PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

INQUIRY INTO THE COUNTER-TERRORISM LEGISLATION AMENDMENT BILL (No. 1) 2015

Questions on Notice

1. **Mr Andrew Nikolic MP asked the following question at the hearing on 14 December 2015:**

   a) What is the number of security cleared advocates in Australia available to appear in closed hearings where national security information may be divulged? Is it possible for independent legal practitioners and not only government employees to obtain security clearances?

   The answer to the member's question is:

   a) While initially taken on notice, the Commission understands that this question was in part withdrawn, and otherwise answered to the satisfaction of the Committee in the course of the oral hearing.

2. **Senator Katy Gallagher asked the following question at the hearing on 14 December 2015:**

   a) Can the Commission provide further advice about the potential third party impacts of the use of the proposed monitoring warrant and control order warrants proposed by schedules 8, 9 and 10 of the Bill?

   The answer to the Senator's question is as follows:

   a) Schedules 8, 9 and 10 of the Bill could impact the rights of third parties in a number of ways.

   b) For instance, a monitoring warrant under schedule 8 could authorise entry to premises to which a person subject to a control order had a 'prescribed connection.' The person might be owner or a tenant, or they might, for example, simply reside, work, or study at the premises. The privacy of third parties including the property owner, other residents, or other students would be affected by any warrant authorising entry to the premises.

   c) In the case of an A-Party control order warrant issued under the *Telecommunications (Interception and Access) Act 1979*, all communications between third parties and the specified subject of a control order could be monitored. All third parties with whom the subject of the control order communicated over a specified service would have, or be liable to having, their communications intercepted. In the case of a B-Party interception warrant, the warrant authorises the interception of communications over a specified service that is associated with a third party.

   d) Control order warrants issued under the *Surveillance Devices Act 2004* would authorise, for example, the installation of listening devices or hidden cameras on specified premises. These premises could include the home of the subject of a

control order, their place of work, or their school. In the case of a warrant authorising the installation of a hidden camera or listening device in, for instance, a person's home, all other persons resident at or visiting that home would be subject to covert surveillance.

e) All these warrants therefore potentially authorise very significant intrusions into the privacy of third parties.

3. Senator the Hon. Penny Wong asked the following question at the hearing on 14 December 2014:

a) In the event that the parliament chose to implement the monitoring warrant and control order warrant regimes in Schedules 8, 9 and 10 of the Bill, what safeguards, oversights or tests does the Commission suggest would be appropriate in the circumstances?

The answer to the honourable Senator's question is as follows:

a) It is difficult to see how the warrant regimes contemplated by schedules 8, 9 and 10 of the Bill could be amended to avoid serious intrusions into the privacy of third parties.

b) This is one reason why the Commission has submitted that, if Schedules 8, 9 and 10 are passed, they should be amended so that the monitoring and surveillance powers they would authorise are exercised only in circumstances where this is some evidence to indicate their use is warranted.

c) The Commission repeats its recommendation that in the event these schedules are passed, they be amended so that:

i. the warrants are only available where a relevant issuing authority is satisfied that there are reasonable grounds to suspect non-compliance with a control order, and

ii. the warrants may only be granted where the relevant authority is satisfied that there are no less intrusive means of obtaining the information.

4. The Hon. Mark Dreyfus MP asked the following question at the hearing on 14 December 2015:

a) Could the Commission make a supplementary submission addressing some of the suggestions the Commission has made for redrafting parts of the Bill, in particular in recommendations 3, 7 and 10 made in its written submission?

The answer to the honourable member's question is as follows:

a) The Commission makes the following drafting suggestions and comments about the recommendations referred to by the honourable member:

i. Recommendation 3 in the Commission's written submission is:

'An issuing court should explicitly be required to make the best interests of the child a primary consideration at all stages in

proceedings relating to the potential issue of an interim or confirmed control order.'

The Commission considers that if Schedule 2 of the Bill is passed, a provision should be inserted in division 104 of the Criminal Code expressly stipulating that in all proceedings relating to the issue, confirmation or variation of a control order in relation to a child, the court must treat the best interests of the child as a primary consideration.

ii. Recommendation 7 in the Commission's written submission is:

'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.'

This recommendation essentially reproduces, in the context of control orders made in relation to children, Recommendation 37 made in the 2013 COAG review of Australia's national security legislation (this recommendation is reproduced in paragraph 17 of the Commission's written submission of 9 December 2015). The Commission considers that Recommendation 37 should be implemented in full (ie, division 104 of the Criminal Code should be amended in accordance with that recommendation, in relation to all control orders).

Failing that, the Bill should be amended to ensure that whenever a control order (whether interim, confirmed, or successive) is made or varied with respect to a child, the court must be satisfied that the obligations, prohibitions and restrictions imposed constitute the least interference with the child's liberty, privacy and freedom of movement that is necessary in all the circumstances.

This could be achieved in a number of ways. A new section could be introduced into division 104 of the Criminal Code, applying to any order a court might make to make, confirm or vary a control order in relation to a child. Alternatively, each provision in s 104 which stipulates the matters a court may consider in imposing obligations, prohibitions and restrictions might be amended to incorporate the relevant requirement.

iii. Recommendation 10 in the Commission's written submission is:

'If schedule 15 is passed, it should be amended so that:

a. A legal representative with an appropriate security clearance may not be excluded from control order proceedings

b. There is a legislated minimum standard concerning the extent of the information to be given to a person the subject of a control order, to ensure a person is made aware of the allegations against them and is in a position to challenge those allegations, and

c. A system of special advocates is established to represent the subjects of control orders, and those advocates be entitled to attend at all hearings in control order proceedings and have access to all material before the court.'

a. The recommendation contained in subparagraph 'a' was primarily made as a result of the inclusion in the Bill of proposed s 38I(3A) [by Item 12 of Schedule 15 of the Bill]. That proposed section would allow for parties or their legal representatives to be excluded from certain NSI proceedings, even if they have an appropriate security clearance.

This recommendation could be implemented by amending the Bill so as to delete Item 12 of Schedule 15 and making any consequential amendments that would require.

b. The recommendation contained in subparagraph 'b' reflects Recommendation 31 made by the 2013 COAG review of Australia's national security legislation. It is also made in light of the discussion contained in paragraphs 14 to 23 of the Commission's written submission, and its recommendation that the changes proposed by the Bill be considered either following, or together with, a thorough review of the control order regime that includes consideration of Recommendation 31 of the COAG review.

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

The question has been considered by both the European Court of Human Rights and the House of Lords in relation to the control order regime then in force in the United Kingdom. (*A v United Kingdom* [2009] ECHR 301; *Secretary of State for the Home Department v AF (No. 3)* [2009] 3 WLR 74, [2009] UKHL 28.) That regime allowed for control orders to be granted in circumstances where a person was not provided with full disclosure of the case against them, but they were provided with a summary or redacted material. In some cases, this was held not to violate the right to a fair trial. In other cases, it did violate that right. Of critical importance were both the level of detail contained in the summary provided to the affected person, and the nature of the allegations made against them. In some cases a fairly general summary might be enough to ensure a person was able to respond to the allegations made against them. On the other hand, to ensure a fair hearing 'where detail matters, as it often will, detail must be met with detail.' (*Secretary of State for the Home Department v AF (No. 3)* [2009] 3 WLR 74; [2009] UKHL 28, [87], (Lord Hope of Craighead)).

It must be noted that the findings of the European and United Kingdom courts were made in the context of the legislation in force in the United

Kingdom at that time, which included a Special Advocate regime. The existence of the Special Advocate was critical in that it ensured that allegations and evidence adduced by the Crown could be challenged if an affected person was excluded from a hearing. The Commission does not uncritically endorse the Special Advocate model adopted in the United Kingdom. It has been the subject of a number of criticisms, in particular because it does not allow an advocate to receive further instructions after seeing or hearing classified material. However the absence of any equivalent regime in Australia would have the result that a significantly higher level of disclosure to the subject of control order proceedings may be required to ensure that person is aware of, and is in a position to meet, the case against them.

It is, in summary, difficult to formulate a comprehensive list of the matters and evidence that must be disclosed to a person against whom a control order is sought.

The Commission notes that the Gilbert and Tobin Centre of Public Law, in its written submission, has suggested that if schedule 15 is passed, proposed subs 38J(1)(c) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* be reformulated to incorporate a requirement that the relevant court be satisfied that an affected person has been:

> given sufficient notice of the allegations on which the control order request was based to enable effective instructions to be given in relation to those allegations (even if the relevant person has not been given notice of the information supporting those allegations).

An amendment on these lines would go some way to address the Commission's concerns.

c. The recommendation contained in subparagraph 'c' reflects Recommendation 30 made by the 2013 COAG review of Australia's national security legislation. That recommendation is reproduced in paragraph 17 of the Commission's written submission.

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. It should also, of course, consider the matters raised by the AFP in its written submission to this Committee in relation to the need to protect the sources of sensitive national security information.