2

Applying for control orders

2.1 This chapter discusses provisions of the Bill relating primarily to the processes involved in applying for, varying or extending a control order:

- Schedule 2 amends the Criminal Code to allow a control order to be made in relation to a person aged 14 or 15 years,
- Schedule 4 removes the Family Court of Australia from the definition of 'issuing court' for the purpose of a control order,
- Schedule 15 amends the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) to enable a court to make three new types of orders for the protection of sensitive information in control order proceedings, and
- Schedule 16 amends the NSI Act to:
  - ⇒ allow a court to make an order that is inconsistent with the National Security Information (Criminal and Civil Proceedings) Regulation 2015 (NSI Regulation) if the Attorney-General has applied for the order, and
  - ⇒ ensure the NSI Regulation continues to apply where an order is made under sections 22 or 38B to the extent that the NSI Regulation relates to matters not included in that order.

2.2 Schedules within the Bill that go to the monitoring of a person subject to a control order are discussed in Chapter 3.

Control orders for young people (Schedule 2)

The existing control order regime

2.3 The control order regime was introduced in December 2005 through the *Anti-Terrorism Act (No 2) 2005,* which inserted *Division 104–Control Orders* into the Criminal Code. Division 104 remained substantially unamended from 2005 until late 2014.

2.4 Control orders may be sought by the AFP to impose obligations, prohibitions and restrictions on a person for the purpose of:

(a) protecting the public from a terrorist act,

(b) preventing the provision of support for or the facilitation of a terrorist act, and

(c) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.[1]

2.5 The control order process consists of two stages: the interim control order and the confirmed control order.

2.6 Subject to the Attorney-General's consent, a senior member of the AFP may apply to an issuing court for an interim control order. Section 100.1 of the Criminal Code defines an 'issuing court' as the Federal Court of Australia, Family Court of Australia or Federal Circuit Court of Australia.

2.7 The issuing court may make the interim control order if it is satisfied 'on the balance of probabilities' that the requirements outlined in paragraphs 104.4(1)(a) to 104.4(1)(c) of the Criminal Code have been met and that each of the obligations, prohibitions and restrictions imposed by the control order are 'reasonably necessary, and reasonably appropriate and adapted' to meet the purpose set out above.[2]

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1 *Criminal Code Act 1995* (Criminal Code), Section 104.1. This section was amended by the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014*.

2 Paragraphs 104.4(1)(a)–(c) state:

(a) the senior AFP member has requested it in accordance with section 104.3; and
(b) the court has received and considered such further information (if any) as the court requires; and
(c) the court is satisfied on the balance of probabilities:
  (i) that making the order would substantially assist in preventing a terrorist act; or
  (ii) that the person has provided training to, received training from or participated in training with a listed terrorist organisation; or
  (iii) that the person has engaged in a hostile activity in a foreign country; or

2.8 An interim control order application is generally heard on an *ex parte* basis and is conducted as an interlocutory proceeding.[3] Accordingly, the issuing court will consider whether to grant an interim control order based on the information put to it by the AFP. In urgent circumstances, interim control orders may be requested from an issuing court by electronic means or in person if a senior AFP member considers it necessary.[4] In such circumstances, the Attorney-General's consent is not required prior to such a request being made to the issuing court, however, if his or her consent is not obtained within eight hours of the request, the interim control order ceases to be in force.[5] These processes are in place to facilitate the timely issuing of control orders, without undue delay, on persons whose conduct constitutes a serious threat to public safety.

2.9 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 confirmation hearing is generally a contested hearing where an issuing court may more fully address the matters relevant to the confirming (with or without variation), voiding and revoking of a control order in respect of an individual. In determining whether to confirm the control order, the issuing court must take into account the original request for the interim control order and the evidence adduced and submissions made by the parties to the proceeding.[6]

2.10 A confirmed control order can last up to 12 months (or three months if the person is aged between 16 and 18) from the day after the interim control order is made, and successive orders may be issued.[7] A control order cannot be made in relation to a person who is under the age of 16.[8]

(iv) that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation (within the meaning of subsection 102.1(1)) or a terrorist act (within the meaning of section 100.1); or

(v) that the person has been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence (within the meaning of subsection 3(1) of the Crimes Act 1914); or

(vi) that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or

(vii) that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country.

3 Criminal Code, section 104.28A.

4 Criminal Code, sections 104.6 and 104.8.

5 Criminal Code, section 104.10.

6 Criminal Code, section 104.14.

7 Criminal Code, section 104.5.

8 Criminal Code, subsection 104.28(1).

2.11 The terms of a control order may, for example, prohibit a person from being in 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 specified times and places.[9] Contravening the conditions of a control order is a criminal offence carrying a maximum penalty of five years imprisonment.[10]

2.12 Amendments to the control order regime were considered by the Committee during its inquiries into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 and Counter-Terrorism Legislation Amendment Bill (No. 1) 2014. The Committee reported on these Bills on 17 October and 20 November 2014 respectively.[11]

Proposed amendments

2.13 Schedule 2 will amend the control order regime so that control orders may be issued in respect of a young person who is 14 or 15 years of age.

2.14 The Explanatory Memorandum states:

> These amendments respond to incidents in Australia and overseas that demonstrate children as young as 14 years of age are organising and participating in terrorism related conduct. With school-age students being radicalised and engaging in radicalising others and capable of participating in activity which poses a threat to national security, the age limit of 16 years is no longer sufficient for control orders to prevent terrorist activity.[12]

2.15 In his second reading speech, the Attorney-General, Senator the Hon George Brandis QC explained:

> Recent counter terrorism operations have unfortunately shown that people as young as 14 years of age can pose a significant risk to national security through their involvement in planning and supporting terrorist acts.
>
> In this context, it is important that our law enforcement and national security agencies are well equipped to respond to, and

9 Criminal Code, subsection 104.5(3).

10 Criminal Code, section 104.27.

11 The Committee's reports may be accessed at its website < http://www.aph.gov.au/pjcis>.

12 Explanatory Memorandum, p. 42.

> prevent, terrorist acts. This is the case even where the threats are posed by people under the age of 18 years.[13]

2.16 In justifying the reduced age at which a control order may be made, the Attorney-General's Department noted that while the control order regime in its current form only applies to persons 16 years of age and older, in Australia, 'a person as young as 10 years of age can be prosecuted for a criminal offence, including a terrorism offence'.[14]

2.17 The proposed amendments will include enhanced protections for young persons between the ages of 14 and 17 and will maintain the existing safeguards embedded within the regime.

2.18 In summary, the schedule includes the following amendments:

- The senior AFP member seeking the Attorney-General's consent for an interim control order in relation to a person under 18 years of age must give the person's age to the Attorney-General.[15]
- Where a person is aged between 14 and 17 years, the issuing court is required to take into account 'the best interests' of the person when considering whether to impose each of the obligations, prohibitions and restrictions sought. Proposed subsection 104.4(2A) lists the matters the court must take into account:
  - ⇒ age, maturity, sex and background (including lifestyle, culture and traditions) of the person,
  - ⇒ their physical and mental health,
  - ⇒ the benefit to the person of having a meaningful relationship with his or her family and friends,
  - ⇒ the right of the person to receive an education,
  - ⇒ the right of the person to practice his or her religion, and
  - ⇒ any other matters the issuing court considers relevant.

  The Explanatory Memorandum states that this list is adapted from the *Family Law Act 1975* (the Family Law Act) and is consistent with Australia's obligations under Article 3 of the *Convention on the Rights of the Child*.[16]

13 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 12 November 2015, p. 8426.

14 Attorney-General's Department, *Submission 9*, p. 5.

15 Proposed paragraph 104.2(3)(ba).

16 Explanatory Memorandum, pp. 10, 43–44.

- Where an issuing court makes an interim control order for a person 14 to 17 years of age, it must appoint a 'court appointed advocate' as soon as practicable to represent the young person's best interests in matters relating to the interim control order and any confirmation, variation or revocation of that order.[17] However, the court appointed advocate is not the young person's legal representative and is not obliged to act on the young person's instructions.[18] Pursuant to proposed subsection 104.28AA(2), the role of the court appointed advocate is to:
  - ⇒ ensure, as far as practicable, that the person understands the information in the control order,
  - ⇒ form an independent view as to what is in the best interests of the person,
  - ⇒ act in what the advocate believes to be the person's best interests,
  - ⇒ suggest to the court the adoption of a course of action which is in the best interests of the person,
  - ⇒ ensure any views expressed by the person in relation to the control order are fully put before an issuing court, and
  - ⇒ endeavour to minimise any distress to the person.

  The Explanatory Memorandum notes that this section is modelled on the Family Law Act.[19]
- An AFP member must, as soon as practicable after an interim control order is made in relation to a young person, serve a copy of the order personally on the person's court appointed advocate and 'take reasonable steps to serve a copy of the order personally on at least one parent or guardian of the person'.[20]

2.19 The amendments proposed by Schedule 2 would apply to a control order requested after the commencement of this section, whether the conduct in relation to which the request is made occurs before or after commencement.[21]

17 Proposed section 104.28AA.
18 Proposed subsection 104.28AA(3).
19 Explanatory Memorandum, p. 17.
20 Proposed subsection 104.12(6).
21 Schedule 7 to the Bill.

Matters raised in evidence

2.20 The submissions received raised four principal concerns regarding the proposed lowering of the age limit for control orders. These concerns focused on:

- the justification for the proposed measure,
- whether the best interests of the young person are 'a primary consideration',
- the role of the court appointed advocate, and
- requirements relating to the service of control orders on parents or guardians.

The justification for lowering the age

2.21 Some submitters questioned the need for the proposed amendments and whether they sought to achieve a legitimate objective in a reasonable, necessary and proportionate manner. For example, the Australian Human Rights Commission submitted:

> The Commission is not aware of what evidence there is to support these claims [in the Explanatory Memorandum]. However, it considers that they are, on their own, insufficient to demonstrate that allowing control orders to be granted for children between 14 and 15 would be necessary and proportionate …
>
> Without such evidence, it is not possible to conclude that the proposed amendment is necessary or proportionate to a legitimate objective. The Commission urges the Committee to consider carefully whether there is cogent evidence that supports the assertion that the proposed lowering of the age limit for control orders would significantly mitigate a real risk of terrorism.[22]

2.22 In explaining the necessity of the proposed lowering of the age limit for control orders, the AFP submitted:

> Recent events have clearly demonstrated the vulnerability of young people to ideologies espousing violent extremism. Law enforcement and intelligence partners have observed both the attraction of terrorist groups to minors, as well as the 'grooming' of minors by adults. With the internet providing easy access to

22 Australian Human Rights Commission, *Submission 5*, pp. 9–10. See also, Law Council of Australia, *Submission 6*, p. 7; Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: thirty-second report of the 44th Parliament*, 1 December 2015, p. 13.

> propaganda and recruiters, both domestic and international, through social media, young people are at risk of falling prey to terrorist groups who promise a sense of purpose, belonging and excitement. Worryingly, law enforcement is also observing that adults are increasingly looking to use young people to evade law enforcement surveillance and/or attention.[23]

2.23 The Gilbert + Tobin Centre of Public Law accepted the evolving nature of the terrorism threat and stated:

> We are in basic agreement with the proposal to lower the age threshold. It is true that there exists clear evidence of young teenagers being involved in terrorism-related activities.[24]

2.24 In its report on the Bill, the Parliamentary Joint Committee on Human Rights similarly acknowledged that 'there have been significant recent developments in the counter-terrorism space in recent times' and noted the increasing use of control orders by law enforcement agencies.[25]

2.25 In contrast, several submitters opposed the proposed amendments, noting the potential social and developmental impacts of imposing control orders on persons as young as 14 years of age. For example, the Muslim Legal Network (NSW) submitted that:

> It is, with respect, counterproductive and misguided to form the view that we will be kept safe from such radicalisation by meaningfully restricting the liberty of a child without sufficient evidence to charge him or her … The reality is, the reduction of any threat that radicalised children may bring, goes hand in hand with their rehabilitation and connection to community and greater society.[26]

2.26 The AFP advanced an alternative view, submitting that the control order regime in fact provides one avenue through which the aims of rehabilitation and connection to community can be furthered:

> [Control orders] give individuals who have engaged in conduct or activities of concern an opportunity to remain in the community and largely continue their ordinary lives (for example, in relation to their participation in schooling, work, and cultural or religious

23 Australian Federal Police, *Submission 3*, p. 7.

24 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 2.

25 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: thirty-second report of the 44th Parliament*, 1 December 2015, p. 11.

26 Muslim Legal Network (NSW), *Submission 11*, pp. 10–11. See also, Victorian Bar and the Criminal Bar Association of Victoria, *Submission 12*, p. 2; Joint councils for civil liberties, *Submission 17*, p. 4.

> practices), while requiring them to discontinue or minimise activities which may enable or drive them to participate in terrorist activity. Maintaining connection to society through participation in ordinary activities is of benefit to the individual, both in relation to their personal interests and from a remedial perspective.[27]

2.27 Furthermore, the AFP submitted that the control order regime addressed a pressing gap in the existing legislative framework by providing a channel through which young persons who are vulnerable to violent extremism may be managed prior to their conduct exposing them to the formal criminal justice system:

> Contact with the formal justice system can increase a person's sensitivity to factors that make them vulnerable to extremist ideology. Incarceration as a result of prosecution not only significantly curtails an individual's personal freedom, but may also increase a person's exposure to undesirable influences and risks further alienation from society. Where a person has already displayed susceptibility to ideologies promoting violent extremism, incarceration may, in some circumstances, be linked to further radicalisation …
>
> While early intervention through voluntary programs is ideal, it should be recognised that young people who are most susceptible to violent extremism are unlikely to participate in such programs of their own accord. Control orders fill a gap by allowing law enforcement to actively manage and divert those young persons who are of greatest concern and vulnerability before they reach the point where there is clear evidence that they have been involved in terrorist activity. They also encourage (but do not mandate) such persons to participate in counselling or education to assist them in the process of reforming their beliefs and behaviour.[28]

2.28 Assistant Commissioner Neil Gaughan of the AFP also noted recent operational experiences in the application of control orders:

> As the committee would be aware, control orders specifically prevent association between groups. There are a whole heap of other controls, but, from our perspective, that is the most effective control in place, because it prevents people from associating with those who are less desirable, if you like. Obviously, I cannot go into the specific control order, but I can say that with two of the control orders there has been a twofold change in behaviour:

27 Australian Federal Police, *Submission 3*, p. 7.

28 Australian Federal Police, *Submission 3*, p. 7.

> firstly, in that the persons are no longer associating with people that we would consider undesirable, and secondly, that those people appear—and again it is early days—to be going down a different path; that is, employment, listening to their family members, listening to what we call respectable members of the community. So, in our view, it has resulted in a change in their behaviour ...
>
> Usually with the control order we also put in one of the controls a requirement that the person that is the subject of the control order seek some level of guidance or counselling in relation to the path they are going down. That is why, as I said in the evidence I gave earlier, we have seen some changes in behaviour, probably due mainly to the fact that they have received some sort of different religious views and therefore have realised that the views they previously had are not the right ones.[29]

Best interests of the young person

2.29 Article 3 of the *Convention on the Rights of the Child* (CRC) states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2.30 The Australian Human Rights Commission, citing the UN Committee on the Rights of the Child, articulated how this balancing exercise is undertaken:

> [S]ince article 3, paragraph 1, covers a wide range of situations, the Committee recognizes the need for a degree of flexibility in its application. The best interests of the child – once assessed and determined – might conflict with other interests or rights (e.g. of other children, the public, parents, etc.). Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. The same must be done if the rights of other persons are in conflict with the child's best interests. If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have

29 Assistant Commissioner Neil Gaughan, *Committee Hansard*, Canberra, 14 December 2015, pp. 36–37.

> his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.[30]

2.31 The proposed amendments draw significantly on principles enshrined in the Family Law Act. However, unlike the Family Law Act, which states that the best interests of the child should be 'the paramount' consideration, the proposed amendments to the control order regime reflect a different prioritisation of the factors that take primacy. The Explanatory Memorandum explained:

> [T]he paramount consideration with respect to control orders is the safety and security of the community. Accordingly, rather than being a paramount consideration, the issuing court will be required to consider the child's best interests as a primary consideration.[31]

2.32 The Committee queried whether the concepts of a 'primary' and a 'paramount' consideration could legally coexist.[32] Professor Andrew Lynch of the Gilbert + Tobin Centre of Public Law explained:

> That is the hierarchy that is suggested by the explanatory memorandum actually. As we have said in the submission, it obviously makes sense. The whole purpose of the division is the prevention of terrorism. That is why the provisions exist, so that must be the paramount consideration, but it is not inconsistent with that to say that a primary consideration—something that the court is required to address very earnestly in making its decision—is the best interests of the child. I think that is what the bill is attempting to do.[33]

2.33 However, several submitters noted that despite the requirement in proposed subsection 104.4(2) that the issuing court consider the best interests of a person between 14 and 17 years of age when determining whether each of the obligations, prohibitions or restrictions of the control order is reasonably necessary, and reasonably appropriate and adapted, there is no express requirement making the best interests 'a primary

30 *General Comment 14 on the right of the child to have his or her bests interests taken as a primary consideration,* 2013, para [39]. Cited by the Australian Human Rights Commission, *Submission 5*, p. 11.

31 Explanatory Memorandum, p. 16.

32 See *Committee Hansard*, 14 December 2015, pp. 10, 21.

33 Professor Andrew Lynch, *Committee Hansard*, 14 December 2015, p. 21.

consideration' in accordance with the CRC.[34] For example, the Gilbert + Tobin Centre of Public Law stated:

> Although the specific aspects of 'best interests' are articulated, the Bill does *not* require the court to give these any particular (let alone 'primary') weight in its determination that each of the obligations, prohibitions and restrictions to be imposed on an adult person by the order is 'reasonably necessary, and reasonably appropriate and adapted'… the failure to accord any special weight to the [child's best interests] as a 'primary consideration' means that the Bill's purported solicitude for the interests of children is not borne out by the legislation.[35]

2.34 Similarly, the Law Council of Australia noted:

> [T]he proposed amendment does not require that the best interests of the child shall be a primary consideration. Rather, it simply requires the court to consider the person's best interests. A similar difficulty arises in relation to proposed paragraphs 104.24(2)(b) (relating to varying a control order). This is inconsistent with Article 3.1 of the CRC.[36]

2.35 The Gilbert + Tobin Centre of Public Law, the Law Council of Australia, the Australian Human Rights Commission and the joint councils for civil liberties recommended that the requirement that the best interests of the child be 'a primary consideration' be expressly enshrined in the legislation.[37] For example, in its supplementary submission, the Law Council of Australia proposed the following redraft:

> Paragraph 104.4(2)(b) of the Criminal Code Act 1995
>
> Omit all the words after 'adapted,', substitute:
>
> the court must take into account:
>
> (a) the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances); and

34 See Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 3; Australian Human Rights Commission, *Submission 5*, p. 14; Law Council of Australia, *Submission 6*, p. 9; Joint councils for civil liberties, *Submission 17*, pp. 7–8; Australian Lawyers for Human Rights, *Submission 4*, p. 5. See also, Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: thirty-second report of the 44th Parliament*, 1 December 2015, p. 14.

35 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 3.

36 Law Council of Australia, *Submission 6*, p. 9.

37 Professor Andrew Lynch, *Committee Hansard*, Canberra, 14 December 2015, p. 19; Law Council of Australia, *Submission 6*, p. 9; Australian Human Rights Commission, *Submission 5*, p. 14; Joint councils for civil liberties, *Submission 17*, p. 8.

(b) If the person is 14 to 17 years of age – the best interests of the child **as a primary (but not the sole) consideration**.[38]

2.36 The Australian Human Rights Commission went further and suggested that the best interests of the person should not only be 'a primary consideration' for determining whether each obligation, prohibition or restriction of the control order is reasonably necessary, and reasonably appropriate and adapted, but rather that it should be made an express requirement at all stages of proceedings associated with a control order (for instance, in the making, confirming or varying of a control order).[39]

2.37 In its supplementary submission, the Attorney-General's Department articulated its reasoning for not including express words stating that the best interests of the young person be 'a primary consideration'. The Department noted that while greater significance is given to the interests of the young person, the ultimate discretion as to the appropriate weight accorded to each competing consideration is a matter for the court:

> Given the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances), and if the person is 14 to 17 years of age — the best interests of the person, are both listed as factors the court must consider, it is clear that such considerations are important and hold relevance over the other possible considerations. This is why the Explanatory Memorandum referred to the best interests of the person as a 'primary consideration'. However, it is appropriate that the court has the ability to consider any possible relevant factor and determine what weight it should be given.[40]

2.38 In response to the recommendation of the Australian Human Rights Commission, the Attorney-General's Department noted:

> The best interests of the child should not be a consideration when determining whether on a balance of probabilities the making of the order would substantially assist in preventing a terrorist attack, or any of the other matters listed in section 104.4(c) as that would fundamentally change the purpose of the test. This is why the Explanatory Memorandum referred to the safety and security of the community as the paramount consideration.[41]

38 Law Council of Australia, *Submission 6.1*, p. 2. Emphasis added.

39 Australian Human Rights Commission, *Submission 5*, p. 14. See also, Australian Human Rights Commission, *Submission 5.1*, p. 3.

40 Attorney-General's Department, *Submission 9.1*, p. 7.

41 Attorney-General's Department, *Submission 9.1*, p. 7.

Court appointed advocate

2.39 To enhance the protection accorded to young persons, the proposed amendments create the new role of the 'court appointed advocate'. Where the issuing court makes an interim control order in relation to a person between 14 and 17 years of age, the court must, as soon as practicable, make an order appointing a lawyer to be the court appointed advocate in relation to the control order, and any proceedings relating to the confirmation of the control order, or the variation or revocation of the confirmed control order.

2.40 The functions of the court appointed advocate are outlined in proposed subsection 104.28AA(2). Paragraph 104.28AA(3)(a) highlights that the court appointed advocate is not the person's legal representative. The proposed amendments do not impact upon the young person's ability to obtain legal representation.

2.41 While there was broad agreement about the desirability of having such a role, submitters expressed concern about:

- the potential tensions that may arise between the court appointed advocate and the young person's legal representation,
- the lack of clarity around what qualifications or experience may be required to ensure the court appointed advocate is capable of determining what is in the young person's best interests,
- the potential inconsistencies relating to the various disclosure obligations the court appointed advocate is subject to, and
- the ability of the court appointed advocate to disclose information to an issuing court against the wishes of the young person.

Interaction with the young person's legal representative

2.42 The Gilbert + Tobin Centre of Public Law noted, in reference to the tensions that may arise between the court appointed advocate and the young person's legal representative, that:

> It is not difficult to imagine the likely tensions between these two advocates in seeking to fulfil their respective functions. For example, subsections 104.28AA(5) and (6) permit the [court appointed advocate] to disclose information communicated to him or her by the child if he or she believes that to be in the child's best interests even when it is against the wishes of the child. It may be anticipated that the child's own legal representative would simply

> advise him or her to not communicate with the [court appointed advocate] as a way of avoiding the prospect of such disclosure.[42]

2.43 Professor Andrew Lynch of Gilbert + Tobin elaborated on this point:

> One of the examples we have given is where the child's own representative, given the disclosure possibilities with the court appointed advocate, advises their client to simply not talk to them. That is what I would imagine I would do if I were representing a child and wanted to control their interests and their wishes in a proceeding. I would say, 'This court appointed advocate is going to ask questions and you do not have to talk to that person because anything you say may be disclosed to the court'. I think there is a problem around double-up … you have two lawyers operating in the space of the child.[43]

Qualifications and experience of the court appointed advocate

2.44 Proposed paragraph 104.28AA(2)(b) states that the court appointed advocate must 'form an independent view, based on the evidence available to the advocate, of what is in the best interests of the person'.

2.45 Some submitters suggested that the ability of the court appointed advocate to determine what is in the best interests of the young person could not be assessed without further information being provided as to what specific qualifications or experience such an advocate would possess in order to discharge this duty effectively.

2.46 The Gilbert + Tobin Centre of Public Law reasoned that while the requirement for the court appointed advocate to form an independent view as to the best interests of the young person is adapted from the Family Law Act:

> Under [the Family Law Act], the independent children's lawyer is presumably an advocate experienced in family law matters and one whose task is made considerably easier by the fact that the child's best interests are not being placed in competition with national security priorities. Additionally, s 68M of the [Family Law Act] (and as further elaborated upon by the Guidelines for Independent Children's Lawyers (Guidelines)) provides for the independent children's lawyer to obtain a report 'about the child' from a family consultant or expert … By contrast, it is unclear

42 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 5.

43 Professor Andrew Lynch, *Committee Hansard*, 14 December 2015, p. 21.

> what 'evidence' the [court appointed advocate] is to base his or her independent view upon under s 104.28AA(2)(b). What qualifications or experience are necessary to equip the [court appointed advocate] personally to determine the child's best interests is unstated by the Bill.[44]

2.47 The Australian Human Rights Commission suggested that mandatory requirements be provided for in the Bill to ensure the court appointed advocate can adequately fulfil his or her function under proposed paragraph 104.28AA(2)(b). The Commission recommended that:

> A court appointed advocate should be required to possess relevant expertise in working with children and the development of the child.[45]

2.48 Similarly, in its report on the Bill, the Senate Standing Committee for the Scrutiny of Bills asked the Attorney-General for

> the justification for not providing more guidance about the qualifications of advocates and mechanisms designed to ensure their independence in the legislation.[46]

2.49 The Gilbert + Tobin Centre of Public Law recommended the alternative model of a 'court appointed child welfare officer' as a means of addressing the difficulties associated with the court appointed advocate. The role would be modelled on the Family Law Act which provides for a 'family consultant' who gives evidence by way of a report in proceedings where 'the care, welfare and development of a child who is under 18 is relevant'.[47] This would provide the issuing court with one further source of evidence that would be considered in determining the best interests of the young person.[48]

2.50 In its supplementary submission, the Attorney-General's Department noted the potential utility of allowing the court to be informed by experts in the field as to what may be in the best interests of the young person:

> [I]t may be possible to address the concerns raised in the submissions by amending the current role of the court appointed advocate and providing that the court may call for evidence from an expert (such as a child psychologist or community welfare

44 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 5.

45 Australian Human Rights Commission, *Submission 5*, p. 14.

46 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 13 of 2015*, 25 November 2015, p. 9.

47 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 5.

48 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 5.

> officer) concerning what is in the best interests of the young person.[49]

Disclosure obligations

2.51 The court appointed advocate would be subject to specific disclosure requirements. The court appointed advocate's powers and obligations with respect to the disclosure of information are variously outlined in subsections 104.28AA(2), (4), (5) and (6).

2.52 The Law Council of Australia noted the possibility of the court appointed advocate being subject to conflicting disclosure requirements. Specifically, proposed paragraph 104.28AA(2)(e) requires the court appointed advocate to 'ensure that any views expressed by the person in relation to the control order matters are fully put before an issuing court' while proposed subsections 104.28AA(3) and (4) respectively provide that the court appointed advocate is not compelled to act on the person's instructions and cannot be required to disclose any information that the person communicates to the advocate.[50] This leads to the possibility that despite having to express to the issuing court any views put forward by the young person, the court appointed advocate may ultimately choose not to. The Law Council of Australia recommended this potential inconsistency be remedied.[51]

2.53 In its supplementary submission, the Attorney-General's Department outlined how the two disclosure obligations may coexist without inconsistency. The Department explained:

> The distinction is between the use of the terms 'views' and 'information'. A young person's view is their position on a matter, while information could be anything communicated to the advocate. For example, the advocate may come to a view about what is in the best interests of the young person but despite holding that view the advocate would also be required to represent to the court the young person's view, even though the advocate does not believe that to be in the young person's best interests. The advocate would not, on the other hand, be required to provide to the court information revealed by the young person that informs either of those positions, but could do so if they thought it was in the interests of the young person, even if it was against the wishes of the young person.

49 Attorney-General's Department, *Submission 9.1*, p. 11.

50 Law Council of Australia, *Submission 6*, p. 10.

51 Law Council of Australia, *Submission 6*, p. 10.

> The purpose of the requirement that the young person's views must be put to the court is to ensure that even when the advocate disagrees with a young person's view, the young person still has the right to have that view heard by the court (as that might be a relevant consideration for the court).
>
> The purpose of subsections 104.28AA(4) and (5) is to allow the advocate to be an effective voice for the young person's best interests by allowing them to provide information to the court where it is in the young person's best interests, and to keep confidential information where it may not be in the young person's best interests for that information to be revealed.[52]

Acting against the wishes of a young person

2.54 Proposed subsection 104.28AA(5) provides that the court appointed advocate may disclose to the issuing court information the young person communicates to them if the advocate considers it to be in the best interests of the young person to disclose such information. Importantly, proposed subsection 104.28AA(6) allows the court appointed advocate to disclose this information to the issuing court even where it is against the wishes of the young person.

2.55 Several submissions expressed unease at the prospect of the court appointed advocate disclosing information to the issuing court against the wishes of the young person.

2.56 The Law Council of Australia stated:

> Where these proceedings are more akin to criminal rather than family proceedings, it is a real concern that an advocate is permitted to breach client confidentiality and disclose information that may incriminate the child. The proposed scheme would be prone to confusion on behalf of the child and increase the likelihood of an unintentional waiver of privilege or other rights of the child. This is a serious infringement of the child's right to silence and clearly not in the best interests of the child. The court appointed advocate should therefore not be permitted to disclose information against the wishes of the child.[53]

2.57 More critically, the Muslim Legal Network (NSW) argued that court appointed advocates 'practically assist investigative authorities [to] obtain information that should ordinarily be gained from pro-active

52 Attorney-General's Department, *Submission 9.1*, p. 10.

53 Law Council of Australia, *Submission 6*, p. 10.

investigations' and that 'rather than protecting the vulnerability of a child, the new provision in practical terms, exploits that vulnerability'.[54]

2.58 In his report on the desirability of including special advocates within the control order regime, the INSLM made a similar point:

> It is contemplated that the lawyer might argue for a control order to be made and that evidence obtained from the child could be used to support that outcome. It is not unreasonable to see that procedure as potentially being an aid to investigation by the authorities.[55]

2.59 The Senate Standing Committee for the Scrutiny of Bills argued that the relationship of trust and open communication between the court appointed advocate and the young person is compromised where the former discloses information to the issuing court against the wishes of the young person.[56]

2.60 The Scrutiny of Bills Committee recommended consideration be given to 'a default requirement to consult with a parent, guardian and/or lawyer … before information is disclosed against the wishes of the child unless exceptional circumstances exist'.[57] In its supplementary submission, the Law Council of Australia suggested a requirement that the young person's legal representative must authorise any views expressed by the person that the court appointed advocate puts before an issuing court in accordance with their functions under proposed paragraph 104.28AA(2)(e).[58]

Service of control orders

2.61 Proposed paragraph 104.12(6)(b) provides that the AFP member must take reasonable steps to personally serve a copy of the interim control order on at least one parent or guardian of the young person as soon as practicable after the interim control order is made.

54 Muslim Legal Network (NSW), *Submission 11*, pp. 7–8.

55 Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Control Order Safeguards (INSLM Report) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, January 2016, p. 3.

56 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 13 of 2015*, 25 November 2015, p. 9. See also, Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: thirty-second report of the 44th Parliament*, 1 December 2015, p. 19.

57 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 13 of 2015*, 25 November 2015, p. 10.

58 Law Council of Australia, *Submission 6.1*, p. 3.

2.62 The Explanatory Memorandum outlines the rationale for the requirement to take 'reasonable steps':

> This slightly lower requirement reflects the fact that there will be instances where it is not possible to identify and/or locate a parent or guardian. For example, the young person could be estranged from his parents or guardians, or those individuals could be overseas or otherwise unable to be contacted … It is fundamental that the inability to serve one of the young person's parents or guardians with the order does not frustrate the commencement of the order.[59]

2.63 An important consequence to this requirement is that where an AFP member, having taken reasonable steps, has been unable to serve a copy of the interim control order on a parent or guardian of the young person, they are under no obligation to take reasonable steps to serve subsequent notifications relating to the control order on the parent or guardian (for instance, notifications relating to the confirming or varying a control order).[60]

2.64 Several submitters expressed concern that the proposed amendments requiring an AFP member to only take 'reasonable steps' to serve a copy of a control order personally on at least one parent or guardian did not go far enough. Broadly, these submissions recommended that a more stringent service obligation be placed on the AFP member. The following proposed amendments to the service requirement were provided:

- the Queensland Government recommended that the service requirement be made a positive obligation such that 'a copy of the order must be served on the young person's parents/guardians, except if not reasonably practicable to do so',[61]
- the Law Council of Australia recommended that 'the full obligations of service, explanation and notification to a child's parent or guardian should apply every time a control order is imposed, varied, amended or extended',[62]
- the Muslim Legal Network (NSW) submitted that the requirement should be that 'the parent or guardian must be served to ensure the child is given clear opportunity to comply with the order',[63] and

59 Explanatory Memorandum, p. 45.

60 Law Council of Australia, *Submission 6*, p. 11.

61 Queensland Government, *Submission 16*, p. 1.

62 Law Council of Australia, *Submission 6*, p. 12.

63 Muslim Legal Network (NSW), *Submission 11*, p. 9.

- the Senate Standing Committee for the Scrutiny of Bills requested that consideration be given to requiring that '*all* reasonable steps are taken to notify a parent or guardian'.[64]

2.65 In its supplementary submission, the Attorney-General's Department expanded upon the rationale for the service requirement:

> The requirement to take reasonable steps to serve the order on a young person's parent or guardian will ensure a parent or guardian is served whenever possible. Service on a parent or guardian will occur unless it is not reasonably possible to do so. There are a number of reasons the AFP may be unable to serve a parent or guardian. It may be that a parent or guardian cannot be located. It may also be that it would be inappropriate to serve a parent or guardian because, for example, the young person is estranged from the parent. Providing that the AFP 'must' serve the parent or guardian could potentially frustrate the process in circumstances where the AFP is unable to effect service or where service would actually infringe on the young person's civil liberties and privacy, where they are estranged from the parent …
>
> The provision as drafted was not intended to exclude subsequent service on a parent or guardian in instances where it was not reasonably possible to serve a copy of the interim control order.[65]

Other matters raised in evidence

2.66 Several submissions drew attention to other aspects of the proposed amendments in Schedule 2. For completeness, these concerns have been addressed below.

Other factors considered in the *Convention on the Rights of the Child*

2.67 The Law Council of Australia noted that the *Convention on the Rights of the Child* contains several additional factors to be considered when determining the best interests of the child that are not otherwise captured under proposed subsection 104.4(2A). These include sexual orientation, the care, protection and safety of the child and the situation of vulnerability.[66]

64 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 13 of 2015*, 25 November 2015, p. 8.

65 Attorney-General's Department, *Submission 9.1*, pp. 8–9.

66 Law Council of Australia, *Submission 6*, p. 10.

2.68 In its supplementary submission, the Attorney-General's Department stated:

> Proposed paragraph 104.4(2A)(f) provides that the court must take into account any other matter the court considers relevant. Where the additional factors set out in the Convention are relevant, this provision already ensures the court must take that into account.[67]

Guarantee of legal representation

2.69 In response to questions as to whether the control order regime provides for legal representation for those subject to control order proceedings (both young persons and adults), the Attorney-General's Department noted:

> Neither Division 104 of the Criminal Code nor other Commonwealth legislation prohibits a person from obtaining legal representation for control order proceedings. Existing s 104.12 of the Criminal Code provides that the AFP must advise the person the subject of the control order of the right of that person and one or more representatives to adduce evidence or make submission[s] if the control order is confirmed, revoked or varied. Consequently, the person will be made aware of their ability to engage a representative to appear on their behalf at the control order proceeding.[68]

Least interference

2.70 The Australian Human Rights Commission recommended that:

> It should be a requirement that whenever a control order is imposed in relation to a person under 18 years of age, any obligations, prohibitions and restrictions imposed should constitute the least interference with the child's liberty, privacy or freedom of movement that is necessary in all the circumstances.[69]

2.71 In response, the Attorney-General's Department stated:

> Under the current legislation, the court considers whether the control order and individual conditions of the control order are

67 Attorney-General's Department, *Submission 9.1*, p. 7.

68 Attorney-General's Department, *Submission 9.1*, p. 11.

69 Australian Human Rights Commission, *Submission 5*, p. 14. See also, Australian Human Rights Commission, *Submission 5.1*, p. 3; Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: thirty-second report of the 44th Parliament*, 1 December 2015, pp. 12–13; Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, 2013, p. 62.

> reasonably necessary, and reasonably appropriate and adapted. This test requires the court to consider the impact of each condition on the person's personal and financial circumstances, and the court has the full discretion to refuse to include any of the proposed conditions, or to vary any of the conditions at confirmation. In this context, a 'least interference' test would substantially overlap with existing safeguards, which are appropriate and effective in ensuring that any conditions imposed are proportionate in limiting the person's liberty and privacy to address the risks to public safety for which the control order is sought.
>
> In addition to the existing safeguards, the requirement in the Bill to consider the best interests of the child will ensure conditions placed on a young person are appropriate, proportionate and balance against the specific risks which the control order is intended to address.[70]

Prosecutions for breach

2.72 The Muslim Legal Network (NSW) raised concerns about the potential for young persons to be imprisoned for up to five years pursuant to section 104.27 of the Criminal Code for breach of the terms of a control order. The Network also considered that general principles of criminal law, as they apply to children, have not been reflected in the proposed amendments. The Network stated:

> In practical terms, this means that if a child subject to a control order [breaches] that order, they are potentially open to receive a sentence of up to 5 years of imprisonment. This is for breaching an order imposed without charge and without conviction. There is no distinction between adults and children in this regard. This raises questions about how a 14 year old child, if placed in custody as a result of the breach, will avoid institutionalisation after spending a significant period in their teens in custody. Not to mention, the debilitating effect that will have on the child's sense of Australian identity and connection to the community.[71]

2.73 In its supplementary submission, the Attorney-General's Department noted:

> Section 20C of the *Crimes Act 1914* (Cth) provides that a young person who is charged with a Commonwealth offence may be

70 Attorney-General's Department, *Submission 9.1*, p. 13.

71 Muslim Legal Network (NSW), *Submission 11*, p. 6.

> tried, punished or otherwise dealt with as if the offence was an offence against a law of the State or Territory.
>
> Existing state and territory legislation already ensures that a young person who breaches a control order will be prosecuted in accordance with State and Territory criminal laws as they apply to children. It is, therefore, unnecessary to replicate those provisions.[72]

Confidentiality

2.74 The Gilbert + Tobin Centre of Public Law echoed the concerns of the Children's Commissioner at the Australian Human Rights Commission in raising the possibly deleterious impact of control orders being imposed on young persons, such as alienation from the community:

> One of the reasons is that a young person subject to a control order would likely find friends, members of the community and possibly even family no longer want to associate with him or her. A potential way of remedying this may be to include in the Bill a provision that the name of a minor subject to a control order must not – unless there are exceptional circumstances – be disclosed to the public.[73]

2.75 In response, the Attorney-General's Department noted:

> Consistent with the processes for prosecutions for young persons, in most – if not all – instances it would be appropriate for the identity of the young person subject to the control order to be subject to a non-publication order …
>
> As the decision to suppress details of a person appearing before a court is an inherent power held by the court, it would not be necessary to direct the court's use of its discretion. The Committee may wish to note that suppression orders have been applied by the court in relation to the current control orders.[74]

Successive control orders

2.76 The Muslim Legal Network (NSW) did not consider the ability to obtain successive control orders on young persons to be a necessary power, arguing a three month control order should provide law enforcement agencies with 'sufficient time to build a prima facie case against an

72 Attorney-General's Department, *Submission 9.1*, p. 12.

73 Gilbert + Tobin Centre of Public law, *Submission 2*, p. 6.

74 Attorney-General's Department, *Submission 9.1*, pp. 7–8.

accused that would warrant the initiation of criminal charges'.[75] The joint councils for civil liberties across Australia considered that there should be a limit of two control orders lasting three months each on a young person.[76]

2.77 In response, the Attorney-General's Department stated:

> A second or successive control order can only be made when the issuing court is satisfied on the balance of probabilities that, for example, the order will substantially assist in preventing a terrorist act …
>
> Control orders are not punitive, and are a preventative tool to protect the Australian community from terrorist threats. It is appropriate that where such threats exist, and a court is satisfied of the requisite matters, control orders are available to manage the threat.[77]

Committee comment

The justification for lowering the age

2.78 The Committee notes the concerns expressed by some submitters about the need for and proportionality of the amendments relating to the imposition of control order on persons as young as 14 or 15 years of age. The Committee acknowledges that while the control order regime has been used sparingly to date, it nevertheless constitutes an incursion into rights traditionally afforded to those who have not been formally convicted in criminal proceedings.

2.79 However, the Committee recognises that recent events, both in Australia and abroad, highlight the attraction among some young people for ideologies that promote violent extremism. There have been several well-known instances of young persons under the age of 16 being involved in terrorist plots, including for example, the murder of New South Wales police employee Mr Curtis Cheng by a 15 year old male. The targeting of minors for recruitment by terrorist groups, particularly through online propaganda, the 'grooming' of minors to take part in terrorist acts and the use of young persons by adults to evade law enforcement attention represents a significant change in the national security landscape. These changes create challenges for law enforcement agencies. It is essential that

75 Muslim Legal Network (NSW), *Submission 11*, p. 11.

76 Joint councils for civil liberties, *Submission 17*, p. 8.

77 Attorney-General's Department, *Submission 9.1*, p. 13.

strong yet measured legislative responses be enacted to ensure law enforcement agencies are appropriately equipped to handle these challenges. The Committee notes that it is conduct that threatens the safety of the Australian community which guides the development of counter-terrorism policy and legislative reform, irrespective of the age, ethnicity or religious affiliation of individuals.

2.80 As such, in light of the evidence advanced by law enforcement, the Committee finds the proposed amendments for the reduction in the age for the imposition of a control order to 14 year olds to be justified and in principle, a reasonable and necessary measure for protecting the community from harm. Moreover, as submitted by the AFP, the Committee agrees that early intervention and disruption through the judicious use of control orders is a preferable outcome to the involvement of a young person in the formal criminal justice system. The Committee notes, importantly, that there is early evidence that some persons subject to control orders have moderated their behaviour and moved off the path of radicalisation as a result of the intervention activities associated with the control order.

Best interests of the young person

2.81 Noting the special vulnerability of young persons, the Committee is of the view that the Bill should reflect the requirement that the best interests of the young person be 'a primary consideration' when determining whether each of the proposed obligations, prohibitions and restrictions under a control order are reasonably necessary, and reasonably appropriate and adapted. This is already suggested in the Explanatory Memorandum, but the intention is not made clear in the Bill.

2.82 Further, while noting the importance of providing the issuing court with a degree of discretion in determining the appropriate weight to be given to competing factors, the Committee understands that the Bill, as currently drafted, provides for the elevation of the best interests of the young person above some other rights. The Committee considers that the hierarchy of considerations the issuing court must have regard to should be made express, such that the paramount consideration is national security, followed by the best interests of the young person being a primary consideration and then all other matters the issuing court may consider relevant. Consequently, the Committee considers that, to avoid doubt, the Bill should also state clearly that the paramount consideration is national security.

Recommendation 1

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to expressly state that when the issuing court determines whether each of the obligations, prohibitions and restrictions imposed on a young person is reasonably necessary, and reasonably appropriate and adapted for the purpose of:

- **protecting the public from a terrorist act;**
- **preventing the provision of support for or the facilitation of a terrorist act; or**
- **preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country,**

then the best interests of the young person is a primary consideration, and the safety and security of the community is the paramount consideration.

Court appointed advocate

2.83 The Committee notes the various criticisms of the proposed role of the court appointed advocate. While the Committee acknowledges that this role has been designed to promote the welfare of a young person who is subject to a control order, the Committee concurs with concerns regarding:

- the likelihood of the young person being confused about the separate and distinct roles of the court appointed advocate and his/her legal representative,
- the lack of clarity as to whether the court appointed advocate possesses the appropriate expertise to determine for himself or herself what is in the best interests of the young person, and
- the ability of the advocate to disclose information to the issuing court against the wishes of the young person.

2.84 The Committee notes that, in his report on the desirability of including special advocates within the control order regime, the INSLM expressed concern about the use of the Family Law Act as the model for the court appointed advocate. Noting that a child is not a party to family law proceedings, the INSLM considered

> [i]t is a large step to move from that context to one where the proceeding is against the child and the choice is whether or not to

impose an intrusive control order with criminal liability for breach.[78]

2.85 In light of the concerns identified, the Committee recommends that the role of the court appointed advocate be removed. The role sits uncomfortably within the existing framework of the control order regime and risks increasing complexity and creating confusion, when what is essential in the context of the proposed amendments is the clear and simple application of the control order provisions to a vulnerable class of individuals. While the Committee acknowledges the advantages of having a role such as the court appointed advocate, the shortcomings identified by submitters suggests that considerable work may be necessary to refine the function in order to ameliorate the concerns raised. Instead of amending or recasting the role, the Committee suggests the role be abolished and other, more appropriate safeguards, be introduced. The underlying rationale for this approach is the recognition that the principal benefits provided by the court appointed advocate are already found in the existing provisions of the control order regime.

2.86 For instance, one of the functions of the court appointed advocate is to inform the young person of the details of the control order such as the effect and duration of the order, the person's right to an appeal or review and the right of the person or the person's representative to adduce evidence or make submissions if the order is confirmed. However, the Committee notes that a similar function is already performed by the AFP. In serving the interim control order on the young person, the AFP member must inform the young person of the very matters identified above.[79] The AFP member must also ensure that the person understands the information provided, taking into account the person's age, language skills, mental capacity and any other relevant factor.[80] Moreover, the Committee considers that any further guidance the young person may require concerning the nature of a control order and the proceedings that are to follow would be effectively provided by the young person's legal representative.

2.87 The Committee further notes that the court appointed advocate assists the court in determining whether each of the obligations, prohibitions and restrictions on the young person is reasonably necessary, and reasonably appropriate and adapted, taking into account the 'best interests' of the

78 Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Control Order Safeguards (INSLM Report) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, January 2016, p. 3.

79 Criminal Code, paragraph 104.12(1)(b).

80 Criminal Code, paragraph 104.12(1)(c).

young person. However, given the lack of clarity about the qualifications of the court appointed advocate and their suitability in undertaking such a function, the Committee considers that the preferable approach is to leave such considerations to the issuing court. That is, the issuing court has the ability to seek expert evidence on any matters it considers relevant in determining the question of best interests. The court may seek such expert evidence from child psychologists or community welfare officers.

2.88 The issuing court is not required to defer to the expert evidence, but rather the expert evidence provides one part of the evidence that the issuing court may consider in determining what is in the young person's best interests. For the avoidance of doubt, the Committee notes that at the interim control order stage, applications for control orders may be urgent, and as such, it is appropriate that recourse to expert evidence is available in control order proceedings subsequent to the making of an interim control order.

2.89 In abolishing the role of the court appointed advocate, the Committee notes that it is important to introduce an additional safeguard to ensure that the young person is provided the opportunity to have legal representation in control order proceedings. The Committee appreciates that nothing in the existing control order regime precludes an individual, young person or otherwise, from seeking legal representation. However, the Committee considers that, given the special vulnerabilities associated with young persons, it is prudent that a young person has a legislative safeguard expressly providing the right to legal representation. The Committee understands that such a right can only go so far as ensuring that the issuing court makes legal representation available to a young person, but it cannot compel the young person to accept that legal representation.

Recommendation 2

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to expressly provide that a young person has the right to legal representation in control order proceedings.

The Committee further recommends that the Bill be amended to remove the role of the court appointed advocate. The Committee considers that given the existing safeguards in the control order regime, the ability of the issuing court to have recourse to expert evidence and concerns regarding the operation of the court appointed advocate, a more effective and appropriate safeguard is to ensure the right of a young person to legal representation.

Service of control orders

2.90 The Committee notes the concerns raised by some submitters about the service of control orders on parents or guardians of the young person. The Committee accepts the reasons advanced by the AFP for an AFP member to only take 'reasonable steps' to serve a copy of an interim control order on a parent or guardian of the young person.

2.91 However, the Committee is concerned that an unintended consequence of this service requirement is that where the AFP member has not been able to serve a copy of the interim control order on a parent or guardian, they are under no obligation to take reasonable steps to serve subsequent notifications (for instance, relating to confirmation or variation of a control order) on the parent or guardian.

2.92 The Committee considers that the obligation to take reasonable steps to serve the control order notification on a parent or guardian should remain ongoing, even if reasonable steps were initially exhausted at the interim control order stage. It is plausible that circumstances may have changed since the issuing of the interim control order that would now allow subsequent control order notifications to be issued on a parent or guardian of the young person. The Committee considers that when dealing with the special vulnerabilities associated with young persons, it is imperative that reasonable efforts continue to be taken to ensure the parent or guardian of the young person be made aware of the control order proceedings.

2.93 Therefore, the Committee concludes that the obligation to serve notifications on at least one parent or guardian of the young person should be ongoing.

Recommendation 3

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to provide that, on each occasion, an Australian Federal Police (AFP) member must take reasonable steps to serve personally on at least one parent or guardian of the young person all notifications and copies of orders associated with a control order.

This requirement should continue irrespective of whether the AFP member, having taken reasonable steps previously, has not been able to serve a copy of the interim control order personally on at least one parent or guardian of the young person.

Issuing court for control orders (Schedule 4)

2.94 Section 100.1 of the Criminal Code defines an 'issuing court' as the Federal Court of Australia, Family Court of Australia or Federal Circuit Court of Australia.

2.95 Schedule 4 of the Bill will amend this definition to remove the Family Court of Australia. The Explanatory Memorandum argues that this is appropriate as the Federal Court and Federal Circuit Court 'exercise various functions relevant to criminal law and counter-terrorism as part of their normal jurisdiction', whereas the Family Court does not.[81]

2.96 The proposed amendment partially implements recommendation 28 of the 2013 Council of Australian Governments Review of Counter-Terrorism Legislation, which recommended that the definition of 'issuing court' be limited to only the Federal Court of Australia.[82]

2.97 Proposed subsection 106.7(2) sets out certain circumstances that will allow a matter that is already before the Family Court of Australia to continue despite the removal of the Court as an issuing court.

81 Explanatory Memorandum, p. 59.

82 Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, 2013, p. 57.

Matters raised in evidence

2.98 Submissions generally supported the removal of the Family Court of Australia as an 'issuing court' for the purpose of the control order regime.

2.99 The Gilbert + Tobin Centre of Public Law recommended that that Federal Circuit Court should similarly be removed from the definition of an 'issuing court', leaving only the Federal Court with the ability to make control orders. Gilbert + Tobin submitted:

> [G]iven the exceptional nature of control orders and the role that the issuing court is required to take in balancing the protection of the community against the liberty of the individual (who may not even have been charged with a criminal offence), we submit that it is appropriate that only the Federal Court of Australia be vested with the power to issue a control order.[83]

2.100 Professor Andrew Lynch of Gilbert + Tobin explained the justification for the removal of the Federal Circuit Court:

> The reason we support the [Council of Australian Governments (COAG)] review's position on the Federal Circuit Court is that we just do not see it as necessary, given the size of the Federal Court of Australia and the number of judicial members that it has, that the circuit court is required, and also the seriousness of what these orders involve and the potentially very severe restrictions and conditions which might be imposed if thought necessary by the court, and also the fact that breaches exposes the individual to a five-year imprisonment sentence.[84]

2.101 In its supplementary submission, the Attorney-General's Department provided further evidence about the utility of maintaining the Federal Circuit Court as an issuing court. The Department stated:

> [B]oth the Federal Court and the Federal Circuit Court exercise a range of functions relevant to the criminal law and counter-terrorism as part of their normal jurisdiction. It is therefore appropriate for both these courts to retain authority as issuing courts. This provides flexibility to ensure ready access to an issuing [court] at a range of locations, including at short notice …
>
> Removing the Federal Circuit Court as an issuing court would limit the geographic locations for making applications and could

83 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 7.

84 Professor Andrew Lynch, *Committee Hansard*, Canberra, 14 December 2015, p. 19.

> delay consideration of a control order application, resulting in ongoing risk to the community.[85]

2.102 The Attorney-General's Department also provided additional evidence on the number of times the Federal Circuit Court has issued control orders:

> Of the six control orders issued to date, two were issued in 2006 and 2007 by the Federal Magistrates Court (now called Federal Circuit Court), with four subsequently being issued by the Federal Circuit Court. Of these, three control orders were issued by the Federal Circuit Court of NSW during 2014 and 2015. The other order was issued by the Federal Circuit Court of Victoria.[86]

Committee comment

2.103 The Committee supports the removal of the Family Court of Australia from the definition of 'issuing court' for the purpose of the control order regime. The fact that the Family Court of Australia does not exercise functions relating to criminal law and more specifically, counter-terrorism, as part of its normal jurisdiction, makes its role in the control order application process anomalous.

2.104 The Committee notes that to date, all control orders have been issued by the Federal Circuit Court (previously known as the Federal Magistrates Court). It was submitted by the Attorney-General's Department that a range of considerations, including availability and proximity, inform the determination of how an issuing court is selected when the AFP make a control order application.[87] The Committee considers that it may be advantageous to have flexibility in which courts an application may be heard to ensure that a control order may be obtained in an efficient and timely manner.

2.105 The Committee also notes that while the proposed amendment attracted little comment in this inquiry, in a recent submission to the Independent National Security Legislation Monitor (INSLM) in respect of his inquiry into the adequacy of the safeguards relating to the control order regime, the Federal Circuit Court argued for its removal from the list of issuing courts under section 100.1 of the Criminal Code.[88] In that submission, the Federal Circuit Court suggested that the control order provisions may be

85 Attorney-General's Department, *Submission 9.1*, p. 15.

86 Attorney-General's Department, *Submission 9.1*, p. 15.

87 Attorney-General's Department, *Submission 9.1*, p. 15.

88 See Independent National Security Legislation Monitor, Inquiry into Control Order Safeguards, <http://www.dpmc.gov.au/pmc/about-pmc/core-priorities/inslm-control-order-submissions> viewed 22 January 2016.

subject to further judicial refinement and accordingly, appreciated the rationale for confining the ability to issue control orders to a court that can make more authoritative determinations, such as the Federal Court. The removal of the Federal Circuit Court would be consistent with Recommendation 28 of the COAG Review of Counter-Terrorism Legislation.

2.106 However, based on the evidence provided to this inquiry, the Committee supports the retention of the Federal Circuit Court as an issuing court for the purposes of the control order regime at this time. The Federal Circuit Court is a court of high status that shares the jurisdiction of the Federal Court of Australia and comprises more than 60 judges in capital cities and regional centres around Australia. Nevertheless, the Committee considers that regard should be given to the final report of the INSLM in respect of his inquiry into the adequacy of the safeguards relating to the control order regime, to determine whether additional evidence provided to that inquiry necessitates a reconsideration of the retention of the Federal Circuit Court as an issuing court for the purposes of the control order regime.

Protection of national security information in control order proceedings (Schedule 15)

Existing NSI Act regime

2.107 The purpose of the NSI Act is to prevent the disclosure of information in federal criminal proceedings and civil proceedings where disclosure is likely to prejudice 'national security'. 'National security' encompasses 'Australia's defence, security, international relations or law enforcement interests'.[89] The NSI Act provides the court with a range of options for dealing with sensitive information, the disclosure of which is likely to prejudice national security. To date, the NSI Act has been invoked in federal criminal proceedings, including all major counter-terrorism prosecutions, and in civil proceedings for the making of control orders.

2.108 In order for the NSI Act to apply to a control order proceeding, the Attorney-General must give notice in writing to the parties to the proceeding, the legal representatives of the parties and the court that the NSI Act applies in the proceeding.

89 *National Security Information (Criminal and Civil Proceedings) Act 2004*, section 8.

2.109 The Attorney-General may issue a civil non-disclosure certificate under section 38F if the Attorney-General is notified, or for any reason expects, that a party to a civil proceeding or another person will disclose information in the proceeding; or considers that a written answer given by a witness under section 38E will disclose information and considers that the disclosure of that information is likely to prejudice national security.

2.110 The Attorney-General may issue a witness exclusion certificate under section 38H if the Attorney-General has been notified, or for any reason expects, that a person intends to call as a witness an individual who may disclose information by his or her mere presence and the Attorney-General considers that the disclosure of such information is likely to prejudice national security. Annual reports provided by the Attorney-General to Parliament in respect of the NSI Act show that in recent years, the Attorney-General has not given any non-disclosure or witness exclusion certificates.[90]

2.111 Where either a civil non-disclosure or witness exclusion certificate has been issued, the court must hold a closed hearing in accordance with section 38I to determine whether information potentially prejudicial to national security may be disclosed and if so, in what form (i.e. summaries, redactions), or whether to allow a witness to be called.

2.112 The court has the discretion to exclude non-security cleared parties, their non-security cleared legal representatives and non-security cleared court officials from the closed hearing where the court considers that the disclosure of the relevant information to these persons would likely prejudice national security.

2.113 Following the closed hearing, the court must make one of four orders under existing section 38L about the relevant information:

- the information may be disclosed with appropriate deletions, redactions and summaries of information or facts,[91]
- the information must not be disclosed,[92]
- the information may be disclosed,[93] or
- when determining whether to call a witness, that either the relevant party must not or may call the person as a witness.[94]

90 For the periods 2010–2011, 2011–2012, 2012–2013 and 2013–2014, the Attorney-General did not give any non-disclosure or witness exclusion certificates. The annual report for the period 2014–2015 has not yet been published.

91 *National Security Information (Criminal and Civil Proceedings) Act 2004*, subsection 38L(2).

92 *National Security Information (Criminal and Civil Proceedings) Act 2004*, subsection 38L(4).

93 *National Security Information (Criminal and Civil Proceedings) Act 2004*, subsection 38L(5).

These orders do not allow for evidence to be adduced in a substantive civil proceeding, such as a control order proceeding, that is withheld from the affected party or their legal representative.

2.114 In determining which of the four orders under section 38L to make, the court must consider the following factors:

- the risk of prejudice to national security if a particular order were not made,
- whether the order would have a substantial adverse effect on the substantive hearing in the proceeding, and
- any other matter the court considers relevant.[95]

In making its decision, the court must give 'greatest weight' to national security considerations.[96] Section 38M requires that the court provide a written statement of reasons for making the section 38L order.

Proposed amendments

2.115 Schedule 15 will amend the NSI Act to provide the court with further options for protecting sensitive information in control order proceedings.

2.116 The Explanatory Memorandum outlines the rationale for the amendment:

> In some circumstances, information will be so sensitive that existing protections under the NSI Act are insufficient. For example, critical information supporting a control order may reveal law enforcement or intelligence sources, technologies and methodologies associated with gathering and analysing information. The inadvertent or deliberate disclosure of such material may endanger the safety of individuals as well as the general public, or jeopardise sources and other intelligence methods. However, the inability to produce such information to a court may mean that a control order is unable to be obtained.[97]

2.117 While the control order regime also has procedures for the protection of sensitive national security information, the disclosure obligations in Division 104 'operate in addition to any other applicable procedural rights in federal civil proceedings, such as the normal processes of discovery, in

94 *National Security Information (Criminal and Civil Proceedings) Act 2004*, subsection 38L(6).

95 *National Security Information (Criminal and Civil Proceedings) Act 2004*, subsection 38L(7).

96 *National Security Information (Criminal and Civil Proceedings) Act 2004*, subsection 38L(8).

97 Explanatory Memorandum, p. 119. See also, Attorney-General's Department, *Submission 9*, p. 6.

which a party to a proceeding is entitled to obtain much of the material relied upon by the other party'.[98]

2.118 The proposed amendments would enable a court to make three new types of orders in control order proceedings for the protection of national security information. The three new orders are contained in proposed section 38J and provide that either:

- The subject of the control order and their legal representative may be provided with a redacted or summarised form of the national security information. However, the court may consider all of the information contained in the original source document, even where that information has not been provided in the redacted or summarised form.[99]
- The subject of the control order and their legal representatives may not be provided with any information contained in the original source document. However, the court may consider all of that information.[100]
- A witness may be called and the information provided by the witness need not be disclosed to the subject of the control order and their legal representative. However, the court may consider all of the information provided by the witness.[101]

2.119 In addition, proposed subsection 38I(3A) provides that at a closed hearing under section 38I to determine if one of the new orders under proposed section 38J should be made, the Attorney-General (or the Attorney-General's legal or other representative) may request the court to order that one or more specified parties to the control order proceeding and their legal representatives (even if security cleared) not be present during the closed hearing proceedings. The discretion to make this order resides with the court.

2.120 A court can only make one of the new orders under proposed section 38J where it is satisfied that the subject of the control order has been provided 'notice of the allegations on which the control order request was based (even if the relevant person has not been given notice of the information supporting those allegations)'.[102] The Explanatory Memorandum states that:

> This ensures that the subject (or proposed subject) of the control order has sufficient knowledge of the essential allegations on which the control order

98 Explanatory Memorandum, p. 120.

99 Proposed subsection 38J(2).

100 Proposed subsection 38J(3).

101 Proposed subsection 38J(4).

102 Proposed paragraph 38J(1)(c).

request is sought (or varied) such that they are able to dispute those allegations during the substantive control order proceedings.[103]

2.121 In determining whether to make one of the new orders under proposed section 38J, the court must consider the following factors:

- the risk of prejudice to national security if a particular order was not made,
- whether the order would have a substantial adverse effect on the substantive hearing in the proceeding, and
- any other matter the court considers relevant.[104]

There is no requirement that the court give greatest weight to national security considerations.

2.122 Where the court makes one of the new orders, the closed hearing requirements under section 38I will apply when that information is heard during the substantive control order proceedings.[105] Moreover, where the court has ordered that one or more specified parties to the control order proceeding and their legal representatives be excluded from the closed hearing, these persons will also be excluded from the closed hearing during the substantive control order proceeding in which the information that is subject to one of the new orders under proposed section 38J is considered.

2.123 Where the court declines making any of the new orders under proposed section 38J, it must make one of the orders under existing section 38L.

2.124 Consistent with the existing NSI Act regime, all evidence adduced must satisfy the rules of evidence. The amendments proposed by Schedule 15 will apply in control order proceedings that begin before or after the commencement of this schedule.

Matters raised in evidence

2.125 The submissions received raised three principal concerns about the proposed amendments to the NSI Act. These concerns were:

- whether the proposed amendments are justified,

103 Explanatory Memorandum, p. 122.

104 Proposed subsection 38J(5).

105 Proposed paragraphs 38J(2)(d), 38J(3)(c) and 38J(4)(b).

- whether the 'notice of the allegations on which the control order request was based' provides the subject of a control order proceeding sufficient information to meaningfully contest the allegations against them, and
- whether more broadly, the amendments provide sufficient safeguards for preserving the right to a fair trial, and relatedly, whether a system of special advocates would ameliorate potential unfairness to the subject of a control order proceeding.

Justification for the measure

2.126 Some submitters queried the necessity of the proposed amendments to the NSI Act and why the existing protections under the NSI Act were insufficient to deal with the risk of disclosure of national security information.

2.127 For instance, the Law Council of Australia submitted that:

> The Explanatory Memorandum does not provide information as to why the current extensive powers to protect national security information … are insufficient to address a pressing or substantial concern, or why this increased level of secrecy is required …
>
> In light of this, it is difficult to make an assessment as to whether the new measures are a necessary limitation on the right to a fair hearing.[106]

2.128 The AFP advanced the following rationale for the proposed measure:

> [L]aw enforcement increasingly relies on sensitive intelligence sources to identify persons of interest and their associates. These sources may include domestic and international intelligence partners, who may require use of their intelligence to be restricted in order to protect ongoing operations overseas. In other cases, undercover or community sources may be invaluable in identifying persons posing a risk to community safety. All of these sources must be strongly and robustly protected, not only to maintain the confidentiality and integrity of law enforcement and intelligence operations and methodologies, but also to maintain the trust with which law enforcement has been provided this information. Without this trust, the ability of law enforcement and its partners to obtain vital intelligence will be severely eroded.[107]

106 Law Council of Australia, *Submission 6*, p. 32. See also, Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: thirty-second report of the 44th Parliament*, 1 December 2015, pp. 36–37.

107 Australian Federal Police, *Submission 3*, p. 11.

2.129 The AFP also highlighted the role of human sources and their particular vulnerability in counter-terrorism operations:

> As with other people who assist police, they may experience a high risk of retaliation from persons who are dangerous and motivated. Where an individual is a member of a community in which persons of interest reside, if it is revealed they are a human source, they may face retaliation … Protection of these sources is not only vital to maintaining the integrity of law enforcement investigations, but also to ensuring that lives are not put at risk.[108]

2.130 The context for this increased reliance on sensitive intelligence and human sources was further raised during the course of the public hearing. Assistant Commissioner Neil Gaughan of the AFP highlighted both the deterioration of the threat environment and the increasing reliance on foreign-sourced information as the rationale for the measures in the Bill:

> Law enforcement is stretched but we are coping, but we need to stay ahead or as much as possible at least keep up with the ever-changing threat environment … Returning foreign fighters, prisoner releases and the ready availability of firearms are likely to see a deterioration of the threat environment in the region before we see any meaningful improvement. Obviously, very recent events in Paris, as well as in the US, have gained significant media attention, but in this month alone there have been other terrorism incidents in Afghanistan, Cameroon, Israel, Nigeria, Pakistan and Yemen, to name but a few countries. The current threat has engulfed the globe and, in my view, will continue for the foreseeable future …
>
> I have to say I have never seen the sharing of information or intelligence better than what it is today with our South-East Asian colleagues, our fives eyes partners, traditional partners. Where it becomes complicated is in the use of that intelligence in proceedings outside basic police information, knowledge. Where we have to use that information in control order applications et cetera, that becomes difficult, and that is why we are seeking another amendment to the bill—to guarantee to our international partners that we will be able to protect their sensitive human source and their sensitive capability.[109]

108 Australian Federal Police, *Submission 3*, p. 11.

109 Assistant Commissioner Neil Gaughan, *Committee Hansard*, Canberra, 14 December 2015, pp. 35, 37.

2.131 In its submission, the Attorney-General's Department similarly referred to the evolving terrorist threat and the potential for control orders to be unable to proceed if the protection of crucial information could not be guaranteed:

> Recent counter-terrorism investigations indicate acceleration from the initiation of an investigation to the point of disruption to ensure community safety. In these circumstances, it is necessary for the AFP to be able to rely on, and adequately protect, sensitive information in control order proceedings. Without additional measures it is possible some control order applications may not be able to proceed, or may be supported using less information (as the AFP would not be willing to disclose information in the proceeding due to its sensitive nature and potential operational/safety risks of disclosure).[110]

2.132 The Minister for Justice recently said that the tempo of Australia's work to help improve the capabilities of other countries in the region to combat terrorism has increased in line with a deteriorating security situation in the region.[111] Speaking at a recent international conference on deradicalisation and countering violent extremism in Kuala Lumpur, the Minister said that

> the volume and diversity of foreign fighters who have flocked to Syria and Iraq has already produced a new generation of terrorists – many with the skills, experience and international connections required to threaten international security for years …
>
> And although there is now significant global momentum behind our efforts to combat these threats, this must not be taken for granted.
>
> Our task as governments is to sustain this momentum. This will require determined cooperation, regionally and globally, to put in place effective counter terrorism measures, protect our citizens and preserve the values we hold dear.[112]

110 Attorney-General's Department, *Submission 9*, p. 6.

111 The Hon Michael Keenan MP, Minister for Justice, cited in Paul Maley, 'Asian Terror the New Front Line', *The Australian*, 8 February 2016, p. 11.

112 The Hon Michael Keenan MP, Minister for Justice, 'Malaysia International Conference on Deradicalisation and Countering Violent Extremism: Australia's CVE Approach and experience on deradicalisation and rehabilitation of extremist individuals', *Transcript*, 26 January 2016.

Minimum standard of disclosure

2.133 A court may only make one of the three new orders under proposed section 38J if it is satisfied that the subject of the control order proceeding has been given 'notice of the allegations on which the control order request was based (even if the relevant person has not been given notice of the information supporting those allegations)'.[113]

2.134 Several submissions questioned whether this standard of disclosure could meaningfully allow the subject of a control order proceeding to contest the allegations against them.[114] For example, the Australian Human Rights Commission considered the proposed amendments resulted in a potential erosion of the right to a fair trial. The Commission stated:

> These provisions would limit the rights of persons to a fair trial protected by article 14(1) of the ICCPR. In particular, they would limit the right of a person subject to a control order to 'equality of arms' by restricting their knowledge of the accusations made against them and the evidence adduced in support of those accusations.[115]

2.135 The unease expressed by some submitters can be summarised as follows: the subject of the control order proceeding does not know the full details of the case against them, and is therefore unable to contest the evidence relied upon by the AFP, which detracts from the person's enjoyment of the right to a fair hearing.

2.136 The Gilbert + Tobin Centre of Public Law identified decisions of the European Court of Human Rights and the House of Lords in the United Kingdom, which establish a minimum standard for information that must be provided to the subject of a control order proceeding (known in the United Kingdom as Terrorism Prevention and Investigation Measures) in order for the subject to be guaranteed a fair hearing. That minimum standard has been expressed in the United Kingdom as:

> **the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.** Provided that this requirement is satisfied there can be a fair trial notwithstanding

113 Proposed paragraph 38J(1)(c).

114 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 15; Law Council of Australia, *Submission 6*, p. 33; Australian Human Rights Commission, *Submission 5*, p. 19. See also, Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 13 of 2015*, 25 November 2015, p. 25; Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: thirty-second report of the 44th Parliament*, 1 December 2015, pp. 34–35.

115 Australian Human Rights Commission, *Submission 5*, p. 19.

> that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirement of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.[116]

2.137 Gilbert + Tobin recommended that this minimum standard of disclosure replace the proposed standard of 'notice of allegations on which the control order request was based' contained in paragraph 38J(1)(c).[117] That is, if the court can be satisfied that the subject of the control order proceeding is provided at least 'sufficient information to enable him [or her] to give effective instructions in relation to those allegations', it can then consider the appropriateness of making one of the new orders under proposed section 38J. This standard mirrors Recommendation 31 of the COAG Review of Counter-Terrorism Legislation in relation to Division 104 of the Criminal Code:

> The Committee recommends that the legislation provide for a minimum standard concerning the extent of the information to be given to a person the subject of an application for the confirmation of a control order, or an application for a variation or revocation of a control order. This requirement is quite separate from the Special Advocates system. It is intended to enable the person and his or her ordinary legal representatives of choice to insist on a minimum level of disclosure to them. The minimum standard should be: '*the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations*'. This protection should be enshrined in Division 104 wherever necessary.[118]

2.138 While that recommendation was made in the context of the non-disclosure of sensitive information under the existing control order regime, the COAG Review Committee stated that restrictions on the disclosure of information 'plainly enough, has the capacity, unless greater protection is provided, to result in a fair trial not being afforded to the person sought to be controlled'.[119]

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116 *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [85] (Lord Phillips) drawing on the decision of the European Court of Human Rights in *A v United Kingdom* [2009] ECHR 301. Emphasis added.

117 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 16.

118 Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, 2013, p. 59. See also Australian Human Rights Commission, *Submission 5.1*, p. 5.

119 Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, 2013, p. 58. The concerns relating to non-disclosure that were considered by COAG

2.139 The Australian Human Rights Commission noted that such an amendment 'would go some way to address the Commission's concerns'.[120] However, the Commission highlighted that the minimum standard in the United Kingdom was made in the context of a regime that also provided for special advocates and that in the absence of such a regime, the standard of disclosure would have to be 'significantly higher'.[121]

2.140 As a matter of practicality, the precise content of any disclosure obligation will depend on the facts and circumstances of each control order proceeding. As noted by the Australian Human Rights Commission:

> What information must be provided to the defendant, or a respondent to a control order proceeding, to ensure a fair hearing must necessarily depend [on] the particular allegations made against that person and the particular evidence adduced by the authorities.[122]

2.141 In its supplementary submission, the Attorney-General's Department elaborated upon the minimum disclosure standard adopted in the proposed amendments:

> The language that has been used in paragraph 38J(1)(c) is reflective of recent Australian case law that has considered the use of certain evidence in a judicial proceeding that is not made available to one of the parties to the proceeding. The provision reflects the observations that were made in *Assistant Commissioner Michael James Condon v Pompano [2013] HCA 7* in that it does not seek to deny the respondent knowledge of what the allegation is, but that it could deny (in some circumstances) knowledge of how the police will seek to prove the allegation.[123]

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relate specifically to the potential for national security information (and other categories of information) to be protected from disclosure during certain stages of the control order proceeding. As such, the concerns relating to the minimum standard of disclosure under the proposed amendments to the NSI Act are separate from the concerns relating to the non-disclosure of information arising from the operation of the control order regime in Division 104 of the Criminal Code. The Committee's review of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 relates solely to the disclosure requirements in respect of the proposed NSI Act amendments and does not extend to a consideration of the operation of the disclosure requirements under the existing control order regime.

120 Australian Human Rights Commission, *Submission 5.1*, p. 5. See also Joint councils for civil liberties, *Submission 17*, p. 21.

121 Australian Human Rights Commission, *Submission 5.1*, pp. 4–5.

122 Australian Human Rights Commission, *Submission 5.1*, p. 4.

123 Attorney-General's Department, *Submission 9.1*, p. 35.

2.142 By way of an example, the Attorney-General's Department illustrated how the minimum standard, coupled with the court's discretion to determine the form in which this information may be disclosed, would ensure procedural fairness is guaranteed:

> [I]f the AFP proposes to withhold an entire document from the subject of a control order, but use it in support of the control order application, the court may decide that only part of the document may be withheld or used, or that the entire document can be withheld and used but the person must be provided with a summary of the information it contains. This is often referred to as 'gisting'.[124]

Security-cleared lawyers

2.143 Under the existing provisions of the NSI Act, during the closed proceedings under section 38I where the court determines if and how national security information should be disclosed, the court may exclude a party to the proceeding and their legal representative if they have not been given a security clearance 'at the level considered appropriate' in relation to the information concerned and the disclosure of that information would prejudice national security.[125]

2.144 During the public hearing, the Committee sought further information from the Attorney-General's Department about the operation of the NSI Act in respect of legal representatives who are not security cleared. In its supplementary submission, the Department stated:

> If a party's legal representative is not security cleared, does not wish to apply for a security clearance, or a clearance is unable to be obtained in sufficient time before the closed hearing, then the court may still hold the closed hearing and determine the matter without the assistance of a legal representative of the party. Alternatively, the court could decide to appoint a security cleared special counsel to represent the interests of the party during the closed hearing (although there has been no need for a security cleared special counsel to be appointed under the NSI Act to date).[126]

2.145 The Committee asked about potential delays involved should a party to a control order proceeding want to get their legal representative security cleared during the course of the proceeding. The Attorney-General's

124 Attorney-General's Department, *Submission 9.1*, p. 35.

125 *National Security Information (Criminal and Civil Proceedings) Act 2004*, subsection 38I(3).

126 Attorney-General's Department, *Submission 9.1*, p. 33.

Department stated that parties to a proceeding are generally aware at the outset that national security information will be relevant and that the NSI Act will be invoked. The requirement to get any legal representative security cleared is therefore evident at the very early stages of any proceeding.[127]

2.146 In response to the Committee's question on the length of time it may take for a lawyer to be appropriately security-cleared,[128] the Attorney-General's Department responded:

> The timeframe for a person's lawyer to receive a security clearance depends on the level of clearance that is necessary to access the relevant security classified information.
>
> In the Department's experience lawyers security cleared who have acted in matters relating to classified information generally require Negative Vetting 1 (NV1) and Negative Vetting 2 (NV2) level clearances, allowing them to access information classified SECRET and TOP SECRET respectively. [The Australian Government Security Vetting Agency] has advised that the current average processing time for a NV1 clearance is 154 days and a NV2 clearance is 188 days.[129]

2.147 In response to the Committee's question on the number of security cleared lawyer's in Australia,[130] the Attorney-General's Department stated:

> The Department is aware of more than 40 legal counsel granted security clearances it engages for matters relating to classified information. Some of these legal counsel are employees of the Attorney-General's Department who would not be available to act for or on behalf of respondents.
>
> Other security cleared legal counsel who have acted for non-Commonwealth clients in recent years would be available to appear for or on behalf of respondents. Potential legal counsel could also be located from either the bar association or legal aid commission of the relevant state and territory.[131]

127 Ms Julia Galluccio, Principal Legal Officer, Counter-Terrorism Branch, Attorney-General's Department, *Committee Hansard*, Canberra, 14 December 2015, p. 48.

128 See *Committee Hansard*, 14 December 2015, p. 48.

129 Attorney-General's Department, *Submission 9.1*, p. 34.

130 See *Committee Hansard*, 14 December 2015, p. 38.

131 Attorney-General's Department, *Submission 9.1*, p. 34.

Safeguards and special advocates

2.148 Schedule 15 safeguards the right to a fair hearing by preserving the court's discretion in several key respects, including the discretion to:

- decline making one of the new orders under proposed section 38J, or in making one of those orders, determining what form such an order may take (for instance, with redactions or summaries of information),
- decline excluding specified parties and their legal representatives from the closed hearing proceedings,
- conduct civil proceedings in a manner it considers appropriate,
- stay proceedings where one of the orders made under proposed section 38J would have a substantial adverse effect on the substantive control order proceeding, and
- determine the weight and probative value placed on evidence that has been withheld from the subject of the control order proceeding and their legal representative.

2.149 The Explanatory Memorandum notes:

> Where a legislative scheme departs from the general principles of procedural fairness, the question for the judiciary will be whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid practical injustice. The discretion provided to the court in managing a control order proceeding enables the court to assess at each stage of the proceeding, whether the subject (or proposed subject) of the control order has been afforded procedural fairness.[132]

2.150 In its supplementary submission, the Attorney-General's Department provided examples of how the court may exercise its discretion to uphold procedural fairness under the proposed amendments to the NSI Act:

> When considering the effect of the proposed amendments to the NSI Act, it is important to consider the proposed amendments as a whole rather than consider the sections in isolation. There are several protections built into the legislation that mitigate any procedural unfairness. Prior to making one of the new orders, the court must consider whether the order would have a substantial adverse effect on the substantive control order proceeding (subsection 38J(5)). This requires the court to contemplate the effect that withholding the information from the respondent or

132 Explanatory Memorandum, p. 25.

> their legal representative will have on procedural fairness for the subject of the control order proceeding. Furthermore, the proposed amendment to subsection 19(4) will confirm that the court has discretion to later order a stay of a control order proceeding, if one of the new orders has been made and later in the proceedings it becomes evident that the order would have a substantial adverse effect on the substantive control order proceeding.[133]

2.151 The INSLM adopted a differing view and stated that the range of discretions provided to the court was of itself insufficient to uphold the principles of equality and fairness:

> The serious impact of the restrictions that can be imposed pursuant to proposed s 38J remain. The amelioration of them might arguably save the provision from constitutional invalidity and non-compliance with Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) but honouring the principles of open justice, a fair trial, a fair hearing and the equality of arms may not be achieved. Any reasonable means of improving the imbalance should be taken. That is the reasonable price to be paid for the maintenance of secrecy.[134]

2.152 Similarly, the Gilbert + Tobin Centre of Public Law disagreed with the proposition that a court may of itself redress potential deficiencies in the right to a fair hearing, especially where evidence is introduced that cannot be tested and has not 'withstood adversarial challenge'. Both Gilbert + Tobin and the Law Council of Australia cited the following passage from Lord Kerr in *Al Rawi v The Security Service* [2011]:

> The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.[135]

2.153 Moreover, the Senate Standing Committee for the Scrutiny of Bills stated:

> In this context, it can be noted that courts are not well placed to second-guess law enforcement evaluations of national security risk

133 Attorney-General's Department, *Submission 9.1*, p. 35.

134 The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Control Order Safeguards – (INSLM Repot) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, January 2016, p. 5.

135 UKSC 34 (United Kingdom Supreme Court (UKSC)), [93]. See Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 13; Law Council of Australia, *Submission 6*, p. 33.

> which means that it may be particularly challenging to protect an individual's interest in a fair hearing …
>
> In considering the extent to which judges will be able, in the exercise of their discretionary powers under the proposed regime, to resist the claims of a law enforcement agency that an order should be made, it should be noted that judges routinely accept that the courts 'are ill-equipped to evaluate intelligence' [*Leghaei v Director-General of Security* (2007) 241 ALR 141; (2007) 97 ALD 516] and the possibility that law enforcement agencies may be wrong in their national security assessments. For this reason, the fact that security information is read by judges in the context of the legislative regime proposed in this schedule does not mean that they will be well placed to draw a different balance between security risk and fairness than is drawn by law enforcement agencies.[136]

2.154 Submitters also expressed concerns about the effect of an order under proposed subsection 38I(3A). Under this subsection, the court may order that the subject of the control order proceeding and their legal representative be excluded from the closed hearing under section 38I. This is the case even where the subject of the control order or their legal representative is security cleared.

Special Advocates

2.155 In 2013, the COAG Review Committee, chaired by the Hon Anthony Whealy QC, a retired Judge from the New South Wales Court of Appeal and comprised of eminent persons in the counter-terrorism field, considered the viability of a special advocates system as part of the COAG Review of Counter-Terrorism Legislation. Recommendation 30 of the COAG Review stated:

> The Committee recommends that the Government give consideration to amending the legislation to provide for the introduction of a nationwide system of 'special advocates' to participate in control order proceedings. The system would allow each State and Territory to have a panel of security-cleared barristers and solicitors who may participate in closed material procedures whenever necessary including, but not limited to, any proposed confirmation of a control order, any revocation or

136 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 13 of 2015*, 25 November 2015, p. 25. See also, Australian Lawyers for Human Rights, *Submission 4*, p. 9.

> variation application, or in any appeal or review application to a superior court relating to or concerning a control order.[137]

2.156 Special advocates are security cleared lawyers who represent individuals in proceedings where the individual and their legal representative have been excluded. In the context of the proposed amendments to the NSI Act, the special advocate would represent the subject of the control order application in closed proceedings where both the subject and their legal representative have been excluded.

2.157 Some submitters noted the option of a system of special advocates in response to concerns about the potential to exclude a party to the control order proceeding and their legal representative (even if security-cleared) under proposed subsection 38I(3A).

2.158 Some submitters addressed the question of whether a special advocates regime would enhance the degree of procedural fairness accorded to the subject of a control order proceeding under the proposed amendments to the NSI Act. The Australian Human Rights Commission recommended the establishment of a system of special advocates to represent the subject of control order proceedings.[138] The Law Council of Australia's 'provisional view' was that a system of special advocates 'would better accord with procedural fairness and the proper administration of justice'.[139] In their respective reports, the Parliamentary Joint Committee on Human Rights and the Senate Standing Committee for the Scrutiny of Bill noted the existence of a special advocates regime in foreign jurisdictions for mitigating a lack of procedural fairness in closed proceedings.[140]

2.159 The Gilbert + Tobin Centre of Public Law did not specifically recommend the creation of a special advocates regime of the kind adopted in the United Kingdom. However, Dr Tamara Tulich, a co-author of the Gilbert + Tobin submission, speaking in her personal capacity, noted:

> [Special advocates] ha[ve] the potential to improve the fairness of the proceedings by having an advocate in the closed material proceedings. A special advocate serves two functions: to represent the individual, and to test the state's case for nondisclosure. However, in the United Kingdom, there have been a number of

137 Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, 2013, p. 59.

138 Australian Human Rights Commission, *Submission 5*, p. 20.

139 Law Council of Australia, *Submission 6*, p. 35.

140 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: thirty-second report of the 44th Parliament*, 1 December 2015, pp. 35–36; Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 13 of 2015*, 25 November 2015, p. 26.

> problems with the special advocates system, including the inability to effectively challenge nondisclosure, the practical inability of special advocates to call evidence and difficulties in achieving that adversarial role.[141]

2.160 The Australian Human Rights Commission similarly noted that it 'does not uncritically endorse the Special Advocate model adopted in the United Kingdom'.[142] The Commission submitted:

> In the Commission's view, the precise form of a Special Advocate regime should be the result of careful consideration, following consultation with appropriately qualified experts, including legal practitioners with experience in criminal and control order proceedings where national security information has been put before the court.[143]

2.161 As recommended by this Committee in its advisory report on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014,[144] the INSLM is currently undertaking an inquiry into whether the additional safeguards recommended in the COAG Review of Counter-Terrorism Laws in relation to the control order regime should be introduced, with particular consideration given to the advisability of introducing a system of special advocates into the regime. In Part 1 of his report, released on 5 February 2016, the INSLM considered the efficacy of a special advocates regime in the context of the proposed changes to the NSI Act contained in Schedule 15 of the Bill.

2.162 Following consideration of the special advocates model in the United Kingdom and the recent report of the New Zealand Law Commission on the subject of national security information, the INSLM ultimately favoured the adoption of a special advocates regime.[145] The INSLM further recommended that Schedule 15 of the Bill should not come into force until a system of special advocates has been implemented. The INSLM made his recommendations taking into account the other changes proposed in the Bill, including the lowering of the age for control orders to 14 years and the new monitoring powers in schedules 3, 8, 9 and 10.

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141 Dr Tamara Tulich, Gilbert + Tobin Centre of Public Law, *Committee Hansard*, Canberra, 14 December 2015, p. 20.

142 Australian Human Rights Commission, *Submission 5.1*, p. 5.

143 Australian Human Rights Commission, *Submission 5.1*, p. 5.

144 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014*, November 2014, p. 24.

145 The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Control Order Safeguards – (INSLM Repot) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, January 2016.

2.163 The INSLM noted that the experience of the UK 'provides the only substantial body of empirical evidence as to how special advocates might act as a safeguard in NSI Act proceedings affecting control order applications'.[146] In respect of the UK special advocates model, the INSLM stated that:

> There has been controversy as to the efficacy of the special advocates system, some of the criticism emanating from the special advocates. A working group was established, to be chaired by a High Court Judge (Mitting J), to discuss procedural and timing concerns in the closed material aspect of the [Temporary Prevention and Investigation Measures] litigation and to seek solutions and/or make recommendations for improvements. No output has emerged yet. The UK Independent Reviewer of Terrorism Legislation, David Anderson QC, generally supports the role of the special advocate.[147]

2.164 Noting the various recommendations put forward on the utility of a special advocates regime, the Attorney-General's Department stated:

> When we have a conversation about special advocates the thing I would draw to the committee's attention is that there are many frameworks around the world. I understand, for instance, that both the UK and Canada use the idea of special advocates. We just need to be careful, to the extent that potentially the committee is thinking about a special advocate in this regime, to think of it within the Australian context. To date there has not been utilisation of special advocates within Australia, although there are regimes that provide for public interest advocates and public interest monitors. They are different options that have been pursued in Australia to date but … we thought that this regime

146 The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Control Order Safeguards – (INSLM Repot) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, January 2016, pp. 5–6.

147 The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Control Order Safeguards – (INSLM Repot) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, January 2016, p. 6. See also, David Anderson QC, Independent Reviewer of Terrorism Legislation, *Terrorism Prevention and Investigation Measures in 2012* (2013), 9.31. The Independent Reviewer noted the concerns raised about the effectiveness of the special advocates regime, but did not recommend its removal. In its response to the 2014 Report of the Independent Reviewer, the UK Government accepted the recommendation of the Independent Reviewer to establish a working group, chaired by a High Court judge, 'to discuss and seek solutions to perceived procedural and timing problems' associated with the terrorism prevention and investigation measures regime, or closed material cases more broadly. See, David Anderson QC, Independent Reviewer of Terrorism Legislation, *Terrorism Prevention and Investigation Measures in 2014* (2015), Annex 2 – Government Response to 2014 Report.

> had appropriate safeguards in place so that the ultimate discretion will always remain with the court whether to disclose information or withhold information and the court retains its own discretion whether or not to appoint an advocate, and we thought that was the appropriate way for the regime to be framed.[148]

2.165 In its supplementary submission, the Attorney-General's Department identified alternatives to the special advocate model which may ameliorate concerns about a lack of procedural fairness. One such model was the public interest advocate or the public interest monitor. A public interest monitor/advocate is:

> an advocate appointed under statute with an appropriate security clearance that has a role similar to an *amicus curiae*.[149] The role of the monitor/advocate is to represent the public interest.[150]

2.166 A regime of public interest monitors and advocates already exists under various Commonwealth and state regimes. The Attorney-General's Department noted in particular the Public Interest Advocates recently established by the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*. Under this regime, a Public Interest Advocate makes submissions to the Attorney-General or an issuing authority in relation to the obtaining of a journalist information warrant. Eight former Commonwealth, State and Territory superior court judges have been appointed by the Prime Minister as Public Interest Advocates.[151] Other similar roles already existing under state legislation include the:

- Queensland Criminal Organisation Public Interest Monitor, established under the *Criminal Organisations Act 2009* (Qld),
- Queensland Public Interest Monitor, who has functions under the *Police Powers and Responsibilities Act 2000* (Qld), *Crime and Corruption Act 2001* (Qld) and *Telecommunications Interception Act 2009* (Qld),
- New South Wales Criminal Intelligence Monitor under the *Crimes (Criminal Organisation Control) Act 2012* (NSW), and
- Victorian Public Interest Monitor under the *Public Interest Monitor Act 2011* (Vic).

148 Mr Cameron Gifford, Acting First Assistant Secretary, National Security Law and Policy Division, Attorney-General's Department, *Committee Hansard*, Canberra, 14 December 2015, p. 47.

149 An *amicus curiae* is a 'friend of the court' and is not a party to the proceeding. It is a person, usually a barrister who, with the court's permission, may advise the court on a point of law or fact or on a matter of practice.

150 Attorney-General's Department, *Submission 9.1*, p. 36.

151 Attorney-General's Department, *Submission 9.1*, p. 36.

2.167 To the extent that such regimes are more familiar and already utilised under existing law, the Attorney-General's Department recommended 'it is preferable to draw upon the experience of existing monitor-type roles which are more developed and understood in the Australian context'.[152]

2.168 In contrast, the INSLM stated:

> [T]he [Public Interest] Monitor's role is not to advocate for a party and risks being seen by the affected parties as a part of the government bureaucracy, not to be trusted. The COAG Review and the New Zealand Law Commission favour the UK model and I agree. It is important that the advocate should unequivocally argue to the result most favourable to the potential controlee without consideration of either the public interest or the 'best interests' of the party.[153]

2.169 The INSLM considered that, 'even if access to the respondent party is limited',[154] there would be utility for special advocates in control order proceedings where a party to the proceeding has been excluded:

> My experience as defence counsel is that it is possible to play a useful role in testing the prosecution case where no positive defence can be put forward on behalf of an accused. My experience as counsel, Royal Commissioner and judge is that a contradictor plays a vital role in any decision making, particularly judicial or quasi-judicial decision making. A special advocate can make submissions, for example: as to the extent to which the information needs to be protected if at all; the most helpful way of redacting the information and providing summaries or particulars of it; and the admissibility of the information and the lack of, or limited, probative value the information might have to support the case for the orders. The special advocate will have access to all of the evidence and can put the withheld evidence into context … The involvement of a special advocate in the NSI Act proceedings should not introduce any undue delay in control order proceedings as special advocates will only be involved in those

152 Attorney-General's Department, *Submission 9.1*, p. 37.

153 The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Control Order Safeguards – (INSLM Repot) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, January 2016, p. 9.

154 The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Control Order Safeguards – (INSLM Repot) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, January 2016, p. 6.

> cases where proposed s 38J of the NSI Act is invoked and should not require any additional steps to be taken.[155]

Committee comment

2.170 The Committee notes that the protection of national security information encompasses a range of obligations, including the protection of human sources, investigatory and intelligence technologies and methodologies, Australia's enforcement and intelligence-gathering partnerships and the need to maintain the confidence placed in these agencies by our allies. As submitted by the AFP, the protection of national security information is not merely a matter of ensuring the integrity of law enforcement operations, but also a matter of protecting lives.

2.171 To date, law enforcement agencies have largely avoided relying on sensitive information in control order proceedings. However, the evidence presented to the Committee highlighted the changing nature of the operational environment, and importantly, the increased need to both rely on and protect sensitive intelligence and human source information. The disclosure of such information may jeopardise the safety of human sources and compromise ongoing police investigations. It is critical that law enforcement is able to seek control orders where necessary, without risking the protection of sensitive information and potentially the lives of people working in the field in order to ensure public safety. To this extent, the Committee accepts that the existing protections under the NSI Act may not go far enough in providing the degree of protection required for a limited category of extremely sensitive information.

2.172 However, the Committee recognises that the type of proceedings contemplated under the proposed amendments to the NSI Act are not a regular feature of Commonwealth legislation and does not wish to normalise such procedures. While courts have long accepted that the requirements of procedural fairness may vary according to context, the Committee notes the words of Chief Justice French in *Assistant Commissioner Michael James Condon v Pompano [2013] HCA 7*:

> At the heart of the common law tradition is 'a method of administering justice'. That method requires judges who are independent of government to preside over courts held in public in which each party has full opportunity to present its own case

155 The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Control Order Safeguards – (INSLM Repot) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, January 2016, pp. 6–7.

> and to meet the case against it. Antithetical to that tradition is the idea of a court, closed to the public, in which only one party, a government party, is present, and in which the judge is required by law to hear evidence and argument which neither the other party nor its legal representatives is allowed to hear.[156]

Accordingly, the Committee approaches the proposed amendments in Schedule 15 cautiously.

2.173 The proposed amendments to the NSI Act mark a significant departure from the existing architecture of the NSI Act, which currently does not provide for information to be adduced in substantive proceedings (be it control order proceedings, or otherwise) that can be withheld from the affected party and their legal representative. The Committee notes that the additional safeguards contained in the proposed amendments, particularly the wide discretion provided to courts to conduct proceedings as they see fit and the minimum disclosure requirement, provide a level of assurance that the subject to the control order proceeding is accorded procedural fairness.

2.174 However, the Committee notes the concerns raised by several submitters that the proposed safeguards in their current form are insufficient in guaranteeing procedural fairness. The Committee considers additional safeguards are warranted and its views are outlined below.

Minimum standard of disclosure

2.175 The minimum standard of disclosure proposed in paragraph 38J(1)(c) of the NSI Act stems from the decision of the High Court in *Assistant Commissioner Michael James Condon v Pompano [2013] HCA 7*. This minimum standard states that the subject of the control order application must be provided 'notice of the allegations on which the control order request was based (even if the relevant person has not been given notice of the information supporting those allegations)'.

2.176 In contrast, the formulation adopted in the COAG Review of Counter-Terrorism Laws, and supported by some submitters, stems from decisions in the European Court of Human Rights and the UK House of Lords. This minimum standard requires that the subject of the control order be provided sufficient information about the allegations against them to enable effective instructions in relation to those allegations to be provided.

2.177 The Committee notes that the precise amount of information required to satisfy either of the minimum disclosure standards will depend on the

156 *Assistant Commissioner Michael James Condon v Pompano* [2013] HCA 7, para [1], French CJ.

facts and circumstances of each case. Practically, it may be that the outcome under each standard would be substantially similar, particularly given it is the court that must ultimately be satisfied that the level of disclosure is sufficient.

2.178 While there may be some advantage in drawing on existing Australian precedent in the formulation of a minimum standard of disclosure for the proposed NSI Act amendments, the Committee finds the experience of the European Court of Human Rights and the United Kingdom in this regard to be extensive and instructive. The formulation recommended in the COAG Review of Counter-Terrorism Laws ensures that the subject of a control order proceeding has an appropriate degree of information to contest the basis on which the control order is sought. However, the Committee accepts that caution must be taken in incorporating wholesale into Australian law European jurisprudence, which may have been developed in distinct legal and constitutional contexts.

Recommendation 4

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended such that the minimum standard of information disclosure outlined in proposed paragraph 38J(1)(c) of the *National Security Information (Criminal and Civil Proceedings Act) 2004* reflects the intent of Recommendation 31 of the Council of Australian Governments Review of Counter-Terrorism Legislation, namely that the subject of the control order proceeding be provided 'sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations'.

Special advocates or Public interest advocates / monitors

2.179 The closely related question of special advocates has been given significant consideration by the Committee. Several submissions encouraged the establishment of a system of special advocates for the purpose of ameliorating the perceived unfairness resulting from the proposed amendments to the NSI Act.

2.180 The Committee welcomes the wide discretion that has been provided to the court in determining whether to make any of the new orders under proposed section 38J and the exclusionary order under proposed subsection 38I(3A). The Committee also acknowledges that the judiciary is

well-equipped and experienced in balancing the rights of the individual with the demands of national security. The Committee considers, however, that the engagement of an advocate during the closed court proceedings could assist the court in its execution of this function.

2.181 The Committee has given thought to whether this role could best be rendered by a special advocate, or alternatively, a public interest advocate or monitor. A special advocate would represent the interests of the subject of the control order proceeding in any application for one of the new orders under proposed section 38J and where the subject of the control order proceeding and their legal representative have been excluded under proposed subsection 38I(3A).

2.182 In contrast, a public interest advocate or monitor would not represent the interests of the excluded party, but rather present arguments to the court about the public interest considerations at stake in each application for one of the new orders under proposed section 38J.

2.183 The Committee recommends that legislation should be enacted to create a system of special advocates to operate in the context of the proposed amendments to the NSI Act. In reaching this conclusion, the Committee has drawn upon the evidence received to the inquiry and the close consideration of the matter provided in the interim report of the INSLM. Additionally, a delegation of the Committee travelled to the United Kingdom in July 2015 and discussed the special advocate system with a range of agencies, a former special advocate and the Independent Reviewer of Terrorism Legislation, David Anderson QC.[157] A Labor member of the Committee, Shadow Attorney-General the Hon Mark Dreyfus QC, MP, also met separately with the Independent Reviewer in July 2015.

2.184 The Committee recommends that legislation should be enacted to create a system of special advocates to operate in the context of the proposed amendments to the NSI Act. In reaching this conclusion, the Committee has drawn upon the evidence received to the inquiry and the close consideration of the matter provided in the interim report of the INSLM. Additionally, a delegation of the Committee travelled to the United Kingdom in July 2015 and discussed the special advocate system with a range of agencies, a former special advocate and the Independent

157 See Mr Dan Tehan MP, *House of Representatives Hansard*, 17 August 2015, p. 8408. The delegation was comprised of Mr Dan Tehan MP, the Hon Philip Ruddock MP and Senator David Fawcett. Senator David Bushby accompanied the delegation on the day of their meeting with the Independent Reviewer of Terrorism Legislation, David Anderson QC.

Reviewer of Terrorism Legislation, David Anderson QC.[158] A Labor member of the Committee, Shadow Attorney-General the Hon Mark Dreyfus QC, MP, also met separately with the Independent Reviewer in July 2015.

2.185 The Committee acknowledges the benefit in drawing upon the experience gained across various jurisdictions with respect to public interest monitors and the recent establishment of the public interest advocate under the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*. The Committee understands that roles such as the Queensland Public Interest Monitor have been a long standing feature of state regimes. They perform a familiar and well understood function in the Australian legal landscape.

2.186 However, the Committee notes that a public interest advocate or monitor would not be a representative of an excluded party to a control order proceeding. It appears incongruous to the Committee that the Crown should be able to vigorously put forward its case for non-disclosure of national security information while the best that may be accorded to the excluded subject of a control order proceeding is a public interest advocate or monitor who makes arguments for and against the public interest associated with making one of the new orders under proposed section 38J. The Committee considers that the court process would be best assisted by an advocate of the excluded party vigorously contesting the assertions for non-disclosure and testing the probative value of the information adduced by the Crown.

2.187 In light of the serious consequences that may result from the imposition of a control order, the Committee considers it necessary that where a subject of a control order has been excluded from proceedings and information has been withheld, the control order subject should be represented by an advocate who advances their interests to the fullest extent possible. The Committee considers it reasonable the excluded party is guaranteed an advocate whose primary responsibility is to the client, rather than the public interest.

2.188 The INSLM identified the many ways in which the presence of a special advocate may produce a positive outcome for the excluded party.[159] For

158 See Mr Dan Tehan MP, *House of Representatives Hansard*, 17 August 2015, p. 8408. The delegation was comprised of Mr Dan Tehan MP, the Hon Philip Ruddock MP and Senator David Fawcett. Senator David Bushby accompanied the delegation on the day of their meeting with the Independent Reviewer of Terrorism Legislation, David Anderson QC.

159 The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Control Order Safeguards – (INSLM Repot) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, January 2016, pp. 6–7.

instance, the special advocate may successfully test the claims for non-disclosure, assist the court in determining the extent of redactions and summaries that are acceptable and test the admissibility and probative value of information that has not been disclosed to the subject of the control order proceeding and their legal representative.

2.189 Furthermore, the Committee considers the ability for a special advocate to challenge the information presented to the court, which cannot be contested by the excluded party, guards against the risk identified by the Law Council of Australia that such untested information may 'inadvertently mislead the court'.[160] The involvement of a special advocate also addresses concerns expressed by the Law Council and the Gilbert + Tobin Centre of Public Law that the mere presence of a judge may not assure procedural fairness.[161]

2.190 Moreover, the Committee sees advantage in ensuring that the advocate regime adopted is, in both actuality and perception, considered as removed from the apparatus of bureaucracy as possible. There is a danger that public offices, such as that of a public interest advocate or monitor, may be viewed as a part of the machinery of government and as such, not understood to be independent.[162] Such a perception is less likely to apply to special advocates who are clearly independent legal practitioners and detached from government.

2.191 The Committee appreciates that the special advocates regime, such as that operating in the United Kingdom, has been the subject of criticism. Some of these criticisms have emanated from the special advocates themselves. Chief among these concerns is that the effective functioning of the special advocates regime is impaired by the inability or limited ability of the special advocates to communicate with the excluded party and their legal representative after the advocate has viewed the sensitive material. This potentially undermines one of the principal benefits of the special advocates regime, being the ability of the special advocate to effectively contest or challenge evidence on behalf of the excluded party. The Committee notes that in his interim report, the INSLM considered potential shortcomings in the special advocates regime.[163] Despite this, the

160 Law Council of Australia, *Submission 6*, pp. 33–34.

161 Law Council of Australia, *Submission 6*, p. 34; Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 13.

162 The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Control Order Safeguards – (INSLM Repot) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, January 2016, p. 9.

163 The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Control Order Safeguards – (INSLM Repot) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, January 2016, p. 6.

INSLM concluded that there is utility in the implementation of a special advocates regime. Similarly, the Committee considers that special advocates provide a valuable additional safeguard in the judicial process.

2.192 Importantly, the Committee notes that although a special advocate represents the interests of the excluded party, their role deviates from that of the ordinary legal representative of the excluded party. This is due to the special advocate being provided access to sensitive information that they cannot disclose to the excluded party. This obligation to not disclose such information to the excluded party necessarily modifies to some extent the ordinary lawyer/client relationship. Legislation establishing the system of special advocates should clearly outline the nature of the special advocate's functions and obligations.

2.193 The Committee is cognisant of this and other practical considerations that must be addressed in the development of a special advocates regime. The experience of other jurisdictions, such as the United Kingdom, Canada and New Zealand on these issues are instructive and provide a valuable guide in the ensuring the regime adopted in Australia is robust and achieves the desired outcome of enhancing the degree of procedural fairness accorded to the subject of a control order proceeding.

2.194 For instance, the Committee notes that in December 2015, the New Zealand Law Commission completed a comprehensive review of the use of national security information in civil, criminal, judicial review and administrative proceedings.[164] The Commission accepted that in certain instances, the withholding of information on national security grounds may be justified and that in such circumstances, closed proceedings may be required. The Commission recommended the creation of a regime of special advocates whose role is to represent the interests of the party excluded from any closed proceedings. The Law Commission also recommended measures to ameliorate the practical difficulties identified in special advocates models operating in foreign jurisdictions.

2.195 The Committee also acknowledges that insights from the experiences of foreign jurisdictions must be cautiously regarded in the realisation that the special advocates regime adopted in Australia would need to operate within the uniquely Australian legal context. In this instance, the special advocates regime would need to be tailored to the very specific and limited context of the NSI Act being invoked in control order proceedings where one of the new orders under proposed section 38J is sought. Accordingly, the wholesale importation of a regime of special advocates

164 New Zealand Law Commission, *The Crown in Court*, Report 135, December 2015.

operating in foreign jurisdictions, such as the United Kingdom, is undesirable.

2.196 The Committee considers that legislation for the introduction of a special advocates regime should be introduced into Parliament as soon as practicable and no later than the end of 2016. Extensive consultation will be necessary to ensure that a robust and highly effective system of special advocates tailored to the Australian context is ultimately established. The Committee considers this timeframe provides sufficient time for Government to undertake the necessary consultation with relevant stakeholders.

2.197 However, cognisant of the changing nature of the operational environment and the increased need to rely on and protect sensitive information in control order proceedings, the Committee considers that the proposed amendments to the NSI Act in Schedule 15 of the Bill should proceed without delay. The Committee notes that its approach deviates from that of the INSLM who recommended that the proposed changes to the NSI Act not come into force until such time as the system of special advocates had been established. The Committee considers it important to note that prior to the establishment of a special advocates scheme, nothing in the proposed amendments to the NSI Act precludes the court from exercising its inherent discretion to appoint a special advocate on an ad hoc basis during control order proceedings where the subject of the control order and their legal representative have been excluded. The Committee further notes that in *R v Lodhi* [2006] NSWSC 586, Justice Whealy held that the framework of the NSI Act is not inconsistent with the appointment of a special advocate and that its provisions were sufficiently broad to permit special advocates to take part in specific hearings under the NSI Act.

2.198 The Committee draws the attention of the courts to this report and the Committee's findings regarding the desirability of a special advocate in control order proceedings of the kind contemplated in Schedule 15. The Committee highlights that while recourse to a special advocate currently exists at the discretion of the court, with the enactment of specific legislation establishing a system of special advocates, the involvement of a special advocate will become a mandatory feature of control order proceedings in which a party and their legal representative have been excluded under the proposed amendments to the NSI Act contained in Schedule 15. This will not only provide certainty to the parties involved, in particular the subjects of control order proceedings, it will also allow for the practical details of how special advocates operate, such as whether and

when they may communicate with the excluded party, to be set out in legislation rather than determined on an ad hoc basis.

Recommendation 5

The Committee recommends that a system of special advocates be introduced to represent the interests of persons subject to control order proceedings where the subject and their legal representative have been excluded under the proposed amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004* contained in Schedule 15 of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015.

Legislation to introduce a special advocates system should be introduced to the Parliament as soon as practicable and no later than the end of 2016. The Committee accepts that there is an increasing need to rely on and protect sensitive national security information in control order proceedings. Accordingly, the Committee supports the amendments proposed in Schedule 15 and considers they should proceed without delay. The Committee notes that this approach does not preclude the court from exercising its existing discretion to appoint special advocates on an ad hoc basis.

Reporting and oversight

2.199 The Committee notes that under section 47 of the NSI Act, the Attorney-General must present to the Parliament an annual report relating to the number of certificates issued by the Attorney-General or Minister appointed by the Attorney-General under various provisions of the NSI Act. The Committee considers that as part of this annual reporting obligation, the Attorney-General should also disclose the number of orders under proposed section 38J that were granted by a court each year. Public confidence in and oversight of the regime would benefit from ascertaining the frequency with which these orders are made.

2.200 Furthermore, the Committee notes that under the Independent National Security Legislation Monitor Act 2010, the INSLM is required to prepare an annual report on the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation. The INSLM must also consider whether these legislative regimes contain appropriate safeguards for protecting individuals' rights and if they remain proportionate and necessary.

2.201 The definition of 'counter-terrorism and national security legislation' includes the NSI Act. The Committee considers that it would be relevant for the INSLM as part of his annual reporting obligations to review the operation, effectiveness and implications of the proposed amendments to the NSI Act contained in this schedule, as well as to consider whether it contains appropriate safeguards for protecting the rights of individuals and remains proportionate and necessary. The Committee requests the INSLM to consider these additional elements as part of his annual report obligations.

Recommendation 6

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to require that, as part of the Attorney-General's annual reporting obligations to the Parliament under section 47 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*, the Attorney-General must also annually report on:

- **the number of orders under proposed section 38J that were granted by the court, and**
- **the control order proceedings to which the orders granted by the court under proposed section 38J relate.**

Dealing with national security information in proceedings (Schedule 16)

Existing regime

2.202 The NSI Act is complemented by the NSI Regulation. The NSI Regulation prescribes requirements for the accessing, storing, handling, destroying and preparing of security classified documents and national security information in proceedings to which the NSI Act applies.

2.203 Sections 22 and 38B of the NSI Act provide that the parties to the proceeding can come to an arrangement about how to protect information in federal criminal proceedings or civil proceedings. The court may give effect to that arrangement under subsections 22(2) or 38B(2) if it considers

it appropriate. In relation to the current operation of these provisions, the Explanatory Memorandum states:

> This means that the parties and the Attorney-General can agree to depart from the NSI Regulation in relation to particular national security information in a proceeding. This may occur, for example, where the owner of the information is content for it to be stored in a different manner to that prescribed for in the Regulation.[165]

2.204 Related to this, sections 23 and 38C state that the NSI Regulation may provide:

- ways in which national security information that is disclosed, or to be disclosed, in a federal criminal proceeding or civil proceeding, must be stored, handled or destroyed,[166] and
- ways in which, and places at which, such information may be accessed and documents or records relating to such information may be prepared.[167]

2.205 However, subsections 23(2) and 38C(3) state that where an order is in force under sections 22 or 38B, the NSI Regulation will not apply. Where the parties wish to deviate from the NSI Regulation in only one respect, but are otherwise content with the remainder of the NSI Regulation, the remaining NSI Regulation will need to be incorporated in full into the order in force under sections 22 or 38B.

2.206 Separately, under subsections 19(1A) and 19(3A), the court may make such orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction of national security information in federal criminal proceedings or civil proceedings to the extent that the court is satisfied it is in the interests of national security to make such orders and that the orders are not inconsistent with the NSI Act or NSI Regulation.

Proposed amendments

2.207 Schedule 16 amends the NSI Act in two respects. Firstly, the proposed amendments allow the NSI Regulation to apply to the extent it provides for ways with dealing with national security information that is disclosed, or is to be disclosed, in federal criminal proceedings and civil proceedings

165 Explanatory Memorandum, p. 131.

166 *National Security Information (Criminal and Civil Proceedings) Act 2004,* Paragraphs 23(1)(a) and 38C(1)(a).

167 *National Security Information (Criminal and Civil Proceedings) Act 2004*, Paragraphs 23(1)(b) and 38C(1)(b).

respectively. That is, the matters listed in subsections 23(1) and 38C(1) will continue to apply to the extent that the orders under either sections 22 or 38B relate to that information but do not deal with that matter.

2.208 Secondly, the NSI Act does not allow a court to make orders that it considers appropriate for the disclosure, protection, storage, handling or destruction of national security information where those orders are inconsistent with the NSI Regulation. The proposed amendments will enable a court to make such orders as the court considers appropriate, even where they are inconsistent with the NSI Regulation, on application by the Attorney-General (or a representative of the Attorney-General) where the Attorney-General wishes to depart from the NSI Regulation in relation to particular national security information.

2.209 The amendments to sections 23 and 38B of the NSI Act apply in relation to orders made on or after the commencement of Schedule 16.

Matters raised in evidence

2.210 The Law Council of Australia noted that in respect of the amendments relating to providing the court with the ability to make orders inconsistent with the NSI Regulation under new subsections 19(1A) and 19(3B), there is a contradiction between the amendment as described in the Explanatory Memorandum and the amendment as outlined in the Bill.[168]

2.211 The Explanatory Memorandum to Schedule 16 suggests that the court may only make an order allowing the parties to deviate from the NSI Regulation in relation to particular national security information where *both* parties agree to such a deviation. The Law Council of Australia submitted:

> However, as the proposed amendments are currently worded – as requiring an application by the Attorney-General (or representative) – it is not clear that an agreement between the parties would actually be required. That is, the amendments as currently drafted, suggest substantial executive discretion (without the agreement of the affected party) would be given to the Attorney-General to depart from the NSI Act or Regulation.[169]

2.212 The Law Council of Australia recommended that the Bill be amended to achieve the intention stated in the Explanatory Memorandum, namely, that a court may only make orders inconsistent with the NSI Regulation on the application of the Attorney-General (or a representative of the

168 Law Council of Australia, *Submission 6*, p. 36.

169 Law Council of Australia, *Submission 6*, p. 36.

Attorney-General) where there is an agreement between the parties to depart from the NSI Regulation in relation to particular national security information.[170]

2.213 In response, the Attorney-General's Department stated:

> To clarify, orders made by the court under subsections 19(1A) and (3A) do not require the consent of the parties …
>
> The proposed amendments will allow the court to make an order that departs from the terms of the NSI Regulation. However, the court must still be satisfied that the order is appropriate, that it is in the interest of national security, and that it is consistent with the NSI Act. The Attorney-General may only apply for an order; the court retains the power to decide whether to make the order …
>
> In some circumstances, the owner of the information may be content for the relevant information to be stored or handled in a manner that departs from the NSI Regulation. In these circumstances, and in the absence of an agreement under section 22 or 38B for that particular information, the Attorney-General should be able to apply for an order under subsection 19(1A) or (3A) that is inconsistent with the NSI Regulation. This would further the NSI Act's objective of balancing the protection of national security information with the administration of justice.[171]

2.214 The Attorney-General's Department also submitted that in respect of the ability to deviate from the NSI Act:

> Neither the court nor the parties have the ability to depart from the terms of the NSI Act, even if there is an agreement to do so.[172]

Committee comment

2.215 The Committee notes that the proposed amendments to section 19 of the NSI Act in Schedule 16 of the Bill are inconsistent with the description of the amendments contained in the Explanatory Memorandum.

2.216 The Committee considers the proposed amendment to section 19 of the NSI Act to be justified. The discretion rightly lies with the court as to whether to make an order sought by the Attorney-General.

170 Law Council of Australia, *Submission 6*, p. 36.

171 Attorney-General's Department, *Submission 9.1*, pp. 37–38.

172 Attorney-General's Department, *Submission 9.1*, p. 37.

2.217 The Committee recommends that the Explanatory Memorandum be amended to be consistent with Schedule 16 of the Bill and the proper operation of the amendments proposed to section 19 of the NSI Act.

Recommendation 7

The Committee recommends that the Explanatory Memorandum to the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to correctly reflect the proposed amendments in Schedule 16 of the Bill.

The Explanatory Memorandum should clarify that the agreement of the parties is not required under subsections 19(1A) and (3A) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* and that the Attorney-General alone can make an application for the court to make an order that is inconsistent with the National Security Information (Criminal and Civil Proceedings) Regulation 2015. The court has the discretion to make such an order where it is satisfied that it is in the interests of national security to do so.