



Counter-Terrorism Bill (No. 1) 2015

Parliamentary Joint Committee on Intelligence and Security

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Table of Contents

Acknowledgments	3
Executive Summary	4
Control orders to be imposed on children as young as 14 (Schedule 2).....	6
Adequacy of safeguards of the control order regime	8
Best interests of the child	9
How a court determines what is in a child's best interests.....	10
Disclosure of information	10
Legal representative	11
Service, explanation and notification of an interim control order	11
Public Interest Monitor.....	12
Requiring a controlee to maintain the tracking device in good operational order (Schedule 3)	13
Removing authority of Family Court to issue control orders and PDOs (Schedules 4 and 6)	14
Preventative detention orders (Schedule 5).....	15
Monitoring Compliance with control orders (Schedules 8-10)	16
Schedule 8	17
B-party warrant.....	18
Requirement not to execute warrant in certain circumstances.....	20
Information sharing.....	20
Destruction of records	20
Deferral of inclusion of information in annual report.....	21
Informer to use surveillance device without a warrant	21
New offence of advocating genocide (Schedule 11)	23
Necessity and limited practical benefit.....	23
Advocate	24
Recklessness	24
Definition of 'publicly'	25
Security Assessment amendments (Schedule 12).....	26
Classification of publications etc (Schedule 13)	28
Delayed notification search warrants (Schedule 14).....	29
Protecting national security information (Schedule 15).....	30
Necessity	32
Inability to meaningfully interrogate secret evidence and potential to inadvertently mislead the court.....	32
Having regard to the Attorney-General's certificate	34
Substantial adverse effect on the affected individual	34
Prompt and due regard to INSLM's control order inquiry report.....	34

Dealing with national security information in proceedings (Schedule 16)	35
Taxation Administration Act 1953 (Schedule 17).....	36
Retrospectivity	37
General Oversight Recommendations	38
Attachment A: Profile of the Law Council of Australia	39

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Executive Summary

1. The Law Council is pleased to provide the following submission to the Parliamentary Joint Committee on Intelligence and Security (the Committee) on the Counter-Terrorism Bill (No. 1) 2015 (the Bill).
2. The Bill would amend a range of Commonwealth legislation to strengthen Australia's national security and counter-terrorism legislation.
3. On 24 November 2015, the Prime Minister, the Hon. Malcolm Turnbull MP, presented a *National Security Statement to the Parliament*. In the Statement, he articulated that Australia's response to recent terrorist events must be 'as clear eyed and strategic as it is determined'.¹
4. The Law Council agrees, and for that reason, considers that any counter-terrorism legislation requires a careful and deliberate response. In order to preserve the values that underpin our democratic society, Australia's counter-terrorism laws must be reasonable, necessary and proportionate to achieve a legitimate objective.²
5. The Law Council acknowledges that the Bill seeks to pursue the legitimate objective of preventing terrorist acts from occurring and ensuring that our law enforcement and security agencies are well-equipped to face the current terrorism environment. The Australian Government has a primary responsibility to protect the life and security of the person.
6. To this end the Law Council supports some of the measures in the Bill, including:
 - the establishment of a mandatory child court appointed advocate;
 - removing the Family Court of Australia as an issuing authority for control orders and preventative detention orders (PDO);
 - clarifying the threshold for the issue of a delayed notification search warrant;
 - ensuring the receipt of funds for the purposes of providing legal assistance as to whether an organisation is a 'terrorist organisation' is not criminalised; and
 - allowing the Australian Security Intelligence Organisation (ASIO) to furnish security assessments directly to a state or territory authority in appropriate circumstances.
7. In other instances, the proposed amendments raise concerns, including the:
 - inadequacy of safeguards to the control order regime as a whole and as it is proposed to be applied to children as young as 14;
 - proposed monitoring control order regime, which would involve significant intrusions into the privacy of individuals unrelated to the subject of a control order;
 - provisions which would enable a 'person assisting' to use a surveillance device without a warrant for the purpose of monitoring compliance with a control order;

¹ Prime Minister, the Hon. Malcolm Turnbull MP, 'National Security Statement' (Speech delivered at Parliament House, Canberra, 24 November 2015).

² This also accords with international human rights law – see Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (2015) 6.

- disproportionate infringement on the right to a fair hearing by preventing a person from meaningfully challenging critical evidence;
 - potential for secret evidence to inadvertently mislead the court;
 - apparent substantial executive discretion that is given to the Attorney-General to depart from the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) or Regulation;
 - potential for the advocating genocide offence to be ineffective and inconsistent with the rule of law;
 - proposed 'imminence' threshold test for PDOs as not requiring a sufficient possibility of the terrorist act being imminent;
 - definition of 'advocacy of terrorist act' under *the Classification (Publications, Films and Computer Games) Act 1995* (Cth) (Classifications Act) may unjustifiably interfere with freedom of speech; and
 - privacy intrusion that may be permitted by information sharing provisions and authorising taxation officers to disclose information to any Government agency in certain circumstances.
8. Consequently, the Law Council recommends the Bill be amended as suggested in this submission, if it is to be passed, to properly align with fundamental legal principles.

Control orders to be imposed on children as young as 14 (Schedule 2)

9. Schedule 2 of the Bill amends the *Criminal Code Act 1995* (Cth) (Criminal Code) to allow for control orders on children aged 14 years and over. Currently, control orders under Division 104 of Part 5.3 of the Criminal Code can be made only in relation to persons 16 years of age or older.³

10. The Explanatory Memorandum to the Bill states that these amendments are necessary because:

*[c]ontrol orders are one of the tools available to law enforcement authorities to prevent a person from carrying out terrorist acts. Children younger than 16 have shown themselves to be capable of participating in activity which poses a threat to national security, including participating in a terrorist act.*⁴

11. As noted by the former Independent National Security Legislation Monitor (INSLM), control orders 'are striking because of their provisions for restraints on personal liberty without there being any criminal conviction or even charge'.⁵

12. The Law Council has previously raised concerns regarding the effectiveness and proportionality of the control order regime.⁶ The Law Council's concerns are maintained. Control orders can involve significant restrictions on a person's liberty without following the normal criminal process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt.⁷ Control orders may impose a number of significant obligations, prohibitions and restrictions on the person subject to the order. Moreover, control orders can result in reduced likelihood of prosecution and conviction, as individuals may be less likely to engage in self-incriminating behaviour.⁸

13. The former INSLM described control orders as 'not effective, not appropriate and not necessary' for persons who have not been convicted of terrorist offences;⁹ and noted that police should instead rely on their established powers to take action against suspected criminals through the traditional law enforcement approach of arrest, charge and prosecution. He therefore recommended Division 104 of Part 5.3 of the Criminal Code be repealed.

14. As noted by the Parliamentary Joint Committee on Human Rights, rights limited by the control order regime include: the right to security of the person and the right to be free from arbitrary detention; the right to a fair trial; the right to freedom of expression; the right to freedom of movement; the right to privacy; the right to protection of the family; the rights to equality and non-discrimination; and the right to work.¹⁰

³ *Criminal Code Act 1995* (Cth) s 104.28.

⁴ Explanatory Memorandum, Counter-Terrorism Bill (No. 1) 2015 (Cth) 15.

⁵ Independent National Security Legislation Monitor, 'Declassified Annual Report' (20 December 2012) 6.

⁶ Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 3 October 2014.

⁷ *Ibid.*

⁸ UK Secretary of State for the Home Department, [Review of Counter-Terrorism and Security Powers: Findings and Recommendations](#), January 2011, 37.

⁹ Independent National Security Legislation Monitor, [Declassified Annual Report](#), 20 December 2012, 4.

¹⁰ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 30 September - 2*

15. Amendments introduced by the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* (Cth) broadened the circumstances in which a control order could be obtained to prevent the provision of support for or the facilitation of a terrorist act and engagement in a hostile activity in a foreign country. In such circumstances, a control order could potentially be sought against persons to prevent online banking, online media or community and/or religious meetings. As a result, the amendments ‘allow control orders to be sought in circumstances where there is not necessarily an imminent threat to personal safety’.¹¹
16. However, if control orders are to be retained, the Law Council suggests that the Committee should conduct relevant inquiries to satisfy itself that extension of control orders to children as young as 14 years of age is necessary. If the Committee is satisfied that it is, the means by which the extension is proposed are by and large appropriate, save for the specific issues identified below.
17. The amendments would introduce a number of safeguards to the current regime, including that the issuing court must be satisfied on the balance of probabilities of a range of matters, such as, that the order would substantially assist in preventing a terrorist act.¹²
18. The existing maximum curfew period of 12 hours in any 24-hour period¹³ would continue to apply. The control order could only be made for a maximum duration of 3 months (although this does not prevent the court from making successive orders),¹⁴ rather than the maximum of 12 months applicable to adults.¹⁵ The ability of the child to obtain legal representation would not be affected.
19. In addition, the Bill would introduce three further significant safeguards:
- the Australian Federal Police (AFP) must give information as to the person’s age to the Attorney-General in the application for consent to a control order;
 - in determining each of the obligations, prohibitions and restrictions under the control order, the court must consider whether they are reasonably necessary and reasonably appropriate and adapted and also whether they are in the best interests of the person; and

October 2014, *Legislative Instruments received 13 – 19 September 2014: Fourteenth Report of the 44th Parliament* (2014) 15.

¹¹ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Human Rights Scrutiny Report* (2015) 14.

¹² Section 104.4 of the Criminal Code requires that 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 (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. The court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of: (i) protecting the public from a terrorist act; or (ii) preventing the provision of support for or the facilitation of a terrorist act; or (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

¹³ *Criminal Code Act 1995* (Cth) s 104.5(3)(c).

¹⁴ *Ibid*, s104.28(2) and (3).

¹⁵ *Ibid*, s 104.16(d).

- subsequent to imposing an interim control order on a child, a court must appoint an independent advocate in relation to the interim control order, any confirmation, variation or revocation of that control order and any other subsequent orders.¹⁶

20. While these additional safeguards in the Bill are to be welcomed, concerns still remain regarding their adequacy to ensure that the powers are not broader than necessary.

Adequacy of safeguards of the control order regime

21. The adequacy of safeguards of the control order regime is currently the subject of an inquiry of the INSLM. If the proposed measures in the Bill are to proceed, prompt (for example, within 6 months of the report being provided to the Attorney-General) and due regard should be had to the forthcoming report of the current INSLM's control order inquiry. In particular, regard should be had to the INSLM's recommendations relating to the desirability or otherwise of:

- introducing a special advocate regime into control order proceedings. Special advocates, in contrast to the proposed court appointed advocate, are lawyers with high security clearances given access to secret evidence that cannot be disclosed to those for whom the advocates act. These special advocates act in closed material proceedings. In such proceedings, the individual who is subject to state action and his or her legal representatives are excluded, but the special advocate acts on the subject's behalf. That is, the special advocate may have access to sensitive information, which would not necessarily be available to a court appointed advocate under the Bill. A special advocate would also be able to assist the court in interrogating evidence not available to the defence. In so doing, a special advocate may increase the efficiency of court procedures, rather than relying on a situation which is similar to an unrepresented litigant, which produces delay.
- requiring the prospects for prosecution to be reviewed throughout the life of a control order and for control orders to always be sought as a last resort.
- Division 104 of the Criminal Code providing for a minimum standard of 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.
- requiring the curfew period to be considered cumulatively by the court, such that the period combined with other stringent measures, do not amount to a disproportionate deprivation of liberty. Concerns arise, for example, about the use of curfews as conditions attached to control orders,

¹⁶ New section 104.28AA of the Bill. The role of the court appointed advocate under the Bill is to: ensure, as far as practicable in the circumstances, that the young person understands the effect and period of the order, the person's right to an appeal and review, right to attend court on the day specified, the right of the person or the person's representative to adduce evidence or make submissions if the order is confirmed, and the person's right to apply for an order revoking or varying the order if it is confirmed; form an independent view, based on the evidence available to the advocate, of what is in the best interests of the person and to act in what s/he believes to be the best interests of the child; act in what the representative believes to be the child's best interests; suggest to the court the adoption of a course of action which is in the best interests of the child; ensure any views expressed by the child in relation to the control order are fully put before an issuing court; endeavour to minimise the distress to the child; and disclose information communicated by the child to an issuing court if s/he considers the disclosure to be in the best interests of the child.

and in particular the fact that the penalty for breaching a control order is up to 5 years imprisonment for children. This may alternatively be achieved by implementation of the COAG Counter-Terrorism Review's Recommendation 37.¹⁷

- requiring an overnight residence where the curfew imposed is considerable.
- imposing a presumption that a person should not be deprived of basic mobile phone or landline access and access to at least one internet computer. This presumption could be rebutted on the basis of necessity for achieving one of the prescribed purposes of the control order regime in section 104.1.
- amending section 104.5 of the Criminal Code to ensure that, whenever a control order is imposed, any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person's liberty, privacy or freedom of movement that is necessary in all the circumstances.

Best interests of the child

22. In proposed paragraph 104.4(2)(b) of the Criminal Code, if the person is 14 to 17 years of age the court must take into account the 'best interests of the person' rather than 'the best interests of the child' in determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted.
23. Courts and the Government have a special interest in ensuring the welfare of children. The language of subsection 104.4(2) fails to acknowledge that persons aged 14 are children, and as such they are owed a duty over and above that of adult persons. These amendments may fail to adequately protect the rights of the child under Article 3, 9, 13, 14, 15 and 16 of the United Nations *Convention on the Rights of the Child* (CRC), which Australia has ratified. This means Australia has a duty to ensure children enjoy all the rights set out in the CRC.
24. In addition, the 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 interest. 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.
25. For this reason, the concept of the 'best interests of the child' should be a primary consideration and the content of the expression (suited or modified to this context) should be adequately provided. Where a control order may not be in the best interests of the child, the issuing authority should be required to be satisfied that the order is necessary for one of the limited purposes, such as, preventing a terrorist attack from occurring.

¹⁷ Recommendation 37 of the COAG Review provides: *The Committee recommends that section 104.5 should be amended to ensure that, whenever a control order is imposed, any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person's liberty, privacy or freedom of movement that is necessary in all the circumstances* – see Council of Australian Governments, [Council of Australian Governments Review of Counter-Terrorism Legislation](#), Australian Government, (2013), Recommendation 37.

How a court determines what is in a child's best interests

26. In proposed subsection 104.4(2) of the Criminal Code, the court must take into account the following factors when determining the best interests of a child: the age, maturity, sex and background (including lifestyle, culture and traditions) of the person; the physical and mental health of the person; 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 practise his or her religion; and any other matter the court considers relevant.
27. The Explanatory Memorandum to the Bill notes that 'this list is adapted from the Family Law Act and is consistent with Australia's international obligations under Article 3 of the *Convention on the Rights of the Child*.'¹⁸
28. However, the CRC states that the following factors should also be taken into account when determining the best interests of a child: sexual orientation; the right to health; the child's views; the care, protection and safety of the child; and situation of vulnerability (for example disability, belonging to a minority, being a refugee or asylum seeker, being a victim of abuse). The *Family Law Act 1975* (Cth), for example, also includes provisions relating taking the child's views into account and protection and safety of the child.¹⁹
29. While the Law Council appreciates that it may not be appropriate for all of the concepts that apply in the family law context to be readily transferable to the control order regime (given the significant difference involved in family law and control order proceedings), consideration should be given to including the additional factors set out in the CRC in the court's determination of what is in a child's best interests.

Disclosure of information

30. The court appointed advocate may disclose to a court any information that the child communicates to the advocate, even if the disclosure is against the wishes of the child.²⁰ 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.
31. It is also unclear as to how subsections 104.28AA(2)(e), (3) and (4) sit together. It appears that the court appointed advocate must ensure that 'any views' expressed by the child are fully put before the court, but there is then a discretion left with the advocate to disclose 'any information' that the person communicates to the advocate. This appears to be an inconsistency, which ought to be clarified to ensure that confidentiality can be maintained.

¹⁸ Explanatory Memorandum, Counter-Terrorism Bill (No. 1) 2015 (Cth), 44.

¹⁹ *Family Law Act 1975* (Cth), s 60CC.

²⁰ Proposed subsections 104.28AA(5) and (6) of the *Criminal Code Act 1995* (Cth).

Legal representative

32. A query arises as to whether state Legal Aid bodies will be obliged to provide funding for court appointed advocates, given that proceedings will initiate under Commonwealth legislation. If this is to occur, legal aid funding must be supplemented to the extent necessary.
33. Where the proposal allows for the potential for a child to have their own legal representative as well as a best interests advocate, this may be confusing for the child and may cause conflicts between representatives. It may also lead the child to choose not to have a legal representative, believing that they are being represented by the best interests advocate.
34. Where paramount consideration is given to the safety of the community and it is alleged that the child is a danger to the community, it is submitted that a child must have access to their own independent legal representative that is properly funded by the Government given the extraordinary nature of the power sought to be invoked against the child.

Service, explanation and notification of an interim control order

35. The Bill would amend section 104.12 of the Criminal Code to require the AFP to serve a copy of the order on the child's court appointed advocate, and take reasonable steps to serve a copy on at least one parent or guardian of the child.
36. The child should also be served with relevant documents (e.g. via their direct legal representative). If they are old enough to be the subject of a control order, they are old enough to be informed that there is an application for such an order.
37. Existing section 104.12 of the Criminal Code places additional requirements on the AFP to inform the person of the effects of the order, and that the person may have appeal and review rights in relation to the order, as well as placing an obligation on the AFP to ensure that the person understands the information provided. There is no equivalent provision in relation to the proposed amendments. While this may not be problematic in relation to the serving of the order on the court appointed advocate (as they should already understand and be aware of the relevant information), these additional requirements should be in place when an order is served on the parents or guardian of the child. It is important that parents or the guardian of the child are fully aware of the effects of the order and review rights.
38. Section 104.12A of the Criminal Code deals with notification to a person when an AFP member elects whether to confirm the order. Proposed paragraph 104.12A(4)(b)(v) would provide that if the person is 14 to 17 years of age and a parent or guardian of the person was served with a copy of the interim control order under paragraph 104.12(6)(b), the AFP is required to take reasonable steps to personally serve on that parent or guardian a copy of the annotated order and notification.
39. This means that, if the AFP was unable to serve the original order on the parents or guardian, for whatever reason, they are not obligated to try and serve written notification of the annotated order regarding the confirmation of the order.
40. Similar difficulties are found in proposed amendments to section 104.17, where a copy of a declaration, revocation or confirmed control order is only required to be served on a parent or guardian if they were served with a copy of the interim order. Similar

problems also arise in proposed sections 104.19(2A), 104.20(3)(b)(ii), 104.23(3)(c)(ii), and 104.26(5)(b).

41. 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.

Public Interest Monitor

42. Proposed sections 104.23(3) and 104.14(4) allow for the involvement of the Queensland Public Interest Monitor, which is appropriate. However, there is a concern that it does not allow for the involvement of the Victorian Public Interest Monitor. Given the proposed expansion of control orders to younger children, consideration should be given to the inclusion of existing Public Interests Monitors. Their involvement is particularly appropriate given the proposal in the Bill to subject those under control orders not only to the conditions of the order, but also to a regime of monitoring via search warrants, surveillance device warrants and telecommunications warrants.
43. In addition, subsection 104.14(4) should include the words 'provided there has been reasonable notice of the court date' prior to paragraph 104.14(4)(a).

Recommendations:

- **If the age for which a control order may be issued is to be reduced to apply to children as young as 14 years of age, prompt and due regard should be had to the forthcoming recommendations arising from the current INSLM's control order inquiry (for example, within 6 months of the report being provided to the Attorney-General) as to how the safeguards in the control order regime as a whole may be improved.**
- **Schedule 2 of the Bill should be amended to require the issuing court to consider the best interests of the child as a primary consideration in determining each of the proposed obligations, prohibitions and restrictions under a control order.**
- **Where a control order may not be in the best interests of the child, the issuing authority should be required to be satisfied that the order is necessary for one of the limited purposes, such as, preventing a terrorist attack from occurring.**
- **Consideration should be given to including the additional factors set out the Convention on the Rights of the Child in the court's determination of what is in a child's best interests.**
- **The court appointed advocate should not be permitted to disclose information against the wishes of the child.**
- **The apparent inconsistency between paragraph 104.28AA(2)(e) and subsection 104.28AA(4) should be clarified.**
- **A child *must* have access to their own independent legal**

representative that is properly funded by the Government given the extraordinary nature of the powers sought to be invoked against the child.

- **If state Legal Aid bodies will be obliged to provide funding for court appointed advocates, given that proceedings will initiate under Commonwealth legislation, legal aid funding must be supplemented by the Commonwealth to the extent necessary.**
- **A child who is the subject of a control order should, in addition to the court appointed advocate and the child's parents/guardian, be served with relevant documents (e.g. via their direct legal representative).**
- **Existing section 104.12 of the Criminal Code places additional requirements on the AFP to, for example, inform the person of the effects of the order, and that the person may have appeal and review rights in relation to the order. These additional requirements should be in place when an order is served on the parents or guardian of the child.**
- **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.**
- **In addition to allowing for the involvement of the Queensland Public Interest Monitor, consideration should be given to allowing the involvement of the Victorian Public Interest Monitor.**
- **Proposed subsection 104.14(4) of the Criminal Code should include the words 'provided there has been reasonable notice of the court date' prior to paragraph 104.14(4)(a).**

Requiring a controlee to maintain the tracking device in good operational order (Schedule 3)

44. The UK Terrorist Prevention and Investigation Measures (TPIM) regime requires a TPIM subject to maintain a tracking apparatus in a specified manner (Schedule 1 of the *Terrorism Prevention and Investigation Measures Act 2011* (UK)). It does not include a requirement for the subject to take 'reasonable steps' to ensure the tracking device and any equipment necessary for the operation of the tracking device are or remain in good working order as is proposed by Schedule 3 of the Bill.²¹

45. The Explanatory Memorandum notes that 'reasonable steps' 'will provide a degree of flexibility to allow for appropriate actions to be taken in unforeseen circumstances. This flexibility will ensure that control orders are able to be tailored to the specific circumstances and the specific threat that an individual poses'²².

²¹ See proposed paragraph 104.5(3)(a) of the *Criminal Code Act 1995* (Cth).

²² Explanatory Memorandum, Counter-Terrorism Bill (No. 1) 2015, 57.

46. However, the specified steps requirement allows an issuing authority to tailor the control order to the specific circumstances of a controlee. The 'reasonable steps' measure would create a difficulty insofar as an individual may believe they have complied with the court's specified steps in maintaining the device, but an unforeseen circumstance may occur and the individual could be unsure as to whether s/he has an obligation over a certain matter.
47. For example, if a court (for arguments sake) did not stipulate what is to be done in the case of a faulty battery, an individual may not know whether they have an obligation to fix the battery or to simply report the matter to the AFP. A similar issue may arise if there is another problem with the device that impacts on its working order. An individual, the AFP and an issuing authority may also have different views as to what is considered to be 'reasonable steps'. This may create confusion for a controlee who may inadvertently fail to maintain the working order of the tracking device. This is particularly pertinent where a breach of a control order may attract criminal liability. The rule of law requires that the law be both readily known, available and certain and clear.²³ In particular, people must be able to know in advance whether their conduct might attract a criminal sanction or a civil penalty. For these reasons, it is suggested that the 'reasonable steps' measure be removed from Schedule 3.
48. Paragraphs 104.5(3)(b) and (c) should also sit outside of the responsibility of the controlee. That is, a controlee should not need to authorise AFP members to ensure that the tracking device is in good working order or to enter premises when there is a court order in place authorising the action.

Recommendation:

- **The requirement for the subject to take 'reasonable steps' to ensure the tracking device and any equipment necessary for the operation of the tracking device are or remain in good working order as is proposed by Schedule 3 of the Bill should be removed.**
- **Proposed paragraphs 104.5(3)(b) and (c) of the Criminal Code should sit outside the responsibility of the controlee and be determined by a court order authorising the action.**

Removing authority of Family Court to issue control orders and PDOs (Schedules 4 and 6)

49. The Law Council supports this amendment.²⁴ Recommendation 28 of the COAG Counter-Terrorism Review (2013) provided for the removal of the Family Court as an issuing authority.²⁵ This recommendation was supported by COAG on the basis that:

A role for the Family Court in the administration of the terrorism control order regime under the Criminal Code is anomalous compared with its areas of

²³ Law Council of Australia, *Policy Statement on Rule of Law Principles*, 19 March 2011, Principle 1, 2.

²⁴ The Law Council has supported this amendment in its Submission to the Independent National Security Legislation Monitor's inquiry into the *Adequacy of safeguards relating to the control order regime*, 30 September 2015, 9.

²⁵ Council of Australian Governments, '[Council of Australian Governments Review of Counter-Terrorism Legislation](#)', Australian Government, (2013), Recommendation 28.

*jurisdiction. While the Family Court is a superior court of record, it is a specialist family law court and does not exercise powers which are similar to those relevant under the control order regime.*²⁶

50. The Law Council agrees with the reasoning of the COAG Review and COAG response as to the removal of the Family Court as an issuing court.
51. The Law Council also notes that new subsection 106.7(2) would ensure that any matter already on foot in relation to a control order that is before the Family Court can continue despite removal of the Family Court as an issuing authority.

Recommendation:

- **The Family Court should be removed as an issuing court for control orders and PDOs.**

Preventative detention orders (Schedule 5)

52. Currently, a PDO can be applied for if an AFP member, suspects on reasonable grounds, that a person will engage in a terrorist act, possesses something in connection with preparing for or engaging in a terrorist act, or has done an act in preparation for planning a terrorist act.²⁷ The terrorist act must be one that is imminent *and* expected to occur in any event, at some time in the next 14 days.²⁸ The issuing authority is also required to be satisfied of these matters if 'there are reasonable grounds to suspect'.²⁹
53. Schedule 5 of the Bill would amend the current test of 'imminent' for the application and grant of a PDO, by providing an 'imminent terrorist act' is one that is suspected, on reasonable grounds, is capable of being carried out, and could occur, within the next 14 days.³⁰
54. PDOs are a form of imprisonment or detention without charge, trial or conviction which is justified on the basis of an imminent threat to public safety. The Law Council has expressed concern about the PDO regime in the Criminal Code – in particular, the absence of demonstrated necessity for such extraordinary powers, particularly in light of the broad range of alternative provisions for the prevention and prosecution of terrorist acts; and the restriction of liberty based on suspicion rather than charge.³¹ If the PDO regime is to be retained, then it must go only so far as is demonstrably necessary. The Law Council suggests that, in order to demonstrate the necessity to reduce the threshold for PDOs, the Committee should inquire as to whether there have been cases where the AFP have sought a PDO, could not meet the current

²⁶ Council of Australian Governments, 'COAG Response to the COAG Review of Counter-Terrorism Legislation' 12.

²⁷ *Criminal Code Act 1995* (Cth), s 105.4(4). There is also the power for a PDO to be issued if a terrorist act has occurred within the last 28 days and it is reasonably necessary to detain a person to preserve evidence (subsection 105.4(6)).

²⁸ *Criminal Code Act 1995* (Cth) s 105.4(5).

²⁹ *Ibid*, s 105.4(4)(b). The AFP member must still demonstrate that the PDO will 'substantially assist in preventing a terrorist act occurring' and demonstrate that detention is 'reasonably necessary' for the purpose of preventing a terrorist act – paragraphs 105.4(4)(b) and (c) of the *Criminal Code Act 1995* (Cth).

³⁰ Proposed subsection 105.4(5) of the *Criminal Code Act 1995* (Cth).

³¹ Law Council of Australia, *Anti-Terror Reform Project* (2013) 14.

threshold and subsequently learnt that there was a near miss or that a terrorist act was furthered.

55. The capability requirement may capture individuals with low and high capability. Individuals presenting low capability or high capability with either low or high scale attack risks could possibly be the subject of a PDO. This is unremarkable and the current scheme already appears to cover such circumstances, although the amendments more clearly clarify the capability requirements.
56. The former INSLM recommended the repeal of PDOs but noted that if they were to be retained in general, the imminence test should be replaced with a requirement that the AFP applicant and issuing authority are each satisfied that there is a sufficient possibility of the terrorist act occurring sufficiently soon so as to justify the restraints imposed by the PDO.³² He noted that 'while a fixed-term requirement for a time period 'is commendable from a civil rights perspective, the requirement to prove that it will occur 'in any event' in that time frame raises the acute problem of forcing a police officer to attest to something they have no way of knowing. It could also prevent applications for PDOs because the threshold cannot practically be met.'³³
57. The Law Council supports the former INSLM's recommendation. The currently drafted wording of 'could occur' is too broad and may not ensure that only situations where there is a real risk of a terrorist attack occurring are captured.
58. Accordingly, the amendments should be changed to 'is capable of being carried out, and *is likely to occur*, within the next 14 days'.

Recommendation:

- **The 'imminence' threshold for PDOs should include the capability requirement and be changed to a 'is capable of being carried out, and *is likely to occur*, within the next 14 days' test.**

Monitoring Compliance with control orders (Schedules 8-10)

59. Schedules 8-10 would allow law enforcement agencies broad powers to search premises, persons the subject of a control order, intercept telecommunications and install surveillance devices in the absence of any suspicion or evidence that the order is not being complied with and/or any intelligence to suggest terrorist activity.
60. The Parliamentary Joint Committee on Human Rights has noted:

These powers involve serious intrusions into a person's private life, including the power for law enforcement agencies to search property, conduct frisk searches, listen into telephone calls, monitor internet usage and install covert devices that would listen into private conversations between individuals.

The powers also involve significant intrusions into the privacy of individuals unrelated to the person who is subject to a control order, including people who

³² INSLM, 'Declassified Annual Report', (2012) Recommendation III/2.

³³ Ibid,51-52.

*use computers at the same education facilities as a person subject to a control order.*³⁴

61. The Law Council agrees and suggests that before issuing a monitoring warrant under the *Crimes Act 1914* (Cth) (Crimes Act), or a telecommunications or surveillance devices warrant in relation to a person the subject of the control order, there must as a minimum be a reasonable suspicion that the order is not being complied with or that the individual is engaged in terrorist related activity. This is also important where a breach of a control order may potentially be minor in nature.

Schedule 8

62. Currently, it is proposed that the issuing officer be a magistrate.³⁵ The Law Council suggests the Committee inquire as to whether these are delegable powers and whether it would be more appropriate for the issuing officer to be a Supreme Court judge. The Law Council notes that in some instances other federal search warrants sought by the AFP can in fact be issued by the Registrar of a Local Court. This would be of grave concern, especially given the broad powers awarded to the constables involved.
63. The privileges that are not abrogated should be clearly stated in any notice given of the monitoring powers being exercised.
64. The 'prescribed connection with premises' definition, in combination with the broadly drafted purpose of 'determining whether the control order has been or is being complied with' and the powers including 'the general monitoring powers' give extraordinary search powers to, for example, inspect any document on the premises (such as a workplace or educational institution), question occupiers and require any person present on the premises to answer any questions and produce any document 'likely to assist' in, the four specified purposes. This is an infringement on the rights of other innocent persons who may have nothing to do with the control order. It purports to conscript other persons present to assist with the investigation being undertaking under pain of punishment. For this reason, the Law Council opposes subsections 3ZZKE(3)-(6).
65. Furthermore, the answers given under compulsion may be used to further an investigation or prosecution. There is no limitation or definition as to 'prosecuting an offence' in s 3ZZRD. It appears to be contemplated also that if while searching, there is evidential material within the meaning of the *Proceeds of Crime Act 2002* (Cth) (POCA), there can be search and seizures and use of such evidence both derivatively and directly in future civil proceedings. These incidental powers are also broad reaching and intrusive. The Law Council opposes paragraph 3ZZKF (2)(b) and subsection 3ZZLC (2). There is already a power to seize information in relation to preventing the support for or the facilitation of a terrorist act. This power is sufficient to enable the purposes of the legislation to be realised. It also avoids unintended consequences of future dissemination of the information through the broad ranging disclosure provisions within the POCA (which has quite different objects to the legislation currently under consideration).

³⁴ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Thirty-second report of the 44th Parliament* (2015) 6.

³⁵ Proposed section 3ZZJB of the *Crimes Act 1914* (Cth).

66. Proposed subsection 3ZZNA(1) (consent of occupier of premises) should include the words 'or express consent subject to limitations' so that an occupier is properly informed of his/her rights in this respect.
67. The words 'were given the opportunity to provide any known appropriate warning or guidance on the operation of the equipment and if so,' should be inserted before the words 'provided any appropriate warning or guidance...' in proposed subsection 3ZZNF(4) (compensation for damage to electronic equipment).
68. Proposed subsection 3ZZNH(2) provides that the right to observe the search being conducted ceases if the person 'impedes' the search. The term 'impedes' should be defined to add certainty to the provision.
69. For monitoring warrants by telephone or other electronic means under proposed subsections 3ZZPA(2) and (3) it is important, even in urgent situations that there be a full record of the request available in order that there may be proper review and scrutiny where necessary. The Bill should be amended to ensure that there is a full record of the request available.

B-party warrant

70. New section 46 of the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA) would permit the issue of a telecommunications service warrant or 'B party' warrant relating to persons subject to a control order.³⁶ It would significantly broaden the circumstances in which innocent parties may be subjected to surveillance by reason of association. It also in effect reduces the threshold for which a B-party warrant may be issued from investigation of a serious offence punishable by 7 years imprisonment³⁷ to investigation of a control order breach punishable 5 years imprisonment.³⁸
71. B-Party warrants are particularly invasive tools for detection of criminal activity.³⁹ They permit law enforcement agencies to intercept telecommunications made or received by people who are not suspects or who may have *no knowledge or involvement in a crime*, but who may be in contact with someone who does. The third party who has his/her communications targeted may be anyone from the suspect's family members to his or her lawyer or even a media provider.

³⁶ Currently, under a B-Party warrant telecommunication interception can be authorised where a third party (a 'B-Party') is believed to be in communication with another person and that other person is engaged in, or is reasonably suspected of being engaged in, activities prejudicial to national security or involved in the commission of a serious criminal offence – see *Telecommunications (Interception and Access) Act 1979* (Cth) subparagraphs 9(1)(a)(i)(ia), 46(1)(d)(ii). New section 46 would enable a B-Party warrant to be issued where a person is subject to a control order and the Judge or nominated AAT member is satisfied that: Division 3 has been complied with in relation to the application; in the case of a telephone application - because of urgent circumstances, it was necessary to make the application by telephone; there are reasonable grounds for suspecting that a particular person is using, or is likely to use, the service; information that would be likely to be obtained by intercepting under a warrant communications made to or from the telecommunications service would be likely to substantially assist in connection with: 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, or any succeeding control order, has been, or is being, complied with.

³⁷ *Telecommunications (Interception and Access) Act 1979* (Cth) s 5D, s 46(1)(d).

³⁸ *Criminal Code Act 1995* (Cth) s 104.27.

³⁹ Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the provisions of the Telecommunications (Interception) Amendment Bill 2006*, 37.

72. The Law Council has previously recommended that B-Party warrants should be repealed⁴⁰ on the basis that the B-Party warrant system is a disproportionate response to the need to investigate threats to national security and serious criminal offences and is contrary to Australia's obligations under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) which provides that:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Everyone has the right to the protection of the law against such interference or attacks.

73. As noted by Simon Bronitt and James Stellios:

*...the B-Party might be the suspected person's legal representative with the result that the interception may lawfully capture otherwise privileged communications. It is also wide enough to capture the privileged communications between the legal representative and other clients, as well as collateral intimate communications between the legal representative and spouse, which have no bearing on the investigation.*⁴¹

74. B-Party warrants received much attention during the Senate Legal and Constitutional Affairs Legislation Committee's *Inquiry into the Telecommunications (Interception) Amendment Bill 2006* (the 2006 Bill). The Committee noted that 'a principal problem with the B-party warrant is the potential for collecting a great deal of information which may be incidental to, or not even associated with, the investigation for which the warrant was issued'.⁴² The Committee made a number of recommendations seeking stricter controls around the threshold for issuing B-party warrants, protecting legal professional privilege and other confidential communications and the subsequent use and derivative use of material. These recommendations were not supported by the then Australian Government for a variety of reasons.

75. However, the Australian Law Reform Commission (ALRC) has also expressed concern that there is potential to collect a large amount of information about non-suspect persons under a B-party warrant, compared with other types of warrant.⁴³

76. The Law Council shares the ALRC's and Senate Legal and Constitutional Affairs Committee's concerns regarding the impact of B-party warrants on the privacy rights of individuals, on bona fide confidential communications and the use and derivative use of material. Given the particular intrusiveness of B-party warrants, the Law Council recommends that the regime be reviewed by the INSLM to determine its effectiveness and appropriateness, particularly if it is to be extended in the manner proposed by the Bill.

⁴⁰ See Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into a Comprehensive Revision of the Telecommunications (Interception and Access) Act 1979 (Cth)*, 14 March 2014, 9-10.

⁴¹ Simon Bronitt and James Stellios, 'Regulating Telecommunications Interception and Access in the Twenty-first Century: Technological Evolution or Legal Revolution?', *Prometheus* (2006) 24:4, 417.

⁴² Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, 'Provisions of the Telecommunications (Interception) Amendment Bill 2006' (2006) 38.

⁴³ Australian Law Reform Commission, *Discussion Paper 72: Review of Australian Privacy Law* (2007) 1056.

Requirement not to execute warrant in certain circumstances

77. Proposed section 3ZZOD of the Crimes Act would expressly provide that if a monitoring warrant is issued on the basis that a control order was in force in relation to a person and the control order is revoked, declared void or a court varies the control order by removing one or more obligations, prohibitions or restrictions imposed on the person by the control order, the authorised officer must not execute the warrant or a consequential power. Schedules 9 and 10 of the Bill should contain a provision to the same effect. If one or more of the obligations, prohibitions or restrictions imposed by the control order ceases to have effect, the grounds upon which the warrant issued under the TIA Act may no longer exist.
78. In addition, the words 'or control order' should be added to paragraph 3ZZOD(1)(d) of the Crimes Act to ensure that powers that are consequential on the control order being in place are not executed when the order is revoked or one of the relevant restrictions is removed.
79. A thing seized, or information or documents obtained, in breach of subsection 3ZZOD(1) (monitoring warrant must not be executed if the relevant control order is revoked or one or more of the obligations, prohibitions or restrictions imposed on the person is removed) is not admissible in evidence in a criminal proceeding (other than for example a complaint or allegation against a law enforcement officer). Such material may therefore be admissible, for example, in proceedings brought under the POCA, which are civil proceedings. The Law Council considers that such evidence should not be acquired for or admissible in such proceedings, which do not have the same objectives as the extraordinary purposes of the proposed legislation.

Information sharing

80. The Bill proposes to insert section 139B into the TIA Act to enable the AFP and state and territory police forces to communicate lawfully accessed information to another person for a broad range of purposes set out in subsection 139B(2), in the context of control orders and preventative detention orders. The Law Council recommends that the Committee should obtain the Privacy Commissioner's views on this amendment.
81. The Bill also proposes to insert subsection 6(1)(q)- (z) into the *Surveillance Devices Act 2004* (Cth) (SD Act) to extend the range of 'relevant proceedings' where protected information, obtained through the use of a surveillance device by a law enforcement officer, can be communicated to a person who is not a member of the relevant agency or organisation.
82. Given the possible, privacy implications of such provisions, the Law Council recommends that the Committee should obtain the Privacy Commissioner's views on these amendments.

Destruction of records

83. The Bill proposes to insert section 46A into the SD Act. This provision would require the destruction of records as 'soon as possible' where the information was obtained through a surveillance device, under either a control order warrant or a tracking device authorisation that was issued on the basis of a control order made in relation to a person, and the information was obtained when the control order had been obtained but had not yet come into force. The destruction of the records serves to protect the privacy of the person in circumstances where the information was not lawfully obtained. However, it may not allow for proper scrutiny. In circumstances where

information is not lawfully obtained, law enforcement agencies should be required to notify the Ombudsman.

Deferral of inclusion of information in annual report

84. The Law Council appreciates that it is important for reporting obligations not to jeopardise ongoing investigations. However, proposed section 50A of the SD Act would enable there to rarely or (never) be reporting where there has been a surveillance warrant in force in the past (that is not current) as any report that it was previously in force could suggest that it is not likely to still be in force. Accordingly, subsections 50A(2)-(5) should either be rephrased or the term 'or is not likely to be' removed from subsections 50A(4)-(5). Proposed section 103B of the TIA Act should similarly be amended.

Informer to use surveillance device without a warrant

85. Currently, section 38 of the Act permits Commonwealth, state and territory law enforcement officers to use a surveillance device to listen to or record words spoken without a warrant in limited circumstances (e.g. the investigation of a relevant offence or the location and safe recovery of a child to whom a recovery order relates). It also allows for non-law enforcement 'persons assisting' a Commonwealth, state and territory law enforcement officer to do so.

86. Proposed subsection 38(6) of the SD Act would allow a 'person assisting' (presumably including an 'informer') to use a surveillance device (such as a listening device) without a warrant where a control order is in force.

87. The Law Council opposes the proposed extension of these extraordinary powers to a 'person assisting' for the purpose of monitoring control order compliance. This extension is a cause of concern, and demands particularly robust external, independent authorisation processes. The Law Council submits that, evidence is obtained from informants without judicial oversight, then such evidence comes at too high a price and is unlikely to be in the interests of justice in the long-term. If such investigative steps are to be used, they should only be taken following the lawful approval of a warrant.

Recommendations:

- **Before issuing a proposed monitoring warrant under the Crimes Act, or a telecommunications or surveillance devices warrant in relation to a person the subject of the control order there must as a minimum be a reasonable suspicion that the order is not being complied with or that the individual is engaged in terrorist related activity.**
- **The Committee should inquire as to whether the monitoring compliance are delegable powers and whether it would be more appropriate for the issuing officer to be a Supreme Court Justice.**
- **The privileges that are not abrogated should be clearly stated in any notice given of the monitoring powers being exercised.**
- **Proposed subsections 3ZZKE(3)-(6) of the Crimes Act should not be enacted.**
- **Proposed paragraph 3ZZKF (2)(b) and subsection 3ZZLC (2) of the**

Crimes Act should not be enacted.

- **Proposed subsection 3ZZNA(1) (consent of occupier of premises) of the Crimes Act should include the words 'or express consent subject to limitations'.**
- **The words 'were given the opportunity to provide any known appropriate warning or guidance on the operation of the equipment and if so,' should be inserted before the words 'provided any appropriate warning or guidance...' in proposed subsection 3ZZNF(4) (compensation for damage to electronic equipment) of the Crimes Act.**
- **The term 'impedes' in proposed subsection 3ZZNH(2) of the Crimes Act should be defined.**
- **For monitoring warrants by telephone or other electronic means under proposed subsections 3ZZPA(2) and (3) of the Crimes Act, the Bill should be amended to ensure that there is a full record of the request available.**
- **If the Committee accepts the necessity of the proposed extension of the B-Party warrant system to control order compliance, the INSLM should be required to review the regime in terms of its (a) usefulness; (b) necessity; (c) appropriateness and (d) to determine whether there is any suggestion that the powers have inadvertently been used inappropriately.**
- **Schedules 9 and 10 of the Bill should contain a provision to the same effect as proposed section 3ZZOD of the Crimes Act, imposing a requirement not to execute a warrant in certain circumstances.**
- **The words 'or control order' should be added to proposed paragraph 3ZZOD(1)(d) of the Crimes Act.**
- **A thing seized, or information or documents obtained, in breach of subsection 3ZZOD(1) (monitoring warrant must not be executed if the relevant control order is revoked or one or more of the obligations, prohibitions or restrictions imposed on the person is removed) should not be admissible in evidence in proceeds of crime matters.**
- **Given the possible, privacy implications of the proposed information sharing provisions, the Committee should obtain the Privacy Commissioner's views on these amendments.**
- **In circumstances where information is not lawfully obtained, law enforcement agencies should be required to notify the Ombudsman.**
- **Proposed subsections 50A(2)-(5) should either be rephrased or the term 'or is not likely to be' removed from subsections 50A(4)-(5). Proposed section 103B of the TIA Act should similarly be amended.**

- **The provisions of the Bill which would enable informers to use a surveillance device without a warrant for the purpose of monitoring control order compliance should not be enacted.**

New offence of advocating genocide (Schedule 11)

88. The Bill would introduce new section 80.2D into the Criminal Code which would create a new offence of 'publicly' advocating⁴⁴ genocide,⁴⁵ punishable by a maximum of 7 years imprisonment.
89. Genocide is a heinous crime and should be condemned. Where genocide has been attempted or carried out, Australia should do all in its power to prosecute or ensure it is prosecuted. The same applies to war crimes and crimes against humanity. However, the Law Council has several concerns with how the proposed advocating genocide offence is framed.

Necessity and limited practical benefit

90. The proposed offence may be of limited practical benefit to law enforcement agencies. The genocide offences in the Criminal Code have a particular history and they are technical in the way in which the elements are framed. To use those technical sets of elements to create an offence of advocating genocide may be largely unworkable.
91. The offence of incitement, in section 11.4 of the Criminal Code, is capable of dealing with any real concern about groups publicly urging genocide to occur. Its restrictions and requirements are necessary safeguards to prevent unreasonable incursions upon free speech. The field is also largely covered by section 80.2A which deals with urging violence against groups, and in particular, subsection 80.2A(2).
92. If there were a policy objective to capture the urging of violence intended to have genocidal impacts, this would be better achieved, with less detrimental impact on the rule of law by creating an aggravated form of the section 80.2A offences.
93. The aggravating element could be that the violence is urged with the intention to destroy, 'in whole or in part, that targeted group which is distinguished by race, religion, nationality, national or ethnic origin or political opinion', an adaption of the third element of the genocide offences in division 268 but using the section 80.2A form

⁴⁴ To 'advocate' means to 'counsel, promote, encourage or urge' (subsection 80.2D(3) of the Criminal Code). The Explanatory Memorandum to the Counter Terrorism Legislation Amendment Bill (No. 1) 2015 notes at page 109, that terms will have their ordinary meaning and are capable of broad construction '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'.

⁴⁵ New subsection 80.2D(3) of the Criminal Code defines 'genocide' to mean an offence contrary to Subdivision B of Division 268 of the Criminal Code (section 268.3 (genocide by killing), section 268.4 (genocide by causing serious bodily harm), section 268.5 (genocide by deliberately inflicting conditions of life calculated to bring about physical destruction), section 268.6 (genocide by imposing measures intended to prevent births), or section 268.7 (genocide by forcibly transferring children)). A genocide offence does not include an offence against section 11.1 (attempt), section 11.4 (incitement) or section 11.5 (conspiracy) to the extent that it relates to a genocide offence against Subdivision B of Division 268; and does not include an offence against that Subdivision that a person is taken to have committed because of section 11.2 (complicity and common purpose), section 11.2A (joint commission) or section 11.3 (commission by proxy).

of defining the group. The aggravated offence could be called 'urging genocidal violence against groups'.

94. When new offences are made to achieve policy objectives, an attempt should be made to maintain the organic integrity of the criminal law as a whole. A decision to use a novel phrase such as 'publicly advocate' may negate the carefully crafted incitement offences and offences involving advocacy of other forms of violent criminal conduct in the past. The policy reasons for applying safeguards and restrictions in the past may be undermined.

Advocate

95. Proposed new subsection 80.2D(3) of the Criminal Code defines 'advocate' for the purpose of the offence as counselling, promoting, encouraging or urging the commission of a genocide offence. These expressions will have their ordinary meaning.

96. The Scrutiny of Bills Committee has noted that the:

... breadth of the definition may amount to an undue trespass on personal rights and liberties as it is not sufficiently clear what the law prohibits. This is particularly important given the substantial custodial penalty (7 years imprisonment). It is also possible that the provision may have a chilling effect on the exercise of the right of free expression.⁴⁶

97. The Law Council agrees with this assessment and considers that if the offence is to proceed, the definition of 'advocate' should be constrained to ensure that the provision is not broader than necessary.

Recklessness

98. The proposed new offence does not import the restriction that is stated in the Explanatory Memorandum – the notion that a successful prosecution would require 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'.⁴⁷
99. The offence does not require proof that a substantial risk that someone (other than the accused) would take that speech as advocating a genocide offence or any appreciation of such a risk by the offender. What is required is that a person intentionally advocated a genocide offence (by words and/or actions taken at face value) in circumstances where there is a substantial risk that the advocacy would be 'public'.
100. The offence therefore has too remote a connection to the possibility that another person would potentially act on the statement. There must be a possibility that the advocacy is capable of influencing others to act (whether by reason of the person's position in the community, and association or religious group or otherwise). This would be more consistent with the pattern of other section 80 offences, such as the advocating terrorism offence in section 80.2C of the Criminal Code. The advocating terrorism offence requires that the person engage in the relevant conduct reckless as

⁴⁶ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest*, No. 13 of 2015, 25 November 2015, 19.

⁴⁷ Explanatory Memorandum, Counter-Terrorism Bill (No. 1) 2015, 109 -110.

to whether another person will engage in a terrorist act or commit a terrorism offence.⁴⁸

101. The proposed advocating genocide offence should be amended to similar terms to those of section 80.2C (advocating terrorism). This would also avoid some of the uncertainty arising from the term 'publicly' in the current drafting.

102. It is uncertain how the fault element of recklessness would operate in the context of the proposed offence. For example, would it capture a person who intentionally advocated genocide at home knowing that there is a substantial and unjustifiable risk that it will be heard in a public place? This could be rectified as noted in the recommendations above and below.

Definition of 'publicly'

103. While there is a definition of 'advocate' in the Bill, there is no definition of 'publicly'.

104. The Explanatory Memorandum notes that 'publicly' is not defined in the Bill although it would include, but not be limited to:

- 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.⁴⁹

105. The absence of a definition of 'publicly' in the Bill is inconsistent with the rule of law because there is insufficient clarity to enable people to know what activity could be deemed illegal.

106. The offence seems to assume the accused communicates with at least one other person. The current explanation of publicly in the Explanatory Memorandum would appear to capture:

- a private conversation between two friends in a public place such as a café;
- a private conversation at a home between friends or family members where those friends or family members could constitute members of the public; and
- a person advocating via some medium of public communication.

107. It is also not clear why the offence should distinguish between publicly advocating genocide and private advocacy. Arguably, 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. The distinction between 'public' and 'private' is not a legitimate one.

108. However, if the term 'publicly' is to be retained, the Law Council recommends that the meaning of the term 'publicly' be further clarified by amendment to either the Bill or the Explanatory Memorandum. In accordance with the rule of law, the definition should not be so broad as to capture a wide range of benign conduct.⁵⁰

⁴⁸ *Criminal Code Act 1995* (Cth), s 80.2C(b)..

⁴⁹ Explanatory Memorandum, Counter-Terrorism Bill (No. 1) 2015, 108.

⁵⁰ Law Council of Australia, *Policy Statement on Rule of Law Principles*, 19 March 2011, Principle 1, 2.

Recommendations:

- **The Committee should inquire into the appropriateness of introducing an ‘urging genocidal violence against groups’ offence as a more appropriate means of ensuring the integrity of the Criminal Code.**
- **If the advocating genocide offence is to be preferred over an ‘urging genocidal violence against groups’ formulation, the term ‘advocate’ should be constrained.**
- **If the advocating genocide offence is to be preferred over an ‘urging genocidal violence against groups’ formulation, the offence should be amended to similar terms to those of section 80.2C (advocating terrorism), and requiring at least that the person be reckless that another person might engage in genocide on the basis of the advocacy.**
- **If the term ‘publicly’ is to be retained, the meaning of the term ‘publicly’ should be further clarified by amendment to either the Bill or the Explanatory Memorandum. In accordance with the rule of law, the definition should not be so broad as to capture a wide range of benign conduct.**

Security Assessment amendments (Schedule 12)

109. ASIO can currently only provide a security assessment to a State or Territory via a Commonwealth agency (except in the case of a designated special event)⁵¹ which the Explanatory Memorandum notes is resource intensive and severely hinders the timely provision of security assessments to State and Territory authorities.⁵²

⁵¹ Currently, paragraph 40(2)(a) of the ASIO Act prevents ASIO from communicating directly to a state (or an authority of a state) either in the form of an assessment or otherwise any information, recommendation opinion or advice concerning a person which ASIO knows is intended or likely to be used by the state or an authority of the state in considering prescribed administrative action in relation to that person. Defined in section 35 of the ASIO Act: Security assessment or assessment means a statement in writing furnished by the Organisation to a Commonwealth agency expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it would be consistent with the requirements of security for prescribed administrative action to be taken in respect of a person or the question whether the requirements of security make it necessary or desirable for prescribed administrative action to be taken in respect of a person, and includes any qualification or comment expressed in connection with any such recommendation, opinion or advice, being a qualification or comment that relates or that could relate to that question. A prescribed administrative action is defined in section 35 of the ASIO Act: prescribed administrative action means (a) action that relates to or affects: (i) access by a person to any information or place access to which is controlled or limited on security grounds; or (ii) a person’s ability to perform an activity in relation to, or involving, a thing (other than information or a place), if that ability is controlled or limited on security grounds; including action affecting the occupancy of any office or position under the Commonwealth or an authority of the Commonwealth or under a State or an authority of a State, or in the service of a Commonwealth contractor, the occupant of which has or may have any such access or ability; (b) the exercise of any power, or the performance of any function, in relation to a person under the Migration Act 1958 or the regulations under that Act; or (c) the exercise of any power, or the performance of any function, in relation to a person under the Australian Citizenship Act 2007, the Australian Passports Act 2005 or the regulations under either of those Acts; or (d) the exercise of a power under any of the following provisions of the Telecommunications Act 1997: (i) section 58A; (ii) subsection 581(3); (iii) clause 57A of Schedule 3A; (iv) clause 72A of Schedule 3A.

⁵² Ibid, 3.

110. The Bill would amend paragraph 40(2)(a) of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) to allow ASIO to pass such information directly to a State or Territory – if it is in the form of a security assessment.
111. The Law Council acknowledges that the current arrangements for the furnishing of a security assessment to a state or territory via a Commonwealth agency may be overly cumbersome. The former INSLM has previously noted, for example, that ‘the challenge of providing professionally acceptable security assessments is a major one’.⁵³ The provision of timely security assessments to relevant State and Territory authorities is essential in protecting the community from harm. To this end, the Law Council supports the proposed amendments, noting that the current applicable review framework would continue to apply.⁵⁴
112. However, it is important that the power to provide a security assessment directly to States and Territories only be available upon satisfaction by the State or Territory that the equivalent rights of review will operate for administrative decisions based on the security assessment. An individual who successfully challenges a security assessment should be given the opportunity to have the State/Territory based decision revisited.
113. For transparency, the Explanatory Memorandum to the Bill should clarify the extent to which reporting obligations would apply to the amendments. In addition, the Committee should inquire as to whether the amendments in the Bill are likely to practically increase the workload of the Inspector-General of Intelligence and Security (IGIS) and, if so, the IGIS’s annual budget be supplemented to the extent required to provide for the increased oversight arrangements associated with the Bill.

Recommendations:

- **The power to provide a security assessment directly to States and Territories should only be available upon satisfaction by the State or Territory that the equivalent rights of review will operate for administrative decisions based on the security assessment.**
- **The Explanatory Memorandum to the Bill should clarify the extent to which reporting obligations would apply to the security assessment amendments.**
- **The Committee should inquire as to whether the amendments in the Bill relating to security assessments are likely to practically increase the workload of the IGIS and, if so, the IGIS’s annual budget should be supplemented to the extent required to provide for the increased oversight arrangements associated with the Bill.**

⁵³ Independent National Security Legislation Monitor, Mr Bret Walker SC, *Annual Report: 28 March 2014*, 46.

⁵⁴ The subject of an adverse or qualified security assessment provided to a state would still be able to seek review of the assessment from the Security Appeals Division of the Administrative Appeals Tribunal under section 54 of the ASIO Act. Section 61 of the ASIO Act provides that the AAT findings, to the extent that they do not confirm the assessment, supersede that assessment. Judicial review of the process of ASIO making a security assessment is available under subsection 39B(1) of the *Judiciary Act 1903* (Cth) and sec 75(v) of the *Constitution*. The Inspector-General of Intelligence and Security also performs a valuable role in overseeing the security assessment framework.

Classification of publications etc (Schedule 13)

114. Section 9A of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (Classification Act) requires that publications, films or computer games that directly or indirectly ‘advocate’ a terrorist act must be classified as Refused Classification and cannot be published in Australia. Currently, ‘advocates’ means directly or indirectly ‘counselling’, ‘urging’, or ‘providing instruction’ on the doing of a terrorist act.⁵⁵ It also includes ‘directly praising’ the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the Criminal Code) that the person might suffer) to engage in a terrorist act.⁵⁶
115. The Schedule 13 amendments would amend the Classification Act to make the meaning of ‘advocates the doing of a terrorist act’ consistent with the revised definition in the Criminal Code by also including the expressions ‘promotes’ and ‘encourages’.
116. While the Law Council supports consistency of definitions across the Classification Act and the Criminal Code, there is a concern with the current definition of the term ‘advocates’ and ‘terrorist act’ in the Criminal Code, which may result in an unjustifiable interference with freedom of speech according to Australia’s international law obligations.⁵⁷
117. The definition of ‘terrorist act’ in section 100.1 of the Criminal Code for example is very broad and may capture the use of non-state violence, anywhere in the world, no matter how oppressive the regime against which violence is taken. A sympathetic portrayal of the Easter 1916 rebellion in Dublin; the conspiracy of the German generals to murder Hitler; or a real or fictional rebellion of the citizens of North Korea against their legal and recognised but oppressive government might each constitute advocacy of terrorism and lead to the banning of a game or television documentary.
118. A range of submitters, including the Law Council, raised concerns with the definition of ‘advocates’, particularly the terms ‘promotes’ and ‘encourages’, in the context of the Counter-Terrorism (Foreign Fighters) Bill 2014 (Cth).⁵⁸ These terms were considered to be overly broad and vague, and to not provide sufficient certainty as to what activity falls within the definition. This is combined with a very broad definition of the term ‘terrorist act’ which includes, for example, a threat of action.
119. The Australian Law Reform Commission’s *Interim Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (July 2015) has articulated that the advocating of terrorism offence ‘might be reviewed to ensure that the laws do not unjustifiably interfere with freedom of speech. Such a task would fall within the role of the Independent National Security Legislation Monitor’.⁵⁹

⁵⁵ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9A(2)(a), s9A(2)(b).

⁵⁶ *Ibid*, s 9A(2)(c).

⁵⁷ See Article 19 of the *International Covenant on Civil and Political Rights*. International instruments cannot be used, however, to ‘override clear and valid provisions of Australian national law’ – see *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J). However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations – see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

⁵⁸ Parliamentary Joint Committee, Parliament of Australia, *Advisory Report on the Counter-Terrorism (Foreign Fighters) Bill 2014*(2014) 34-37.

⁵⁹ Australian Law Reform Commission, ‘ALRC Freedoms Inquiry Interim Report’ (2015) 95.

120. The Law Council supports review by the INSLM of the ‘advocating terrorism’ offence and any consequential amendments to the definition of ‘advocating terrorism’ in the Classifications Act. In the case of the Classifications Act, such review by the INSLM is particularly important, given the relatively low threshold of what material should be refused classification.⁶⁰

Recommendation:

- **If the ‘advocacy of doing a terrorist act’ provision is to remain in the Classifications Act, it should be consistent with the revised definition in the Criminal Code.**
- **The INSLM should be required to review the definition of ‘advocacy’ for the purposes of both the Classification Act and the Criminal Code to ensure that it is not inconsistent with Australia’s international obligations under Article 19 of the International Covenant on Civil and Political Rights.**

Delayed notification search warrants (Schedule 14)

121. The Law Council has previously expressed concern about the potential for the delayed notification search warrant scheme to disproportionately impact on personal rights and liberties.⁶¹ However, if the scheme is to be maintained, the Law Council supports this amendment, noting that it would be consistent with other analogous provisions relating to search warrants.⁶²

Recommendation:

- **The amendments in Schedule 14 of the Bill, which clarify the threshold requirements for the issue of a delayed notification search warrant should be enacted.**

⁶⁰ For example, material can ‘advocate’ the doing of a terrorist act if it ‘directly praises doing a terrorist act where there is a substantial risk that such praise *might* lead a person (regardless of his or her age or any mental impairment) to engage in a terrorist act. The Law Council has previously raised a number of concerns regarding the advocacy restrictions in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) – see for example, the Law Council’s *Anti-Terrorism Reform Project*, October 2013, 126-127.

⁶¹ Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*(2014).

⁶² For example, a key Commonwealth search warrant provision can be found in section 3E of the Crimes Act. Section 3E applies to all Commonwealth offences. Section 3E provides that an issuing authority may issue warrants to search premises or to conduct an ordinary search or a frisk search of a person if satisfied, on the basis of information on oath or affirmation, that there are reasonable grounds for suspecting that there is or there will be within the next 72 hours any evidential material at the premises or the person has in his or her possession or will within the next 72 hours have in his or her possession any evidential material. That is, the issuing officer need not hold the suspicion him/herself, but must be satisfied that there are reasonable grounds for suspicion of the relevant state of affairs. For similarly worded legislation see for example *George v Rockett* (1990) 170 CLR 104.

Protecting national security information (Schedule 15)

122. Currently, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) allows a court to prevent the disclosure of information in federal and civil proceedings where it would be likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.⁶³ A court can hold a closed hearing to determine whether information potentially prejudicial to security may be disclosed, and if so, in what form.⁶⁴ Sensitive information may be protected by allowing it to be redacted or summarised, and preventing a witness from giving evidence.⁶⁵ The court can also exclude non-security cleared persons from the closed hearing if their presence would be likely to prejudice national security.⁶⁶
123. In addition, sensitive information may be protected under the Criminal Code in control order proceedings. An interim control order must include a summary of the grounds on which the order is made, but information can be excluded if it is likely to prejudice national security.⁶⁷ When the AFP seek a confirmation of an interim control order, the contolee must be served with details to allow them 'to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order'.⁶⁸ However, information does not need to be served if it would prejudice national security, be protected by public interest immunity or put at risk ongoing operations by law enforcement agencies or intelligence agencies or put at risk the safety of the community, law enforcement officers or intelligence officers.⁶⁹
124. The Bill would permit under the NSI Act the admission of certain evidence in substantive control order proceedings, while excluding the person and/or their legal representative (including a security cleared representative) from a closed hearing or from accessing the information.
125. The three new orders that may be made under revised section 38J in relation to a control order proceedings (including for the making, confirming or varying of a control order) would provide that:
- 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;⁷⁰
 - 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;⁷¹ or

⁶³ *National Security Information (Criminal and Civil Proceedings Act 2004* (Cth) s 3(1)..

⁶⁴ *Ibid*, s 38G, s38H .

⁶⁵ *Ibid*, s 38L.

⁶⁶ *Ibid*, s 38I(3).

⁶⁷ *Criminal Code Act 1995* (Cth) s 104.5(2A).

⁶⁸ *Ibid*, s 104.12A(2).

⁶⁹ *Ibid*, s 104.12A(3).

⁷⁰ New subsection 38J(2) of the NSI Act.

⁷¹ New subsection 38J(3) of the NSI Act.

- 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.⁷²

126. The Bill would insert new subsection 38I(3A) into the NSI Act, which would allow the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General to request that one or more specified parties to the control order proceeding and their legal representatives not be present during the closed hearing. A court may also exclude an individual's security cleared legal representative, if the court considers it appropriate.

127. Section 8 of the *Public Interest Disclosure Act 2013* (Cth) would be amended include the new orders under section 38J in the definition of 'designated publication restriction'. This would mean that such information could not be published.⁷³

128. The Explanatory Memorandum explains the rationale for these amendments:

In some circumstances, the information will be so sensitive that the existing protections under the NSI Act are insufficient. The inadvertent or deliberate disclosure of such national security information may endanger the safety of individuals as well as the general public, or jeopardise sources and other intelligence methods. In the absence of the amendments contained in Schedule 15, a control order may not be able to be obtained because of the inability to provide such information to the issuing court.

The speed of counter-terrorism investigations is increasing. In order for control orders to be effective, law enforcement agencies need to be able to act quickly, and to be able to present sensitive information (which is in the form of admissible evidence) to a court as part of a control order proceeding without risking the integrity, safety or security of the information or its source.⁷⁴

129. However, the Law Council is concerned that the proposed amendments do not contain adequate safeguards to protect the right to a fair hearing. The Constitutional validity of the scheme could be challenged in the High Court regarding the sufficiency of the safeguards to protect the institutional integrity of the court.

130. The right to a fair trial and hearing is protected by article 4 of the *International Covenant on Civil and Political Rights*. The right is concerned with procedural fairness and encompasses notions of equality in proceedings, including the right to equality of arms. The latter concept requires that 'all parties have a reasonable opportunity to present their case under conditions that do not disadvantage them against other parties to the proceedings'.⁷⁵

131. Allowing one party in an application for a control order to rely on information to the exclusion of the other party may limit the rights of a person subject to that order to equality of arms.

⁷² New subsection 38J(4) of the NSI Act.

⁷³ A designated publication restriction means certain restrictions listed in the *Public Interest Disclosure Act 2013* (Cth) (s 8). They generally concern protecting the identity of people through court or tribunal orders that information not be published (such as under the *Family Law Act 1975* (Cth) and the *Migration Act 1958* (Cth)), witness protection and law enforcement mechanisms (see the full definition in s 8).

⁷⁴ Explanatory Memorandum, Counter-Terrorism Bill (No.1) 2015, . 24.

⁷⁵ Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report: Thirtieth Report of the 44th Parliament (2015).

132. The UN Human Rights Committee has articulated that the equality of arms principle means:

*... the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or unfairness to the defendant.*⁷⁶

Necessity

133. The Explanatory Memorandum does not provide information as to why the current extensive powers to protect national security information as noted above, are insufficient to address a pressing or substantial concern, or why this increased level of secrecy is required.

134. The former INSLM noted that ‘the investigations of resort to the NSI Act have not revealed any deficiency in practice so far as concerns its capacity to protect the secrecy of information which ought not to be disclosed because of the public interest in maintaining national security’.⁷⁷

135. 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.

136. Given this, the Committee is encouraged to inquire, having regard to the inherent unfairness of a potential/actual controlee being unable to effectively challenge critical evidence in the case against her/him and the possibility that secret evidence may inadvertently mislead the court (discussed below), as to the necessity of the amendments.

Inability to meaningfully interrogate secret evidence and potential to inadvertently mislead the court

137. The amendments would create a legislative system that permits and regulates the use of secret evidence in a civil proceeding – i.e. evidence adverse to a potential/actual controlee, that s/he and her/his legal representative is not allowed to know. An inability for a controlee to meaningfully interrogate and challenge information which is relied upon against her/him, which may be critical in a court’s decision to impose a control order significantly restricting liberty, is inconsistent with the right to a fair hearing.

138. The Australian Law Reform Commission’s Interim Report on Traditional Rights and Freedoms addressed the use of secret evidence in the following way:

Withholding secret evidence from one party to a criminal or civil procedure – particularly is a more serious matter. Here, the court is asked to rely on evidence that the other party has no opportunity to see or challenge.

There is a strong common law tradition against the use of secret evidence. In Pompano, French CJ said:

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

⁷⁶ Human Rights Committee, *General Comment 32: Right to equality before courts and tribunals and to a fair trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) [13].

⁷⁷ Independent National Security Legislation Monitor, *Third Annual Report* (2013) 125.

*held in public in which each party has a full opportunity to present its own case 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.*⁷⁸

139. Proposed new paragraph 38J(1)(c) would require a court to be satisfied that the subject of a control order ‘has been given notice of the allegation on which the control order request was based (even if the relevant person has not been given notice of the information supporting those allegations)’. However, the Law Council is concerned that providing a person with notice of the allegations on which a control order request is based may not give sufficient detail to a person to refute those allegations.
140. The Explanatory Memorandum provides an example of where a subject may only be informed of the allegation that s/he had attended a terrorist training camp in a foreign country in general terms.⁷⁹ However, in the absence of information as to, for example, where and when the subject is alleged to have attended the training camp, the subject may not be in a position to provide exonerating evidence to effectively challenge the allegation (for example by providing an alibi).
141. The provision of allegations in general terms may also result in a person providing a range of unnecessary and unhelpful evidence to a court in an attempt to dispute the allegations against them. It may also prevent the presentation to the court of relevant information known to the proposed subject of the control order (e.g. in the case of mistaken identification, the proposed subject may know and wish to confirm the identity of the true target), which could then be the subject matter of further investigation by the authorities or evidence before the court.
142. In addition, untested evidence may also inadvertently mislead the court. As UK Supreme Court Justice Lord Kerr has noted:
- 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.*⁸⁰
143. The number of proposed safeguards in the Bill⁸¹ may not militate against the inability of a controlee to meaningfully interrogate secret evidence and for that evidence to inadvertently mislead the court. This is because the court will not have assistance in

⁷⁸ Australian Law Reform Commission, ‘Traditional Rights and Freedoms – Encroachments by Commonwealth Laws - Interim Report 127’ (2015).

⁷⁹ Explanatory Memorandum, Counter-Terrorism Bill (No. 1) 2015, 122.

⁸⁰ *Al Rawi and Others v Security Service and Others* [2011] UKSC 34 [93] (Lord Kerr).

⁸¹ A number of the safeguards include: court satisfaction that the subject of the control order proceeding has been provided sufficient notice of the allegations on which the control order request is based, even if the individual may be denied notice of the information supporting those allegations; court being required to have regard to ‘substantial adverse effect on the substantive hearing in the proceeding’ (paragraph 38J(5)(b)) and ‘any other matter it considers relevant’ (paragraph 38J(5)(c)) before making an order; the court has discretion whether to make the order and what form it will take. The court also has discretion to decline excluding parties/legal representatives from the closed hearing; the right of a court to stay control order proceedings, including where one of the new orders has been made and the order would have a substantial adverse effect on the substantive control order proceeding, is preserved (subsection 19(4)); and existing subsection 19(3) preserves the power of the court to control the conduct of civil proceedings, in particular with respect to abuse of process, except so far as the NSI Act expressly or impliedly provides otherwise.

scrutinising the secret evidence. In such circumstances, it is unclear how a court's discretion may ensure procedural fairness to all parties.

144. If the proposed amendments are considered necessary, the Law Council makes the following recommendations to improve the safeguards of the regime, some of which may assist in ensuring the scheme's proportionality and Constitutional validity.

Having regard to the Attorney-General's certificate

145. The phrase 'having regard to the Attorney-General's certificate' should be omitted from proposed paragraph 38J(5)(a) of the NSI Act. Such a recommendation would be consistent with the former INSLM's recommendation regarding subsection 31(7) of NSI Act (relating to court orders in criminal proceedings).⁸² To avoid doubt, it would 'militate against any irrational favouring of an Executive view so as to skew what would otherwise have been the judge's own view in light of the evidence and argument'.⁸³ It would also be consistent with the current state of the law as stated by Whealy J, holding that the obligation to have regard to the Attorney-General's certificate conveyed 'no suggestion... that the certificate is conclusive or determinative of the issue'.⁸⁴ Further, provided possible prejudice to national security is given 'the appropriate weight, the court is free to form a view that is entirely contrary to the tenor of the certificate'.⁸⁵

Substantial adverse effect on the affected individual

146. Proposed paragraph 38J(5)(b) of the NSI Act should be amended to require the court to consider 'whether any such order would have a substantial adverse effect on the person's (who is the subject of the control order proceeding) right to receive a fair hearing in the substantive hearing in the proceeding'.
147. The currently worded requirement of 'whether any such order would have a substantial adverse effect on the substantive hearing in the proceeding' may not sufficiently encompass the constitutional need for courts to be able to proceed fairly. It is not apparent as to whether the substantial adverse effect would apply to ensuring that a control order is imposed or to the affected party and how the court would weigh these matters.
148. The suggested Law Council amendment is consistent with the wording in current paragraph 31(7)(b) of the NSI Act. The former INSLM, referring to the High Court's decision in *Condon v Pompano* [2013] HCA 7, noted that this wording 'thoroughly encompasses these up-to-date restatements of the constitutional need for courts to be able to proceed fairly'.

Prompt and due regard to INSLM's control order inquiry report

149. As noted above in relation to the control order amendments, prompt and due regard should be had to the forthcoming report of the current INSLM regarding the desirability of establishing a special advocate regime for control orders and a minimum standard of disclosure of information to the controlee (for example, within 6 months of the report being provided to the Attorney-General).

⁸² Independent National Security Legislation Monitor, *Third Annual Report* (2013) Recommendation VII2.

⁸³ *Ibid*, 137.

⁸⁴ *R v Lodhi* (2006) 163 A Crim R 448 at 468 [105].

⁸⁵ *Ibid*.

150. While we have not seen the INSLM's findings in this regard, a provisional view is that a special advocate regime in this context would better accord with procedural fairness and the proper administration of justice by permitting scrutiny of the evidence against the affected party in control order proceedings. A special advocate would appear to assist the court in determining what material should be permitted to be adduced in the substantive proceedings that will be withheld from the affected party or their legal representative. A minimum standard of disclosure to a controlee may also allow sufficient information to be given to enable effective instructions to be given in relation to allegations.⁸⁶

Recommendations:

- **The Committee should inquire, having regard to the inherent unfairness of a potential/actual controlee being unable to effectively challenge critical evidence in the case her/him and the possibility that secret evidence may inadvertently mislead the court, as to the necessity of the amendments in Schedule 15 of the Bill.**
- **The phrase 'having regard to the Attorney-General's certificate' should be omitted from proposed paragraph 38J(5)(a) of the NSI Act.**
- **Proposed paragraph 38J(5)(b) of the NSI Act should be amended to require the court to consider 'whether any such order would have a substantial adverse effect on the person's (who is the subject of the control order proceeding) right to receive a fair hearing in the substantive hearing in the proceeding'.**
- **Prompt and due regard should be had to the forthcoming report of the current INSLM regarding the desirability of establishing a special advocate regime for control orders and a minimum standard of disclosure of information to the controlee (for example, within 6 months of the report being provided to the Attorney-General).**

Dealing with national security information in proceedings (Schedule 16)

151. Subsections 19(1A) and (3A) of the NSI Act currently permit the court to make such orders as it considers appropriate in relation to the disclosure, storage, handling or destruction of national security information in a federal criminal or civil proceeding respectively provided such orders are in the interests of national security and not inconsistent with the Act or its Regulations.⁸⁷

⁸⁶ The COAG Counter-Terrorism Review, for example, recommended consideration be given to the introduction of a special advocate system for control order proceedings and for a minimum standard of disclosure of information to be given to a controlee – see Council of Australian Governments, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) Recommendations 30 and 31.

⁸⁷ For the purposes of paragraphs 23(1)(a) and (b) of the NSI Act, national security information, must be stored, handled, destroyed, accessed and prepared in accordant with the *Requirements for the Protection of National Security Information in Federal Criminal Proceedings and Civil Proceedings*. The requirements are given effect by regulations 4A(1) and 4C(1) of the NSI Act. The prescribed ways of storing, handling,

152. The Schedule 16 amendments to subsections 19(1A) and (3A) of the NSI Act would provide that a court may make an order inconsistent with the Act or Regulation where the Attorney-General or a representative applies for the orders. The Explanatory Memorandum to the Bill provides:

This Schedule amends section 19 to allow the court to make an order enabling the parties and the Attorney-General to agree to depart from the NSI Regulation in relation to particular national security information.⁸⁸

153. 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.

Recommendation:

- **The Bill be amended to clarify that the application by the Attorney-General or a representative of the Attorney-General for the orders under subsections 19(1A) and (3A) is based on an arrangement between the parties about how to protect information in the proceeding. This would accord with the intention of the amendments as set out in the Explanatory Memorandum.**

Taxation Administration Act 1953 (Schedule 17)

154. Section 355-25 of the Taxation Administration Act 1953 (Cth) (TAA) creates an offence, punishable by two years imprisonment, prohibiting the disclosure of protected information by taxation officers. Table 1, at subsection 355-65(2) of Schedule 1, sets out the exceptions to the offence provision for disclosures relating to social welfare, health or safety.

155. The amendment to the TAA would create an additional exception to the offence provision, authorising taxation officers to disclose information to **any** Australian government agency for purposes of preventing, detecting, disrupting or investigating conduct that relates to a matter of security as defined by section 4 of the ASIO Act.

156. The rationale for such an expansion is set out in the Explanatory Memorandum to the Bill as follows:

The amendment will supplement existing exemptions and is designed to ensure that relevant information can be disclosed for listed purposes to Australian government agencies for the national security functions of the agency, including member agencies of the Australian Counter-Terrorism Committee and National Disruption Group, both of which have roles relating to the prevention, detection, disruption and investigation of terrorism and related conduct.⁸⁹

destroying or accessing national security information do not apply if the information is the subject of orders under sections 22 or 38B of the NSI Act. These provisions permit the court to give effect to an arrangement between the parties allowing a departure from the requirements.

⁸⁸ Explanatory Memorandum, Counter-Terrorism Bill (No. 1) 2015, 131.

⁸⁹ Explanatory Memorandum, Counter-Terrorism Bill (No. 1) 2015 (Cth), 134.

157. The purpose of disclosure acts as a limitation on when information may be disclosed. Nonetheless, a question arises as to whether the limitations are proportionate in light of the fact that such disclosures may be made to any Australian agency.
158. Consideration should be given to whether a more appropriate way to achieve the objective while balancing privacy concerns would be to list the agencies in the Bill or in regulations rather than leave it open-ended. Alternatively, the Privacy Commissioner's views should be obtained on the TAA amendments.

Recommendation:

- **Consideration should be given to whether the range of agencies to which taxation officers will be able disclose information for the purposes of the Bill, should be listed in the Bill or in regulations. Alternatively, the Privacy Commissioner's views should be obtained on the TAA amendments.**

Retrospectivity

159. Generally, the Law Council is opposed in principle to the enactment of legislation with retrospective effect, particularly where this may have significant implications on a person's liberty. Such objection has informed the approach of courts to the interpretation of statutes, such that courts will not readily interpret a statute as having retrospective effect unless the intention of the legislature to do so is clear. The rule of law requires that the law must be readily known and available, and certain and clear.⁹⁰
160. Another justification provided for the principle against retrospectivity has been that it protects a public interest. In *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, Toohey J stated:

Prohibition against retroactive laws protects a particular accused against potentially capricious state action. But the principle also represents a protection of a public interest. This is so, first, in the sense that every individual is, by the principle, assured that no future retribution by society can occur except by reference to rules presently known; and secondly, it serves to promote a just society by encouraging a climate of security and humanity.⁹¹

161. The amendments in Schedule 15 of the Bill relating to the NSI Act would be retrospective – i.e. they would apply to control order proceedings commenced before the commencement of Schedule 15.⁹² If the new measures are to apply to proceedings already on foot, there should be a return application effectively seeking a new control order relying on the new powers. This would ensure court supervision of the application as a whole.
162. The effect of the amendments in Schedule 2 of the Bill would mean that children between 14-17 may be subject to control orders for conduct engaged in before commencement of the Bill. In accordance with the above general principles, conduct

⁹⁰ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), Principle 1.

⁹¹ *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at [107]-[108] (Toohey J).

⁹² Item 27 in Schedule 15 of the Counter-Terrorism Bill (No. 1) 2015 (Cth).

that could not have supported the making of a control order prior to the commencement of the Bill should not be taken into account.

163. However, the Law Council acknowledges that:

- (a) the legislation is for the purpose of temporary restriction of liberty and not a conviction or punishment of an offence;
- (b) antecedent conduct must in any event be sufficiently connected to one of the limited purposes, such as, the prevention of a terrorist act, to justify the making of a control order.

164. In those circumstances, additional safeguards do operate as a counter-balance to the potential retrospective application.

Recommendation:

- **If the new measures to the NSI Act are to apply to proceedings already on foot, there should be a return application effectively seeking a new control order relying on the new powers.**

General Oversight Recommendations

Recommendations:

- **If the enhanced powers in the Bill are to proceed, they should be accompanied by enhanced reporting requirements as to when they were used, why they were used and whether they were effective.**
- **The expanded powers should be subject to appropriate sunset clauses and reviews, which would consider the reported information.**
- **The Committee should inquire as to whether the amendments in the Bill are likely to practically increase the workload of the Ombudsman and, if so, the Ombudsman's annual budget should be supplemented to the extent required to provide for the increased oversight arrangements associated with the Bill.**
- **The INSLM should be required to review the operation of the amendments within 3 years of their commencement. The Committee should inquire as to whether the amendments in the Bill are likely to practically increase the workload of the INSLM in light of current review requirements proposed by other recent tranches of national security legislation. If so, the INSLM's annual budget should be supplemented to the extent required to provide for the increased oversight arrangements associated with the Bill.**

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive as at 1 July 2015 are:

- Mr Duncan McConnel, President
- Mr Stuart Clark AM, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Mr Morry Bailes, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.