential public utility; or
      (vi) a system used for, or by, a transport system.

(3) Action falls within this subsection if it:
   (a) is advocacy, protest, dissent or industrial action; and
   (b) is not intended:
      (i) to cause serious harm that is physical harm to a person; or
      (ii) to cause a person’s death; or
      (iii) to endanger the life of a person, other than the person taking the action; or
      (iv) to create a serious risk to the health or safety of the public or a section of the public.

(4) In this Division:
   (a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and
   (b) a reference to the public includes a reference to the public of a country other than Australia.

Division 101 – Terrorism

101.2 Providing or receiving training connected with terrorist acts

(1) A person commits an offence if:
   (a) the person provides or receives training; and
   (b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
   (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

Penalty: Imprisonment for 25 years.
(2) A person commits an offence if:
   (a) the person provides or receives training; and
   (b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
   (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).
Penalty: Imprisonment for 15 years.

(3) A person commits an offence under this section even if:
   (a) a terrorist act does not occur; or
   (b) the training is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
   (c) the training is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.

(4) Section 15.4 (extended geographical jurisdiction – category D) applies to an offence against this section.

(5) If, in a prosecution for an offence (the prosecuted offence) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the alternative offence) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

101.4 Possessing things connected with terrorist acts

(1) A person commits an offence under this section even if:
   (a) a terrorist act does not occur; or
   (b) the training is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
   (c) the training is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.
Penalty: Imprisonment for 15 years.

(2) A person commits an offence if:
   (a) the person possesses a thing; and
   (b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
   (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).
Penalty: Imprisonment for 10 years.
(3) A person commits an offence under subsection (1) or (2) even if:
   (a) a terrorist act does not occur; or
   (b) the thing is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
   (c) the thing is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.

(4) Section 15.4 (extended geographical jurisdiction – category D) applies to an offence against this section.

(5) Subsections (1) and (2) do not apply if the possession of the thing was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).

(6) If, in a prosecution for an offence (the prosecuted offence) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the alternative offence) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

101.5 Collecting or making documents likely to facilitate terrorist acts

(1) A person commits an offence if:
   (a) the person collects or makes a document; and
   (b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
   (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

Penalty: Imprisonment for 15 years.

(2) A person commits an offence if:
   (a) the person collects or makes a document; and
   (b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
   (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).

Penalty: Imprisonment for 10 years.

(3) A person commits an offence under subsection (1) or (2) even if:
   (a) a terrorist act does not occur; or
   (b) the document is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
   (c) the document is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.
(4) Section 15.4 (extended geographical jurisdiction – category D) applies to an offence against this section.

(5) Subsections (1) and (2) do not apply if the collection or making of the document was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.
Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).

(6) If, in a prosecution for an offence (the prosecuted offence) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the alternative offence) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

101.6 Other acts done in preparation for, or planning, terrorist acts

(1) A person commits an offence if the person does any act in preparation for, or planning, a terrorist act.
Penalty: Imprisonment for life.

(2) A person commits an offence under subsection (1) even if:
(a) a terrorist act does not occur; or
(b) the person’s act is not done in preparation for, or planning, a specific terrorist act; or
(c) the person’s act is done in preparation for, or planning, more than one terrorist act.

(3) Section 15.4 (extended geographical jurisdiction – category D) applies to an offence against subsection (1).

Division 102 – Terrorist organisations

Subdivision A – Definitions

102.1 Definitions

(1) In this Division:

advocate has the meaning given by subsection (1A).

associate: a person associates with another person if the person meets or communicates with the other person.

close family member of a person means:
(a) the person’s spouse or de facto partner; or
(b) a parent, stepparent or grandparent of the person; or
(c) a child, stepchild or grandchild of the person; or
(d) a brother, sister, stepbrother or stepsister of the person; or
(e) a guardian or carer of the person.
Note: See also subsection (19).

*member* of an organisation includes:
(a) a person who is an informal member of the organisation; and
(b) a person who has taken steps to become a member of the organisation; and
(c) in the case of an organisation that is a body corporate – a director or an officer of the body corporate.

*recruit* includes induce, incite and encourage.

*terrorist organisation* means:
(a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or
(b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)).

**Definition of advocates**

(1A) In this Division, an organisation *advocates* the doing of a terrorist act if:
(a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or
(b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or
(c) the organisation directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act.

**Terrorist organisation regulations**

(2) Before the GovernorGeneral makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section, the Minister must be satisfied on reasonable grounds that the organisation:
(a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or
(b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

(2A) Before the GovernorGeneral makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section, the Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation.

(3) Regulations for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section cease to have effect on the third anniversary of the day on which they take effect. To avoid doubt, this subsection does not prevent:
(a) the repeal of those regulations; or
(b) the cessation of effect of those regulations under subsection (4); or
(c) the making of new regulations the same in substance as those regulations (whether the new regulations are made or take effect before or after those regulations cease to have effect because of this subsection).

(4) If:
   (a) an organisation is specified by regulations made for the purposes of paragraph (b) of the definition of terrorist organisation in this section; and
   (b) the Minister ceases to be satisfied of either of the following (as the case requires):
      (i) that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);
      (ii) that the organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);

the Minister must, by written notice published in the Gazette, make a declaration to the effect that the Minister has ceased to be so satisfied. The regulations, to the extent to which they specify the organisation, cease to have effect when the declaration is made.

(5) To avoid doubt, subsection (4) does not prevent the organisation from being subsequently specified by regulations made for the purposes of paragraph (b) of the definition of terrorist organisation in this section if the Minister becomes satisfied as mentioned in subsection (2).

(6) If, under subsection (3) or (4), a regulation ceases to have effect, section 15 of the Legislative Instruments Act 2003 applies as if the regulation had been repealed.

(17) If:
   (a) an organisation (the listed organisation) is specified in regulations made for the purposes of paragraph (b) of the definition of terrorist organisation in this section; and
   (b) an individual or an organisation (which may be the listed organisation) makes an application (the delisting application) to the Minister for a declaration under subsection (4) in relation to the listed organisation; and
   (c) the delisting application is made on the grounds that there is no basis for the Minister to be satisfied that the listed organisation:
      (i) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or
      (ii) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);
       as the case requires;

the Minister must consider the delisting application.

(18) Subsection (17) does not limit the matters that may be considered by the Minister for the purposes of subsection (4).
For the purposes of this Division, the close family members of a person are taken to include the following (without limitation):

(a) a de facto partner of the person;

(b) someone who is the child of the person, or of whom the person is the child, because of the definition of child in the Dictionary;

(c) anyone else who would be a member of the person’s family if someone mentioned in paragraph (a) or (b) is taken to be a close family member of the person.

... 

102.5 Training a terrorist organisation or receiving training from a terrorist organisation

(1) A person commits an offence if:

(a) the person intentionally provides training to, or intentionally receives training from, an organisation; and

(b) the organisation is a terrorist organisation; and

(c) the person is reckless as to whether the organisation is a terrorist organisation.

Penalty: Imprisonment for 25 years.

(2) A person commits an offence if:

(a) the person intentionally provides training to, or intentionally receives training from, an organisation; and

(b) the organisation is a terrorist organisation that is covered by paragraph (b) of the definition of terrorist organisation in subsection 102.1(1).

Penalty: Imprisonment for 25 years.

(3) Subject to subsection (4), strict liability applies to paragraph (2)(b).

(4) Subsection (2) does not apply unless the person is reckless as to the circumstance mentioned in paragraph (2)(b).

Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3)).

102.6 Getting funds to, from or for a terrorist organisation

(1) A person commits an offence if:

(a) the person intentionally:

   (i) receives funds from, or makes funds available to, an organisation (whether directly or indirectly); or

   (ii) collects funds for, or on behalf of, an organisation (whether directly or indirectly); and

(b) the organisation is a terrorist organisation; and

(c) the person knows the organisation is a terrorist organisation.

Penalty: Imprisonment for 25 years.
(2) A person commits an offence if:
(a) the person intentionally:
   (i) receives funds from, or makes funds available to, an organisation (whether directly or indirectly); or
   (ii) collects funds for, or on behalf of, an organisation (whether directly or indirectly); and
(b) the organisation is a terrorist organisation; and
(c) the person is reckless as to whether the organisation is a terrorist organisation.
Penalty: Imprisonment for 15 years.

(3) Subsections (1) and (2) do not apply to the person’s receipt of funds from the organisation if the person proves that he or she received the funds solely for the purpose of the provision of:
(a) legal representation for a person in proceedings relating to this Division; or
(b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.

Note: A defendant bears a legal burden in relation to the matter in subsection (3) (see section 13.4).

102.8 Associating with terrorist organisations

(1) A person commits an offence if:
(a) on 2 or more occasions:
   (i) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation; and
   (ii) the person knows that the organisation is a terrorist organisation; and
   (iii) the association provides support to the organisation; and
   (iv) the person intends that the support assist the organisation to expand or to continue to exist; and
   (v) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation; and
(b) the organisation is a terrorist organisation because of paragraph (b) of the definition of terrorist organisation in this Division (whether or not the organisation is a terrorist organisation because of paragraph (a) of that definition also).

Penalty: Imprisonment for 3 years.

(2) A person commits an offence if:
(a) the person has previously been convicted of an offence against subsection (1); and
(b) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation; and
(c) the person knows that the organisation is a terrorist organisation; and
(d) the association provides support to the organisation; and
(e) the person intends that the support assist the organisation to expand or to continue to exist; and

(f) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation; and

(g) the organisation is a terrorist organisation because of paragraph (b) of the definition of \textit{terrorist organisation} in this Division (whether or not the organisation is a terrorist organisation because of paragraph (a) of that definition also).

Penalty: Imprisonment for 3 years.

(3) Strict liability applies to paragraphs (1)(b) and (2)(g).

(4) This section does not apply if:

(a) the association is with a close family member and relates only to a matter that could reasonably be regarded (taking into account the person’s cultural background) as a matter of family or domestic concern; or

(b) the association is in a place being used for public religious worship and takes place in the course of practising a religion; or

(c) the association is only for the purpose of providing aid of a humanitarian nature; or

(d) the association is only for the purpose of providing legal advice or legal representation in connection with:

(i) criminal proceedings or proceedings related to criminal proceedings (including possible criminal proceedings in the future); or

(ii) proceedings relating to whether the organisation in question is a terrorist organisation; or

(iii) a decision made or proposed to be made under Division 3 of Part III of the \textit{Australian Security Intelligence Organisation Act 1979}, or proceedings relating to such a decision or proposed decision; or

(iv) a listing or proposed listing under section 15 of the \textit{Charter of the United Nations Act 1945} or an application or proposed application to revoke such a listing, or proceedings relating to such a listing or application or proposed listing or application; or

(v) proceedings conducted by a military commission of the United States of America established under a Military Order of 13 November 2001 made by the President of the United States of America and entitled “Detention, Treatment, and Trial of Certain NonCitizens in the War Against Terrorism”; or

(vi) proceedings for a review of a decision relating to a passport or other travel document or to a failure to issue such a passport or other travel document (including a passport or other travel document that was, or would have been, issued by or on behalf of the government of a foreign country).

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3).

(5) This section does not apply unless the person is reckless as to the circumstance mentioned in paragraph (1)(b) and (2)(g) (as the case requires).
Note: A defendant bears an evidential burden in relation to the matter in subsection (5). See subsection 13.3(3).

(6) This section does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.
Note: A defendant bears an evidential burden in relation to the matter in subsection (6). See subsection 13.3(3).

(7) A person who is convicted of an offence under subsection (1) in relation to the person’s conduct on 2 or more occasions is not liable to be punished for an offence under subsection (1) for other conduct of the person that takes place:
   (a) at the same time as that conduct; or
   (b) within 7 days before or after any of those occasions.

...  

Division 103 – Financing terrorism

103.1 Financing terrorism
(1) A person commits an offence if:
   (a) the person provides or collects funds; and
   (b) the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act.

Penalty: Imprisonment for life.
Note: Intention is the fault element for the conduct described in paragraph (1)(a). See subsection 5.6(1).

(2) A person commits an offence under subsection (1) even if:
   (a) a terrorist act does not occur; or
   (b) the funds will not be used to facilitate or engage in a specific terrorist act; or
   (c) the funds will be used to facilitate or engage in more than one terrorist act.

103.2 Financing a terrorist
(1) A person commits an offence if:
   (a) the person intentionally:
      (i) makes funds available to another person (whether directly or indirectly); or
      (ii) collects funds for, or on behalf of, another person (whether directly or indirectly); and
   (b) the firstmentioned person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.

Penalty: Imprisonment for life.
(2) A person commits an offence under subsection (1) even if:
   (a) a terrorist act does not occur; or
   (b) the funds will not be used to facilitate or engage in a specific terrorist act; or
   (c) the funds will be used to facilitate or engage in more than one terrorist act.

103.3 Extended geographical jurisdiction for offences
Section 15.4 (extended geographical jurisdiction – category D) applies to an offence against this Division.

Division 104 – Control orders

Subdivision A – Object of this Division

104.1 Object of this Division
The object of this Division is to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act.

Subdivision B – Making an interim control order

104.2 Attorney-General’s consent to request an interim control order
(1) A senior AFP member must not request an interim control order in relation to a person without the Attorney-General’s written consent.
   Note: However, in urgent circumstances, a senior AFP member may request an interim control order without first obtaining the Attorney-General’s consent (see Subdivision C).

(2) A senior AFP member may only seek the Attorney-General’s written consent to request an interim control order in relation to a person if the member:
   (a) considers on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act; or
   (b) suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation.

(3) In seeking the Attorney-General’s consent, the member must give the Attorney-General a draft request that includes:
   (a) a draft of the interim control order to be requested; and
   (b) the following:
      (i) a statement of the facts relating to why the order should be made;
      (ii) if the member is aware of any facts relating to why the order should not be made – a statement of those facts; and
   (c) the following:
      (i) an explanation as to why each of the obligations, prohibitions and restrictions should be imposed on the person;
(ii) if the member is aware of any facts relating to why any of those obligations, prohibitions or restrictions should not be imposed on the person – a statement of those facts; and

(d) the following:

(i) the outcomes and particulars of all previous requests for interim control orders (including the outcomes of the hearings to confirm the orders) in relation to the person;

(ii) the outcomes and particulars of all previous applications for variations of control orders made in relation to the person;

(iii) the outcomes of all previous applications for revocations of control orders made in relation to the person;

(iv) the outcomes and particulars of all previous applications for preventative detention orders in relation to the person;

(v) information (if any) that the member has about any periods for which the person has been detained under an order made under a corresponding State preventative detention law; and

(e) information (if any) that the member has about the person’s age; and

(f) a summary of the grounds on which the order should be made.

Note 1: An interim control order cannot be requested in relation to a person who is under 16 years of age (see section 104.28).

Note 2: The member might commit an offence if the draft request is false or misleading (see sections 137.1 and 137.2).

(3A) To avoid doubt, paragraph (3)(f) does not require any information to be included in the summary if disclosure of that information is likely to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004).

(4) The Attorney-General’s consent may be made subject to changes being made to the draft request (including the draft of the interim control order to be requested).

(5) To avoid doubt, a senior AFP member may seek the Attorney-General’s consent to request an interim control order in relation to a person, even if such a request has previously been made in relation to the person.

104.3 Requesting the court to make an interim control order

If the Attorney-General consents to the request under section 104.2, the senior AFP member may request the interim control order by giving an issuing court:

(a) a request:

   (i) that is the same as the draft request, except for the changes (if any) required by the Attorney-General; and

   (ii) the information in which is sworn or affirmed by the member; and

(b) a copy of the Attorney-General’s consent.

Note: The member might commit an offence if the request is false or misleading (see sections 137.1 and 137.2).
104.4 Making an interim control order

(1)  The issuing court may make an order under this section in relation to the person, but only if:
(a)  the senior AFP member has requested it in accordance with section 104.3; and
(b)  the court has received and considered such further information (if any) as the court requires; and
(c)  the court is satisfied on the balance of probabilities:
   (i)  that making the order would substantially assist in preventing a terrorist act; or
   (ii)  that the person has provided training to, or received training from, a listed terrorist organisation; and
(d)  the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

(2)  In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account the impact of the obligation, prohibition or restriction on the person’s circumstances (including the person’s financial and personal circumstances).

(3)  The court need not include in the order an obligation, prohibition or restriction that was sought by the senior AFP member if the court is not satisfied as mentioned in paragraph (1)(d) in respect of that obligation, prohibition or restriction.

104.5 Terms of an interim control order

(1)  If the issuing court makes the interim control order, the order must:
(a)  state that the court is satisfied of the matters mentioned in paragraphs 104.4(1)(c) and (d); and
(b)  specify the name of the person to whom the order relates; and
(c)  specify all of the obligations, prohibitions and restrictions mentioned in subsection (3) that are to be imposed on the person by the order; and
(d)  state that the order does not begin to be in force until it is served personally on the person; and
(e)  specify a day on which the person may attend the court for the court to:
   (i)  confirm (with or without variation) the interim control order; or
   (ii)  declare the interim control order to be void; or
   (iii)  revoke the interim control order; and
(f)  specify the period during which the confirmed control order is to be in force, which must not end more than 12 months after the day on which the interim control order is made; and
(g)  state that the person’s lawyer may attend a specified place in order to obtain a copy of the interim control order; and
(h)  set out a summary of the grounds on which the order is made.
Note 1: An interim control order made in relation to a person must be served on the person at least 48 hours before the day specified as mentioned in paragraph (1)(e) (see section 104.12).

Note 2: A confirmed control order that is made in relation to a 16 to 18 year old must not end more than 3 months after the day on which the interim control order is made (see section 104.28).

(1A) The day specified for the purposes of paragraph (1)(e) must be as soon as practicable, but at least 72 hours, after the order is made.

(2) Paragraph (1)(f) does not prevent the making of successive control orders in relation to the same person.

(2A) To avoid doubt, paragraph (1)(h) does not require any information to be included in the summary if disclosure of that information is likely to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004).

Obligations, prohibitions and restrictions

(3) The obligations, prohibitions and restrictions that the court may impose on the person by the order are the following:

(a) a prohibition or restriction on the person being at specified areas or places;
(b) a prohibition or restriction on the person leaving Australia;
(c) a requirement that the person remain at specified premises between specified times each day, or on specified days;
(d) a requirement that the person wear a tracking device;
(e) a prohibition or restriction on the person communicating or associating with specified individuals;
(f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet);
(g) a prohibition or restriction on the person possessing or using specified articles or substances;
(h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
(i) a requirement that the person report to specified persons at specified times and places;
(j) a requirement that the person allow himself or herself to be photographed;
(k) a requirement that the person allow impressions of his or her fingerprints to be taken;
(l) a requirement that the person participate in specified counselling or education.

Note: Restrictions apply to the use of photographs or impressions of fingerprints taken as mentioned in paragraphs (3)(j) and (k) (see section 104.22).

Communicating and associating

(4) Subsection 102.8(4) applies to paragraph (3)(e) and the person’s communication or association in the same way as that subsection applies to section 102.8 and a person’s association.

(5) This section does not affect the person’s right to contact, communicate or associate with
the person’s lawyer unless the person’s lawyer is a specified individual as mentioned in paragraph (3)(e). If the person’s lawyer is so specified, the person may contact, communicate or associate with any other lawyer who is not so specified.

Counselling and education

(6) A person is required to participate in specified counselling or education as mentioned in paragraph (3)(l) only if the person agrees, at the time of the counselling or education, to participate in the counselling or education.

Subdivision C – Making an urgent interim control order

104.6 Requesting an urgent interim control order by electronic means

(1) A senior AFP member may request, by telephone, fax, email or other electronic means, an issuing court to make an interim control order in relation to a person if:

(a) the member considers it necessary to use such means because of urgent circumstances; and

(b) the member either considers or suspects the matters mentioned in subsection 104.2(2) on reasonable grounds.

(2) The Attorney-General’s consent under section 104.2 is not required before the request is made.

Note: However, if the Attorney-General’s consent is not obtained before the member makes the request, the Attorney-General’s consent must be obtained within 4 hours of the member making the request (see section 104.10).

(3) The issuing court may require communication by voice to the extent that is practicable in the circumstances.

(4) The request must include the following:

(a) all that is required under subsection 104.2(3) in respect of an ordinary request for an interim control order (including, if the Attorney-General’s consent has been obtained before making the request, the changes (if any) required by the Attorney-General);

(b) an explanation as to why the making of the interim control order is urgent;

(c) if the Attorney-General’s consent has been obtained before making the request – a copy of the Attorney-General’s consent.

Note: The member might commit an offence if the request is false or misleading (see sections 137.1 and 137.2).

(5) The information and the explanation included in the request must be sworn or affirmed by the member, but do not have to be sworn or affirmed before the request is made.

Note: Subsection 104.7(5) requires the information and the explanation to be sworn or affirmed within 24 hours.
104.7 Making an urgent interim control order by electronic means

(1) Before making an order in response to a request under section 104.6, the issuing court must:
   (a) consider the information and the explanation included in the request; and
   (b) receive and consider such further information (if any) as the court requires.

(2) If the issuing court is satisfied that an order should be made urgently, the court may complete
the same form of order that would be made under sections 104.4 and 104.5.

Procedure after urgent interim control order is made

(3) If the issuing court makes the order, the court must inform the senior AFP member, by
telephone, fax, email or other electronic means, of:
   (a) the terms of the order; and
   (b) the day on which, and the time at which, it was completed.

(4) The member must then complete a form of order in terms substantially corresponding to those
given by the issuing court, stating on the form:
   (a) the name of the court; and
   (b) the day on which, and the time at which, the order was completed.

(5) Within 24 hours of being informed under subsection (3), the member must give or transmit
the following to the issuing court:
   (a) the form of order completed by the member;
   (b) if the information and the explanation included in the request were not already sworn or
affirmed – that information and explanation duly sworn or affirmed;
   (c) if the Attorney-General’s consent was not obtained before making the request – a copy of
the Attorney-General’s consent.

(6) The issuing court must attach to the documents provided under subsection (5) the form of
order the court has completed.

104.8 Requesting an urgent interim control order in person

(1) A senior AFP member may request, in person, an issuing court to make an interim control
order in relation to a person without first obtaining the Attorney-General’s consent under
section 104.2 if:
   (a) the member considers it necessary to request the order without the consent because of
urgent circumstances; and
   (b) the member either considers or suspects the matters mentioned in subsection 104.2(2) on
reasonable grounds.

Note: The Attorney-General’s consent must be obtained within 4 hours of making the request
(see section 104.10).

(2) The request must include the following:
   (a) all that is required under subsection 104.2(3) in respect of an ordinary request for an
interim control order (including information that is sworn or affirmed by the member);
(b) an explanation that is sworn or affirmed as to why the making of the interim control order without first obtaining the Attorney-General’s consent is urgent.
Note: The member might commit an offence if the request is false or misleading (see sections 137.1 and 137.2).

104.9 Making an urgent interim control order in person

(1) Before making an order in response to a request under section 104.8, the issuing court must:
   (a) consider the information and the explanation included in the request; and
   (b) receive and consider such further information (if any) as the court requires.

(2) If the issuing court is satisfied that an order should be made urgently, the court may make the same order that would be made under sections 104.4 and 104.5.

(3) Within 24 hours of the order being made under subsection (2), the member must:
   (a) give or transmit a copy of the order to the issuing court; and
   (b) either:
      (i) give or transmit a copy of the Attorney-General’s consent to request the order to the court; or
      (ii) notify the court in writing that the Attorney-General’s consent was not obtained.

Note: Section 104.10 deals with the Attorney-General’s consent.

104.10 Obtaining the Attorney-General’s consent within 4 hours

(1) If the Attorney-General’s consent to request an interim control order was not first sought before making a request under section 104.6 or 104.8, the senior AFP member who made the request must, in accordance with subsection 104.2(3), seek that consent within 4 hours of making the request.

(2) In any case, if the Attorney-General:
   (a) refuses his or her consent to request the order; or
   (b) has not given his or her consent to request the order; within 4 hours of the request being made, the order immediately ceases to be in force.

Note: However, the senior AFP member can vary the request and seek the Attorney-General’s consent to request a new interim control order in relation to the person (see subsection 104.2(5)).

(3) If the order ceases to be in force under subsection (2), the senior AFP member must, as soon as practicable:
   (a) notify the court that the order has ceased to be in force; and
   (b) if the order has been served on the person in relation to whom it was made:
      (i) annotate the order to indicate that it has ceased to be in force; and
      (ii) cause the annotated order to be served personally on the person.
104.11 Court to assume that exercise of power not authorised by urgent interim control order

If:
(a) it is material, in any proceedings, for a court to be satisfied that an interim control order was duly made under section 104.7; and
(b) the form of order completed by the relevant issuing court is not produced in evidence; the firstmentioned court is to assume, unless the contrary is proved, that the order was not duly made.

Subdivision D – Confirming an interim control order

104.12 Service, explanation and notification of an interim control order

Service and explanation of an interim control order

(1) As soon as practicable after an interim control order is made in relation to a person, and at least 48 hours before the day specified as mentioned in paragraph 104.5(1)(e), an AFP member:
(a) must serve the order personally on the person; and
(b) must inform the person of the following:
   (i) the effect of the order;
   (ii) the period for which the order (if confirmed) is in force;
   (iii) the effect of sections 104.12A, 104.13, 104.14, 104.18 and 104.27 (and section 104.22 if appropriate); and
(c) must ensure that the person understands the information provided under paragraph (b) (taking into account the person’s age, language skills, mental capacity and any other relevant factor).

(3) Paragraphs (1)(b) and (c) do not apply if the actions of the person in relation to whom the interim control order has been made make it impracticable for the AFP member to comply with those paragraphs.

(4) A failure to comply with paragraph (1)(c) does not make the control order ineffective to any extent.

Queensland public interest monitor to be given copy of interim control order

(5) If:
(a) the person in relation to whom the interim control order is made is a resident of Queensland; or
(b) the issuing court that made the interim control order did so in Queensland;
an AFP member must give to the Queensland public interest monitor a copy of the order.
104.12A Election to confirm control order

(1) At least 48 hours before the day specified in an interim control order as mentioned in paragraph 104.5(1)(e), the senior AFP member who requested the order must:
   (a) elect whether to confirm the order on the specified day; and
   (b) give a written notification to the issuing court that made the order of the member’s election.

(2) If the senior AFP member elects to confirm the order, an AFP member must:
   (a) serve personally on the person in relation to whom the order is made:
      (i) a copy of the notification; and
      (ii) a copy of the documents mentioned in paragraphs 104.2(3)(b) and (c); and
      (iii) any other details required to enable the person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order; and
   (b) if the person is a resident of Queensland, or the court made the order in Queensland – give the Queensland public interest monitor a copy of the documents mentioned in paragraph (a).

(3) To avoid doubt, subsection (2) does not require any information to be served or given if disclosure of that information is likely:
   (a) to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004); or
   (b) to be protected by public interest immunity; or
   (c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or
   (d) to put at risk the safety of the community, law enforcement officers or intelligence officers.

The fact that information of a kind mentioned in this subsection is not required to be disclosed does not imply that such information is required to be disclosed in other provisions of this Part that relate to the disclosure of information.

(4) If the senior AFP member elects not to confirm the order, and the order has already been served on the person, then:
   (a) the order immediately ceases to be in force; and
   (b) an AFP member must:
      (i) annotate the order to indicate that it has ceased to be in force; and
      (ii) cause the annotated order and a copy of the notification to be served personally on the person; and
      (iii) if the person is a resident of Queensland, or the court made the order in Queensland – give the Queensland public interest monitor a copy of the annotated order and the notification.
104.13 Lawyer may request a copy of an interim control order

(1) A lawyer of the person in relation to whom an interim control order is made may attend the place specified in the order as mentioned in paragraph 104.5(1)(g) in order to obtain a copy of the order.

(2) This section does not:
   (a) require more than one person to give the lawyer a copy of the order; or
   (b) entitle the lawyer to request, be given a copy of, or see, a document other than the order.

104.14 Confirming an interim control order

Who may adduce evidence or make submissions

(1) If an election has been made to confirm an interim control order, then, on the day specified as mentioned in paragraph 104.5(1)(e), the following persons may adduce evidence (including by calling witnesses or producing material), or make submissions, to the issuing court in relation to the confirmation of the order:
   (a) the senior AFP member who requested the interim control order;
   (b) one or more other AFP members;
   (c) the person in relation to whom the interim control order is made;
   (d) one or more representatives of the person;
   (e) if:
      (i) the person is a resident of Queensland; or
      (ii) the court made the interim control order in Queensland;
           the Queensland public interest monitor (unless the monitor is already a representative of the person).

(2) Subsection (1) does not otherwise limit the power of the court to control proceedings in relation to the confirmation of an interim control order.

(3) Before taking action under this section, the court must consider:
   (a) the original request for the interim control order; and
   (b) any evidence adduced, and any submissions made, under subsection (1) in respect of the order.

Failure of person or representative etc. to attend

(4) The court may confirm the order without variation if:
   (a) none of the following persons attend the court on the specified day:
      (i) the person in relation to whom the order is made;
      (ii) a representative of the person;
      (iii) if the person is a resident of Queensland, or the court made the order in Queensland – the Queensland public interest monitor; and
   (b) the court is satisfied on the balance of probabilities that the order was properly served on the person in relation to whom the order is made.
Attendance of person or representative etc.

(5) The court may take the action mentioned in subsection (6) or (7) if any of the following persons attend the court on the specified day:
   (a) the person in relation to whom the order is made;
   (b) a representative of the person;
   (c) if the person is a resident of Queensland, or the court made the order in Queensland – the Queensland public interest monitor.

(6) The court may declare, in writing, the order to be void if the court is satisfied that, at the time of making the order, there were no grounds on which to make the order.

(7) Otherwise, the court may:
   (a) revoke the order if, at the time of confirming the order, the court is not satisfied as mentioned in paragraph 104.4(1)(c); or
   (b) confirm and vary the order by removing one or more obligations, prohibitions or restrictions if, at the time of confirming the order, the court is satisfied as mentioned in paragraph 104.4(1)(c) but is not satisfied as mentioned in paragraph 104.4(1)(d); or
   (c) confirm the order without variation if, at the time of confirming the order, the court is satisfied as mentioned in paragraphs 104.4(1)(c) and (d).

Note: If the court confirms the interim control order, the court must make a new order under section 104.16.

104.15 When a declaration, or a revocation, variation or confirmation of a control order, is in force

(1) If the court declares the interim control order to be void under section 104.14, the order is taken never to have been in force.

(2) If the court revokes the interim control order under section 104.14, the order ceases to be in force when the court revokes the order.

(3) If the court confirms the interim control order (with or without variation) under section 104.14 then:
   (a) the interim control order ceases to be in force; and
   (b) the confirmed control order begins to be in force;
   when the court makes a corresponding order under section 104.16.

104.16 Terms of a confirmed control order

(1) If the issuing court confirms the interim control order under section 104.14, the court must make a corresponding order that:
   (a) states that the court is satisfied of the matters mentioned in paragraphs 104.4(1)(c) and (d); and
   (b) specifies the name of the person to whom the order relates; and
   (c) specifies all of the obligations, prohibitions and restrictions mentioned in subsection 104.5(3) that are to be imposed on the person by the order; and
(d) specifies the period during which the order is to be in force, which must not end more than 12 months after the day on which the interim control order was made; and
(e) states that the person’s lawyer may attend a specified place in order to obtain a copy of the confirmed control order.

Note: A confirmed control order that is made in relation to a 16 to 18 year old must not end more than 3 months after the day on which the interim control order was made (see section 104.28).

(2) Paragraph (1)(d) does not prevent the making of successive control orders in relation to the same person.

104.17 Service of a declaration, or a revocation, variation or confirmation of a control order

As soon as practicable after an interim control order is declared to be void, revoked or confirmed (with or without variation) under section 104.14, an AFP member must serve the declaration, the revocation or the confirmed control order personally on the person.

Subdivision E – Rights in respect of a control order

104.18 Application by the person for a revocation or variation of a control order

(1) A person in relation to whom a confirmed control order is made may apply to an issuing court for the court to revoke or vary the order under section 104.20.

(2) The person may make the application at any time after the order is served on the person.

(3) The person must give written notice of both the application and the grounds on which the revocation or variation is sought to the following persons:
   (a) the Commissioner of the Australian Federal Police;
   (b) if:
      (i) the person in relation to whom the order is made is a resident of Queensland; or
      (ii) the court will hear the application in Queensland;
          the Queensland public interest monitor.

(4) The following persons may adduce additional evidence (including by calling witnesses or producing material), or make additional submissions, to the court in relation to the application to revoke or vary the order:
   (a) the Commissioner;
   (b) one or more other AFP members;
   (c) the person in relation to whom the order is made;
   (d) one or more representatives of the person;
   (e) if paragraph (3)(b) applies – the Queensland public interest monitor (unless the monitor is a representative of the person).

(5) Subsection (4) does not otherwise limit the power of the court to control proceedings in relation to an application to revoke or vary a confirmed control order.
104.19 **Application by the AFP Commissioner for a revocation or variation of a control order**

(1) While a confirmed control order is in force, the Commissioner of the Australian Federal Police must cause an application to be made to an issuing court:

(a) to revoke the order, under section 104.20, if the Commissioner is satisfied that the grounds on which the order was confirmed have ceased to exist; and

(b) to vary the order, under that section, by removing one or more obligations, prohibitions or restrictions, if the Commissioner is satisfied that those obligations, prohibitions or restrictions should no longer be imposed on the person.

(2) The Commissioner must cause written notice of both the application and the grounds on which the revocation or variation is sought to be given to the following persons:

(a) the person in relation to whom the order is made;

(b) if:

   (i) the person in relation to whom the order is made is a resident of Queensland; or

   (ii) the court will hear the application in Queensland;

   the Queensland public interest monitor.

(3) The following persons may adduce additional evidence (including by calling witnesses or producing material), or make additional submissions, to the court in relation to the application to revoke or vary the order:

(a) the Commissioner;

(b) one or more other AFP members;

(c) the person in relation to whom the order is made;

(d) one or more representatives of the person;

(e) if paragraph (2)(b) applies – the Queensland public interest monitor (unless the monitor is a representative of the person).

(4) Subsection (3) does not otherwise limit the power of the court to control proceedings in relation to an application to revoke or vary a confirmed control order.

104.20 **Revocation or variation of a control order**

(1) If an application is made under section 104.18 or 104.19 in respect of a confirmed control order, the court may:

(a) revoke the order if, at the time of considering the application, the court is not satisfied as mentioned in paragraph 104.4(1)(c); or

(b) vary the order by removing one or more obligations, prohibitions or restrictions if, at the time of considering the application, the court is satisfied as mentioned in paragraph 104.4(1)(c) but is not satisfied as mentioned in paragraph 104.4(1)(d); or

(c) dismiss the application if, at the time of considering the application, the court is satisfied as mentioned in paragraphs 104.4(1)(c) and (d).

(2) A revocation or variation begins to be in force when the court revokes or varies the order.
(3) An AFP member must serve the revocation or variation personally on the person as soon as practicable after a confirmed control order is revoked or varied.

104.21 Lawyer may request a copy of a control order

(1) If a control order is confirmed or varied under section 104.14, 104.20 or 104.24, a lawyer of the person in relation to whom the control order is made may attend the place specified in the order as mentioned in paragraph 104.16(1)(e) or 104.25(d) in order to obtain a copy of the order.

(2) This section does not:
   (a) require more than one person to give the lawyer a copy of the order; or
   (b) entitle the lawyer to request, be given a copy of, or see, a document other than the order.

104.22 Treatment of photographs and impressions of fingerprints

(1) A photograph, or an impression of fingerprints, taken as mentioned in paragraph 104.5(3) (j) or (k) must only be used for the purpose of ensuring compliance with the relevant control order.

(2) If:
   (a) a period of 12 months elapses after the control order ceases to be in force; and
   (b) proceedings in respect of the control order have not been brought, or have been brought and discontinued or completed, within that period;

   the photograph or the impression must be destroyed as soon as practicable after the end of that period.

(3) A person commits an offence if:
   (a) the person engages in conduct; and
   (b) the conduct contravenes subsection (1).

   Penalty: Imprisonment for 2 years.

Subdivision F – Adding obligations, prohibitions or restrictions to a control order

104.23 Application by the AFP Commissioner for addition of obligations, prohibitions or restrictions

(1) The Commissioner of the Australian Federal Police may cause an application to be made to an issuing court to vary, under section 104.24, a confirmed control order, by adding one or more obligations, prohibitions or restrictions mentioned in subsection 104.5(3) to the order, if the Commissioner considers on reasonable grounds that the varied control order in the terms to be sought would substantially assist in preventing a terrorist act.

(2) The Commissioner must cause the court to be given:
   (a) a copy of the additional obligations, prohibitions and restrictions to be imposed on the person by the order; and
   (b) the following:
      (i) an explanation as to why each of those obligations, prohibitions and restrictions should be imposed on the person; and
(ii) if the Commissioner is aware of any facts relating to why any of those obligations, prohibitions or restrictions should not be imposed on the person – a statement of those facts; and

(c) the outcomes and particulars of all previous applications under this section for variations of the order; and

(d) information (if any) that the Commissioner has about the person’s age.

Note 1: A control order cannot be made in relation to a person who is under 16 years of age (see section 104.28).

Note 2: An offence might be committed if the application is false or misleading (see sections 137.1 and 137.2).

(3) The Commissioner must cause:

(a) written notice of the application and the grounds on which the variation is sought; and

(b) a copy of the documents mentioned in paragraph (2)(b); and

(c) any other details required to enable the person in relation to whom the order is made to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the variation of the order;

(d) the person in relation to whom the order is made;

(e) if the person is a resident of Queensland, or the court will hear the application in Queensland – the Queensland public interest monitor.

(3A) To avoid doubt, subsection (3) does not require any information to be given if disclosure of that information is likely:

(a) to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004); or

(b) to be protected by public interest immunity; or

(c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or

(d) to put at risk the safety of the community, law enforcement officers or intelligence officers.

The fact that information of a kind mentioned in this subsection is not required to be disclosed does not imply that such information is required to be disclosed in other provisions of this Part that relate to the disclosure of information.

(4) The following persons may adduce additional evidence (including by calling witnesses or producing material), or make additional submissions, to the court in relation to the application to vary the order:

(a) the Commissioner;

(b) one or more other AFP members;

(c) the person in relation to whom the order is made;

(d) one or more representatives of the person;

(e) if paragraph (3)(b) applies – the Queensland public interest monitor (unless the monitor is a representative of the person).
Subsection (4) does not otherwise limit the power of the court to control proceedings in relation to an application to vary a confirmed control order.

104.24 Varying a control order

(1) If an application is made under section 104.23, the issuing court may vary the control order, but only if:
   (a) an application has been made in accordance with section 104.23; and
   (b) the court is satisfied on the balance of probabilities that each of the additional obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

(2) In determining whether each of the additional obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account the impact of the obligation, prohibition or restriction on the person’s circumstances (including the person’s financial and personal circumstances).

(3) The court need not include in the order an obligation, prohibition or restriction that was sought if the court is not satisfied as mentioned in paragraph (1)(b) in respect of that obligation, prohibition or restriction.

104.25 Terms of a varied control order

If the issuing court varies the control order under section 104.24, the following must be included in the order:
   (a) a statement that the court is satisfied of the matter mentioned in paragraph 104.24(1)(b); and
   (b) the additional obligations, prohibitions and restrictions that are to be imposed on the person by the varied order; and
   (c) a statement that the variation of the order does not begin to be in force until the varied order is served personally on the person; and
   (d) a statement that the person’s lawyer may attend a specified place in order to obtain a copy of the varied order.

104.26 Service and explanation of a varied control order

(1) As soon as practicable after a control order is varied under section 104.24, an AFP member:
   (a) must serve the varied order personally on the person; and
   (b) must inform the person that the order has been varied to impose additional obligations, prohibitions and restrictions; and
   (c) must inform the person of the following:
      (i) the effect of the additional obligations, prohibitions and restrictions;
      (ii) the effect of sections 104.18, 104.21 and 104.27 (and section 104.22 if appropriate); and
(d) must ensure that the person understands the information provided under paragraph (c) (taking into account the person’s age, language skills, mental capacity and any other relevant factor).

(3) Paragraphs (1)(c) and (d) do not apply if the actions of the person in relation to whom the interim control order has been made make it impracticable for the AFP member to comply with those paragraphs.

(4) A failure to comply with paragraph (1)(d) does not make the control order ineffective to any extent.

**Subdivision G – Contravening a control order**

**104.27 Offence for contravening a control order**

A person commits an offence if:

(a) a control order is in force in relation to the person; and

(b) the person contravenes the order.

Penalty: Imprisonment for 5 years.

**Subdivision H – Miscellaneous**

**104.28 Special rules for young people**

**Rule for persons under 16**

(1) A control order cannot be requested, made or confirmed in relation to a person who is under 16 years of age.

**Rule for persons who are at least 16 but under 18**

(2) If an issuing court is satisfied that a person in relation to whom an interim control order is being made or confirmed is at least 16 but under 18, the period during which the confirmed control order is to be in force must not end more than 3 months after the day on which the interim control order is made by the court.

(3) Subsection (2) does not prevent the making of successive control orders in relation to the same person.

**104.28A Interlocutory proceedings**

(1) Proceedings in relation to a request under section 104.3, 104.6 or 104.8 to make an interim control order are taken to be interlocutory proceedings for all purposes (including for the purpose of section 75 of the *Evidence Act 1995*).

(2) The following proceedings are taken not to be interlocutory proceedings for any purpose (including for the purpose of section 75 of the *Evidence Act 1995*):

(a) proceedings in relation to the confirmation under section 104.14 of an interim control order;

(b) proceedings in relation to an application under section 104.18, 104.19 or 104.23 to revoke or vary a confirmed control order.
104.29 Reporting requirements

(1) The Attorney-General must, as soon as practicable after each 30 June, cause to be prepared a report about the operation of this Division during the year ended on that 30 June.

(2) Without limiting subsection (1), a report relating to a year must include the following matters:

(a) the number of interim control orders made under:
   (i) section 104.4; and
   (ii) section 104.7; and
   (iii) section 104.9;

(aa) the number of interim control orders in respect of which an election was made under section 104.12A not to confirm the order;

(b) the number of control orders confirmed under section 104.14;

(c) the number of control orders declared to be void under section 104.14;

(d) the number of control orders revoked under sections 104.14 and 104.20;

(e) the number of control orders varied under sections 104.14, 104.20 and 104.24;

(f) particulars of:
   (i) any complaints made or referred to the Commonwealth Ombudsman that related to control orders; and
   (ii) any information given under section 40SA of the Australian Federal Police Act 1979 that related to control orders and raised an AFP conduct or practices issue (within the meaning of that Act).

(3) The Attorney-General must cause copies of the report to be laid before each House of the Parliament within 15 sitting days of that House after the report is completed.

104.30 Requirement to notify Attorney-General of declarations, revocations or variations

The Commissioner must cause:

(a) the Attorney-General to be notified in writing if:
   (i) a control order is declared to be void under section 104.14; or
   (ii) a control order is revoked under section 104.14 or 104.20; or
   (iii) a control order is varied under section 104.14, 104.20 or 104.24; and

(b) the Attorney-General to be given a copy of the varied order (if appropriate).

104.31 Queensland public interest monitor functions and powers not affected

This Division does not affect a function or power that the Queensland public interest monitor, or a Queensland deputy public interest monitor, has under a law of Queensland.
### 104.32 Sunset provision

1. A control order that is in force at the end of 10 years after the day on which this Division commences ceases to be in force at that time.

2. A control order cannot be requested, made or confirmed after the end of 10 years after the day on which this Division commences.

### Division 105 – Preventative detention orders

#### Subdivision A – Preliminary

**105.1 Object**

The object of this Division is to allow a person to be taken into custody and detained for a short period of time in order to:

(a) prevent an imminent terrorist act occurring; or

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

Note: Section 105.42 provides that, while a person is being detained under a preventative detention order, the person may only be questioned for very limited purposes.

#### 105.2 Issuing authorities for continued preventative detention orders

1. The Minister may, by writing, appoint as an issuing authority for continued preventative detention orders:
   
   (a) a person who is a judge of a State or Territory Supreme Court; or
   
   (b) a person who is a Judge; or
   
   (c) a person who is a Federal Magistrate; or
   
   (d) a person who:
       
       (i) has served as a judge in one or more superior courts for a period of 5 years; and
       
       (ii) no longer holds a commission as a judge of a superior court; or
   
   (e) a person who:
       
       (i) holds an appointment to the Administrative Appeals Tribunal as President or Deputy President; and
       
       (ii) is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory; and
       
       (iii) has been enrolled for at least 5 years.

2. The Minister must not appoint a person unless:
   
   (a) the person has, by writing, consented to being appointed; and
   
   (b) the consent is in force.
105.3 Police officer detaining person under a preventative detention order

If:
(a) a number of police officers are detaining, or involved in the detention of, a person under a preventative detention order at a particular time; and
(b) an obligation is expressed in this Division to be imposed on the police officer detaining the person;
   the obligation is imposed at that time on:
(c) if those police officers include only one AFP member – that AFP member; or
(d) if those police officers include 2 or more AFP members – the most senior of those AFP members; or
(e) if those police officers do not include an AFP member – the most senior of those police officers.
Note: See also paragraph 105.27(2)(c).

Subdivision B – Preventative detention orders

105.4 Basis for applying for, and making, preventative detention orders

(1) An AFP member may apply for a preventative detention order in relation to a person only if the AFP member meets the requirements of subsection (4) or (6).
(2) An issuing authority may make a preventative detention order in relation to a person only if the issuing authority meets the requirements of subsection (4) or (6).
Note: For the definition of issuing authority, see subsection 100.1(1) and section 105.2.
(3) The person in relation to whom the preventative detention order is applied for, or made, is the subject for the purposes of this section.
(4) A person meets the requirements of this subsection if the person is satisfied that:
   (a) there are reasonable grounds to suspect that the subject:
      (i) will engage in a terrorist act; or
      (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
      (iii) has done an act in preparation for, or planning, a terrorist act; and
   (b) making the order would substantially assist in preventing a terrorist act occurring; and
   (c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).
(5) A terrorist act referred to in subsection (4):
   (a) must be one that is imminent; and
   (b) must be one that is expected to occur, in any event, at some time in the next 14 days.
(6) A person meets the requirements of this subsection if the person is satisfied that:
   (a) a terrorist act has occurred within the last 28 days; and
   (b) it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and
   (c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

(7) An issuing authority may refuse to make a preventative detention order unless the AFP member applying for the order gives the issuing authority any further information that the issuing authority requests concerning the grounds on which the order is sought.

105.5 No preventative detention order in relation to person under 16 years of age

(1) A preventative detention order cannot be applied for, or made, in relation to a person who is under 16 years of age.
   Note: See also section 105.39 and subsections 105.43(4) to (9) and (11) for the special rules for people who are under 18 years of age.

(2) If:
   (a) a person is being detained under a preventative detention order or a purported preventative detention order; and
   (b) the police officer who is detaining the person is satisfied on reasonable grounds that the person is under 16 years of age;
   the police officer must:
   (c) if the police officer is an AFP member – release the person, as soon as practicable, from detention under the order or purported order; or
   (d) if the police officer is not an AFP member – inform a senior AFP member, as soon as practicable, of the police officer’s reasons for being satisfied that the person is under 16 years of age.

(3) If:
   (a) a senior AFP member is informed by a police officer under paragraph (2)(d); and
   (b) the senior AFP member is satisfied on reasonable grounds that the person being detained is under 16 years of age;
   the senior AFP member must arrange to have the person released, as soon as practicable, from detention under the order or purported order.

105.5A Special assistance for person with inadequate knowledge of English language or disability

If the police officer who is detaining a person under a preventative detention order has reasonable grounds to believe that the person is unable, because of inadequate knowledge of the English language or a disability, to communicate with reasonable fluency in that language:
   (a) the police officer has an obligation under subsection 105.31(3) to arrange for the assistance of an interpreter in informing the person about:
(i) the effect of the order or any extension, or further extension, of the order; and
(ii) the person’s rights in relation to the order; and
(b) the police officer has an obligation under subsection 105.37(3A) to give the person reasonable assistance to:
   (i) choose a lawyer to act for the person in relation to the order; and
   (ii) contact the lawyer.

105.6 Restrictions on multiple preventative detention orders

Preventative detention orders under this Division

(1) If:
   (a) an initial preventative detention order is made in relation to a person on the basis of assisting in preventing a terrorist act occurring within a particular period; and
   (b) the person is taken into custody under the order;
   another initial preventative detention order cannot be applied for, or made, in relation to the person on the basis of assisting in preventing the same terrorist act occurring within that period.

Note: It will be possible to apply for, and make, another initial preventative detention order in relation to the person on the basis of preserving evidence of, or relating to, the terrorist act if it occurs.

(2) If:
   (a) an initial preventative detention order is made in relation to a person on the basis of assisting in preventing a terrorist act occurring within a particular period; and
   (b) the person is taken into custody under the order;
   another initial preventative detention order cannot be applied for, or made, in relation to the person on the basis of assisting in preventing a different terrorist act occurring within that period unless the application, or the order, is based on information that became available to be put before an issuing authority only after the initial preventative detention order referred to in paragraph (a) was made.

(3) If:
   (a) an initial preventative detention order is made in relation to a person on the basis of preserving evidence of, or relating to, a terrorist act; and
   (b) the person is taken into custody under the order;
   another initial preventative detention order cannot be applied for, or made, in relation to the person on the basis of preserving evidence of, or relating to, the same terrorist act.

Detention orders under corresponding State preventative detention laws

(4) If:
   (a) an order for a person’s detention is made under a corresponding State preventative detention law on the basis of assisting in preventing a terrorist act occurring within a particular period; and
(b) the person is taken into custody under that order;

an initial preventative detention order cannot be applied for, or made, under this Division in relation to the person on the basis of assisting in preventing the same terrorist act occurring within that period.

(5) If:

(a) an order for a person’s detention is made under a corresponding State preventative detention law on the basis of assisting in preventing a terrorist act occurring within a particular period; and

(b) the person is taken into custody under that order;

an initial preventative detention order cannot be applied for, or made, under this Division in relation to the person on the basis of assisting in preventing a different terrorist act occurring within that period unless the application, or the order, is based on information that became available to be put before an issuing authority only after the order referred to in paragraph (a) was made.

(6) If:

(a) an order for a person’s detention is made under a corresponding State preventative detention law on the basis of preserving evidence of, or relating to, a terrorist act; and

(b) the person is taken into custody under that order;

an initial preventative detention order cannot be applied for, or made, under this Division in relation to the person on the basis of preserving evidence of, or relating to, the same terrorist act.

105.7 Application for initial preventative detention order

(1) An AFP member may apply to an issuing authority for an initial preventative detention order in relation to a person.

Note 1: Senior AFP members are issuing authorities for initial preventative detention orders (see the definition of issuing authority in subsection 100.1(1)).

Note 2: For the definition of senior AFP member, see subsection 100.1(1).

(2) The application must:

(a) be made in writing; and

(b) set out the facts and other grounds on which the AFP member considers that the order should be made; and

(c) specify the period for which the person is to be detained under the order and set out the facts and other grounds on which the AFP member considers that the person should be detained for that period; and

(d) set out the information (if any) that the applicant has about the person’s age; and

(e) set out the following:

(i) the outcomes and particulars of all previous applications for detention orders in relation to the person;

(ii) the outcomes and particulars of all previous requests for interim control orders (including the outcomes of the hearings to confirm the orders) in relation to the person;
(iii) the outcomes and particulars of all previous applications for variations of control orders made in relation to the person;
(iv) the outcomes of all previous applications for revocations of control orders made in relation to the person; and
(f) set out the information (if any) that the applicant has about any periods for which the person has been detained under an order made under a corresponding State preventative detention law; and
(g) set out a summary of the grounds on which the AFP member considers that the order should be made.

Note: Sections 137.1 and 137.2 create offences for providing false or misleading information or documents.

(2A) To avoid doubt, paragraph (2)(g) does not require any information to be included in the summary if disclosure of that information is likely to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004).

(3) If:
(a) an initial preventative detention order is made in relation to a person on the basis of assisting in preventing a terrorist act occurring within a particular period; and
(b) the person is taken into custody under the order; and
(c) an application is made for another initial preventative detention order in relation to the person on the basis of assisting in preventing a different terrorist act occurring within that period;
the application must also identify the information on which the application is based that became available to be put before an issuing authority only after the initial preventative detention order referred to in paragraph (a) was made.

Note: See subsection 105.6(2).

(4) If:
(a) an order for a person’s detention is made under a corresponding State preventative detention law on the basis of assisting in preventing a terrorist act occurring within a particular period; and
(b) the person is taken into custody under that order; and
(c) an application is made for an initial preventative detention order in relation to the person on the basis of assisting in preventing a different terrorist act occurring within that period;
the application must also identify the information on which the application is based that became available to be put before an issuing authority only after the order referred to in paragraph (a) was made.

Note: See subsection 105.6(5).
105.8 Senior AFP member may make initial preventative detention order

(1) On application by an AFP member, an issuing authority may make an initial preventative detention order under this section in relation to a person.

Note 1: Senior AFP members are issuing authorities for initial preventative detention orders (see the definition of issuing authority in subsection 100.1(1)).

Note 2: For the definition of senior AFP member, see subsection 100.1(1).

(2) Subsection (1) has effect subject to sections 105.4, 105.5 and 105.6.

(3) An initial preventative detention order under this section is an order that the person specified in the order may be:

(a) taken into custody; and

(b) detained during the period that:

(i) starts when the person is first taken into custody under the order; and

(ii) ends a specified period of time after the person is first taken into custody under the order.

(4) The order must be in writing.

(5) The period of time specified in the order under subparagraph (3)(b)(ii) must not exceed 24 hours.

(6) An initial preventative detention order under this section must set out:

(a) the name of the person in relation to whom it is made; and

(b) the period during which the person may be detained under the order; and

(c) the date on which, and the time at which, the order is made; and

(d) the date and time after which the person may not be taken into custody under the order; and

(e) a summary of the grounds on which the order is made.

Note: Paragraph (d) – see subsection 105.9(2).

(6A) To avoid doubt, paragraph (6)(e) does not require any information to be included in the summary if disclosure of that information is likely to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004).

(7) If the person in relation to whom the order is made is:

(a) under 18 years of age; or

(b) incapable of managing his or her affairs;

the order may provide that the period each day for which the person is entitled to have contact with another person under subsection 105.39(2) is the period of more than 2 hours that is specified in the order.

(8) The senior AFP member nominated under subsection 105.19(5) in relation to the initial preventative detention order must:

(a) notify the Commonwealth Ombudsman in writing of the making of the order; and

(b) give the Commonwealth Ombudsman a copy of the order; and
(c) if the person in relation to whom the order is made is taken into custody under the order – notify the Commonwealth Ombudsman in writing that the person has been taken into custody under the order.

105.9 Duration of initial preventative detention order

(1) An initial preventative detention order in relation to a person starts to have effect when it is made.

Note: The order comes into force when it is made and authorises the person to be taken into custody (see paragraph 105.8(3)(a)). The period for which the person may then be detained under the order only starts to run when the person is first taken into custody under the order (see subparagraph 105.8(3)(b)(i)).

(2) An initial preventative detention order in relation to a person ceases to have effect at the end of the period of 48 hours after the order is made if the person has not been taken into custody under the order within that period.

(3) If the person is taken into custody under the order within 48 hours after the order is made, the order ceases to have effect when whichever of the following first occurs:

(a) the end of:
   (i) the period specified in the order as the period during which the person may be detained under the order; or
   (ii) if that period is extended or further extended under section 105.10 – that period as extended or further extended;

(b) the revocation of the order under section 105.17.

Note 1: The order does not cease to have effect merely because the person is released from detention under the order.

Note 2: An AFP member may apply under section 105.11 for a continued preventative detention order in relation to the person to allow the person to continue to be detained for up to 48 hours after the person is first taken into custody under the initial preventative detention order.

105.10 Extension of initial preventative detention order

(1) If:

(a) an initial preventative detention order is made in relation to a person; and
(b) the order is in force in relation to the person;

an AFP member may apply to an issuing authority for initial preventative detention orders for an extension, or a further extension, of the period for which the order is to be in force in relation to the person.

(2) The application must:

(a) be made in writing; and
(b) set out the facts and other grounds on which the AFP member considers that the extension, or further extension, is reasonably necessary for the purpose for which the order was made; and
(c) set out the outcomes and particulars of all previous applications for extensions, or further extensions, of the order.

Note: Paragraph (b) – see subsections 105.4(4) and (6) for the purpose for which a preventative detention order may be made.

(3) The issuing authority may extend, or further extend, the period for which the order is to be in force in relation to the person if the issuing authority is satisfied that detaining the person under the order for the period as extended, or further extended, is reasonably necessary for the purpose for which the order was made.

(4) The extension, or further extension, must be made in writing.

(5) The period as extended, or further extended, must end no later than 24 hours after the person is first taken into custody under the order.

105.10A Notice of application for continued preventative detention order

An AFP member who proposes to apply for a continued preventative detention order in relation to a person under section 105.11 must, before applying for the order:

(a) notify the person of the proposed application; and

(b) inform the person that, when the proposed application is made, any material that the person gives the AFP member in relation to the proposed application will be put before the issuing authority for continued preventative detention orders to whom the application is made.

Note: The AFP member who applies for the order must put the material before the issuing authority – see subsection 105.11(5).

105.11 Application for continued preventative detention order

(1) If an initial preventative detention order is in force in relation to a person in relation to a terrorist act, an AFP member may apply to an issuing authority in relation to continued preventative detention orders for a continued preventative detention order in relation to the person in relation to the terrorist act.

Note: Certain judges, Federal Magistrates, AAT members and retired judges are issuing authorities for continued preventative detention orders (see the definition of issuing authority in subsection 100.1(1) and section 105.2).

(2) The application must:

(a) be made in writing; and

(b) set out the facts and other grounds on which the AFP member considers that the order should be made; and

(c) specify the period for which the person is to continue to be detained under the order and set out the facts and other grounds on which the AFP member considers that the person should continue to be detained for that period; and

(d) set out the information (if any) that the applicant has about the person’s age; and
(e) set out the following:
   (i) the outcomes and particulars of all previous applications for preventative detention orders in relation to the person;
   (ii) the outcomes and particulars of all previous requests for interim control orders (including the outcomes of the hearings to confirm the orders) in relation to the person;
   (iii) the outcomes and particulars of all previous applications for variations of control orders made in relation to the person;
   (iv) the outcomes of all previous applications for revocations of control orders made in relation to the person; and
(f) set out the information (if any) that the applicant has about any periods for which the person has been detained under an order made under a corresponding State preventative detention law; and
(g) set out a summary of the grounds on which the AFP member considers that the order should be made.

Note: Sections 137.1 and 137.2 create offences for providing false or misleading information or documents.

(3) Subparagraph (2)(e)(i) does not require the application to set out details in relation to the application that was made for the initial preventative detention order in relation to which the continued preventative detention order is sought.

(3A) To avoid doubt, paragraph (2)(g) does not require any information to be included in the summary if disclosure of that information is likely to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004).

(4) The information in the application must be sworn or affirmed by the AFP member.

(5) The AFP member applying for the continued preventative detention order in relation to the person must put before the issuing authority to whom the application is made any material in relation to the application that the person has given the AFP member.

105.12 Judge, Federal Magistrate, AAT member or retired judge may make continued preventative detention order

(1) On application by an AFP member, an issuing authority may make a continued preventative detention order under this section in relation to a person if:
   (a) an initial preventative detention order is in force in relation to the person; and
   (b) the person has been taken into custody under the order (whether or not the person is being detained under the order).

Note: Certain judges, Federal Magistrates, AAT members and retired judges are issuing authorities for continued preventative detention orders (see the definition of issuing authority in subsection 100.1(1) and section 105.2).
(2) Subsection (1) has effect subject to sections 105.4, 105.5 and 105.6. Section 105.4 requires the issuing authority to consider afresh the merits of making the order and to be satisfied, after taking into account relevant information (including any information that has become available since the initial preventative detention order was made), of the matters referred to in subsection 105.4(4) or (6) before making the order.

(3) A continued preventative detention order under this section is an order that the person specified in the order may be detained during a further period that:
   (a) starts at the end of the period during which the person may be detained under the initial preventative detention order; and
   (b) ends a specified period of time after the person is first taken into custody under the initial preventative detention order.

(4) The order must be in writing.

(5) The period of time specified under paragraph (3)(b) must not exceed 48 hours.

(6) A continued preventative detention order under this section must set out:
   (a) the name of the person in relation to whom it is made; and
   (b) the further period during which the person may be detained under the order; and
   (c) the date on which, and the time at which, the order is made; and
   (d) a summary of the grounds on which the order is made.

(6A) To avoid doubt, paragraph (6)(d) does not require any information to be included in the summary if disclosure of that information is likely to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004).

(7) If the person in relation to whom the order is made is:
   (a) under 18 years of age; or
   (b) incapable of managing his or her affairs;
the order may provide that the period each day for which the person is entitled to have contact with another person under subsection 105.39(2) is the period of more than 2 hours that is specified in the order.

(8) The senior AFP member nominated under subsection 105.19(5) in relation to the continued preventative detention order must:
   (a) notify the Commonwealth Ombudsman in writing of the making of the order; and
   (b) give the Commonwealth Ombudsman a copy of the order.

105.13 Duration of continued preventative detention order

(1) A continued preventative detention order in relation to a person starts to have effect when it is made.
Note: The order comes into force when it is made. The period for which the person may be detained under the order, however, only starts to run when the period during which the person may be detained under the initial preventative detention order ends (see paragraph 105.12(3)(a)).
A continued preventative detention order in relation to a person ceases to have effect when whichever of the following first occurs:

(a) the end of:
   (i) the period specified in the order as the further period during which the person may be detained; or
   (ii) if that period is extended or further extended under section 105.14 – that period as extended or further extended;

(b) the revocation of the order under section 105.17.

Note: The order does not cease to have effect merely because the person is released from detention under the order.

105.14 Extension of continued preventative detention order

(1) If:
   (a) an initial preventative detention order is made in relation to a person; and
   (b) a continued preventative detention order is made in relation to the person in relation to that initial preventative detention order; and
   (c) the continued preventative detention order is in force in relation to the person;

an AFP member may apply to an issuing authority for continued preventative detention orders for an extension, or a further extension, of the period for which the continued preventative detention order is to be in force in relation to the person.

(2) The application must:
   (a) be made in writing; and
   (b) set out the facts and other grounds on which the AFP member considers that the extension, or further extension, is reasonably necessary for the purpose for which the order was made; and
   (c) set out the outcomes and particulars of all previous applications for extensions, or further extensions, of the continued preventative detention order.

Note: Paragraph (b) – see subsections 105.4(4) and (6) for the purpose for which a preventative detention order may be made.

(3) The information in the application must be sworn or affirmed by the AFP member.

(4) The issuing authority may extend, or further extend, the period for which the continued preventative detention order is to be in force in relation to the person if the issuing authority is satisfied that detaining the person under the order for the period as extended, or further extended, is reasonably necessary for the purpose for which the order was made.

(5) The extension, or further extension, must be made in writing.

(6) The period as extended, or further extended, must end no later than 48 hours after the person is first taken into custody under the initial preventative detention order.
105.14A Basis for applying for, and making, prohibited contact order

(1) An AFP member may apply for a prohibited contact order in relation to a person only if the AFP member meets the requirements of subsection (4).

(2) An issuing authority for initial preventative detention orders, or continued preventative detention orders, may make a prohibited contact order in relation to a person’s detention under a preventative detention order only if the issuing authority meets the requirements of subsection (4).

(3) The person in relation to whose detention the prohibited contact order is applied for, or made, is the subject for the purposes of this section.

(4) A person meets the requirements of this subsection if the person is satisfied that making the prohibited contact order is reasonably necessary:
   (a) to avoid a risk to action being taken to prevent a terrorist act occurring; or
   (b) to prevent serious harm to a person; or
   (c) to preserve evidence of, or relating to, a terrorist act; or
   (d) to prevent interference with the gathering of information about:
       (i) a terrorist act; or
       (ii) the preparation for, or the planning of, a terrorist act; or
   (e) to avoid a risk to:
       (i) the arrest of a person who is suspected of having committed an offence against this Part; or
       (ii) the taking into custody of a person in relation to whom a preventative detention order is in force, or in relation to whom a preventative detention order is likely to be made; or
       (iii) the service on a person of a control order.

(5) An issuing authority may refuse to make a prohibited contact order unless the AFP member applying for the order gives the issuing authority any further information that the issuing authority requests concerning the grounds on which the order is sought.

105.15 Prohibited contact order (person in relation to whom preventative detention order is being sought)

(1) An AFP member who applies to an issuing authority for a preventative detention order in relation to a person (the subject) may also apply for a prohibited contact order under this section in relation to the subject’s detention under the preventative detention order.

(2) The application must set out:
   (a) the terms of the order sought; and
   (b) the facts and other grounds on which the AFP member considers that the order should be made.

(3) If a continued preventative detention order is being applied for, the information in the application for the prohibited contact order must be sworn or affirmed by the AFP member.
(4) If the issuing authority makes the preventative detention order, the issuing authority may make a prohibited contact order under this section that the subject is not, while being detained under the preventative detention order, to contact the person specified in the prohibited contact order.

Note: Section 105.14A sets out the basis on which the order may be made.

(5) The prohibited contact order must be in writing.

(6) The senior AFP member nominated under subsection 105.19(5) in relation to the preventative detention order must:

(a) notify the Commonwealth Ombudsman in writing of the making of the prohibited contact order; and

(b) give the Commonwealth Ombudsman a copy of the prohibited contact order.

105.16 Prohibited contact order (person in relation to whom preventative detention order is already in force)

(1) If a preventative detention order is in force in relation to a person (the subject), an AFP member may apply to an issuing authority for preventative detention orders of that kind for a prohibited contact order under this section in relation to the subject’s detention under the preventative detention order.

(2) The application must set out:

(a) the terms of the order sought; and

(b) the facts and other grounds on which the AFP member considers that the order should be made.

(3) If the preventative detention order is a continued preventative detention order, the information in the application for the prohibited contact order must be sworn or affirmed by the AFP member.

(4) The issuing authority may make a prohibited contact order under this section that the subject is not, while being detained under the preventative detention order, to contact the person specified in the prohibited contact order.

Note: Section 105.14A sets out the basis on which the order may be made.

(5) The prohibited contact order must be in writing.

(6) The senior AFP member nominated under subsection 105.19(5) in relation to the preventative detention order must:

(a) notify the Commonwealth Ombudsman in writing of the making of the prohibited contact order; and

(b) give the Commonwealth Ombudsman a copy of the prohibited contact order.
105.17 Revocation of preventative detention order or prohibited contact order

Preventative detention order

(1) If:
   (a) a preventative detention order is in force in relation to a person; and
   (b) the police officer who is detaining the person under the order is satisfied that the grounds on which the order was made have ceased to exist;

   the police officer must:
   (c) if the police officer is an AFP member – apply to an issuing authority for preventative detention orders of that kind for the revocation of the order; or
   (d) if the police officer is not an AFP member – inform a senior AFP member of the police officer’s reasons for being satisfied that the grounds on which the order was made have ceased to exist.

(2) If:
   (a) a senior AFP member is informed by a police officer under paragraph (1)(d); and
   (b) the senior AFP member is satisfied that the grounds on which the preventative detention order was made have ceased to exist;

   the senior AFP member must apply to an issuing authority for preventative detention orders of that kind for the revocation of the order.

(3) If:
   (a) a preventative detention order is in force in relation to a person; and
   (b) an issuing authority for preventative detention orders of that kind is satisfied, on application by an AFP member, that the grounds on which the order was made have ceased to exist;

   the issuing authority must revoke the order.

Prohibited contact order

(4) If:
   (a) a prohibited contact order is in force in relation to a person’s detention under a preventative detention order; and
   (b) the police officer who is detaining the person under the preventative detention order is satisfied that the grounds on which the prohibited contact order was made have ceased to exist;

   the police officer must:
   (c) if the police officer is an AFP member – apply to an issuing authority for preventative detention orders of that kind for the revocation of the prohibited contact order; or
   (d) if the police officer is not an AFP member – inform a senior AFP member of the police officer’s reasons for being satisfied that the grounds on which the prohibited contact order was made have ceased to exist.
(5) If:

(a) a senior AFP member is informed by a police officer under paragraph (4)(d); and
(b) the senior AFP member is satisfied that the grounds on which the prohibited contact order was made in relation to the person’s detention under the preventative detention order have ceased to exist;

the senior AFP member must apply to an issuing authority for preventative detention orders of that kind for the revocation of the prohibited contact order.

(6) If:

(a) a prohibited contact order is in force in relation to a person’s detention under a preventative detention order; and
(b) an issuing authority for preventative detention orders of that kind is satisfied, on application by an AFP member, that the grounds on which the prohibited contact order was made have ceased to exist;

the issuing authority must revoke the prohibited contact order.

**Detainee’s right to make representations about revocation of preventative detention order**

(7) A person being detained under a preventative detention order may make representations to the senior AFP member nominated under subsection 105.19(5) in relation to the order with a view to having the order revoked.

**105.18 Status of person making continued preventative detention order**

(1) An issuing authority who makes:

(a) a continued preventative detention order; or
(b) a prohibited contact order in relation to a person’s detention under a continued preventative detention order;

has, in the performance of his or her duties under this Subdivision, the same protection and immunity as a Justice of the High Court.

(2) A function of:

(a) making or revoking a continued preventative detention order; or
(b) extending, or further extending, the period for which a continued preventative detention order is to be in force; or
(c) making or revoking a prohibited contact order in relation to a person’s detention under a continued preventative detention order;

that is conferred on a judge, a Federal Magistrate or a member of the Administrative Appeals Tribunal is conferred on the judge, Federal Magistrate or member of the Administrative Appeals Tribunal in a personal capacity and not as a court or a member of a court.
Subdivision C – Carrying out preventative detention orders

105.19 Power to detain person under preventative detention order

General powers given by preventative detention order

(1) While a preventative detention order is in force in relation to a person:
   (a) any police officer may take the person into custody; and
   (b) any police officer may detain the person.

(2) A police officer, in taking a person into custody under and in detaining a person under a preventative detention order, has the same powers and obligations as the police officer would have if the police officer were arresting the person, or detaining the person, for an offence.

(3) In subsection (2):
   offence means:
   (a) if the police officer is an AFP member – an offence against a law of the Commonwealth; or
   (b) if the police officer is not an AFP member – an offence against a law of the State or Territory of whose police force the police officer is a member.

(4) Subsection (2) does not apply to the extent to which particular powers, and the obligations associated with those powers, are provided for in this Subdivision or Subdivision D or E.

Nominated senior AFP member

(5) If a preventative detention order is made in relation to person, the Commissioner of the Australian Federal Police must nominate a senior AFP member (the nominated senior AFP member) to oversee the exercise of powers under, and the performance of obligations in relation to, the preventative detention order.

(6) The nominated senior AFP member must be someone who was not involved in the making of the application for the preventative detention order.

(7) The nominated senior AFP member must:
   (a) oversee the exercise of powers under, and the performance of obligations in relation to, the preventative detention order; and
   (b) without limiting paragraph (a), ensure that the provisions of section 105.17 (which deals with revocation of preventative detention orders and prohibited contact orders) are complied with in relation to the preventative detention order; and
   (c) receive and consider any representations that are made under subsection (8).

(8) The following persons:
   (a) the person being detained under the preventative detention order;
   (b) a lawyer acting for that person in relation to the preventative detention order;
   (c) a person with whom that person has contact under subsection 105.39(2);
are entitled to make representations to the nominated senior AFP member in relation to:

(d) the exercise of powers under, and the performance of obligations in relation to, the preventative detention order; and

(e) without limiting paragraph (a), compliance with the provisions of section 105.17 (which deals with revocation of preventative detention orders and prohibited contact orders) in relation to the preventative detention order; and

(f) the person’s treatment in connection with the person’s detention under the preventative detention order.

(9) The Commissioner of the Australian Federal Police may, in writing, delegate to a senior AFP member the Commissioner’s powers under subsection (5).

105.20 Endorsement of order with date and time person taken into custody

As soon as practicable after a person is first taken into custody under an initial preventative detention order, the police officer who is detaining the person under the order must endorse on the order the date on which, and time at which, the person is first taken into custody under the order.

105.21 Requirement to provide name etc.

(1) If a police officer believes on reasonable grounds that a person whose name or address is, or whose name and address are, unknown to the police officer may be able to assist the police officer in executing a preventative detention order, the police officer may request the person to provide his or her name or address, or name and address, to the police officer.

(2) If a police officer:

(a) makes a request of a person under subsection (1); and

(b) informs the person of the reason for the request; and

(c) if the police officer is not in uniform – shows the person evidence that the police officer is a police officer; and

(d) complies with subsection (4) if the person makes a request under that subsection; the person must not:

(e) refuse or fail to comply with the request; or

(f) give a name or address that is false in a material particular.

Penalty: 20 penalty units.

(3) Subsection (2) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3)).

(4) If a police officer who makes a request of a person under subsection (1) is requested by the person to provide to the person any of the following:

(a) his or her name;

(b) the address of his or her place of duty;
(c) his or her identification number if he or she has an identification number;
(d) his or her rank if he or she does not have an identification number;
the police officer must not:
(e) refuse or fail to comply with the request; or
(f) give a name, address, number or rank that is false in a material particular.
Penalty: 5 penalty units.

105.22 Power to enter premises

(1) Subject to subsection (2), if:
(a) a preventative detention order is in force in relation to a person; and
(b) a police officer believes on reasonable grounds that the person is on any premises;
the police officer may enter the premises, using such force as is necessary and reasonable in
the circumstances and with such assistance from other police officers as is necessary, at any
time of the day or night for the purpose of searching the premises for the person or taking the
person into custody.

(2) A police officer must not enter a dwelling house under subsection (1) at any time during the
period commencing at 9 pm on a day and ending at 6 am on the following day unless the
police officer believes on reasonable grounds that:
(a) it would not be practicable to take the person into custody, either at the dwelling house
or elsewhere, at another time; or
(b) it is necessary to do so in order to prevent the concealment, loss or destruction of
evidence of, or relating to, a terrorist act.

(3) In subsection (2):
**dwelling house** includes a conveyance, and a room in a hotel, motel, boarding house or club,
in which people ordinarily retire for the night.

105.23 Power to conduct a frisk search

A police officer who takes a person into custody under a preventative detention order, or
who is present when the person is taken into custody, may, if the police officer suspects on
reasonable grounds that it is prudent to do so in order to ascertain whether the person is
carrying any seizable items:
(a) conduct a frisk search of the person at, or soon after, the time when the person is taken
into custody; and
(b) seize any seizable items found as a result of the search.

105.24 Power to conduct an ordinary search

A police officer who takes a person into custody under a preventative detention order, or
who is present when the person is taken into custody, may, if the police officer suspects on
reasonable grounds that the person is carrying:
(a) evidence of, or relating to, a terrorist act; or
(b) a seizable item;
conduct an ordinary search of the person at, or soon after, the time when the person is taken
into custody, and seize any such thing found as a result of the search.

105.25 Warrant under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*

(1) This section applies if:
(a) a person is being detained under a preventative detention order; and
(b) a warrant under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* is in force in relation to the person; and
(c) a copy of the warrant is given to the police officer who is detaining the person under the
preventative detention order.

(2) The police officer must take such steps as are necessary to ensure that the person may be dealt
with in accordance with the warrant.

(3) Without limiting subsection (2), the police officer may, under section 105.26, release the
person from detention under the preventative detention order so that the person may be dealt
with in accordance with the warrant.

Note: If the police officer is not an AFP member, the police officer will need to obtain the
approval of a senior AFP member before releasing the person from detention (see subsection
105.26(2)).

(4) To avoid doubt, the fact that the person is released from detention under the preventative
detention order so that the person may be:
(a) questioned before a prescribed authority under the warrant; or
(b) detained under the warrant in connection with that questioning;
does not extend the period for which the preventative detention order remains in force in
relation to the person.

Note: See paragraph 105.26(7)(a).

105.26 Release of person from preventative detention

(1) The police officer who is detaining a person under a preventative detention order may release
the person from detention under the order.

Note: A person may be released, for example, so that the person may be arrested and
otherwise dealt with under the provisions of Division 4 of Part IAA, and Part IC, of the
*Crimes Act 1914*.

(2) If the police officer detaining the person under the order is not an AFP member:
(a) the police officer must not release the person from detention without the approval of a
senior AFP member; and
(b) the senior AFP member must approve the person’s release if the person is being released so that the person may be dealt with in accordance with a warrant under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*.

(3) The police officer who releases the person from detention under the preventative detention order must give the person a written statement that the person is being released from that detention. The statement must be signed by the police officer.

(4) Subsection (3) does not apply if the police officer releases the person from detention so that the person may be dealt with:
   (a) in accordance with a warrant under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*; or
   (b) under the provisions of Division 4 of Part IAA, and Part IC, of the *Crimes Act 1914*.

(5) To avoid doubt, a person may be taken to have been released from detention under a preventative detention order even if:
   (a) the person is informed that he or she is being released from detention under the order; and
   (b) the person is taken into custody on some other basis immediately after the person is informed that he or she is being released from detention under the order.

(6) To avoid doubt, a person is taken not to be detained under a preventative detention order during a period during which the person is released from detention under the order.

Note: During this period, the provisions of this Division that apply to a person who is being detained under a preventative detention order (for example, section 105.34 which deals with the people the person may contact) do not apply to the person.

(7) To avoid doubt:
   (a) the release of the person under subsection (1) from detention under the preventative detention order does not extend the period for which the preventative detention order remains in force; and
   (b) a person released under subsection (1) from detention under a preventative detention order may again be taken into custody and detained under the order at any time while the order remains in force in relation to the person.

Note: Paragraph (a) – this means that the time for which the person may be detained under the order continues to run while the person is released.

105.27 Arrangement for detainee to be held in State or Territory prison or remand centre

(1) A senior AFP member may arrange for a person (the *subject*) who is being detained under a preventative detention order to be detained under the order at a prison or remand centre of a State or Territory.

(2) If an arrangement is made under subsection (1):
   (a) the preventative detention order is taken to authorise the person in charge of the prison or remand centre to detain the subject at the prison or remand centre while the order is in force in relation to the subject; and
(b) section 105.33 applies in relation to the subject’s detention under the order at the prison or remand centre as if:
   (i) the person in charge of that prison or remand centre; or
   (ii) any other person involved in the subject’s detention at that prison or remand centre;
were a person exercising authority under the order or implementing or enforcing the order; and
(c) the senior AFP member who makes the arrangement is taken, while the subject is detained at the prison or remand centre, to be the AFP member detaining the subject for the purposes of Subdivisions D and E of this Division.

(3) The arrangement under subsection (1) may include provision for the Commonwealth meeting the expenses of the subject’s detention at the prison or remand centre.

Subdivision D – Informing person detained about preventative detention order

105.28 Effect of initial preventative detention order to be explained to person detained

(1) As soon as practicable after a person is first taken into custody under an initial preventative detention order, the police officer who is detaining the person under the order must inform the person of the matters covered by subsection (2).

Note 1: A contravention of this subsection may be an offence under section 105.45.
Note 2: A contravention of this subsection does not affect the lawfulness of the person’s detention under the order (see subsection 105.31(5)).

(2) The matters covered by this subsection are:
   (a) the fact that the preventative detention order has been made in relation to the person; and
   (b) the period during which the person may be detained under the order; and
   (c) the restrictions that apply to the people the person may contact while the person is being detained under the order; and
   (d) the fact that an application may be made under section 105.11 for an order that the person continue to be detained for a further period; and
   (da) the person’s entitlement under subsection 105.17(7) to make representations to the senior AFP member nominated under subsection 105.19(5) in relation to the order with a view to having the order revoked; and
   (e) any right the person has to make a complaint to the Commonwealth Ombudsman under the Ombudsman Act 1976 in relation to:
      (i) the application for, or the making of, the preventative detention order; or
      (ii) the treatment of the person by an AFP member in connection with the person’s detention under the order; and
   (ea) any right the person has to give information under section 40SA of the Australian Federal Police Act 1979 in relation to:
      (i) the application for, or the making of, the preventative detention order; or
      (ii) the treatment of the person by an AFP member in connection with the person’s detention under the order; and
(f) any right the person has to complain to an officer or authority of a State or Territory in relation to the treatment of the person by a member of the police force of that State or Territory in connection with the person’s detention under the order; and

(g) the fact that the person may seek from a federal court a remedy relating to:
   (i) the order; or
   (ii) the treatment of the person in connection with the person’s detention under the order; and

(h) the person’s entitlement under section 105.37 to contact a lawyer; and
   (i) the name and work telephone number of the senior AFP member who has been nominated under subsection 105.19(5) to oversee the exercise of powers under, and the performance of obligations in relation to, the order.

Note: Paragraph (g) – see section 105.51.

(2A) Without limiting paragraph (2)(c), the police officer detaining the person under the order must inform the person under that paragraph about the persons that he or she may contact under section 105.35 or 105.39.

(3) Paragraph (2)(c) does not require the police officer to inform the person being detained of:
   (a) the fact that a prohibited contact order has been made in relation to the person’s detention; or
   (b) the name of a person specified in a prohibited contact order that has been made in relation to the person’s detention.

105.29 Effect of continued preventative detention order to be explained to person detained

(1) As soon as practicable after a continued preventative detention order (the continued order) is made in relation to a person, the police officer who is detaining the person must inform the person of the matters covered by subsection (2).

Note 1: A contravention of this subsection may be an offence under section 105.45.

Note 2: A contravention of this subsection does not affect the lawfulness of the person’s detention under the order (see subsection 105.31(5)).

(2) The matters covered by this subsection are:
   (a) the fact that the continued order has been made in relation to the person; and
   (b) the further period during which the person may continue to be detained under the continued order; and
   (c) the restrictions that apply to the people the person may contact while the person is being detained under the continued order; and
   (ca) the person’s entitlement under subsection 105.17(7) to make representations to the senior AFP member nominated under subsection 105.19(5) in relation to the order with a view to having the order revoked; and
   (d) any right the person has to make a complaint to the Commonwealth Ombudsman under the Ombudsman Act 1976 in relation to:
(i) the application for the continued order; or
(ii) the treatment of the person by an AFP member in connection with the person’s detention under the continued order; and
(da) any right the person has to give information under section 40SA of the Australian Federal Police Act 1979 in relation to:
   (i) the application for the continued order; or
   (ii) the treatment of the person by an AFP member in connection with the person’s detention under the continued order; and
(e) any right the person has to complain to an officer or authority of a State or Territory about the treatment of the person by a member of the police force of that State or Territory in connection with the person’s detention under the continued order; and
(f) the fact that the person may seek from a federal court a remedy relating to:
   (i) the continued order; or
   (ii) the treatment of the person in connection with the person’s detention under the continued order; and
(g) the person’s entitlement under section 105.37 to contact a lawyer; and
(h) the name and work telephone number of the senior AFP member who has been nominated under subsection 105.19(5) to oversee the exercise of powers under, and the performance of obligations in relation to, the continued order.

Note: Paragraph (f) – see section 105.51.

(2A) Without limiting paragraph (2)(c), the police officer detaining the person under the order must inform the person under that paragraph about the persons that he or she may contact under section 105.35 or 105.39.

(3) Paragraph (2)(c) does not require the police officer to inform the person being detained of:
(a) the fact that a prohibited contact order has been made in relation to the person’s detention; or
(b) the name of a person specified in a prohibited contact order that has been made in relation to the person’s detention.

105.30 Person being detained to be informed of extension of preventative detention order

If a preventative detention order is extended, or further extended, under section 105.10 or 105.14, the police officer detaining the person under the order must inform the person of the extension, or further extension, as soon as practicable after the extension, or further extension, is made.

Note 1: A contravention of this subsection may be an offence under section 105.45.
Note 2: A contravention of this subsection does not affect the lawfulness of the person’s detention under the order (see subsection 105.31(5)).
105.31 Compliance with obligations to inform

(1) Subsection 105.28(1) or 105.29(1) or section 105.30 does not apply if the actions of the person being detained under the preventative detention order make it impracticable for the police officer to comply with that subsection.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3)).

(2) The police officer detaining the person under the preventative detention order complies with subsection 105.28(1) or 105.29(1) if the police officer informs the person in substance of the matters covered by subsection 105.28(2) or 105.29(2) (even if this is not done in language of a precise or technical nature).

(3) The police officer who is detaining the person under the preventative detention order must arrange for the assistance of an interpreter in complying with subsection 105.28(1) or 105.29(1) or section 105.30 if the police officer has reasonable grounds to believe that the person is unable, because of inadequate knowledge of the English language or a disability, to communicate with reasonable fluency in that language.

(4) Without limiting subsection (3), the assistance of the interpreter may be provided by telephone.

(5) The lawfulness of a person’s detention under a preventative detention order is not affected by a failure to comply with subsection 105.28(1) or 105.29(1), section 105.30 or subsection (3) of this section.

105.32 Copy of preventative detention order

(1) As soon as practicable after a person is first taken into custody under an initial preventative detention order, the police officer who is detaining the person under the order must give the person a copy of the order.

(3) Despite subsection 105.19(2), a police officer does not need to have a copy of the order with him or her, or to produce a copy of the order to the person being taken into custody, when the police officer takes the person into custody.

(4) As soon as practicable after a continued preventative detention order is made in relation to a person in relation to whom an initial preventative detention order is in force, the police officer who is detaining the person under the initial preventative detention order, or the continued preventative detention order, must give the person a copy of the continued preventative detention order.

(5) As soon as practicable after a preventative detention order is extended, or further extended, under section 105.10 or 105.14, the police officer who is detaining the person under the preventative detention order must give the person a copy of the extension or further extension.

(6) A person who is being detained under a preventative detention order may request a police officer who is detaining the person to arrange for a copy of:
   (a) the order; or
   (c) any extension or further extension of the order under section 105.10 or 105.14;
to be given to a lawyer acting for the person in relation to the order.

Note 1: Section 105.37 deals with the person’s right to contact a lawyer and the obligation of the police officer detaining the person to give the person assistance to choose a lawyer.

Note 2: Section 105.40 prevents the person from contacting a lawyer who is specified in a prohibited contact order.

(7) The police officer must make arrangements for a copy of the order, or the extension or further extension, to be given to the lawyer as soon as practicable after the request is made.

(8) Without limiting subsection (7), the copy of the order, or the extension, may be faxed or emailed to the lawyer.

(9) To avoid doubt, subsection (7) does not entitle the lawyer to be given a copy of, or see, a document other than the order, or the extension or further extension.

(10) Nothing in this section requires a copy of a prohibited contact order to be given to a person.

(11) The police officer who gives:
(a) the person being detained under an initial preventative detention order; or
(b) a lawyer acting for the person;
a copy of the initial preventative detention order under this section must endorse on the copy the date on which, and time at which, the person was first taken into custody under the order.

(12) The lawfulness of a person’s detention under a preventative detention order is not affected by a failure to comply with subsection (1), (4), (5), (7) or (11).

Subdivision E – Treatment of person detained

105.33 Humane treatment of person being detained

A person being taken into custody, or being detained, under a preventative detention order:
(a) must be treated with humanity and with respect for human dignity; and
(b) must not be subjected to cruel, inhuman or degrading treatment;
by anyone exercising authority under the order or implementing or enforcing the order.

Note: A contravention of this section may be an offence under section 105.45.

105.33A Detention of persons under 18

(1) Subject to subsection (2), the police officer detaining a person who is under 18 years of age under a preventative detention order must ensure that the person is not detained together with persons who are 18 years of age or older.

Note: A contravention of this subsection may be an offence under section 105.45.

(2) Subsection (1) does not apply if a senior AFP member approves the person being detained together with persons who are 18 years of age or older.

(3) The senior AFP member may give an approval under subsection (2) only if there are exceptional circumstances justifying the giving of the approval.
(4) An approval under subsection (2) must:
   (a) be given in writing; and
   (b) set out the exceptional circumstances that justify the giving of the approval.

105.34 Restriction on contact with other people

Except as provided by sections 105.35, 105.36, 105.37 and 105.39, while a person is being detained under a preventative detention order, the person:
   (a) is not entitled to contact another person; and
   (b) may be prevented from contacting another person.

Note 1: This section will not apply to the person if the person is released from detention under the order (even though the order may still be in force in relation to the person).

Note 2: A person’s entitlement to contact other people under sections 105.35, 105.37 and 105.39 may be subject to a prohibited contact order made under section 105.15 or 105.16 (see section 105.40).

105.35 Contacting family members etc.

(1) The person being detained is entitled to contact:
   (a) one of his or her family members; and
   (b) if he or she:
       (i) lives with another person and that other person is not a family member of the person being detained; or
       (ii) lives with other people and those other people are not family members of the person being detained;
that other person or one of those other people; and
   (c) if he or she is employed – his or her employer; and
   (d) if he or she employs people in a business – one of the people he or she employs in that business; and
   (e) if he or she engages in a business together with another person or other people – that other person or one of those other people; and
   (f) if the police officer detaining the person being detained agrees to the person contacting another person – that person;
by telephone, fax or email but solely for the purposes of letting the person contacted know that the person being detained is safe but is not able to be contacted for the time being.

(2) To avoid doubt, the person being detained is not entitled, under subsection (1), to disclose:
   (a) the fact that a preventative detention order has been made in relation to the person; or
   (b) the fact that the person is being detained; or
   (c) the period for which the person is being detained.
(3) In this section:  

family member of a person means:

(a) the person’s spouse or de facto partner; or  
(b) a parent, stepparent or grandparent of the person; or  
(c) a child, stepchild or grandchild of the person; or  
(d) a brother, sister, stepbrother or stepsister of the person; or  
(e) a guardian or carer of the person.

(4) For the purposes of this section, the family members of a person are taken to include the following (without limitation):

(a) a de facto partner of the person;  
(b) someone who is the child of the person, or of whom the person is the child, because of the definition of child in the Dictionary;  
(c) anyone else who would be a member of the person’s family if someone mentioned in paragraph (a) or (b) is taken to be a family member of the person.

105.36 Contacting Ombudsman etc.

(1) The person being detained is entitled to contact:

(a) the Commonwealth Ombudsman in accordance with subsections 7(3) to (5) of the Ombudsman Act 1976; or  
(b) a person referred to in subsection 40SA(1) of the Australian Federal Police Act 1979 in accordance with section 40SB of that Act.

Note 1: Subsections 7(3) to (5) of the Ombudsman Act 1976 provide for the manner in which a person who is in custody may make a complaint to the Commonwealth Ombudsman under that Act.

Note 2: Section 40SB of the Australian Federal Police Act 1979 provides for the manner in which a person who is in custody may give information under section 40SA of that Act.

(2) If the person being detaine d has the right, under a law of a State or Territory, to complain to an officer or authority of the State or Territory about the treatment of the person by a member of the police force of that State or Territory in connection with the person’s detention under the order, the person is entitled to contact that officer or authority to make a complaint in accordance with that law.

105.37 Contacting lawyer

(1) The person being detained is entitled to contact a lawyer but solely for the purpose of:

(a) obtaining advice from the lawyer about the person’s legal rights in relation to:  
   (i) the preventative detention order; or  
   (ii) the treatment of the person in connection with the person’s detention under the order; or  
(b) arranging for the lawyer to act for the person in relation to, and instructing the lawyer in relation to, proceedings in a federal court for a remedy relating to:
(i) the preventative detention order; or
(ii) the treatment of the person in connection with the person’s detention under the order; or
(c) arranging for the lawyer to act for the person in relation to, and instructing the lawyer in relation to, a complaint to the Commonwealth Ombudsman under the Ombudsman Act 1976 in relation to:
   (i) the application for, or the making of, the preventative detention order; or
   (ii) the treatment of the person by an AFP member in connection with the person’s detention under the order; or
   (ca) arranging for the lawyer to act for the person in relation to, and instructing the lawyer in relation to, the giving of information under section 40SA of the Australian Federal Police Act 1979 in relation to:
      (i) the application for, or the making of, the preventative detention order; or
      (ii) the treatment of the person by an AFP member in connection with the person’s detention under the order; or
   (d) arranging for the lawyer to act for the person in relation to, and instructing the lawyer in relation to, a complaint to an officer or authority of a State or Territory about the treatment of the person by a member of the police force of that State or Territory in connection with the person’s detention under the order; or
   (e) arranging for the lawyer to act for the person in relation to an appearance, or hearing, before a court that is to take place while the person is being detained under the order.

(2) The form of contact that the person being detained is entitled to have with a lawyer under subsection (1) includes:
   (a) being visited by the lawyer; and
   (b) communicating with the lawyer by telephone, fax or email.

(3) If:
   (a) the person being detained asks to be allowed to contact a particular lawyer under subsection (1); and
   (b) either:
      (i) the person is not entitled to contact that lawyer because of section 105.40 (prohibited contact order); or
      (ii) the person is not able to contact that lawyer;
   the police officer who is detaining the person must give the person reasonable assistance to choose another lawyer for the person to contact under subsection (1).

(3A) If the police officer who is detaining a person under a preventative detention order has reasonable grounds to believe that:
   (a) the person is unable, because of inadequate knowledge of the English language, or a disability, to communicate with reasonable fluency in that language; and
   (b) the person may have difficulties in choosing or contacting a lawyer because of that inability;
the police officer must give the person reasonable assistance (including, if appropriate, by arranging for the assistance of an interpreter) to choose and contact a lawyer under subsection (1).

(4) In recommending lawyers to the person being detained as part of giving the person assistance under subsection (3) or (3A), the police officer who is detaining the person may give priority to lawyers who have been given a security clearance at an appropriate level by the Department.

(5) Despite subsection (4) but subject to section 105.40, the person being detained is entitled under this section to contact a lawyer who does not have a security clearance of the kind referred to in subsection (4).

105.38 Monitoring contact under section 105.35 or 105.37

(1) The contact the person being detained has with another person under section 105.35 or 105.37 may take place only if it is conducted in such a way that the contact, and the content and meaning of the communication that takes place during the contact, can be effectively monitored by a police officer exercising authority under the preventative detention order.

(2) The contact may take place in a language other than English only if the content and meaning of the communication that takes place during the contact can be effectively monitored with the assistance of an interpreter.

(3) Without limiting subsection (2), the interpreter referred to in that subsection may be a police officer.

(4) If the person being detained indicates that he or she wishes the contact to take place in a language other than English, the police officer who is detaining the person must:

(a) arrange for the services of an appropriate interpreter to be provided if it is reasonably practicable to do so during the period during which the person is being detained; and

(b) if it is reasonably practicable to do so – arrange for those services to be provided as soon as practicable.

(5) Any communication between:

(a) a person who is being detained under a preventative detention order; and

(b) a lawyer;

for a purpose referred to in paragraph 105.37(1)(a), (b), (c), (ca), (d) or (e) is not admissible in evidence against the person in any proceedings in a court.

105.39 Special contact rules for person under 18 or incapable of managing own affairs

(1) This section applies if the person being detained under a preventative detention order:

(a) is under 18 years of age; or

(b) is incapable of managing his or her affairs.
(2) The person is entitled, while being detained under the order, to have contact with:
   (a) a parent or guardian of the person; or
   (b) another person who:
       (i) is able to represent the person’s interests; and
       (ii) is, as far as practicable in the circumstances, acceptable to the person and to the
            police officer who is detaining the person; and
       (iii) is not an AFP member; and
       (iv) is not an AFP employee (within the meaning of the Australian Federal Police Act
            1979); and
       (v) is not a member (however described) of a police force of a State or Territory; and
       (vi) is not an officer or employee of the Australian Security Intelligence Organisation.

(3) To avoid doubt:
   (a) if the person being detained (the detainee) has 2 parents or 2 or more guardians, the
       detainee is entitled, subject to section 105.40, to have contact under subsection (2)
       with each of those parents or guardians; and
   (b) the detainee is entitled to disclose the following to a person with whom the detainee has
       contact under subsection (2):
           (i) the fact that a preventative detention order has been made in relation to the
               detainee;
           (ii) the fact that the detainee is being detained;
           (iii) the period for which the detainee is being detained.

(4) The form of contact that the person being detained is entitled to have with another person
     under subsection (2) includes:
     (a) being visited by that other person; and
     (b) communicating with that other person by telephone, fax or email.

(5) The period for which the person being detained is entitled to have contact with another person
     each day under subsection (2) is:
     (a) 2 hours; or
     (b) such longer period as is specified in the preventative detention order.
     Note: Paragraph (b) – see subsections 105.8(7) and 105.12(7).

(6) Despite subsection (5), the police officer who is detaining the person may permit the person
     to have contact with a person under subsection (2) for a period that is longer than the period
     provided for in subsection (5).

(7) The contact that the person being detained has with another person under subsection (2) must
     be conducted in such a way that the content and meaning of any communication that takes
     place during the contact can be effectively monitored by a police officer exercising authority
     under the preventative detention order.
(8) If the communication that takes place during the contact takes place in a language other than English, the contact may continue only if the content and meaning of the communication in that language can be effectively monitored with the assistance of an interpreter.

(9) Without limiting subsection (8), the interpreter referred to in that subsection may be a police officer.

(10) If the person being detained indicates that he or she wishes the communication that takes place during the contact to take place in a language other than English, the police officer who is detaining the person must:
(a) arrange for the services of an appropriate interpreter to be provided if it is reasonably practicable to do so during the period during which the person is being detained; and
(b) if it is reasonably practicable to do so – arrange for those services to be provided as soon as practicable.

105.40 Entitlement to contact subject to prohibited contact order

Sections 105.35, 105.37 and 105.39 have effect subject to any prohibited contact order made in relation to the person’s detention.

105.41 Disclosure offences

Person being detained

(1) A person (the subject) commits an offence if:
(a) the subject is being detained under a preventative detention order; and
(b) the subject discloses to another person:
   (i) the fact that a preventative detention order has been made in relation to the subject; or
   (ii) the fact that the subject is being detained; or
   (iii) the period for which the subject is being detained; and
   (c) the disclosure occurs while the subject is being detained under the order; and
   (d) the disclosure is not one that the subject is entitled to make under section 105.36, 105.37 or 105.39.

   Penalty: Imprisonment for 5 years.

Lawyer

(2) A person (the lawyer) commits an offence if:
(a) a person being detained under a preventative detention order (the detainee) contacts the lawyer under section 105.37; and
(b) the lawyer discloses to another person:
   (i) the fact that a preventative detention order has been made in relation to the detainee; or
   (ii) the fact that the detainee is being detained; or
   (iii) the period for which the detainee is being detained; or
   (iv) any information that the detainee gives the lawyer in the course of the contact; and
(c) the disclosure occurs while the detainee is being detained under the order; and

(d) the disclosure is not made for the purposes of:

   (i) proceedings in a federal court for a remedy relating to the preventative detention order or the treatment of the detainee in connection with the detainee’s detention under the order; or

   (ii) a complaint to the Commonwealth Ombudsman under the Ombudsman Act 1976 in relation to the application for, or making of, the preventative detention order or the treatment of the detainee by an AFP member in connection with the detainee’s detention under the order; or

   (iii) the giving of information under section 40SA of the Australian Federal Police Act 1979 in relation to the application for, or making of, the preventative detention order or the treatment of the detainee by an AFP member in connection with the detainee’s detention under the order; or

   (iv) making representations to the senior AFP member nominated under subsection 105.19(5) in relation to the order, or another police officer involved in the detainee’s detention, about the exercise of powers under the order, the performance of obligations in relation to the order or the treatment of the detainee in connection with the detainee’s detention under the order.

Penalty: Imprisonment for 5 years.

Person having special contact with detainee who is under 18 years of age or incapable of managing own affairs

(3) A person (the parent/guardian) commits an offence if:

   (a) a person being detained under a preventative detention order (the detainee) has contact with the parent/guardian under section 105.39; and

   (b) the parent/guardian discloses to another person:

      (i) the fact that a preventative detention order has been made in relation to the detainee; or

      (ii) the fact that the detainee is being detained; or

      (iii) the period for which the detainee is being detained; or

      (iv) any information that the detainee gives the parent/guardian in the course of the contact; and

   (c) the other person is not a person the detainee is entitled to have contact with under section 105.39; and

   (d) the disclosure occurs while the detainee is being detained under the order; and

   (e) the disclosure is not made for the purposes of:

      (i) a complaint to the Commonwealth Ombudsman under the Ombudsman Act 1976 in relation to the application for, or the making of, the preventative detention order or the treatment of the detainee by an AFP member in connection with the detainee’s detention under the order; or
(ia) the giving of information under section 40SA of the *Australian Federal Police Act 1979* in relation to the application for, or the making of, the preventative detention order or the treatment of the detainee by an AFP member in connection with the detainee’s detention under the order; or

(ii) a complaint to an officer or authority of a State or Territory about the treatment of the detainee by a member of the police force of that State or Territory in connection with the detainee’s detention under the order; or

(iii) making representations to the senior AFP member nominated under subsection 105.19(5) in relation to the order, or another police officer involved in the detainee’s detention, about the exercise of powers under the order, the performance of obligations in relation to the order or the treatment of the detainee in connection with the detainee’s detention under the order.

Penalty: Imprisonment for 5 years.

(4) To avoid doubt, a person does not contravene subsection (3) merely by letting another person know that the detainee is safe but is not able to be contacted for the time being.

(4A) A person (the *parent/guardian*) commits an offence if:

(a) the parent/guardian is a parent or guardian of a person who is being detained under a preventative detention order (the *detainee*); and

(b) the detainee has contact with the parent/guardian under section 105.39; and

(c) while the detainee is being detained under the order, the parent/guardian discloses information of the kind referred to in paragraph (3)(b) to another parent or guardian of the detainee (the *other parent/guardian*); and

(d) when the disclosure is made, the detainee has not had contact with the other parent/guardian under section 105.39 while being detained under the order; and

(e) the parent/guardian does not, before making the disclosure, inform the senior AFP member nominated under subsection 105.19(5) in relation to the order that the parent/guardian is proposing to disclose information of that kind to the other parent/guardian.

Penalty: Imprisonment for 5 years.

(4B) If:

(a) a person (the *parent/guardian*) is a parent or guardian of a person being detained under a preventative detention order (the *detainee*); and

(b) the parent/guardian informs the senior AFP member nominated under subsection 105.19(5) in relation to the order that the parent/guardian proposes to disclose information of the kind referred to in paragraph (3)(b) to another parent or guardian of the detainee (the *other parent/guardian*);

that senior AFP member may inform the parent/guardian that the detainee is not entitled to contact the other parent/guardian under section 105.39.

Note: The parent/guardian may commit an offence against subsection (2) if the other parent/guardian is a person the detainee is not entitled to have contact with under section 105.39 and the parent/guardian does disclose information of that kind to the other parent/guardian. This is because of the operation of paragraph (3)(c).
Interpreter assisting in monitoring contact with detainee

(5) A person (the **interpreter**) commits an offence if:
   (a) the interpreter is an interpreter who assists in monitoring the contact that a person being detained under a preventative detention order (the **detainee**) has with someone while the detainee is being detained under the order; and
   (b) the interpreter discloses to another person:
       (i) the fact that a preventative detention order has been made in relation to the detainee; or
       (ii) the fact that the detainee is being detained; or
       (iii) the period for which the detainee is being detained; or
       (iv) any information that interpreter obtains in the course of assisting in the monitoring of that contact; and
   (c) the disclosure occurs while the detainee is being detained under the order.

Penalty: Imprisonment for 5 years.

Passing on improperly disclosed information

(6) A person (the **disclosure recipient**) commits an offence if:
   (a) a person (the **earlier discloser**) discloses to the disclosure recipient:
       (i) the fact that a preventative detention order has been made in relation to a person; or
       (ii) the fact that a person is being detained under a preventative detention order; or
       (iii) the period for which a person is being detained under a preventative detention order; or
       (iv) any information that a person who is being detained under a preventative detention order communicates to a person while the person is being detained under the order; and
   (b) the disclosure by the earlier discloser to the disclosure recipient contravenes:
       (i) subsection (1), (2), (3) or (5); or
       (ii) this subsection; and
   (c) the disclosure recipient discloses that information to another person; and
   (d) the disclosure by the disclosure recipient occurs while the person referred to in subparagraph (a)(i), (ii), (iii) or (iv) is being detained under the order.

Penalty: Imprisonment for 5 years.

Police officer or interpreter monitoring contact with lawyer

(7) A person (the **monitor**) commits an offence if:
   (a) the monitor is:
       (i) a police officer who monitors; or
       (ii) an interpreter who assists in monitoring;
   contact that a person being detained under a preventative detention order (the **detainee**) has with a lawyer under section 105.37 while the detainee is being detained under the order; and
(b) information is communicated in the course of that contact; and
(c) the information is communicated for one of the purposes referred to in subsection 105.37(1); and
(d) the monitor discloses that information to another person.
Penalty: Imprisonment for 5 years.
Note: See also subsection 105.38(5).

105.42 Questioning of person prohibited while person is detained

(1) A police officer must not question a person while the person is being detained under a preventative detention order except for the purposes of:
(a) determining whether the person is the person specified in the order; or
(b) ensuring the safety and wellbeing of the person being detained; or
(c) allowing the police officer to comply with a requirement of this Division in relation to the person’s detention under the order.

Note 1: This subsection will not apply to the person if the person is released from detention under the order (even though the order may still be in force in relation to the person).
Note 2: A contravention of this subsection may be an offence under section 105.45.

(2) An officer or employee of the Australian Security Intelligence Organisation must not question a person while the person is being detained under a preventative detention order.

Note 1: This subsection will not apply to the person if the person is released from detention under the order (even though the order may still be in force in relation to the person).
Note 2: A contravention of this subsection may be an offence under section 105.45.

(3) An AFP member, or an officer or employee of the Australian Security Intelligence Organisation, must not question a person while the person is being detained under an order made under a corresponding State preventative detention law.

Note 1: This subsection will not apply to the person if the person is released from detention under the order (even though the order may still be in force in relation to the person).
Note 2: A contravention of this subsection may be an offence under section 105.45.

(4) If a police officer questions a person while the person is being detained under a preventative detention order, the police officer who is detaining the person must ensure that:
(a) a video recording is made of the questioning if it is practicable to do so; or
(b) an audio recording is made of the questioning if it is not practicable for a video recording to be made of the questioning.

Note: A contravention of this subsection may be an offence under section 105.45.

(5) Subsection (4) does not apply if:
(a) the questioning occurs to:
   (i) ensure the safety and well being of the person being detained; or
   (ii) determine whether the person is the person specified in the order; and
(b) complying with subsection (4) is not practicable because of the seriousness and urgency of the circumstances in which the questioning occurs.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).

(6) A recording made under subsection (4) must be kept for the period of 12 months after the recording is made.

105.43 Taking fingerprints, recordings, samples of handwriting or photographs

(1) A police officer must not take identification material from a person who is being detained under a preventative detention order except in accordance with this section.

Note: A contravention of this subsection may be an offence under section 105.45.

(2) A police officer who is of the rank of sergeant or higher may take identification material from the person, or cause identification material from the person to be taken, if:

(a) the person consents in writing; or

(b) the police officer believes on reasonable grounds that it is necessary to do so for the purpose of confirming the person’s identity as the person specified in the order.

(3) A police officer may use such force as is necessary and reasonable in the circumstances to take identification material from a person under this section.

(4) Subject to this section, a police officer must not take identification material (other than hand prints, fingerprints, foot prints or toe prints) from the person if the person:

(a) is under 18 years of age; or

(b) is incapable of managing his or her affairs; unless a Federal Magistrate orders that the material be taken.

Note: A contravention of this subsection may be an offence under section 105.45.

(5) In deciding whether to make such an order, the Federal Magistrate must have regard to:

(a) the age, or any disability, of the person; and

(b) such other matters as the Federal Magistrate thinks fit.

(6) The taking of identification material from a person who:

(a) is under 18 years of age; or

(b) is incapable of managing his or her affairs;

must be done in the presence of:

(c) a parent or guardian of the person; or

(d) if a parent or guardian of the person is not acceptable to the person – another appropriate person.

Note 1: For appropriate person, see subsection (11).

Note 2: A contravention of this subsection may be an offence under section 105.45.
(7) Despite this section, identification material may be taken from a person who is under 18 years of age and is capable of managing his or her affairs if:
(a) subsections (8) and (9) are satisfied; or
(b) subsection (8) or (9) is satisfied (but not both) and a Federal Magistrate orders that the material be taken.

In deciding whether to make such an order, the Federal Magistrate must have regard to the matters set out in subsection (5).

(8) This subsection applies if the person agrees in writing to the taking of the material.

(9) This subsection applies if either:
(a) a parent or guardian of the person; or
(b) if a parent or guardian is not acceptable to the person – another appropriate person; agrees in writing to the taking of the material.

Note: For appropriate person, see subsection (11).

(10) Despite this section, identification material may be taken from a person who:
(a) is at least 18 years of age; and
(b) is capable of managing his or her affairs;
if the person consents in writing.

(11) A reference in this section to an appropriate person in relation to a person (the subject) who is under 18 years of age, or incapable of managing his or her affairs, is a reference to a person who:
(a) is capable of representing the subject’s interests; and
(b) as far as is practicable in the circumstances, is acceptable to the subject and the police officer who is detaining the subject; and
(c) is none of the following:
   (i) an AFP member;
   (ii) an AFP employee (within the meaning of the Australian Federal Police Act 1979);
   (iii) a member (however described) of a police force of a State or Territory;
   (iv) an officer or employee of the Australian Security Intelligence Organisation.

105.44 Use of identification material

(1) This section applies if identification material is taken under section 105.43 from a person being detained under a preventative detention order.

(2) The material may be used only for the purpose of determining whether the person is the person specified in the order.

Note: A contravention of this subsection may be an offence under section 105.45.

(3) If:
(a) a period of 12 months elapses after the identification material is taken; and
(b) proceedings in respect of:
   (i) the preventative detention order; or
   (ii) the treatment of the person in connection with the person’s detention under the order;

have not been brought, or have been brought and discontinued or completed, within that period;

the material must be destroyed as soon as practicable after the end of that period.

105.45 Offences of contravening safeguards

A person commits an offence if:

(a) the person engages in conduct; and

(b) the conduct contravenes:
   (i) subsection 105.28(1); or
   (ii) subsection 105.29(1); or
   (iii) section 105.30; or
   (iv) section 105.33; or
   (iva) subsection 105.33A(1); or
   (v) subsection 105.42(1), (2), (3) or (4); or
   (vi) subsection 105.43(1), (4) or (6); or
   (vii) subsection 105.44(2).

Penalty: Imprisonment for 2 years.

Subdivision F – Miscellaneous

105.46 Nature of functions of Federal Magistrate

(1) A function of making an order conferred on a Federal Magistrate by section 105.43 is
    conferred on the Federal Magistrate in a personal capacity and not as a court or a member of
    a court.

(2) Without limiting the generality of subsection (1), an order made by a Federal Magistrate
    under section 105.43 has effect only by virtue of this Act and is not to be taken by implication
    to be made by a court.

(3) A Federal Magistrate performing a function of, or connected with, making an order under
    section 105.43 has the same protection and immunity as if he or she were performing that
    function as, or as a member of, the Federal Magistrates Court.

105.47 Annual report

(1) The AttorneyGeneral must, as soon as practicable after each 30 June, cause to be prepared a
    report about the operation of this Division during the year ended on that 30 June.

(2) Without limiting subsection (1), a report relating to a year must include the following matters:
    (a) the number of initial preventative detention orders made under section 105.8 during
        the year;
(b) the number of continued preventative detention orders made under section 105.12 during the year;

(c) whether a person was taken into custody under each of those orders and, if so, how long the person was detained for;

(d) particulars of:

(i) any complaints made or referred to the Commonwealth Ombudsman during the year that related to the detention of a person under a preventative detention order; and

(ii) any information given under section 40SA of the Australian Federal Police Act 1979 during the year that related to the detention of a person under a preventative detention order and raised an AFP conduct or practices issue (within the meaning of that Act);

(e) the number of prohibited contact orders made under sections 105.15 and 105.16 during the year;

(f) the number of preventative detention orders, and the number of prohibited contact orders, that a court has found not to have been validly made or that the Administrative Appeals Tribunal has declared to be void.

(3) The AttorneyGeneral must cause copies of the report to be laid before each House of the Parliament within 15 sitting days of that House after the report is completed.

105.48 Certain functions and powers not affected

This Division does not affect:

(a) a function or power of the Commonwealth Ombudsman under the Ombudsman Act 1976; or

(b) a function or power of a person under Part V of the Australian Federal Police Act 1979.

105.49 Queensland public interest monitor functions and powers not affected

This Division does not affect a function or power that the Queensland public interest monitor, or a Queensland deputy public interest monitor, has under a law of Queensland.

105.50 Law relating to legal professional privilege not affected

To avoid doubt, this Division does not affect the law relating to legal professional privilege.

105.51 Legal proceedings in relation to preventative detention orders

(1) Subject to subsections (2) and (4), proceedings may be brought in a court for a remedy in relation to:

(a) a preventative detention order; or

(b) the treatment of a person in connection with the person’s detention under a preventative detention order.
(2) A court of a State or Territory does not have jurisdiction in proceedings for a remedy if:
   (a) the remedy relates to:
       (i) a preventative detention order; or
       (ii) the treatment of a person in connection with the person’s detention under a preventative detention order; and
   (b) the proceedings are commenced while the order is in force.

(3) Subsection (2) has effect despite any other law of the Commonwealth (whether passed or made before or after the commencement of this section).

(4) An application cannot be made under the *Administrative Decisions (Judicial Review) Act 1977* in relation to a decision made under this Division.

Note: See paragraph (dac) of Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977*.

(5) An application may be made to the Administrative Appeals Tribunal for review of:
   (a) a decision by an issuing authority under section 105.8 or 105.12 to make a preventative detention order; or
   (b) a decision by an issuing authority in relation to a preventative detention order to extend or further extend the period for which the order is in force in relation to a person.

The application cannot be made while the order is in force.

(6) The power of the Administrative Appeals Tribunal to review a decision referred to in subsection (5) may be exercised by the Tribunal only in the Security Appeals Division of the Tribunal.

(7) The Administrative Appeals Tribunal may:
   (a) declare a decision referred to in subsection (5) in relation to a preventative detention order in relation to a person to be void if the Tribunal would have set the decision aside if an application for review of the decision had been able to be made to the Tribunal while the order was in force; and
   (b) determine that the Commonwealth should compensate the person in relation to the person’s detention under the order if the Tribunal declares the decision to be void under paragraph (a).

(8) If the Administrative Appeals Tribunal makes a determination under paragraph (7)(b), the Commonwealth is liable to pay the compensation determined by the Tribunal.

(9) The provisions of the *Administrative Appeals Tribunal Act 1975* apply in relation to an application to the Administrative Appeals Tribunal for review of a decision referred to in subsection (5) with the modifications specified in the regulations made under this Act.

105.52 Review by State and Territory courts

(1) This section applies if:
   (a) a person is detained under a preventative detention order (the *Commonwealth order*) that is made on the basis of:
(i) assisting in preventing a terrorist act occurring within a period; or
(ii) preserving evidence of, or relating to, a terrorist act; and

(b) the person is detained under an order (the State order) that is made under a corresponding State preventative detention law on the basis of:
   (i) assisting in preventing the same terrorist act, or a different terrorist act, occurring within that period; or
   (ii) preserving evidence of, or relating to, the same terrorist act; and

(c) the person brings proceedings before a court of a State or Territory in relation to:
   (i) the application for, or the making of, the State order; or
   (ii) the person’s treatment in connection with the person’s detention under the State order.

(2) The court may:
   (a) review the application for, or the making of, the Commonwealth order, or the person’s treatment in connection with the person’s detention under the Commonwealth order, on the same grounds as those on which the court may review the application for, or the making of, the State order, or the person’s treatment in connection with the person’s detention under the State order; and
   (b) grant the same remedies in relation to the application for, or the making of, the Commonwealth order, or the person’s treatment in connection with the person’s detention under the Commonwealth order, as those the court can grant in relation to the application for, or the making of, the State order, or the person’s treatment in connection with the person’s detention under the State order.

(3) If:
   (a) the person applies to the court for:
      (i) review of the application for, or the making of, the Commonwealth order or the person’s treatment in connection with the person’s detention under the Commonwealth order; or
      (ii) a remedy in relation to the application for, or the making of, the Commonwealth order or the person’s treatment in connection with the person’s detention under the Commonwealth order; and
   (b) the person applies to the court for an order under this subsection;
the court may order the Commissioner of the Australian Federal Police to give the court, and the parties to the proceedings, the information that was put before the person who issued the Commonwealth order when the application for the Commonwealth order was made.

(4) Subsection (3) does not require information to be given to the court, or the parties to the proceedings, if the disclosure of the information is likely to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004).

(5) This section has effect:
   (a) without limiting subsection 105.51(1); and
   (b) subject to subsection 105.51(2).

105.53 Sunset provision

(1) A preventative detention order, or a prohibited contact order, that is in force at the end of 10 years after the day on which this Division commences ceases to be in force at that time.

(2) A preventative detention order, and a prohibited contact order, cannot be applied for, or made, after the end of 10 years after the day on which this Division commences.

...  

106.2 Saving – regulations made for the purposes of paragraph (a) of the definition of terrorist organisation

(1) If:
   (a) regulations were made before commencement for the purposes of paragraph (a) of the definition of terrorist organisation in subsection 102.1(1), as in force before commencement; and
   (b) the regulations were in force immediately before commencement;
the regulations continue to have effect, after commencement, as if they had been made for the purposes of that paragraph, as in force after commencement.

(2) In this section, commencement means the commencement of this section.

106.3 Application provision

The amendments to this Code made by Schedule 1 to the AntiTerrorism Act 2005 apply to offences committed:
   (a) before the commencement of this section (but not before the commencement of the particular section of the Code being amended); and
   (b) after the commencement of this section.

**Crimes (Foreign Incursions and Recruitment) Act 1978**

6 Incursions into foreign States with intention of engaging in hostile activities

(1) A person shall not:
   (a) enter a foreign State with intent to engage in a hostile activity in that foreign State; or
   (b) engage in a hostile activity in a foreign State.
Penalty: Imprisonment for 20 years.

(2) A person shall not be taken to have committed an offence against this section unless:
   (a) at the time of the doing of the act that is alleged to constitute the offence, the person:
      (i) was an Australian citizen; or
      (ii) not being an Australian citizen, was ordinarily resident in Australia; or
(b) the person was present in Australia at any time before the doing of that act and, at any
time when the person was so present, his or her presence was for a purpose connected
with that act, or for purposes that included such a purpose.

(3) For the purposes of subsection (1), engaging in a hostile activity in a foreign State consists
of doing an act with the intention of achieving any one or more of the following objectives
(whether or not such an objective is achieved):
(a) the overthrow by force or violence of the government of the foreign State or of a part of
the foreign State;
(aa) engaging in armed hostilities in the foreign State;
(b) causing by force or violence the public in the foreign State to be in fear of suffering
death or personal injury;
(c) causing the death of, or bodily injury to, a person who:
   (i) is the head of state of the foreign State; or
   (ii) holds, or performs any of the duties of, a public office of the foreign State or of a
        part of the foreign State; or
(d) unlawfully destroying or damaging any real or personal property belonging to the
government of the foreign State or of a part of the foreign State.

(4) Nothing in this section applies to an act done by a person in the course of, and as part of, the
person’s service in any capacity in or with:
(a) the armed forces of the government of a foreign State; or
(b) any other armed force in respect of which a declaration by the Minister under
subsection 9(2) is
in force.

(5) Paragraph (4)(a) does not apply if:
(a) a person enters a foreign State with intent to engage in a hostile activity in that foreign
State while in or with an organisation; and
(b) the organisation is a prescribed organisation at the time of entry.

(6) Paragraph (4)(a) does not apply if:
(a) a person engages in a hostile activity in a foreign State while in or with an organisation;
and
(b) the organisation is a prescribed organisation at the time when the person engages in that
hostile activity.

(7) For the purposes of subsections (5) and (6), prescribed organisation means:
(a) an organisation that is prescribed by the regulations for the purposes of this paragraph; or
(b) an organisation referred to in paragraph (b) of the definition of terrorist organisation in
subsection 102.1(1) of the Criminal Code.

(8) Before the GovernorGeneral makes a regulation prescribing an organisation for the purposes
of paragraph (7)(a), the Minister must be satisfied on reasonable grounds that the organisation
is directly or indirectly engaged in, preparing, planning, assisting in or fostering:
(a) a serious violation of human rights; or
(b) armed hostilities against the Commonwealth or a foreign State allied or associated with the Commonwealth; or
(c) a terrorist act (as defined in section 100.1 of the Criminal Code); or
(d) an act prejudicial to the security, defence or international relations of the Commonwealth.

**Crimes Act 1914**

**Part IAA — Search, information gathering, arrest and related powers**

**Division 1 — Preliminary**

**3C Interpretation**

(1) In this Part, unless the contrary intention appears:

- **constable assisting**, in relation to a warrant, means:
  (a) a person who is a constable and who is assisting in executing the warrant; or
  (b) a person who is not a constable and who has been authorised by the relevant executing officer to assist in executing the warrant.

- **data held in a computer** includes:
  (a) data held in any removable data storage device for the time being held in a computer; or
  (b) data held in a data storage device on a computer network of which the computer forms a part.

- **emergency situation**, in relation to the execution of a warrant in relation to premises, means a situation that the executing officer or a constable assisting believes, on reasonable grounds, involves a serious and imminent threat to a person’s life, health or safety that requires the executing officer and constables assisting to leave the premises.

- **evidential material** means a thing relevant to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form.

- **executing officer**, in relation to a warrant, means:
  (a) the constable named in the warrant by the issuing officer as being responsible for executing the warrant; or
  (b) if that constable does not intend to be present at the execution of the warrant — another constable whose name has been written in the warrant by the constable so named; or
  (c) another constable whose name has been written in the warrant by the constable last named in the warrant.

- **frisk search** means:
  (a) a search of a person conducted by quickly running the hands over the person’s outer garments; and
(b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

**issuing officer**, in relation to a warrant to search premises or a person or a warrant for arrest under this Part, means:

(a) a magistrate; or

(b) a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue search warrants or warrants for arrest, as the case may be.

**magistrate**, in sections 3ZI, 3ZJ, 3ZK, 3ZN and 3ZQZB, has a meaning affected by section 3CA.

**offence** means:

(a) an offence against a law of the Commonwealth (other than the *Defence Force Discipline Act 1982*); or

(b) an offence against a law of a Territory; or

(c) a State offence that has a federal aspect.

**ordinary search** means a search of a person or of articles in the possession of a person that may include:

(a) requiring the person to remove his or her overcoat, coat or jacket and any gloves, shoes and hat; and

(b) an examination of those items.

**police station** includes:

(a) a police station of a State or Territory; and

(b) a building occupied by the Australian Federal Police.

**premises** includes a place and a conveyance.

**recently used conveyance**, in relation to a search of a person, means a conveyance that the person had operated or occupied at any time within 24 hours before the search commenced.

**seizable item** means anything that would present a danger to a person or that could be used to assist a person to escape from lawful custody.

**serious offence** means an offence:

(a) that is punishable by imprisonment for 2 years or more; and

(b) that is one of the following:

(i) a Commonwealth offence;

(ii) an offence against a law of a State that has a federal aspect;

(iii) an offence against a law of a Territory; and

(c) that is not a serious terrorism offence.

**serious terrorism offence** means:

(a) a terrorism offence (other than offence against section 102.8, Division 104 or Division 105 of the *Criminal Code*); or
(b) an offence against a law of a State:
   (i) that has a federal aspect; and
   (ii) that has the characteristics of a terrorism offence (other than such an offence
        that has the characteristics of an offence against section 102.8, Division 104 or
        Division 105 of the *Criminal Code*); or

(c) an offence against a law of a Territory that has the characteristics of a terrorism
    offence (other than such an offence that has the characteristics of an offence against
    section 102.8, Division 104 or Division 105 of the *Criminal Code*).

*strip search* means a search of a person or of articles in the possession of a person that
may include:
(a) requiring the person to remove all of his or her garments; and
(b) an examination of the person’s body (but not of the person’s body cavities) and of
    those garments.

*warrant* means a warrant under this Part.

*warrant premises* means premises in relation to which a warrant is in force.

(2) A person referred to in paragraph (b) of the definition of *constable assisting* in subsection (1)
must not take part in searching or arresting a person.

...

3D Application of Part

(1) This Part is not intended to limit or exclude the operation of another law of the
    Commonwealth relating to:
    (a) the search of premises; or
    (b) arrest and related matters; or
    (c) the stopping, detaining or searching of conveyances or persons; or
    (d) the seizure of things; or
    (e) the requesting of information or documents from persons.

(2) To avoid any doubt, it is declared that even though another law of the Commonwealth
    provides power to do one or more of the things referred to in subsection (1), a similar power
    conferred by this Part may be used despite the existence of the power under the other law.

(4) This Part is not intended to limit or exclude the operation of a law of a Territory relating to:
    (a) the search of premises; or
    (b) arrest and related matters; or
    (c) the stopping, detaining or searching of conveyances or persons; or
    (d) the seizure of things; or
    (e) the requesting of information or documents from persons;
    in relation to offences against a law of that Territory.
(5) This Part does not apply to the exercise by a constable of powers under the *Defence Force Discipline Act 1982*.

(6) The application of this Part in relation to State offences that have a federal aspect is not intended to limit or exclude the concurrent operation of any law of a State or of the Australian Capital Territory.

Note 1: Subsection 3(1) defines *State* to include the Northern Territory.

Note 2: Section 3AA has the effect that an offence against the law of the Australian Capital Territory is a State offence that has a federal aspect.

...  

**Division 3A – Powers in relation to terrorist acts and terrorism offences**

**Subdivision A – Definitions**

**3UA Definitions**

In this Division:

*Commonwealth place* means a Commonwealth place within the meaning of the *Commonwealth Places (Application of Laws) Act 1970*.

*Police officer* means:

(a) a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*); or

(b) a special member (within the meaning of that Act); or

(c) a member, however described, of a police force of a State or Territory.

*Prescribed security zone* means a zone in respect of which a declaration under section 3UJ is in force.

*Serious offence related item* means a thing that a police officer conducting a search under section 3UD reasonably suspects:

(a) may be used in a serious offence; or

(b) is connected with the preparation for, or the engagement of a person in, a serious offence; or

(c) is evidence of, or relating to, a serious offence.

*Terrorism related item* means a thing that a police officer conducting a search under section 3UD reasonably suspects:

(a) may be used in a terrorist act; or

(b) is connected with the preparation for, or the engagement of a person in, a terrorist act; or

(c) is evidence of, or relating to, a terrorist act.

*Vehicle* includes any means of transport (and, without limitation, includes a vessel and an aircraft).
Subdivision B – Powers

3UB Application of Subdivision

(1) A police officer may exercise the powers under this Subdivision in relation to a person if:
   (a) the person is in a Commonwealth place (other than a prescribed security zone) and the
       officer suspects on reasonable grounds that the person might have just committed, might
       be committing or might be about to commit, a terrorist act; or
   (b) the person is in a Commonwealth place in a prescribed security zone.

(2) This section does not limit the operation of section 3UEA.

3UC Requirement to provide name etc.

(1) A police officer may request the person to provide the officer with the following details:
   (a) the person’s name;
   (b) the person’s residential address;
   (c) the person’s reason for being in that particular Commonwealth place;
   (d) evidence of the person’s identity.

(2) If a police officer:
   (a) makes a request under subsection (1); and
   (b) informs the person:
       (i) of the officer’s authority to make the request; and
       (ii) that it may be an offence not to comply with the request;

       the person commits an offence if:
   (c) the person fails to comply with the request; or
   (d) the person gives a name or address that is false in a material particular.

       Penalty: 20 penalty units.
       Note: A more serious offence of obstructing a Commonwealth public official may also apply
       (see section 149.1 of the Criminal Code).

(3) Subsection (2) does not apply if the person has a reasonable excuse.

       Note: A defendant bears an evidential burden in relation to the matter in subsection (3)
       (see subsection 13.3(3) of the Criminal Code).

3UD Stopping and searching

(1) A police officer may:
   (a) stop and detain the person for the purpose of conducting a search under paragraph (b); and
   (b) conduct one of the following searches for a terrorism related item:
       (i) an ordinary search or a frisk search of the person;
       (ii) a search of any thing that is, or that the officer suspects on reasonable grounds to
            be, under the person’s immediate control;
(iii) a search of any vehicle that is operated or occupied by the person;
(iv) a search of any thing that the person has, or that the officer suspects on reasonable grounds that the person has, brought into the Commonwealth place.

*Conditions relating to conduct of search of person*

(2) A police officer who conducts a search of a person under this section must not use more force, or subject the person to greater indignity, than is reasonable and necessary in order to conduct the search.

(3) A person must not be detained under this section for longer than is reasonably necessary for a search to be conducted under this section.

*Other conditions relating to conduct of search of person or thing*

(4) In searching a thing (including a vehicle) under subsection (1), a police officer may use such force as is reasonable and necessary in the circumstances, but must not damage the thing by forcing it, or a part of it, open unless:
   (a) the person has been given a reasonable opportunity to open the thing or part of it; or
   (b) it is not possible to give that opportunity.

3UE  Seizure of terrorism related items and serious offence related items

If a police officer:
(a) conducts a search under section 3UD; and
(b) finds, in the course of the search, a thing that is:
   (i) a terrorism related item; or
   (ii) a serious offence related item;
the officer may seize the thing.

3UEA  Emergency entry to premises without warrant

(1) A police officer may enter premises in accordance with this section if the police officer suspects, on reasonable grounds, that:
   (a) it is necessary to exercise a power under subsection (2) in order to prevent a thing that is on the premises from being used in connection with a terrorism offence; and
   (b) it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person’s life, health or safety.

(2) The police officer may:
   (a) search the premises for the thing; and
   (b) seize the thing if he or she finds it there.

(3) If, in the course of searching for the thing, the police officer finds another thing that the police officer suspects, on reasonable grounds, to be relevant to an indictable offence or a summary offence, the police officer may secure the premises pending the obtaining of a warrant under Part IAA in relation to the premises.
(4) Premises must not be secured under subsection (3) for longer than is reasonably necessary to obtain the warrant.

(5) In the course of searching for the thing, the police officer may also seize any other thing, or do anything to make the premises safe, if the police officer suspects, on reasonable grounds, that it is necessary to do so:
   (a) in order to protect a person’s life, health or safety; and
   (b) without the authority of a search warrant because the circumstances are serious and urgent.

(6) In exercising powers under this section:
   (a) the police officer may use such assistance; and
   (b) the police officer, or a person who is also a police officer and who is assisting the police officer, may use such force against persons and things; and
   (c) a person (other than a police officer) who is authorised by the police officer to assist the police officer may use such force against things; as is necessary and reasonable in the circumstances.

Notification

(7) If one or more police officers have entered premises in accordance with this section, a police officer must, within 24 hours after the entry:
   (a) notify the occupier of the premises that the entry has taken place; or
   (b) if it is not practicable so to notify the occupier – leave a written notice of the entry at the premises.

3UF Seizure notices

Seizure notice to be served

(1) A police officer who is for the time being responsible for a thing seized under section 3UE or 3UEA must, within 7 days after the day on which the thing was seized, serve a seizure notice on:
   (a) the owner of the thing; or
   (b) if the owner of the thing cannot be identified after reasonable inquiries – the person from whom the thing was seized.

(2) Subsection (1) does not apply if:
   (a) both:
      (i) the owner of the thing cannot be identified after reasonable inquiries; and
      (ii) the thing was not seized from a person; or
   (b) it is not possible to serve the person required to be served under subsection (1).

(3) A seizure notice must:
   (a) identify the thing; and
   (b) state the date on which the thing was seized; and
   (c) state the ground or grounds on which the thing was seized; and
(d) state that, if the owner does not request the return of the thing within 90 days after the date of the notice, the thing is forfeited to the Commonwealth.

**Forfeiture of thing seized**

(8) A thing is forfeited to the Commonwealth if the owner of the thing does not request its return:

(a) before the end of the 90th day after the date of the seizure notice in relation to the thing; or

(b) if subsection (2) applied in relation to the thing so that a seizure notice was not served – before the end of the 90th day after the day on which the thing was seized.

### 3UH Relationship of Subdivision to other laws

(1) The powers conferred, and duties imposed, by this Subdivision on police officers are in addition to, and not in derogation of, any other powers conferred, or duties imposed, by any other law of the Commonwealth or the law of a State or Territory.

(2) This Division is not intended to exclude or limit the operation of any other law of the Commonwealth or the law of a State or Territory in so far as it is capable of operating concurrently with this Subdivision.

### Subdivision C – Prescribed security zones

#### 3UI Applications for declarations

A police officer may apply to the Minister for a declaration that a Commonwealth place be declared as a prescribed security zone.

#### 3UJ Minister may make declarations

**Declaration**

(1) The Minister may declare, in writing, a Commonwealth place to be a prescribed security zone if he or she considers that a declaration would assist:

(a) in preventing a terrorist act occurring; or

(b) in responding to a terrorist act that has occurred.

**Declaration has effect**

(2) A declaration under this section has effect accordingly.

**Duration of declaration**

(3) A declaration ceases to have effect at the end of 28 days after it is made, unless the declaration is revoked by the Minister before then.

**Revocation of declaration**

(4) The Minister must revoke a declaration, in writing, if he or she is satisfied that:

(a) in the case of a declaration made on the ground mentioned in paragraph (1)(a) – there is no longer a terrorism threat that justifies the declaration being continued; or
(b) in the case of a declaration made on the ground mentioned in paragraph (1)(b) – the declaration is no longer required.

Gazettal and publication of declaration

(5) If a declaration of a Commonwealth place as a prescribed security zone under this section is made or revoked, the Minister must arrange for:

(a) a statement to be prepared that:

(i) states that the declaration has been made or revoked, as the case may be; and

(ii) identifies the prescribed security zone; and

(b) the statement to be:

(i) broadcast by a television or radio station so as to be capable of being received within the place; and

(ii) published in the Gazette; and

(iii) published on the internet.

Effect of failure to publish

(6) A failure to comply with subsection (5) does not make the declaration or its revocation ineffective to any extent.

Declaration or revocation not legislative instruments

(7) A declaration or revocation made under this section is not a legislative instrument.

Subdivision D – Sunset provision

3UK Sunset provision

(1) A police officer must not exercise powers or perform duties under this Division (other than under section 3UF) after the end of 10 years after the day on which the Division commences.

(2) A declaration under section 3UJ that is in force at the end of 10 years after the day on which this Division commences ceases to be in force at that time.

(3) A police officer cannot apply for, and the Minister cannot make, a declaration under section 3UJ after the end of 10 years after the day on which this Division commences.
Financial Transaction Reports Act 1988

Division 2 – Reports of suspect transactions

16 Reports of suspect transactions

(1) Subject to subsections (4A) and (4B), where:

(a) a cash dealer is a party to a transaction; and

(b) the cash dealer has reasonable grounds to suspect that information that the cash dealer has concerning the transaction:

(i) may be relevant to investigation of an evasion, or attempted evasion, of a taxation law; or

(ii) may be relevant to investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a Territory; or

(iii) may be of assistance in the enforcement of the Proceeds of Crime Act 1987 or the regulations made under that Act; or

(iv) may be of assistance in the enforcement of the Proceeds of Crime Act 2002 or the regulations made under that Act;

the cash dealer, whether or not required to report the transaction under Division 1 or 3, shall, as soon as practicable after forming that suspicion:

(c) prepare a report of the transaction; and

(d) communicate the information contained in the report to the AUSTRAC CEO.

(1A) Subject to subsections (4A) and (4B), where:

(a) a cash dealer is a party to a transaction; and

(b) either:

(i) the cash dealer has reasonable grounds to suspect that the transaction is preparatory to the commission of a financing of terrorism offence; or

(ii) the cash dealer has reasonable grounds to suspect that information that the cash dealer has concerning the transaction may be relevant to investigation of, or prosecution of a person for, a financing of terrorism offence;

the cash dealer, whether or not required to report the transaction under Division 1 or 3, must, as soon as practicable after forming the suspicion:

(c) prepare a report of the transaction; and

(d) communicate the information contained in the report to the AUSTRAC CEO.

(2) A report under subsection (1) or (1A) shall:

(a) be prepared in the approved form;

(b) contain the reportable details of the transaction;

(c) contain a statement of the grounds on which the cash dealer holds the suspicion referred to in the subsection under which the report is prepared; and

(d) be signed by the cash dealer.
(3) A communication under subsection (1) or (1A) shall be made to the AUSTRAC CEO:
(a) by giving the AUSTRAC CEO a copy of the report; or
(b) in such other manner and form as is approved by the AUSTRAC CEO, in writing, in relation to the cash dealer or to a class of cash dealers that includes the cash dealer.

(4) Where a cash dealer communicates information to the AUSTRAC CEO under subsection (1) or (1A), the cash dealer shall, if requested to do so by:
(a) the AUSTRAC CEO;
(b) a relevant authority; or
(c) an investigating officer who is carrying out an investigation arising from, or relating to the matters referred to in, the information contained in the report;
give such further information as is specified in the request to the extent to which the cash dealer has that information.

(4A) Subsections (1) and (1A) do not impose any obligations on a cash dealer in relation to a transaction if:
(a) the cash dealer is a reporting entity; and
(b) the transaction occurs after 11 March 2010; and
(c) the transaction is a designated service transaction.

(4B) Subsection (1) or (1A) does not apply in relation to a transaction if the cash dealer complies with section 41 of the AntiMoney Laundering and CounterTerrorism Financing Act 2006 in relation to the transaction.

(5) An action, suit or proceeding does not lie against:
(a) a cash dealer; or
(b) an officer, employee or agent of the cash dealer acting in the course of that person’s employment or agency;
in relation to any action by the cash dealer or person taken:
(c) under this section; or
(d) in the mistaken belief that such action was required under this section.

(5A) Where a cash dealer communicates to the AUSTRAC CEO, under subsection (1) or (1A), information about the cash dealer’s suspicion in relation to a transaction to which the cash dealer is a party, the cash dealer must not disclose to anyone else:
(a) that the cash dealer has formed the suspicion; or
(b) that information has been communicated to the AUSTRAC CEO; or
(c) any other information from which the person to whom the information is disclosed could reasonably be expected to infer that the suspicion had been formed or that the firstmentioned information had been communicated.

(5AA) If a cash dealer gives further information pursuant to a request under subsection (4), the cash dealer must not disclose to anyone else:
(a) that the information has been given; or
(b) any other information from which the person to whom the information is disclosed could reasonably be expected to infer that the firstmentioned information had been given.

(5B) A cash dealer who contravenes subsection (5A) or (5AA) is guilty of an offence punishable, upon conviction, by imprisonment for not more than 2 years.

Note: Subsection 4B(2) of the Crimes Act 1914 allows a court to impose in respect of an offence an appropriate fine instead of, or in addition to, a term of imprisonment. The maximum fine that a court can impose on an individual is worked out by multiplying the maximum term of imprisonment (in months) by 5, and then multiplying the resulting number by the amount of a penalty unit. The amount of a penalty unit is stated in section 4AA of that Act. If a body corporate is convicted of an offence, subsection 4B(3) of that Act allows a court to impose a fine that is not greater than 5 times the maximum fine that could be imposed by the court on an individual convicted of the same offence.

(5C) Neither subsection (5A) nor (5AA) prohibits a cash dealer from communicating or disclosing to any court any information, or matter, referred to in that subsection, but this subsection does not affect the operation of subsection (5D).

(5D) In any legal proceeding other than a prosecution for an offence against subsection 29(1) or 30(1):

(a) none of the following is admissible in evidence:
   (i) a report prepared (whether before or after the commencement of this subsection) under subsection (1) or (1A);
   (ii) a copy of such a report;
   (iii) a document purporting to set out information contained in such a report;
   (iv) a document given (whether before or after the commencement of this subsection) under subsection (4); and

(b) evidence is not admissible as to:
   (i) whether or not a report was prepared (whether before or after the commencement of this subsection) under subsection (1) or (1A); or
   (ii) whether or not a copy of a report prepared under that subsection (whether before or after the commencement of this subsection), or a document purporting to set out information contained in such a report, was given to, or received by, the AUSTRAC CEO (whether before or after the commencement of this subsection); or
   (iii) whether or not particular information was contained in a report prepared under that subsection (whether before or after the commencement of this subsection); or
   (iv) whether or not particular information was given under subsection (4) (whether before or after the commencement of this subsection).

(5E) In subsection (5D):

information includes the formation or existence of a suspicion referred to in subsection (1) or (1A).
(6) In this section:

financing of terrorism offence means an offence under:
(a) section 102.6 or Division 103 of the Criminal Code; or
(b) section 20 or 21 of the Charter of the United Nations Act 1945.

investigating officer means:
(a) a taxation officer; or
(b) an AFP member; or
(c) a customs officer (other than the Chief Executive Officer of Customs); or
(d) a staff member of ACLEI; or
(e) an examiner or member of the staff of the ACC.

relevant authority means:
(a) the Commissioner of the Australian Federal Police; or
(aa) the Integrity Commissioner; or
(b) the Chief Executive Officer of the ACC; or
(c) the Commissioner of Taxation; or
(d) the Chief Executive Officer of Customs.

reportable details, in relation to a transaction, means the details of the transaction that are referred to in Schedule 4.

**Administrative Decisions (Judicial Review) Act 1977**

Schedule 1 – Classes of decisions that are not decisions to which this Act applies

(dab) decisions of the AttorneyGeneral under section 104.2 of the Criminal Code;
(dac) decisions under Division 105 of the Criminal Code;