



**Submission to Parliamentary Joint Committee on  
Intelligence and Security**

**Inquiry into the Counter-Terrorism Legislation  
Amendment Bill (No. 1) 2015**

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## Introduction

1. The Muslim Legal Network (NSW) welcomes the opportunity provided by the Parliamentary Joint Committee on Intelligence and Security (the **Committee**) in providing this submission on the *Counter-Terrorism Legislation Amendment Bill* (No. 1) 2015 (the **Bill**).
2. The last 18 months have seen extensive and significant changes to the counter-terrorism laws. The Muslim Legal Network (NSW) has been actively involved in the consultations with respect to those laws. We have stated previously that the limited time provided to complete submissions to bills has been an impediment to responding to them.
3. Whilst this inquiry has provided comparatively more time for response than other recent bills, it is submitted that the time provided was still inadequate to respond meaningfully and thoroughly to each aspect of the Bill.
4. This Bill is technical and contains significant changes to the laws involving children and the introduction of new offences, including advocating genocide. The Muslim Legal Network (NSW) is a volunteer organisation whose members work outside business hours towards the organisation. Furthermore, the Public Hearing for this inquiry is being held within a few days of the due date of these submissions. Due to the time restraints and these limited resources, we have not had adequate time to consult with the Muslim community and other civil advocacy organisations about the more practical aspects to the Bill and how effectively it will address radicalisation of young people. We believe such consultations would have assisted our submissions a great deal. Consequently, we note that silence to any portion the Bill is not necessarily acceptance of it, but rather, it is our inability to respond to it with the time restraints in lieu of other more obvious or pressing matters contained within the Bill.
5. During the last 18 months, Muslim leaders and organisations have been actively consulting with the Government to raise their concerns about the ineffectiveness of the recent amendments to counter-terrorism laws. These laws, have to date, only been applied to the Muslim community. With the rise of extremist groups such as, Reclaim Australia and increasing incidents of Islamophobia in Australia, the Muslim community is deeply concerned by the social divisiveness that is growing in Australia. Such divisiveness is enforced by the use of these laws. With Tony Abbott MP making extremely offensive and derogatory remarks this week towards Muslims and their

faith, coupled with the announcement of this Bill and the highly publicised counter-terrorism raids in Western Sydney, the Muslim community is yet again placed in the spotlight and their belonging in Australia is being questioned.

6. It is accepted that during these 18 months we have also seen the tragedy of the Parramatta Shooting on 2 October 2015. Farhad Jabbar was unknown to Police. None of the amendments in this Bill would have assisted in preventing that incident.
7. Whilst there is no doubt that the law needs to protect the safety of all Australians and reflect the concerns of the time, the laws need to be reasonable, effective, proportionate and consistent with our values as a society. The laws need to target the gathering of evidence that would be admissible in a court of law, against someone who is a threat to national security, rather than enabling lower thresholds. Furthermore, it must be noted that a purely legislative response to the issue of young people who may be prone to violent behaviour will never be effective. The approach must be consultative, inclusive and one which directly addresses the issues that young people who may be prone to violent behaviour face in line with already established principles regarding children in criminal proceedings.

## Schedule 1 – Receiving Funds for Legal Assistance

8. The Muslim Legal Network (NSW) supports the amendments proposed by Sections 1 & 2 in Schedule 1 of the Bill. It is essential that any person who is a defendant in criminal proceedings, or is expected to face consequences due to the application of criminal law, has adequate legal representation. The inclusion of the exception of any funds received for the provision of legal services to such organisations from criminal prosecution ensures their right to fair trial.

## Schedule 2 – Control Orders for Younger People

9. There are a number of significant changes being proposed by this Schedule, most notably, the lowering of age of the subjects of control orders to 14 years and importing aspects of the *Family Law Court Act 1975* (Cth) into the control order regime.
10. The proposal to lower the requisite age of control orders to 14 is deeply concerning to the Muslim Legal Network (NSW).
11. The Muslim Legal Network (NSW) is concerned about the practical effects these amendments will have on 14-16 year old subjects. These amendments have the potential to severely interfere with a child's liberty, development and sense of identity within the Australian society.
12. The Explanatory Memoranda (the **EM**) raises questions about both the efficacy and efficiency of the proposed amendments, At page 14, the EM states that the purpose of the control order regime is to protect the public from a terrorist act. The EM further states that this supports the assertion that the orders are preventative, not punitive.
13. It is submitted that despite the intention of the orders to be preventative; imposing obligations, prohibitions and restrictions on a person will, practically, have a punitive effect. This is clear from the fact that the control orders that have been issued so far have been more onerous than bail conditions for accused persons charged with criminal offences.
14. The punitive effect is further emphasised by the fact that breaching control orders carries a maximum penalty of 5 years. In practical terms, this means that if a child subject to a control order breaches that order, they are potentially open to receive a sentence of up to 5 years of imprisonment. This is for breaching an order imposed without charge and without conviction. There is no distinction between adults and children in this regard. This raises serious questions about how a 14 year old child, if placed in custody as a result of the breach, will avoid institutionalisation after spending a significant period in their teens in custody. Not to mention, the debilitating effect that will have on the child's sense of Australian identity and connection to community.
15. In support of the amendments, the EM states that the age to which control orders would apply (14) is higher than the age of criminal responsibility (10). It is submitted that this is irrelevant to control orders. That is because criminal prosecutions are subject to a higher standard of proof, which does not apply to the control order

regime. Furthermore, children aged between 10 and 14 years are subject to the rebuttable presumption of *Doli Incapax*.

### **The proposed introduction of the Family Law Court Provisions**

16. The proposed Section 104.28AA seeks to import sections 68L and 68LA from the *Family Law Court Act 1975 (Cth)* into the *Criminal Code Act 1995 (Cth)*. This involves making it a requirement to have a court appointed advocate in control order proceedings involving children. It is proposed that these advocates are to have the “best interests” of the child. The court appointed advocate is not the child’s legal representative, does not take instructions from the child and may disclose information if they form they view that it is in the “best interests” of the child. It appears from the EM that the justification for this amendment is so that control orders will engage the Covenant of the Rights of the Child (CRC), particularly, Article 12, which the relevant sections in the *Family Law Court Act 1975 (Cth)* also seek to do.
17. However, there is stark difference between the involvement of children in Family Court proceedings to those in the criminal jurisdiction. In the Family Court, the child is never a party to the proceedings and is generally not spoken to by the Judge, except in rare circumstances. It is a completely different circumstance when the child is an accused to an offence or potentially an accused to a criminal offence (as is the case with control orders.) Furthermore, a child being charged with criminal offences is a very different circumstance to the child being an affected party in parenting orders.
18. It also raises the question of the need to have a court appointed advocate when the child is legally represented and is capable of giving instructions. Under NSW Care and Protection law, “best interest” lawyers are usually only appointed when children are under 12 years or are otherwise not capable of giving proper instructions. Children who are 12 years or over are presumed of being capable of giving proper instructions and are represented by a ‘direct legal representative’.
19. Under the Bill, the court appointed advocate can disclose to the court certain information that they believe is in the “best interests” of the child. This is a clear violation of established legal principles of the ‘right to silence’ and the right against self-incrimination.
20. The Muslim Legal Network (NSW) submits that, rather than operating as a safeguard that adheres to our international obligations, the proposed court appointed advocates will practically assist investigative authorities obtain information that should ordinarily be gained from pro-active investigations. The attainment of such information is not possible in control order proceedings against adults. Therefore, the Muslim Legal

Network (NSW) submits that rather than protecting the vulnerability of a child, the new provision in practical terms, exploits that vulnerability.

21. We therefore, on the information provided, are not satisfied that a court appointed advocate is appropriate in circumstances when the child is capable of giving instructions to a direct representative.
22. We further add that it be made a requirement that all children subject to a control order application must have legal representation if they are capable of providing instructions to a direct representative in lieu of a court appointed advocate.

### **Inconsistent approach taken towards children compared with existing Children’s criminal legislation**

23. The proposed amendments do not include accepted principles in legislation concerning children in criminal proceedings. This includes:

- Accepting that because of their state of dependency and immaturity, children require guidance and assistance;<sup>1</sup>
- That the penalty imposed on a child or an offence should be no greater than that imposed on an adult who commits an offence of the same kind;<sup>2</sup>
- That children be assisted with their reintegration into the community so as to sustain family and community ties;<sup>3</sup> and
- The need to minimise the stigma to the child resulting from a court determination.<sup>4</sup>

24. The Muslim Legal Network (NSW) submits that these new provisions mark a departure in the approach usually taken towards children in criminal proceedings and is concerned by this. To restrict the liberty of any child is not a slight action. Let alone, in the case where investigators are without sufficient evidence to charge the child. Therefore, if control orders are to be applied towards children, we submit that factors, such as the above, should be incorporated to ensure that a consistent approach is taken towards children in criminal proceedings.

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<sup>1</sup> *Children (Criminal Proceedings) Act 1987 (NSW)*, section 6(b)

<sup>2</sup> *Ibid*, Section 6(e)

<sup>3</sup> *Ibid*, Section 6(f)

<sup>4</sup> *Children Youth and Families Act 2005 (VIC)*, s362(1)(d)



## **Other amendments concerning court appointed advocates and service on parents and guardians**

25. The Muslim Legal Network (NSW) strongly opposes the inclusion of the court appointed advocate in proposed sections 104.12, 104.12A, 104.14, 104.17, 104.18, 104.19, 104.20, 104.23 and 104.26. Service of such documents should only be made on the young person's parent or guardian or their legal representative. Young people are dependent and require further assistance and guidance to be able to comply with such directions. Out of fairness to the child and to ensure his or her compliance with the order, it should only be served upon his or her guardian or legal representative. Consequently, the requirement to "take reasonable steps" is opposed by the Muslim Legal Network (NSW) and it is submitted that it be replaced with the requirement the parent or guardian must be served to ensure the child is given clear opportunity to comply with the order.

### **Are control orders keeping us safer?**

26. The previous Independent National Security Legislation Monitor, Brett Walker SC concluded in his 2012 annual report that there was no evidence that the control orders issued against David Hicks and Jack Thomas had left Australia appreciably safer nor were they reasonably necessary for the protection of the public from a terrorist act.<sup>5</sup> Furthermore, control orders have not been proven to assist in the prosecution of terrorism offence, but rather act as an impediment to it.<sup>6</sup>

27. Since then, a further four control orders have been issued. This includes two that involve non-publication orders. The four control orders that are known to the public involve the following circumstances:

- a) **Jack Thomas:** the control order regime was evoked after Thomas' acquittal of terrorism offences on the basis that it would substantially assist in preventing a terrorist act and that Thomas had received training from a listed terrorist organisation.
- b) **David Hicks:** the control order regime was evoked after his acquittal of terrorism offences on the basis that would substantially assist in preventing a terrorist act and that Hicks had received training from a listed terrorist organisation. A control order was confirmed on the basis that others could exploit Hicks for their own terrorist objectives. No criminal charges were ever brought against Hicks.

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<sup>5</sup> INSLM Annual Report 2012, page 14

<sup>6</sup> INSLM Annual Report 2012, page 26

**c) Ahmed Nazimand:** A control order was made after Nazimand was arrested and released without charge.

**d) Harun Causevic:** A control order was issued after terrorism charges were against Causevic were withdrawn.

28. The EM states that because only 6 control orders have been issued to date “reflects the policy intent that these orders do not act as a substitute for criminal proceedings” Despite this assertion from the EM, the Muslim Legal Network (NSW) submits that the above cases are clear examples of control orders being used in lieu of criminal prosecutions where there is clearly insufficient evidence to lay criminal charges. This is due to the civil standard of “balance of probabilities” being applied to the regime. Furthermore, despite the fact that the regime has only been used six times to date, does not limit the extent to which it may be used in the future. The fact is, there are no safeguards to protect its limited use. The discretion is wide and open to be misused. The EM itself asserts that there is an expectation that the number of control orders will increase in the coming years.

29. Previous INSLM, Brett Walker, has stated that *“the notion of control orders for 14 year olds is no more tested than control orders, really, for anyone. There’s simply no experience from which one could say, ‘this is going to make us safer.’”*<sup>7</sup>

30. When the proposal to lower the age of control orders to 14 was first introduced, Prime Minister Malcolm Turnbull stated that the amendments were being considered for some time and were not a response to the 2 October shooting in Parramatta.<sup>8</sup> This is in contradiction to the EM memorandum that refers to the Parramatta shooting heavily to justify the change in requisite age. The Muslim Legal Network (NSW) submits that the Parramatta shooting is not a pertinent example – Farhad Jabbar was unknown to authorities and would have never been subject to a control order, even if it were legal.

31. It is, with respect, counterproductive and misguided to form the view that we will be kept safe from such radicalisation by meaningfully restricting the liberty of a child without sufficient evidence to charge him or her. It is a well-established principle that rehabilitation is to be the ultimate focus of any approach when dealing with children who have committed offences. This accepts that, due to the child’s age, a level of guidance and assistance is required. The control order regime, if applied to children, will be completely void of this. It will make possible to place a curfew of 12 hours on a

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<sup>7</sup> <http://www.abc.net.au/lateline/content/2015/s4331116.htm>

<sup>8</sup> <http://www.skynews.com.au/news/top-stories/2015/10/13/george-brandis-defends-new-terror-laws.html>

child or placing a tracking device on them. The reality is, the reduction of any threat that radicalised children may bring, goes hand in hand with their rehabilitation and connection to community and greater society. Therefore, to approach this issue in such a way is counter-productive in the long-term.

32. We therefore, oppose the proposal to lower the age for control orders to children of 14 years of age.

### **Length of control orders**

33. The length for control orders are 3 months, however, this does not prevent the making of successive orders (s104.28(3)). The Muslim Legal Network (NSW) submits that if the control order regime is to apply for young people, that it be limited to 3 months (without renewal). This is to emphasise the seriousness of imposing such restrictions on children to issuing authorities. It is submitted that a period of 3 months is sufficient time to build a prima facie case against an accused that would warrant the initiation of criminal charges.

## Schedule 3 – Control Orders and Tracking Devices

34. The proposed amendments seek to enforce on persons subject to control orders additional responsibility with respect to the maintenance, upkeep and reporting of any mal-operation of the subject tracking device.
35. The Muslim Legal Network (NSW) submits that there is no demonstrated need for the amendment given the present Control Order regime already places significant responsibility upon the persons subject to the Order. Specifically, where the Control Order and potential subsequent tracking device apply to a minor, they may not have the ability or capacity to assess if the operation of the device is defective or requires reporting of a potential fault within 4 hours as described in the proposed amendment at 104.5(3)(3A)(e). This is also not a responsibility that could be transferred to a parent or guardian of the child as it would be onerous and impractical.
36. This is particularly relevant where it is demonstrated that tracking devices applied to any persons subject to a Control Order or even other bail conditions may be faulty as a result of manufacturing processes. This was aptly demonstrated in the case of Mr Ron Medich in 2012 where it was found the monitoring bracelet had malfunctioned.<sup>9</sup>
37. What is also of concern is that the amendment seeks to provide at least one AFP member with the ability to take specified steps to ensure the relevant device is operating properly (104.5(3)(3A)(d)) and also for the AFP member “to enter one or more specified premises for the purposes of installing any equipment necessary for the operation of the tracking device” (104.5(3)(3A)(e)).
38. Whilst the Muslim Legal Network (NSW) appreciates the requirement for the upkeep and adequate operation of tracking devices, the section could provide AFP officers with the ability to enter into various premises, including perhaps a school, to adjust, monitor or install equipment required for the operation of the tracking device. In circumstances where the tracking device is attached to a minor or someone who may not be charged with any offence, there is no doubt an impact on the mental well being of the subject individual. The impact on schooling and/or work conditions is immeasurable and is likely to damage community relationships and partnerships.

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<sup>9</sup> “Following in Medich’s Footsteps, confusion reigns over tracking devices”, Sydney Morning Herald online, <http://www.smh.com.au/nsw/following-in-medichs-footsteps-confusion-reigns-over-tracking-devices-20120529-1zhgx.html>

39. A more practicable approach would be that any monitoring, adjustment or maintenance be conducted in a private place such as police station.
40. Ultimately, however, in circumstances where an individual is subject to a control order that arbitrarily restricts movements, it is unreasonable to impose additional obligations on the individual concerning the tracking process should this be imposed by a court.
41. Currently, the definition of 'issuing court' in the *Criminal Code Act 1995* (Cth) means the Federal, the Federal Circuit Court and the Family Court. However, the amendments seek to amend the provision to exclude the Family Court of Australia which the explanatory memorandum has explained fairly conclusively advising that the other two Courts have the power and functions to deal with criminal law and counter-terrorism matters while the Family Court does not exercise this function and is an anomaly being part of the definition.

## Schedule 4 – Issuing Court for Control Orders

42. Currently, the definition of 'issuing court in the *Criminal Code Act 1995 (Cth)* means the Federal, the Federal Circuit Court and the Family Court. However, the amendments seek to amend the provision to exclude the Family Court of Australia which the explanatory memorandum has explained fairly conclusively advising that the other two Courts have the power and functions to deal with criminal law and counter-terrorism matters while the Family Court does not exercise this function and is an anomaly being part of the definition.
43. Whilst this amendment seems to be logical from an initial glance, the Muslim Legal Network (NSW) has simply not had sufficient time to consider the broader implications of this removal and is unable to submit conclusively on it.
44. We note that the proposed amendments to Schedule 2 involve the imposition of the *Family Court Act 1975 (Cth)* into criminal legislation and require further time to consider the implications of this amendment.

## Schedule 5 – Preventative Detention Orders

44. The purpose of a preventative detention order is to:
- a. *to allow a person to be taken into custody and detained for a short period of time in order to:*
    - (a) *prevent an imminent terrorist act occurring; or*
    - (b) *preserve evidence of, or relating to, a recent terrorist act.*<sup>10</sup>
45. The existing legislation focuses upon an AFP member and issuing authority when applying for and/or issuing a preventative detention order based on reasonable grounds that an individual will engage in ‘a terrorist act’, possesses a thing that is connected with the preparation of ‘a terrorist act’ or has done an act in preparation of ‘a terrorist act’.
46. The proposed amendments focus upon lowering the threshold for applying for and/or issuing a preventative detention order from ‘a terrorist act’ to ‘an imminent terrorist act’. The existing legislation provides for the AFP member and/or issuing authority significant powers in applying for and/or issuing a preventative detention order on the basis of reasonably suspecting that one will engage in ‘a terrorist act’. The effect of lowering the threshold will impede upon the fundamental right to be at liberty on the basis of a subjective threshold standard of ‘an imminent terrorist act’.
47. The Muslim Legal Network (NSW) submits that lowering the threshold from ‘a terrorist act’ to ‘an imminent terrorist act’ may potentially open up the possibility of granting a power which can be based on criteria which is significantly subjective, therefore criminalising an individual on the basis of a perceived ‘imminent terrorist act’ as opposed to a higher threshold of engaging in ‘a terrorist act’.
48. The Muslim Legal Network (NSW) position is that if the AFP member had sufficient evidence of ‘an imminent terrorist threat’, the individual should be arrested and charged. If however, the evidence is not sufficient in arresting and/or charging an individual in respect of a criminal offence, it would be unnecessary for the AFP member to apply for a preventative detention order on the basis of an ‘imminent terrorist act’.
49. To remove an individual’s freedom on the basis of a perceived ‘imminent terrorist act’ as defined by the amendments by placing that individual in custody, even for a short

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<sup>10</sup> *Criminal Code Act 1995 (Cth) ss105.1.*

period of time, undermines the fundamental individual right to liberty. We are therefore, opposed to this amendment.





## Schedule 7 – Application of the Criminal Code Act

### **The Presumption against retroactive laws: s 106.7 Application provision for certain amendments in the *Counter-Terrorism Amendment Act (No. 1) 2015***

54. The Muslim Legal Network (NSW) raises concerns about the practical effects the amendments proposed by Schedules 2 & 3 would have on Australian citizens' fundamental rights, particularly the rights of children. The amendments proposed by Schedule 7, specifically s 106.7(1)<sup>11</sup>, add to those concerns. The insertion of s 106.7(1) would give the amendments proposed by Schedules 2 & 3 retrospective effect. The EM sets out:

New subsection 106.7 (1) provides that the amendments to the control order regime made by Schedules 2 and 3 apply to an order made under Division 104 after the commencement of this section where the order is requested after commencement, and whether the conduct in relation to which that request is made occurs *before or after commencement* [**own emphasis**]. Schedules 2 and 3 amend Division 104 to permit control orders to be imposed on persons younger than 16 years of age, and to impose certain obligations on a person required to wear a tracking device under a control order, respectively.

55. It is a well-established presumption that laws do not apply retrospectively. The criminal law "should be certain and its reach ascertainable by those who are subject to it"<sup>12</sup>. Laws that have retrospective effect make the law ambiguous and less reliable. Objections to retrospectively-applied laws

*... [H]ave their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal*

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<sup>11</sup> [Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill \(NO. 1\) 2015](#), 64 [para. 389].

<sup>12</sup> [Director of Public Prosecutions \(Cth\) v Keating](#) (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

*sanction; a choice made impossible if conduct is assessed by rules made in the future.*<sup>13</sup>

56. This position echoes Article 15 of the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>14</sup>, which Australia has signed and ratified.

57. Yet there is no express or implied prohibition on the making of retroactive laws in the *Australian Constitution*<sup>15</sup>. That principle was established in the case of *R v Kidman*<sup>16</sup>, in which the High Court found that the Commonwealth Parliament had the power to make laws with retrospective effect. Subsequent cases have affirmed that principle, notably *Polyukhovich*, in which McHugh J stated:

*...[N]umerous Commonwealth statutes, most of them civil statutes, have been enacted on the assumption that the Parliament of the Commonwealth has power to pass laws having a retrospective operation. Since Kidman, the validity of their retrospective operation has not been challenged*<sup>17</sup>

### **The Principle of Legality**

58. Nevertheless, the retrospective application of s 106.7 is a serious issue. While the operation of s106.7 does not offend a constitutional principle, it is tolerably clear that it offends the principle of legality.

59. The principle of legality is a principle of statutory interpretation that gives some protection to certain traditional rights and freedoms<sup>18</sup>. Courts pursue this principle during the process of statutory interpretation, by presuming that Parliament did not intend to create offences with retrospective application, unless this intention was made unambiguously clear.

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<sup>13</sup> *Polyukhovich v Commonwealth* ('*Polyukhovich*') (1991) 172 CLR 501, 608 (Toohey J).

<sup>14</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 15.

<sup>15</sup> Freedoms Inquiry, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Interim Report 127)* (3 August 2015) [9] Australian Law Reform Commission.  
<<https://www.alrc.gov.au/publications/alrc127>>

<sup>16</sup> *R v Kidman* (1915) 20 CLR 425 (Higgins J).

<sup>17</sup> (1991) 172 CLR 501, 718 [23].

<sup>18</sup> Freedoms Inquiry, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Interim Report 127)* (3 August 2015) [1.28] Australian Law Reform Commission.

60. This principle of legality is as well-established as the principle set out in *R v Kidman*. Early Australian authority for it can be found in *Potter v Minahan*<sup>19</sup>; contemporary expression of the principle can be found in *Re Bolton; Ex Parte Beane*:

*Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation*<sup>20</sup>.

61. The High Court has identified the rights and freedoms the principle of legality encompasses. In *Momcilovic v The Queen*, Heydon J said such rights included, *inter alia*:

*... [T]he non-retrospectivity of statutes extending the criminal law; the non-retrospectivity of changes in rights or obligations generally.*<sup>21</sup>

62. The amendments proposed in Schedule 7 lack the requisite clarity to justify their retrospective operation. It is unclear from the text of the Bill how far what “reach” this section will have. The EM gives the following example:

*...[A] request could be made to make an interim control order in relation to a young person 15 years of age after the commencement of this section based on information about the young person’s conduct that occurred before the commencement.*<sup>22</sup>

63. However, neither the text of the Bill, nor statements in the Explanatory Memorandum clarify what the age threshold is for the child’s “conduct that occurred before the commencement [of this section]”. For example, will an 11 year old child’s potentially offensive present conduct, taking place as it does prior to the commencement of s 106.7, qualify as conduct that can be used in a request for an Interim Control Order, once the commencement is enacted and the child is 14 years of age? Is this the legislature’s intention? It might be possible to construe the text of the s 106.7(b) that

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<sup>19</sup> ‘It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used’: *Potter v Minahan* (1908) 7 CLR 277, 304.

<sup>20</sup> *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523. This was quoted with approval in *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

<sup>21</sup> (2011) 245 CLR 1, [444] (Heydon J).

<sup>22</sup> [Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill \(No. 1\) 2015](#), 64 [para. 391].

way. However, the text is unclear, and so is Parliament's intention in introducing s 106.7(b).

64. In summary, there is a clear presumption that firstly, parliament does not create laws with retroactive effect and secondly, where parliament does create such laws, in the text of the statute clearly expresses its intention to do so. In *Maxwell v Murphy*, Dixon CJ said:

*[T]he general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events.*<sup>23</sup>

65. The Muslim Legal Network (NSW) submits that text of s 106.7(b) operates retrospectively. In doing so it has abrogated or suspended a fundamental right, namely the right of a child to know whether or not particular conduct they engage in *prior to the commencement* of s 106.7 will be used *after the commencement of* s106.7 as the basis for a request for an interim control order under that section. What is more, it is not clear to which age group this section applies. In its current incarnation, the wording of the text is so inexact that it potentially covers not only children aged 14-16, but children younger than 14 years of age: all that is needed to request a control order is that the child be aged 14 years or older *after* the commencement of s 106.7, while "conduct in relation to which that request is made [occur] before or after [the] commencement of s 106.7.
66. The Muslim Legal Network (NSW) recommends that s 106.7 of "Schedule 7 – Application of amendments of the Criminal Code" be dispensed with for want of clarity and by extension, the section's offensiveness to the principle of legality.

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<sup>23</sup> (1957) 96 CLR 261, 267 (Dixon CJ).

## Schedule 8 – Monitoring Compliance with Control Orders

### **3ZZJA Simplified outline of this Part**

- If a control order is in force in relation to a person, and the person has a prescribed connection with premises, a constable may enter and search the premises if:
    - (a) the person is the occupier of the premises and consents to the entry; or
    - (b) the entry is made under a monitoring warrant.
  - If a control order is in force in relation to a person, a constable may conduct an ordinary search or a frisk search of the person if:
    - (a) the person consents to the search; or
    - (b) the search is conducted under a monitoring warrant.
  - A search must be for any of the following purposes:
    - (a) the protection of the public from a terrorist act;
    - (b) preventing the provision of support for, or the facilitation of, a terrorist act;
    - (c) preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country;
- (d) determining whether the control order has been, or is being, complied with.

67. Schedule 8 of the proposed Bill is voluminous in its length and technical in its application. It is clear that this portion of the proposed Bill has been under consideration for some time and as such the Muslim Legal Network (NSW) highlights again to the Committee the short amount of time there has been available to properly consider the proposed Bill. The EM states that:

- a. *“There are impediments to monitoring a person’s compliance with a control order imposed by an issuing court on the person. These amendments amend the Crimes Act to establish a new regime for monitoring the compliance of individuals the subject of a control order through monitoring search warrants,*

*with a threshold targeted to monitoring. The Bill establishes complementary regimes for monitoring compliance with control orders under the TIA (Telecommunications interception and access) Act and SD (Surveillance Devices) Act.*

- b. When the delayed notification search warrant regime was inserted into the Crimes Act in 2014, the threshold for issue required, not only the applicant (eligible officer), but also the police officer approving the application (chief officer) and the person considering whether to approve the warrant (eligible issuing officer) to suspect and believe certain things on reasonable grounds. These amendments amend the delayed notification search warrant regime to clarify that while the eligible officer must suspect and believe those matters on reasonable grounds, the chief officer and eligible issuing officer are not required to personally hold the relevant suspicions and belief. Rather, they must be satisfied that there are reasonable grounds for the eligible officer to hold those suspicions and belief. “*

68. For the sake of brevity, we will not discuss each provision in the proposed schedule 8, rather highlight the concerns which are most obvious held by the Muslim Legal Network (NSW) in relation to the enhanced powers sought under the monitoring warrant regime.

69. At a high level we note that the provision of monitoring warrants on a person subject to an interim control order will allow:

- c. the monitoring of an individual where there exists a mere “possibility” that the person has, is or will engage in a terrorist attack; or possibly provided, is providing or will provide support for a terrorist attack; or possibly has provide, is providing or will provide support for engagement in a hostile activity in a foreign country; or the possibility the person has facilitated, is facilitating, or will facilitate, the engagement in a hostility in a foreign country; or the possibility that the person has contravened, is contravening, or will contravene, the control order;
- d. the monitoring of any premises where the individual is described as a “prescribed connection” with which can be as broad as a place where the person conducts voluntary work;
- e. the installation of monitoring devices and the removal or materials with the consent of the occupier of the premises;
- f. the frisk searching and questioning of persons at a subject premises concerning the person’s knowledge of the individual’s relationship to terrorist

activities; and

- g. the issuing officer may be kept in the dark over the reasons for the application for the monitoring warrant where the constable is satisfied that the warrant is required to be issued on the person subject to the interim control order or the premises with a prescribed connection to the individual should they be satisfied the disclosure of such is likely to prejudice national security.

70. As a starting proposition, it is disingenuous to submit in the proposed bill that the Simplified outline is limited to what is described below when it is clear that the insertion of Part IAAB seeks more than simply an exercise in “monitoring compliance of control orders”. It is clearly designed to operate as an investigative extension of the control order provisions.
71. One should be cognisant that the control order regime originally was not designed to be punitive given that it is applied to an individual who has not been charged with any offence, rather has been placed under the interim control order potentially at a mere suspicion of potential involvement in a terrorist act. We also note that the application of a control order, under the present regime, allows the AFP to exclude sensitive national security information at each stage of the control order process, limiting the individuals’ ability to challenge the imposition of a control order.
72. The control order itself is far more onerous than matters that are subject to bail conditions and take away from courts the ability to apply procedural fairness to an individual suspected of a crime. This is particularly relevant where the application for a monitoring warrant under the Bill provides for there to be a complete exclusion of information under “national security” provisions. This application of what has commonly been referred to as “secret evidence” and travels not only through the amendments to the application of the control order but is also echoed in the application for a monitoring warrant (sections 3ZZOA(6) and 3ZZOB(6)).
73. The application for a monitoring warrant as proposed also results in a lowering of the standard as to what knowledge an issuing officer will be required to have in terms of the offence which has occurred in order to issue the monitoring warrant. The offence would not have to have been committed, there simply needs to be a “possibility” that the individual may engage in some activity contrary with the provisions supplied in sections 3ZZOA(4) and 3ZZOB(4) for the issuing officer to be satisfied of the monitoring warrant’s need. It is explained in the explanatory memorandum that this requirement arises from a need to monitor an individual subject to a control order (already an invasive imposition) for the purposes of preventing a person in engaging in a terrorist attack or being involved in the preparation of same.



74. The reality is that Control Orders arbitrarily detain a person who has not been convicted nor charged with any criminal offence by an Executive order i.e an order by the Australian Government and illustrates “...*the inability of judges to protect the community from the erosion of civil rights*”<sup>24</sup>.
75. Control Orders involve “...*the loss of liberty, potentially extending to virtual house arrest, not by reference to past conduct or even by reference to what that person himself might or might not do in the future. It is based entirely in a prediction of what is “reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act, a vague, obscure and indeterminate criterion if there was one....On its face, it is capable of arbitrary and capricious interpretation*”<sup>25</sup>.
76. It is important to appreciate that the imposition of the control order itself is a serious exercise in restricting ones liberty. By allowing the monitoring warrant regime to operate in the manner foreshadowed, the individual subject to a control order as well as bystanders are opened up to searches by the prescribed security agencies conducting the monitoring.
77. This is particularly relevant when reading proposed section 3ZZKE which operates following the entering into premises by a constable (regardless of the mode of entry being consent or by way of a monitoring warrant). The provision a 3ZZKE(3)(b) authorises a constable to:
- h. “require any person on the premises to answer any questions, and produce any document, that is likely to assist in:*
  - i. (c) the protection of the public from a terrorist act; or*
  - j. (d) preventing the provision of support of, or the facilitation of, a terrorist act;*  
*or*
  - k. ...”*
78. The provision at sub section 6 also provides for there to be an offence committed upon refusal of answering questions or production of documents.
79. Whilst 3ZZJD provides a limited protection against self incrimination, 3ZZKE is open to abuse and infringement of an individual’s right to silence where they may not be instructed in such a respect or have available to them the assistance of a legal practitioner. This is particularly intrusive in circumstances where a person in

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<sup>24</sup> Fairall, P and Lacey, W. “Preventative Detention and Control Orders under Federal Law: the Case for a Bill of Rights”. *Melbourne University Law Review*. Volume 31 1076.

<sup>25</sup> *Thomas v Mowbray* (2007) 237 ALR 194 per Kirby J at 291-2.

attendance at a relevant premises may have no contact with the individual subject to a control order. This power is unnecessarily wide and the protections available to do not sufficiently account for the potential issues arising.

80. Taking all these factors into account it is clear that the monitoring warrant provisions can potentially result in the imposition of unreasonable invasions of privacy into the lives of anyone who may be even incidentally connected with an individual the subject of a control order. That persons who may be in the presence of a person subject to a control order without any evidence to suggest any involvement in a criminal offence may be subject to searches, questioning or potential detention (should the person refuse to answer questions) is extraordinary and a severe imposition of ancillary restrictions on persons outside of a control order impacting negatively upon an individuals civil liberties.

81. Even where it is determined that monitoring warrants which are conducted contrary to the imposition of a valid control order, the proposed regime (at 3ZZTC) allows for that information collected to be adduced if it is considered that the evidence was collected in the interest of national security. This section seeks to provide an exemption for circumstances where the evidence was obtained improperly or illegally. Clearly, this is in contradiction with principles espoused in s138 of the Evidence Act.

*l. Section 138 provides a non-exhaustive list of the factors that a court may take into account in conducting the balancing exercise specified in s 138(1).*

*m. Section 138(3) provides:*

*n. Without limiting the matters that the court may take into account under subsection (1), it is to take into account:*

*(a) the probative value of the evidence; and*

*(b) the importance of the evidence in the proceeding; and*

*(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;<sup>[123]</sup> and*

*(d) the gravity of the impropriety or contravention; and*

*(e) whether the impropriety or contravention was deliberate or reckless;*

*and*

- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and*
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and*
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.*

82. As a general submission, the Muslim Legal Network (NSW) takes issue with the introduction of the new “Part IAAB - Monitoring compliance with control orders”. The proposed regime seeks to provide a wide ranging set of circumstances whereby an individual already under the imposition of a control order could:

- b. be monitored at home, school, work, in a vehicle or any frequently attended premises as defined in the section;
- c. be subjected to frequent personal searches where a monitoring warrant on a person or premises is issued;
- d. potentially have no access to evidence/materials/reasons for which an application for the monitoring warrant is applied for; and
- e. have no recourse to challenge improperly or illegally obtained evidence.

83. These few examples are important to illustrate the extent to which the legislation removes the application of procedural fairness or the ability for the individual the subject of a control order to maintain any semblance of a normal life, particularly given that the control order itself is applied without charge and on occasion without disclosing the reasons for its application.

84. Further, the monitoring warrant regime also lowers significantly the threshold for the application of said warrant. The Muslim Legal Network (NSW) submits that the proposed threshold is far too low, particularly in circumstances where the application of the monitoring warrant allows for the non-disclosure of relevant information in the interests of national security.

85. The Muslim Legal Network (NSW) provides the above general objection to the provisions within the Bill providing additional monitoring of individuals subject to control orders. There has been no objectively verifiable evidence which suggests either that such powers will do anything other than further isolating uncharged individuals from the community, remove resources from Australia’s policing presence and ultimately infringing on the rights of persons and places even tangentially connected with an individual on whom a control order exists.

86. The regime contains too few limitations on the provision of the monitoring warrants, immunity for improper issuing of the monitoring warrants and directly contradicts established principles of evidentiary law as well as a general and significant on civil liberties.
87. The Muslim Legal Network (NSW) can only continue to stress the need to have legislation that is effective and proportionate in addressing terrorism.

## Schedule 9 – Telecommunications Interception

88. The proposed amendments in this Schedule will allow agencies to obtain warrants to monitor a person who is subject to a control order, and to detect breaches of the order. This regime will allow agencies to apply to an issuing authority for a TI warrant for the purposes of monitoring compliance with a control order issued under Division 104. It will allow TI information to be used in any proceedings associated with that control order.
89. The proposed schedule of amendments is quite detailed, technical and lengthy in nature. The implications of the amendments are far ranging and raise serious considerations regarding infringements of the privacy of the individual, as well as the use of prejudicial information against an individual in circumstances where a control order is subsequently declared void.
90. We have outlined below the glaring issues we perceive to have arisen from the amendments, although we note that as a whole, the Muslim Legal Network (NSW) believes that any amendments in this area must be approached cautiously, and with the overriding objective that the rights of the individual are not unduly infringed.

### **Item 19 – At the end of section 46**

91. This item inserts three new subsections into section 46 in relation to the issue of telecommunications service warrants. These new subsections permit the issues of a telecommunications service warrant or 'B party' warrants relating to persons subject to a control order.
92. Importantly, subsections 46(4) and (5) set out the tests and matters that a Judge or AAT matter must satisfy themselves of before the issue of a telecommunications service warrant. Essentially, a decision is to be reached by a Judge or AAT member by having regard to a number of prescribed matters. The effect is that the Judge or the AAT member is required to undertake a proportionality test which takes into consideration privacy concerns and the extent to which interception would assist in preventing terrorist and related acts or monitoring compliance with a control order.
93. The Muslim Legal Network (NSW) submits that a proportionality test is not sufficient to address the privacy implications of these amendments. Instead, we would propose that among the range of factors, which a Judge or AAT member is required to consider, the privacy of the individual also forms a part of the consideration so as to satisfy the test for the issue of a telecommunications service warrant.

94. The Muslim Legal Network (NSW) submits that this higher burden of proof is desirable, and gives greater due weight to the protection of the privacy of the individual.

**Item 29 – Subsections 63(1) and (2)**

95. The additions in this item of the Schedule amend section 63 of the Act, which prohibits dealing in lawfully intercepted information or interception warrant information. This amendment aims to ensure that the prohibition on dealing with intercepted information is subject to the operation of new section 299, which permits limited use of information obtained under a warrant relating to an interim control order which is subsequently declared void.

96. The Muslim Legal Network (NSW) submits that as a general position, the prohibition on dealing in lawfully intercepted information or interception warrant information should remain unchanged. In addition, the Muslim Legal Network (NSW) adds that allowing the use of information obtained under a warrant relating to an interim control order, which is subsequently declared void prejudices the rights of the individual and is in violation of the principle requiring that only legally obtained information may be used as evidence against an individual. This principle should not be dispensed with, particularly in circumstances where the liberty and livelihood of an individual are at stake.

97. Instead, the Muslim Legal Network (NSW) submits that where an interim control order is subsequently found to be void, then there should be a prohibition on using any information obtained under a warrant relating to that interim control order.

**Item 37 –79AA**

98. Item 37 inserts a new section 79AA, which provides that information obtained under a warrant relating to a control order that was issued prior to the control order coming into force must be destroyed if the sole purpose, or one of the purposes, of issuing the warrant was to determine whether the person would comply with the control order (or any succeeding control order). This destruction requirement applies unless the chief officer is satisfied that the information is likely to assist in connection with the following matters:

- f. the protection of the public from a terrorist act

- g. preventing the provision of support for, or the facilitation of, a terrorist act, or
- h. preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country.

99. The issues arising from this amendment are that information obtained under a warrant relating to a control order, where the sole purpose of obtaining the information was to determine if the person would comply with the control order, will not be destroyed in circumstances where the chief officer determines (in his discretion) that the information is likely to assist with the few prescribed matters which he is to have regard to.

100. The Muslim Legal Network (NSW) is of the view that leaving this determination at the discretion of the chief officer is problematic, particularly where the chief officer may have a vested interest in showing that the information obtained under such a warrant assists in the prevention or facilitation of a terrorist act.

101. Furthermore, it would seem that the decision to be made by the chief officer is only examined by the ombudsmen under the amendments to sections 83 and 85 of the Act. There seems to be no requirement that a Judge or AAT member, who would normally issue the warrants, review the decision made by the chief officer. This lack of oversight further heightens the possibility that the discretionary decision making by the chief officer may be easily skewed in favour of allowing the use of the information and not giving proper due thought to the violations to the rights of the individual associated with using the prejudicial information in such circumstances. This is of particular concern in circumstances where the information is obtained without charge of a defendant.

102. The Muslim Legal Network submits in the first instance that the chief officer not be provided with this discretion. If however this discretion is to be retained, then the Muslim Legal Network (NSW) requests that there be oversight of the chief officer's decision by a Judge or AAT member.

103. The issue of warrants for telecommunications interception is a complicated area of the law. Many competing factors are involved in decision-making, and there is often a delicate balancing act between protection of the public and the protection of the rights of the individual. It must be remembered however that ultimately, a decision weighing up the competing factors must not prejudice the rights of either the public or the individual, but rather must seek to strike a balance between them. The Muslim Legal Network (NSW) is of the view that the balance has not been attained with these amendments and the rights of the individual are unduly restricted.

## Schedule 10 – Surveillance Devices

104. This schedule of the Bill makes significant changes to the Surveillance Devices Act 2004 (**the Surveillance Devices Act**) in a manner that raises important concerns for civil rights and liberties. The Muslim Legal Network (NSW) notes its apprehensions below and strongly recommends reconsideration by Parliament of these provisions as stipulated in the Bill.

### **Disclosure of information related to approvals**

105. The current legislative regime governing the authorisation and use of surveillance devices, as given in the Surveillance Devices Act, obligates the chief officer of a law enforcement agency to submit annual reports to the Minister which, among other things, entail the number of applications made and approvals given for applications for surveillance (in the form of orders made under the Surveillance Devices Act) to that law enforcement agency in a given year. The Minister is then obliged to table the report in the Parliament.

106. The amendment by insertion of Section 50A in the Surveillance Devices Act, as proposed by the Bill, allows the chief officer of a law enforcement agency to defer the inclusion of such information in this report, that, he believes, may expose whether or not a particular control order warrant is in place. A similar power is given to the Minister in terms of his obligation to table the report in Parliament.

107. The EM to the Bill mentions the primary reason for this is the risk that such information, if disclosed, has the capacity to alarm the person subject to the control order warrant as to his surveillance. This might restrict his movements or communications and the expected valuable information to be gathered by surveillance might, therefore, be jeopardized. While understanding the nature of such concerns, the Muslim Legal Network (NSW) believes that Parliament should consider the negative ramifications of this provision on democratic principles and values.

108. Transparency forms cornerstone of our democracy and its preservation has been one of the primary responsibilities of all Australian governments since the introduction of freedom of information reforms in the 1970s. Its absence undermines the accountability of our Cabinet.

109. Providing an avenue for the Executive to escape disclosure of important information regarding criminal sanctions laid on individuals is deeply concerning as it damages transparency. Lack of information in Parliament means that periodic review



of this newly introduced legislative scheme (i.e. the surveillance of control order subjects) by members of Parliament will not take place.

110. It also means that members of the Public and Media will be unable to access, or report on, this information. This will damage the freedom with which the decision-making process, performance and impartiality of law enforcement agencies can be assessed. Such secrecy regarding decisions that potentially hinge upon basic human rights like the right to protection against arbitrary and unlawful interferences with privacy<sup>26</sup> is undesirable. This right is of particular significance in respect to the proposed control order regime, as the liberty and privacy of individuals as young as 14-year olds could be at stake. We can not stress the need for accountability and transparency, as much as possible, about the control order regime enough as it involves subjects without criminal charges who have been assessed according to a civil standard, rather than a criminal standard.

#### **Use of information obtained under surveillance**

111. The new Section 46A of the Surveillance Devices Act, as proposed by the Bill, provides for the destruction of any records, obtained via surveillance that is conducted to ensure compliance with a control order, that is no longer needed for the prevention of terrorism. This is an appropriate safeguard, which ensures the propriety and use of evidence for the purpose it is obtained for.
112. However, in respect of any information obtained via surveillance under an interim control order, which a court subsequently declares void, the new Section 65B of the Surveillance Devices Act, as proposed by the Bill, allows the storage and use of it. This stands in contrast with, and seeks to undermine, the utility of the safeguard put in place by Section 46A. The combined effect of the operation of the two provisions would be the destruction of information obtained through surveillance conducted in respect of a legitimate control order but potential preservation and use of surveillance information, which was obtained under a 'retrospectively-held' void interim control order.
113. Subsection 65(2) allows the use, communication and publication of information obtained under such interim control orders. This can have the potential of risking the security of or defaming the person previously subject to such interim control orders. Subsections 65(3) & 4 are further concerning as they allow the use of such information as evidence in proceedings related to serious offences. This, as

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<sup>26</sup> Article 17, *International Covenant on Civil and Political Rights*

shown below, can significantly expand powers of law enforcement agencies, increasing the risk for abuse, and further risk the liberty of individuals who are the subject of criminal charges.

114. Pursuant to Subsection 65(4), the information can be used as evidence for proceedings in relation to preventative detention orders. Senior members of the Australian Federal Police hold powers<sup>27</sup> to make initial preventative detention orders. Relying on Subsection 65(4) and utilizing the surveillance information obtained under such interim control orders as described above, AFP may be able to apply for the extension<sup>28</sup> or continuation<sup>29</sup> of preventative detention orders in an easier, and much more robust, manner than before. Preventative detention orders, by definition, restrict the liberty of an individual without affording him the usual procedures and application of criminal charges. Such expansion of Police powers have the risk of significantly hampering vital human rights enjoyed by our society such as the right to freedom of movement<sup>30</sup> and the right to liberty and security and to freedom from arbitrary arrest or detention<sup>31</sup>.
115. Furthermore, granting impunity to the utilization of evidence extracted from surveillance conducted under 'retrospectively-held' void interim control orders reduce the role of courts to decide upon the propriety and allowance of evidence in proceedings<sup>32</sup>.

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<sup>27</sup> Schedule The Criminal Code, *Criminal Code Act 1995* (Cth) s105.8

<sup>28</sup> Schedule The Criminal Code, *Criminal Code Act 1995* (Cth) s15.10

<sup>29</sup> Schedule The Criminal Code, *Criminal Code Act 1995* (Cth) s15.11

<sup>30</sup> Article 12, *International Covenant on Civil and Political Rights*

<sup>31</sup> Article 9, *International Covenant on Civil and Political Rights*

<sup>32</sup> *Evidence Act 1995* (Cth) s138.

## Schedule 11 – New Offence of Advocating Genocide

116. In international law, freedom of expression ‘carries with it special duties and responsibilities’ and may be limited by law if necessary to secure ‘respect of the rights or reputations of others’ or to protect ‘national security ... public order ... public health or morals’.<sup>33</sup> Any restriction on the freedom of expression must not jeopardise the right itself. Rather, it may only be curtailed or restricted to the extent necessary to prevent the greater harm.<sup>34</sup>

117. Schedule 11 of the proposed amendments creates the new offence of advocating genocide. This offence is proposed to exist in addition to the offences contained in Division 80 of the Criminal code setting out the offences for urging or advocating certain conduct, including terrorism.

118. This new offence is said to apply to advocacy of genocide of people who are outside Australia or the genocide of national, ethnic, racial or religious groups within Australia. It applies to advocacy done publicly, but the term ‘publicly’ is not defined.

119. The Muslim Legal Network (NSW) submits that in addition to the reservations set out about this offence below, the failure to define ‘publicly’ is problematic and casts doubt on the application and scope of this offence. This is particularly so, given the various technological platforms that exist today to transmit information to mass audiences.

120. The legislative intent of this provision is drawn from paragraph 687 of the EM which states:

*687. Where there is sufficient evidence, the existing offences of incitement (section 11.4 of the Criminal Code) or urging violence (in Division 80 of the Criminal Code) will continue to be pursued. These offences require proof that the person intended the crime or violence to be committed, and there are circumstances where there is insufficient evidence to meet that threshold. Groups or individuals publicly advocating genocide can be very deliberate about the precise language they use, even though their overall message still has the impact of encouraging others to engage in genocide.*

121. The legislative intent behind this new offence is problematic in the first

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<sup>33</sup> International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, art 19(3) (entered into force 23 March 1976).

<sup>34</sup> Saul, Ben (2005) “Speaking of Terror: Criminalising Incitement to Violence” UNSW Law Journal, Volume 28(3) pp 282

instance because it appears to be a 'catch all' provision that may be used to establish the commission of an offence where a lack of evidence may prevent the existing offences of incitement or urging violence to be established. It also disregards the findings recklessness that are open to a jury if an accused is acquitted on intention, such as sedition offences.

122. The Muslim Legal Network (NSW) is of the view that the evidentiary thresholds required to establish incitement and urging violence should similarly apply to the new offence of advocating genocide. Without these evidentiary thresholds, the balance will tip in favour of an excessive restriction on freedom of expression, and there may be insufficient judicial guards to protect these freedoms. As Ben Saul explains:

*"In the absence of a bill of rights, the Australian Constitution impliedly protects only political communication (Lange v Australian Broadcasting Corporation (1997) 189 CLR 520), and not speech more generally. This means that Australian courts are less able to supervise sedition or incitement laws for excessively restricting free expression."<sup>35</sup>*

123. The Muslim Legal Network (NSW) further makes the point that it would seem the legislative intent of this provision is for this offence to apply where an explicit statement which goes to proving intention for the crime or violence to be committed, does not exist. This is demonstrated at paragraph 688 of the Explanatory Memorandum which states:

*"Furthermore, in the current threat environment, the use of social media by hate preachers means the speed at which persons can become radicalised and could prepare to carry out genocide may be accelerated. It is no longer the case that explicit statements (which would provide evidence to meet the threshold of intention and could be used in a prosecution for inciting genocide) are required to inspire others to take potentially devastating action against groups of individuals. Law enforcement agencies require tools to intervene earlier in the radicalisation process to prevent and disrupt the radicalisation process and engagement in terrorist activity. This new offence, along with the offence prohibiting advocating terrorism, which came into effect on 1 December 2014, is intended to be one of those tools."*

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<sup>35</sup> Saul, Ben (2005) "Speaking of Terror: Criminalising Incitement to Violence" UNSW Law Journal, Volume 28(3) pp 283

If this were indeed the purpose behind the addition of this offence, the Muslim Legal Network (NSW) would make the argument that there do exist offences prescribed in the *Criminal Code Act 1995* which may sufficiently deal with these situations including:

- Advocating terrorism
- Sedition offences
- **.474.17 Criminal Code – using a carriage service to menace, harass or cause offence (if committed on social media)**

124. The creation of an offence of advocating genocide creates overlap with existing offences for incitement to terrorism and sedition. The distinction between those offences and the offence of advocating genocide is therefore unclear, and the Explanatory Memorandum fails to remedy this ambiguity.

125. The Muslim Legal Network (NSW) has previously submitted on the problematic nature of the advocating terrorism offence to this committee. That offence is broad and the exact scope is yet to be tested. This offence has potentially an even broader scope as intention or recklessness seem to not be an element of the offences. It raises questions of to what circumstances may this offence apply. Will it for example, apply to the retelling of particular stories in the Old Testament – stories that are shared by all Abrahamic faiths? Will it be assumed that the retelling of such stories constitute the advocacy of genocide? Likewise, will ‘sharing’ or ‘liking’ a post on social media relating to genocide constitute ‘advocacy.’ It is, with respect, unacceptably too broad. Parliament needs to narrow the scope of any such section to avoid such difficulties.

126. It is precisely this broad nature that concerns the Muslim Legal Network as the potential arises for the law to apply in a discriminate way – to initiate criminal proceedings only when there is political benefit in doing so.

127. Finally, the Muslim Legal Network (NSW) would make the point that we observe it to be an inconsistency that the offence of advocating genocide includes religious groups, but that religious groups are not similarly included in anti-discrimination legislation<sup>36</sup> where it relates to the implications for freedom of speech.

128. The Muslim Legal Network (NSW) therefore recommends that the offence of advocating genocide not form part of the amendments as there is simply no need for

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<sup>36</sup> ***Racial Discrimination Act 1975 (Cth) and Anti-Discrimination Act 1977 (NSW)***

it. it is unnecessarily restrictive on freedom of expression and serves only to complicate the distinction between the existing offences in Division 80 of the *Criminal Code Act 1995*.

## Schedule 14 – Delayed Notification Warrants

129. Schedule 14 of the Counter-Terrorism Legislation Amendment Bill (No.1) 2015 (“the **Bill**”) seeks to make amendments to the delayed notification search warrants under part IAAA of the Crimes Act 1914 (*Cth*)(“the **Crimes Act**”). The Bill seeks to authorise amendments to “clarify the threshold requirements for the issue of a delayed notification search warrant” and to clarify that an eligible officer and Chief issuing officer must actually hold the relevant suspicions and belief set out in section 3ZZBA of the Crimes Act.

### **Section 3ZZAC and 3ZZBA of the Crimes Act 1914**

130. Item 1 of Section 3ZZAC has been proposed to be repealed which currently provides the definition of conditions for issue and refers to s3ZZBA to mean within the definition of s3ZZBA of the Crimes Act. The purpose of the removal of the above definition as explained in the explanatory memorandum is to ensure that the eligible offer must personally suspect and have reasonable grounds for suspecting the following;

- i. Eligible offences have been, being, or about to be likely committed; and
- j. That entry and search of the premises without the knowledge of the occupier will assist in the prevention or investigation of one or more offences.
- k. The amendment to 3ZZBA continues and provides that the eligible officer may seek the authorisation of the chief officer of the agency to apply for the delayed notification search warrant which does not require the judiciary to make a decision in respect to these warrants. Effectively the amended legislation still requires the eligible officer to suspect on reasonable grounds which and suspects and does not change the required standard of the suspicion and belief by the eligible officer.

131. The Muslim Legal Network (NSW) does not support entry and search of a premises without the knowledge of the occupier. We believe it directly violates Article 17 of the *International Covenant on Civil and Political Rights* which provides

*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 and everyone has the right to the protection of the law against such interference.*

132. The concerns which the Muslim Legal Network (NSW) has with the provision include:

- a) All individuals should have the right to be in their homes while being raided or at the very least, have knowledge of it;
- b) The powers are extraordinary and should be restricted to allowing the judiciary to make decision on granting the Delayed notification search warrants; and
- c) The power is very broad and not specific which allows potentially unlawful interference with privacy and an individual's family and home.



## Schedule 15 – Protecting National Security in Control Order Proceedings

133. The Muslim Legal Network (NSW) only submits with respect to s38J.
134. In relation to Section 19 being s38J, it is in the Muslim Legal Network (NSW)'s submission that the proposed amendments regarding special court orders in control order proceedings, seek to broaden the Court's power in respect of the disclosure of information including documentation during control order proceedings. The proposed amendments that are objected to namely s38J(2)(e) & s38J(3)(d) states:
- a. *“if the information is disclosed to the court in the proceeding and, apart from the order, the information is admissible in evidence in the proceeding—the court may consider the information in the proceeding, even if the information has not been disclosed to the relevant person or the relevant person’s legal representative.”*
135. This amendment allows for information to be admissible into evidence in control order proceedings in respect of non-disclosure certificates, even if the relevant person or relevant person's legal representative have not had prior access to it. If this amendment was implemented, this would undermine the pivotal principle of procedural fairness in Court hearings.
136. The proposed amendments also create additional requirements for the Court to consider when making a decision in relation to special court orders in control order proceedings. The overarching factor for the Courts to consider will be whether there is a risk of prejudice to national security. The primary concern the Muslim Legal Network (NSW) has in this respect is one of a balancing act between that of protecting basic fundamental rights of an individual including that of procedural fairness and transparency≤ as well as the ability of the defendant to adequately defend him or herself.

## Schedule 17 – Disclosures by Taxation Officers

137. Schedule 17 seeks to create an additional exception to section 355-25 of the *Taxation Administration Act 1953*, which creates an offence prohibiting the disclosure of protected information by taxation officers. This exception will authorise taxation officers to disclose information to an Australian government agency for the listed purposes. The purposes are limited to preventing, detecting, disrupting or investigating conduct that relates to a matter of security as defined by section 4 of the ASIO Act.
138. This additional exception will apply in relation to records and disclosures of information made on or after the commencement of this Schedule, whether the information was obtained before, on or after that commencement.
139. The Muslim Legal Network (NSW) submits that the retrospective application of the Schedule to information that was obtained before its date of commencement should not occur and the Schedule should apply solely to information that was obtained on or after the date of the commencement of the Schedule.
140. At a rudimentary level, the application of retrospective laws is in contradiction to the rule of law. We note that Australia Parliament's Legislation Handbook sets out that retrospective laws are to be included only in exceptional circumstances and on explicit policy authority<sup>37</sup>. No such exceptional circumstance or explicit policy authority exists in this instance to warrant the retrospective application of the commencement of this exception to the provision.
141. The Muslim Legal Network (NSW) therefore submits that this exception, if it were to apply, applies only prospectively.

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<sup>37</sup> Department of Premier and Cabinet, Australia, Legislation Handbook, 1999

## Conclusion

142. The Muslim Legal Network (NSW) Committee on Intelligence and Security for considering its submission.