



Australian  
Human Rights  
Commission

# Review of Counter-Terrorism and National Security Legislation

**AUSTRALIAN HUMAN RIGHTS COMMISSION  
SUBMISSION TO THE INDEPENDENT NATIONAL  
SECURITY LEGISLATION MONITOR**

14 September 2012

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

Australian Human Rights Commission  
[www.humanrights.gov.au](http://www.humanrights.gov.au)

## Table of Contents

1	Introduction.....	3
2	Summary .....	3
3	Questioning warrants and questioning and detention warrants under Division 3 of Part III of the <i>Australian Security Intelligence Organisation Act 1979</i> (Cth)..	4
3.1	<i>Legislative framework</i> .....	4
3.2	<i>Risk of arbitrary detention</i> .....	6
3.3	<i>Inadequate protection against self-incrimination</i> .....	8
3.4	<i>Restrictions on access to legal advisers, and lack of effective review/remedy</i> .....	9
4	Control orders and preventative detention orders under the <i>Criminal Code Act 1995</i> (Cth) .....	11
4.1	<i>Legislative framework</i> .....	11
(a)	<i>Division 104: control orders</i> .....	11
(b)	<i>Division 105: preventative detention orders</i> .....	13
4.2	<i>Risk of arbitrary detention and interference with other rights</i> .....	14
4.3	<i>Lack of effective review/remedy</i> .....	15
(a)	<i>Review of PDOs</i> .....	16
(b)	<i>Review of control orders</i> .....	17

## 1 Introduction

1. The Australian Human Rights Commission makes this submission to the Independent National Security Legislation Monitor (INSLM) in his Inquiry into Australia's counter-terrorism and national security legislation.
2. Specifically, the Commission seeks to respond to the INSLM's request for a submission concerning the powers relating to questioning warrants and questioning and detention warrants under the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act), and those relating to control orders and preventative detention orders under the *Criminal Code Act 1995* (Cth). In doing so the Commission has had regard to the Issues for Consideration listed in Appendix 3 of the INSLM's annual report of 16 December 2011, and the implications of, and for, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

## 2 Summary

3. The Commission has previously considered the system of warrants provided for in Division 3 of Part III of the ASIO Act, and the control orders and preventative detention orders available under the *Criminal Code Act 1995* (Cth), and has raised a number of concerns about aspects of these provisions in terms of their compatibility with Australia's human rights obligations.<sup>1</sup>
4. In summary, the key concerns which the Commission wishes to emphasise to the INSLM, in light of the Issues for Consideration to which the Commission was referred, are the following. The Commission considers that Division 3 of Part III of the ASIO Act, which provides for the use of questioning and questioning and detention warrants:
  - raises specific and general concerns regarding arbitrary detention, which is proscribed by article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR)<sup>2</sup>
  - may not provide adequate protection against self-incrimination (as required by article 14(3) of the ICCPR), as Division 3 of Part III does not protect against 'derivative use' of material obtained through the warrant procedures
  - limits the legal advice or representation available to the subjects of the warrant procedures, which, in the Commission's view, may leave people without an opportunity for judicial review and thus an 'effective remedy' for violations of their human rights, contrary to articles 2(3) and 9(4) of the ICCPR.
5. The Commission considers that Divisions 104 and 105 of Part 5.3 of the *Criminal Code Act 1995* (Cth), which provide for the making of control orders and preventative detention orders respectively, also raise serious concerns, as:

- preventative detention orders (and control orders, depending on the prohibitions and restrictions attached to such an order) may allow for arbitrary detention of individuals, contrary to article 9(1) of the ICCPR
- the making of control orders may result in arbitrary interference with a number of other rights of those subjected to such orders, such as the right to privacy, and the rights to freedom of movement, expression, and association (articles 17, 12, 19 and 22 of the ICCPR respectively)
- the ability of persons the subject of control orders or preventative detention orders to challenge the legality of their treatment and secure an effective remedy for any violation of their rights is limited by requirements that certain applications be heard *ex parte*, and restrictions on the disclosure of information concerning their treatment. This raises issues under articles 9(4) and 2(3) of the ICCPR.

### **3 Questioning warrants and questioning and detention warrants under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979 (Cth)***

#### **3.1 Legislative framework**

6. Division 3 of Part III enables ASIO to seek from an ‘issuing authority’ two types of special warrants:
  - a warrant which authorises the questioning of a person (a ‘questioning warrant’)
  - a warrant which authorises detention and questioning of a person (a ‘detention warrant’).
7. To obtain either type of warrant the Director-General of ASIO must first seek the consent of the Attorney-General to apply for such a warrant. The Attorney-General may consent to the Director applying for a questioning warrant if she or he is satisfied (*inter alia*):
  - that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence
  - that relying on other methods of collecting that intelligence would be ineffective.<sup>3</sup>
8. If the Director seeks to obtain a detention warrant, the Attorney-General must also be satisfied before granting consent that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:
  - may alert a person involved in a terrorism offence that the offence is being investigated
  - may not appear before the prescribed authority, or

- may destroy, damage or alter a record or thing the person may be requested to produce in accordance with the warrant.<sup>4</sup>
9. Once the Attorney-General's approval has been obtained, the Director may apply to an 'issuing authority'. An issuing authority is either a federal magistrate or a judge (acting in their personal, rather than judicial, capacity).<sup>5</sup>
10. The only criteria which the issuing authority must be satisfied have been met before issuing either type of warrant is that the Director-General has followed the relevant procedural requirements in requesting the warrant, and that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.<sup>6</sup>
11. A person who is the subject of a detention warrant must be brought immediately before a 'prescribed authority' for questioning. Questioning under a questioning warrant must also take place before a prescribed authority. These prescribed authorities are former members of the judiciary who are appointed by the Attorney-General.<sup>7</sup>
12. Division 3 of Part III prescribes that a person may be detained for a maximum of seven days (168 hours),<sup>8</sup> and questioned for a maximum period of 24 hours.<sup>9</sup> However, the prescribed authority must authorise ongoing questioning every eight hours.<sup>10</sup> The total time for questioning increases to 48 hours if 'an interpreter is present at any time while a person is questioned under a warrant'.<sup>11</sup> In the case of a detention warrant, the prescribed authority must direct that the person be released from detention:
- at the end of the 24 or 48 hour maximum period, or
  - at such a time as the authority refuses permission to continue questioning or revokes an earlier granted permission.<sup>12</sup>
13. In the case of detention warrants, the person detained may not communicate with anyone while in custody or detention.<sup>13</sup> This prohibition is subject to certain exceptions,<sup>14</sup> including in relation to contact with lawyers.
14. Further secrecy is drawn over the process by s 34ZS of the ASIO Act, which provides that it is an offence, punishable by a maximum of five years' imprisonment, for a person to:
- disclose the existence of a warrant and any fact relating to the content of a warrant or to the questioning or detention of a person under a warrant while it is in force (up to 28 days)
  - disclose any ASIO operational information acquired as a direct or indirect result of the issue of a warrant while it is in force and during the period of two years after the expiry of the warrant, unless the disclosure is permitted under another provision.

### 3.2 *Risk of arbitrary detention*

15. A key concern of the Commission, which is pertinent to consideration of the questions raised by the INSLM in his list of Issues for Consideration, is the compatibility of the warrant powers in Division 3 of Part III with the prohibition on arbitrary detention contained in article 9(1) of the ICCPR. Article 9(1) provides that:

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.

16. It should be noted that both questioning warrants and detention warrants may raise issues under article 9(1), as the effect of a questioning warrant on a person, in terms of restrictions on their freedom of movement and ability to contact others, may be such as to qualify as detention for the purposes of the ICCPR. The Human Rights Committee has observed that ‘detention’ is not to be narrowly understood, and that article 9 applies to all forms of detention or deprivations of liberty, whether they are criminal, civil, immigration, health or vagrancy related.<sup>15</sup> The distinction between measures constituting ‘deprivation of’ as opposed to ‘restrictions upon’ liberty is one of degree or intensity, and not one of nature or substance. Nor does it depend in any way upon the labelling of something as ‘detention’. Rather, it will depend upon criteria such as the type, duration, effects and manner of implementation of the measure in question.<sup>16</sup> In the Commission’s view, many questioning warrants will involve detention for the purposes of article 9(1) by reason of the following matters:

- A person who is the subject of a questioning warrant will be required to attend a particular place (before the prescribed authority) or be guilty of an offence.<sup>17</sup>
- That person may be required to stay in that place for a period of up to 24 hours (or more if an interpreter is required or further warrants are issued). Again, failure to do so may constitute an offence. In addition, a person seeking to leave a place where they were being questioned might be the subject of a ‘detention direction’ made by the prescribed authority.<sup>18</sup>
- That person will be exposed to onerous restrictions on their ability to communicate with third parties about certain matters.
- That person will be subjected to intense scrutiny, including having their communications with their lawyer monitored.<sup>19</sup>

17. In terms of when detention under either type of warrant will be held to be ‘arbitrary’, the Human Rights Committee has interpreted the term to include concepts of ‘inappropriateness, injustice and lack of predictability’,<sup>20</sup> and has stressed that to be compatible with article 9(1) detention must meet the requirement of ‘proportionality’.<sup>21</sup> In Australia the Full Federal Court in the matter of *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* similarly concluded that ‘the text of Art 9... requires that arbitrariness is not to be equated with “against the law” but is to be interpreted more broadly,

and so as to include a right not to be detained in circumstances which, in the individual case, are “unproportional” or unjust’.<sup>22</sup>

18. Therefore in order for the detention of a person not to be considered arbitrary, his or her detention must not only be lawful, but also reasonable and necessary in all the circumstances.<sup>23</sup> A lack of proportionality between a decision to detain a person and the aims sought to be achieved by the State can result in such detention violating article 9(1).<sup>24</sup>
19. In this context it is important to recognise the category of persons who may be subjected to detention pursuant to a questioning or detention warrant. Persons need not be charged with, or even suspected of, committing or planning to commit a terrorist (or other criminal) offence in order to be detained pursuant to one of the warrants in Division 3 of Part III. The only requirement is that, in the view of the Attorney-General and the issuing authority, the person is someone who may be able to ‘substantially assist in the collection of intelligence that is important in relation to a terrorism offence’. This very low threshold for detention of persons under Division 3 of Part III necessarily increases the need for very strong reasons to justify such measures if they are to qualify as proportionate for the purposes of article 9(1).
20. In the view of the Commission, the need for proportionality in how the questioning and detention warrants in Division 3 of Part III are used is relevant to several of the Issues for Consideration listed by the INSLM in his annual report. Issues 7 and 14 to 17 all in some way relate to the questions of what should be the requirements before a questioning warrant or detention warrant can be issued, and who (that is whether the Attorney-General or the issuing authority) should be responsible for determining whether those requirements have been met.
21. The Commission submits that in order to avoid arbitrary detention of persons who have not been charged with any criminal offence, the provisions allowing for the issuance of a questioning or detention warrant should require an assessment by the issuing authority as to whether issuing the warrant is necessary and proportionate to the purpose of obtaining intelligence to avoid terrorist attacks, and/or that relying on other methods of collecting the intelligence would be ineffective. In relation to detention warrants, the issuing authority, in addition to the Attorney-General, should be required to be satisfied that there are reasonable grounds for believing that detention is required for one of the reasons set out in s 34F(4)(d) of the ASIO Act.
22. The issuing authority could also consider whether it would be more appropriate for the person the subject of an proposed questioning or detention warrant to be formally arrested (with the attendant procedural protections), thereby providing a check on the discretion of ASIO to choose not to proceed in this manner.
23. The Commission believes that requiring the issuing authority to consider whether the issuance of a questioning or detention warrant is in fact a necessary and/or proportionate measure to take in light of the available alternatives would strengthen the checks on the use of this extraordinary

power by ASIO, and would help to avoid detention of individuals which is arbitrary and therefore contrary to article 9(1) of the ICCPR.

24. Another aspect of the detention powers available under Division 3 of Part III which raises questions about proportionality (and which is the subject of Issues 8 and 9) is the length of time for which a person can be detained. The Human Rights Committee has stated that even if a decision to detain someone can be considered a proportional response in light of a particular aim, 'in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification'.<sup>25</sup>
25. As mentioned above, pursuant to a warrant issued under Division 3 of Part III, a person can be detained for up to seven days (168 hours), for up to 24 hours of questioning (or 48 hours if an interpreter is required at any point). This very long period of possible detention, combined with the very low threshold for detention, is of considerable concern to the Commission, as on its face it raises serious questions about proportionality.
26. Also of concern is the fact that the period of questioning (which is linked to the period of detention, because a person must be released from detention upon conclusion of the period allowed for questioning)<sup>26</sup> doubles if 'an interpreter is present **at any time** while a person is questioned under a warrant' (emphasis added).<sup>27</sup> This is irrespective of how long the interpreter is present, whether questioning has been conducted through them and whether their presence has facilitated or impeded the questioning process.
27. The Commission's view is that the provisions regarding extensions of time where interpreters are involved should be amended so as to require the prescribed authority to form a view as to the effect the interpreter has had on the conduct of the particular proceedings. The prescribed authority should have the discretion to allow questioning to continue for a period considered to be sufficient to ameliorate any delay (subject to upper limits on the period by which questioning can be extended).

### **3.3 *Inadequate protection against self-incrimination***

28. Under Division 3 of Part III of the ASIO Act, a person who is the subject of a questioning warrant or a detention warrant who either does not appear before the prescribed authority, or who fails to give any information or to produce any record or thing requested in the warrant, is subject to a penalty of five years' imprisonment.<sup>28</sup> The person is not entitled to refuse to give such information or produce such record on the ground that to do so would incriminate him or herself.<sup>29</sup>
29. Section 34L does provide for 'use immunity', in that information obtained under a questioning or detention warrant is not admissible as evidence against the person in other criminal proceedings.<sup>30</sup> This protects a person from the direct use of material gathered under a questioning or detention warrant. However, it does not protect against what is referred to as 'derivative use',



meaning the use of that material to uncover other evidence, the latter of which can be used against the person in future criminal proceedings.<sup>31</sup>

30. The omission of protection against derivative use potentially raises an issue under article 14(3) of the ICCPR, which provides that:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality...

(g) Not to be compelled to testify against himself or to confess guilt.

31. The Human Rights Committee in a General Comment relating to article 14 commented that the protection afforded by article 14 paragraph 3(g) should extend to prohibiting the admission of evidence provided by 'any...form of compulsion'.<sup>32</sup> This comment may be sufficiently wide to apply to derivative use of material provided under the ASIO Act. In the Commission's view, the protection conferred by section 34L(9) should be widened to exclude such use.

### **3.4 Restrictions on access to legal advisers, and lack of effective review/remedy**

32. The Commission has concerns about the restrictions the ASIO Act places on the ability of a person the subject of a warrant under Division 3 of Part III to challenge the legality of their treatment, and to contact a lawyer for this purpose. This concern corresponds with Issue 20 in the INSLM's annual report, and the question he raised in his letter to the Commission about the possibility of judicial review.
33. Section 34K(10) of the ASIO Act provides as a general rule that a person who has been taken into custody or detained under Division 3 is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention. This is subject to certain exceptions, including a right of access to the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman.
34. A person subjected to a warrant under Division 3 of Part III has no guaranteed right to access a legal adviser. Rather, his or her right to contact a legal adviser and to legal representation during questioning is regulated by both the terms of the warrant and the prescribed authority in the exercise of its discretion.
35. A detention warrant must permit the person to contact a single lawyer of choice at any time while they are detained, but contact with the lawyer is not permitted until the person is brought before the prescribed authority and ASIO has had an opportunity to oppose access to the particular lawyer of choice.<sup>33</sup>
36. No such provision is made in respect of questioning warrants. However, the prohibition on external communications does not apply to the subject of a questioning warrant, unless the prescribed authority orders the detention of that person under s 34K(1)(a). If such a direction is made, the prescribed authority may (but need not) make a direction allowing them to contact a lawyer.<sup>34</sup>

37. The prescribed authority may prevent the subject of a detention warrant from contacting a lawyer if satisfied, on the basis of circumstances relating to that lawyer, that:

- a person may be alerted to the fact a terrorism offence is being investigated
- a record or thing that the person may be requested in connection with the warrant to produce may be destroyed, damaged or altered.<sup>35</sup>

38. Further, the prescribed authority can tightly control the contact between a person being questioned and his or her legal adviser. It must provide a reasonable opportunity for the lawyer to advise the person detained during breaks in questioning,<sup>36</sup> but contact between the lawyer and the person detained must be made in a way that can be monitored by a person exercising authority under the warrant.<sup>37</sup> The lawyer may not interrupt the questioning of the person detained or address the prescribed authority before whom questioning is being conducted, except to request clarification of an ambiguous question.<sup>38</sup> Indeed, the Act specifically provides that a person may be questioned in the absence of their lawyer.<sup>39</sup> In addition, a lawyer may be removed from the location where questioning is taking place if the prescribed authority considers that he or she is 'unduly interrupting questioning'.<sup>40</sup> The person detained is then to be given the opportunity to contact a further lawyer of their choice.<sup>41</sup>

39. Protection of a person's right to have access to a legal adviser once subjected to a warrant under Division 3 of Part III is crucial, as it is a precondition to effective exercise of that person's right to challenge the legality of his or her detention. This latter right is enshrined in article 9(4) of the ICCPR, which provides that:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

40. The procedural right conferred by article 9(4) is a specific manifestation of the overarching right to an 'effective remedy' for violations of the ICCPR, which is recognised by article 2(3).<sup>42</sup> Given the risk of persons being arbitrarily detained under Division 3 of Part III, discussed above, the right to an effective remedy becomes paramount.

41. The ASIO Act does not purport to oust the original jurisdiction of the High Court or Federal Court, and the prescribed authority is required to draw to the attention of a person who is the subject of a warrant that they may seek a relevant remedy from a federal court.<sup>43</sup> However, such a process of review is unlikely to be a sufficient remedy, in terms of bringing the violation (that is the detention) to an end, given the time it would potentially take to approach a court for relevant relief.

42. Also, the prospects of a successful application to the Federal (or High) Court would be hampered by the restrictions which are, and can be, placed on a detained person's contact with a legal adviser.

43. Further, access by the legal adviser to relevant information as to the reasons or basis for the person's detention, which would be necessary in order to assess the legality of that detention, may be restricted by the provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).
44. There would therefore be significant practical obstacles to a person detained pursuant to a warrant under Division 3 of Part III obtaining an effective remedy (through judicial review) if that detention was in fact arbitrary, and thus in violation of article 9(1) of the ICCPR.
45. There are a number of other concerns which the Commission has in relation to the compatibility of the warrants regime in Division 3 of Part III of the ASIO Act with Australia's human rights obligations. For a full discussion of these concerns, please see the Commission's *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD: Review of Division 3 Part III of the ASIO Act 1979* (Cth), available at: [http://humanrights.gov.au/legal/submissions/asio\\_asis\\_dsd\\_review.html](http://humanrights.gov.au/legal/submissions/asio_asis_dsd_review.html).

## **4 Control orders and preventative detention orders under the Criminal Code Act 1995 (Cth)**

### **4.1 Legislative framework**

46. Under Divisions 104 and 105 of Part 5.3 of *Criminal Code Act 1995* (Cth), similarly to Division 3 of Part III of the ASIO Act, a person can be deprived of their liberty or have their movements restricted without that person having been convicted of or charged with a criminal offence. Rather, the focus of the measures is on preventing suspected future behaviour.

#### **(a) Division 104: control orders**

47. Division 104 of Part 5.3 provides for the making of control orders. A control order is an order issued by a court (either the Federal Court, Family Court or Federal Magistrates Court), at the request of a member of the Australian Federal Police (AFP), to allow obligations, prohibitions and restrictions to be imposed on a person, for the purpose of protecting the public from a terrorist act.<sup>44</sup>
48. These prohibitions or restrictions may prevent the person from:
- being at specified areas or places
  - leaving Australia
  - communicating or associating with specific individuals
  - accessing or using specified types of telecommunications, including the internet
  - possessing or using specified articles or substances
  - carrying out specified activities (including in respect to their work or occupation).<sup>45</sup>

49. Control order terms may also require the person to:

- remain at specific premises at particular times of the day
- wear a tracking device
- report to specified persons at specified times and places
- allow him or herself to be photographed and have fingerprint impressions taken
- participate in specified counselling or education (only if they agree to do so).<sup>46</sup>

50. A control order may only be sought with the prior permission of the Attorney-General,<sup>47</sup> unless the AFP officer makes an application for an 'urgent interim control order',<sup>48</sup> in which case the Attorney's consent must be obtained no later than four hours after the request for the urgent order is made.<sup>49</sup> However, no conditions are placed upon the giving of the Attorney's consent to any type of control order.

51. If the Attorney consents, the AFP officer may seek an 'interim control order' from the Federal Court, Family Court or Federal Magistrates Court. The court may make such an order if it is satisfied, on the balance of probabilities that:

- making the order would substantially assist in preventing a terrorist act; or
- the person has provided training to, or received training from, a listed terrorist organisation; and (in either case)
- 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.<sup>50</sup>

52. Interim control orders are to be issued *ex parte* in all cases (i.e. in the absence of the person against whom the order is sought). However, the interim control order must specify a day, at the latest 72 hours after it was made, on which the person who is the subject of the order can attend court to challenge the making of the order.<sup>51</sup> If the AFP wishes to confirm the control order, they must go back to court on that date and seek a confirmed order.

53. The person who is the subject of the interim control order must be given 48 hours' notice of the confirmation hearing, a copy of the interim control order (including a summary of the grounds on which it was made),<sup>52</sup> and the documents given to the Attorney-General in order to obtain his or her consent to seek an interim control order.<sup>53</sup>

54. However, the information provided to the person upon whom the interim control order has been imposed will not include any information which is considered to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*) or jeopardise police operations.<sup>54</sup>

55. The court will make a decision after hearing evidence from both parties. The court may declare an interim control order void, revoke it, or confirm it (including with variations). A confirmed control order can last up to 12 months, after which it can be renewed.<sup>55</sup>

(b) *Division 105: preventative detention orders*

56. Under Division 105 of Part 5.3, a preventative detention order (PDO) enables a person to be taken into custody and detained by the AFP, initially for a period of up to 24 hours.<sup>56</sup> Upon application to an 'issuing authority', this period can be extended, but the total period of detention cannot exceed 48 hours.<sup>57</sup>

57. There are two distinct bases for the making of a PDO.<sup>58</sup> The first relates to the prevention of a terrorist act. To utilise that head, the issuing authority must be satisfied that there are reasonable grounds to suspect that the subject:

- will engage in a terrorist act, or
- possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act, or
- has done, or will do, an act in preparation for, or planning, a terrorist act.<sup>59</sup>

58. The issuing authority must also be satisfied that making the order would substantially assist in preventing a terrorist act occurring, and that detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for this purpose.<sup>60</sup> The 'terrorist act' in question must be 'imminent', and in any event be expected to occur within 14 days.<sup>61</sup>

59. The second head for the making of a PDO relates to the protection of evidence. To utilise that head, the issuing authority must be satisfied that:

- a terrorist act has occurred within the last 28 days
- it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act, and
- detaining the subject for the period for which the person is to be detained under the order is reasonably necessary in order to achieve the above purpose.<sup>62</sup>

60. There are two stages of PDOs, each of which involve different 'issuing authorities':

- initial preventative detention orders which last 24 hours, and can be issued by senior members of the AFP;<sup>63</sup> and
- continued preventative detention orders and extensions of continued preventative detention orders, which extend the time in detention to a maximum of 48 hours,<sup>64</sup> and which can be issued by a judge, federal magistrate, tribunal member or retired judge (these persons are appointed by the Attorney-General and act in a personal capacity).<sup>65</sup>

61. In respect of both forms of PDOs, the individual has no right to appear personally or through legal representation so as to challenge the issuing of the order.
62. The person who is detained is required to be given certain information. That includes a copy of the initial PDO and a 'summary of the grounds' upon which it was made.<sup>66</sup> It is specifically provided that information is not to be included in that summary if it is 'likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth))'.<sup>67</sup>
63. If a PDO is made in relation to a person, the AFP must nominate a senior AFP member, not involved in the making of the application for the order, to oversee the exercise of power under, and the performance of obligations pursuant to the order.<sup>68</sup> The nominated officer must 'consider' representations made by the person who is being detained and/or his or her lawyer.<sup>69</sup>
64. A person detained pursuant to a PDO is entitled to contact a lawyer to arrange for the lawyer to act for them to seek a remedy relating to the PDO or their treatment whilst detained, but this contact is strictly regulated.<sup>70</sup>
65. Restrictions are also placed upon a detained person's capacity to contact other people. With limited exceptions for family members, lawyers, the Commonwealth Ombudsman and parents/guardians, a person is not entitled to contact another person and may be prevented from doing so.<sup>71</sup> Disclosure outside these exceptions is subject to criminal sanctions.<sup>72</sup>
66. Further, the AFP may seek a 'prohibited contact order' when applying for a PDO or in relation to a PDO which is already in force.<sup>73</sup> Such an order provides that the person detained under a preventative detention order is not to contact certain persons.<sup>74</sup> The AFP is not required to inform the detainee that a prohibited contact order has been made in relation to the person's detention, or the name of a person specified in the prohibited contact order.<sup>75</sup>

## **4.2 Risk of arbitrary detention and interference with other rights**

67. As with the questioning and detention warrants under the ASIO Act, a key concern of the Commission with regard to the PDOs available under Division 105 of Part 5.3 of the *Criminal Code Act 1995* (Cth) is that they allow for arbitrary detention, in violation of article 9(1) of the ICCPR. As discussed above, in order for detention not to be arbitrary it must fulfil the requirement of proportionality, in light of the aims sought to be achieved by such detention.
68. Before issuing a PDO the issuing authority must be satisfied that detaining the subject for the relevant period is 'reasonably necessary' for the purpose of preventing a terrorist attack or preserving evidence of such an attack. This scrutiny of the necessity of the order means that proportionality is being considered to some extent before such an order is made.
69. However, the Commission considers that a more stringent proportionality test would appropriately reflect the fact that PDOs are exceptional orders and should only be made in exceptional circumstances. It is also relevant to

observe that the other conditions for the making of PDOs may be relatively easily satisfied (particularly those which relate to an imminent terrorist threat, where the powers are only otherwise conditioned upon a ‘reasonable suspicion’ and satisfaction that the making of an order will ‘substantially assist’ in the prevention of a terrorist act).

70. In relation to control orders, it is evident from the types of prohibitions and restrictions which can be placed upon a person that these orders potentially infringe upon a number of human rights, including:

- the right to liberty (article 9(1) of the ICCPR)
- the right to freedom of movement (article 12 of the ICCPR)
- the right to privacy (article 17 of the ICCPR)
- the right to freedom of expression (article 19 of the ICCPR)
- the right to freedom of association (article 22 of the ICCPR)
- the right to work (article 7 of the *International Covenant on Economic, Social and Cultural Rights*<sup>76</sup>).

71. As noted above, the right to liberty is not absolute – a person may be deprived of that right subject to certain conditions, the most notable of which is that the deprivation meets the test of proportionality in all the circumstances. The same may generally be said of the other human rights potentially infringed by the restrictions available under control orders.

72. It is the case that before an issuing court can make an interim control order, it must be satisfied that every one of the obligations, prohibitions and restrictions to be imposed on the person is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. However, the Commission considers that, as with PDOs, given the extraordinary nature of a control order, a stricter test of proportionality would be appropriate.

73. The Commission suggests that, in relation to both PDOs and control orders, the issuing authority or issuing court should be required to be satisfied that detaining the person (in the case of PDOs) or imposing each of the obligations, prohibitions and restrictions (in the case of control orders) is the least restrictive way of achieving the purpose for which the order is sought.

### **4.3 Lack of effective review/remedy**

74. As with the provisions in Division 3 of Part III of the ASIO Act, the Commission has concerns about the restricted ability of persons the subject of control orders or PDOs to have the legality of their treatment effectively (and impartially) reviewed and remedied, as they are entitled to under articles 9(4) and 2(3) of the ICCPR.

(a) *Review of PDOs*

75. The Human Rights Committee has explicitly stated that article 9 of the ICCPR requires that adequate safeguards be put in place if any system of 'preventative' detention is used by a State party in relation to persons not charged with any criminal offence. In General Comment 8 the Committee commented:

[I]f so-called preventative detention is used, for reasons of public security, it ... must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4).<sup>77</sup>

76. Division 105 provides that the ongoing need for a PDO will potentially be reviewed on a number of occasions (that is, each time an extension is sought, when a continuing PDO is sought and in any application for revocation). However, the detained person (or their lawyer) has no right to appear before the issuing authority on those occasions; these applications are decided *ex parte*. They are able to make representations to the nominated AFP officer – but that person is under no obligation to draw those matters to the attention of the issuing authority. The nominated AFP officer must merely 'consider' any such representations.

77. Section 105.51 provides that generally a person may bring legal proceedings in a court in order to obtain a remedy in relation to a PDO or the treatment of a person in connection with that person's detention under a PDO.<sup>78</sup> However, applications for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) are excluded,<sup>79</sup> as is the jurisdiction of State and Territory courts.<sup>80</sup>

78. Further, while s 105.51(5) does allow for an application to the Administrative Appeals Tribunal for a review of the merits of the decision to make a PDO, it also provides that such an application cannot be made while the PDO is in force, which essentially confines the remedy which the AAT can award to compensation after the fact.

79. That leaves judicial review in the Federal Court under s 39B of the *Judiciary Act 1903* (Cth) or in the High Court under s 75(v) of the *Constitution*. However these processes do not allow for an investigation of the facts or of the reasonableness and proportionality of the detention.

80. Consequently, it is questionable whether s 105.51 provides the right to review required by article 9(4) of the ICCPR.

81. Even if a person the subject of a PDO can get an application for review of the order before a court, there would be practical obstacles in terms of the restrictions on the information which would be made available to the applicant about his or her detention.

82. As noted above, Division 105 only requires that the detained person be given a copy of the initial PDO, the continuing PDO and any extensions and a 'summary' of the grounds for the making of the initial PDO. No content is



prescribed for the summary. This means that the material could be entirely general in nature.

83. The summary also will not include any information which is 'likely to prejudice national security' within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). As the Commission has noted in earlier hearings before the Committee,<sup>81</sup> 'national security' has a very broad definition under that Act.
84. A detained person may be able to obtain access to a wider range of documentary information through the court's compulsory processes after commencing a judicial review application in a federal court. However, there are a number of difficulties with this. First, the court would only compel production of documents relevant to a matter in issue. As noted above, judicial review is a narrow, technical process and this will limit the scope of any documents required to be produced. In addition, the Attorney could potentially invoke the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) and seek to have the court make non-disclosure orders and orders allowing the use of redacted evidence.<sup>82</sup>
85. Accordingly, the Commission has concerns as to whether the provisions of Division 105 are compatible with articles 9(4) and 2(3) of the ICCPR, in that they do not appear to allow for an effective review and/or remedy in the event that a person is detained pursuant to a PDO in violation of article 9(1).

(b) *Review of control orders*

86. As noted above, both interim control orders and urgent interim control orders may be made *ex parte*. The person the subject of those orders has no right to appear before the court. Nor does Division 104 impose any requirement upon the AFP or the court to consider whether the circumstances of the case are such that the person may be given such an opportunity without endangering national security.
87. Division 104 does provide for an *inter partes* hearing after the interim control order has been served. It specifically states that the subject of the control order and their legal representative may make submissions and adduce evidence at that hearing.<sup>83</sup> After considering the material before it, the court is empowered to revoke the order, or declare it void.
88. The Division also allows the subject of a control order to bring an application for revocation or variation of the order, provided they have given written notice of the application and the grounds upon which revocation is sought to the Commissioner of the AFP.<sup>84</sup>
89. However, as with the regime provided for PDOs under Division 105, a difficulty with the review of control orders under Division 104 is that of access to information. Division 104 adopts a similar approach to that discussed above in relation to PDOs under Division 105 – that is, a person must be served with a copy of the control order, including a 'summary' of the grounds upon which it was made, as well as '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'.<sup>85</sup> However, again, the AFP need not include any information considered likely to prejudice national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)*.<sup>86</sup>

90. A number of consequences follow from this. Firstly, a person subject to a control order may find it difficult or impossible to comply with the requirement that a revocation or variation application be preceded by written notice to the AFP Commissioner of the grounds upon which revocation or variation is sought.
91. Secondly, the issuing court would presumably be able to rely upon the usual range of compulsory powers to require the AFP to produce relevant documentary material at a confirmation, revocation or variation hearing. However, this will inevitably result in delays, during which time a person may be effectively subjected to a form of detention (if the order includes a requirement that the person remain at specified premises between specified times each day, or on specified days). The current approach in Division 104 therefore increases the likelihood that a person may be subject to arbitrary detention or violation of one of the other human rights referred to above for a longer period of time.
92. Even if a court does compel production of relevant material, the Attorney-General could invoke the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)*. As noted above, the use of that procedure may result in information being withheld (through orders for redaction or non-disclosure). It will also delay any determination as to whether the control order should be revoked or varied. Again, this raises the possibility of delay in correcting mistaken exercises of power and thus bringing an end to the violations of the human rights of people who should not be subjected to control orders.
93. The Commission therefore has strong concerns about the lack of an effective review mechanism for control orders, which could provide a remedy for any potential violations of the wide range of rights which could be impacted by such an order, depending on the particular restrictions and prohibitions which are attached to it.
94. There are a number of other concerns which the Commission has in relation to the compatibility of the control orders and PDOs in Part 5.3 of the *Criminal Code Act 1995 (Cth)* with Australia's international human rights obligations. For a full discussion of these concerns, please see the Commission's *Submission to the Senate Legal and Constitutional Legislation Committee inquiry into the Anti-Terrorism Bill (No 2) 2005*, dated 11 November 2005, available at: [http://humanrights.gov.au/legal/submissions/terrorism\\_sub\\_12-11-2005.html](http://humanrights.gov.au/legal/submissions/terrorism_sub_12-11-2005.html).

---

<sup>1</sup> See the following submission made by the Commission, all of which are available at [http://humanrights.gov.au/human\\_rights/counter\\_terrorism/index.html](http://humanrights.gov.au/human_rights/counter_terrorism/index.html): *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD (May 2002)*; *Submission to the Parliamentary*

*Joint Committee on ASIO, ASIS and DSD: Review of Division 3 Part III of the ASIO Act 1979 (Cth), Submission to the Senate Legal and Constitutional Legislation Committee, Inquiry into the Anti-Terrorism Bill (No 2) 2005* (November 2005). See also the Background Paper prepared by the Commission on human rights concerns raised by Australia's counter-terrorism laws, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008), available at [http://humanrights.gov.au/legal/publications/counter\\_terrorism\\_laws.html](http://humanrights.gov.au/legal/publications/counter_terrorism_laws.html).

<sup>2</sup> Opened for signature 16 December 1966, 999 United Nations Treaty Series 171; entered into force 23 March 1976 except article 41 which came into force 28 March 1979; ratified by Australia 13 August 1980 except article 41 which was ratified by Australia 28 January 1993.

<sup>3</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34D(4).

<sup>4</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34F(4)

<sup>5</sup> See *Grollo v Palmer* (1995) 184 CLR 348.

<sup>6</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* ss 34E(1) and 34G(1).

<sup>7</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34B.

<sup>8</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34S.

<sup>9</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34R(6).

<sup>10</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34R.

<sup>11</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34R(8) to (12).

<sup>12</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34R(7).

<sup>13</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34K(10).

<sup>14</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34K(11).

<sup>15</sup> United Nations Human Rights Committee, *General Comment No 8: Right to liberty and security of persons (Art. 9)* (1982), [1].

<sup>16</sup> See, in the context of the *European Convention on Human Rights*, *Amuur v France* (1992) 22 EHRR 533, [42].

<sup>17</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34L(1).

<sup>18</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34K(1) and (4).

<sup>19</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34ZQ(2).

<sup>20</sup> United Nations Human Rights Committee, *Van Alphen v Netherlands*, *Communication No.* 305/1988, views adopted 23 July 1990 [5.8].

<sup>21</sup> See e.g. United Nations Human Rights Committee, *A v Australia*, *Communication No.* 560/1993, views adopted 3 April 1997, [9.2]. See also Manfred Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary* NP Engel (1993) p 172.

<sup>22</sup> (2003) 126 FCR 54 at [152].

<sup>23</sup> United Nations Human Rights Committee, *Van Alphen v Netherlands*, *Communication No.* 305/1988, views adopted 23 July 1990, [5.8].

<sup>24</sup> United Nations Human Rights Committee, *A v Australia*, *Communication No.* 560/1993, views adopted 3 April 1997, [9.2].

<sup>25</sup> United Nations Human Rights Committee, *C v Australia*, *Communication No.* 900/1999, views adopted 28 October 2002, [8.2].

<sup>26</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34R(7).

<sup>27</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34R(8).

<sup>28</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34L(1),(2) and (6).

<sup>29</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s34L(8).

<sup>30</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s34L(9).

<sup>31</sup> See Senate Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*, December 2002, at 61-64.

<sup>32</sup> United Nations Human Rights Committee, *General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)* (1984), [14].

<sup>33</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 35F(5)

<sup>34</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34K(1)(d).

<sup>35</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34ZO.

<sup>36</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34ZQ(5).

<sup>37</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34ZQ(2).

<sup>38</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34ZQ(6).

<sup>39</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34ZP.

<sup>40</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34ZQ(9).

- 
- <sup>41</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZQ(10).
- <sup>42</sup> See e.g. United Nations Human Rights Committee, *Massiotti and Baritussio v Uruguay*, Communication No 25/1978, views adopted 26 July 1982, [13].
- <sup>43</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34J(1)(f).
- <sup>44</sup> *Criminal Code Act 1995* (Cth) s 104.1.
- <sup>45</sup> See *Criminal Code Act 1995* (Cth) ss 104.5(3) and 104.16(1)(c).
- <sup>46</sup> *Criminal Code Act 1995* (Cth) ss 104.5(3) and 104.16(1)(c).
- <sup>47</sup> *Criminal Code Act 1995* (Cth) s 104.2.
- <sup>48</sup> *Criminal Code Act 1995* (Cth) s 104.6(2).
- <sup>49</sup> *Criminal Code Act 1995* (Cth) s 104.10.
- <sup>50</sup> *Criminal Code Act 1995* (Cth) s104.4(i)(c) and(d).
- <sup>51</sup> *Criminal Code Act 1995* (Cth) s 104.5(1)(e) and (1A).
- <sup>52</sup> *Criminal Code Act 1995* (Cth) s 104.5(1)(h).
- <sup>53</sup> *Criminal Code Act 1995* (Cth) ss 104.12 and 104.12A
- <sup>54</sup> *Criminal Code Act 1995* (Cth) s 104.12A(3).
- <sup>55</sup> *Criminal Code Act 1995* (Cth) s 104.16.
- <sup>56</sup> *Criminal Code Act 1995* (Cth) s 105.8
- <sup>57</sup> *Criminal Code Act 1995* (Cth) s 105.12.
- <sup>58</sup> *Criminal Code Act 1995* (Cth) s 105.1.
- <sup>59</sup> *Criminal Code Act 1995* (Cth) s 105.4(4)(a).
- <sup>60</sup> *Criminal Code Act 1995* (Cth) s 105.4(4)(b) and (c).
- <sup>61</sup> *Criminal Code Act 1995* (Cth) s 105.4(5).
- <sup>62</sup> *Criminal Code Act 1995* (Cth) s 105.5(6).
- <sup>63</sup> *Criminal Code Act 1995* (Cth) s 105.5(8).
- <sup>64</sup> *Criminal Code Act 1995* (Cth) s 105.14(6).
- <sup>65</sup> *Criminal Code Act 1995* (Cth) ss 105.2 and 105.18(2).
- <sup>66</sup> *Criminal Code Act 1995* (Cth) ss 105.8(6)(e), 105.12(6)(d) and 105.32(1) and (4).
- <sup>67</sup> *Criminal Code Act 1995* (Cth) s 105.8(6A)
- <sup>68</sup> *Criminal Code Act 1995* (Cth) s 105.19(5) and (6).
- <sup>69</sup> *Criminal Code Act 1995* (Cth) s 105.19(7)(c) and (8).
- <sup>70</sup> *Criminal Code Act 1995* (Cth) s 105.37.
- <sup>71</sup> *Criminal Code Act 1995* (Cth) s 105.34.
- <sup>72</sup> *Criminal Code Act 1995* (Cth) s 105.41(1).
- <sup>73</sup> *Criminal Code Act 1995* (Cth) s 105.15.
- <sup>74</sup> *Criminal Code Act 1995* (Cth) s 105.15(4).
- <sup>75</sup> *Criminal Code Act 1995* (Cth) s 105.28(3).
- <sup>76</sup> Opened for signature, 16 December 1966, 993 United Nations Treaty Series 3; entered into force 3 January 1976; ratified by Australia 10 December 1975.
- <sup>77</sup> United Nations Human Rights Committee, *General Comment No 8: Right to liberty and security of persons* (Art. 9) (1982) [4].
- <sup>78</sup> *Criminal Code Act 1995* (Cth) s 105.51(1).
- <sup>79</sup> *Criminal Code Act 1995* (Cth) s 105.51(4) and *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1 (dac).
- <sup>80</sup> *Criminal Code Act 1995* (Cth) s 105.51(2).
- <sup>81</sup> *Official Committee Hansard*, Senate Legal and Constitutional Committee, Parliament of Australia, Canberra, 13 April 2005, 37 (Craig Lenahan).
- <sup>82</sup> See Part 3, Divisions 2 and 3 of the Act.
- <sup>83</sup> *Criminal Code Act 1995* (Cth) s 104.14(1).
- <sup>84</sup> *Criminal Code Act 1995* (Cth) s 104.18.
- <sup>85</sup> *Criminal Code Act 1995* (Cth) 104.12A(2).
- <sup>86</sup> *Criminal Code Act 1995* (Cth) 104.12A(3).