The Parliament of the Commonwealth of Australia

Advisory report on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014

Parliamentary Joint Committee on Intelligence and Security

November 2014
Canberra

ISBN 978-1-74366-247-2 (Printed version)

ISBN 978-1-74366-248-9 (HTML version)

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Membership of the Committee

Chair	Mr Dan Tehan MP	
Deputy Chair	Hon Anthony Byrne MP	
Members	Mr Andrew Nikolic AM, CSC, MP	Senator David Bushby
	Hon Tanya Plibersek MP	Senator the Hon Stephen Conroy
	Hon Philip Ruddock MP	Senator the Hon John Faulkner
	Hon Bruce Scott MP	Senator David Fawcett
		Senator the Hon Penny Wong

Terms of reference

On 29 October 2014, the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 was referred to the Committee by the Attorney-General.

List of abbreviations

ADF	Australian Defence Force
AFP	Australian Federal Police
AGD	Attorney-General's Department
AGO	Australian Geospatial-Intelligence Organisation
ASD	Australian Signals Directorate
ASIO	Australian Security Intelligence Organisation
ASIO Act	*Australian Security Intelligence Organisation Act 1979*
ASIS	Australian Secret Intelligence Service
COAG	Council of Australian Governments
Criminal Code	*Criminal Code Act 1995*
Foreign Fighters Bill	Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014
IGIS	Inspector-General of Intelligence and Security
INSLM	Independent National Security Legislation Monitor
IS	Islamic State
ISA/ IS Act	*Intelligence Services Act 2001*

List of recommendations

The Committee's recommendations appear in the order in which the corresponding measures appear in the report. They do not reflect the priority that the Committee places on each issue.

2 Schedule 1 – Proposed amendments to the *Criminal Code Act 1995*

Recommendation 1

The Committee recommends that the Government finalise the appointment of the Independent National Security Legislation Monitor (INSLM) as a matter of absolute urgency.

Further, the Committee recommends that, in light of the proposed expansion of the control order regime, the Government task the newly appointed INSLM to consider whether the additional safeguards recommended in the 2013 Council of Australian Governments Review of Counter-Terrorism Legislation should be introduced. Particular consideration should be given to the advisability of introducing a system of 'Special Advocates' into the regime.

Recommendation 2

The Committee recommends that, to the extent possible, the terms 'supports' and 'facilitates' in the proposed amendments to the control order regime be based on language in the existing Criminal Code and that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 and its Explanatory Memorandum be amended to reflect this.

Recommendation 3

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to require that, when seeking the Attorney-General's consent to request an interim control order, the Australian Federal Police must provide the Attorney-General with a

statement of facts relating to why the order should be made, and any known facts as to why it should not be made.

Recommendation 4

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to require that the Attorney-General's consent to an urgent interim control order be obtained within eight hours of a request being made by a senior member of the Australian Federal Police.

Recommendation 5

The Committee recommends that proposed section 104.4 in the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to ensure that an issuing court retains the authority to examine the individual obligations, prohibitions and restrictions in a draft control order to determine whether each condition is reasonably necessary, and reasonably appropriate and adapted.

Recommendation 6

The Committee recommends that proposed paragraphs 104.3(d) and 104.23(2)(b) in the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to retain the current requirement that the Australian Federal Police explain why each of the obligations, prohibitions and restrictions proposed in a draft control order should, or should not, be imposed on the person.

3 Schedule 2 – Proposed amendments to the *Intelligence Services Act 2001*

Recommendation 7

The Committee recommends that the Explanatory Memorandum to the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to provide further information about how a class of Australian persons will be defined.

The Committee further recommends that the Explanatory Memorandum be amended to make it clearer that any Australian person included in a specified class of Australian persons agreed to by the Attorney-General, must be involved in an activity or activities that pose a threat to security as defined by the *Australian Security Intelligence Organisation Act 1979*.

Recommendation 8

The Committee recommends that, subject to passage of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, the Inspector-General of Intelligence and Security provide close oversight of:

- all ministerial authorisations given orally under proposed subsection 9A(2) of the *Intelligence Services Act 2001*, and
- all oral agreements provided by the Attorney-General under the proposed amendments to paragraph 9(1A)(b) of the *Intelligence Services Act 2001*.

Recommendation 9

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to require an agency head to notify the relevant responsible Minister of an authorisation given by the agency head under proposed section 9B of the *Intelligence Services Act 2001* within eight hours.

Copies of the authorisation and other documents should then be provided to the Minister and the Inspector-General of Intelligence and Security as outlined in proposed subsections 9B(5) and 9B(6) of the *Intelligence Services Act 2001*.

Recommendation 10

The Committee recommends that, subject to passage of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, the Inspector-General of Intelligence and Security be required to oversight within 30 days all emergency authorisations given by agency heads under proposed section 9B of the *Intelligence Services Act 2001.*

Recommendation 11

The Committee recommends that the Inspector-General of Intelligence and Security be required to notify the Parliamentary Joint Committee on Intelligence and Security within 30 days of all emergency authorisations issued under proposed section 9B and inform the Committee whether the *Intelligence Services Act 2001* was fully complied with in the issuing of the authorisation.

Recommendation 12

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to require an agency head to notify the Attorney-General within eight hours of an emergency authorisation given:

- with the agreement of the Director-General of Security, or
- without the agreement of either the Attorney-General or the Director-General of Security.

Written advice should then be provided to the Attorney-General as soon as practicable and within 48 hours as outlined in proposed subsection 9C(5) of the *Intelligence Services Act 2001*.

Recommendation 13

The Committee recommends that, subject to passage of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, the Inspector-General of Intelligence and Security be required to oversight within 30 days, all instances in which agreement to an emergency authorisation from the Attorney-General was required and not obtainable, and instead:

- authorisation was given with the agreement of the Director-General of Security, or
- authorisation was given without the agreement of either the Attorney-General or the Director-General of Security.

Recommendation 14

The Committee recommends that the Inspector-General of Intelligence and Security be required to notify the Parliamentary Joint Committee on Intelligence and Security within 30 days of all instances in which agreement to an emergency authorisation from the Attorney-General was required and not obtainable, and instead:

- authorisation was given with the agreement of the Director-General of Security, or
- authorisation was given without the agreement of either the Attorney-General or the Director-General of Security

and inform the Committee whether the *Intelligence Services Act 2001* was fully complied with in the issuing of the authorisation.

Recommendation 15

The Committee recommends that the *Intelligence Services Act 2001* be amended to clarify that 'responsible minister' refers only to the Prime Minister, Defence Minister, Foreign Minister, and Attorney-General, or those acting in those positions.

Recommendation 16

The Committee commends its recommendations to the Parliament and recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be passed.

1

Introduction

The Bill and its referral

1.1 On 29 October 2014, the Attorney-General, Senator the Hon George Brandis QC, introduced the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (the Bill) into the Senate.

1.2 The Bill contains a series of amendments to the *Criminal Code Act 1995* (the Criminal Code) and *Intelligence Services Act 2001* (the IS Act). In his second reading speech, the Attorney-General stated that the proposed amendments would address the following three key areas:

- Australian Secret Intelligence Service support and cooperation with the Australian Defence Force on military operations,
- arrangements for the provision of emergency Ministerial authorisations to IS Act agencies to undertake activities in the performance of their statutory functions, and
- changes to the control order regime to allow the Australian Federal Police to seek control orders in relation to a broader range of individuals of security concern and to streamline the application process.[1]

1.3 The Attorney-General indicated that the measures in the Bill were 'included as a result of instances of operational need identified by relevant agencies subsequent to the introduction of the previous two tranches of legislation'.[2]

1 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 29 October 2014, p. 62.

2 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 29 October 2014, p. 62.

1.4 The Attorney-General also noted that the Bill would implement a recommendation from the Committee's recent inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Foreign Fighters Bill).[3]

1.5 On the same day as the Bill was introduced, the Attorney-General wrote to the Committee to refer the provisions of the Bill for inquiry and to request it to report by 20 November 2014. He further requested that the Committee should, as far as possible, conduct its inquiry in public.

Inquiry objectives and scope

1.6 Some of the amendments proposed in the Bill were flagged to the Committee during its inquiry into the Foreign Fighters Bill, including the proposal for 'further enhancing' the control order regime. In its report on that Bill, the Committee recommended that the amendments should be referred to the Committee with appropriate time for inquiry and review.[4]

1.7 As part of its inquiry, the Committee examined whether the Bill incorporates adequate safeguards and accountability mechanisms to ensure the proper application of the laws into the future.

Conduct of the inquiry

1.8 The inquiry was referred to the Committee by the Attorney-General on 29 October 2014. The Chair of the Committee, Mr Dan Tehan MP, announced the inquiry by media release on 30 October 2014 and invited submissions from interested members of the public. Submissions were requested by 10 November 2014.

1.9 The Committee received 17 submissions, three supplementary submissions and one exhibit from sources including government agencies, legal, community and civil liberties groups and members of the public. A list of submissions and exhibits received by the Committee is at Appendix A.

1.10 The Committee held one public hearing in Canberra on 13 November 2014. A list of witnesses who appeared before the

3 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 29 October 2014, p. 62.

4 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, pp. 60–61.

Committee is included at Appendix B. The Committee also received two private briefings from relevant agencies.

1.11 The intensive nature of the inquiry and the short timeframes placed significant demands on the Committee. While the Committee recognises and understands that this resulted from exceptional circumstances, it would have been preferable if more time had been available for the inquiry.

1.12 Copies of submissions received and transcripts of public hearings can be accessed on the Committee website at www.aph.gov.au/pjcis. Links to the Bill and the Explanatory Memorandum are also available on the Committee website.

Report structure

1.13 This report consists of three chapters:

- This chapter sets out the context, scope and conduct of the inquiry,
- Chapter 2 contains a discussion of the main issues raised in evidence regarding Schedule 1 of the Bill, and the Committee's comments and recommendations regarding those issues, and
- Chapter 3 contains a discussion of the main issues raised in evidence concerning Schedule 2 to the Bill, and the Committee's comments and recommendations regarding those issues.

2

Schedule 1 – Proposed amendments to the *Criminal Code Act 1995*

Summary of proposed amendments

2.1 Schedule 1 to the Bill contains:

- implementation of Recommendation 8 of the Committee's previous inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Foreign Fighters Bill), and
- proposed amendments to the control order regime in Division 104 of the *Criminal Code Act 1995* (the Criminal Code).

Implementation of previous recommendation

2.2 The Foreign Fighters Bill, which received royal assent on 3 November 2014, included an amendment to the Criminal Code to provide that a regulation specifying an organisation to be a 'terrorist organisation' could be updated to include another name the organisation is known by, or to remove a name that the organisation is no longer known by.[1]

2.3 In its report on the Foreign Fighters Bill, the Committee recommended that 'the Attorney-General notify the Committee of any proposed Regulation to alter the listing of a terrorist organisation by adding or removing a name or alias', and that the Committee 'have the power to

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1 Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Foreign Fighters Bill), Schedule 1, item 67.

determine if it wishes to review any proposed changes to listings'.[2] The Government indicated its support for this recommendation in a media release on 22 October 2014.[3]

2.4 In referring the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (the Bill) to the Committee, the Attorney-General advised that, while the Government had agreed to the recommendation, it had required agreement from the states and territories before it could be implemented.[4]

2.5 The Bill proposes to implement the Committee's recommendation through an amendment to section 102.1A of the Criminal Code. The amendment would extend the Committee's existing power to review and report on listings of terrorist organisations to include the addition of aliases or removal of former names.[5]

Amendments to the control order regime

2.6 Division 104 of the Criminal Code sets out a control order regime which allows 'obligations, prohibitions and restrictions' (conditions) to be imposed on a person 'for the purpose of protecting the public from a terrorist act'. Subject to the consent of the Attorney-General, an interim control order is applied for by a senior member of the Australian Federal Police (AFP) to an issuing court, which makes the order if it is satisfied 'on the balance of probabilities' that the conditions in the order are 'reasonably necessary, and reasonable appropriate and adapted'. An interim control order is subject to confirmation by the court as soon as practicable, but at least 72 hours after the interim order is made. A confirmed control order can last up to 12 months, and successive orders may be issued.[6]

2.7 The terms of a control order may, for example, prohibit a person from being at a specified place, leaving Australia, or communicating with specified individuals; or require the person to remain at specified places at certain times of day, wear a tracking device, or report to authorities at

2 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, Recommendation 8, p. 50.

3 Attorney-General, 'Government response to committee report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014', *Media Release*, 22 October 2014.

4 Division 2 of the *Inter-Governmental Agreement on Counter-Terrorism Laws 2004* requires the Commonwealth to consult with and obtain the majority support of the states and territories before introducing any legislation to amend Part 5.3 of the *Criminal Code Act 1995*.

5 Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (CTLA Bill), Schedule 1, item 1.

6 *Criminal Code Act 1995*, Division 104.

specified times and places. Contravening the conditions of a control order is an offence carrying a maximum penalty of imprisonment for five years.[7]

2.8 The Foreign Fighters Bill introduced a range of amendments to the control order regime. These amendments included changing the threshold for the AFP to make an application for a control order, amending the criteria for applying for and issuing a control order, and extending the duration of the sunset clause applying to the regime. The Bill also implemented two recommendations from the 2013 Council of Australian Governments (COAG) Review of Counter-Terrorism Legislation.[8]

2.9 During its inquiry into the Foreign Fighters Bill, the AFP informed the Committee that further urgent changes to the control order regime would be necessary 'in light of recent operational experience'. The AFP's submission indicated that the changes being considered included streamlining the application process for control orders 'in a way that does not detract from any important accountability mechanisms or safeguards' and expanding the preventative purposes for which a control order can be applied.[9]

2.10 In its report on the Foreign Fighters Bill, the Committee recommended that, should further changes to the control order regime be proposed, the amendments be referred to the Committee 'with appropriate time for inquiry and review'.[10]

2.11 The Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 proposes to amend the control order regime by

- expanding the objects of the control order regime, and subsequently the grounds upon which a control order can be requested and issued, to include:
  - ⇒ 'preventing the provision of support for or the facilitation of a terrorist act', and
  - ⇒ 'preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country',
- replacing the current requirement for the AFP to provide all documents that will subsequently be provided to the issuing court with a

7 *Criminal Code Act 1995*, sections 104.5 and 104.27.

8 Foreign Fighters Bill, Schedule 1, items 70–87.

9 Australian Federal Police, *Submission 36* to the Committee's inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, pp. 5–6.

10 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. 61.

requirement that the AFP provide the Attorney-General with a draft of the interim control order, information about the person's age and a summary of the grounds for the request when seeking consent to apply for a control order,

- replacing the existing requirement for the AFP member to provide an explanation as to why 'each' obligation, prohibition and restriction should be imposed with a requirement to provide an explanation as to why 'the control order' should be made or varied,
- replacing the existing requirement for the issuing court to be satisfied on the balance of probabilities that 'each' obligation, prohibition and restriction 'is reasonably necessary, and reasonably appropriate and adapted' with a requirement to be satisfied on the balance of probabilities that 'the control order' to be made or varied 'is reasonably necessary, and reasonably appropriate and adapted',
- authorising an issuing court to make, confirm or vary a control order by removing one or more of the requested obligations, prohibitions or restrictions where doing so would allow the court to be satisfied that the order 'is reasonably necessary, and reasonably appropriate and adapted' to achieving one of the regime's objects,
- providing that an issuing court must take into account that the parties may need to prepare when setting a day for the confirmation hearing,
- extending the time before the material provided to an issuing court must subsequently be provided to the Attorney-General from 4 hours to 12 hours where a request for an urgent interim control order has been made to an issuing court, and
- ensuring the AFP Commissioner can apply for a variation of a control order in 'appropriate circumstances'.[11]

2.12 The Explanatory Memorandum to the Bill outlined that the proposed amendments were drafted in response to issues identified during recent counter-terrorism operations:

> Australia faces a serious and ongoing terrorist threat which has recently been raised by the return of Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas ('foreign fighters'). This heightened threat environment has seen an increased operational tempo from Australia's law enforcement agencies to protect the public from

11 CTLA Bill, *Explanatory Memorandum*, pp. 4–5, 7.

> terrorist acts, including some widely noted counter-terrorism operations conducted by Joint Counter-Terrorism Teams comprising the Australian Federal Police and state police.
>
> The amendments in this Bill to further strengthen and enhance the operation of the control order regime in Part 5.3 of the Criminal Code have been developed in response to operational issues identified following these counter-terrorism raids.[12]

Matters raised in evidence

2.13 No significant concerns were raised by inquiry participants in regard to the proposed implementation of the Committee's previous recommendation on oversight of changes to names and aliases of terrorist organisations, with some participants registering their support for the proposed amendment.[13]

2.14 Several submitters to the inquiry noted in-principle objections to the existence of control orders, both in their current form and with the proposed amendments.[14] Amnesty International, for example, re-iterated comments it made in the Foreign Fighters inquiry that

> … control orders are in breach of a person's right to a fair trial as the imposition of a control order is tantamount to 'trying' and 'sentencing' a person without the fair trial guarantees required in criminal cases. In addition, Amnesty International is concerned control orders violate the right to liberty and security of the person, the right to freedom from arbitrary detention and the right to freedom of movement, the right to freedom of religion, the rights to freedom of expression and association, and the right to be presumed innocent. Although international human rights law allows for some limitations to these rights under prescribed certain circumstances including national security, Amnesty International does not believe that the use of control orders to restrict the rights

12 CTLA Bill, *Explanatory Memorandum*, p. 1.

13 Dr A J Wood of the Australian National University, however, suggested that the word 'may' in the clause should be replaced with the word 'must', thereby requiring the Committee to review each change to a terrorist organisation's name or alias. See *Submission 11*, p. [3]. See also Law Council of Australia, *Submission 16*, p. 6.

14 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 2; Amnesty International, *Submission 2*, p. [1]; Australian Lawyers for Human Rights, *Submission 6*, p. 4; NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7*, pp. 3–4; Senator David Leyonhjelm, *Submission 15*, p. [2]; Law Council of Australia, *Submission 16*, p. 9.

> and remove the rights of individuals who have not been convicted of any crime can be adequately justified.[15]

2.15 Specific matters raised by inquiry participants with regard to the proposed amendments to the control order regime are discussed below.

Broadening the application of the control order regime

2.16 In its submission to the inquiry, the AFP explained that it had identified 'serious risks' in its assessment of the current operating environment that control orders would 'greatly assist in mitigating'. It added that the existing control order regime, including the amendments made through the Foreign Fighters Bill, would 'not be available to manage those who seek to facilitate or support terrorist acts or persons travelling overseas to participate in hostile activities'. The submission explained the AFP's rationale for seeking an expanded control order regime:

> The AFP considers that the overriding purpose of the control order regime should be to prevent terrorism. Preventing or disrupting persons who provide critical support to those activities is equally important and effective as preventing or disrupting those directly involved in those acts of terrorism or hostility. This means targeting both persons directly committing acts of terrorism or hostile activities overseas (which the regime currently addresses), and persons who provide critical support to those activities (without whom the act or hostility could not occur).[16]

2.17 At the public hearing, the AFP said that its operating environment had 'totally changed' since the declaration of a caliphate in Syria and Iraq and the continuation of people travelling to that region.[17] The AFP also expanded on its rationale for the proposed broadening of the grounds for control orders:

> We are still seeing people travel to the conflict zone. We are interdicting where possible but some are slipping through the net … And now, more than ever, our ability to not only interdict people who would attempt to engage in the conduct of a terrorist activity on Australia but also put control orders on enablers and supporters is of crucial importance. We are finding that facilitators and others are slightly out of our reach. We would like to be in a

15 Amnesty International Australia, *Submission 2*, p. [1].

16 Australian Federal Police, *Submission 5*, p. 2.

17 Assistant Commissioner Neil Gaughan, *Committee Hansard*, Canberra, 13 November 2014, p. 26.

> position whereby we could stop people from travelling, and we see control orders as being one way that we can put some controls on the enablers and supporters.[18]

2.18 The inability of the AFP and its state and territory partners to target facilitators and enablers was described as a 'gap', with control orders being 'one tool' which it could employ to help target those persons.[19] The AFP further explained that efforts focused on 'enablers and supporters' could have a positive downstream effect on its other counter-terrorism efforts:

> The issue, I suppose is what we are trying to get here is the enablers and supporters, which we believe we do not currently have sufficient controls or ability to take action against. As I have said previously in evidence today, if we can take the enablers out of play, to some extent I think we can have a downstream impact to stop other issues. That is what I mean by saying that it is not a substantial change. We are just trying to capture another group that we have missed.[20]

2.19 Other participants in the inquiry argued that there was not sufficient justification for broadening the objects of the control order regime and the grounds under which they could be sought and obtained. The Gilbert + Tobin Centre of Public Law, for example, argued that the general claim that the proposed changes to the control order regime would assist in efforts against Islamic State and returning foreign fighters was 'not sufficient to justify the significant expansion of measures that have already been discredited by major inquiries'. In particular, it highlighted the 2012 review of the control order regime by the Independent National Security Legislation Monitor (INSLM), which concluded that control order powers were 'not effective, not appropriate and not necessary' and recommended repeal of the existing regime.[21]

2.20 The Australian Human Rights Commission registered its concern that the Bill proposed to increase the availability of control orders 'without introducing any of the additional safeguards' recommended by the COAG Review of Counter-Terrorism Legislation. In line with a COAG recommendation, the Commission argued for an additional requirement

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18 Assistant Commissioner Gaughan, *Committee Hansard*, Canberra, 13 November 2014, p. 25.

19 Assistant Commissioner Gaughan, *Committee Hansard*, Canberra, 13 November 2014, pp. 25, 27.

20 Assistant Commissioner Gaughan, *Committee Hansard*, Canberra, 13 November 2014, p. 30.

21 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 2; Independent National Security Legislation Monitor, *Declassified Annual Report*, 20 December 2012, pp. 4, 44.

for the issuing court to 'be satisfied that imposing each of the obligations, prohibitions and restrictions is the least restrictive way of achieving the purpose for which the control order is sought'.[22] At the public hearing, the Commission also called for the implementation of COAG's recommendation to introduce a nationwide network of 'special advocates' to participate in control order proceedings:

> … which would mean that you would have a trained lawyer able to articulate the concerns and maybe to work with the court when it makes a control order to ensure that each of the elements of that control order is appropriate, given the suspicions or concerns that the intelligence agency might have.[23]

2.21 In response to a question at the hearing about whether the findings of the COAG and INSLM reviews of controls orders were still relevant to the current operating environment, Professor George Williams expressed concern about the 'piecemeal' approach being taken to modifying the control order regime and called for a new 'proper' review of the legislation:

> I note here the fact that we are coming back again to control orders so soon after the prior amendments illustrates problems with the way these laws are being made in that we are not having the more considered response to those [past] reviews that we ought to be having.[24]

2.22 The Law Council of Australia expressed concern that the proposed new ground for a control order to be sought to 'substantially assist in preventing the provision of support for or the facilitation of a terrorist act' was 'too low a threshold' to justify the 'substantial deprivation of liberty' enabled under control orders. It argued the Explanatory Memorandum to the Bill did not explain why individuals engaged in support and facilitation of terrorist acts and hostile activity activities 'should not be simply arrested, charged and prosecuted'.[25]

2.23 At the public hearing, the AFP informed the Committee that while the 'primary intent' of law enforcement agencies was to arrest and prosecute persons involved in 'foreign fighter activity', that preferred option was not always available. The AFP discussed the example of the recent 'Operation

22 Australian Human Rights Commission, *Submission 14*, pp. 5, 6; Council of Australian Governments Review of Counter-Terrorism Legislation, May 2013, p. 59.

23 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 13 November 2014, p. 12.

24 Professor George Williams, *Committee Hansard*, Canberra, 13 November 2014, p. 20.

25 Law Council of Australia, *Submission 16*, p. 8.

Appleby' raids, in which agencies decided to intervene to disrupt planned terrorist activity 'primarily based on public safety issues', but that intervention was 'at the cost of evidence collection'.[26]

2.24 The Attorney-General's Department added that, due the speed in which threats were developing in the current environment, law enforcement agencies often no longer had time to wait until a standard of evidence sufficient for prosecution could be gathered before intervening in a situation:

> The speed with which people are moving from an intention to developing capability is quite startling and it is not something we have seen before … In the past, there was some difficulty in developing capabilities while making skills. What we are seeing now is that people are able to use things they already have in their home. They can move from intention to capability within days or weeks. The luxury of allowing a situation to unfold for the purposes of gathering evidence, with an eye to prosecution, may not exist anymore. I think we saw that with the Operation Appleby situation, effectively, where the AFP and state police were forced move to disrupt an activity rather than, ideally, letting enough time run so that they could collect enough evidence to prosecute.[27]

2.25 The AFP further explained that the 'balance of probabilities' test in the control order regime was an easier threshold to meet than the 'beyond reasonable doubt' threshold for criminal prosecution, highlighting the challenge law enforcement agencies currently face in trying to take action against 'facilitation groups':

> I would say there is a handful of facilitation groups operating up and down the coast that, at the moment, are just far away enough from law enforcement that we cannot arrest them. If we had sufficient evidence we would arrest them … when we have the evidence we will definitely go down the path of prosecution. Unfortunately, we are just not quite there. But I think there is an expectation that we actually do something about it.[28]

2.26 On further questioning, the AFP advised the Committee that there had been around five occasions in the last 20 months in which it had

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26 Assistant Commissioner Gaughan, *Committee Hansard*, Canberra, 13 November 2014, p. 25.

27 Ms Jamie Lowe, First Assistant Secretary, National Security Law and Policy Division, Attorney-General's Department, *Committee Hansard*, Canberra, 13 November 2014, pp. 28–29.

28 Assistant Commissioner Gaughan, *Committee Hansard*, Canberra, 13 November 2014, p. 26.

contemplated using a control order and not proceeded with it. On at least three of those occasions, the application could have proceeded if the additional grounds proposed in the Bill had been in place.[29]

2.27 Several participants argued that the proposed new grounds for the issue of control orders were too vaguely defined, raising concerns that the orders could be used to constrain free speech or be applied against innocent third parties.[30]

2.28 In a joint submission, the NSW Council for Civil Liberties and the Muslim Legal Network (NSW) argued that the broadening of the AFP's grounds to apply for a control order would 'reinforce the concept that the AFP are not reasonable, responsible or accountable' and would 'further damage the relationship between communities and law enforcement agencies'.[31]

2.29 The Gilbert + Tobin Centre for Public Law suggested that, if the proposed new grounds for seeking and issuing control orders were to be enacted, they should 'be linked directly to existing criminal offences, such as funding or supporting terrorist organisations'.[32] At the public hearing, Professor George Williams explained that the absence of a clear link to 'actual offences' meant that control orders 'might be imposed in a much broader range of circumstances than the criminal law would otherwise prescribe'.[33]

2.30 The Law Council of Australia similarly questioned whether there was 'sufficient legal certainty' in the scope of activities capable of being captured under the proposed new grounds, and recommended the Bill or Explanatory Memorandum be amended to clarify what activities would be captured by the terms 'supports' and 'facilitates'.[34] The Council also recommended that, if an expansion of the regime was to be progressed, the first of the proposed new grounds for a control order to be issued should be amended to require that 'the person has provided support for or otherwise facilitated a terrorist act'.[35]

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29 Assistant Commissioner Gaughan, *Committee Hansard*, Canberra, 13 November 2014, p. 33.

30 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 3; Amnesty International, *Submission 2*, p. [2]; NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7*, p. 6; Senator David Leyonhjelm, *Submission 15*, p. [2]; Law Council of Australia, *Submission 16*, pp. 11–12.

31 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7*, p. 6.

32 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 4.

33 Professor Williams, *Committee Hansard*, Canberra, 13 November 2014, p. 21.

34 Law Council of Australia, *Submission 16*, pp. 11–12.

35 Law Council of Australia, *Submission 16*, p. 12.

Amendments to the control order process

2.31 As outlined above, in addition to expanding the objects of the control order regime and the grounds upon which control orders can be sought and obtained, the Bill proposes to make a number of changes to the process by which control orders are applied for, issued, confirmed and varied. Elements of these changes that attracted significant comments from participants in the inquiry are discussed below.

Information provided to Attorney-General before consent

2.32 Some inquiry participants raised concerns about the Bill's proposal to reduce the amount of information provided to the Attorney-General in considering whether to give his or her consent to a request for an interim control order. If passed, the Bill would remove the existing requirement for a senior AFP member to provide the Attorney-General with the full draft of the request that would subsequently be provided to the issuing court, which includes

- a statement of the facts relating to why the order should be made,
- if the member is aware of any facts relating to why the order should not be made—a statement of those facts,
- an explanation as to why each of the obligations, prohibitions and restrictions should be imposed on the person,
- 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,
- 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,
- the outcomes and particulars of all previous applications for variations of control orders made in relation to the person,
- the outcomes of all previous applications for revocations of control orders made in relation to the person,
- the outcomes and particulars of all previous applications for preventative detention orders in relation to the person, and

- 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.[36]

2.33 The existing requirement to provide the Attorney-General with a draft of the interim control order; any information about the person's age; and a summary of the grounds on which the order should be made would continue to apply.[37]

2.34 Dr Greg Carne submitted that the proposed amendments, by reducing the amount of information provided to the Attorney-General, would weaken the control order regime's internal accountability measures. Dr Carne suggested the amendments could result in particularly sensitive information never being provided to the issuing court.[38]

2.35 Mr Bruce Baer Arnold suggested that while the proposal may be 'bureaucratically convenient', its rationale was 'unclear' and it would 'remove a check that was accepted by previous Parliaments'.[39]

2.36 The NSW Council for Civil Liberties and the Muslim Legal Network (NSW) submitted that the proposed amendment could 'give rise to an AFP member essentially "cherry-picking" the information put to the Attorney-General, greatly impacting on the Attorney General's ability to make an informed decision'.[40]

2.37 The Law Council of Australia similarly submitted that that the proposal would make the Attorney-General's supervisory role less effective, as his or her decision would be based on a 'reduced pool of evidence'. The Law Council recommended that

> … the AFP should also be required to provide to the Attorney-General a summary of the evidence (if any) that may suggest that a control order should *not* be made.[41]

2.38 In its submission to the inquiry, the AFP indicated that the procedural requirements for the initial seeking of consent for a control order would be 'streamlined' by the proposed amendments 'without diminishing the level of accountability under the control order regime':

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36 *Criminal Code Act 1995*, subsection 104.2(3).

37 CTLA Bill, Schedule 1, items 8 and 9.

38 Associate Professor Greg Carne, University of New England, *Submission 4*, pp. 3–5.

39 Mr Bruce Baer Arnold, *Submission 9*, p. 5.

40 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7*, p. 7.

41 Law Council of Australia, *Submission 16*, p. 13.

> Currently, the legislation practically requires the AFP to have its entire case ready—akin to a sizeable brief of evidence—before the AFP can apply to the court for an interim order. It also requires the Attorney-General to consider all of the information that would be provided to the court, despite the fact that the Attorney-General is only required to consent to an application being made. The time taken to consider this information (which may run to more than 100 pages) delays the ability to lodge an application with the court, consequently delaying the commencement of the control order conditions.[42]

2.39 The Attorney-General's Department stated in its submission that the current requirements were 'unnecessarily onerous' and did not 'recognise the different roles of the Attorney-General and the issuing court'. The Department argued that the Attorney-General's decision on whether to consent to a control order application had 'some analogies to seeking the Attorney-General's consent to prosecute a person for a serious criminal offence', for which a full brief of evidence was not required.[43]

Deadline for obtaining Attorney-General's consent

2.40 The Criminal Code currently allows for an interim control order to be requested from an issuing court by electronic means or in person if a senior AFP member considers it necessary because of urgent circumstances. The Attorney-General's consent is not required to be given prior to such requests being made, however, if his or her consent is not obtained within four hours of the request the order ceases to be in force.[44]

2.41 The Bill proposes to increase the amount of time available for the AFP to obtain the Attorney-General's consent from four hours to 12 hours. The Bill's Explanatory Memorandum states that this proposal

> … reflects the fact that it may not always be practical or even possible to seek the Attorney-General's consent within 4 hours of making a request for an urgent interim control order. For example, the Attorney-General may be in transit between the east and west coasts of Australia and unable to be contacted for a period of more than 4 hours.[45]

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42 Australian Federal Police, *Submission 8*, p. 4.

43 Attorney-General's Department, *Submission 5*, p. 6.

44 *Criminal Code Act 1995*, section 104.10.

45 CTLA Bill, *Explanatory Memorandum*, p. 24.

2.42 Some inquiry participants registered concerns that the proposed increase in time to 12 hours was not adequately justified.[46]

2.43 The Law Council of Australia, while accepting that four hours may not be sufficient, emphasised the importance of the Attorney-General considering the order in a timely manner and recommended the time limit in the Bill be 'reconsidered to a shorter period, such as an additional two hours'.[47]

2.44 The Australian Human Rights Commission similarly agreed that some extension to the period for obtaining the Attorney-General's consent was 'reasonable', but recommended that the period be limited to eight hours.[48]

Consideration of obligations, prohibitions and restrictions

2.45 The Bill proposes to replace the existing requirement for a senior AFP member, when requesting, confirming or varying a control order, to provide an explanation as to why 'each' of the proposed conditions should be imposed with a requirement to provide an explanation of why 'the control order' should be made or varied. The Bill also proposes to replace the existing requirement for the issuing court to be satisfied that, on the balance of probabilities, 'each' condition is 'reasonably necessary, and reasonably appropriate and adapted' with a requirement to consider 'the control order' as a whole against the same test.[49]

2.46 In its submission to the inquiry, the Attorney-General's Department explained that

> … in practice, the justification for one requested obligation, prohibition or restriction is likely to be substantially similar—if not identical—to the justification for one or more of the other requested obligations, prohibitions and restrictions.

and that, in a situation where three controls were being sought all with the same justification

> … it would be more practical and judicious to require the AFP to provide one set of facts in support of all three requested controls, and for the issuing court to consider them together.[50]

46 Associate Professor Greg Carne, University of New England, *Submission 4*, p. 5; NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7*, pp. 9–10.

47 Law Council of Australia, *Submission 16*, p. 15.

48 Australian Human Rights Commission, *Submission 14*, p. 6.

49 CTLA Bill, Schedule 1, items 9, 12, 13, 26, 27, 28, and 29.

50 Attorney-General's Department, *Submission 5*, p. 7.

2.47 Dr A J Wood supported the proposed changes in his submission, indicating that the approach of considering the control order application as a whole appeared 'sensible and more practical' than individually considering each obligation, prohibition and restriction.[51]

2.48 Dr Greg Carne, however, suggested the move to consideration of control orders as a whole amounted to a 'subtle change' in the way the issuing court assesses their proportionality, and the test in the Bill would operate 'subtly more executive orientated manner'. Dr Carne submitted that this change, combined with other changes proposed in the Bill, would 'arguably place the revised control order regime in the Bill on less solid constitutional ground than the original legislation'.[52]

2.49 The NSW Council for Civil Liberties and the Muslim Legal Network (NSW) similarly questioned the constitutional validity of the proposed control order amendments. They suggested the move to explanation and consideration of control orders as a whole would 'substantially lower the burden on the AFP and will adversely impact upon the individual's civil liberties and human rights', and that it would result in the court's power to vary or revoke control orders being 'substantially limited'.[53]

2.50 The Australian Human Rights Commission also opposed the proposed changes to the way control orders were considered, referring to the amendments as a 'less targeted proportionality analysis'. The Commission submitted that, 'given the extreme nature of control orders', there was 'value in considering the impact of each of the obligations, prohibitions and restrictions individually rather than as a whole'.[54] At the public hearing, however, the Commission acknowledged that 'as a matter of practice', the issuing court was still likely to consider challenges to the particular components of a requested control order.[55]

2.51 Professor George Williams similarly acknowledged at the hearing that a court would not be obliged to accept a control order that included inappropriate conditions due to the absence of a requirement to consider each condition individually. He argued, however, that the proposed wording 'removes a rigorous standard of justification that otherwise is required', and suggested the court should be required to be satisfied that,

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51 Dr A J Wood, Australian National University, *Submission 11*, p. [3].

52 Dr Carne, *Submission 4*, pp. 4–5.

53 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7*, pp. 7, 9, 11.

54 Australian Human Rights Commission, *Submission 14*, p. 6.

55 Professor Triggs, *Committee Hansard,* Canberra, 13 November 2014, pp. 12–13.

on the balance of probabilities, each element of the order was reasonably necessary:

> That would remove doubt about it. It would also mean that not only limits on communication but limits on personal liberty—in fact, each aspect—are looked at and each aspect must be justified as being necessary.[56]

2.52 The Law Council of Australia pointed out that, apart from reducing the burden on the AFP member requesting the control order, there was no indication in the Explanatory Memorandum as to why the amendments were thought to be necessary or appropriate. The Council submitted that

> … the risk with removing the requirement that each item be fully considered is that some restrictions imposed by the control order will not be carefully assessed. As a result, the order may be granted containing inappropriate or unnecessary restrictions on a person's liberty.[57]

2.53 In its submission, the AFP expanded on the rationale for the proposed change to consideration of the control order as an 'integrated whole':

> By considering the conditions and obligations as a whole—which supports the integrated approach the AFP takes to considering the application of such conditions and obligations, the issuing court is in a better position to assess the overall effect of the conditions / obligations on the individual, the level of imposition the conditions / obligations have on the individual, thus ensuring the rights of the individual are properly balanced with the requirements for law enforcement to prevent and ameliorate the risk of terrorist act(s).[58]

2.54 At the public hearing, the AFP indicated that, further to the improved efficiency of reducing duplication in control order documentation, changing the requirement to consider the order as a whole would be a 'more digestible way of approaching the problem'. It contended that the changes would not result in any reduced level of scrutiny, as the issuing court would still need to be 'satisfied on the balance of probabilities that the order is reasonably appropriate and adapted'.[59]

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56 Professor Williams, *Committee Hansard*, Canberra, 13 November 2014, pp. 20, 22.

57 Law Council of Australia, *Submission 16*, p. 14.

58 Australian Federal Police, *Submission 8*, p. 5.

59 Mr Tony Alderman, Coordinator Legislation Program, Australian Federal Police, *Committee Hansard*, Canberra, 13 November 2014, pp. 29, 36.

2.55 The AFP and Attorney-General's Department also pointed out that, even though the control order would be considered at an integrated level, the court would have the specific power to excise particular elements if it was not satisfied they were necessary and appropriate.[60]

Committee comment

2.56 The Committee welcomes the implementation of its previous recommendation that it have the opportunity to review changes to the name or alias of terrorist organisations listed under the Criminal Code. This measure will ensure that the Committee is able to maintain its existing oversight of the listing process and conduct further inquiries as necessary.

2.57 The Committee also welcomes the opportunity to inquire into the proposed amendments to the control order regime, in line with a recommendation in its previous report. While noting concerns raised by some participants about the short timeframe for the inquiry, the Committee appreciates that introducing these provisions to the Parliament in a separate Bill, rather than as amendments to the (recently enacted) Foreign Fighters Bill, has provided an opportunity for scrutiny by the Committee.

2.58 During its inquiry, the Committee received compelling evidence from the AFP that, even with the passage of the Foreign Fighters Bill, there remain significant gaps in the ability of law enforcement agencies to deal with the current threat posed by Australians seeking to provide support to terrorist organisations, or engage in conflict on behalf of such organisations overseas.

2.59 The Committee recognises that the proposed extension of the control order regime would enable law enforcement agencies to take action in situations where they do not yet have sufficient evidence 'beyond reasonable doubt' to proceed with a prosecution, but nonetheless are satisfied 'on the balance of probabilities' that intervention is needed to prevent a person from providing support to or facilitating terrorism, either in Australia or abroad. The Committee notes the AFP's evidence that such early intervention may come at the expense of evidence collection, and that arrest, charge and prosecution remains its preferred approach.

60 Mr Alderman, *Committee Hansard*, Canberra, 13 November 2014, p. 29; Ms Lowe, Attorney-General's Department, *Committee Hansard*, Canberra, 13 November 2014, p. 36.

2.60 The Committee strongly agrees that arrest, charge and prosecution under criminal offences is always preferable. However, the Committee also accepts that there are increasingly situations in which security interests require action to be taken by police at a time before the standard of evidence required for criminal prosecution can been obtained. In the current environment, these situations require not only the capacity to directly prevent terrorist acts, but also to prevent persons from providing support for or facilitating terrorist acts.

2.61 Nonetheless, the Committee recognises that the proposed broadening of the grounds for control orders to be sought and obtained is a substantial expansion of the current regime. The amendments proposed in the Bill would expand the purpose for which a control order can be applied. The Committee's evidence indicated that, while community protection has been the purpose of the control order regime in the past, under the amended regime control orders can be used as a prevention and disruption tool.[61]

2.62 The Explanatory Memorandum notes that only two control orders have been issued under the existing control order regime since it was introduced in 2005.[62] Evidence provided to the Committee suggests that, under the proposed amendments and current heighted security threat, control orders will be sought more often that they have been in the past.

2.63 Given this, the Committee believes it is vitally important that adequate safeguards are in place to ensure control orders do not deprive persons of their liberties to any extent beyond what is necessary. Some members of the Committee had concerns about the control order regime, including that control orders could be re-issued after 12 months without reasonable attempts being made to obtain a prosecution.

2.64 The Committee is conscious that the Bill's proposal to expand the control order regime takes place in a context in which the majority of the 2013 COAG Review of Counter-Terrorism Legislation's recommendations to strengthen safeguards in the *existing* control order regime have not yet been implemented.

2.65 The Committee strongly believes that, in the absence of proof beyond reasonable doubt, control orders should impose the minimum interference on a person's rights and liberties that is necessary to achieve the regime's objectives. The Committee notes the existing requirement to this effect (as amended in the Bill) that an issuing court must be 'satisfied on the balance

61 Australian Federal Police, *Submission 5*, p. 2; Assistant Commissioner Neil Gaughan, *Committee Hansard*, Canberra, 13 November 2014, p. 30.

62 CTLA Bill, *Explanatory Memorandum,* p. 7.

of probabilities' that the proposed control order is *reasonably necessary, and reasonably appropriate and adapted* for meeting the regime's objectives, and that in making this determination the court must take into account *the impact of the order on the person's circumstances (including the person's financial and personal circumstances)*.[63]

2.66 However, the COAG review observed that the inability of persons who are the subject of a control order application to access restricted information about their case could 'result in a fair trial not being afforded to the person sought to be controlled'. The review recommended that a nationwide system of 'Special Advocates'— who would be able to access classified information and act on behalf of individuals—should be considered for introduction. The review further recommended that a 'minimum standard of disclosure of information' be introduced for individuals over whom control orders are being sought.[64]

2.67 Some members of the Committee were of the view that the introduction of a system of 'Special Advocates' should be considered.

2.68 The Committee considers that the extended delay in appointing an Independent National Security Legislation Monitor (INSLM) leaves a gap in accountability and oversight of the control order regime, and recommends that this appointment should be finalised as a matter of absolute urgency.

2.69 The Committee considers that the INSLM should be tasked with undertaking a review of the COAG proposals and advising of any of the recommendations relating to control orders that should be implemented. In undertaking this review, the INSLM should take into account the significant changes to the security environment and the control order regime that have taken place since the COAG review was completed. The changing nature of the security threat was highlighted in an Australia-New Zealand Counter-Terrorism Committee 'Context Statement' provided to the Committee on a confidential basis.[65]

63 CTLA Bill, proposed paragraph 104.4(1)(d) and subsection 104.4(2).

64 Council of Australian Governments Review of Counter-Terrorism Legislation, May 2013, p. 59.

65 *Exhibit 1*.

Recommendation 1

The Committee recommends that the Government finalise the appointment of the Independent National Security Legislation Monitor (INSLM) as a matter of absolute urgency.

Further, the Committee recommends that, in light of the proposed expansion of the control order regime, the Government task the newly appointed INSLM to consider whether the additional safeguards recommended in the 2013 Council of Australian Governments Review of Counter-Terrorism Legislation should be introduced. Particular consideration should be given to the advisability of introducing a system of 'Special Advocates' into the regime.

2.70 The Committee notes concerns raised by participants about the lack of clarity in the definition of the proposed new grounds for issuing a control order: 'preventing the provision of support for or the facilitation of a terrorist act' and 'preventing the provision of support for or the facilitation of engagement in a hostile activity in a foreign country'. The Committee accepts that further clarity of the key terms in these grounds would assist the public and judiciary, and agrees that, where possible, the grounds should be based on existing criminal offences.

Recommendation 2

The Committee recommends that, to the extent possible, the terms 'supports' and 'facilitates' in the proposed amendments to the control order regime be based on language in the existing Criminal Code and that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 and its Explanatory Memorandum be amended to reflect this.

2.71 In relation to proposed amendments to the process underpinning the control order regime, the Committee accepts that there is likely to be room for improvement given the limited use the powers have had since their introduction in 2005. The Committee also accepts that, provided safeguards are not materially weakened, streamlining certain parts of the process in order to reduce administrative burdens is a legitimate goal, particularly given the time constraints under which control order applications may need to be lodged.

2.72 The Attorney-General's role in the control order process is to give consent, where appropriate, for the AFP to request an interim order from the

issuing court. It remains the role of the issuing court to determine, based on all the information available, whether the control order should be issued. To assist the Attorney-General with his or her decision on whether or not to give consent, it is appropriate that he or she be made aware of the key facts relating to the person on whom the order is being sought. However, the Committee does not agree with the view of some inquiry participants that this means the Attorney-General must be provided with all documents that will subsequently be provided to the issuing court, as is currently required, which may run into hundreds of pages.

2.73 The Bill proposes to only require a draft of the interim control order, any available information on the person's age, and a summary of the grounds on which the order is being sought to be provided to the Attorney-General. The Committee considers that, as suggested by the Law Council of Australia, it would be helpful if the Attorney-General was also provided with a summary of any facts relating to why the control order should *not* be made.

Recommendation 3

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to require that, when seeking the Attorney-General's consent to request an interim control order, the Australian Federal Police must provide the Attorney-General with a statement of facts relating to why the order should be made, and any known facts as to why it should not be made.

2.74 The Bill also proposes to increase the amount of amount of time available for the AFP to obtain the Attorney-General's consent from four hours to 12 hours after an urgent request for a control order has been made. The Committee considers that, while it is conceivable that the Attorney-General (or acting Attorney-General) may be unable to provide consent within four hours due to domestic air travel commitments, it is very unlikely that he or she will be non-contactable for more than eight hours. The Committee therefore suggests that, to ensure the integrity of the Minister's important role in the process is not diminished, the proposed time limit in the Bill be reduced to eight hours.

Recommendation 4

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to require that the Attorney-General's consent to an urgent interim control order be obtained within eight hours of a request being made by a senior member of the Australian Federal Police.

2.75 The Committee noted the argument presented by some inquiry participants that requiring a request for a control order, and court consideration of that request, to address the order as a whole, rather than each of its elements individually, would amount to a substantial weakening of the issuing court's ability to properly scrutinise the order. The Committee considers there would be benefits in the conditions proposed for a control order being considered in an integrated, holistic manner, rather than individually.

2.76 The Committee notes evidence that the court would, in practice, retain its ability to scrutinise the individual elements of an order. This ability is confirmed in the Bill's provisions allowing the court to excise any condition which it did not consider to be 'reasonably necessary, and reasonably appropriate and adapted'.[66] The Committee is of the view that this aspect of the court's authority should be more clearly stated in the Explanatory Memorandum.

Recommendation 5

The Committee recommends that proposed section 104.4 in the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to ensure that an issuing court retains the authority to examine the individual obligations, prohibitions and restrictions in a draft control order to determine whether each condition is reasonably necessary, and reasonably appropriate and adapted.

2.77 The Committee did not find the arguments compelling, however, for the AFP not to be required to provide detail to the issuing court on why each of the obligations, prohibitions and restrictions in a draft control order is necessary and proportionate. While accepting that the current requirements may lead to some duplication in the documentation, it would not appear to be an onerous administrative burden for the AFP to

66 CTLA Bill, proposed subsection 104.1(3) and paragraph 104.4(1)(d).

copy the same explanation from one condition to another where the explanation is the same. Retaining the current requirements would support better due diligence on the part of the AFP and may assist the court in its deliberations. The Committee therefore recommends that the elements of the Bill proposing to amend these requirements be removed.

Recommendation 6

The Committee recommends that proposed paragraphs 104.3(d) and 104.23(2)(b) in the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to retain the current requirement that the Australian Federal Police explain why each of the obligations, prohibitions and restrictions proposed in a draft control order should, or should not, be imposed on the person.

2.78 The Committee considers control orders, particularly in their proposed expanded form, to be extraordinary powers that will be required only for so long as a heighted threat from terrorism to the community remains. The Committee was satisfied, based on both the public and private evidence it received, that these powers are needed at the present time. However, the Committee believes that the ongoing need for these powers to exist should remain subject to regular scrutiny.

2.79 The Committee was therefore pleased that the Government implemented its previous recommendation to ensure the control order powers—including the amendments proposed in the Bill—will 'sunset' in September 2018 and be subject to prior reviews of the regime by the INSLM and this Committee. The Committee anticipates that the ongoing need for the expanded control order regime provided for in this Bill, as well as the processes underpinning it, will be subject to close scrutiny in those reviews.

3

Schedule 2 – Proposed amendments to the *Intelligence Services Act 2001*

Summary of proposed amendments

3.1 Schedule 2 of the Bill contains amendments to the *Intelligence Services Act 2001* (IS Act). The proposed amendments are directed to two key areas:

- Australian Secret Intelligence Service (ASIS) support to Australian Defence Force (ADF) military operations and cooperation with the ADF on intelligence matters, and
- emergency ministerial authorisations.

3.2 In particular, the Bill proposes to amend the IS Act to:

- explicitly provide (at the Defence Minister's written request) for ASIS assistance to the ADF in support of military operations and cooperation on intelligence matters, including:
  - ⇒ producing intelligence on one or more members of a class of Australian persons, or
  - ⇒ undertaking activities that will or are likely to have a direct effect on one or more members of a class of Australian persons.
- allow a ministerial authorisation under section 9 of the IS Act to be issued for a 'class of Australian person',
- allow agreement of the Attorney-General (where required) under paragraph 9(1A)(b) to be obtained orally,
- allow the Attorney-General to specify a class of Australian persons who are or are likely to be involved in activities that are a threat to security

and give agreement in relation to any Australian person in that specified class, and

- amend provisions relating to emergency ministerial authorisations to provide for:
  - ⇒ oral authorisations (of up to 48 hour duration) by the Minister,
  - ⇒ written authorisation by an agency head when the Prime Minister, Defence Minister, Foreign Minister and Attorney-General are not readily available or contactable, and
  - ⇒ agreement to an emergency authorisation by the Director-General of Security where required under paragraph 9(1A)(b) and the Attorney-General is not readily available or contactable.

3.3 In his second reading speech, the Attorney-General indicated that the proposed amendments to the IS Act were

> … urgent, as a result of recent developments in the security environment, primarily due to the Government's decision to authorise the ADF to undertake operations against the Islamic State terrorist organisation in Iraq.[1]

Support to ADF military operations

3.4 The proposed amendments will make it explicit in the IS Act 'that it is a statutory function of ASIS to provide assistance to the ADF in support of military operations, and to cooperate with the ADF on intelligence matters.'[2] The basis for the proposed amendments is the different circumstances in Iraq compared with Afghanistan. The Explanatory Memorandum states that

> … differences in the circumstances in Iraq mean that reliance on existing provisions of the ISA in relation to the functions of ASIS (which are not specific to the provision of assistance to the ADF) is likely to severely limit ASIS's ability to provide such assistance in a timely way.[3]

1 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 29 October 2014, p. 62.

2 CTLA Bill, *Explanatory Memorandum*, p. 2.

3 CTLA Bill, *Explanatory Memorandum*, p. 2.

3.5 In particular:

> Unlike the ADF's and ASIS's operations for almost 10 years in Afghanistan, in Iraq it is known that a large number of Australian persons are actively engage with terrorist groups, including ISIL.[4]

3.6 Accordingly, ASIS's support to ADF operations are likely to require ASIS to produce intelligence on and undertake activities (subject to the limits on ASIS's functions) that may have a direct effect on Australian persons.[5]

3.7 Agencies highlighted the current constraints of the IS Act on ASIS:

> There is no provision in the ISA that would enable the ADF to solely determine the requirement for ASIS to produce intelligence on, or to undertake activities in accordance with its functions that will have a direct effect on, an Australian involved in terrorist activity without needing the prior agreement of ASIO. The ADF is, however, not itself constrained in this manner but is able to act within its authorised targeting authorities. Put simply, in a swiftly changing operational environment the ADF is able to act quickly in response to operational threats and requirements, but ASIS would be unable to act as quickly and flexibly to support the ADF.[6]

3.8 It was further argued that '[i]n time sensitive situations ASIS could be left unable to act legally even to protect life'.[7]

3.9 The Attorney-General's Department provided an additional detailed rationale for the amendments:

> While it is acknowledged that AGO and ASD are within the Defence portfolio and may therefore be said to have a greater need to perform functions in support of, or in cooperation with the ADF (or might be expected to do so with greater frequency than ASIS), these agencies do not exclusively service the Defence portfolio, and have significant involvement in broader national security activities and operations. This broader remit has been reflected in their recent, formal re-naming as part of the National Security Legislation Amendment Act (No. 1) 2014. In addition, as noted below in this submission, ASIS has played a significant role in previous military operations conducted by the ADF, including in

4 Australian Secret Intelligence Service, *Submission 17,* p. [4].
5 Australian Secret Intelligence Service, *Submission 17,* p. [4].
6 Australian Secret Intelligence Service, *Submission 17,* p. [3].
7 Australian Secret Intelligence Service, *Submission 17,* p. [5].

> Afghanistan. It would therefore be inconsistent with the contemporary security environment, and the activities of these IS Act agencies in that environment, to maintain a formal distinction between their statutory functions in this regard, on the technical basis of portfolio responsibility. It is, in AGD's view, preferable that agencies' statutory functions should explicitly reflect the circumstances in which their functions are, in practice, performed, and should be amenable to the performance of those functions in a timely and effective way, subject to necessary safeguards. On this basis, AGD considers that it is not tenable to maintain a different statutory approach to ASIS's functions concerning the provision of support to, or cooperating with, the ADF (in the form of a non-prohibition on such activities in subsection 6(7), and a general Ministerial discretion to issue directions under paragraph 6(1)(e) for other activities, which can be utilised in such cases); and the statutory functions of AGO and ASD (in the form of an express statutory function to provide support to, or cooperate with, the ADF).[8]

Emergency ministerial authorisation

3.10 The amendments also address the circumstance in which an emergency ministerial authorisation is required and neither the Prime Minister, Defence Minister, Foreign Minister or Attorney-General are available.[9] The Explanatory Memorandum states that:

> Experience in responding to urgent requirements for ministerial authorisations has identified that the existing emergency authorisation arrangements under section 9A of the ISA do not sufficiently address the need for ASIS, ASD and AGO to be able to obtain a Ministerial authorisation in an extreme emergency.[10]

3.11 Further, existing section 9A of the IS Act does not

> … make provision for the contingency that the Attorney General may not be readily available or contactable to provide his or her agreement to the making of an authorisation, in the circumstances in which such agreement is required.[11]

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8 Attorney-General's Department, *Submission 5,* p. 14 (footnote 9).

9 See current section 9A of the IS Act.

10 CTLA Bill, *Explanatory Memorandum*, p. 2.

11 CTLA Bill, *Explanatory Memorandum*, p. 2.

Matters raised in evidence

Oral authorisations

3.12 Under proposed amendments to section 9A of the IS Act, the Minister may issue emergency authorisations orally. While some submitters supported the proposed amendment,[12] or raised no objections,[13] other submitters opposed oral authorisations. Concerns included the time lag that may occur between issuing the oral authorisation and preparing the written record, and the perceived freedom that an oral authorisation provides.[14]

3.13 In response, the Attorney-General's Department commented:

> The ability for authorisations to be issued via oral means reflects a genuine operational need, in recognition that circumstances of emergency can arise, in which it is simply not possible in the time available to comply with written form requirements. The limited ability for a Minister to issue an oral authorisation is a form requirement only. It does not alter, in any way, the substantive issuing criteria that govern Ministerial authorisations under section 9. This is not about replacing the general rule that authorisations must be issued in writing for the purpose of convenience, but rather about making provision for cases of the most exceptional kind.[15]

3.14 A written record of the oral authorisation must be made as soon as practicable but no later than 48 hours after the authorisation is provided.[16] The Attorney-General's Department noted that 48 hours is the 'absolute latest' time that a record can be made, with agency heads obliged to do so as soon as practicable.[17]

3.15 The Law Council of Australia proposed that safeguards surrounding oral authorisations would be improved with a more prescriptive approach to the matters that must be recorded in the written record.[18]

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12 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7,* p. 12.

13 Law Council of Australia, *Submission 16,* p. 21.

14 Mr Bruce Baer Arnold, *Submission 9,* p. 4; Australian Privacy Foundation, *Submission 13,* p. 3; Senator David Leyonhjelm, *Submission 15,* p. [4].

15 Attorney-General's Department, *Supplementary Submission 5.1,* p. 27.

16 Proposed subsection 9A(5).

17 Attorney-General's Department, *Supplementary Submission 5.1,* p. 27.

18 Law Council of Australia, *Submission 16,* pp. 22–23.

Class authorisations

3.16 The Bill amends sections 8, 9, 10 and 10A of the IS Act to enable the Minister responsible for ASIS to give authorisation to ASIS to:

- to undertake activities for the specific purpose or for purposes which include the specific purpose of producing intelligence on a specified class of Australian persons, or
- to undertake activities or a series of activities that will, or is likely to, have a direct effect on a specified class of Australian persons.

3.17 The arrangements for class authorisations will only apply to support to the ADF following a written request from the Defence Minister.[19]

3.18 According to the Explanatory Memorandum:

> In giving the authorisation relating to the specified class, the Minister responsible for ASIS must be satisfied of the preconditions set out in subsection 9(1) of the ISA. The Minister must also be satisfied that the class relates to support to the Defence Force in military operations as requested by the Defence Minister and that all persons in the class of Australian persons will or are likely to be involved in one or more of the activities set out in paragraph 9(1A)(a).[20]

3.19 The Bill will also amend subsection 9(1A) to enable the Attorney-General to specify a class of Australian persons who are, or are likely to be, involved in an activity or activities that are, or are likely to be, a threat to security, and give agreement in relation to any Australian person in that specified class.

3.20 ASIO argued that:

> The ability to provide a 'class agreement' in this manner will provide greater operational flexibility for IS Act agencies, which will also be particularly useful in time critical circumstances.[21]

3.21 For the purpose of ASIS support to the ADF, without class authorisations:

> This means that multiple, simultaneous Ministerial authorisations would need to be sought and issued on identical grounds; or that Ministerial authorisations would be unable to be issued because a

19 CTLA Bill, *Explanatory Memorandum*, p. 28.

20 CTLA Bill, *Explanatory Memorandum*, p. 28.

21 Australian Security Intelligence Organisation, *Submission 10,* p. [2].

particular Australian person fighting with that organisation was not known in advance of the commencement of the operation.[22]

Definition of a class of Australian persons

3.22 Concern was expressed by submitters as to how a class of Australian persons may be defined.[23] Dr A J Wood, for example, stated:

> While it might be convenient to leave this definition of what constitutes a 'class' open, it can in the mind of some communities raise the spectre of 'racial or religious profiling'.[24]

3.23 The Law Council of Australia similarly commented that a class of Australian persons may include all Australian persons:

- adhering to a certain religious belief;
- adhering to a certain political or ideological belief;
- who are a member of a particular association;
- who are engaging in a certain activity;
- who are present within a certain location;
- who have a certain ethnic background.[25]

3.24 The Law Council also expressed concern 'that such an overarching power as class authorisation has the potential to apply intrusive interrogation powers to a group, which do not apply to the broader community'.[26] The Law Council considered such an approach:

- is not consistent within the principle of equality before the law,
- does not sit easily with rule of law principles (such as the use of Executive powers), and
- is inconsistent with traditional rule of law and criminal justice principles by shifting the focus from a person's conduct to his or her associations.[27]

3.25 During the public hearing, the Committee sought further clarification from agencies as to how classes of Australian persons will be defined under the proposed amendments. In its supplementary submission, the

22 Attorney-General's Department, *Submission 5,* p. 16.

23 Dr Greg Carne, *Submission 4,* p. 8.

24 Dr A J Wood, *Submission 11,* p. [4]. See also, Australian Lawyers for Human Rights, *Submission 6,* p. 4; Mrs Lydia Shelly, Muslim Legal Network (NSW), *Committee Hansard,* Canberra, 13 November 2014, p. 18.

25 Law Council of Australia, *Submission 16,* p. 18.

26 Law Council of Australia, *Submission 16,* p. 19.

27 Law Council of Australia, *Submission 16,* p. 19.

Attorney-General's Department advised that there would be four principal limitations on the classes of Australian persons for whom the Foreign Minister may issue authorisations enabling ASIS to undertake activities in support of the ADF:

- First, the Defence Minister must request the authorisation in writing and will set out in this request the class of Australian persons for whom ASIS's assistance is sought in relation to a specified ADF military operation.[28]
- Secondly, the Foreign Minister must be satisfied that the other authorisation criteria in subsections 9(1) and 9(1A) are satisfied. Where authorisation is sought in relation to a class of Australian persons

  > … the Minister must specifically assess, and be satisfied of, the necessity and proportionality of the impacts of that activity or activities in relation to that class of Australian persons.

  Further, the Minister must be satisfied that the particular activities of a class of person in relation to whom the authorisation is sought fall within one or more of the activities prescribed in paragraph 9(1)(a):

  > Hence, the IS Act does not prescribe an exhaustive list of the exact classes of persons in relation to whom a Ministerial authorisation must be issued. Rather, the Act confers a discretion on the authorising Minister to define the class of Australian persons in relation to individual authorisation decisions, provided that the class satisfies the 'activity test' in paragraph 9(1A)(a).

  For ASIS assistance to ADF operations:

  > The relevant limb of the activity test will invariably be that in subparagraph 9(1A)(a)(iii), which prescribes activities that are or are likely to be a threat to security (as that term is defined in section 4 of the ASIO Act). This connection is inherent in the nature of military operations undertaken by the ADF, which are undertaken for the purpose of the defence of Australia.[29]
- Thirdly, the agreement of the Attorney-General is required in relation to a class of Australian persons before an authorisation is issued. The Attorney-General's Department argued that:

  > This means that the Attorney-General will apply his or her judgment as to whether the class of Australian persons—as

28 Attorney-General's Department, *Supplementary Submission 5.1,* p. 4.

29 Attorney-General's Department, *Supplementary Submission 5.1,* pp. 4–5.

> defined by reference to their actual or likely engagement in a particular activity—has the requisite nexus to security.

The Attorney-General's Department noted that at this point, the proposed class of Australian persons will have been scrutinised by three Ministers.[30]

- Fourthly, a class cannot include anyone who is not engaged in the specified activity or activities. Accordingly:

> Once the Foreign Minister has issued an authorisation for ASIS to undertake activities for the purpose of providing assistance to the ADF in support of a military operation, ASIS must then make decisions about whether a particular Australian person or persons fall within the class of persons specified in the authorisation, in order to undertake activities in reliance on the authorisation.
>
> If ASIS purported to rely on an authorisation to undertake activities in relation to an Australian person who did not fall within the relevant class, those activities would not be lawfully authorised.[31]

3.26 One example of a class is 'Australian persons who are or are likely to be members of IS [Islamic State] who are fighting with IS or are otherwise supporting IS in its military operations'.[32] The Attorney-General's Department went on to emphasise:

> The key point is that however the class is defined, all Australian persons who fall within that class must be or are likely to be, for the reasons explained above, involved in activities which are or are likely to be a threat to security. For this reason, it would be extremely difficult to define a class solely by reference to a geographical location because this would not necessarily be sufficient to exclude Australian persons who are not or are not likely to be involved in activities which are or are likely to be a threat to security.[33]

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30 Attorney-General's Department, *Supplementary Submission 5.1,* pp. 5–6.

31 Attorney-General's Department, *Supplementary Submission 5.1,* p. 6.

32 Attorney-General's Department, *Supplementary Submission 5.1,* p. 7; Australian Secret Intelligence Service, *Submission 17,* p. [5].

33 Attorney-General's Department, *Supplementary Submission 5.1,* p. 7.

3.27 The Department also noted that provision for a class of persons occurs elsewhere in the IS Act and in the ASIO Act.[34]

Duration of Defence Minister's request and Attorney-General's agreement

3.28 In her submission, the Inspector-General of Intelligence and Security (IGIS) noted that there is no time limit on the duration of a request from the Defence Minister for a class authorisation which, in the event of a protracted military operation, could extend for many years.[35]

3.29 Similarly, although the Attorney-General could specify a time limit, agreement of the Attorney-General to a class authorisation may not be time limited. The IGIS expressed an expectation that both the Defence Minister and the Attorney-General would be periodically briefed, allowing Ministers the opportunity to consider the ongoing appropriateness of either the request or the agreement.[36]

3.30 The Attorney-General's Department agreed that it would be appropriate for Ministers to be periodically briefed. It noted that as a ministerial authorisation issued by the Foreign Minister for ASIS to assist the ADF in support of a military operation is limited to six months,

> [i]n practice, before such an authorisation would be renewed, there would be appropriate consultation with Defence and ASIO and consideration of whether it is appropriate to continue relying on a request that may have been made, or an agreement that may have been provided, some time ago.[37]

3.31 In evidence, it was also suggested that a Minister could make a direction under section 8(2) of the IS Act that the Minister be briefed at a particular time (such as every six months). The IGIS would then measure the agency's actions against this direction.[38]

Emergency authorisations by agency head

3.32 Proposed section 9B of the IS Act provides for circumstances in which an emergency authorisation is required and none of the Ministers specified in the IS Act, namely the Prime Minister, Defence Minister, Foreign Minister

34 Attorney-General's Department, *Supplementary Submission 5.1,* p. 9.

35 Inspector-General of Intelligence and Security, *Submission 12,* p. 5.

36 Inspector-General of Intelligence and Security, *Submission 12,* p. 5.

37 Attorney-General's Department, *Supplementary Submission 5.1,* p. 22.

38 Mr Jake Blight, Assistant Inspector-General of Intelligence and Security, *Committee Hansard,* Canberra, 13 November 2014, p. 2.

or Attorney-General, are available. In this case, the agency head may give a written[39] authorisation for an activity or series of activities.[40] An authorisation given by an agency head would have effect for a maximum period of 48 hours.[41] The agency head would be required to inform the relevant responsible Minister of the authorisation as soon as practicable, within 48 hours of giving the authorisation, and the IGIS within 3 days.[42]

3.33 According to the Attorney-General's Department,

> … statutory limitations ensure that emergency authorisations by agency heads can only be issued where necessary, and in cases of extreme urgency, where failure to undertake the relevant activities is likely to yield adverse consequences of the most serious kind with respect to security and the lives or safety of other persons.[43]

3.34 Proposed section 9C provides for the unavailability of the Attorney-General. In this circumstance, the Director-General of Security (unless not readily available or contactable) could provide agreement to the authorisation. The Attorney-General's Department indicated that, as the proposed amendments recognise the Attorney-General's particular role in providing agreement to ministerial authorisations and

> … extensive visibility of the security environment and detailed awareness and understanding of any relevant security operations …
>
> it is appropriate that this specialised role is performed by the Director-General of Security (in favour of delegating responsibility to another Minister).[44]

3.35 In support of the proposed amendments, ASIS commented that under the current IS Act

> … the requirement that that the agreement of the Attorney-General must have been obtained where the Australian person is, or is likely to be, involved in activities which are, or are likely to be, a threat to security means that in practice if the Attorney-

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39 Any emergency authorisation issued by an agency head under this proposed section must be in writing. Attorney-General's Department, *Supplementary Submission 5.1,* p. 22.

40 Proposed subsection 9B(2).

41 Proposed subsection 9B(4).

42 Proposed subsections 9B(5) and 9B(6).

43 Attorney-General's Department, *Submission 5,* p. 27.

44 Attorney-General's Department, *Submission 5,* pp. 22–23.

> General is not available an authorisation cannot be provided at all.[45]

3.36 In addition, ASIO highlighted that:

> While previously the deficiencies in emergency provisions were not as stark because of the typical length of time it took for threats to security to develop, in the current operational environment, notice of activities that involve a threat to security can, and do, arise in very short time frames. Current limitations may mean time critical opportunities to collect vital intelligence and indeed, protect human life, are lost or compromised. If, for example, ASIO had some intelligence indicating an imminent terrorist attack by an Australian person, it is vital that IS Act agencies can be authorised to respond quickly and in accordance with their functions.[46]

3.37 Several submitters opposed the delegation of powers to agency heads.[47] Senator David Leyonhjelm raised concerns that the delegation of powers to agency heads contradicts 'fundamental common law principles that a delegate cannot authorise someone else to exercise all his powers'.[48] Senator Leyonhjelm argued that

> … the Intelligence Services Act in its unamended form seems to have been drafted with the intent that the Minister's decision is to be a personal one. The traditional common law caution regarding authorisations where significant individual rights and liberties (in this case – life, movement, association) would be affected is important here, and suggests that a regime whereby at least one relevant minister is always contactable should be instituted.[49]

3.38 The Law Council of Australia also opposed delegation to an agency head, suggesting that another senior cabinet Minister, such as the Deputy Prime Minister, be included in the list of responsible ministers.[50]

3.39 The NSW Council for Civil Liberties and Muslim Legal Network (NSW) considered that

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45 Australian Secret Intelligence Service, *Submission 17,* p. [3].

46 Australian Security Intelligence Organisation, *Submission 10,* p. [2].

47 Mr Bruce Baer Arnold, *Submission 9,* p. 5; Law Council of Australia, *Submission 16,* p. 24.

48 Senator David Leyonhjelm, *Submission 15,* p. [3].

49 Senator David Leyonhjelm, *Submission 15,* p. [4].

50 Law Council of Australia, *Submission 16,* p. 25.

> … expanding this power to heads of agencies when the Ministers are unavailable does not take into account the appropriateness and need for reserving this power for those at the most senior level.[51]

3.40 Dr A J Wood, although accepting the proposed delegation to agency heads, expressed concern at the possible lack of availability of all four Ministers. Further,

> … in the absence of a definition for the meaning of 'readily available or contactable' it should be mandated that all steps taken to contact the relevant person is documented in a manner that would enable a reasonable person to concur that the steps taken were apt.[52]

3.41 The NSW Council for Civil Liberties and Muslim Legal Network (NSW) argued that extension of the power to agency heads does not provide adequate safeguards and protection of human rights. Further, with regard to the requirement to report to the Minister:

> Although, 48 hours is preferable to a longer period of time, it is nevertheless still ample time to breach the privacy of an Australian person without the appropriate safeguards in place. Despite the time limit, intelligence activity would still be undertaken against the relevant Australian person. Whilst it is acknowledged that the ISA agencies are subject to the oversight of IGIS, the IGIS will only become aware of any misuse of this provision after the intelligence activity is undertaken and does not provide any safeguards to prevent misuse at the time such emergency authorisations are made.[53]

3.42 The Attorney-General's Department argued in response that privacy impacts are relevant considerations in the assessments made under subsection 9(1) and that agencies are required to comply with Privacy Rules made under section 15 of the IS Act in relation to the communication and retention of intelligence gathering information concerning Australian persons.[54]

3.43 Additionally, the NSW Council for Civil Liberties and Muslim Legal Network (NSW) argued that:

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51 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7,* p. 12.

52 Dr A J Wood, *Submission 11,* p. [3].

53 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7,* pp. 12–13.

54 Attorney-General's Department, *Supplementary Submission 5.1,* p. 30.

> The Explanatory Memoranda also states that other safeguards include the requirement of the relevant head of agency submitting a report to the relevant Minister and on receipt of such a report, the Minister has the option to cancel the authorisation. However, this report is required to be completed within 48 hours of the authorisation and the maximum period of that authorisation is 48 hours. If the report is submitted towards the end of that period, there is little utility in the Minister cancelling the authorisation as by that time, intelligence activity would have already been undertaken and collected against an Australian person. Consequently, this is not an effective safeguard. Furthermore, the question arises that if these provisions are put in place to respond to extreme emergencies where relevant Ministers are not available within a 48 hour period, it will not be effective to give the power of a Minister to cancel that authorisation within 48 hours and presumably, they would be unavailable for that whole period. If they are not unavailable for that period, we respectfully submit that the need will not arise to defer such power to the heads of agencies.[55]

3.44 As noted above, an agency head is required to notify the responsible Minister as soon as practicable and within 48 hours of the issuing of an authorisation. The Committee questioned agencies about the adequacy of these time limits. In response, the Attorney-General's Department advised:

> The reference to 48 hours in this provision is the upper limit of the time period within which notification must be made as soon as practicable. The effect of the upper limit of 48 hours is that any notification provided after this maximum period is deemed not to have been made as soon as practicable. This is a safeguard which removes any possibility for a suggestion that the provision of a notification after the expiry of an emergency authorisation could have been the first practicable opportunity to do so.[56]

3.45 Further:

> The longer the delay between issuing and Ministerial notification, the more compelling evidence would be needed to show that it

55 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7,* p. 13.

56 Attorney-General's Department, *Supplementary Submission 5.1,* p. 16.

> would not have been practicable to have notified the Minister earlier.[57]

3.46 The Department indicated that, based on discussions with agencies, '48 hours is considered to provide an appropriate outer limit'.[58]

Definitional clarity

3.47 Some submitters raised concerns about the lack of clarity around several terms in the Bill, including 'not readily available'[59] and 'emergency'.[60]

3.48 The Attorney-General's Department responded to these concerns, noting that:

> An assessment by an agency head of the availability and contactability of a Minister is intended to be a matter of judgement by the agency head in the circumstances of individual cases, having regard to the nature of the relevant activity and the degree of urgency in respect of the particular matter.[61]

3.49 In addition, the Department indicated that the term 'emergency'

> … is not specifically defined in the Bill because it is capable of bearing its ordinary meaning, having regard to the context in which it is used in particular provisions. In particular, there are different considerations depending upon whether the relevant decision is an emergency Ministerial authorisation (under proposed section 9A) or an emergency authorisation issued by an agency head, if the agency head is satisfied that no relevant Ministers are readily available or contactable (under proposed section 9B).[62]

3.50 In his submission, Dr Greg Carne also raised concerns about the scope of military operations that are captured by the proposed amendments.[63] Dr Carne argued that military operations could 'conceivably include all forms of military operations, both external to, and internal to the

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57 Attorney-General's Department, *Supplementary Submission 5.1,* pp. 16–17.

58 Attorney-General's Department, *Supplementary Submission 5.1,* p. 17.

59 Mr Bruce Baer Arnold, *Submission 9,* p. 3; Australian Privacy Foundation, *Submission 13,* p. 2.

60 Dr A J Wood, *Submission 11,* p. [3]; Dr Greg Carne, *Submission 4,* pp. 10–11.

61 Attorney-General's Department, *Submission 5,* p. 27. See also, Attorney-General's Department, *Supplementary Submission 5.1,* p. 25.

62 Attorney-General's Department, *Supplementary Submission 5.1,* p. 24.

63 Dr Greg Carne, *Submission 4,* p. 7.

Commonwealth of Australia, and those which both do, and do not, involve the direct or indirect application of the use of force'.[64]

3.51 Responding to this matter in its supplementary submission, the Attorney-General's Department noted that the scope of military operations are limited by several requirements of the IS Act, including section 9 and subsections 11(1) and 11(2).[65]

'Targeted killings'

3.52 Drawing on media reporting, several submitters raised the issue of 'targeted killings' being authorised by the IS Act.[66] For example, while the Gilbert + Tobin Centre for Public Law accepted that there are reasons to improve cooperation between ASIS and the ADF, the Centre raised concerns about the possibility that increased cooperation could lead to the targeted killings of Australian citizens fighting in Iraq and Syria:

> Such killings raise significant and difficult questions of domestic policy, human rights and international law, and in the absence of greater parliamentary and public debate about these matters, this should not be facilitated by this Bill.[67]

3.53 The NSW Council for Civil Liberties and Muslim Legal Network (NSW) also expressed concern that the amendments would allow ASIS to be complicit 'in the targeted killings of Australian citizens who have not been charged or convicted of a criminal offence', and called for clarity on the need for this provision.[68]

3.54 Both ASIS and the Attorney-General's Department commented on this issue. ASIS told the Committee:

> Importantly, the proposed amendments do not expand the functions of ASIS or the other ISA agencies. Nor do they change the current limitation on ASIS under subsection 6(4) of the ISA …
>
> What is changed is the means by which the Foreign Minister, as the Minister responsible for ASIS, is able to authorise ASIS to undertake activities relating to Australian persons in accordance

64 Dr Greg Carne, *Submission 4,* p. 7.

65 Attorney-General's Department, *Supplementary Submission 5.1,* pp. 28–29.

66 Dr A J Wood, *Submission 11,* p. [3]; Senator David Leyonhjelm, *Submission 15,* p. [3]; Mrs Shelly, *Committee Hansard,* Canberra, 13 November 2014, pp. 18–19.

67 Gilbert + Tobin Centre for Public Law, *Submission 1,* p. 1.

68 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7,* pp. 14–15.

> with a direction under subsection 8(1) of the ISA to provide assistance to the ADF in support of military operations.[69]

3.55 Similarly:

> The proposed amendments will not change the role of ASIS in a way that may enable ASIS to kill or use violence against people, or to facilitate so-called 'targeted killings'.[70]

3.56 Both ASIS and the Attorney-General's Department went on to note that:

> What the ADF can do with intelligence provided by ASIS, including the legality of any use of force exercised in reliance on intelligence provided by ASIS, is governed by the ADF's Rules of Engagement. These rules are developed in consultation with the Office of International Law within the Attorney-General's Department, to ensure their consistency with international law, including international humanitarian law.[71]

3.57 In issuing an authorisation, the Minister must be satisfied of a number of criteria under subsections 9(1) and 9(1A) as well as the limitations on agencies functions and activities outlined in sections 11 and 12 of the IS Act.[72]

3.58 While it raised no concerns about making it an explicit statutory function of ASIS to provide assistance to ADF in support of military operations, the Law Council of Australia argued that there is currently an ambiguity under the IS Act, 'which requires an amendment to make it clear that nothing in the Act permits torture in any form.'[73]

3.59 The NSW Council for Civil Liberties and Muslim Legal Network (NSW) expressed further concerns about the sharing of intelligence with 'friendly foreign states' and the use of that information in their military operations.[74] In response, the Attorney-General's Department highlighted that the sharing of intelligence is governed and limited by section 13 of the

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69 Australian Secret Intelligence Service, *Submission 17,* p. [2]. Specifically, the Minister would be able to provide an authorisation in respect of a class of Australian persons rather than being limited to providing an authorisation for specified individuals.

70 Attorney-General's Department, *Supplementary Submission 5.1,* p. 20. The Department noted that the Australian Government does not use the term 'targeted killings'. See also Australian Secret Intelligence Service, *Submission 17,* p. [7].

71 Attorney-General's Department, *Supplementary Submission 5.1,* p. 20; Australian Secret Intelligence Service, *Submission 17,* p. [7].

72 Attorney-General's Department, *Submission 5,* p. 25.

73 Law Council of Australia, *Submission 16*, p. 17.

74 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7,* pp. 14–15.

IS Act and that the communication of information concerning an Australian person can only be done in accordance with Privacy Rules made by the Minister under section 15. The Department considered that existing provisions under section 13 make it unnecessary to place further limitations on the circumstances in which intelligence can be shared.[75]

Acts Interpretation Act 1901

3.60 It became apparent during the inquiry that the number of Ministers that may issue an emergency authorisation is larger than originally envisaged. Evidence provided by the IGIS suggested that, consistent with the *Acts Interpretation Act 1901,* the term 'responsible minister' could include any of the Ministers within the portfolio in which an IS Act agency is located; that is, the senior portfolio minister and any junior ministers or parliamentary secretaries. The IGIS indicated her understanding that this arrangement would apply to sections 9A, 9B and 9C.[76] This was corroborated during the hearing by departmental representatives.[77]

3.61 However while acknowledging this interpretation, the Attorney-General's Department also stated that:

> There are, in AGD and agencies' views, a number of characteristics of both the text and wider context of the relevant emergency authorisation provisions that could be taken to—and were intended to—evince a contrary intention. (That is, an intention to limit the responsible Minister to the single, senior portfolio Minister who in practice is responsible for the relevant agency—being the Foreign Affairs Minister in the case of ASIS, and the Defence Minister in the case of AGO and ASD.)[78]

3.62 The Australian Secret Intelligence Service also commented that, consistent with existing practice, 'the intention is that emergency authorisations would be sought from the senior Ministers.'[79]

75 Attorney-General's Department, *Supplementary Submission 5.1,* p. 29.

76 Inspector-General of Intelligence and Security, *Submission 12,* p. 7.

77 Ms Jamie Lowe, Attorney-General's Department, *Committee Hansard,* Canberra, 13 November 2014, pp. 37–38.

78 Attorney-General's Department, *Supplementary Submission 5.1,* p. 12.

79 Australian Secret Intelligence Service, *Submission 17,* p. [7].

Committee comment

3.63 The Committee notes that the proposed amendments to the IS Act were not identified in time to be included with the amendments in the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.[80] The amendments have also been proposed in response to recent operational issues. The relevant IS Act agencies briefed the Committee on these matters.

3.64 The Committee also notes that the IGIS has indicated that the *Inspector-General of Intelligence and Security Act 1986* provides her with sufficient authority to oversight the intelligence agencies under the proposed amendments to the IS Act.[81]

3.65 The Committee supports the proposed amendments to the IS Act to explicitly provide for ASIS support to ADF military operations and to enable ASIS to support these operations with greater agility. The Committee recognises that the situation in Iraq, where it is known that there are a large number of Australians either fighting for or providing support to terrorist organisations, has significant implications for the ADF.

3.66 The Committee acknowledges the concerns raised by some submitters that the proposed amendments will facilitate so-called 'targeted killings'. The Committee does not accept this evidence, noting that the proposed amendments do not change the role of ASIS in any way that would enable ASIS to kill, use violence against people, or participate in so-called 'targeted killings'. The Committee also notes that the ADF must abide by its Rules of Engagement at all times during its overseas engagements.

3.67 The Committee also received evidence that suggested an ambiguity exists in the IS Act that may permit torture.[82] While the Committee does not accept this evidence, the Committee considers the Explanatory Memorandum should be amended to make it explicit that the *Intelligence Services Act 2001* does not in any way permit torture.

Class of Australian persons

3.68 During the hearing, the Committee sought additional clarification as to how the term 'class of Australian persons' would be defined. The Committee acknowledges the information provided by the Attorney-

80 CTLA Bill, *Explanatory Memorandum*, p. 2.

81 Inspector-General of Intelligence and Security, *Submission 12,* p. 3.

82 Law Council of Australia, *Submission 16,* p. 17.

General's Department and ASIO to clarify this matter, including the Department's comment that:

> AGD and agencies are of the view that it would not be appropriate to either define the term 'class' for the purpose of class authorisations issued under section 9, or to otherwise impose further statutory limitations on the classes of persons in relation to whom Ministerial authorisations can be issued.
>
> The intention of the proposed class authorisation amendments (in relation to ASIS assistance to the ADF) is not to expand or alter, in any way, the existing Ministerial authorisation criteria for activities undertaken in relation to individual Australian persons. Rather, the intention is simply to replicate them in relation to classes of Australian persons, so that identical requirements apply to the issuing of class authorisations as to individual authorisations. Attempting to impose further requirements for class authorisations under section 9(1) or 9(1A) carries a significant risk of either expanding or limiting the authorisation grounds, which could undermine or frustrate the policy intent.[83]

3.69 The Committee recognises that the power to issue ministerial authorisations in relation to a class of Australian persons will provide operational benefits to ASIS and enable it to provide more effective assistance to the ADF in support of military operations. Similarly, there are operational benefits to the Attorney-General being empowered to provide agreement in relation to a class of Australian persons.

3.70 The limitations upon classes of Australian persons to whom the minister may issue authorisations—outlined in detail earlier—and particularly the requirement that a class be linked to the 'activity test' in subparagraph 9(1A)(a) of the IS Act, should ensure that a class cannot be defined on the basis of racial or religious features, or geographical location.

3.71 The Committee considers, however, that to provide more guidance to the public, the Explanatory Memorandum should be amended to include further information about how a class of Australian persons may be defined, and importantly, how it will not be defined.

3.72 The Explanatory Memorandum should also make it clear that any Australian person included in a specified class of Australian persons agreed to by the Attorney-General must pose a threat to security as defined by the *Australian Security Intelligence Organisation Act 1979*.

83 Attorney-General's Department, *Supplementary Submission 5.1,* p. 8.

Recommendation 7

The Committee recommends that the Explanatory Memorandum to the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to provide further information about how a class of Australian persons will be defined.

The Committee further recommends that the Explanatory Memorandum be amended to make it clearer that any Australian person included in a specified class of Australian persons agreed to by the Attorney-General, must be involved in an activity or activities that pose a threat to security as defined by the *Australian Security Intelligence Organisation Act 1979*.

Oral authorisations

3.73 The Committee accepts the rationale for providing Ministers the ability to issue oral authorisations. The Committee considers, however, that the power for Ministers to issue an oral authorisation represents a substantial change to the ministerial authorisations regime, and that all oral authorisations should be subject to close oversight by the Inspector-General of Intelligence and Security.

Recommendation 8

The Committee recommends that, subject to passage of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, the Inspector-General of Intelligence and Security provide close oversight of:

- **all ministerial authorisations given orally under proposed subsection 9A(2) of the *Intelligence Services Act 2001*, and**
- **all oral agreements provided by the Attorney-General under the proposed amendments to paragraph 9(1A)(b) of the *Intelligence Services Act 2001*.**

Emergency authorisations by agency head

3.74 The Committee accepts that authorisation by agency heads under proposed section 9B is likely to occur only in exceptional circumstances, and notes the IGIS's statement that there are only a small number of cases where the existing provisions for Ministers to give an emergency

declaration have been relied upon.[84] Further, in relation to the Attorney-General's agreement, the Committee accepts that situations could arise where an authorisation could not proceed because the Attorney-General's agreement was unable to be obtained.

3.75 The Committee is of the view, however, that the principle of Ministerial responsibility and accountability is an important principle that should not be discarded. That said, the Committee received evidence in private briefings of situations, albeit rare, where agencies may be unable to contact Ministers. In such circumstances, the Committee considers it is preferable that the responsibility for issuing an authorisation be delegated to an agency head with the relevant operational knowledge and expertise, than to a junior minister or parliamentary secretary who may not have day-to-day responsibility for, or background in, national security or intelligence-related matters.

3.76 Notwithstanding this, the Committee remains firmly of the view that there is a responsibility on the government to ensure that appropriate practical arrangements are in place to facilitate Ministerial availability wherever possible.

3.77 While noting that agency heads have an obligation to inform the Minister as soon as practicable, and not later than 48 hours, of the issuing of an authorisation by an agency head, and acknowledging that this is subject to IGIS oversight, the Committee is concerned about the possible circumstances in which a Minister may be unaware for as long as 48 hours that an authorisation has been issued. The Committee considers that this is an unacceptable timeframe. The Committee accepts that it may not be immediately practicable to provide the Minister with the documentation required by paragraph 9B(5). However, given that this is a significant extension of an agency head's powers, the Committee believes that it is imperative that the relevant Minister be notified of the authorisation in a shorter timeframe. Consistent with arrangements proposed in the Bill, complete documentation required for the notification process should then be provided as soon as practicable and within 48 hours.

84 Inspector-General of Intelligence and Security, *Submission 12,* p. 6.

Recommendation 9

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to require an agency head to notify the relevant responsible Minister of an authorisation given by the agency head under proposed section 9B of the *Intelligence Services Act 2001* within eight hours.

Copies of the authorisation and other documents should then be provided to the Minister and the Inspector-General of Intelligence and Security as outlined in proposed subsections 9B(5) and 9B(6) of the *Intelligence Services Act 2001*.

3.78 Further, the Committee considers that all authorisations that are issued by an agency head should be subject to close oversight by the IGIS and that this Committee should be informed by the IGIS in each circumstance. In this regard, the Committee is reassured by the IGIS's statement that she would review the authorisations in those cases.[85] The Committee notes the IGIS's comment that:

> It is my experience that, when circumstances occur very rarely or are very uncommon or are an emergency or are exceptional circumstances, agencies pay particular attention to do everything correctly. I would expect these would be extraordinarily rare. I would pay very close attention, but, notwithstanding that, they would in any event make sure that they satisfied all the tests correctly. As long as it were extremely rare, I would not have concerns. If it became commonplace, obviously that would be a problem.[86]

3.79 The Committee will report on this matter in its annual review of administration and expenditure of the Australian intelligence agencies.

85 Dr Vivienne Thom, Inspector-General of Intelligence and Security, *Committee Hansard,* Canberra, 13 November 2014, p. 6; See also Inspector-General of Intelligence and Security, *Submission 12,* p. 6.

86 Dr Thom, *Committee Hansard,* 13 November 2014, p. 7.

Recommendation 10

The Committee recommends that, subject to passage of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, the Inspector-General of Intelligence and Security be required to oversight within 30 days all emergency authorisations given by agency heads under proposed section 9B of the *Intelligence Services Act 2001.*

Recommendation 11

The Committee recommends that the Inspector-General of Intelligence and Security be required to notify the Parliamentary Joint Committee on Intelligence and Security within 30 days of all emergency authorisations issued under proposed section 9B and inform the Committee whether the *Intelligence Services Act 2001* was fully complied with in the issuing of the authorisation.

Agreement of Attorney-General or Director-General of Security

3.80 Section 9C of the Bill provides that in circumstances where the Attorney-General is not readily available or contactable, then an agency head must obtain the agreement of the Director-General of Security *'unless the agency head is satisfied that the Director-General of Security is not readily available or contactable'*. It is the Committee's strong view that the presumption should be against proceeding with an authorisation without the agreement of either the Attorney-General or the Director-General of Security in any but the most extreme circumstances—for example, when immediate action is necessary for the protection of lives.

3.81 Given the extraordinary nature of this power, the Committee considers that the Attorney-General should be informed within eight hours of any emergency authorisation that is issued without either his or her agreement or that of the Director-General of Security. The Committee also considers that the Attorney-General should be informed in any circumstance where the Director-General of Security has provided agreement.

Recommendation 12

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to require an agency head to notify the Attorney-General within eight hours of an emergency authorisation given:

- **with the agreement of the Director-General of Security, or**
- **without the agreement of either the Attorney-General or the Director-General of Security.**

Written advice should then be provided to the Attorney-General as soon as practicable and within 48 hours as outlined in proposed subsection 9C(5) of the *Intelligence Services Act 2001*.

3.82 The Committee considers that the IGIS should be required to examine and inform the Committee of every instance in which the agreement of the Director-General of Security was provided.

3.83 Further, the IGIS should be required to examine and inform the Committee of any instance in which the agreement of the Attorney-General or Director-General of Security was required but not obtainable, and authorisation was given by either a Minister or agency head. The Committee understands the circumstances in which this power may be exercised will be extremely rare. If the Committee were to observe this power being used more than in only the most extreme circumstances, then its strong view would be that the power should be removed.

3.84 The Committee will also report on this matter in its review of administration and expenditure of the Australian intelligence agencies.

Recommendation 13

The Committee recommends that, subject to passage of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, the Inspector-General of Intelligence and Security be required to oversight within 30 days, all instances in which agreement to an emergency authorisation from the Attorney-General was required and not obtainable, and instead:

- **authorisation was given with the agreement of the Director-General of Security, or**
- **authorisation was given without the agreement of either the Attorney-General or the Director-General of Security.**

Recommendation 14

The Committee recommends that the Inspector-General of Intelligence and Security be required to notify the Parliamentary Joint Committee on Intelligence and Security within 30 days of all instances in which agreement to an emergency authorisation from the Attorney-General was required and not obtainable, and instead:

- **authorisation was given with the agreement of the Director-General of Security, or**
- **authorisation was given without the agreement of either the Attorney-General or the Director-General of Security**

and inform the Committee whether the *Intelligence Services Act 2001* was fully complied with in the issuing of the authorisation.

Unintended consequences

3.85 The Committee notes the unintended consequences that have been identified in consideration of provisions of the IS Act when read with the *Acts Interpretation Act 1901*. The Committee agrees that the IS Act should be amended as necessary to provide clarity on this point. While the Committee sees benefit in having a larger pool of Ministers who can provide authorisations, as it would 'give strongest effect to a policy preference that authorisation decisions should, almost invariably, if not

exclusively, be made by Ministers',[87] the Committee also take the view that such authorisations should be issued at the most senior level.

3.86 As stated above, the Committee does not consider it appropriate that junior ministers and parliamentary secretaries without day-to-day responsibility for, or background in, national security or intelligence-related matters be called upon to make an emergency authorisation decision. The Committee also notes the potential operational implications that may arise in a time critical circumstance while an agency head attempts to contact a large number of ministers.

Recommendation 15

The Committee recommends that the *Intelligence Services Act 2001* be amended to clarify that 'responsible minister' refers only to the Prime Minister, Defence Minister, Foreign Minister, and Attorney-General, or those acting in those positions.

87 Attorney-General's Department, *Supplementary Submission 5.1,* p. 13.

Concluding comment

3.87 The recommendations the Committee has made in its report are intended to further strengthen the provisions of the Bill, including its safeguards, transparency and oversight mechanisms. The Committee commends its recommendations to the Parliament and recommends the Bill be passed.

Recommendation 16

The Committee commends its recommendations to the Parliament and recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be passed.

Dan Tehan MP
Chair

November 2014

A

Appendix A – List of Submissions and Exhibit

Submissions

1. Gilbert + Tobin Centre of Public Law
   1.1 Supplementary
2. Amnesty International Australia
3. Joint media organisations
4. Dr Greg Carne
5. Attorney-General's Department
   5.1 Supplementary
   5.2 Supplementary
6. Australian Lawyers for Human Rights
7. New South Wales Council for Civil Liberties & the Muslim Legal Network (NSW)
8. Australian Federal Police
9. Mr Bruce Baer Arnold
10. Australian Security Intelligence Organisation
11. Dr A J Wood
12. Inspector-General of Intelligence and Security
13. Australian Privacy Foundation
14. Australian Human Rights Commission
15. Senator David Leyonhjelm
16. Law Council of Australia
17. Australian Secret Intelligence Service

Exhibit

1. Australia-New Zealand Counter-Terrorism Committee
   ANZCTC Context Statement, August 2014.

B

Appendix B – Witnesses appearing at public hearing

Thursday, 13 November 2014 – Canberra, ACT

Attorney-General's Department

Ms Jamie Lowe, First Assistant Secretary

Ms Karen Horsfall, A/g Assistant Secretary

Ms Annette Willing, National Security Legal Adviser

Ms Christina Raymond, Senior Legal Officer

Australian Federal Police

Assistant Commissioner Neil Gaughan

Mr Tony Alderman, Coordinator Legislation Program

Australian Human Rights Commission

Professor Gillian Triggs, President

Mr Tim Wilson, Human Rights Commissioner

Ms Bronwyn Byrnes, Lawyer

Australian Security Intelligence Organisation

Ms Kerri Hartland, Deputy Director-General

Australian Signals Directorate

Mrs Heidi Wilson, Special Counsel

Gilbert + Tobin Centre of Public Law

Professor George Williams

Mr Keiran Hardy

Muslim Legal Network (NSW) and New South Wales Council for Civil Liberties

Mr Stephen Blanks, President, New South Wales Council for Civil Liberties

Mrs Lydia Shelly, Solicitor, Muslim Legal Network (NSW)

Office of the Inspector-General of Intelligence and Security

Dr Vivienne Thom, Inspector-General of Intelligence and Security

Mr Jake Blight, Assistant Inspector-General of Intelligence and Security