The Parliament of the Commonwealth of Australia

Advisory report on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015

Parliamentary Joint Committee on Intelligence and Security

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Canberra

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Membership of the Committee

Chair Mr Dan Tehan MP

Deputy Chair Hon Anthony Byrne MP

Members

Hon Mark Dreyfus QC, MP
Mr Andrew Nikolic AM, CSC, MP
Hon Philip Ruddock MP
Hon Bruce Scott MP

Senator David Bushby
Senator the Hon Stephen Conroy
Senator David Fawcett
Senator Katy Gallagher
Senator the Hon Penny Wong

Terms of reference

On 12 November 2015, the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 was referred to the Committee by the Attorney-General for public inquiry.

List of abbreviations

AAT	Administrative Appeals Tribunal
AFP	Australian Federal Police
AIC	Australian Intelligence Community
ASIO	Australian Security Intelligence Organisation
ASIO Act	*Australian Security Intelligence Organisation Act 1979*
Classification Act	*Classification (Publications, Films and Computer Games) Act 1995*
COAG	Council of Australian Governments
CRC	*Convention on the Rights of the Child*
Crimes Act	*Crimes Act 1914*
Criminal Code	*Criminal Code Act 1995*
DNSW	Delayed notification search warrant
Family Law Act	*Family Law Act 1975*
Genocide Convention	*Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by the General Assembly of the United Nations on 9 December 1948
ICCPR	*International Covenant on Civil and Political Rights*

IGIS	Inspector-General of Intelligence and Security
INSLM	Independent National Security Legislation Monitor
NSI Act	*National Security Information (Criminal and Civil Proceedings) Act 2004*
NSI Regulation	*National Security Information (Criminal and Civil Proceedings) Regulation 2015*
PIM	Public Interest Monitor
PDO	Preventative detention order
SD	Surveillance Devices
SD Act	*Surveillance Devices Act 2004*
TA Act	*Taxation Administration Act 1953*
TI	Telecommunications Interception
TIA Act	*Telecommunications (Interception and Access) Act 1979*

List of recommendations

2 Applying for control orders

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.

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.

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.

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'.

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.

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.

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.

3 Monitoring of persons subject to control orders

Recommendation 8

The Committee recommends that, in regard to the obligations to be imposed on a person required to wear a tracking device under a control order, the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to:

- remove the ambiguity in subparagraphs (3A)(b) and (c) in Schedule 3 to clarify that it is the court, not the subject of the control order, which authorises any 'specified steps' to be taken by the Australian Federal Police to ensure the device remains in good working order and to enter specified premises to install necessary equipment, and

- include a clear prohibition on interfering with a tracking device that is required to be worn by the subject of a control order, in addition to the other requirements set out in Schedule 3 of the Bill.

The Committee also recommends that the Explanatory Memorandum be amended to include examples of what would constitute reasonable steps to ensure the device remains in good working order.

Recommendation 9

The Committee recommends that for a monitoring warrant in relation to a premises or person, the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to reflect the intent of Recommendation 37 of the Council of Australian Governments Review of Counter-Terrorism Legislation, to explicitly require that:

- the issuing officer is to have regard to whether the exercise of monitoring powers under the warrant constitutes the least interference with the liberty or privacy of any person that is necessary in all the circumstances.

Recommendation 10

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to require the Australian Federal Police to notify persons required to answer questions or produce documents by virtue of a monitoring warrant of their right to claim privilege against self-incrimination and legal professional privilege.

Recommendation 11

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to require the Australian Federal Police (AFP) to notify the Commonwealth Ombudsman within six months following the exercise of monitoring powers. This requirement should also apply to telecommunications interception (TI) and surveillance device (SD) control order warrants under Schedules 9 and 10.

The Committee further recommends that the Bill be amended to require:

- the AFP to retain all relevant records in relation to the use of monitoring warrants or the exercise of monitoring powers, including for TI and SD control order warrants under Schedules 9 and 10, consistent with existing requirements in relation to other TI and SD warrants,

- the AFP to notify the Commonwealth Ombudsman as soon as practicable of any breaches of the monitoring powers requirements, including for TI and SD warrants under Schedules 9 and 10, and

- the Commonwealth Ombudsman to report to the Attorney-General annually regarding the AFP's compliance with the requirements of the monitoring powers regime, including for TI and SD warrants under Schedules 9 and 10, and deferred reporting for those warrants.

Recommendation 12

The Committee recommends that the Attorney-General be required to report annually to the Parliament on the Australian Federal Police (AFP) use of the monitoring powers regime as part of the control order reporting requirements set out in section 104.29 of the Criminal Code. The matters to be included in the report, mirroring the relevant requirements in section 104.29, are:

- the number of monitoring warrants issued,

- the number of instances on which powers incidental to the issue of a monitoring warrant were exercised,

- particulars of:

  ⇒ any breaches self-reported to the Commonwealth Ombudsman

  ⇒ any complaints made or referred to the Commonwealth Ombudsman relating to the exercise of monitoring powers, and

- any information given under section 40SA of the *Australian Federal Police Act 1979* that related to the exercise of monitoring powers and raised an AFP conduct or practices issue (within the meaning of that Act).

The Committee also recommends that the Attorney-General ensure that the telecommunications interception and surveillance device control order warrants provided for in Schedules 9 and 10 of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 are comprehensively covered by the annual reporting requirements in the *Telecommunications (Interception and Access) Act 1979* and *Surveillance Devices Act 2004*.

Recommendation 13

The Committee recommends that for a telecommunications interception control order warrant, the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to reflect the intent of Recommendation 37 of the Council of Australian Governments Review of Counter-Terrorism Legislation, to explicitly require that:

- the issuing officer is to have regard to whether the interception of telecommunications under the warrant constitutes the least interference with the liberty or privacy of any person that is necessary in all the circumstances.

Recommendation 14

The Committee recommends that for a surveillance device control order warrant, the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to reflect the intent of Recommendation 37 of the Council of Australian Governments Review of Counter-Terrorism Legislation, to explicitly require that:

- the issuing officer is to have regard to whether the use of the surveillance device under the warrant constitutes the least interference with the liberty or privacy of any person that is necessary in all the circumstances.

4 Other amendments to the Criminal Code

Recommendation 15

The Committee recommends that clause 105.4(5) of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to replace the term 'imminent terrorist act' with 'terrorist act' in the threshold test for preventative detention orders (PDOs).

The Committee notes that the use of the word 'imminent' could be regarded as inconsistent with the Bill's amended definition of a terrorist act that is 'capable of occurring, and could occur, within the next 14 days'.

The Committee notes that existing thresholds under the PDO regime would continue to require the applicant and the issuing authority to be satisfied that making the PDO would substantially assist in preventing a terrorist act from occurring and that detaining the subject for the applicable period is reasonably necessary for the purpose preventing a terrorist act from occurring.

Recommendation 16

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to remove the ability for serving judges of the Family Court of Australia to be appointed as issuing authorities under paragraph 105.2(1)(b) of the Criminal Code.

Recommendation 17

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended so that, in order to meet the threshold to be convicted of the proposed 'advocating genocide' offence, a person must be reckless as to whether another person might engage in genocide on the basis of their advocacy.

Recommendation 18

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to remove the word 'publicly' from the proposed 'advocating genocide' offence.

5 Amendments to other legislation

Recommendation 19

The Committee recommends that the *Australian Security Intelligence Organisation Act 1979* be amended to include State and Territory authorities within the scope of section 61 of the Act.

Recommendation 20

The Committee recommends that the *Taxation Administration Act 1953* be amended to authorise disclosure of protected information to the Commonwealth Ombudsman.

Recommendation 21

The Committee recommends that, following implementation of the recommendations in this report, the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be passed.

1

Introduction

The bill and its referral

1.1 On 12 November 2015, the Attorney-General, Senator the Hon George Brandis QC, introduced the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 (the Bill) into the Senate.

1.2 In his second reading speech, the Attorney-General stated that:

> The measures introduced in this Bill reflect lessons learned from recent counter-terrorism investigations and operational activity. The Bill also gives effect to a number of recommendations from the Council of Australian Governments Review of Counter-Terrorism Legislation.
>
> The Bill seeks to maintain a careful balance between enhancing our law enforcement capabilities and protecting individual rights. The provisions set out in this Bill include a range of safeguards that also complement the suite of counter-terrorism measures introduced by this government in 2014.[1]

1.3 On the same day, the Attorney-General wrote to the Committee to refer the provisions of the Bill for inquiry and report by 15 February 2016. The Attorney-General requested that the Committee should, as far as possible, conduct its inquiry in public.

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1 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard,* 12 November 2015, p. 8422.

Conduct of the inquiry

1.4 The Chair of the Committee, Mr Dan Tehan MP, announced the inquiry by media release on 12 November 2015 and invited submissions from interested members of the public. Submissions were requested by 10 December 2015.

1.5 The Committee received 17 submissions and 4 supplementary submissions. A list of submissions received by the Committee is at Appendix A.

1.6 The Committee held one public hearing and one private hearing in Canberra on 14 December 2015. It also received two private briefings and conducted a site inspection at the Australian Federal Police (AFP) Headquarters. Details of the hearings are included at Appendix B.

1.7 Copies of submissions and the transcript of the public hearing can be accessed on the Committee's website at www.aph.gov.au/pjcis. Links to the Bill and Explanatory Memorandum are also available on the Committee's website.

1.8 As with its previous bill inquiries, the Committee benefitted from the provision of secondees with technical expertise from the Attorney-General's Department and AFP.

Report structure

1.9 This report consists of five chapters:

- This introductory chapter sets out the conduct of the inquiry, provides an overview of the key provisions of the Bill, and discusses evidence received about the rationale for the proposed amendments,
- Chapters 2 to 5 discuss each of the Bill's schedules in detail:
  - ⇒ Schedules 2, 4, 15 and 16, which relate to control orders for children and the protection of national security information, are discussed in Chapter 2.
  - ⇒ Schedules 3, 8, 9 and 10, which relate to monitoring persons subject to a control order, are discussed in Chapter 3.
  - ⇒ Schedules 1, 5, 6 and 11, which contain other amendments to the *Criminal Code Act 1995* (Criminal Code), including those concerning

preventative detention orders and advocating genocide, are discussed in Chapter 4.

⇒ Schedules 12, 13, 14 and 17, which concern amendments to other legislation, are discussed in Chapter 5.

Other inquiries

1.10 The control order regime was amended twice in 2014 by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* and the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014*. This Committee conducted inquiries into both bills, resulting in bipartisan reports. The Committee made 53 recommendations across the two inquiries, with 10 concerning control orders. All of the Committee's recommendations were accepted by the Government and changes made to the control order regime.[2]

1.11 These changes included:

- a revised sunset clause for the control order and preventative detention order regimes of 7 September 2018,
- amendments to the *Independent National Security Legislation Monitor Act 2010* to require the Independent National Security Legislation Monitor (INSLM) to review, by 7 September 2017, 'Divisions 104 and 105 of the *Criminal Code* and any other provision of the *Criminal Code Act 1995* as far as it relates to those Divisions', and
- amendments to the *Intelligence Services Act 2001* to require the Committee to review, by 7 March 2018, the 'operation, effectiveness and implications' of Division 104 and Division 105 of the Criminal Code.[3]

1.12 At the time of the Committee's second inquiry in November 2014, the Committee noted that the majority of the recommendations of the 2013 Council of Australian Governments (COAG) Review of Counter-Terrorism Legislation to strengthen safeguards in the existing control

2 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014,* Canberra, October 2014, pp. 51–61, 70–79; Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Amendment Bill (No. 1) 2014,* Canberra, November 2014, pp. 5–27.

3 Criminal Code, Sections 104.32 and 105.53; *Independent National Security Legislation Monitor Act 2010,* Section 6(1B); *Intelligence Services Act 2001,* Paragraph 29(bb)(iii).

order regime had not yet been implemented.[4] Accordingly, the Committee recommended that the INSLM be tasked with undertaking a review of the COAG proposals and advising of any recommendations relating to control orders that should be implemented. The Committee further recommended that particular consideration be given to the advisability of introducing a system of 'Special Advocates' into the regime.[5]

1.13 After the appointment of the Hon Roger Gyles AO QC as INSLM, the then Prime Minister referred the following matter pursuant to section 7 of the *Independent National Security Legislation Monitor Act 2010* in line with the Committee's recommendation:

> [W]hether the additional safeguards recommended in the 2013 Council of Australian Government Review of Counter-Terrorism Legislation 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, as recommended in the advisory report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014 by the Parliamentary Joint Committee on Intelligence and Security (PJCIS), tabled on 20 November 2014.[6]

1.14 Submissions were received by the INSLM and a public hearing conducted on 16 December 2015. The INSLM's website noted the introduction of the Bill, stating that 'the inquiry will now proceed taking into account those provisions that relate to the reference'.[7]

1.15 The INSLM's first report on control order safeguards was released on 5 February 2016. The report focused on consideration of special advocates, with a further report on the remainder of the Prime Minister's reference to follow at a later date.[8]

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4 The report of the Council of Australian Governments Review of Counter-Terrorism Legislation was tabled in Parliament on 14 May 2013 and can be accessed at <www.ag.gov.au/Consultations/Pages/COAGReviewofCounter-TerrorismLegislation.aspx>.

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

6 The 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. 1.

7 Independent National Security Legislation Monitor (INSLM), 'INSLM Current Inquiries', <www.dpmc.gov.au/pmc/about-pmc/core-priorities/independent-national-security-legislation-monitor/inslm-current-inquiries>, viewed 5 January 2016.

8 The 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. 2.

1.16 The INSLM made the following recommendations:

1. That the recommendations of the COAG Review as to the introduction of a system of special advocates into the control order regime be accepted and implemented if proposed s 38J of the [*National Security Information (Criminal and Civil Proceedings) Act 2004] (*NSI Act)] in Schedule 15 of the 2015 Bill, is to become law; and
2. That proposed s 38J of the NSI Act in Schedule 15 of the Bill, should not come into force until Recommendation 1 has been implemented.[9]

1.17 The INSLM's findings are discussed in Chapter 2.

Outline of the bill

1.18 The Bill comprises 17 schedules and will mostly affect the control order regime. Amendments will also be made to the following acts:

- *Australian Security Intelligence Organisation Act 1979*
- *Administrative Appeals Tribunal Act 1975*
- *Classification (Publications, Films and Computer Games) Act 1995*
- *Criminal Code Act 1995* (the Criminal Code)
- *Crimes Act 1914*
- *National Security Information (Criminal and Civil Proceedings) Act 2004*
- *Public Interest Disclosure Act 2014*
- *Taxation Amendment Act 1953*
- *Telecommunications (Interception and Access) Act 1979,* and
- *Surveillance Devices Act 2004.*

1.19 Following is a summary of the key elements of each schedule, which are discussed in greater detail in subsequent chapters.

9 The 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. 10.

Schedule 1–Receiving funds for legal assistance

1.20 Schedule 1 will amend the existing exemption to the offence of 'getting funds to, from or for a terrorist organisation' at section 102.6(3)(a) of the Criminal Code to include legal assistance in matters involving the question of whether an entity is a terrorist organisation. This will enable a lawyer to receive funds from a terrorist organisation in cases where it seeks to challenge its status as a terrorist organisation.

1.21 The amendment implements the Government's response to recommendation 20 of the 2013 COAG Review of Counter-Terrorism Legislation, which was supported in part by COAG.

Schedule 2–Control orders for young people

1.22 Schedule 2 amends Division 104 of the Criminal Code to allow a control order to be issued for persons aged 14 and 15 years old. In doing so, the Bill proposes that a number of additional obligations be imposed on the AFP and the issuing court in relation to a person aged less than 18 years, including:

- when seeking the Attorney-General's consent to request an interim control order, the AFP must inform the Attorney-General of the person's age,
- when making an interim control order, 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 by the AFP. Matters that must be taken into account are:
  - ⇒ 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,
- where an issuing court makes an interim control order, it must, as soon as practicable after making the order, appoint a 'court-appointed advocate' to represent the child's best interests. The court appointed advocate is not the child's legal representative, is not obliged to act on their instructions, and may disclose information considered to be in the

child's best interests even if such disclosure is against the child's wishes, and

- control order documents must be served on the court appointed advocate and reasonable steps taken to serve them on a parent or guardian.

Schedule 3–Control orders and tracking devices

1.23 Schedule 3 amends Division 104 of the Criminal Code to impose obligations on a person required to wear a tracking device to ensure that the tracking device remains operational and functional. A person would be required to:

- ⇒ ensure the device remains in good working order,
- ⇒ authorise the AFP to take steps to ensure the device is in good working order,
- ⇒ authorise the AFP to enter premises to install equipment necessary for the operation of the tracking device,
- ⇒ report to have the device inspected, and
- ⇒ if the device is not working, notify the AFP as soon as practicable but within four hours.

Schedule 4–Issuing court for control orders

1.24 The amendments proposed in Schedule 4 would remove the Family Court of Australia from the definition of 'issuing court' for the purpose of a control order, partially implementing a recommendation of the 2013 COAG Review of Counter Terrorism Legislation. The issuing courts would then be the Federal Court of Australia and Federal Circuit Court of Australia.

Schedule 5–Preventative detention orders – 'imminent' test

1.25 Schedule 5 will amend Division 105 of the Criminal Code by inserting a defined term 'imminent terrorist act' as a threshold for the preventative detention order (PDO) regime, based on a suspicion on reasonable grounds by an AFP member, and the satisfaction of an issuing authority, that an attack is '*capable of being carried out, and could occur, within the next 14 days*'.

1.26 The current threshold for a PDO to be issued is that an attack is 'one that is imminent' (not defined) and is '*expected to occur, in any event, at some time in the next 14 days*'.

Schedule 6–Issuing authorities for preventative detention orders

1.27 The amendment proposed in Schedule 6 would remove the Family Court of Australia from the definition of 'superior court' in section 100.1 of the Criminal Code; that is, the list of superior courts in which a retired judge must have served for five years before becoming eligible to be appointed as an issuing authority for continued PDOs.

1.28 The amended definition of superior court will include the High Court, the Federal Court of Australia, the Supreme Court of a state or territory, or the District Court (or equivalent) of a state or territory. Serving judges of federal courts, serving judges of state and territory supreme courts, and the President or Deputy President of the Administrative Appeals Tribunal would also be eligible to be appointed as issuing authorities under existing legislation.

Schedule 7–Application of amendments of the Criminal Code

1.29 Schedule 7 outlines the application of the proposed amendments to Division 104 and Division 105 of the Criminal Code, including that:

- Schedules 2 and 3 apply to an order made under Division 104 after the commencement of the section where
  - ⇒ the order is requested after commencement, and
  - ⇒ the conduct in relation to that request occurred before or after commencement,
- despite the amendment made by Schedule 4, matters already afoot in the Family Court of Australia can continue, and
- the new threshold for PDOs applies to new, extended or continued PDOs.

Schedule 8–Monitoring compliance with control orders

1.30 Schedule 8 would create a monitoring powers regime in a new Part IAAB of the *Crimes Act 1914* (Crimes Act) for individuals subject to a control order. The proposed regime is closely modelled on existing provisions in the *Regulatory Powers (Standard Provisions) Act 2014*.

1.31 The regime would enable premises and persons to be searched either by consent or on the basis of a warrant, targeted at monitoring compliance with conditions of a control order 'for the purposes of preventing a person from engaging in terrorist act planning or preparatory acts'. Unlike the existing regime, the proposed amendments will not require the issuing authority to be satisfied that an offence has already occurred or is going to be committed.

1.32 The amendments enable a wide range of premises to be searched, as long as the control order subject has a 'prescribed connection' with the premises. This includes premises where the person works, conducts volunteer work, or studies.

1.33 The amendments include an incidental power to seize evidential material identified in the course of searching premises or a person.

Schedule 9–Telecommunications interception

1.34 The amendments proposed in Schedule 9 will allow agencies to apply to an issuing authority for a telecommunications interception warrant for the purposes of monitoring compliance with a control order. The warrant can be issued following the making of a control order but prior to it being served on the person, and telecommunications interception information can be used in any proceedings associated with that control order.

1.35 The amendments include deferred reporting arrangements on the use of such warrants.

1.36 The amendments also permit intercepted material to be used in connection with PDOs nationally, not just the Commonwealth scheme, and retrospectively validate previous communication or use of telecommunications interception information for a purpose connected with State and Territory PDO legislation.

1.37 The amendments also allow the limited use of telecommunications interception information obtained under a warrant relating to an interim control order which is subsequently declared void. However, use is allowed only when necessary to assist in preventing or reducing the risk of a terrorist act being committed, serious harm to a person, serious damage to property or a purpose connected with PDOs nationally.

Schedule 10–Surveillance devices

1.38 Schedule 10 will amend the *Surveillance Devices Act 2004* to allow agencies to apply for a surveillance device warrant for the purpose of monitoring

compliance with a control order. The warrant can be issued following the making of a control order but prior to it being served on the person and surveillance device information can be used in any proceedings associated with that control order.

1.39 The amendments include deferred reporting arrangements on the use of such warrants.

1.40 The amendments also allow the limited use of surveillance device information obtained under a warrant relating to an interim control order which is subsequently declared void. However, use is allowed only when necessary to assist in preventing or reducing the risk of a terrorist act being committed, serious harm to a person, serious damage to property or a purpose connected with PDOs nationally.

Schedule 11–Offence of advocating genocide

1.41 Schedule 11 amends the Criminal Code to create a new offence of 'publicly advocating genocide' to people inside or outside Australia, carrying a maximum sentence of seven years' imprisonment. The offence is intended as tool to enable law enforcement to intervene earlier in the radicalisation process.

1.42 The term 'advocates' is defined in the Bill to mean 'counsel, promote, encourage or urge', identical to the terms used in the existing 'advocating terrorism' offence.

Schedule 12–Security assessments

1.43 Under schedule 12, section 40 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) would be amended to allow ASIO to furnish security assessments directly to states and territories. Currently, security assessments can only be provided directly to a state or territory in respect of a designated special event (such as a major intergovernmental meeting or sporting event) or, in all other cases, indirectly via a Commonwealth agency.

Schedule 13–Classification of publications, films and computer games

1.44 Schedule 13 will amend the *Classification (Publications, Films and Computer Games) Act 1995* to align the definition of 'advocates' with the Criminal Code definition as amended by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*. A publication, film or computer

game would therefore advocate the doing of a terrorist act if it 'directly or indirectly counsels, promotes, encourages or urges the doing of a terrorist act'.

Schedule 14–Delayed notification search warrants

1.45 Delayed notification search warrants were introduced into the Crimes Act by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*.

1.46 The proposed amendment is intended to clarify that while an eligible officer applying for a delayed notification search warrant must hold the relevant suspicions and belief set out in section 3ZZBA of the Crimes Act, the chief officer and eligible issuing officer need only be satisfied that there are reasonable grounds for the eligible officer to hold the relevant suspicions and belief (that is, the eligible officer is not required to personally suspect or believe).

1.47 The amendment brings the issuing requirements for a delayed notification search warrant in line with other search warrant provisions in the Crimes Act.

Schedule 15–Protecting national security information in control order proceedings

1.48 Schedule 15 amends the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) to enable the court to make three new types of orders in proceedings for the making, confirming or varying of a control order (new section 38J):

- the subject of the control order and their legal representative may be provided 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,
- the subject of the control order and their legal representative may not be provided with any information contained in the original source document. However, the court may consider all of that information, or
- a witness may be called and the information provided by the witness need not be disclosed to the subject of the control order or their legal representative. However, the court may consider all of the information provided by the witness.

1.49 The effect of these orders is that it will allow the court to consider information that is not disclosed to the subject of the control order or their legal representative.

Schedule 16–Dealing with national security information in proceedings

1.50 The National Security Information Regulation (NSI Regulation) prescribes requirements for accessing, storing, handling, destroying and preparing security classified documents and national security information in proceedings to which the NSI Act applies.

1.51 Schedule 16 would amend section 19 of the NSI Act to allow the court to make an order enabling the parties and the Attorney-General to depart from the NSI Regulation in relation to particular national security information.

Schedule 17–Disclosures by taxation officers

1.52 Schedule 17 will add an additional exception to the existing exceptions to the offence prohibiting disclosure of protected information by taxation officers in the *Taxation Administration Act 1953*.

1.53 Disclosure will be permitted for the purposes of preventing, detecting, disrupting or investigating conduct that relates to a matter of security as defined by section 4 of the ASIO Act.

Rationale for the Bill

1.54 In his second reading speech, the Attorney-General outlined the current threat environment facing Australia:

> Around 110 Australians are currently fighting in Syria and Iraq. At least 41 Australians are believed to have been killed and approximately 30 Australians have returned from the conflict.
>
> There are about 190 people in Australia actively supporting extremist groups through financing and recruitment or seeking to travel to the conflict in Syria and Iraq.
>
> ASIO is currently investigating several thousand leads and persons of concern. More than 400 of these are high-priority cases. That's more than double the number since early 2014.

> Since 12 September 2014, when the National Terrorism Public Alert level was raised to High, 26 people have been charged as a result of 10 counter-terrorism operations around Australia. That's more than one third of all terrorism related arrests since 2001.[10]

1.55 The Attorney-General's Department stated that 'Australians currently face the most significant threat from terrorism in our nation's history', pointing in particular to the risks posed by Australians who travel to conflict zones such as Syria and Iraq and then return to Australia.[11]

1.56 The proposed amendments, as noted in the Attorney-General's second reading speech, respond to recent operational experience. The AFP offered the following rationale for the Bill:

> Since the initial raising of the terror threat in September 2014, the operational pace has continued to increase, as has the number of ongoing investigations. In the 2014–15 financial year alone, the AFP conducted eight disruption activities that resulted in 25 people being charged with a number of terrorism and other related offences.
>
> The speed of radicalisation and the trend towards smaller, opportunistic plots, dictate that police must act quickly in the interest of ensuring community safety. This increasingly necessitates taking matters to operational resolution at early stages of an investigation when, and if, an imminent threat has been identified. The tragic murder of Mr Curtis Cheng in October 2015 by a 15 year old highlights the high cost to the community when threats remain undisrupted, as well as underscoring the increasingly young age of those being radicalised.
>
> The fact that measures to prevent and disrupt terror threats addressed by the Bill have been used infrequently does not mean the existence of these tools is unwarranted. Rather, it highlights the commitment of law enforcement agencies, including the AFP, to using such measures judiciously and in accordance with the public interest. That there are only a small number of persons who have been found to warrant the use of these measures thus far is not predictive of the future. With the current terrorism threat level at 'probable', there is likely to be increased need to apply such measures in the near future.

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10 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard,* 12 November 2015, p. 8422.

11 Attorney-General's Department, *Submission 9,* p. 3.

> The amendments in the Bill address the increased need to ensure the effective operation of existing preventative and risk mitigation mechanisms, such as control orders and preventative detention orders, while safeguarding accountability and strengthening existing requirements. The AFP considers strengthening these short-medium term preventative tools does not weaken the criminal justice system. On the contrary, it ensures that traditional arrest, charge and criminal prosecution are not used as blunt instruments applied indiscriminately to address the risk a person may pose to the safety of the community.[12]

1.57 Describing control orders as a preventative measure, not intended to be punitive or a substitute for prosecution, the AFP went on to state that:

> In the current fluid and evolving terrorism threat environment, police may have sufficient intelligence to establish serious concern regarding the threat posed by an individual or group, but may not have sufficient time or evidence to commence criminal prosecution. In these circumstances, control orders provide a mechanism to manage the threat in the short to medium term. Use of a control order is thus considered in conjunction with and complementary to criminal prosecution options, and allows a balance to be achieved between mitigating the risk to community safety posed by an individual and allowing criminal investigations to continue.[13]

1.58 Assistant Commissioner Neil Gaughan of the AFP told the Committee at the public hearing:

> The legislative reform we are seeking in this bill primarily focuses on control orders and preventive detention orders. These powers have been used infrequently and, in my view, very judiciously. However, whilst the operational environment remains as it is, it is likely there will be an increase in the need to apply these measures in the future. We are seeking the proposed amendments as a result of experience in using these orders over the last 15 months. I should add that, in a couple of circumstances, control orders appear to have a positive influence on behaviour. While this is indeed early days, I think this is a positive, if not unintended, consequence of the system.[14]

12 Australian Federal Police, *Submission 3,* p. 4.

13 Australian Federal Police, *Submission 3,* p. 5.

14 Assistant Commissioner Neil Gaughan, National Manager Counter Terrorism, Australian Federal Police, *Committee Hansard,* 14 December 2015, p. 35.

1.59 While some submitters reiterated their opposition to or concerns about aspects of Australia's counter-terrorism framework,[15] contributors to the inquiry generally acknowledged the need to safeguard Australia's national security.[16] The Australian Human Rights Commission, for example, commented that:

> The Commission recognises the vital importance of ensuring that intelligence and law enforcement agencies have appropriate powers to protect Australia's national security and to protect the community from terrorism. Indeed, such steps are consistent with Australia's international obligations in international law, both under Security Council Resolutions, and to protect the right to life of persons under its jurisdiction. This right is itself a human right, enshrined in article 6 of the International Covenant on Civil and Political Rights (ICCPR).[17]

1.60 The measures proposed in the Bill did, however, attract detailed comment and are discussed in later chapters.

1.61 In addition, the Committee received evidence about community perceptions that Australia's counter-terrorism framework contributes to social division. Representatives of the Muslim Legal Network (NSW) conveyed community concerns about the application of counter-terrorism laws, noting in particular that control orders have to date only been applied to Muslim individuals.[18]

1.62 Ms Rabea Khan, Vice President of the Muslim Legal Network (NSW) explained the need to understand the context in which these laws

> are coming into play, particularly with young children who are at risk of radicalisation. They are dealing with this sense of identity and sense of belonging to Australian or Western society. We are in a context where Islam is the top headline of every newspaper and every news channel. The place of Muslims in Australia is constantly being questioned, and these young people grow in that

15 Gilbert + Tobin Centre for Public Law, *Submission 2,* pp. 1, 7; Law Council of Australia, *Submission 6,* pp. 6, 15, 19 and 28; Joint Media Organisations, *Submission 7,* p. 1; Victorian Bar and Criminal Bar Association of Victoria, *Submission 12,* p. 1; Amnesty International Australia, *Submission 13,* p. 1; Joint councils for civil liberties, *Submission 17,* pp. 4, 11 and 18.

16 Police Federation of Australia, *Submission 1,* p. 1; Australian Lawyers for Human Rights, *Submission 4,* p. 1; Law Council of Australia, *Submission 6,* p. 4; Muslim Legal Network (NSW), *Submission 11,* p. 4; Queensland Government, *Submission 16,* p. 1; Joint councils for civil liberties, *Submission 17,* p. 2.

17 Australian Human Rights Commission, *Submission 5,* p. 3.

18 Mr Zaahir Edries, President, Muslim Legal Network (NSW), *Committee Hansard,* 14 December 2015, pp. 23–24, 26–27; Muslim Legal Network (NSW), *Submission 11,* pp. 3–4.

> environment. There is a sense of growing social divisiveness, as groups like Reclaim Australia have shown. When we are talking to young people about the reasons for radicalisation it is relevant that we also address the context in which these children or young people are coming from.[19]

1.63 Mr Zaahir Edries, President of the Muslim Legal Network (NSW) also commented that:

> We have not had the opportunity or the benefit of exhaustive consultation with our community, but what we do get on an ad hoc basis from people, who may have been approached by policing agencies within New South Wales or even ASIO officials, are reports that there seems to be a targeting of young Muslim, potentially Middle Eastern, men and an almost threatening attitude by some—I would not say all—law enforcement agents in the way they question or interact with these people. From the perspective of many young people within the community—and I do not think it is just the Muslim community—there is an over-representation or a saturation of their attitude towards this legislation that it seems geared towards regulating these potentially at risk young people. That is not something we could leave out. It is an underlying theme in many areas within the Muslim community. Accurate or not, it is something that exists and something that is important to those people whom we do not necessarily represent but from whom we receive comment.[20]

1.64 The Victorian Bar and Criminal Bar Association of Victoria similarly argued, in relation to control orders, that 'many will view the amendment as targeting Muslim youth who already have a strong sense of persecution and alienation'.[21]

Committee comment

1.65 The Committee notes that the measures proposed in the Bill reflect recent operational experience and will give effect to some of the

19 Ms Rabea Khan, Vice President, Muslim Legal Network (NSW), *Committee Hansard,* 14 December 2015, p. 27.

20 Mr Edries, *Committee Hansard,* 14 December 2015, p. 26.

21 Victorian Bar and Criminal Bar Association of Victoria, *Submission 12,* p. 2.

recommendations of the 2013 COAG Review of Counter-Terrorism Legislation.

1.66 Australia faces a rapidly changing security environment, where the operational pace has and continues to increase, and where the number of ongoing investigations is also increasing. The Explanatory Memorandum points to an increasing number of smaller groups or lone actors engaging in short-term, low-complexity attack plans, with reduced warning times making it more difficult for agencies to detect, investigate and disrupt attacks before they occur. Individuals and groups are more resistant to disruption and the number of persons-of-concern is 'substantially higher than at any point historically'. Further, if and when foreign fighters return, pressure on agencies is expected to increase substantially.[22]

1.67 The AFP highlighted the importance of short to medium term preventative tools, such as control orders, as effective prevention and risk mitigation tools, arguing they have been used judiciously to date.

1.68 Indeed, when the Committee inquired into the control order regime in its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 only two control orders had been issued since inception of the regime in 2005. Since then, four further control orders have been issued.

1.69 The Committee accepts that the security risks to Australia are increasing and that even a small number of terrorist attacks can have a profound national effect. Measures are required to address the threats terrorism poses to the Australian community. These measures must, however, be balanced and proportionate.

1.70 The Committee acknowledges evidence from the Muslim Legal Network (NSW) about community perceptions. Concerns have been raised in this inquiry and previous inquiries about the potential for national security legislation to have a marginalising effect on sections of the Australian community. The Committee reiterates its strong support for efforts to promote social cohesion.

1.71 The Committee acknowledges that control orders are intrusive, however accepts that they are a preventative measure that targets conduct. The Committee also points out that laws passed by the Parliament are intended to protect the Australian community as a whole.

1.72 This inquiry has proceeded concurrently with the INSLM's review of the safeguards in the control order regime. The Committee's consideration of

22 Explanatory Memorandum, p. 33.

the Bill has been informed by the INSLM's findings in relation to implementing a system of special advocates into the control order regime. The Committee notes that the INSLM's report focused on this particular matter, and that he will address the remainder of the Prime Minister's reference in a later report.

1.73 Matters raised by submitters concerning the content of the Bill are discussed in the following chapters. The Committee has examined the appropriateness of the proposed amendments, including whether the Bill incorporates adequate safeguards and accountability mechanisms.

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.

3

Monitoring of persons subject to control orders

3.1 This chapter discusses the following provisions of the Bill, which primarily relate to the monitoring of persons subject to control orders in operation:

- Schedule 3 amends the Criminal Code to place obligations on a person who is required to wear a tracking device under a control order to ensure that the device remains operational and functional.
- Schedule 8 creates a new monitoring powers regime under the *Crimes Act 1914* (the Crimes Act) for entering premises or searching persons in order to monitor the compliance of a person who is subject to a control order with the conditions of their control order, and for preventing such a person from engaging in a terrorist act or planning or preparatory acts.
- Schedule 9 amends the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) to
  - ⇒ allow agencies to apply for a Telecommunications Interception (TI) warrant for the purposes of monitoring compliance with a control order,
  - ⇒ allow TI information to be used in any proceedings associated with that control order, and
  - ⇒ permit the use of intercepted material in connection with preventative detention orders (PDOs) nationally.
- Schedule 10 amends the *Surveillance Devices Act 2004* (the SD Act) to
  - ⇒ allow law enforcement officers to apply for a surveillance device warrant for the purposes of monitoring compliance with a control order,

- ⇒ allow that information to be used in any proceedings associated with that control order,
- ⇒ extend the circumstances in which agencies can use less intrusive surveillance devices without a warrant to include monitoring of compliance with a control order, and
- ⇒ allow protected information obtained under a control order warrant to be used to determine whether the control order has been complied with.

Tracking devices (Schedule 3)

3.2 One of the obligations that may be placed on a person subject to a control order is to require the person to wear a tracking device.[1] A tracking device used in association with a control order is a small, portable device used to monitor a person's location. It is worn on the body of the person, often around the ankle, and is used to locate and track a person's movements. Similar tracking devices are sometimes used to monitor individuals released on bail or parole to ensure compliance with bail or parole conditions, which often include curfews or prohibitions on entering or approaching particular locations.

3.3 Schedule 3 to the Bill proposes to amend the Criminal Code to require a person subject to such a requirement to take steps, to be set out in the control order, to ensure the tracking device remains operational and functional. Specifically, the person would be required to

> (a) take specified steps and reasonable steps to ensure that the tracking device and any equipment necessary for the operation of the tracking device are or remain in good working order;
>
> (b) authorise one or more AFP members to take specified steps to ensure that the tracking device and any equipment necessary for the operation of the tracking device are or remain in good working order;
>
> (c) authorise one or more AFP members to enter one or more specified premises for the purposes of installing any equipment necessary for the operation of the tracking device;
>
> (d) report to specified persons at specified times and places for the purposes of having the tracking device inspected;

1 *Criminal Code Act 1995* (Criminal Code), paragraph 104.5(3)(d).

> (e) if the person becomes aware that the tracking device or any equipment necessary for the operation of the tracking device is not in good working order—notify an AFP member as soon as practicable, but no later than 4 hours, after becoming so aware.[2]

3.4 The Explanatory Memorandum notes that there are no obligations under the current control order regime for the person to keep their tracking device charged and operational. The amendments are thus intended to 'ensure the utility of a requirement to wear a tracking device':

> Requiring a person who is required to wear a tracking device to take steps to ensure that the device is charged and operational is necessary to prevent the effective operation of the requirement from being frustrated without technically breaching the requirements of the control order, which carries a criminal penalty. Ensuring the effective operation of a requirement to wear a tracking device is designed to support compliance with other related conditions, such as restrictions on movement.[3]

Matters raised in evidence

3.5 The Attorney-General's Department explained in its submission that

> [t]he steps that the AFP will be able to request and an issuing court will be able to impose, will include 'specified' steps to ensure the tracking device is or remains in good working order (for example, by agreeing to answer the phone if the AFP call because the device appears not to be working) and take 'reasonable' steps to ensure the device remains in good working order (for example, regular charging of the device).
>
> The amendments do not give an issuing court a discretion to impose the additional obligations in relation to maintaining the operation of the device. That is, the issuing court can either impose the requirement to wear a tracking device and the accompanying requirements to maintain the device or neither requirement. The rationale for this is that a requirement to wear a device without the accompanying requirements would be ineffective.[4]

3.6 Several submitters raised concerns with these provisions. Common themes were that the proposed provisions inappropriately place responsibilities on persons who are the subject of control orders, rather

2 Proposed subsection 104.5(3A).

3 Explanatory Memorandum, p. 57.

4 Attorney-General's Department, *Submission 9*, pp. 5–6.

than police, and a lack of clarity as to what the provisions actually require.[5]

3.7 The Law Council of Australia considered the requirement to take 'reasonable steps', in addition to 'specified steps', could create confusion as to what was actually required to be done as there may be different views about what are considered to be 'reasonable steps'. It raised the example of a faulty battery, in relation to which it suggested a person may not know whether they have an obligation to fix the battery or simply to report the matter to the AFP.[6]

3.8 The Council noted that a breach of a control order may attract criminal liability, and that the rule of law requires that a person 'know in advance whether their conduct might attract a criminal sanction.'[7] It recommended that the requirement to take 'reasonable steps' be removed, as the 'specified steps' requirement would allow an issuing authority to tailor the control order to the specific circumstances of the subject of the control order. Further, it recommended that the subject of the control order should not be required to authorise AFP members to take specified steps to ensure the device is in good working order or to enter premises, as such actions should be authorised by the court.[8]

3.9 The Gilbert + Tobin Centre of Public Law made a similar argument, contending 'it should be the responsibility of the police to ensure the technology is in good working order.'[9] It suggested that if the legislation is seeking to address concerns about the disabling of tracking devices, this should be addressed 'by a clear prohibition of interference with the device.'[10]

3.10 Submitters were particularly concerned as to how the responsibility of ensuring the functioning of a tracking device would apply to children.

3.11 The Muslim Legal Network (NSW) questioned the ability of minors to assess whether a tracking device is defective and whether a report to the AFP would need to be made.[11] It also submitted that it would be 'onerous

5 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 6; Law Council of Australia, *Submission 6*, p. 14; Muslim Legal Network (NSW), *Submission 11,* p. 12.

6 Law Council of Australia, *Submission 6*, p. 14.

7 Law Council of Australia, *Submission 6*, p. 14.

8 Law Council of Australia, *Submission 6*, p. 14.

9 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 6.

10 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 6.

11 Muslim Legal Network (NSW), Submission 11, p. 12.

and impractical' to transfer this responsibility to a parent or guardian of the child.[12]

3.12 In a similar vein, the Queensland Government suggested that

> young people may be more likely to negligently damage or fail to maintain equipment due to their developmental life stage. This could be relevant in relation to a young person's failure to charge a device, when a particularly immature 14 year old may not understand (or remember) the significance of ensuring this simple action occurs (and by failing to do so, they may be committing a criminal offence).[13]

3.13 Accordingly, the Queensland Government submitted the proposed mandatory conditions should not apply in cases where a court imposes a condition on a young person to wear a tracking device.[14]

3.14 As with a range of other provisions proposed by the Bill, the Muslim Legal Network (NSW) commented that proposed subsection 104.5(3A) could provide AFP officers 'with the ability to enter into various premises, including perhaps a school'.[15] It submitted there is 'no doubt' this would impact upon the mental wellbeing of the subject of the control order, as well as other aspects of their life.[16]

3.15 In its supplementary submission, the Attorney-General's Department responded to these concerns, noting that

> [a]n issuing court will only impose as a condition of the order that the young person wear a tracking device if it determines on a balance of probabilities that the restriction is reasonably necessary, and reasonably appropriate and adapted for the purposes of protecting the public from a terrorist attack, preventing the provision of support for or the facilitation of a terrorist attack or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country. When determining what is 'reasonably necessary, and reasonably appropriate and adapted', the issuing authority must consider the impact of the tracking device (including the mandatory conditions associated with the device, such as maintaining it in good working order) on the young person's circumstances and consider the best

12 Muslim Legal Network (NSW), *Submission 11*, p. 12.

13 Queensland Government, *Submission 16*, p. 2.

14 Queensland Government, *Submission 16*, p. 3.

15 Muslim Legal Network (NSW), *Submission 11*, p. 12.

16 Muslim Legal Network (NSW), *Submission 11,* p. 12.

> interests of the young person, for example their maturity, lifestyle, and right to receive education …
>
> A tracking device which has run out of battery will render a requirement to wear a tracking device ineffective, but may not constitute interference with the device. Consequently, it is important that the Bill provides the ability to prosecute a person in circumstances where they not only interfere with the device but intentionally render it ineffective by letting it run out of battery.
>
> Any prosecution for an offence must be supported by admissible evidence and both the physical and fault elements proved to the criminal standard beyond reasonable doubt.[17]

Committee comment

3.16 The Committee notes submitters' concerns that Schedule 3 as proposed is ambiguous in some respects, namely the requirements to take 'reasonable steps' and to authorise AFP members to take specified steps to ensure the device is in good working order or to enter premises. The Committee considers that these issues should be clarified. This should include a non-exhaustive list of examples in the Explanatory Memorandum of what would be expected to constitute 'reasonable steps'. The Bill should also make it clear that it is the court making the order, rather than the person subject to the order, who authorises the AFP to take specified steps to ensure the device remains in good working order and to enter specified premises to install necessary equipment.

3.17 With respect to the deliberate disabling of a tracking device, the Bill should be amended to include a clear prohibition on interference with the device. The inclusion of this amendment, in addition to the proposed requirements already set out in Schedule 3, would ensure that the full range of actions or inactions which would render a tracking device inoperative are captured by the Bill.

3.18 In relation to the application of the proposed obligations on a child who is required to wear a tracking device under a control order, the Committee considers this appropriate, noting that:

- the ability of a child to understand the terms of a control order may vary depending on their individual development and maturity, which would be considered by an issuing court in deciding whether or not to impose a requirement to wear a tracking device, and

17 Attorney-General's Department, *Submission 9.1*, p. 14.

- the court must take into account the best interests of the child in determining whether to include a requirement to wear a tracking device as part of a control order placed on a child, including the mental health of the child.

3.19 The Committee notes that, as with other criminal offences, the prosecution must prove an offence of contravening a control order beyond reasonable doubt. That is, the prosecution would be required to lead evidence as to the individual's state of mind, including their subjective intention or knowledge that their actions would result in, or be likely to result in, a breach of the control order. It would not be enough to show that the individual should have known that their actions would result in a breach.

3.20 In light of these points, the Committee considers that the risk of a person, including a child, being prosecuted for breaching the additional obligations in relation to wearing a tracking device will be appropriately confined to cases of flagrant and egregious breaches. In the case of a child, the maturity of the child and their developmental stage would be key factors not only in determining whether to impose a requirement to wear a tracking device, but also in determining whether prosecution for a breach of a tracking device requirement is justified.

Recommendation 8

The Committee recommends that, in regard to the obligations to be imposed on a person required to wear a tracking device under a control order, the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to:

- **remove the ambiguity in subparagraphs (3A)(b) and (c) in Schedule 3 to clarify that it is the court, not the subject of the control order, which authorises any 'specified steps' to be taken by the Australian Federal Police to ensure the device remains in good working order and to enter specified premises to install necessary equipment, and**
- **include a clear prohibition on interfering with a tracking device that is required to be worn by the subject of a control order, in addition to the other requirements set out in Schedule 3 of the Bill.**

The Committee also recommends that the Explanatory Memorandum be amended to include examples of what would constitute reasonable steps to ensure the device remains in good working order.

Monitoring powers (Schedule 8)

3.21 Schedule 8 to the Bill proposes to amend the Crimes Act by inserting a new Part 1AAB granting the power to police to enter premises or search persons, and to exercise other 'monitoring powers', in order to monitor the compliance of individuals subject to a control order with the controls in the order.

Powers in relation to premises

3.22 Under proposed section 3ZZKA, police would be able to enter premises and exercise the monitoring powers if a control order is in force in relation to a person and the person has a 'prescribed connection' with the premises,[18] and:

- the person is the occupier of the premises and consents to the entry, or

18 Proposed section 3ZZJC sets out when a person will have a 'prescribed connection' with premises.

- the entry is made under a monitoring warrant, and
- the entry and exercise of monitoring powers are for any of the following purposes (the control order monitoring purposes):
  - ⇒ the protection of the public from a terrorist act;
  - ⇒ preventing the provision of support for, or the facilitation of, a terrorist act;
  - ⇒ preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country; or
  - ⇒ determining whether the control order has been, or is being, complied with.

3.23 The first three of the control order monitoring purposes mirror the purposes for which a control order can be made under section 104.1 of the Criminal Code. The fourth is specific to the monitoring powers in the Bill.

3.24 The monitoring powers that would be able to be exercised in relation to the premises are set out in proposed sections 3ZZKB, 3ZZKC and 3ZZKD. These powers are:

- the power to search the premises and any thing on the premises,
- the power to search for and record fingerprints found at the premises,
- the power to take samples of things found at the premises,
- the power to examine or observe any activity conducted on the premises,
- the power to inspect, examine, take measurements of or conduct tests on any thing on the premises,
- the power to make any still or moving image or any recording of the premises or any thing on the premises,
- the power to inspect any documents on the premises,
- the power to take extracts from, or make copies of, any such document,
- the power to take onto the premises equipment and materials required for the purpose of exercising powers in relation to the premises,
- the power to operate electronic equipment on the premises and to use tapes, disks or other storage devices that are on the premises and can be used with it, and
- if 'relevant data' is found in the exercise of the monitoring powers, the power to operate electronic equipment to:

- ⇒ put the data in documentary form and remove the documents from the premises,
- ⇒ transfer the data onto a disk, tape or other storage device and remove the disk, tape or other storage device from the premises.

3.25 Where premises are entered under a monitoring warrant only, police would have the power to secure any electronic equipment on the premises to obtain expert assistance. This power would be able to be exercised if it is suspected on reasonable grounds that relevant data may be accessible by operating the equipment, expert assistance is required to do so and, in the absence of the equipment being secured, the relevant data may be destroyed, altered or otherwise interfered with.[19]

3.26 Proposed section 3ZZKE would provide additional powers to ask questions or seek the production of documents, with the precise nature of the power depending on whether premises have been entered under a monitoring warrant or on the basis of consent. Where premises have been entered on a consensual basis, police would have the power to ask questions of the occupier and request the occupier to produce any document that is likely to assist with the control order monitoring purposes.[20] However, in such circumstances, there is no requirement for the occupier to answer questions or produce documents.

3.27 Where premises have been entered under a monitoring warrant, police would have the power to require *any* person on the premises to answer questions or produce any document that is likely to assist with the control order monitoring purposes.[21] However, the person is not required to answer questions or produce any document if the person does not possess the information or document required and has taken all reasonable steps available to the person to obtain the information or document.[22] The person is not required produce a document if the document is not at the premises.[23] Failure to comply with a requirement to answer questions or produce documents would constitute an offence.[24]

3.28 In addition, only where premises are entered on the basis of a monitoring warrant, police would have the power to:

- seize evidential material and other things found during the exercise of monitoring powers (if certain criteria are met, as discussed below), and

19 Proposed section 3ZZKD.

20 Proposed subsection 3ZZKE(2).

21 Proposed subsection 3ZZKE(3).

22 Proposed subsection 3ZZKE(4).

23 Proposed subsection 3ZZKE(5).

24 Proposed subsection 3ZZKE(6).

- conduct an ordinary search or a frisk search of a person at or near the premises if it is suspected on reasonable grounds that the person has any evidential material or seizable items in their possession.[25]

3.29 Proposed section 3ZZKG would provide police with the power to use such force as is necessary and reasonable against persons and things in executing a monitoring warrant in relation to premises and in exercising the seizure powers under proposed section 3ZZKF.

The power to search persons

3.30 Under proposed section 3ZZLA, police would be able to conduct an ordinary search or a frisk search of a person if a control order is in force in relation to a person and:

- the person has consented to the search, or
- the search is conducted under a monitoring warrant, and
- the search is for one of the control order monitoring purposes.

3.31 The monitoring powers that would be able to be exercised in relation to the person are set out in proposed section 3ZZLB. These powers are:

- the power to search things found in the possession of the person,
- the power to search any recently used conveyance (e.g. a vehicle), and
- the power to record fingerprints or take samples from things found in the course of a search of the person, of things in their possession or in any recently used conveyance.

3.32 In addition, under proposed section 3ZZLC, where a search is conducted on the basis of a warrant—but not in the case of a consensual search—police would have certain seizure powers, which are discussed below.

3.33 Proposed section 3ZZKG, which provides police with powers to use force when executing a monitoring warrant in relation to premises and exercising seizure powers, is mirrored by proposed section 3ZZLD, in relation to the execution of monitoring warrants in relation to persons.

Seizure powers

3.34 Under the proposed provisions, where premises are entered or a person is searched under a monitoring warrant, police would also have powers to seize certain things. Specifically, police would have the power to seize:

25 Proposed section 3ZZKF.

- evidential material (as defined in Part 1AA of the Crimes Act)[26] found:
  - ⇒ in the course of the exercise of monitoring powers on the premises, or
  - ⇒ in the course of the search of the person or recently used conveyance, and
- other things:
  - ⇒ found during the exercise of monitoring powers on the premises, or
  - ⇒ on or in the possession of the person or in the recently used conveyance

  that police believe on reasonable grounds to be:
  - ⇒ evidential material (within the meaning of the *Proceeds of Crimes Act 2002*),[27]
  - ⇒ tainted property (within the meaning of the *Proceeds of Crimes Act 2002*),[28] or
  - ⇒ seizable items.[29]

Applications for monitoring warrants

3.35 The application process for monitoring warrants in relation to premises and persons are set out at proposed sections 3ZZOA and 3ZZOB respectively. These provisions also set out the requirements for the contents of warrants issued.

3.36 Under proposed section 3ZZOA, an application would need to be made to an issuing officer (a magistrate acting in their personal capacity), who may issue a monitoring warrant in relation to premises if satisfied a control order is in force in relation to a person, the person has a prescribed connection with the premises and, having regard to a number of specified matters, it is reasonably necessary that police have access to the premises for a control order monitoring purpose.

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26 Section 3C of the Crimes Act provides that 'evidential material' means 'a thing relevant to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form'.

27 Under section 338 of the *Proceeds of Crime Act 2002*, 'evidential material' means evidence relating to: (a) property in respect of which action has been or could be taken under that Act; (b) benefits derived from the commission of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern; or (c) literary proceeds.

28 Under section 338 of the *Proceeds of Crime Act 2002,* 'tainted property' means: (a) proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern; or (b) an instrument of an indictable offence.

29 'Seizable item' is defined in section 3C of the Crimes Act as 'anything that would present a danger to a person or that could be used to assist a person to escape from lawful custody'.

3.37 Under proposed section 3ZZOB, the issuing officer would be able to issue a monitoring warrant in relation to a person if satisfied a control order is in force in relation to the person and, having regard to a number of specified matters, it is reasonably necessary that police should conduct an ordinary search or a frisk search of the person for a control order monitoring purpose.

3.38 The matters the issuing officer must have regard to when considering an application for a monitoring warrant in relation to a premises or person include the possibility that the subject of the control order has or will engage in conduct connected to the control order monitoring purposes.[30] When considering issuing a monitoring warrant in respect of premises, the issuing officer must also have regard to the nature of the person's prescribed connection with the premises.[31]

3.39 In the event that a monitoring warrant is issued on the basis that a control order is in force and:

- the control order is revoked,
- the control order is declared to be void, or
- a court varies the control order by removing one or more obligations, prohibitions or restrictions imposed by the control order,

proposed section 3ZZOD provides that the monitoring warrant must not be executed and any consequential powers must not be exercised.

Other provisions

3.40 Proposed Part 1AAB would require police to comply with certain obligations when entering premises or searching persons under the monitoring powers regime, including obligations in relation to seeking the consent of an occupier to enter premises or of a person to search them, and that the person must be notified that they may refuse consent.[32] When exercising powers under a monitoring warrant, obligations include that the officer must be in possession of the warrant (or a copy) and to give the occupier a copy of the warrant.[33]

3.41 The provisions would also require the Commonwealth to provide compensation for damage to electronic equipment incurred as a result of the equipment being operated in the exercise of monitoring powers, entitle

30 Proposed subsections 3ZZOA(4) and 3ZZOB(4).

31 Proposed subparagraph 3ZZOA(2)(c)(i).

32 Proposed section 3ZZNA.

33 Proposed sections 3ZZND and 3ZZNE.

occupiers to be present during a search of their premises and entitle a person who is subject to a control order to be present and observe a search of premises under a monitoring warrant.[34]

3.42 Proposed sections 3ZZRA to D relate to things seized, documents produced and answers given as a result of the exercise of monitoring powers. As noted in the Explanatory Memorandum, proposed section 3ZZRB would provide that existing provisions in Division 4C of Part 1AA of the Crimes Act would apply to things seized under the monitoring powers. The applied provisions specify:

> the purposes for which things and documents may be used and shared by a constable or Commonwealth officer, the requirements for operating seized electronic equipment, compensation for damaged electronic equipment, and the requirements for returning things seized or documents produced.[35]

3.43 The provisions of Division 4C of Part 1AA of the Crimes Act would similarly apply to documents produced under the monitoring powers, by virtue of proposed subsection 3ZZRC(1). Documents produced under the monitoring powers would also be able to be used for the control order monitoring purposes.[36]

3.44 Information provided in response to questions asked under the monitoring powers would only be able to be used for the control order monitoring purposes and the additional purpose of preventing, investigating or prosecuting an offence.[37]

3.45 Where the interim control order providing the basis for the use of monitoring powers has been declared void by a court, things seized, information obtained or documents produced under monitoring powers while the interim control order was in force would be able to be adduced as evidence, used or communicated for limited purposes. The thing, information or document could only be adduced, used or communicated by a person if the person reasonably believes that doing so is necessary to assist in preventing, or reducing the risk of, the commission of a terrorist act, serious harm to a person or serious damage to property, or for purposes connected with PDOs under Commonwealth, State or Territory laws.[38]

34 Proposed sections 3ZZNF, 3ZZNG and 3ZZNH.

35 Explanatory Memorandum, p. 80.

36 Proposed subsection 3ZZRC(2).

37 Proposed paragraph 3ZZRD(e).

38 Proposed section 3ZZTC.

Matters raised in evidence

3.46 The proposed monitoring powers regime was the subject of several submissions. Key concerns were the threshold for the issue of a monitoring warrant and the effect of the monitoring powers on the privacy of the subject of the control order and third parties.

3.47 Several submitters expressed concern that the proposed threshold for the issue of a monitoring warrant is too low.[39] Comments focused on the ability of an issuing officer to issue a monitoring warrant on the basis of the 'possibility' that the subject of the control order has contravened, is contravening, or will contravene the control order.[40] According to the Australian Human Rights Commission:

> The new warrant powers that the Bill would introduce are different from other warrant powers, in that an issuing authority would not need to be satisfied that there is reason to suspect a person may have breached a control order or committed any other offence.[41]

3.48 Similarly, the Muslim Legal Network (NSW) submitted

> the monitoring warrant regime also lowers significantly the threshold for the application of said warrant. The Muslim Legal Network (NSW) submits that the proposed threshold is far too low …[42]

3.49 Amongst such submissions, there appeared to be a consistent view that if the proposed monitoring regime were to be retained, the threshold for the issuing of a monitoring warrant should at least require a suspicion that the control order was being breached.[43] For example, the Gilbert + Tobin Centre of Public Law suggested that a magistrate should be authorised to issue a monitoring warrant only where a police officer suspects on reasonable grounds that the person is failing to comply with an order.[44]

3.50 Many submitters also raised the impacts of the monitoring powers on the privacy and human rights of the subject of the control order and of third

39 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 10; Australian Human Rights Commission, *Submission 5*, pp. 17–18; Law Council of Australia, *Submission 6*, pp. 16–17, p. 21; Muslim Legal Network (NSW), *Submission 11*, p. 27; Joint councils for civil liberties, *Submission 17*, p. 14.

40 Proposed paragraphs 3ZZOA(4)(f), 3ZZOB(4)(f).

41 Australian Human Rights Commission, *Submission 5*, pp. 17–18.

42 Muslim Legal Network (NSW), *Submission 11*, p. 27.

43 See Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 10; Australian Human Rights Commission, *Submission 5*, p. 18; Law Council of Australia, *Submission 6*, p. 21.

44 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 10.

parties.[45] In particular, submitters expressed concerns regarding the breadth of powers available under a monitoring warrant, and the wide range of premises that could be subject to a monitoring warrant by virtue of having a 'prescribed connection' to the subject of a control order. Concerns were also raised in relation to the use of information and evidence obtained under the monitoring powers.

3.51 Australian Lawyers for Human Rights submitted:

> We are concerned that the **degree of monitoring** of a person who is subject to a control order is, under the proposed amendments, **virtually unlimited** and capable of stripping that person of all privacy and such basic rights as the rights to privacy, to liberty, to freedom of speech, of assembly, of movement and of security.[46]

3.52 The Muslim Legal Network (NSW) questioned the breadth and purpose of the monitoring warrant regime, asserting that:

> As a starting proposition, it is disingenuous to submit in the proposed bill that the simplified outline is limited to what is described below when it is clear that the insertion of Part 1AAB seeks more than simply an exercise in 'monitoring compliance of control orders'. It is clearly designed to operate as an investigative extension of the control order provisions.[47]

3.53 The Independent National Security Legislation Monitor alluded to similar concerns in the context of his report on the desirability of including provisions for special advocates within the Bill:

> The details of the potential monitoring blur, if not eliminate, the line between monitoring and investigation … The significance for present purposes is to emphasise the seriousness of the impact upon a person of the grant of a control order if these changes come into force and the consequent necessity for proper safeguards of the interests of a potential controlee.[48]

45 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 10; Australian Lawyers for Human Rights, *Submission 4*, p. 4; Australian Human Rights Commission, *Submission 5*, pp. 17–18 and *Supplementary Submission 5.1*, p. 1; Law Council of Australia, *Submission 6*, pp. 16–17, p. 21; Muslim Legal Network (NSW), *Submission 11*, p. 27; Joint councils for civil liberties, *Submission 17*, pp. 14–15.

46 Australian Lawyers for Human Rights, *Submission 4*, p. 4. Emphasis in the original.

47 Muslim Legal Network (NSW), *Submission 11*, p. 24.

48 The 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.

3.54 The joint civil liberties councils queried whether existing monitoring and surveillance powers were in fact insufficient to allow effective, legitimate monitoring of persons subject to a control order.[49] However, they suggested that the proposed powers might be more defensible if they were limited to the objective of the legislation to prevent terrorism:

> There may be greater justification for a blanket authority to monitor persons who have a control order if the purpose was indeed restricted to reducing 'the risk that a person will engage in terrorist act planning or preparatory acts while subject to a control order'.[50]

3.55 The Gilbert + Tobin Centre of Public Law argued that the low threshold for the issue of a monitoring warrant, where the magistrate is satisfied that it is reasonably necessary for the purposes of determining whether the control order has been, or is being complied with, would provide a 'blanket authorisation for police officers to conduct searches for the purpose of monitoring whether a person is complying with an order.'[51] It highlighted the range of powers authorised under a monitoring warrant, including powers to conduct a frisk search of a person, take fingerprints, take samples and photographs, seize evidentiary material, make copies of documents and use electronic equipment to record relevant data, and ask questions and seek production of documents.[52]

3.56 In light of the breadth of these monitoring powers, Gilbert + Tobin suggested the control order regime may be rendered vulnerable to constitutional challenge. It noted that the High Court of Australia upheld the constitutionality of the control order regime in *Thomas v Mowbray* (2007) 233 CLR 307, in part based on its view that control orders were not punitive measures.[53] At the public hearing, Professor Andrew Lynch from Gilbert + Tobin stated that

> in overlaying new processes to monitor compliance with control orders, [the Gilbert + Tobin Centre of Public Law] suggest the bill alters the orders in a way that moves them closer to a punitive measure and so may risk unconstitutionality.[54]

3.57 However, Professor Lynch qualified this point later in the hearing, stating

49 Joint councils for civil liberties, *Submission 17*, p. 13.

50 Joint councils for civil liberties, *Submission 17*, p. 13.

51 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 9.

52 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 10.

53 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 10.

54 Professor Andrew Lynch, Gilbert + Tobin Centre of Public Law, *Committee Hansard*, Canberra, 14 December 2015, p. 18.

> there is a case to be made for monitoring compliance with the control order. If the control orders are going to remain as part of the national security framework, then they should be as effective as possible. The experience in the UK of people absconding on control orders is an instructive one, and is something to be avoided …
>
> It may well be that there is nothing in the prospect that we raise, but we think it is a prospect because you are actually adding a second layer or a second tier to the existing scheme which is being upheld.[55]

3.58 The joint civil liberties councils raised specific concerns regarding the powers to operate electronic equipment, noting the large amount of personal information likely to be stored on electronic devices. It submitted that, in conjunction with the types of premises with which a person could have a 'prescribed connection', the exercise of powers to operate electronic equipment could potentially intrude on the right to privacy of innocent third party persons.[56]

3.59 The Muslim Legal Network (NSW) and the Law Council of Australia separately raised concerns regarding the impact on the privacy of the subject of the control order and third parties of the power to require a person on a premises entered under a monitoring warrant to answer any questions, and produce any documents, that are likely to assist in any of the purposes for which a monitoring warrant may be issued.[57]

3.60 The Muslim Legal Network (NSW) stated that:

> Whilst 3ZZJD provides a limited protection against self-incrimination, 3ZZKE is open to abuse and infringement of an individual's right to silence where they may not be instructed in such a respect or have available to them the assistance of a legal practitioner. This is particularly intrusive in circumstances where a person in attendance at a relevant premises may have no contact with the individual subject to a control order.[58]

3.61 Similarly, the Law Council of Australia submitted that the power 'purports to conscript other persons present to assist with the investigation being undertaken under pain of punishment'.[59] The Council

55 Professor Andrew Lynch, Gilbert + Tobin Centre of Public Law, *Committee Hansard*, Canberra, 14 December 2015, p. 22.

56 Joint councils for civil liberties, *Submission 17*, pp. 14–15.

57 Proposed subsections 3ZZKE(3)–(6).

58 Muslim Legal Network (NSW), *Submission 11*, pp. 25–26.

59 Law Council of Australia, *Submission 6*, p. 17.

submitted that answers given under compulsion could be used to further an investigation or prosecution as proposed paragraph 3ZZRD(e) provides 'no limitation or definition as to "prosecuting an offence"'.[60]

3.62 The Law Council of Australia also opposed the inclusion of the following incidental powers that may be exercised by a constable executing a monitoring warrant:[61]

- proposed paragraph 3ZZKF(2)(b)—the power to seize other things found during the exercise of monitoring powers on a premises searched under monitoring warrant if the constable believes on reasonable grounds that the things are evidential material or tainted property, within the meaning of the *Proceeds of Crime Act 2002*; and
- proposed subsection 3ZZLC(2)—in relation to the search of a person or recently used conveyance under a monitoring warrant, the power to:
  - ⇒ seize evidential material[62] found in the course of the search;
  - ⇒ seize things the constable believes on reasonable grounds to be evidential material or tainted property within the meaning of the *Proceeds of Crime Act 2002*; and
  - ⇒ seize other things the constable believes on reasonable grounds to be seizable items.[63]

3.63 The Council submitted that these incidental powers are not necessary for the purposes of the legislation to be realised as '[t]here is already a power to seize information in relation to preventing the support for or the facilitation of a terrorist act', and noted that the *Proceeds of Crime Act 2002* has quite different objects to the proposed legislation.[64]

3.64 The ability to use in proceedings information obtained under a monitoring warrant where the grounds on which it was issued no longer exist (e.g. the control order as it was originally issued is no longer in force) was also raised as an issue.

3.65 The Law Council of Australia submitted that under proposed subsections 3ZZOD(2) to (4), a thing, a document or information may be admissible in

60 Law Council of Australia, *Submission 6*, p. 17.

61 Law Council of Australia, *Submission 6*, p. 17.

62 'Evidential material' has the same meaning as in Part 1AA of the *Crimes Act 1914* (Cth), which is defined in subsection 3C(1) of that Act as 'a thing relevant to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form'.

63 'Seizable item' has the same meaning as in Part 1AA of the *Crimes Act 1914* (Cth), which is defined in subsection 3C(1) of that Act as 'anything that would present a danger to a person or that could be used to assist a person to escape from lawful custody'.

64 Law Council of Australia, *Submission 6*, p. 17.

civil proceedings, including proceedings under the *Proceeds of Crime Act 2002*k, even if obtained in breach of the requirement not to execute a monitoring warrant if the control order is revoked, declared void, or varied by the removal of one or more obligations, prohibitions or restrictions.[65] The Council opposed the admissibility of such evidence in such proceedings, due to the difference in objectives from the proposed legislation.[66]

3.66 The Muslim Legal Network (NSW) submitted that proposed section 3ZZTC, would provide an exemption for evidence obtained improperly or illegally, as it would allow a thing, information or document obtained under a monitoring warrant executed before a control order is subsequently declared void to be adduced in proceedings. It submitted:

> Clearly, this is in contradiction with principles espoused in s. 138 of the Evidence Act.[67]

3.67 To mitigate these impacts on privacy, submitters made a range of suggestions to amend the monitoring powers regime. The Australian Human Rights Commission recommended that monitoring warrants only be granted 'where the relevant authority is satisfied that there are no less intrusive means of obtaining the information'.[68] The Gilbert + Tobin Centre of Public Law submitted that the definition of 'prescribed connection' to a premises triggering a monitoring warrant to search premises should be narrowed.[69]

3.68 The Law Council of Australia recommended that:

- the privileges that are not abrogated (referring to the privileges of self-incrimination and legal professional privilege, as set out in proposed section 3ZZJD) should be clearly stated in any notice given of the monitoring powers being exercised,[70]
- proposed subsections 3ZZKE(3)–(6) regarding the power to require the answering of questions and production of documents not be passed,[71] and

65 Law Council of Australia, *Submission 6*, p. 20.
66 Law Council of Australia, *Submission 6*, p. 20.
67 Muslim Legal Network, *Submission 11*, p. 26.
68 Australian Human Rights Commission, *Submission 5*, p. 18.
69 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 10.
70 Law Council of Australia, *Submission 6*, p. 17.
71 Law Council of Australia, *Submission 6*, p. 17.

- the Committee inquire into whether the power to issue a monitoring warrant is delegable and whether it would be more appropriate for the issuing officer for a monitoring warrant to be a Supreme Court judge.[72]

3.69 The Queensland Government submitted that Schedule 8 should be amended to incorporate an oversight and reporting role for the Queensland Public Interest Monitor (PIM). This would then require an issuing authority considering the issue of a monitoring warrant to an agency in Queensland to have regard to any submissions made by the Queensland PIM.[73]

3.70 The AFP submission outlined the importance of being able to monitor and enforce compliance with a control order to ensure its effectiveness. The AFP submitted that

> a control order is only as effective as the ability of police to monitor and enforce the subject's compliance with the conditions imposed by the control order. While the imposition of a control order may in itself be sufficient to deter some individuals from engaging in the behaviours or activities restricted under the order, in some cases, individuals have attempted to subvert their conditions …
>
> As with any laws restricting the freedom of persons to engage in specified conduct, the legal and practical ability of authorities to monitor and enforce compliance is a key factor in promoting voluntary compliance amongst the population. Law enforcement is restricted in its ability to monitor and enforce compliance with control orders both by operational resourcing, and gaps in the drafting of laws.[74]

3.71 Similarly, in its supplementary submission, the Department referred to comments made by the former Independent National Security Legislation Monitor (INSLM) that a control order itself is unlikely to have a significant deterrent effect on someone intent on causing harm through terrorist activity.[75] It submitted:

72 Law Council of Australia, *Submission 6*, p. 17.

73 Queensland Government, *Submission 16*, p. 4. Noting the requirement that the Queensland Public Interest Monitor report annually with respect to control orders, the Queensland Government recommended that the provisions be amended to provide for deferred public reporting by the Queensland PIM on the use of monitoring warrants.

74 Australian Federal Police, *Submission 3*, pp. 9–10.

75 Independent National Security Legislation Monitor, *Declassified Annual Report*, December 2012, Chapter II, as cited in Attorney-General's Department, *Submission 9.1*, p. 18.

> Enabling agencies to monitor a person's compliance with a control order is likely to increase the deterrence element, as the controlee will be aware that their behaviour can be more readily monitored. This is likely to enhance the preventative effect of control orders and increase their effectiveness in protecting the public from a terrorist act.[76]

3.72 For this reason, the AFP stated that it is 'imperative that law enforcement has adequate powers to monitor a person's compliance with the conditions of the control order' and submitted that current provisions do not confer such powers.[77] Assistant Commissioner Neil Gaughan stated at the public hearing:

> That is a significant gap for us at the moment. Even though we have an order saying 'X', we actually cannot monitor that.[78]

3.73 The AFP submission further noted that it is currently not able to apply for a search warrant, TI warrant or surveillance device warrant until and unless it is suspected that an offence has already occurred.[79]

3.74 The Attorney-General's Department noted the implications of only being able to apply for a warrant after it is suspected that an offence has already occurred:

> Given the gravity of the purposes for which a control order is made, compliance with its terms is clearly important. If compliance could only be monitored once there was information that a breach had occurred, the damage would have been done and lives may have been lost.[80]

3.75 Addressing concerns raised by submitters regarding the threshold for issue of monitoring warrants, the Department noted that

> in order to apply for a monitoring warrant, a Federal Court must first have been satisfied … that a control order should be issued. This requires the AFP to lead evidence to satisfy the court of a number of threshold issues outlined in Part 5.3 of the Criminal Code. This contrasts with a warrant issued for investigative

76 Attorney-General's Department, *Submission 9.1*, p. 18.

77 Australian Federal Police, *Submission 3*, p. 10.

78 Assistant Commissioner Neil Gaughan, Australian Federal Police, *Committee Hansard*, Canberra, 14 December 2015, p. 46.

79 Australian Federal Police, *Submission 3*, p. 10.

80 Attorney-General's Department, *Submission 9*, p. 7.

> purposes, where the information in the application has not been judicially considered.[81]

3.76 The Department further explained that including a 'reasonable suspicion' threshold, as suggested by several submitters, would not address the gap that the proposed monitoring power provisions are intended to fill. This is because

> [i]f there were reasonable grounds to suspect that the control order subject was contravening the terms of the control order or engaging in terrorism-related conduct, given both categories of conduct constitute criminal offences, law enforcement would be able to apply for warrants under the existing provisions for search, telecommunications interception or surveillance device powers for the purposes of investigating the commission of an offence.[82]

3.77 The Department also rejected the suggestion that the proposed monitoring powers regimes (including the TIA Act and SD Act provisions) would allow warrants to be issued 'automatically'. It noted that the fourth limb of the test as to whether the power sought is reasonably necessary or likely to substantially assist (in determining whether the control order has been, or is being, complied with)

> necessarily envisages that the issue of a monitoring warrant must consider the extent to which the grant of the warrants would assist in determining compliance. It will not necessarily be the case that such a warrant will assist, and will particularly depend on the conditions of a control order …
>
> Issuing authorities must also consider whether there is a possibility or risk that the person will engage in such conduct or breach the control order. The absence of any indications of a propensity or capacity to do so would for example weigh against the issuing of a warrant.[83]

3.78 Responding to concerns regarding the scope of monitoring powers and places at which monitoring powers could be exercised, the Department asserted that a monitoring search warrant

> can only be issued where it is reasonably necessary and reasonably appropriate and adapted to the prescribed purposes. This ensures

81 Attorney-General's Department, *Submission 9.1*, p. 19.

82 Attorney-General's Department, *Submission 9.1*, p. 19.

83 Attorney-General's Department, *Submission 9.1*, p. 22.

> that less intrusive means of gathering information will be used where possible.[84]

3.79 Moreover, the Department noted that even where a monitoring warrant is in force, 'any questioning or request for documents must be directed to one or more of the four prescribed purposes set out in paragraphs 3ZZKE(3)(c)-(f)'.[85]

3.80 While the Department agreed that the public interest must be balanced against the intrusion on the privacy of an individual, it rejected the contention that monitoring warrants should only be available where the relevant authority is satisfied that there are no less intrusive means of obtaining the information. The Department submitted:

> Introducing a requirement that a warrant only be issued where there is 'no less intrusive means' would, in effect, make the privacy intrusiveness of the power the primary consideration for issuing a warrant. This would subordinate other relevant considerations, such as the relative likely effectiveness of the different powers, operational imperatives or risks posed by the use of the different powers.
>
> For example, overt, physical surveillance may be less intrusive than an alternative power, but may also be likely to be significantly less effective than covert or electronic surveillance. The use of physical surveillance may also pose a greater risk to the safety of officers. Such an outcome would leave little scope for judgement on the part of the issuing authority in relation to whether, on balance, a monitoring warrant should be issued.[86]

3.81 The Department also drew a comparison with the privacy impact of ordinary search warrants, noting that

> current search warrant provisions have the effect that third parties may be affected by the execution of a search warrant … It is a matter for the issuing authority to determine, in the course of considering a search warrant application, whether it is appropriate for the warrant to authorise such searches.[87]

3.82 The Department further noted that:

84 Attorney-General's Department, *Submission 9.1*, p. 19.

85 Attorney-General's Department, *Submission 9.1*, p. 20.

86 Attorney-General's Department, *Submission 9.1*, p. 22.

87 Attorney-General's Department, *Submission 9.1*, p. 20.

- the power to issue a monitoring warrant is not delegable and can only be exercised by magistrates,[88]
- the Commonwealth Ombudsman has robust oversight powers to investigate complaints regarding the exercise of monitoring powers,[89] and
- there are existing rights of the person to seek remedies in relation to the unlawful exercise of police powers, as well as specific provision in the Bill for compensation for damage to electronic equipment.[90]

3.83 In relation to the role of the Queensland PIM, the Department stated that the Bill was modelled on the provisions of the standard search warrant regime in Part 1AA of the Crimes Act and the *Regulatory Powers (Standard Provisions) Act 2014*, which do not have a role for the PIM.[91] However, it also suggested that a State or Territory body like the PIM would not necessarily be excluded from the warrant application process under the SD Act provisions (discussed further below).[92]

Committee comment

3.84 The Committee notes concerns raised by submitters in relation to the impact of the proposed monitoring warrant regime on the privacy of a person subject to a control order as well as third parties.

3.85 The Committee also notes the potential constitutional implications of the proposed monitoring warrant regime for the validity of the control order regime, as identified by the Gilbert + Tobin Centre of Public Law.

3.86 It is vital that law enforcement has sufficient powers to be able to monitor a person's compliance with a control order consistent with the purposes for which a control order may be issued. Noting that the controls which may be placed on a person by a control order can include prohibitions or restrictions on their activities, whereabouts, associations and communications, the Committee does not consider it practicable to restrict the range of premises that may be subject to a monitoring warrant, or the means through which relevant evidence may be obtained.

3.87 The Committee notes the importance of ensuring that law enforcement has sufficient powers to detect breaches of control orders, as well as deter

88 Attorney-General's Department, *Submission 9.1*, p. 21.
89 Attorney-General's Department, *Submission 9.1*, p. 20.
90 Attorney-General's Department, *Submission 9.1*, p. 20.
91 Attorney-General's Department, *Submission 9.1*, p. 20.
92 Attorney-General's Department, *Submission 9.1*, p. 25.

individuals subject to control orders from attempting to breach their conditions. The Committee considers that a threshold of 'reasonable suspicion' for the monitoring warrant regime, as suggested by some submitters, would substantially reduce the utility of the proposed regime. However, the Committee notes the general comments made by the Independent National Security Legislation Monitor regarding the significance of these powers, and accordingly has recommended the inclusion of special advocates as a safeguard in Chapter 2 consistent with the Monitor's recommendations.

3.88 Given the extraordinary nature of these powers, the Committee considers it necessary to ensure that due regard is given to the intrusion on privacy and liberty when a monitoring warrant is issued. The Committee notes that Recommendation 37 of the COAG Review of Counter-Terrorism Legislation proposed a 'least interference' test in relation to the issuing of control orders. The Committee considers that there is value in applying a similar approach to the issuing of monitoring warrants for control orders. Accordingly, the Committee recommends that the issue of a monitoring warrant be subject to a requirement that the issuing officer have regard to whether the use of powers under the warrant constitutes the least interference with the liberty or privacy of any person that is necessary in all the circumstances.

3.89 As an additional safeguard, the Committee considers that persons required to answer questions or produce documents should be notified of their rights to claim privilege against self-incrimination and legal professional privilege.

3.90 The Committee notes concerns about the admissibility of evidence obtained in breach of the requirement not to execute a monitoring warrant if a control order is revoked, declared void, or varied by the removal of one or more controls, in civil proceedings. The Committee is satisfied that the rules of evidence, including the *Evidence Act 1995*, will apply, as with all criminal and civil proceedings, to ensure that such evidence will not be admitted unless a court considers the desirability of admitting the evidence outweighs the undesirability of admitting evidence improperly or illegally obtained.[93]

3.91 Use of the proposed regime should be subject to a level of oversight commensurate with the extraordinary nature of the powers granted. The

93 *Evidence Act 1995*, section 138. The factors that a court must take into account include the probative value of the evidence, the importance of the evidence in the proceedings, and the gravity of the impropriety or contravention of law and whether it was deliberate, reckless or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights.

Commonwealth Ombudsman, as the Law Enforcement Ombudsman, possesses existing complaints-investigation powers and experience in relation to the AFP and responsibility for oversight of the telecommunications interception and surveillance devices regimes. The Committee considers that the Commonwealth Ombudsman is the appropriate body to provide oversight of the proposed regime and report to the Minister on the AFP's compliance with the requirements of the regime. The Commonwealth Ombudsman's oversight would be enabled by a requirement for all records relating to monitoring warrants to be kept, consistent with existing requirements under the current *Telecommunications (Interception and Access) Act 1979* (TIA) and *Surveillance Device Act 2004* (SD Acts). This requirement should also be accompanied by a requirement for the AFP to report to the Commonwealth Ombudsman any breaches detected in relation to the legislative requirements.

3.92 Further, the Committee accepts that the extraordinary nature of the proposed monitoring powers demands ongoing review by the Parliament as to the necessity of such powers and their use over time. Accordingly, the Committee recommends that the Bill provide for annual reporting to the Parliament, consistent with the control order reporting requirements in section 104.29 of the Criminal Code. The Committee notes that the TIA and SD Acts contain comprehensive annual reporting requirements, and considers that these requirements should also apply to the amendments in Schedules 9 and 10 of the Bill.

Recommendation 9

The Committee recommends that for a monitoring warrant in relation to a premises or person, the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to reflect the intent of Recommendation 37 of the Council of Australian Governments Review of Counter-Terrorism Legislation, to explicitly require that:

- **the issuing officer is to have regard to whether the exercise of monitoring powers under the warrant constitutes the least interference with the liberty or privacy of any person that is necessary in all the circumstances.**

Recommendation 10

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to require the Australian Federal Police to notify persons required to answer questions or produce documents by virtue of a monitoring warrant of their right to claim privilege against self-incrimination and legal professional privilege.

Recommendation 11

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to require the Australian Federal Police (AFP) to notify the Commonwealth Ombudsman within six months following the exercise of monitoring powers. This requirement should also apply to telecommunications interception (TI) and surveillance device (SD) control order warrants under Schedules 9 and 10.

The Committee further recommends that the Bill be amended to require:

- **the AFP to retain all relevant records in relation to the use of monitoring warrants or the exercise of monitoring powers, including for TI and SD control order warrants under Schedules 9 and 10, consistent with existing requirements in relation to other TI and SD warrants,**
- **the AFP to notify the Commonwealth Ombudsman as soon as practicable of any breaches of the monitoring powers requirements, including for TI and SD warrants under Schedules 9 and 10, and**
- **the Commonwealth Ombudsman to report to the Attorney-General annually regarding the AFP's compliance with the requirements of the monitoring powers regime, including for TI and SD warrants under Schedules 9 and 10, and deferred reporting for those warrants.**

Recommendation 12

The Committee recommends that the Attorney-General be required to report annually to the Parliament on the Australian Federal Police (AFP) use of the monitoring powers regime as part of the control order reporting requirements set out in section 104.29 of the Criminal Code. The matters to be included in the report, mirroring the relevant requirements in section 104.29, are:

- **the number of monitoring warrants issued,**
- **the number of instances on which powers incidental to the issue of a monitoring warrant were exercised,**
- **particulars of:**
  - ⇒ **any breaches self-reported to the Commonwealth Ombudsman**
  - ⇒ **any complaints made or referred to the Commonwealth Ombudsman relating to the exercise of monitoring powers, and**
- **any information given under section 40SA of the *Australian Federal Police Act 1979* that related to the exercise of monitoring powers and raised an AFP conduct or practices issue (within the meaning of that Act).**

The Committee also recommends that the Attorney-General ensure that the telecommunications interception and surveillance device control order warrants provided for in Schedules 9 and 10 of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 are comprehensively covered by the annual reporting requirements in the *Telecommunications (Interception and Access) Act 1979* and *Surveillance Devices Act 2004.*

3.93 The Committee's functions were expanded in 2014 to include reporting to the Parliament on any matter 'appertaining to the AFP or connected with the performance of its functions under Part 5.3 of the *Criminal Code*'.[94] The Committee first reported on the AFP's functions in its 2014–2015 Annual Report.[95] The Committee intends that future annual reports will be informed by the Attorney-General's report to the Parliament on the control order regime.

94 *Intelligence Services Act 2001*, paragraph 29(1)(bab).

95 Parliamentary Joint Committee on Intelligence and Security, *Annual Report of Committee Activities 2014–2015*, September 2015, pp. 12–14, 25–27.

Telecommunications interception (Schedule 9)

3.94 Under Schedule 9 of the Bill the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) would be amended to allow agencies to apply to a judge or nominated member of the Administrative Appeals Tribunal (the AAT) for a TI warrant for the control order monitoring purposes (a TI control order warrant).

3.95 Under sections 46 and 46A of the TIA Act, warrants may be issued with respect to a telecommunications service, or with respect to a person (termed 'telecommunications service warrants' and 'named person warrants', respectively). Whereas a telecommunications service warrant authorises interception of a particular telecommunications service,[96] a named person warrant authorises the interception of communications made to or from any telecommunications service that a particular person is using or is likely to use, or the interception of communications made by means of one or more particular telecommunications devices that the person is using or is likely to use.[97]

3.96 Telecommunications service warrants and named person warrants authorise the interception of communications made to or from a telecommunications service where information that would likely be obtained would likely assist in connection with the investigation of a serious offence, or serious offences, in which the particular person is involved.[98]

3.97 Under section 46, warrants may also authorise the interception of communications made to or from the telecommunications service to assist in connection with the investigation of a serious offence, or serious offences, in which *another* person is involved, with whom the particular person is likely to communicate using the service (so-called 'B-party warrants').[99]

3.98 The proposed amendments would allow warrants to be issued under these provisions where there is a control order in force in relation to a person (where a serious offence or serious offences are not being investigated). Section 46 would be amended by the insertion of proposed subsections 46(4)–(6), which would allow a telecommunications service warrant to be issued where:

96 *Telecommunications (Interception and Access) Act 1979*, subsection 46(1).

97 *Telecommunications (Interception and Access) Act 1979*, subparagraphs 46A(1)(d)(i)–(ii).

98 *Telecommunications (Interception and Access) Act 1979*, subparagraph 46(1)(d)(i), paragraph 46A(1)(d).

99 *Telecommunications (Interception and Access) Act 1979*, subparagraph 46(1)(d)(ii).

- there are reasonable grounds to suspect a particular person is using or is likely to use, the telecommunications service, and
- a control order is in force in relation to the person using the service, or
- a control order is in force in relation to another person and the person using the service is likely to communicate with the subject of the control order using the service (a 'B-party warrant'), and
- information that would likely be obtained under the warrant would be likely to substantially assist in connection with the control order monitoring purposes.

3.99 Section 46A would be amended by the insertion of proposed subsections 46A(2A) and (2B), which would allow a named person warrant to be issued where:

- there are reasonable grounds for suspecting that a person is using or is likely to use more than one telecommunications service,
- a control order is in force in relation to a person, and
- information that would likely be obtained by intercepting:
  - ⇒ communications made to or from any telecommunications service the person is using or is likely to use, or
  - ⇒ communications made by means of a particular telecommunications device or particular telecommunications devices that the person the person is using or is likely to use,

  would likely substantially assist in connection with the control order monitoring purposes.

3.100 Prior to issuing either a telecommunications service or named person warrant for control order monitoring purposes, the judge or AAT member must have regard to certain matters. These matters include:

- how much the privacy of any person or persons would likely be interfered with,
- how much information likely to be obtained under the warrant would be likely to assist with the control order monitoring purposes,
- to what extent other methods for those purposes that do not involve the interception are available, and

- the possibility that the subject of the control order has engaged or will engage in conduct connected to the control order monitoring purposes.[100]

3.101 The issuing of B-party warrants for control order monitoring purposes would additionally be restricted by the requirement that, prior to issuing such a warrant, the judge or AAT member must also be satisfied that the agency has exhausted all other practicable methods of identifying the telecommunications service used or likely to be used by the subject of the control order, or that that interception of communications made to or from a telecommunications service used or likely to be used by the subject of the control order would not otherwise be possible.[101]

3.102 An application for a TI warrant would be able to made, and the warrant issued, prior to the control order being served on the person.[102] The Explanatory Memorandum provides the following rationale:

> Warrant applications and the subsequent process of provisioning an interception warrant can take a considerable period of time. If agencies were required to wait for a control order to be in force to apply for a warrant critical time may be lost to the time taken to then obtain and provision the warrant.[103]

3.103 The revocation provisions under the TIA Act would apply to control order warrants.[104] In particular, the requirement for the chief officer of an agency to revoke a warrant if satisfied that the grounds on which the warrant was issued have ceased to exist will extend to circumstances where the control order, or any succeeding control order, are no longer in force.[105] Further, under section 58 of the TIA Act, the chief officer must immediately take such steps as are necessary to discontinue the interception of communications on the revocation or proposed revocation of a warrant.

3.104 Records of the particulars of TI warrants issued for control order monitoring purposes would need to be kept under the proposed provisions.[106]

3.105 The current provisions in relation to public reporting of TI warrants would be amended to provide for the deferral of reporting in relation to TI control order warrants. This would occur where the information contained

100 See proposed subsections 46(5) and 46A(2B).

101 Proposed subsection 46(6).

102 Proposed section 6T.

103 Explanatory Memorandum, pp. 84–85.

104 See *Telecommunications (Interception and Access) Act 1979*, section 57.

105 Item 28 of the Bill.

106 Items 38–43 of the Bill.

in the public report would be capable of revealing whether or not a TI control order warrant is in force in relation to a telecommunications service being used by, or in relation to, a particular person.[107]

Use of information

3.106 The proposed provisions would also amend the definition of 'permitted purpose' under existing subsection 5(1) of the TIA Act to allow the communication, use and recording by State and Territory police of lawfully intercepted information (that is, information intercepted under a TI warrant)[108] and interception warrant information (information about an application for, issue of, existence or non-existence of, or the expiry of a TI warrant, or any other information likely to enable the identification of a telecommunications service or person to which a TI warrant relates)[109] for purposes connected with the Commonwealth control order regime and with the State and Territory PDO regimes.[110]

3.107 The definition of 'exempt proceeding' in subsection 5B(1) of the TIA Act would be amended to allow lawfully intercepted information and interception warrant information to be given in proceedings relating to the State and Territory PDO regimes.[111] Such information can already be given in evidence in proceedings related to control orders and Commonwealth PDOs.[112]

3.108 Lawfully accessed information (which is information obtained by accessing stored communications, such as text messages or email, under warrant) would also be able to be communicated, used and recorded by police for purposes connected with control orders and the PDO regimes nationally.[113]

3.109 The Bill would allow for the limited retention and use of information obtained under a TI control order warrant where the interim control order which provided the basis for the warrant is subsequently declared void by a court.

107 Proposed section 103B.

108 *Telecommunications (Interception and Access) Act 1979*, section 6E.

109 *Telecommunications (Interception and Access) Act 1979*, section 6EA.

110 Item 3 of the Bill. See also section 67 of the *Telecommunications (Interception and Access) Act 1979*, which relates to dealings for a permitted purpose.

111 Item 7 of the Bill. See also section 74 of the *Telecommunications (Interception and Access) Act 1979*.

112 See paragraphs 5B(1)(bb) and 5B(1)(bc), and section 74 of the *Telecommunications (Interception and Access) Act 1979*.

113 Proposed section 139B. See also the definitions of 'lawfully accessed information' and 'stored communication' in subsection 5(1) of the *Telecommunications (Interception and Access) Act 1979*.

3.110 Section 79 of the TIA Act provides that the chief officer of an agency must cause a restricted record in the possession of the agency to be destroyed if the chief officer is satisfied that the record is not likely to be required for a permitted purpose in relation to the agency.[114] The Bill proposes to insert a section 79AA, which provides that the chief officer must cause information obtained under a TI control order warrant issued prior to the control order being served on the person to be destroyed if the warrant was issued for the purpose of determining compliance with the control order. This requirement would apply unless the chief officer is satisfied that the information is likely to assist in the protection of the public from a terrorist act, or preventing the provision of support for, or the facilitation of, a terrorist act or hostile activity in a foreign country.[115]

3.111 Under proposed section 299, information obtained under a TI control order warrant where the interim control order is subsequently declared by a court to be void would only be able to be communicated, used, recorded or given in evidence in a proceeding in limited circumstances. This would be where the person reasonably believes that doing so is necessary to assist in preventing, or reducing the risk of, the commission of a terrorist act, serious harm to a person or serious damage to property, or for purposes connected with Commonwealth, State or Territory PDO laws.[116]

Matters raised in evidence

3.112 As with the proposed monitoring warrant regime, submitters expressed concern regarding the threshold for issuing a TI control order warrant and the impact on the privacy of both the individual subject to the control order and third parties.[117]

3.113 The proposed subsection 46(5) mirrors existing requirements in the TIA Act for an issuing judge or AAT member to have regard to how much the privacy of any person or persons would be likely to be interfered with. However, some submitters did not consider this was adequate. The Australian Human Rights Commission submitted:

> While there are requirements that issuing authorities take a number of other factors into account, including the extent to which any person's privacy would be affected and whether there are

114 'Restricted record' is defined in subsection 5(1) of the *Telecommunications (Interception and Access) Act 1979* as 'a record other than a copy, that was obtained by means of an interception … of a communication passing over a telecommunications system'.

115 Proposed paragraph 79AA(1)(e).

116 Proposed paragraphs 299(2)(e)–(f), and proposed subsection 299(3).

117 Australian Human Rights Commission, *Submission* 5, p. 18; Law Council of Australia, *Submission 6*, p. 17; Joint councils for civil liberties, *Submission 17*, p. 15.

> alternative means of obtaining the information, the Commission considers these requirements are insufficient in [the] circumstances.[118]

3.114 The Commission went on to state that:

> It is necessary to bear in mind that control orders are granted following a civil hearing, determined on the civil standard of proof. The subject of the order need not have been charged with or convicted of any offence. In those circumstances, the Commission considers that it has not been demonstrated that it would be appropriate to allow for the highly intrusive monitoring or surveillance which would be authorised by these amendments …[119]

3.115 Accordingly, the Commission recommended that the threshold for the issue of a TI control order warrant be raised and that its suggested 'no less intrusive means' requirement also apply in the same terms as for the proposed monitoring warrants.[120]

3.116 Similarly, the Muslim Legal Network (NSW) submitted that the balancing of privacy concerns and the extent to which interception would assist in preventing terrorist and related acts or monitoring compliance with a control order was not sufficient to address the privacy implications of the proposed amendments.[121]

3.117 Such concerns appeared to be closely related to the proposed inclusion of 'B-party warrants' for the monitoring of compliance with a control order. The Law Council of Australia described B-party warrants as 'particularly invasive tools for detection of criminal activity',[122] while the joint civil liberties councils submitted that B-party warrants 'are a serious and unjustifiable invasion of a non-suspect person's right to privacy.'[123] Both of these submitters argued that the proposed regime lowers the threshold for which a B-party warrant may be issued from investigation of a serious offence punishable by seven years' imprisonment to a control order breach punishable by five years' imprisonment.[124]

118 Australian Human Rights Commission, *Submission 5*, pp. 17–18.

119 Australian Human Rights Commission, *Submission 5*, p. 18.

120 Australian Human Rights Commission, *Submission 5*, p. 18.

121 Muslim Legal Network (NSW), *Submission 11*, p. 29.

122 Law Council of Australia, *Submission 6*, p. 18.

123 Joint councils for civil liberties, *Submission 17*, p. 16.

124 Joint councils for civil liberties, *Submission 17*, p. 16. See also Law Council of Australia, *Submission 6*, p. 18.

3.118 Concerns were also raised about the use of a TI control order warrant prior to a control order being served on a person. Australian Lawyers for Human Rights stated:

> We do not agree that new section 6T, which treats a control order as effective even if has not been able to be served on the person in question, is appropriate. This provision enables monitoring of a person on the basis of a control order, before they are even aware that they are the subject of a control order. According to [the Explanatory Memorandum, paragraph 158], referring to the *Surveillance Devices Act*, this appears to be **intended 'to ensure that officers have an opportunity to install surveillance devices covertly**, as there are often limited opportunities to do so'.[125]

3.119 Other privacy issues raised by submitters related to the use of information obtained under the proposed amendments. The Law Council of Australia noted that proposed section 139B will enable lawfully accessed information to be communicated for a broad range of purposes in the context of control orders and PDOs, and recommended further scrutiny of this provision by the Privacy Commissioner.[126]

3.120 The Council also noted the absence of a specific provision in Schedule 9 similar to proposed section 3ZZOD in Schedule 8, imposing a requirement not to execute a TI control order warrant if the control order is revoked, declared void or varied by removing one or more obligations, prohibitions or restrictions.[127] However, the Bill amends section 57 of the TIA Act to require a TI control order warrant to be revoked if the control order or any succeeding control order has ceased to be in force.[128]

3.121 The Muslim Legal Network (NSW) submitted that there should be a complete prohibition on the use of information obtained under a TI control order warrant issued under the proposed amendments if the control order is subsequently declared void.[129]

3.122 The Network also did not support giving the chief officer of the interception agency the ability to determine whether information obtained under a TI control order warrant, issued for the purpose of determining compliance with a control order, prior to the control order being served, should be destroyed. It contended that

125 Australian Lawyers for Human Rights, *Submission 4*, p. 5. Emphasis in the original.

126 Law Council of Australia, *Submission 6*, p. 20.

127 Law Council of Australia, *Submission 6*, p. 20.

128 Item 28 of the Bill.

129 Muslim Legal Network (NSW), *Submission 11*, p. 30.

> leaving this determination at the discretion of the chief officer is problematic, particularly where the chief officer may have a vested interest in showing that the information obtained under such a warrant assists in the prevention or facilitation of a terrorist act …
>
> Furthermore, it would seem that the decision to be made by the chief officer is only examined by the ombudsman under the amendments to sections 83 and 85 of the Act.[130]

3.123 Accordingly, the Network called for oversight of such decisions by a judge or AAT member, arguing that would be consistent with the issuing of the warrants.[131]

3.124 The deferred reporting provisions attracted some comments by submitters in the context of the TIA Act provisions. They will be discussed in the next section as such comments also apply to the SD Act provisions.

3.125 The comments of the AFP and Attorney-General's Department in relation to the operational imperative to effectively monitor compliance with control orders, referred to above, are also relevant to the proposed amendments to the TIA Act.[132] The AFP's submission noted

> Search, telecommunications interception and surveillance powers are particularly relevant to monitoring a person's compliance with obligations, prohibitions and restrictions in relation to:
>
> - the possession of specified articles or substances;
> - communication or association with specified individuals;
> - access or use of specified telecommunications or technology, including the internet; and
> - the carrying out of specified activities.[133]

3.126 The Attorney-General's Department explained in its submission the rationale for provisions relating to the use of lawfully intercepted information in PDO proceedings. It submitted:

> At the Commonwealth level, and in approximately half of all States and Territories, applications for preventative detention orders are by way of an application to an 'issuing authority'. However, in the remaining States and Territories, applications are made by way of proceedings before a court. Accordingly, in these States and Territories, there is a risk that a court would determine that lawfully intercepted information may not be given in

130 Muslim Legal Network (NSW), *Submission 11*, p. 31.

131 Muslim Legal Network (NSW), *Submission 11*, pp. 30–31.

132 See paragraphs 3.69–3.73 above.

133 Australian Federal Police, *Submission 3*, p. 10.

> evidence in a proceeding for the application for a preventative detention order …
>
> In the Department's view, this represents an anomaly in the legislation. Whether the application for a preventative detention order is made by an issuing authority acting in his or her personal capacity, or whether it is made by a court, should not affect the ability for telecommunications interception and surveillance device information to be relied upon as part of the application.[134]

3.127 Responding to concerns about the availability of B-party warrants for monitoring compliance with a control order, the Department explained that

> B-party warrants assist interception agencies to counter measures adopted by persons of interest to evade telecommunications interception, such as adopting and discarding multiple telecommunications services. The ability, as a last resort, to intercept the communications of an associate of a person of interest will ensure that the utility of interception is not undermined by evasive techniques adopted by those subject to a monitoring warrant.[135]

3.128 It also outlined the additional requirements that apply to B-party warrants compared to other interception warrants.[136]

3.129 The Department noted that information obtained under a control order that is subsequently declared void can only be admitted into proceedings related to preventing or reducing the risk of the commission of a terrorist act, serious harm to a person or serious damage to a property, or a Commonwealth, State or Territory PDO.[137] Section 63 of the TIA Act and section 45 of the SD Act prohibit dealing in information obtained for any purpose unless an express exception applies, overriding the provisions of the *Evidence Act 1995* and other common law discretions which allow evidence to be admitted where the public interest outweighs the undesirability of admitting it, in light of the manner in which the evidence was obtained.

3.130 Accordingly, the Bill provides for limited exceptions to use and adduce such information in proceedings, but does not affect the court's discretion

134 Attorney-General's Department, *Submission 9*, pp. 9–10.

135 Attorney-General's Department, *Submission 9.1*, p. 23.

136 Attorney-General's Department, *Submission 9.1*, pp. 23–24.

137 Attorney-General's Department, *Submission 9.1*, p. 24.

to refuse to admit evidence, or its duty to refuse to admit improperly obtained evidence in particular circumstances.[138]

Committee comment

3.131 The Committee acknowledges concerns raised by submitters in relation to the potentially significant privacy impacts of TI control order warrants on third parties in particular.

3.132 However, while the seriousness of a breach of a control order may vary depending on the circumstances, the purposes for which a control order is issued are invariably serious. Therefore, the ability to monitor compliance with a control order is important in deterring breaches that may have grave consequences for community safety.

3.133 The Committee considers that the proposed safeguards surrounding the issuing of TI control order warrants within the Bill are appropriate and proportionate in light of the objectives and rationale for the legislation. It is noted that, of the range of 'serious offences' in relation to which a TI warrant is currently available, although many are punishable by seven–year prison terms, the length of the prison term is not a determinative factor for inclusion in that list.

3.134 The power to intercept communications is vital to ensuring compliance with certain conditions that may be imposed under a control order, such as restrictions or prohibitions on communicating or associating with specified individuals, accessing or using specified telecommunications or technology, and carrying out specified activities, can be effectively monitored. Such a power must be covert, in order to obtain information that can be used to accurately assess a person's intentions or behaviour. The deferred reporting provisions in the Bill are appropriate to balance the protection of the covert nature of the power and the need for accountability and transparency.

3.135 The Committee believes that robust accountability and oversight of the proposed provisions is the key to ensuring the protection of individual rights, and guarding against unjustified intrusions into privacy or abuse of police powers. The Committee is satisfied that the oversight of the Commonwealth Ombudsman, which is responsible for overseeing the existing TIA and SD Act regimes, will ensure there is appropriate accountability for the use of the proposed provisions. The Committee considers that a requirement for the AFP to proactively report any

138 Attorney-General's Department, *Submission 9.1*, p. 24.

breaches of the legislative requirements to the Ombudsman would further strengthen this accountability (see recommendation under Schedule 8).

3.136 As with the monitoring powers regime, the Committee considers that the overall effectiveness and justification for the TI control order warrants regime should be subject to ongoing review by Parliament. The Committee considers that, subject to the deferred reporting arrangements, TI control order warrants should also be covered by the existing annual reporting requirements contained in the TIA Act.

3.137 The Committee has earlier recommended a 'least interference' test to require that due regard is given to the intrusion on privacy and liberty when a monitoring warrant is issued under Schedule 8 of the Bill. The Committee notes that Schedule 9 of the Bill already contains provisions requiring the judge or AAT member to have regard to the likelihood that the privacy of any person would be interfered with, the likely usefulness of any information that would be obtained, and the extent to which other methods that do not involve interception are available, in determining whether a TI control order warrant should be issued. The Committee considers these provisions should be strengthened to include a more explicit 'least interference' test.

Recommendation 13

The Committee recommends that for a telecommunications interception control order warrant, the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to reflect the intent of Recommendation 37 of the Council of Australian Governments Review of Counter-Terrorism Legislation, to explicitly require that:

- **the issuing officer is to have regard to whether the interception of telecommunications under the warrant constitutes the least interference with the liberty or privacy of any person that is necessary in all the circumstances.**

Surveillance devices (Schedule 10)

3.138 Schedule 9 of the Bill would amend the *Surveillance Devices Act 2004* (SD Act) to allow law enforcement officers to obtain warrants for the installation and use of surveillance devices (SDs) and to obtain tracking device authorisations for control order monitoring purposes.

3.139 Under the amendments, law enforcement officers would be able to apply to a judge or nominated AAT member for the issue of a control order warrant to use an SD (an SD control order warrant). In order to make the application, there must be a control order in force and the officer must suspect on reasonable grounds that the use of an SD to obtain information relating to the subject of the control order would be likely to substantially assist in the control order monitoring purposes.[139] An application would be able to be made and the warrant issued prior to the control order having been served on the person.[140]

3.140 Prior to issuing an SD control order warrant, the issuing officer must be satisfied that a control order is in force and that use of the SD would be likely to substantially assist in the control order monitoring purposes.[141] The issuing officer must have regard to the likely value of the information sought to be obtained to the control order monitoring purposes, the possibility that the subject of the control order has or will engage in conduct connected to the control order monitoring purposes, and also any previous SD control order warrants sought in relation to that person.[142]

3.141 The revocation provisions under the SD Act would apply to control order warrants.[143] A judge or nominated AAT member may revoke a warrant prior to its expiry on their own initiative,[144] or in certain circumstances, the chief officer of the relevant law enforcement agency must revoke a warrant. These circumstances would include where the warrant is no longer required for the control order monitoring provisions or if no control order is in force.[145] In addition to revoking the control order

139 See proposed subsection 14(3C).

140 See proposed section 6C.

141 See proposed paragraph 16(1)(bc).

142 See proposed paragraphs 16(2)(eb), 16(2)(ec) and 16(2)(g).

143 See section 20.

144 Subsection 20(1).

145 Item 17 of the Bill.

warrant, the chief officer would also be required to take steps to discontinue the use of the warrant as soon as practicable.[146]

3.142 Existing provisions in the SD Act allow the limited use of optical SDs without a warrant, in circumstances where this will not involve entry onto premises without permission or interference without permission with any vehicle or thing.[147] The existing provisions already allow Commonwealth law enforcement officers to do this in the course of their duties within the functions of the AFP, but State and Territory law enforcement officers may only do so in the investigation of a relevant offence.[148] The proposed provisions would amend section 37 so that State and Territory law enforcement officers acting in the course of their duties may use optical SDs without a warrant to obtain information about the activities of the subject of a control order for the control order monitoring purposes.[149]

3.143 SDs may also currently be used without a warrant for the purpose of listening to or recording words spoken in limited circumstances.[150] The amendments would extend these provisions to State or Territory law enforcement officers or persons assisting State or Territory law enforcement officers for control order monitoring purposes.[151]

3.144 In addition, as noted above, the Bill would amend the existing tracking device provisions to permit law enforcement officers to use tracking devices for obtaining information about the subject of a control order for the control order monitoring purposes.[152] This must be with the written permission of an appropriate authorising officer, which must not be given for the use, installation or retrieval of the tracking device if that would involve entry onto premises without permission or interference without permission with any vehicle or thing.[153]

3.145 Details of the particulars of SD warrants issued for the control order monitoring purposes would need to be reported to the Minister for Justice under existing reporting provisions.[154] In addition, proposed subsection 49(2A) would require information about the benefit of the use of an SD for the control order monitoring purposes and details of the general use of

146 See proposed subsections 21(3C) and 21(3D).

147 See section 37.

148 Subsection 37(2).

149 See proposed subsection 37(4).

150 Section 38.

151 See proposed subsections 38(3A) and 38(6).

152 See proposed subsection 39(3B).

153 See subsection 39(8).

154 See proposed subparagraph 49(2)(b)(xb).

information or evidence obtained by the use of the SD. The Explanatory Memorandum states:

> This will ensure that law enforcement agencies are required to document and report the value of the use of surveillance devices used in relation to a control order.[155]

3.146 Current provisions in relation to public reporting of SD warrants would be amended to require in limited circumstances that reporting of SD control order warrants be deferred until a subsequent report. These circumstances relate to where the information contained in the public report would be capable of revealing whether a SD control order warrant is likely to be, or not likely to be, in force in relation to particular premises, a particular object or class of object, or the conversations, activities or location of a particular person.[156]

Use of information

3.147 Under existing section 45 of the SD Act, the unlawful use, recording, communication or publication of 'protected information' is prohibited, subject to limited exceptions.[157] Similarly, protected information may not be admitted in evidence in any proceedings, subject to limited exceptions.[158]

3.148 Schedule 10 would amend the existing provisions relating to the use of protected information in several ways. The amendments would allow protected information to be used in control order proceedings and PDO proceedings nationally, by adding these proceedings to the definition of 'relevant proceedings' under existing subsection 6(1) and by amending the definition of 'State and Territory relevant proceeding' under subsection 45(9).[159]

3.149 Further, information:

- obtained under a SD control order warrant,
- likely to enable the identification of a person, object or premises specified in a control order warrant,

155 Explanatory Memorandum, page 104.

156 See proposed section 50A.

157 'Protected information' is defined in section 44 of the *Surveillance Devices Act 2004*, and includes information obtained from the use of a surveillance device under warrant or tracking device authorisation.

158 Subsections 45(3)–(5).

159 See items 5 and 31.

- obtained under a tracking device authorisation issued for control order monitoring purposes, or
- likely to enable the identification of a person, object or premises specified in a tracking device authorisation

would be able to be used, recorded, communicated, published or admitted into evidence to determine whether a control order is being complied with.[160]

3.150 Proposed section 65B would permit the use of information obtained under a SD control order warrant where the interim control order which provided the basis for the warrant is subsequently declared void by a court. This provision would relate to information obtained using:

- a surveillance device authorised by a control order warrant issued under section 14 on the basis that an interim control order was in force,
- an optical surveillance device authorised (without warrant) under section 37 on the basis that an interim control order was in force and used for control order monitoring purposes,
- a surveillance device authorised (without warrant) under section 38 on the basis that an interim control order was in force and used for control order monitoring purposes, or
- a tracking device authorised (without warrant) under section 39 on the basis that an interim control order was in force and used for control order monitoring purposes

as long as the information was obtained while the interim control order was in force.

3.151 The information would be able to be given in evidence, used, recorded or communicated by a person if the person reasonably believes that doing so is necessary to assist in preventing, or reducing the risk of, the commission of a terrorist act, serious harm to a person or serious damage to property, or for purposes connected with PDOs under Commonwealth, State or Territory laws.[161]

3.152 Proposed section 46A would require the destruction as soon as reasonably practicable of information obtained under a SD control order warrant or control order tracking device authorisation for the purpose of determining compliance with a control order, where the information was obtained prior to the control order being served. This requirement would not apply

160 See proposed paragraphs 45(5)(j) and 45(5)(k).

161 See proposed subsections 65B(2) and 65B(3).

where the information would be likely to assist in protecting the public from a terrorist act, or preventing the provision of support for or facilitation of a terrorist act or hostile activity in a foreign country. The Explanatory Memorandum states that this provision

> reflects the overwhelming public interest in law enforcement agencies being permitted to use information in their possession to prevent acts of terrorism and hostile activity in foreign countries.[162]

Matters raised in evidence

3.153 As with Schedules 8 and 9 relating to monitoring warrants and TI control order warrants, there were several submissions regarding the privacy and human rights impacts of the SD Act amendments.[163] The joint civil liberties councils submitted that they

> have the same general unease in relation to these proposals as [they] do to the monitoring and surveillance proposals in schedules 8 and 9.[164]

3.154 The Law Council of Australia submitted that the threshold for a SD control order warrant under Schedule 10 should require, at a minimum, a reasonable suspicion that the control order is not being complied with or that the individual is engaged in terrorist-related activity. The Council recommended this with respect to the proposed monitoring warrants and TI control order warrants.[165]

3.155 Similarly, the Australian Human Rights Commission applied its recommendations in relation to the threshold and availability of monitoring warrants and TI control order warrants to the proposed surveillance devices regime.[166]

3.156 The Law Council of Australia also raised concerns regarding proposed subsection 38(6), which allows a 'person assisting' a State or Territory law enforcement officer to use a surveillance device without warrant in relation to determining whether a control order has been, or is being, complied with. The Council suggested that this provision would extend to informants, and submitted that

162 Explanatory Memorandum, page 103.

163 Australian Lawyers for Human Rights, *Submission 4*, p. 4; Australian Human Rights Commission, *Submission 5*, pp. 16–18; Law Council of Australia, *Submission 6*, pp. 16–17, 20–23; Muslim Legal Network (NSW), *Submission 11*, pp. 32–34; Joint councils for civil liberties, *Submission 17*, p. 17.

164 Joint councils for civil liberties, *Submission 17*, p. 17.

165 Law Council of Australia, *Submission 6*, p. 17.

166 Australian Human Rights Commission, *Submission 5*, p.18.

> [if] evidence is obtained from informants without judicial oversight, then such evidence comes at too high a price … If such investigative steps are to be used, they should only be taken following the lawful approval of a warrant.[167]

3.157 The Council further suggested that the Committee should seek the view of the Privacy Commissioner in relation to the extension of the range of 'relevant proceedings' for which information obtained through the use of a surveillance device warrant can be used.[168] These amendments relate to the use of such information in control order proceedings under Division 104 of the Criminal Code and PDO proceedings under relevant Commonwealth, State and Territory legislation.[169]

3.158 The Muslim Legal Network (NSW) raised concerns regarding the use of information obtained under the proposed surveillance device provisions in relation to an interim control order which is subsequently declared void by a court. It considered that proposed section 65B would allow the storage and use of such information which, it submitted, 'stands in contrast with, and seeks to undermine, the utility of the safeguard put in place by section 46A'.[170]

3.159 Specifically, the Network expressed concern that proposed subsection 65B(3) would allow such information to be used as evidence in proceedings related to 'serious offences'.[171] It submitted that this would increase the risk of abuse of such powers by law enforcement agencies,[172] and 'reduce the role of courts to decide upon the propriety and allowance of evidence in proceedings'.[173] In particular, it highlighted the fact that senior members of the AFP have the power to make initial PDOs, and submitted that proposed subsection 65(4) would allow the AFP to more easily make such orders.[174]

3.160 The Network also expressed concerns that the proposed deferred reporting provisions would undermine transparency and accountability in relation to the control order regime. It submitted:

> Providing an avenue for the Executive to escape disclosure of important information regarding criminal sanctions laid on

167 Law Council of Australia, *Submission 6*, p. 21.

168 Law Council of Australia, *Submission 6*, p. 20.

169 Proposed paragraphs 6(1)(q)–(z).

170 Muslim Legal Network (NSW), *Submission 11*, p. 33.

171 Muslim Legal Network (NSW), *Submission 11*, p. 33.

172 Muslim Legal Network (NSW), *Submission 11*, pp. 33–34.

173 Muslim Legal Network (NSW), *Submission 11*, p. 34.

174 Muslim Legal Network (NSW), *Submission 11*, p. 34.

> individuals is deeply concerning as it damages transparency. Lack of information in Parliament means that periodic review of this newly introduced legislative scheme (ie the surveillance of control order subjects) by members of Parliament will not take place.
>
> It also means that members of the public and media will be unable to access, or report on, this information. This will damage the freedom with which the decision-making process, performance and impartiality of law enforcement agencies can be assessed.[175]

3.161 Australian Lawyers for Human Rights submitted that the rationale for deferred reporting proffered by the Explanatory Memorandum was 'not convincing', arguing that

> it is quite clear from the legislation and the [Explanatory Memorandum] that any person who is the subject of a control order will be subject to intensive electronic and other surveillance …[176]

3.162 The joint submission from a range of media organisations commented that the deferred reporting provisions represented a choice to prioritise security considerations over the public interest in the free flow of information, and submitted that

> [t]he public discourse surrounding national security laws which impinge on the freedom of the media needs to acknowledge this compromise, rather than suggesting a balance has been achieved.[177]

3.163 The joint media organisations recommended oversight of the deferred reporting provisions by the Commonwealth Ombudsman and/or the Inspector-General of Intelligence and Security. They submitted that this would

> ensure that information is made publicly available within the most appropriate timeframes, and there are checks and balances in place to ensure the Australian public's right to know is met – without jeopardising national security and the safety of the public and our law enforcement and security personnel.[178]

3.164 The Law Council of Australia acknowledged the importance of reporting obligations not jeopardising ongoing investigations. However, it submitted that proposed section 50A of the SD Act as drafted would mean

175 Muslim Legal Network (NSW), *Submission 11*, pp. 32–33.

176 Australian Lawyers for Human Rights, *Submission 4*, p. 5.

177 Joint media organisations, *Submission 10*, p. 2.

178 Joint media organisations, *Submission 10*, p. 2.

that it was unlikely that reporting would occur where a surveillance device warrant had been but was no longer in force.[179] Accordingly, the Council suggested that these provisions be redrafted or that the phrase 'or is not likely to be' removed.[180]

3.165 As with Schedule 8, the Queensland Government submitted that in relation to an application for a surveillance device warrant by a Queensland interception agency, issuing authorities should be required to have regard to any submissions made by the Queensland PIM.[181]

3.166 Noting the requirement that the Queensland PIM report annually with respect to control orders, the Queensland Government also recommended that the provisions be amended to provide for deferred public reporting by the Queensland PIM on the use of surveillance device warrants.[182]

3.167 The Attorney-General's Department explained that the issues necessitating the provisions relating to the use of information obtained by surveillance device in PDO proceedings were similar to those arising under the telecommunications interception regime, discussed at paragraph 3.124 above.[183]

3.168 In its supplementary submission, the Attorney-General's Department responded to concerns regarding the use of surveillance devices without warrant, explaining that the Bill

> makes the full range of surveillance device options in the *Surveillance Devices Act 2004* available to monitor compliance with a control order subject to authorisation processes contained within the Act. The *Surveillance Devices Act 2004* does not prohibit the use of surveillance devices without a warrant in circumstances where the use of the device is lawful such as where no trespass is involved. This includes using an optical surveillance device (a camera) in public or enabling persons assisting police to record conversation to which they are a party or could be reasonably expected to overhear. Consistent with this the Bill does not require a warrant in those circumstances for the purpose of monitoring a control order.[184]

3.169 The Department also reiterated the rationale for the deferred reporting arrangements set out in the Explanatory Memorandum:

179 Law Council of Australia, *Submission 6*, p. 21.

180 Law Council of Australia, *Submission 6*, p. 21.

181 Queensland Government, *Submission 16*, p. 5.

182 Queensland Government, *Submission 16*, p. 5.

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

184 Attorney-General's Department, *Submission 9.1*, p. 23.

> Due to the generally small number of control orders likely to be in force at any one time, immediate public reporting may enable an individual to determine or speculate as to whether they are subject to covert surveillance. In turn, there is a risk that the person may modify their behaviour to defeat the surveillance efforts. Conversely, public reporting that would effectively confirm that a person is not being monitored may increase the risk that the person will breach the conditions of the order based on a belief that their actions will not be detected.[185]

3.170 The Department further explained that it considered it unnecessary to amend the Bill to allow the Queensland PIM to report on the use of surveillance device warrants in a subsequent report, stating that

> the Queensland Public Interest Monitor's annual reporting obligations relate to, in the context of control orders, the number of control orders confirmed, declared void, revoked or varied during the year, and the use of control orders generally, and in the surveillance devices context, to those issued under the aforementioned Queensland Acts. By comparison, public annual reporting on the operation of the *Surveillance Devices Act 2004* (Cth) is the responsibility of, and is undertaken by, the Commonwealth Attorney-General.[186]

Committee comment

3.171 It is critical that law enforcement has sufficient powers to use surveillance devices to determine whether an individual has complied with the conditions of their control order. This includes the ability to covertly use surveillance devices to monitor a person's compliance with controls such as restrictions or prohibitions on communicating or associating with specified individuals, accessing or using specified telecommunications or technology, and carrying out specified activities.

3.172 The Committee's views in relation to telecommunications interception powers equally apply to the surveillance device provisions, including with respect to the deferred reporting arrangements.

3.173 The Committee notes concerns from submitters regarding the transparency and accountability of the proposed regime, particularly the deferred reporting provisions. As with the TI control order warrants regime, the proposed and existing safeguards in the SD Act would be

185 Attorney-General's Department, *Submission 9.1*, p. 25.

186 Attorney-General's Department, *Submission 9.1*, pp. 25–26.

further strengthened by a requirement for the AFP to report any breaches to the Ombudsman and for the Ombudsman to report annually to the Minister regarding AFP compliance and deferred reporting (see Schedule 8 recommendations). The Committee considers that, subject to the deferred reporting arrangements, SD control order warrants should also be subject to regular parliamentary scrutiny under the comprehensive annual reporting requirements contained in the existing SD Act.

3.174 The Committee has earlier recommended a 'least interference' test to require that due regard is given to the intrusion on privacy and liberty when a monitoring warrant or TI control order warrant is issued under Schedule 8 or 9 of the Bill. The Committee notes that the issue of a SD control order warrant under Schedule 10 of the Bill will be subject to existing requirements under the SD Act that the judge or AAT member have regard to the extent to which the privacy of any person is likely to be affected, and the existence of any alternative means of obtaining the evidence or information sought to be obtained. Schedule 10 of the Bill also includes requirements that the judge or AAT member have regard to the likely value of the information sought to be obtained in relation to the control order monitoring purposes, and the possibility that the person has engaged, is engaging, or will engage in terrorist-related activity, or has contravened, is contravening or will contravene the control order or a succeeding control order. The Committee considers these requirements should be strengthened to include a more explicit 'least interference' test in Schedule 10.

Recommendation 14

The Committee recommends that for a surveillance device control order warrant, the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to reflect the intent of Recommendation 37 of the Council of Australian Governments Review of Counter-Terrorism Legislation, to explicitly require that:

- **the issuing officer is to have regard to whether the use of the surveillance device under the warrant constitutes the least interference with the liberty or privacy of any person that is necessary in all the circumstances.**

4

Other amendments to the Criminal Code

4.1 Further to the proposed amendments relating to control orders discussed in Chapters 2 and 3, the Bill proposes a number of other amendments to the Criminal Code:

- Schedule 1 adds an additional exception to the criminal offence of 'getting funds to, from or for a terrorist organisation', and amends the wording of an existing exception to the offence of 'associating with terrorist organisations'.
- Schedule 5 adopts a new defined term of 'imminent terrorist act' and clarifies the thresholds applicable to the application for or issuing of a preventative detention order (PDO).
- Schedule 6 removes the Family Court of Australia from the list of superior courts in which a person must have served as a judge before being eligible to be appointed as an issuing authority for continued PDOs.
- Schedule 11 creates a new offence for publicly advocating genocide.

Receiving funds for legal assistance (Schedule 1)

4.2 Schedule 1 to the Bill primarily relates to the offence under the Criminal Code of 'getting funds to, from or for a terrorist organisation', which carries a maximum penalty of 25 years' imprisonment (where the person knows it is a terrorist organisation) or 15 years' imprisonment (where the person is reckless as to whether it is a terrorist organisation).[1]

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1 *Criminal Code Act 1995* (Criminal Code), section 102.6.

4.3 The offence currently contains exceptions for a person who proves that he or she received funds from a terrorist organisation solely for the purpose of providing

- legal representation for a person in proceedings relating to [Division 102 of the Criminal Code]; or
- assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.[2]

4.4 The Bill proposes to add an additional exception to the offence for

- legal advice or legal representation in connection with the question of whether the organisation is a terrorist organisation.

4.5 This provision is a partial implementation of Recommendation 20 of the COAG Review of Counter-Terrorism Legislation, which recommended that

> subsection 102.6(3)(a) be amended to exempt the receipt of funds from a terrorist organisation for the purpose of legal advice or legal representation in connection with criminal proceedings or proceedings relating to criminal proceedings (including possible criminal proceedings in the future) and in connection with civil proceedings of the following kind:
>
> (i) Proceedings relating to whether the organisation in question is a terrorist organisation, including the proscription of an organisation, a review of any proscription, or the de-listing of an organisation; or
>
> (ii) A decision made or proposed to be made under Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 (Cth), or proceedings relating to such a decision or proposed decision; or
>
> (iii) A listing or proposed listing under section 15 of the Charter of the United Nations Act 1945 (Cth) or an application or proposed application to revoke such a listing, or proceedings relating to such a listing or application or proposed listing or application; or
>
> (iv) Proceedings conducted by a military commission of the United States of America or any proceedings relating to or arising from such a proceeding; or
>
> (v) Proceedings for a review of a decision relating to a passport or other travel document or to a failure to issue such a passport or other travel document (including a passport or other travel

2 Criminal Code, subsection 102.6(3).

> document that was, or would have been, issued by or on behalf of the government of a foreign country).[3]

4.6 The COAG response to the COAG Review considered that 'the range of circumstances in which the exception ought to apply should be more limited', and as such the Bill only proposes to implement the recommendation in part.[4]

4.7 The Explanatory Memorandum contains further information on the rationale behind this measure:

> It is appropriate that an organisation is provided with an opportunity to contest a determination that it is a terrorist organisation. The amendment will enable a lawyer to receive funds from a terrorist organisation in cases where it seeks to challenge its status as a terrorist organisation. However, the exception will not extend to receiving funds for legal services that could help the organisation flourish. For example, lawyers will not be able to receive funds for providing legal advice or legal representation in general commercial or civil transactional matters.[5]

4.8 The Attorney-General's Department submission provided examples of why the existing exemptions were not sufficient:

> [A] person could be facing prosecution for a financing terrorism offence under Division 103. Part of the prosecution case could be that the individual was providing or collecting funds for a terrorist organisation that is not 'listed' but falls within the meaning of the Criminal Code. A lawyer would be unable to receive funds from the organisation to provide legal advice or legal representation to the individual who has been charged under Division 103 of the Criminal Code for financing terrorism, even though there may be a legal question as to whether the organisation is a terrorist organisation.
>
> In addition, the current exception may not apply for the purpose of providing legal advice on the potential delisting of a terrorist organisation on the basis that it does not fall within the meaning of a 'proceeding' relating to Division 102.

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3 Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, 2013, p. 29.

4 Attorney-General's Department, *Submission 9*, p. 12.

5 Explanatory Memorandum, pp. 40–41.

4.9 The Bill also proposes to modify the language used in the equivalent existing exemption to the Criminal Code offence of 'associating with terrorist organisations'. This offence currently excludes the provision of legal advice or legal representation in connection with 'proceedings relating to whether the organisation in question is a terrorist organisation'.[6] The Bill proposes to change the wording of this exception to 'the question of whether the organisation is a terrorist organisation', hence removing the word 'proceedings'. The Explanatory Memorandum provides the following reason for this change:

> Currently, the reference to proceedings in subparagraph 102.8(4)(d)(ii) could create uncertainty as to whether formal proceedings must be instituted before the exemption applies. The amendment removes this ambiguity and provides certainty that legal advice or legal representation can be provided in relation to the question of whether the organisation in question is a terrorist organisation, before proceedings are formally instituted or have commenced.[7]

Matters raised in evidence

4.10 This schedule attracted only a small amount of comment from submitters. The Muslim Legal Network (NSW) indicated its support for the amendments, noting that it is 'essential that any person who is a defendant in criminal proceedings … has adequate legal representation', and that the inclusion of the exception would 'ensure their right to fair trial'.[8]

4.11 A joint submission from councils for civil liberties across Australia also indicated support for the proposal and agreement with the rationale in the Explanatory Memorandum. The councils noted, however, that the Bill did not propose to implement the COAG Review's related recommendation concerning the legal burden on the defendant being reduced to an evidential one.[9] The councils called for this recommendation to also be implemented.[10]

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6 Criminal Code, subparagraph 102.8(4)(d)(ii).

7 Explanatory Memorandum, p. 41.

8 Muslim Legal Network (NSW), *Submission 11*, p. 5.

9 See Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, 2013, p. 28.

10 Joint councils for civil liberties, *Submission 17*, p. 3.

4.12 At the public hearing, the Committee asked the Department for further information on the genesis of the changes proposed in Schedule 1.[11] In a supplementary submission, the Department advised that the COAG Review recommendation drew on a number of public submissions in favour of expanding the exception for lawyers to receive funds from a terrorist organisation, in addition to the 2006 Report of the Security Legislation Review Committee (the Sheller Report) and a subsequent report by the then Parliamentary Joint Committee on Intelligence and Security.[12]

4.13 No concerns were raised by inquiry participants in relation to the particular amendments proposed in the Bill. As such, the Committee makes no further comments and supports the schedule's inclusion in the Bill.

Preventative detention orders – 'imminent' test (Schedule 5)

4.14 The preventative detention order (PDO) regime allows persons over 16 years of age to be taken into custody and detained for a short period of time—up to 48 hours—in order to (a) prevent an imminent terrorist act occurring; or (b) preserve evidence of, or relating to, a recent terrorist act.[13]

4.15 Under subsection 105.4(4) of the Criminal Code, an AFP member may apply to an issuing authority for a person to be made subject to an initial PDO if the following criteria are met:[14]

> (a) in the case of an AFP member—the member suspects, on reasonable grounds, that the subject:
>
> (i) will engage in a terrorist act; or
>
> (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
>
> (iii) has done an act in preparation for, or planning, a terrorist act; and

11 *Committee Hansard*, 14 December 2015, Canberra, p. 45.

12 Attorney-General's Department, *Submission 9.1*, p. 5.

13 See Criminal Code, Division 105—Preventative detention orders.

14 For the purposes of initial PDOs, the issuing authority is a 'senior AFP member', which includes the Commissioner, a Deputy Commissioner, or 'an AFP member of, or above, the rank of Superintendent'. See Criminal Code, section 100.1.

(b) in the case of an issuing authority—the issuing authority is satisfied there are reasonable grounds to suspect that the subject:

(i) will engage in a terrorist act; or

(ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or

(iii) has done an act in preparation for, or planning, a terrorist act; and

(c) the person is satisfied that making the order would substantially assist in preventing a terrorist act occurring; and

(d) the person is satisfied that detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (c).[15]

4.16 Under subsection 105.4(5), for the purposes of the above criteria, a terrorist act

(a) must be one that is imminent; and

(b) must be one that is expected to occur, in any event, at some time in the next 14 days.[16]

4.17 Schedule 5 to the Bill proposes to repeal and replace subsection 105.4(5) with the following new definition of 'imminent terrorist act':

An ***imminent terrorist act*** is a terrorist act that:

(a) in the case of an AFP member—the member suspects, on reasonable grounds; or

(b) in the case of an issuing authority—the issuing authority is satisfied there are reasonable grounds to suspect;

is **capable of being carried out, and could occur, within the next 14 days**. [emphasis added]

4.18 Through consequential amendments to subsection (4),[17] this newly defined term of 'imminent terrorist act' would form the basis of the test that applications for PDOs must meet if they are to be issued.

4.19 The Explanatory Memorandum states that the amendments are intended to 'clarify how the "imminent" test in subsection 105.4(5) operates'. It

15 Criminal Code, subsection 105.4(4).

16 Criminal Code, subsection 105.4(5).

17 Item 1, Schedule 5 to the Bill.

notes that the current language in the subsection is 'confusing' and could be interpreted to impose 'impractical constraints on law enforcement agencies':

> [Subsection 105.4(5)] requires an expectation that an event will occur in the next 14 days. However, law enforcement agencies may be aware of individuals who intend to commit terrorist acts and who possess the necessary ability to carry out a terrorist act, but who have no clear timeframe in mind as to when they might perpetrate the act. The terrorist act could potentially occur within hours, weeks or months. In such circumstances, law enforcement agencies may not be able to obtain a PDO as the issuing authority may not be satisfied that there is an expectation the act will occur within precisely 14 days, despite the clear and ongoing threat posed by the individual. The current focus of 105.4(5) on the timing for when an act will occur within a certain period, rather than the capability for an act to occur within a certain period, is problematic.
>
> …
>
> With the terrorist threat continuing to evolve, radicalisation occurs with increasing speed and terrorists may seek to commit terrorist acts quickly to evade the attention of law enforcement. Law enforcement may be aware that a person has the intention, motivation and necessary tools to commit a terrorist act, but no evidence as to the specific date on which the attack is planned to occur. In other circumstances, a person may become aware that they are the subject of law enforcement surveillance and accordingly change the timing of the planned attack to evade attention. In such circumstances, explicit reference to 'capability' will ensure that law enforcement is able to take appropriate action to protect public safety and prevent the terrorist act from occurring.[18]

4.20 The Explanatory Memorandum further states that the existing structure of section 105.4 is open to two differing interpretations of the thresholds to apply to the 'imminent' test. The proposed amendments are intended to clarify that 'the test of "imminent terrorist act" must be read in conjunction with the thresholds applicable to the AFP member and issuing authority'—that is, the thresholds of 'suspects, on reasonable grounds'

18 Explanatory Memorandum, pp. 60–61.

and 'satisfied that there are reasonable grounds to suspect' are built into the definition of 'imminent terrorist act'.[19]

4.21 In reviewing the Bill, the Senate Standing Committee for the Scrutiny of Bills flagged that the proposed new definition of 'imminent terrorist act' would constitute a broadening of the power to issue a PDO, and sought more explanation from the Attorney-General as to why this should occur.[20] The Parliamentary Joint Committee on Human Rights similarly sought advice on the objective of the proposal, whether the proposal is 'rationally connected to that objective', and whether the limitation on the right to liberty is a 'reasonable and proportionate measure for the achievement of that objective'.[21]

Matters raised in evidence

4.22 Submissions from the Attorney-General's Department and the AFP expanded on the rationale for the proposed amendments in Schedule 5. The Attorney-General's Department noted that the amendment would seek to address the 'possible compromise to the operational utility of the PDO regime' that exists in the 14-day requirement, in which it is 'often difficult, if not impossible' to establish with certainty that a terrorist act is expected to occur within exactly 14 days.[22]

4.23 The Department noted that similar concerns had been raised in the 2012 report by the former Independent National Security Legislation Monitor (INSLM).[23] The former INSLM, while recommending that the PDO regime be repealed entirely, noted that the 'degree of precision required in the 14-day requirement 'limits the efficacy of the PDO regime'. He recommended that, if PDOs were to be retained, the imminence test should be replaced with a requirement that there is 'a sufficient possibility of the terrorist act occurring sufficiently soon so as to justify the restraints imposed by the PDO'.[24]

4.24 The AFP submitted that the intention of the Bill was

19 Explanatory Memorandum, p. 61.

20 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 13/15*, 25 November 2015, p. 12.

21 Parliamentary Joint Committee on Human Rights, *Thirty-second reports of the 44th Parliament*, 1 December 2015, p. 24.

22 Attorney-General's Department, *Submission 9*, p. 8.

23 Attorney-General's Department, *Submission 9*, p. 8.

24 Independent National Security Legislation Monitor, *Declassified Annual Report: 20 December 2012*, p. 52.

> not to expand the meaning of 'imminent', but rather to clarify its meaning. That is, it seeks to address the underlying factors which made a terrorist act 'likely to occur at any moment':
>
> - the intent of a person to commit a terrorist act in the near future (within the next 14 days); and
> - the actual capability of a person to commit a terrorist act in the near future (within the next 14 days).[25]

4.25 During the inquiry, several submitters took the opportunity to state their concerns about the PDO regime as a whole, primarily citing issues with the utility of the regime, a perceived lack of procedural fairness, and human rights concerns.[26] Notwithstanding these concerns, comments by submitters on the specific amendments proposed in the Bill were mixed.

4.26 The Australian Human Rights Commission, for example, was opposed to the amendments, arguing that they would 'substantially reduce' the threshold required to be met to obtain a PDO.[27] The Commission noted that the dictionary definition of 'imminent' involves 'a very high likelihood (or even certainty) of an event occurring and a short timeframe within which it is to occur'.[28] It argued that, under the existing legislation,

> [t]he requirement that an issuing authority be satisfied there are reasonable grounds to suspect an imminent terrorist attack may not be an easy one to meet. However, that is entirely consistent with the extraordinary nature of the preventative detention order regime … It is not appropriate that powers of this nature be exercised if there is not a high risk of a terrorist act.

4.27 The Commission suggested that the proposed lowering of the threshold had 'not been shown to be justified', and 'could allow an order to be made in cases where no more is shown than that there is a possibility a terrorist attack might occur'.[29]

4.28 The Muslim Legal Network (NSW) similarly opposed the amendments, arguing that the new definition of 'imminent terrorist act' would amount to lowering the threshold for impeding upon an individual's right to be at liberty on the basis of 'subjective' criteria.[30]

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25 Australian Federal Police, *Submission 3*, p. 14.

26 Gilbert + Tobin Centre of Public Law, *Submission 2*, pp. 7, 8–9; Australian Human Rights Commission, *Submission 5*, p. 6; Law Council of Australia, *Submission 6*, p. 15; Joint councils for civil liberties, *Submission 17*, pp. 11–12.

27 Australian Human Rights Commission, *Submission 5*, p. 16.

28 Australian Human Rights Commission, *Submission 5*, p. 15.

29 Australian Human Rights Commission, *Submission 5*, p. 15, 16.

30 Muslim Legal Network (NSW), *Submission 11*, p. 15.

4.29 The Gilbert + Tobin Centre of Public Law, on the other hand, while opposing PDOs generally, supported the amendments as proposed in Schedule 5. It noted that the existing legislation was 'awkwardly phrased' in that the requirement that a terrorist act be expected to occur within 14 days is 'restrictive and conceivably fails to capture terrorist acts that could occur on very short notice but for which no date has been set'. The Centre submitted that the amendment proposed in the Bill would 'improve the clarity of the provisions'.[31]

4.30 The Law Council of Australia supported the INSLM's recommendation that, if the PDO regime were to be retained, the imminence test should be amended. However, it argued that the inclusion of the words 'could occur' (within 14 days) was too broad, and 'may not ensure that only situations where there is a real risk of a terrorist attack occurring are captured'. The Law Council's submission recommended that 'could occur' be replaced with 'is likely to occur', such that an imminent terrorist act would be one that

> is capable of being carried out, and *is likely to* occur, within the next 14 days.[32]

4.31 A similar recommendation was made in the joint submission from the councils for civil liberties across Australia.[33]

4.32 Ms Gabrielle Bashir SC expanded on the Law Council's recommendation at the public hearing and suggested that the definition of 'imminent terrorist act' proposed in the Bill would introduce 'vagueness' into the existing legislation, increasing its susceptibility to challenge on constitutional grounds. Ms Bashir indicated that a definition that incorporated 'likelihood' would help bring it into line with previous High Court decisions.[34]

4.33 Responding to the language in the AFP's submission that the intention of the Bill is to clarify the meaning of 'imminent' to 'address the underlying factors which make a terrorist act "likely to occur at any moment"',[35] the President of the Law Council added that

> it seems from what you have just read out to the committee that there may have been an intention to direct the words 'could occur'

31 Gilbert + Tobin Centre of Public Law, *Submission 2*, pp. 7–8.

32 Law Council of Australia, *Submission 6*, p. 16.

33 Joint councils for civil liberties, *Submission 17*, p. 12.

34 Ms Gabrielle Bashir, SC, Member, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, Canberra, 14 December 2015, p. 5.

35 Australian Federal Police, *Submission 3*, p. 14.

> to the rather arbitrary and definite time frame of 14 days. It does not, on our reading, have that effect. In fact, the effect of using those words is to dilute and weaken the circumstances but do nothing about the arbitrariness of the 14 days. Certainly, the Law Council does not submit that the 14 days is some magical, important period. If the objective was to create some flexibility around that 14-day period within limits, then that is not something that would concern the Law Council. But we do not think that these proposed words achieve that.[36]

4.34 In a supplementary submission, the Attorney-General's Department highlighted problems with the proposal for the definition of 'imminent terrorist act' to be phrased around likelihood:

> The proposed phrase 'likely to occur' would not entirely overcome the problems with the existing phrase 'expected to occur' as it still places an emphasis on the probability of an act occurring within 14 days. As noted in the AFP submission, a terrorist act can be likely to occur at any moment in circumstances where a person has made plans or preparations to carry out an act, but has not yet selected a date for it to occur (for example, if a terrorist has concealed a bomb in a building with a remote detonator). In those circumstances, if the test for the issue of the PDO was that the terrorist act was 'likely to occur within 14 days', the AFP would still be required to provide evidence as to the likelihood of the act occurring within that set timeframe. This test may be impossible to meet if the terrorist had no particular timeframe for executing their plan, even if it could occur at any moment.[37]

4.35 At the public hearing, Ms Bashir also suggested 'unacceptable risk of harm' as an alternative form of words that, while not preferred by the Law Council compared to its recommendation of 'is likely to occur', would represent the 'very minimum' of what should be considered. Ms Bashir noted that 'unacceptable risk of a terrorist attack occurring' would be consistent with language approved by the High Court in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.[38]

4.36 In response, the Attorney-General's Department argued that an 'unacceptable risk' component was already part of the PDO regime:

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36 Mr Duncan McConnel, President, Law Council of Australia, *Committee Hansard*, Canberra, 14 December 2015, p. 6.

37 Attorney-General's Department, *Submission 9.1*, p. 16.

38 Ms Bashir, Law Council of Australia, *Committee Hansard*, Canberra, 14 December 2015, pp. 5, 7.

> The proposal that the test should refer to an 'unacceptable risk of harm' requires a balancing exercise to be undertaken between the relevant nature and degree of risk of harm to the community and the deprivation of a person's liberty for a limited period of time. However, this balancing exercise is already built into the preventative detention order regime under paragraphs 105.4(4)(c) and (d) which require that the issuing authority is satisfied that making the order would substantially assist in preventing an imminent terrorist act, and that detaining the person is reasonably necessary for the purpose of preventing a terrorist act. To the extent that the 'unacceptable risk' component is already a part of the preventative detention order regime, it would be undesirable and unnecessary to include it within the revised 'imminent' test.[39]

Committee comment

4.37 During this inquiry, the Committee considered the specified amendments contained in the Bill, rather than examining the merits of the PDO regime as a whole.[40]

4.38 There were mixed views on the proposed amendments. The majority of inquiry participants who commented on the provision accepted the need for less restrictive wording in the 'imminent terrorist act' test for PDOs, as is proposed in the Bill and was initially recommended by the INSLM. However, views on the precise wording selected varied.

4.39 While accepting the need to address the current limits on the efficacy of the PDO regime, the Committee acknowledges concerns that the wording in the Bill may be overly broad, and as a result could potentially increase the susceptibility of the legislation to legal challenge on constitutional grounds.

4.40 Alternative proposals put before the Committee included redrafting the definition of 'imminent terrorist act' to require consideration of whether an act is 'likely to occur' within 14 days, or to require consideration of whether there is an 'unacceptable risk' that an attack may occur. However, there are difficulties with both of these alternative propositions.

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39 Attorney-General's Department, *Submission 9.1*, p. 17.

40 The Committee is required to undertake a separate, broader review of the operation, effectiveness and implications of the PDO regime, along with a range of other counter-terrorism powers, by 7 March 2018 under paragraph 29(1)(bb) of the *Intelligence Services Act 2001*.

4.41 In regard to the proposal to replace the Bill's use of the words 'could occur' with 'is likely to occur' (within the next 14 days), it is unclear that this would overcome the existing overly-restrictive requirement that a terrorist act must be *expected* to occur, at any event, within 14 days. It would still prevent the use of a PDO in circumstances where the AFP does not have evidence as to when precisely the terrorist act is likely to occur, including in circumstances where a terrorist attack could occur at any moment.

4.42 The Committee also examined the Law Council of Australia's proposal to introduce a requirement for consideration of whether there is an 'unacceptable risk' of a terrorist act occurring. This subjective test would avoid the need to define 'imminent' or specify an arbitrary time period, and would require the decision-maker to balance the risk to the community of a terrorist act occurring against the deprivation of liberty under a PDO for the individual involved. However, the Committee accepts the Attorney-General's Department's view that a similar 'balancing exercise' is already built into the PDO regime. It is not clear how an additional balancing exercise would sit with the existing requirements, and it may in fact risk duplicating or making unworkable the current requirements.

4.43 It is important that any changes to the 'imminent' test in the PDO regime be considered in light of the other significant thresholds that must be met before a PDO can be issued. As noted earlier, for a PDO to be made under the existing legislation an AFP member must 'suspect on reasonable grounds' and an issuing authority must be 'satisfied that there are reasonable grounds to suspect' that the subject

- will engage in a terrorist act; or
- possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
- has done an act in preparation for, or planning, a terrorist act.[41]

Additionally, both the AFP member and the issuing authority must be satisfied that

- making the order would substantially assist in preventing a terrorist act occurring; and

41 Criminal Code, paragraph 105.4(4)(a)–(b).

- detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose preventing a terrorist act occurring.[42]

4.44 Together, these requirements will ensure that PDOs are only used in the most extreme situations where rapid preventative detention is reasonably necessary for preventing a terrorist act, including where the timing of that terrorist act is uncertain.

4.45 The new definition of 'imminent terrorist act' in the Bill retains a 14 day outer limit in which a terrorist act must be 'capable of being carried out, and could occur' to meet the requirements of the PDO regime. As some submitters pointed out, however, this definition stretches beyond the common understanding of the term 'imminent', which implies that an act is 'likely to occur at any moment' or is 'about to happen'.[43] In fact, the focus of the new definition is more on the capacity of an act to occur (at any time), rather than on its imminence. The Committee therefore considers that the word 'imminent' in the definition should be removed altogether.

4.46 The Committee suggests that subsection 105.4(5) in the Bill be rephrased simply to state:

> A terrorist act referred to in subsection (4) is a terrorist act that
>
> (a) in the case of an AFP member—the member suspects, on reasonable grounds; or
>
> (b) in the case of an issuing authority—the issuing authority is satisfied there are reasonable grounds to suspect;
>
> is capable of being carried out, and could occur, within the next 14 days.

4.47 The Committee notes that, as part of its enabling legislation, it has oversight over the performance of the AFP's functions with respect to the Commonwealth PDO regime. The Committee is also required to review the operation, effectiveness and implications of the PDO regime by 7 March 2018. In carrying out both of these functions, the Committee will pay close attention to the practical operation of the regime, including with respect to the changes proposed in the Bill.

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42 Criminal Code, paragraph 105.4(4)(c)–(d).

43 See Australian Human Rights Commission, *Submission 5*, p. 15, citing the Macquarie Dictionary (3rd ed.).

Recommendation 15

The Committee recommends that clause 105.4(5) of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to replace the term 'imminent terrorist act' with 'terrorist act' in the threshold test for preventative detention orders (PDOs).

The Committee notes that the use of the word 'imminent' could be regarded as inconsistent with the Bill's amended definition of a terrorist act that is 'capable of occurring, and could occur, within the next 14 days'.

The Committee notes that existing thresholds under the PDO regime would continue to require the applicant and the issuing authority to be satisfied that making the PDO would substantially assist in preventing a terrorist act from occurring and that detaining the subject for the applicable period is reasonably necessary for the purpose preventing a terrorist act from occurring.

Preventative detention orders –issuing authorities (Schedule 6)

4.48 Schedule 6 to the Bill proposes to remove the 'Family Court of Australia or of a State' from the Criminal Code definition of 'superior court'.[44] This would have the effect of removing the Family Court from the list of courts in which a *retired* judge must have served as a judge for five years before being eligible to be appointed as an issuing authority for continued PDOs. 'Superior courts' would be limited to the High Court, the Federal Court of Australia, the Supreme Court of a state or territory, or the District Court (or equivalent) of a state or territory.[45]

4.49 Under existing provisions in the Criminal Code, *serving* judges of federal courts (which would include the Federal Circuit Court and the Family Court of Australia), serving judges of State and Territory supreme courts, and the President or Deputy President of the Administrative Appeals Tribunal may also be appointed as issuing authorities for continued

44 See Criminal Code, section 100.1.

45 Explanatory Memorandum, p. 63. See Criminal Code, section 100.1 (definition of 'superior court') and section 105.2 (Issuing authorities for continued preventative detention orders).

PDOs.[46] Initial PDOs are made internally by a senior member of the AFP.[47] The Bill does not propose to amend these provisions.

4.50 The Explanatory Memorandum provides the following rationale for the proposal in the Bill:

> Currently, a person who has served as a judge of the Family Court for at least five years may be appointed as an issuing authority under section 105.2, with various powers including the power to make and extend a continued PDO.
>
> However, while the other courts within the definition of a 'superior court' exercise functions relevant to the areas of criminal law and counter-terrorism, the Family Court does not have jurisdiction in relation to those matters. It is anomalous for a judge of the Family Court to play a role in the control order regime, and no Family Court judge has ever been appointed under section 105.2.
>
> This amendment removes the anomaly and means that only those judges who have served in a court which ordinarily exercises criminal jurisdiction will be eligible for appointment as an issuing authority for continued PDOs.[48]

Matters raised in evidence

4.51 The proposed amendment is somewhat similar to the proposed omission of the Family Court from the definition of 'issuing court' for Control Orders, provided for in Schedule 4 (see Chapter 2). As with Schedule 4, a number of participants in the inquiry expressed their support for the removal of the Family Court from the definition of 'superior court',[49] with one submission opposing the amendment on the grounds that Family Court members have more experience than others in considering the best interests of children.[50]

4.52 In its submission, the Gilbert + Tobin Centre of Public Law argued that the Federal Circuit Court should additionally be 'stripped of jurisdiction to

46 Criminal Code, Section 105.2.

47 Criminal Code, Section 100.1, definition of 'issuing authority'.

48 Explanatory Memorandum, p. 63.

49 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 8; Law Council of Australia, *Submission 6*, p. 15; Joint councils for civil liberties, *Submission 17*, p. 11; Professor Andrew Lynch, Gilbert + Tobin Centre of Public Law, *Committee Hansard*, Canberra, 14 December 2015, pp. 18, 19.

50 Australian Lawyers for Human Rights, *Submission 4*, p. 4.

issue PDOs'.[51] In response, the Attorney-General's Department argued that it was appropriate for judges of the Federal Circuit Court to retain the ability to be appointed as issuing authorities

> to ensure flexibility and to facilitate access to an issuing authority at a range of locations, including at short notice, noting the urgency necessarily associated with the making of a preventative detention order to prevent an imminent terrorist attack.[52]

4.53 Gilbert + Tobin also expressed a more general concern that the power of *serving* judges to be made issuing authorities for PDOs was of 'questionable' constitutional validity:

> Chapter III of the Constitution prohibits the conferral of any functions on a serving judge in his or her personal capacity, when those functions are incompatible with the independence or integrity of the judicial institution.
>
> … The involvement of serving state, territory or federal judges in a scheme that brings about the detention of citizens in proceedings lacking procedural fairness undermines the integrity of the judicial institution and could be struck down on this basis. In order to avoid this risk of constitutional invalidity, the role of issuing authority ought not be conferred on serving judges of any court.[53]

4.54 In a supplementary submission, the Attorney-General's Department contested the Centre's assertion that the PDO regime lacked procedural fairness and responded as follows:

> The Minister can only appoint a person who has provided written consent. This ensures persons appointed as an issuing authority have considered and understands the role. In exercising functions as an issuing authority, subsection 105.18(2) makes it clear that the functions conferred are conferred in a *personal capacity* and not as a court or a member of a court, regardless of whether the person is a current or former judge.[54]

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51 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 8.

52 Attorney-General's Department, *Submission 9.1*, p. 17.

53 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 8. See also Rebecca Ananian-Welsh, 'Preventative Detention Orders and the Separation of Judicial Power', *University of New South Wales Law Journal*, 38(2), 2015, p. 756.

54 Attorney-General's Department, *Submission 9.1*, p. 17. Emphasis in the original.

Committee comment

4.55 The Committee notes there was general support for the proposal to remove the Family Court of Australia or of a State from the definition of 'superior court'. The Federal Circuit Court is already excluded from this definition.

4.56 The definition of 'superior court', which would be amended by the Bill, is only relevant to the eligibility of *retired* judges to become PDO issuing authorities. A broader range of *serving* judges—including those of both the Family Court of Australia and Federal Circuit Court—will still be eligible to be appointed as issuing authorities if the Bill is passed.

4.57 The Committee supports the amendment as outlined in the Bill in relation to retired judges, but considers that an additional amendment is required to paragraph 105.2(1)(b) of the Criminal Code to provide that a serving judge of the Family Court of Australia is also ineligible to be appointed as an issuing authority. This would be in keeping with the stated intent of the Bill to remove an anomaly in which Family Court judges can be appointed as issuing authorities for PDOs, despite the Family Court not having jurisdiction in relation to matters of criminal law and counter-terrorism.[55]

4.58 At this point in time and based on the evidence received to this inquiry, the Committee is not convinced of the need to also remove the ability of Federal Circuit Court judges to be appointed.

4.59 Although some have questioned the constitutional validity of appointing any serving judges as issuing authorities, the Committee notes the clear intention that any judge appointed would only have the functions of an issuing officer conferred on them in a personal capacity. Such a judge would presumably give careful consideration to any perceived impact on the independence and integrity of the judiciary prior to giving their written consent to be an issuing officer. The Committee also notes that no PDOs have been issued under the Commonwealth regime to date.[56]

Recommendation 16

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to remove the ability for serving judges of the Family Court of Australia to be appointed as issuing authorities under paragraph 105.2(1)(b) of the Criminal Code.

55 See Explanatory Memorandum, p. 63.

56 Australian Federal Police, *Submission 3*, p. 14.

Advocating genocide offence (Schedule 11)

4.60 Schedule 11 to the Bill proposes to insert a new offence into the Criminal Code, carrying a maximum seven year prison sentence, targeting persons who 'publicly advocate genocide'.

4.61 Genocide is defined in the Bill as the commission of any of the genocide offences outlined in existing Division 268 of the Criminal Code. These offences cover acts committed with an intent to 'destroy, in whole or in part', a 'particular national, ethnical, racial or religious group, as such', including by killing; causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about physical destruction; imposing measures intended to prevent births; and forcibly transferring children.[57] The 'extended criminal liability' offences related to genocide—that is, attempt, incitement, conspiracy, complicity and common purpose, joint commission and commission by proxy—are specifically excluded from the new offence.[58]

4.62 The term 'advocate' is defined in the Bill to mean 'counsel, promote, encourage or urge'.[59] This is the same language used to define 'advocates' in relation to the 'advocating terrorism' offence that was enacted under section 80.2C of the Criminal Code in 2014. However, unlike the 'advocating terrorism' offence, the new 'advocating genocide' offence, as drafted, is limited to *public* advocacy.[60] The Explanatory Memorandum notes that, while the word 'publicly' is not defined, it would include:

- causing words, sounds, images of writing to be communicated to the public, a section of the public, or a member of members of the public,
- conduct undertaken in a public place, or
- conduct undertaken in the sight or hearing of people who are in a public place.[61]

4.63 According to the Explanatory Memorandum, the existing Criminal Code offences for incitement and urging violence would continue to be pursued 'where there is sufficient evidence', however, this would not always be possible:

57 Criminal Code, Division 268, Subdivision B—Genocide.

58 Proposed subsection 80.2D(3).

59 Proposed subsection 80.2D(3).

60 Proposed subsection 80.2D(1).

61 Explanatory Memorandum, p. 108.

> These offences require proof that the person intended the crime or violence to be committed, and there are circumstances where there is insufficient evidence to meet that threshold. Groups or individuals publicly advocating genocide can be very deliberate about the precise language they use, even though their overall message still has the impact of encouraging others to engage in genocide.[62]

4.64 The Explanatory Memorandum argues that, in addition to the existing 'advocating terrorism' offence, the new offence would become one of the tools available to law enforcement agencies to help them 'intervene earlier' in order to 'prevent and disrupt the radicalisation process and engagement in terrorist activity'. Such tools were said to be necessary because of the increased speed of the radicalisation process in recent times:

> [I]n the current threat environment, the use of social media by hate preachers means the speed at which persons can become radicalised and could prepare to carry out genocide may be accelerated. It is no longer the case that explicit statements (which would provide evidence to meet the threshold of intention and could be used in a prosecution for inciting genocide) are required to inspire others to take potentially devastating action against groups of individuals.[63]

4.65 The proposed new offence includes a 'double jeopardy' protection in relation to any prior convictions or acquittals by the International Criminal Court.[64] A note in the provision also refers to the existing defences in section 80.3 of the Criminal Code for acts done in 'good faith'.[65]

4.66 The Committee previously examined the 'advocating terrorism' offence in its review of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014. Submitters to that inquiry identified a number of concerns relating to the proposed advocating terrorism offence, including:

- the sufficiency of the existing incitement and urging violence offences in capturing those who directly encourage others to engage in criminal acts,

62 Explanatory Memorandum, pp. 108–109.

63 Explanatory Memorandum, p. 109.

64 Proposed subsection 80.2D(2).

65 Proposed subsection 80.2D(1).

- that a 'recklessness' threshold is a disproportionate impingement on the right to free speech,
- the potentially counter-productive nature of the offence,
- that the definition of 'advocacy' is overly vague and does not provide sufficient clarity to enable people to know what activity could be deemed illegal, and
- that the 'good faith' defence does not sufficiently capture the full range of activities that should be covered.[66]

4.67 In its report on the Foreign Fighters Bill, the Committee accepted that, despite these concerns, the Government has a responsibility for ensuring that advocacy of terrorism is discouraged and prevented, and that the existing offences did not cover this type of behaviour.[67] It also accepted that 'recklessness' was the appropriate test for assessing an individual's behaviour under the proposed offence,[68] and that the existing 'good faith' defence and other criminal law safeguards would ensure an appropriate balance was struck between free speech, healthy public discourse and the illegal and unwanted encouragement of terrorism.[69]

4.68 Acting on recommendations of the Committee, the Government revised the Foreign Fighters Bill's Explanatory Memorandum to clarify the meaning of the terms 'encourage', 'advocacy' and 'promotion' as they relate to the advocating terrorism offence.[70] The Explanatory Memorandum to the current Bill contains similar language to clarify the meaning of these expressions in respect to the proposed 'advocacy of genocide' offence:

> The terms 'promotes' and 'encourages' are not defined. The ordinary meaning of each of the relevant expressions varies, but it is important that they be interpreted broadly to ensure a person who advocates genocide does not escape punishment by relying on a narrow construction of the terms or one of the terms.

66 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. 30.

67 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. 42.

68 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. 39.

69 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. 43.

70 Senator the Hon George Brandis QC, Attorney-General, 'Government response to committee report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014', *Media release*, 22 October 2014.

> However, some examples of the ordinary meaning of each of the expressions follow: to 'counsel' the doing of an act (when used as a verb) is to urge the doing or adoption of the action or to recommend doing the action; to 'encourage' means to inspire or stimulate by assistance of approval; to 'promote' means to advance, further or launch; and 'urge' covers pressing by persuasion or recommendation, insisting on, pushing along and exerting a driving or impelling force.[71]

4.69 The Explanatory Memorandum contends that, while these expressions may be interpreted broadly, combined with the existing 'good faith' defences it would be clear that they do not cover 'merely commenting on or drawing attention to a factual scenario', such as pointing out errors in government policy or publishing material about a matter of public interest in good faith:

> This will not stifle true debate that occurs—and should occur—within a democratic and free society. The new offence is designed to capture those communications that create an unacceptable risk of the commission of genocide. Accordingly, a successful prosecution will require evidence that the person intentionally communicated something in circumstances where there is a substantial risk that somebody would take that speech as advocating the commission of a genocide offence.[72]

Matters raised in evidence

4.70 In its submission, the AFP expressed its concern about the impact of 'hate preachers' on the current crime environment and provided further detail on the rationale for the new offence:

> The new 'advocating genocide' offence is directed at those who supply the motivation and imprimatur for violence. This is particularly the case where the person advocating genocide holds significant influence over other people who sympathise with, and are prepared to fight for, the genocide cause. …
>
> The cumulative effect of more generalised statements, when made by a person in a position of influence and authority, can still have the impact of directly encouraging others to undertake a range of violent acts, including genocide, overseas or in Australia. The AFP therefore require tools, such as the new 'advocating genocide'

71 Explanatory Memorandum, p. 109.

72 Explanatory Memorandum, pp. 109–110.

> offence, to intervene earlier in the radicalisation process to prevent and disrupt further engagement in genocide.[73]

4.71 The Attorney-General's Department's submission noted that the proposed new offence would be consistent with the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) as well as 'offences enacted by some of Australia's closest allies, including the United States, Canada and Ireland', in its prohibition of 'direct and public incitement' to commit genocide.[74]

4.72 Other submitters to the inquiry raised concerns about the proposed new offence, in particular:

- the justification for the new offence and overlap with existing offences,
- the breadth of conduct potentially falling under the definition of 'advocating',
- the absence of a fault element of 'intention' or 'recklessness', and
- the lack of a definition of 'publicly'.

4.73 Several inquiry participants questioned the necessity for the new offence in light of existing offences that could target the same behaviour.[75] For example, the Australian Human Rights Commission noted existing offences for 'urging violence' and 'advocating terrorism' that it considered would 'capture much of the conduct at which the proposed measures are said to be targeted'. It recommended the Committee 'scrutinise closely the claimed justifications' for the new offence.[76] The Muslim Legal Network (NSW) further identified sedition offences and an offence targeting the use of carriage services (such as social media) to 'menace, harass or cause offence'.[77]

4.74 The Gilbert + Tobin Centre of Public Law contended that the new offence would go 'significantly beyond the law of incitement' and that

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73 AFP, *Submission 3*, p. 16.

74 Attorney-General's Department, *Submission 9*, p. 12.

75 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 12; Australian Human Rights Commission, *Submission 5*, p. 20–22; Law Council of Australia, *Submission 6*, pp. 23–24; Muslim Legal Network (NSW), *Submission 11*, p. 37; Joint councils for civil liberties, *Submission 17*, p. 17; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 14 December 2015, p. 16; Mr Zaahir Edries, President, Muslim Legal Network (NSW), *Committee Hansard*, Canberra, 14 December 2015, p. 29.

76 Australian Human Rights Commission, *Submission 5*, p. 21.

77 Muslim Legal Network (NSW), *Submission 11*, p. 37.

> to the extent that the offence includes speech that amounts to incitement, its enactment is entirely superfluous since the incitement of genocide is already a criminal offence.[78]

4.75 At the public hearing, the Attorney-General's Department provided the Committee with an explanation of the difference between the proposed new offence and existing offences, and the gap in the legislation that the new offence is seeking to fill:

> [I]nciting genocide would be a criminal offence under the Criminal Code. The penalty provisions in the code would provide that that would be a 10-year penalty. However, the elements of that would be that you intentionally—because intention is read in—engage in conduct that is advocating, promoting or inciting genocide and you also intend that that conduct happen. What we are seeing in what has been broadly described as hate speech is commentary—and I cannot give you a specific example—where it is quite intentional in terms of the conduct that they are engaging in, whether that is something written or spoken, but there is no evidence that they actually intend that the genocide occur. It is very difficult to identify what proof or evidence you would adduce in order to prove not only that I said, 'You should kill all the people of race X,' but that I actually intended for you to do that.
>
> Our concern is that it is easy to mount an argument that you did not intend that conduct to be followed through on. With this particular proposed offence if you intentionally … and publicly advocate genocide that is sufficient for this offence, and that is why it has a lower penalty of seven years. It is capturing the difference between intentionally engaging in that conduct intending that something happen on the one hand and intentionally engaging in that conduct of advocating genocide without any particular intention as to what follows on the other hand.[79]

4.76 In a supplementary submission, the Department noted this difference was the reason for the lower maximum sentence for the proposed offence (seven years) compared to the existing incitement offence (10 years). It added:

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78 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 12.

79 Ms Karen Bishop, Acting Assistant Secretary, Counter-Terrorism Branch, Attorney-General's Department, *Committee Hansard*, Canberra, 14 December 2015, p. 42.

> Where there is evidence that a person engaged in inciting conduct and also intended genocide would occur, the person would be charged with the more serious offence.[80]

4.77 Similarly to submissions made to the Committee's previous review of the 'advocating terrorism' offence, several inquiry participants argued that the term 'advocating' was defined too broadly in the Bill.[81] For example, a joint submission to the inquiry received from a range of media organisations echoed a concern the group previously raised that the ambiguous nature of the term 'advocates' could potentially limit discussion, debate and the exploration of terrorism in news and current affairs reporting.[82]

4.78 The joint submission from councils for civil liberties across Australia noted that the existing 'advocating terrorism' offence has been identified as a law that may restrict speech or expression by the Australian Law Reform Commission in its review of Commonwealth laws that encroach upon traditional rights, freedoms and privileges.[83]

4.79 At the public hearing, representatives of the Muslim Legal Network (NSW) explained their concerns about the breadth of the offence and its potential impact on freedom of speech:

> What we are mindful of is throwing a very wide net which could impact on people's ability to speak freely about issues. There are valid concerns for many people in the general wider community with respect to issues around the world, be they speaking about ISIS or any other terrorist type of organisation. What we have to do is not to limit or stifle discussion about how we address those issues.[84] …
>
> What that also does is it pushes those discussions underground, which is dangerous. They should be open to criticism and open to be challenged. We are certainly not saying we are advocating that hate speech should be without any sort of restrictions but it does

80 Attorney-General's Department, *Submission 9.1*, p. 26.

81 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 11; Australian Human Rights Commission, *Submission 5*, p. 21; Law Council of Australia, *Submission 6*, pp. 24; Muslim Legal Network (NSW), *Submission 11*, p. 37.

82 Joint media organisations, *Submission 7*, p. 2.

83 Joint councils for civil liberties, *Submission 17*, p. 18. See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws, Interim Report*, July 2015, pp. 65–68.

84 Mr Edries, Muslim Legal Network (NSW), *Committee Hansard*, Canberra, 14 December 2015, p. 29.

> need to be considered that pushing these sort of conversations underground is effectively what these provisions will do, which potentially will be more dangerous.[85]

4.80 The Australian Human Rights Commission submitted that the lack of precision in the definition of 'advocating' may

> infringe the right, protected by article 15 of the ICCPR, that criminal offences be defined with sufficient precision to allow people to regulate their conduct.[86]

4.81 The Gilbert + Tobin Centre of Public Law specifically highlighted concerns about the use of the term 'promotion' in the definition of 'advocating', which it submitted

> could encompass a general statement of support that is posed online or through some other means, with no particular audience in mind. It is thus a less determinate form of speech to which to attach criminal liability.[87]

4.82 While the proposed new offence requires that a person intentionally advocates genocide, a number of participants pointed out that, unlike the 'advocating terrorism' offence, there is no fault element requiring the offender to *intend* another person to act upon their words.[88] The majority of these participants recommended such an element should be included in the new offence.

4.83 At the public hearing, the Muslim Legal Network (NSW) told the committee that the lack of the intention element would open up the offence to a 'very broad scope' of conduct:

> Although we appreciate the intention of the type of conduct that is being targeted, with the way it is drafted at present, it could potentially open up to many unintended situations as well. We are talking about social media. For example, could liking or sharing a post or something as simple as that advocate genocide? We just do

85 Ms Rabea Khan, Vice-President, Muslim Legal Network (NSW), *Committee Hansard*, Canberra, 14 December 2015, p. 29.

86 Australian Human Rights Commission, *Submission 5*, p. 21.

87 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 11.

88 Gilbert + Tobin Centre of Public Law, *Submission 2*, p. 11; Law Council of Australia, *Submission 6*, p. 25; Joint media organisations, *Submission 7*, p. 2; Muslim Legal Network (NSW), *Submission 11*, p. 37; Joint councils for civil liberties, *Submission 17*, p. 17; Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 14 December 2015, p. 16; Ms Khan, Muslim Legal Network (NSW), *Committee Hansard*, Canberra, 14 December 2015, p. 28.

> not know and until those test cases come through, we will not know. That is our primary concern.[89]

4.84 The Law Council of Australia recommended that, if the 'advocating genocide' offence were to proceed, the offence should be amended to similar terms to those in the 'advocating terrorism' offence by requiring at least that the person be *reckless* that another person might engage in genocide on the basis of their advocacy.[90]

4.85 At the public hearing, the Attorney-General's Department explained that the reason no fault element of recklessness was included in the offence was that

> the government has decided that it is appropriate, given the consequences of actual genocide occurring or the risks of it occurring—given how heinous it is—that one element is the appropriate one in this particular instance.[91]

4.86 In a supplementary submission, the Department further responded to concerns that the offence does not require a person to be reckless as to whether another person would act on their advocacy of genocide. The Department emphasised the existing elements of the offence that any prosecution must prove beyond reasonable doubt:

> The prosecution must prove the person 'intentionally' made the relevant conduct or said the relevant statement. Inadvertent or reckless conduct would not be captured by the offence. In addition, the prosecution must also prove the person's conduct advocated 'genocide' within the meaning of the offences in Division 268 of the Criminal Code. Advocating conduct that falls short of one of those offences would not be captured. In addition, the prosecution must prove the person's conduct occurred in public. Statements made or conduct undertaken in private would not be captured.[92]

4.87 The Law Council also questioned the legitimacy of the offence being limited to advocacy of genocide that is 'public':

> It is also not clear why the offence should distinguish between publicly advocating genocide and private advocacy. Arguably,

89 Ms Khan, Muslim Legal Network (NSW), *Committee Hansard*, Canberra, 14 December 2015, p. 28.

90 Law Council of Australia, *Submission 6*, p. 26.

91 Ms Bishop, Attorney-General's Department, *Committee Hansard*, Canberra, 14 December 2015, p. 42

92 Attorney-General's Department, *Submission 9.1*, p. 29.

> private advocacy might be more dangerous depending on the context. Further, it is not clear under the definition of 'advocates' as to whether a person can ever advocate privately.[93]

4.88 The Law Council pointed out that the term 'publicly' is not defined in the Bill, a fact which it considered to be 'inconsistent with the rule of law because there is insufficient clarity to enable people to know what activity could be deemed illegal'. The Law Council argued that, if the term 'publicly' was to be retained, it should be further clarified by amendment to either the Bill or the Explanatory Memorandum, and that the definition 'should not be so broad as to capture a wide range of benign conduct'.[94]

4.89 Similar concerns about the vagueness of the definition of 'publicly' were raised in submissions from the Muslim Legal Network (NSW) and the councils for civil liberties across Australia,[95] and in the review of the Bill by the Senate Standing Committee for the Scrutiny of Bills.[96]

4.90 Responding to these concerns, the Attorney-General's Department noted that the offence, as drafted, 'more fully addresses' the requirement under the Genocide Convention for states to punish 'direct and *public* incitement to commit genocide'.[97] The Department argued it would be 'undesirable' to define the expression 'publicly' in the Bill as it 'may lead to a narrow interpretation that could exclude some types of conduct sought to be captured by the proposed offence':

> In the rapidly evolving modern technological world, the meaning of 'publicly' may have a different meaning than one which may have existed 30 years ago, before social media. To publicly advocate would include a statement made at a public rally attended by many people, or a statement on national television. However it will be a matter for the court to determine whether conduct constituting 'advocacy' was made 'publicly', taking into account the conduct and all the facts and circumstances.[98]

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93 Law Council of Australia, *Submission 6*, p. 26.

94 Law Council of Australia, *Submission 6*, pp. 25–26.

95 Muslim Legal Network (NSW), *Submission 11*, p. 35; Joint councils for civil liberties, *Submission 17*, p. 17.

96 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 13/15*, 25 November 2015, p. 20.

97 Attorney-General's Department, *Submission 9.1*, p. 28.

98 Attorney-General's Department, *Submission 9.1*, p. 28.

Committee comment

4.91 Genocide is a most horrendous crime, and the Committee supports measures aimed at closing any legislative gaps that allow persons to advocate the commission of genocide without consequence.

4.92 The Committee notes that the incitement of genocide is already an offence under the Criminal Code carrying a maximum sentence of 10 years' imprisonment.[99] Urging violence against racial, religious, national, ethnic or political groups is also a criminal offence carrying a maximum sentence of seven years' imprisonment.[100]

4.93 Some participants in the inquiry argued that such existing offences mean that the proposed 'advocating genocide' offence is unnecessary. However, the Committee recognises that the new offence is targeted at behaviour that does not meet the thresholds for prosecution under existing legislation. Evidence from the AFP was that such tools are needed to enable police to intervene earlier in the radicalisation process to prevent and disrupt further engagement in genocide offences.

4.94 A key difference between existing offences and the proposed new offence is that the existing offences would require both that the urging of genocide is intended to occur *and* that the offender intends that a genocide offence be undertaken. The proposed 'advocating genocide' offence, on the other hand, only requires that genocide be intentionally (and publicly) advocated. The Committee understands that the new offence will enable the prosecution of persons of influence who openly advocate genocide, but, because of the language deliberately used, are not able to be prosecuted due to the near impossibility of proving whether they intend others to act on their words. The Committee therefore considers it would be counter-productive to reintroduce a second intention-based element into the offence, as some submitters suggested.

4.95 However, noting the potential for the proposed offence to limit freedom of speech, the Committee sees merit in the suggestion that a 'recklessness' element should be added to the new offence—that is, to be guilty of the offence, a person would have to both *intentionally* advocate genocide and be *reckless* as to whether another person might engage in genocide on the basis of their advocacy. Such a fault element is included in the equivalent 'advocating terrorism' offence, which the Committee previously considered in its review of the Counter-Terrorism Legislation Amendment

99 See Division 269 and extended liability provisions for incitement under section 11.4.

100 Criminal Code, section 80.2A.

(Foreign Fighters) Bill 2014. In that review, the Committee accepted that the 'recklessness' threshold was an 'appropriate tool for assessing an individual's behaviour under the proposed offence'.[101] The Committee stands by this conclusion with respect to the 'advocating genocide' offence.

4.96 While a lower threshold than 'intention', a 'recklessness' threshold would still require the prosecution to prove that the accused was *aware of a substantial risk* that a genocide offence would occur as the result of the their conduct and, *having regard to the circumstances known to him or her, it was unjustifiable to take that risk*.[102] The offence would therefore take into account a person's unique circumstances, including any special positions of power or influence the individual may hold.

4.97 The Committee understands that the usual police investigation thresholds relating to the seriousness of the offence, as well as the discretion of the Commonwealth Director of Public Prosecutions, as outlined in the prosecution policy of the Commonwealth, will continue to apply to the new offence.

4.98 The Committee notes that the definition of 'advocates' in the Bill uses the same terminology as used in the 'advocating terrorism' offence's definition of 'advocates'—that is, a person who 'counsels, promotes, encourages or urges'. The Committee gave close consideration to the definition of 'advocates' in its previous review of the 'advocating terrorism' offence. While recognising the intentional use of broad language in the definition for policy reasons, the Committee recommended that further clarity be provided to explain the activities that would be covered by the terms 'encourages', 'promotes' and, 'advocacy'. As a result of this recommendation, the Explanatory Memorandum was amended to give further clarity to the definition of 'advocates'. The Committee notes that a similar clarification has been included in the Explanatory Memorandum for the current Bill in relation to 'advocating genocide'.

4.99 The Committee understands that the 'advocating genocide' offence has been limited to 'public' advocacy in order to more closely reflect the language used in the Genocide Convention, which requires 'direct *and public* incitement to commit genocide' to be punishable. However, the Committee questions whether it is necessary to include this limitation

101 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. 39.

102 Criminal Code, section 5.4.

given that the new offence already goes beyond the requirements of the Genocide Convention by dealing with 'advocacy' rather than 'incitement'. Removing the term 'publicly' would be consistent with the existing 'advocating terrorism' offence, for which no such limitation applies. It would also address concerns raised by inquiry participants that it is not clear what conduct it is intended to be included—and excluded—by the use of the term.

Recommendation 17

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended so that, in order to meet the threshold to be convicted of the proposed 'advocating genocide' offence, a person must be reckless as to whether another person might engage in genocide on the basis of their advocacy.

Recommendation 18

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to remove the word 'publicly' from the proposed 'advocating genocide' offence.

5

Amendments to other legislation

5.1 This chapter discusses amendments to the following legislation, which would be amended by schedules 12, 13, 14 and 17 of the Bill:

- *Australian Security Intelligence Organisation Act 1979* (Schedule 12),
- *Classification (Publications, Films and Computer Games) Act 1995* (Schedule 13),
- *Crimes Act 1914* (Schedule 14), and
- *Taxation Amendment Act 1953* (Schedule 17).

Security assessments (Schedule 12)

5.2 Schedule 12 would amend section 40 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to enable ASIO 'to furnish security assessments directly to a state or territory or an authority of a state or territory'.[1]

5.3 The amendment is intended to enhance timely provision of security assessments. Currently, ASIO can only provide a security assessment to a state or territory either, directly, in respect of a designated event or, indirectly, via a Commonwealth agency. The Explanatory Memorandum notes that the existing arrangements are resource intensive and 'significantly hinder' timely provision of security assessments.[2]

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1 Explanatory Memorandum, p. 111.

2 Explanatory Memorandum, p. 111.

5.4 Under the proposed amendments, ASIO will be permitted to pass information directly to a state or territory if it is in the form of a security assessment. Existing prohibitions on providing other information, recommendations, opinions or advice that do not constitute a security assessment will continue.[3] Accountability mechanisms in the ASIO Act relating to rights of notice and review also remain unchanged.[4]

5.5 The amendments also provide that ASIO may continue to furnish a security assessment to a Commonwealth agency for transmission to a state or territory.[5] It is envisaged this would occur for major events being coordinated at a Commonwealth level.[6]

5.6 In its submission, the Attorney-General's Department stated there was 'an increasing need to ensure security information is being shared efficiently at both the Commonwealth and State level' and that the proposed amendments to Schedule 12 (and Schedule 17) are intended to facilitate information sharing 'for purposes related to terrorism security'.[7]

Matters raised in evidence

5.7 The Inspector-General of Intelligence and Security (IGIS) indicated she had 'not identified any concerns with this proposal, noting the existing rights of notice and review continue to apply'.[8] The IGIS went on to state, however, that:

> A question does arise as to whether an amendment should also be made to section 61 of the ASIO Act to refer to State and Territory authorities.[9]

5.8 Section 61 of the ASIO Act provides that:

> Where an assessment has been reviewed by the Tribunal, every Commonwealth agency concerned with prescribed administrative action to which the assessment is relevant, and any tribunal, person or authority having power to hear appeals from, or to review, a decision with respect to any prescribed administrative action to which the assessment is relevant, shall treat the findings

3 Proposed paragraph 40(2)(a).
4 Explanatory Memorandum, p. 112; Attorney-General's Department, *Submission 9,* p. 10.
5 Proposed paragraph 40(1)(a).
6 Explanatory Memorandum, p. 112.
7 Attorney-General's Department, *Submission 9,* p. 10.
8 Inspector-General of Intelligence and Security, *Submission 8,* p. 1.
9 Inspector-General of Intelligence and Security, *Submission 8,* p. 1.

> of the Tribunal, to the extent that they do not confirm the assessment, as superseding that assessment.

5.9 In the IGIS's view, the safeguard provided by section 61 would be limited if a 'State or Territory authority were minded to make a decision or take action inconsistent with a decision of the [Administrative Appeals Tribunal]', given the section does not refer to State and Territory authorities and tribunals.[10]

5.10 The Attorney-General's Department raised no objections to the IGIS's suggestion, commenting that:

> Amendments could be made to section 61 of the ASIO Act so that States and Territory authorities are also bound (as is every Commonwealth agency) to treat the findings of the Tribunal, to the extent that they do not confirm the security assessment, as superseding the security assessment furnished by ASIO.[11]

5.11 The Law Council of Australia submitted that the proposed power should only be available should equivalent rights of review for administrative decisions operate, arguing that 'an individual who successfully challenges a security assessment should be given the opportunity to have the State/Territory based decision revisited'.[12]

5.12 In response, the Attorney-General's Department confirmed, as outlined in the Explanatory Memorandum, that 'the accountability mechanisms already provided for in the ASIO Act in relation to rights of notice and review of security assessments will be maintained'.[13]

Committee comment

5.13 The Committee supports the proposed amendments outlined in Schedule 12 of the Bill, noting that existing accountability mechanisms will continue to apply. The Committee also sees merit in amending section 61 of the ASIO Act to ensure that State and Territory authorities are bound by the findings of the Administrative Appeals Tribunal.

Recommendation 19

The Committee recommends that the *Australian Security Intelligence*

10 Inspector-General of Intelligence and Security, *Submission 8,* p. 2.

11 Attorney-General's Department, *Submission 9.1,* p. 30.

12 Law Council of Australia, *Submission 6,* p. 27.

13 Attorney-General's Department, *Submission 9.1,* p. 30.

Organisation Act 1979 **be amended to include State and Territory authorities within the scope of section 61 of the Act.**

Classification of publications (Schedule 13)

5.14 Under subsection 9A(1) of the *Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act) a publication, film or computer game that advocates the doing of a terrorist act must be classified 'Refused Classification (RC)'. Existing paragraph 9A(2)(a) of the Classification Act states that a publication, film or computer game advocates the doing of a terrorist act if 'it directly or indirectly counsels or urges the doing of a terrorist act'.

5.15 Schedule 13 of the Bill would amend paragraph 9A(2)(a) to align the definition of 'advocates' with the current definition in the Criminal Code.[14] Paragraph 102.1(1A)(a) of the Criminal Code states that an organisation advocates the doing of a terrorist act if 'the organisation directly or indirectly counsels, promotes, encourages or urges the doing of a terrorist act'.[15]

5.16 The amendments will therefore add 'promotes' and 'encourages' to the existing definition. The Explanatory Memorandum notes that these terms are not defined and have their ordinary meaning.[16] The Attorney-General's Department explained that:

> The ordinary meaning of 'promotes' the doing of a terrorist act, and the ordinary meaning of 'encourages' the doing of a terrorist act could include conduct or statements that inspire an individual to commit a terrorist act.[17]

14 The Criminal Code definition was amended on 1 December 2014 by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*. The Classification Act was not amended at this time.

15 The Explanatory Memorandum to the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* noted that the definition of 'advocates' should have the same meaning in the Classification Act when applied to a publication, film or computer game, as in the Criminal Code when applied to a terrorist organisation. Explanatory Memorandum, p. 114.

16 Explanatory Memorandum, p. 114.

17 Attorney-General's Department, *Submission 9.1,* p. 32.

Matters raised in evidence

5.17 In its submission, Blueprint for Free Speech argued that the proposed amendment would make the Classification Act much more restrictive, citing the potential impact, for example, on popular television series. Blueprint also considered the amendment to be 'too broad and out of step with public opinion in Australia' and challenged the Explanatory Memorandum's assessment against the *International Covenant on Civil and Political Rights* (ICCPR), arguing evidence had not been presented as to the impact the amendment would have on preventing terrorist activity.[18]

5.18 The joint councils for civil liberties submitted that the amendment would 'significantly and inappropriately expand the meaning of "advocates" with unwarranted implications for freedom of speech'.[19]

5.19 The Law Council of Australia and joint councils for civil liberties reiterated concerns expressed in previous inquiries about the expanded Criminal Code definition of 'advocates', which was considered to be overly broad and vague, and lacking certainty as to what fell within the definition. Both organisations pointed to the Australian Law Reform Commission's Interim Report on *Traditional Rights and Freedoms-Encroachments by Commonwealth Law,* which identified the offence of advocating terrorism as one that might be reviewed by the INSLM to ensure it does not unjustifiably interfere with freedom of speech.[20]

5.20 In its supplementary submission, the Attorney-General's Department reiterated that the ICCPR provides that freedom of expression may be limited where the limitations are provided for by law and are necessary for the protection of natural security (Article 19[3]). Further Article 20(2) of the ICCPR 'also requires that laws prohibit any advocacy for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.[21]

5.21 The Attorney-General's Department argued that the limitation on freedom of expression provided by Schedule 13 is 'reasonable, necessary and proportionate', noting that

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18 Blueprint for Free Speech, *Submission 15,* pp. 4–6.

19 Joint councils for civil liberties, *Submission 17,* p. 17. See also Law Council of Australia, *Submission 6,* p. 28.

20 Law Council of Australia, *Submission 6,* p. 28; Joint councils for civil liberties, *Submission 17,* p. 18. See also Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Law,* Interim Report, July 2015, p. 95.

21 Attorney-General's Department, *Submission 9.1,* p. 31.

> a terrorist organisation could continue to have a significant influence in promoting or encouraging terrorism by others without necessarily engaging in terrorist acts itself, and without directly counselling or urging the doing of a terrorist act.[22]

5.22 In addition, the Department argued that Schedule 13 'is not intended to, and is unlikely to affect, artistic freedom', as a publication, film or computer game will not satisfy the definition through the mere depiction, description or discussion of a terrorist act.[23] Specifically addressing the concerns raised by Blueprint for Free Speech, the Department stated:

> Amending the definition of advocates is unlikely to result in legitimate artistic and entertainment content like Homeland being classified Refused Classification.[24]

Committee comment

5.23 As discussed in Chapter 4, the Committee previously examined the advocating terrorism offence in its review of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, and accepted that the Government has a responsibility to ensure that the advocacy of terrorism is discouraged and prevented. The Committee remains of the same view. The Committee gave close consideration to the definition of 'advocates' in that inquiry, and recommended amendments to the Explanatory Memorandum to provide greater clarity.

5.24 In terms of the possible impact of the amendment, the Committee notes that an exception already exists at subsection 9A(3) of the Classification Act, which provides that:

> A publication, film or computer game does not advocate the doing of a terrorist act if it depicts or describes a terrorist act, but the depiction or description could reasonably be considered to be done merely as part of public discussion or debate or as entertainment or satire.

5.25 The Committee also notes the following statement in the Explanatory Memorandum:

> Material that is classified RC contains content that is very high in impact and falls outside generally accepted community standards,

22 Attorney-General's Department, *Submission 9.1,* p. 31.

23 Attorney-General's Department, *Submission 9.1,* p. 32.

24 Attorney-General's Department, *Submission 9.1,* p. 32.

> including the category of detailed instruction or promotion in matters of crime and violence.[25]

5.26 The Committee considers it reasonable that publications, films and computer games should be refused classification on the basis of the same definition of advocacy of terrorism as that in the Criminal Code. The Committee therefore supports the proposed amendment.

Delayed notification search warrants (Schedule 14)

5.27 Delayed notification search warrants were introduced into the *Crimes Act 1914* by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*.[26]

5.28 Schedule 14 of the Bill will amend the threshold requirements for the issue of a delayed notification search warrant. The Explanatory Memorandum states that:

> The amendments clarify that, while an eligible officer applying for a delayed notification search warrant must actually hold the relevant suspicions and belief set out in section 3ZZBA, the chief officer and eligible issuing officer need only be satisfied that there are reasonable grounds for the eligible officer to hold the relevant suspicion and belief.[27]

5.29 The Explanatory Memorandum goes on to say that the

> amendments are intended simply to clarify that neither a chief officer nor an eligible issuing officer is required to personally suspect or believe the matters set out in section 3ZZBA. This is because the chief officer and eligible issuing officer are unlikely to be directly involved in the investigation.[28]

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25 Explanatory Memorandum, p. 9.

26 See *Crimes Act 1914*, Part IAAA. The Committee made a number of recommendations in relation to the delayed notification search warrant scheme in its advisory report. Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014,* October 2014, pp. 13–29.

27 Explanatory Memorandum, p. 115. The chief officer is the AFP Commissioner and the eligible issuing officer is a judge of the Federal Court or a state or territory Supreme Court, or a nominated AAT member.

28 Explanatory Memorandum, p. 115; See also Attorney-General's Department, *Submission 9,* p. 13.

5.30 Accordingly, the amendments will substitute the following test for the chief officer and eligible issuing officer:

> That there are reasonable grounds for the eligible officer to have:
>
> (i) The suspicions mentioned in paragraphs 3ZZBA(a) and (b); and
>
> (ii) The belief mentioned in paragraph 3ZZBA(c).

5.31 In its submission, the Attorney-General's Department stated that the requirement that the chief officer and eligible issuing officer personally suspect or believe 'was not intended when the provision was drafted'.[29] The AFP made the same point, commenting in relation to thresholds and oversight that:

> The AFP does not consider that the amendments in the Bill in any way lower the existing threshold for the application and issuing of [delayed notification search warrants (DNSW)]. Rather, the amendments ensure that the chief officer approving the application for a DNSW and, importantly, the issuing officer determining the application for a DNSW, are clearly separate from, and independent of, the relevant investigation. This is consistent with other types of warrants for which law enforcement may apply, where persons with oversight of the application and deciding the application must be satisfied that there are reasonable grounds for the officer making the application to have the relevant suspicions or belief.
>
> The AFP considers that it would be both inappropriate and inconsistent with existing criminal law procedures regarding the issuing of warrants if an issuing officer in relation to an application for a DNSW were required to personally hold the relevant suspicions and belief, as it would then bring into question their independence and ability to provide proper oversight of executive actions undertaken by law enforcement.[30]

Matters raised in evidence

5.32 The joint councils for civil liberties reiterated their opposition to delayed notification search warrants on the basis of a person's right to be notified of a violation of their privacy, and argued that the proposed amendment lowers the threshold for such warrants. The councils acknowledged

29 Attorney-General's Department, *Submission 9,* p. 13.

30 Australian Federal Police, *Submission 3,* p. 17.

however that 'the lower threshold is consistent with other existing Commonwealth laws relating to search warrants'.[31]

5.33 The Muslim Legal Network (NSW) and Law Council of Australia raised similar concerns about the potential impact of delayed notification search warrants on personal rights and liberties.[32] The Law Council of Australia supported the proposed amendment, however, on the basis that it would provide consistency with analogous search warrant provisions.[33]

5.34 Australian Lawyers for Human Rights also reiterated concerns about delayed notification search warrants and argued that the proposed amendments 'remove some of the levels of protection and oversight that were previously contained in the legislation'.[34]

Committee comment

5.35 The Committee notes that the proposed amendment in Schedule 14 will provide consistency with other search warrant provisions in the *Crimes Act 1914* and address an unintended consequence of initial drafting. The Committee accepts the Government's explanation that

> this amendment does not seek to lower the threshold for issuing a delayed notification search warrant, rather it clarifies the threshold to ensure that it is correctly interpreted in a fashion consistent with other search warrant provisions in the Crimes Act.[35]

5.36 The Committee examined the delayed notification search warrant scheme during its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014. The Committee accepted the precedents for the scheme in other jurisdictions as well as the safeguards and accountability mechanisms, and made several recommendations in its report.[36]

5.37 The Committee supports the amendment as outlined in the Bill.

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31 Joint councils for civil liberties, *Submission 17,* p. 19.

32 Muslim Legal Network (NSW), *Submission 11,* pp. 39–40; Law Council of Australia, *Submission 6,* p. 29.

33 Law Council of Australia, *Submission 6,* p. 29.

34 Australian Lawyers for Human Rights, *Submission 4,* p. 4.

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

36 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014,* October 2014, pp. 13–29.

Disclosure by taxation officers (Schedule 17)

5.38 It is an offence under section 355-25 of the *Taxation Administration Act 1953* (TA Act) for taxation officers to disclose protected information. The TA Act sets out, however, a number of exceptions to this offence.[37]

5.39 Schedule 17 of the Bill will create an additional exception to the offence provision by inserting a new item into Table 1 at subsection 355-65(2) of Schedule 1 of the TA Act. Table 1 sets out exceptions for disclosures relating to social welfare, health or safety. Taxation officers would be authorised to disclose information to an Australian government agency where the disclosure

> is for the purpose of preventing, detecting, disrupting or investigating conduct that relates to a matter of security as defined by section 4 of the *Australian Security Intelligence Organisation Act 1979*.[38]

5.40 The Attorney-General's Department argued in its submission that:

> The appropriate sharing of information is fundamental to the efforts of our law enforcement and other agencies in preventing, detecting, disrupting and investigating terrorist conduct, including terrorist planning and preparatory acts. Currently, there are restrictions in the *Taxation Administration Act 1953* to the sharing of relevant taxation information for these purposes. These amendments remove that restriction for national security purposes.[39]

5.41 The Department noted that the amendments would authorise the disclosure of taxation information to any Australian Government agency, but emphasised that this could only occur where it is for the purpose of preventing, detecting, disrupting or investigating conduct that involves a threat related to security.[40]

5.42 The Australian Federal Police similarly supported the amendment, commenting that in the current threat environment 'it is vitally important

37 See, for example, section 355-65 and section 355-70 of the TA Act.

38 Item 1, Schedule 17 to the Bill.

39 Attorney-General's Department, *Submission 9,* p. 11.

40 Attorney-General's Department, *Submission 9,* p. 11. The definition of Australian Government agency in section 995-1 of the *Income Tax Assessment Act 1997* includes Commonwealth, State and Territory agencies.

that information is able to be shared between government agencies to address terrorism threats at the earliest stage possible'.[41]

Matters raised in evidence

5.43 In her submission, the IGIS made the following comments in relation to oversight arrangements for this schedule:

> While the amendment in the Bill uses the ASIO Act definition of 'security', the IGIS will not necessarily have oversight of disclosures made under this provision unless they are made to an [Australian Intelligence Community (AIC)] agency. Where an AIC agency is a member of a multi-agency or multi-jurisdictional body that is the recipient of protected taxation information, the IGIS would expect that the agency would provide information about such disclosures on request by the IGIS. As a matter of practice, the IGIS probably would not expect to review such information in routine inspections without specifically requesting details – particularly if an AIC agency is not the lead agency for a multi-agency body. Other oversight bodies, such as the Commonwealth Ombudsman and relevant State and Territory oversight bodies, may also need to consider if and how they will review disclosures of protected taxation information made to multi-agency and multi-jurisdictional bodies.
>
> Noting that there is currently a specific exception for ASIO officers to disclose protected taxation information provided by the ATO to the IGIS, the Committee may wish to consider whether a similar exception in favour of other relevant oversight bodies is required to ensure that there can be appropriate oversight of disclosures made under the proposed provision.[42]

5.44 While noting that the purpose of disclosure (as outlined in paragraph 5.39 above) would act as a limitation on disclosure, the Law Council of Australia questioned whether this limitation is proportionate given that disclosure may be made to *any* Australian government agency.[43]

5.45 In response, the Attorney-General's Department stated it is important that the amendment allow disclosure to any Australian government agency

41 Australian Federal Police, *Submission 3,* p. 18.

42 Inspector-General of Intelligence and Security, *Submission 8,* p. 3.

43 Law Council of Australia, *Submission 6,* p. 37.

because 'bodies that have a role in preventing, detecting, disrupting or investigating conduct that involves a matter of security vary over time'.[44]

5.46 It is envisaged that the key agencies that would seek disclosure under the proposed exception are the National Disruption Group and the Australian Counter-Terrorism Centre.[45] The membership or composition of both can change at short notice.[46] The Explanatory Memorandum notes that:

> The amendment is drafted to ensure that Australian government agencies that are not currently member agencies of national security bodies such as the National Disruption Group, but that could be represented by that Group at short notice, will be covered by the exception.[47]

5.47 The Department went on to argue:

> This amendment will ensure that ATO officers have the ability to disclose relevant information which would support effective coordinated responses to terrorist threats. It would be of grave concern should an attack occur and on review the ATO held information that would have contributed to early notice and possible disruption, but they were prevented from lawfully sharing this information with other government bodies because they were not listed in a Schedule. Limiting the purposes for disclosure will ensure that bodies that are not involved in addressing national security threats will not be able to receive such information, and that disclosure only occurs where required for those specified purposes.[48]

5.48 The Muslim Legal Network (NSW) raised concerns about the retrospective application of this schedule, arguing that it should apply prospectively to information obtained on or after the date of the commencement.[49]

Committee comment

5.49 The Committee acknowledges the concerns of the Law Council of Australia that information may be disclosed to *any* Australian

44 Attorney-General's Department, *Submission 9.1,* p. 38.

45 The National Distribution Group coordinates joint Commonwealth and State and Territory agency capabilities to prevent, disrupt and prosecute terrorism related activities. Explanatory Memorandum, pp. 133–134.

46 Attorney-General's Department, *Submission 9.1,* p. 38.

47 Explanatory Memorandum, p. 135.

48 Attorney-General's Department, *Submission 9.1,* p. 38.

49 Muslim Legal Network (NSW), *Submission 11,* p. 42.

Government agency. The Committee notes, however, that the proposed wording 'an Australian government agency' has been used elsewhere in Table 1 at section 355-65(2) of the TA Act. Item 9, for example, provides for disclosure to an Australian government agency where the record or disclosure is necessary for the purpose of preventing or lessening a serious threat to an individual's life, health or safety, or a serious threat to public health or public safety.[50]

5.50 Any disclosure of information will be limited by the requirement that it relate to a matter of security as defined by section 4 of the ASIO Act. The Committee accepts that this is an appropriate limitation. Further, where disclosure is made to an AIC agency, it will fall within the oversight of the IGIS.

5.51 Where the disclosure is to a multi-agency or multi-jurisdictional body, the Committee notes the IGIS's suggestion that an exception, similar to that already existing for ASIO officers at section 355-185 of the TA Act, be considered to allow disclosure to other oversight bodies. The Committee did not receive any additional evidence on this matter, but supports mechanisms to facilitate appropriate oversight for agencies that do not fall with the IGIS's jurisdiction. The Committee considers a similar exception should be made for disclosure to the Commonwealth Ombudsman. As, in some instances, disclosure may be made to a multi-jurisdictional body, future consideration could also be given to an exception for state and territory oversight bodies.

Recommendation 20

The Committee recommends that the *Taxation Administration Act 1953* be amended to authorise disclosure of protected information to the Commonwealth Ombudsman.

50 *Taxation Administration Act 1953*, Item 9, Table 1 at section 355-65(2).

Concluding comments

5.52 The Committee is mindful that this Bill responds to recent operational experience and will give effect to some of the recommendations of the 2013 COAG Review of Counter-Terrorism Legislation.

5.53 The Committee notes that the security risks to Australia are increasing, with law enforcement having to act more quickly to counter current and emerging threats. The Committee accepts that experience has shown that additional measures are required to enhance the ability of security and law enforcement agencies to respond to these threats and protect the Australian community from terrorism. On this basis, the Committee fully supports the intent of the Bill.

5.54 The recommendations the Committee has made in this report are intended to further strengthen the provisions of the Bill, including its safeguards, transparency and oversight mechanisms.

5.55 While some submitters reiterated their in-principle opposition to the control order and preventative detention order regimes, the Committee has not in this inquiry examined the merit of these regimes, but has instead focused on the provisions of the Bill before the Parliament.

5.56 As noted earlier, the control order and preventative detention order regimes (Divisions 104 and 105 of the Criminal Code) will sunset on 7 September 2018.

5.57 The *Intelligence Services Act 2001* requires the Committee to review the 'operation, effectiveness and implications' of Divisions 104 and 105 of the Criminal Code no later than 7 March 2018. This review will be the opportunity to examine operational experience and assess whether these regimes should continue to exist and in what form.

5.58 The Committee commends its recommendations to the Parliament and recommends the Bill be passed.

Recommendation 21

The Committee recommends that, following implementation of the recommendations in this report, the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be passed.

Dan Tehan MP
Chair

February 2016

A

Appendix A – List of Submissions

1. Police Federation of Australia
2. Gilbert + Tobin Centre of Public Law
3. Australian Federal Police
4. Australian Lawyers for Human Rights
5. Australian Human Rights Commission
   - 5.1. Supplementary
6. Law Council of Australia
   - 6.1. Supplementary
7. Joint media organisations
8. Inspector-General of Intelligence and Security
9. Attorney-General's Department
   - 9.1. Supplementary
   - 9.2. Supplementary
10. UNICEF Australia
11. Muslim Legal Network (NSW)
12. Victorian Bar and Criminal Bar Association of Victoria
13. Amnesty International Australia
14. Australian Taxation Office (confidential)
15. Blueprint for Free Speech
16. Queensland Government
17. Joint councils for civil liberties

B

Appendix B –Witnesses appearing at public and private hearings

Monday, 14 December 2015 (public hearing)

Attorney-General's Department

Mr Cameron Gifford, Acting First Assistant Secretary, National Security Law and Policy Division

Ms Karen Bishop, Acting Assistant Secretary, Counter-Terrorism Branch

Ms Julia Galluccio, Principal Legal Officer

Australia Defence Association

Mr Neil James, Executive Director

Australian Federal Police

Assistant Commissioner Neil Gaughan, National Manager Counter Terrorism

Mr Tony Alderman, Acting Manager, Government and Communications

Australian Human Rights Commission

Professor Gillian Triggs, President

Mr John Howell, Lawyer

Gilbert + Tobin Centre of Public Law

Professor Andrew Lynch, Member

Dr Tamara Tulich, Affiliate

Law Council of Australia

Mr Duncan McConnel, President

Ms Gabrielle Bashir SC, Member, National Criminal Law Committee

Dr Natasha Molt, Senior Policy Lawyer, Criminal and National Security Law

Muslim Legal Network (NSW)

Mr Zaahir Edries, President

Ms Rabea Khan, Vice President

Monday, 14 December 2015 (private hearing)

Attorney-General's Department

Mr Cameron Gifford, Acting First Assistant Secretary, National Security Law and Policy Division

Australian Federal Police

Assistant Commissioner Neil Gaughan, National Manager Counter Terrorism