5

Amendments to other legislation

- 5.1 This chapter discusses amendments to the following legislation, which would be amended by schedules 12, 13, 14 and 17 of the Bill:
 - Australian Security Intelligence Organisation Act 1979 (Schedule 12),
 - Classification (Publications, Films and Computer Games) Act 1995 (Schedule 13),
 - Crimes Act 1914 (Schedule 14), and
 - *Taxation Amendment Act* 1953 (Schedule 17).

Security assessments (Schedule 12)

- 5.2 Schedule 12 would amend section 40 of the *Australian Security Intelligence Organisation Act* 1979 (ASIO Act) to enable ASIO 'to furnish security assessments directly to a state or territory or an authority of a state or territory'.¹
- 5.3 The amendment is intended to enhance timely provision of security assessments. Currently, ASIO can only provide a security assessment to a state or territory either, directly, in respect of a designated event or, indirectly, via a Commonwealth agency. The Explanatory Memorandum notes that the existing arrangements are resource intensive and 'significantly hinder' timely provision of security assessments.²

¹ Explanatory Memorandum, p. 111.

² Explanatory Memorandum, p. 111.

- 5.4 Under the proposed amendments, ASIO will be permitted to pass information directly to a state or territory if it is in the form of a security assessment. Existing prohibitions on providing other information, recommendations, opinions or advice that do not constitute a security assessment will continue.³ Accountability mechanisms in the ASIO Act relating to rights of notice and review also remain unchanged.⁴
- 5.5 The amendments also provide that ASIO may continue to furnish a security assessment to a Commonwealth agency for transmission to a state or territory.⁵ It is envisaged this would occur for major events being coordinated at a Commonwealth level.⁶
- In its submission, the Attorney-General's Department stated there was 'an increasing need to ensure security information is being shared efficiently at both the Commonwealth and State level' and that the proposed amendments to Schedule 12 (and Schedule 17) are intended to facilitate information sharing 'for purposes related to terrorism security'.

Matters raised in evidence

5.7 The Inspector-General of Intelligence and Security (IGIS) indicated she had 'not identified any concerns with this proposal, noting the existing rights of notice and review continue to apply'.8 The IGIS went on to state, however, that:

A question does arise as to whether an amendment should also be made to section 61 of the ASIO Act to refer to State and Territory authorities.⁹

5.8 Section 61 of the ASIO Act provides that:

Where an assessment has been reviewed by the Tribunal, every Commonwealth agency concerned with prescribed administrative action to which the assessment is relevant, and any tribunal, person or authority having power to hear appeals from, or to review, a decision with respect to any prescribed administrative action to which the assessment is relevant, shall treat the findings

- 3 Proposed paragraph 40(2)(a).
- 4 Explanatory Memorandum, p. 112; Attorney-General's Department, Submission 9, p. 10.
- 5 Proposed paragraph 40(1)(a).
- 6 Explanatory Memorandum, p. 112.
- 7 Attorney-General's Department, Submission 9, p. 10.
- 8 Inspector-General of Intelligence and Security, Submission 8, p. 1.
- 9 Inspector-General of Intelligence and Security, Submission 8, p. 1.

of the Tribunal, to the extent that they do not confirm the assessment, as superseding that assessment.

- In the IGIS's view, the safeguard provided by section 61 would be limited if a 'State or Territory authority were minded to make a decision or take action inconsistent with a decision of the [Administrative Appeals Tribunal]', given the section does not refer to State and Territory authorities and tribunals.¹⁰
- 5.10 The Attorney-General's Department raised no objections to the IGIS's suggestion, commenting that:

Amendments could be made to section 61 of the ASIO Act so that States and Territory authorities are also bound (as is every Commonwealth agency) to treat the findings of the Tribunal, to the extent that they do not confirm the security assessment, as superseding the security assessment furnished by ASIO.¹¹

- 5.11 The Law Council of Australia submitted that the proposed power should only be available should equivalent rights of review for administrative decisions operate, arguing that 'an individual who successfully challenges a security assessment should be given the opportunity to have the State/Territory based decision revisited'.¹²
- 5.12 In response, the Attorney-General's Department confirmed, as outlined in the Explanatory Memorandum, that 'the accountability mechanisms already provided for in the ASIO Act in relation to rights of notice and review of security assessments will be maintained'.¹³

Committee comment

5.13 The Committee supports the proposed amendments outlined in Schedule 12 of the Bill, noting that existing accountability mechanisms will continue to apply. The Committee also sees merit in amending section 61 of the ASIO Act to ensure that State and Territory authorities are bound by the findings of the Administrative Appeals Tribunal.

Recommendation 19

The Committee recommends that the Australian Security Intelligence

¹⁰ Inspector-General of Intelligence and Security, Submission 8, p. 2.

¹¹ Attorney-General's Department, Submission 9.1, p. 30.

¹² Law Council of Australia, Submission 6, p. 27.

¹³ Attorney-General's Department, Submission 9.1, p. 30.

Organisation Act 1979 be amended to include State and Territory authorities within the scope of section 61 of the Act.

Classification of publications (Schedule 13)

- Under subsection 9A(1) of the *Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act) a publication, film or computer game that advocates the doing of a terrorist act must be classified 'Refused Classification (RC)'. Existing paragraph 9A(2)(a) of the Classification Act states that a publication, film or computer game advocates the doing of a terrorist act if 'it directly or indirectly counsels or urges the doing of a terrorist act'.
- 5.15 Schedule 13 of the Bill would amend paragraph 9A(2)(a) to align the definition of 'advocates' with the current definition in the Criminal Code. 14 Paragraph 102.1(1A)(a) of the Criminal Code states that an organisation advocates the doing of a terrorist act if 'the organisation directly or indirectly counsels, promotes, encourages or urges the doing of a terrorist act'. 15
- 5.16 The amendments will therefore add 'promotes' and 'encourages' to the existing definition. The Explanatory Memorandum notes that these terms are not defined and have their ordinary meaning. ¹⁶ The Attorney-General's Department explained that:

The ordinary meaning of 'promotes' the doing of a terrorist act, and the ordinary meaning of 'encourages' the doing of a terrorist act could include conduct or statements that inspire an individual to commit a terrorist act.¹⁷

¹⁴ The Criminal Code definition was amended on 1 December 2014 by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act* 2014. The Classification Act was not amended at this time.

The Explanatory Memorandum to the *Classification (Publications, Films and Computer Games)*Amendment (Terrorist Material) Act 2007 noted that the definition of 'advocates' should have the same meaning in the Classification Act when applied to a publication, film or computer game, as in the Criminal Code when applied to a terrorist organisation. Explanatory Memorandum, p. 114.

¹⁶ Explanatory Memorandum, p. 114.

¹⁷ Attorney-General's Department, Submission 9.1, p. 32.

Matters raised in evidence

- 5.17 In its submission, Blueprint for Free Speech argued that the proposed amendment would make the Classification Act much more restrictive, citing the potential impact, for example, on popular television series. Blueprint also considered the amendment to be 'too broad and out of step with public opinion in Australia' and challenged the Explanatory Memorandum's assessment against the *International Covenant on Civil and Political Rights* (ICCPR), arguing evidence had not been presented as to the impact the amendment would have on preventing terrorist activity. ¹⁸
- 5.18 The joint councils for civil liberties submitted that the amendment would 'significantly and inappropriately expand the meaning of "advocates" with unwarranted implications for freedom of speech'. 19
- The Law Council of Australia and joint councils for civil liberties reiterated concerns expressed in previous inquiries about the expanded Criminal Code definition of 'advocates', which was considered to be overly broad and vague, and lacking certainty as to what fell within the definition. Both organisations pointed to the Australian Law Reform Commission's Interim Report on *Traditional Rights and Freedoms-Encroachments by Commonwealth Law*, which identified the offence of advocating terrorism as one that might be reviewed by the INSLM to ensure it does not unjustifiably interfere with freedom of speech.²⁰
- 5.20 In its supplementary submission, the Attorney-General's Department reiterated that the ICCPR provides that freedom of expression may be limited where the limitations are provided for by law and are necessary for the protection of natural security (Article 19[3]). Further Article 20(2) of the ICCPR 'also requires that laws prohibit any advocacy for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.²¹
- 5.21 The Attorney-General's Department argued that the limitation on freedom of expression provided by Schedule 13 is 'reasonable, necessary and proportionate', noting that

¹⁸ Blueprint for Free Speech, Submission 15, pp. 4–6.

¹⁹ Joint councils for civil liberties, *Submission 17*, p. 17. See also Law Council of Australia, *Submission 6*, p. 28.

²⁰ Law Council of Australia, Submission 6, p. 28; Joint councils for civil liberties, Submission 17, p. 18. See also Australian Law Reform Commission, Traditional Rights and Freedoms-Encroachments by Commonwealth Law, Interim Report, July 2015, p. 95.

²¹ Attorney-General's Department, Submission 9.1, p. 31.

a terrorist organisation could continue to have a significant influence in promoting or encouraging terrorism by others without necessarily engaging in terrorist acts itself, and without directly counselling or urging the doing of a terrorist act.²²

5.22 In addition, the Department argued that Schedule 13 'is not intended to, and is unlikely to affect, artistic freedom', as a publication, film or computer game will not satisfy the definition through the mere depiction, description or discussion of a terrorist act.²³ Specifically addressing the concerns raised by Blueprint for Free Speech, the Department stated:

Amending the definition of advocates is unlikely to result in legitimate artistic and entertainment content like Homeland being classified Refused Classification.²⁴

Committee comment

- As discussed in Chapter 4, the Committee previously examined the advocating terrorism offence in its review of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, and accepted that the Government has a responsibility to ensure that the advocacy of terrorism is discouraged and prevented. The Committee remains of the same view. The Committee gave close consideration to the definition of 'advocates' in that inquiry, and recommended amendments to the Explanatory Memorandum to provide greater clarity.
- 5.24 In terms of the possible impact of the amendment, the Committee notes that an exception already exists at subsection 9A(3) of the Classification Act, which provides that:

A publication, film or computer game does not advocate the doing of a terrorist act if it depicts or describes a terrorist act, but the depiction or description could reasonably be considered to be done merely as part of public discussion or debate or as entertainment or satire.

5.25 The Committee also notes the following statement in the Explanatory Memorandum:

Material that is classified RC contains content that is very high in impact and falls outside generally accepted community standards,

²² Attorney-General's Department, Submission 9.1, p. 31.

²³ Attorney-General's Department, Submission 9.1, p. 32.

²⁴ Attorney-General's Department, Submission 9.1, p. 32.

including the category of detailed instruction or promotion in matters of crime and violence.²⁵

5.26 The Committee considers it reasonable that publications, films and computer games should be refused classification on the basis of the same definition of advocacy of terrorism as that in the Criminal Code. The Committee therefore supports the proposed amendment.

Delayed notification search warrants (Schedule 14)

- 5.27 Delayed notification search warrants were introduced into the *Crimes Act* 1914 by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act* 2014.²⁶
- 5.28 Schedule 14 of the Bill will amend the threshold requirements for the issue of a delayed notification search warrant. The Explanatory Memorandum states that:

The amendments clarify that, while an eligible officer applying for a delayed notification search warrant must actually hold the relevant suspicions and belief set out in section 3ZZBA, the chief officer and eligible issuing officer need only be satisfied that there are reasonable grounds for the eligible officer to hold the relevant suspicion and belief.²⁷

5.29 The Explanatory Memorandum goes on to say that the

amendments are intended simply to clarify that neither a chief officer nor an eligible issuing officer is required to personally suspect or believe the matters set out in section 3ZZBA. This is because the chief officer and eligible issuing officer are unlikely to be directly involved in the investigation.²⁸

²⁵ Explanatory Memorandum, p. 9.

²⁶ See Crimes Act 1914, Part IAAA. The Committee made a number of recommendations in relation to the delayed notification search warrant scheme in its advisory report.
Parliamentary Joint Committee on Intelligence and Security, Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, October 2014, pp. 13–29.

²⁷ Explanatory Memorandum, p. 115. The chief officer is the AFP Commissioner and the eligible issuing officer is a judge of the Federal Court or a state or territory Supreme Court, or a nominated AAT member.

²⁸ Explanatory Memorandum, p. 115; See also Attorney-General's Department, *Submission 9*, p. 13.

5.30 Accordingly, the amendments will substitute the following test for the chief officer and eligible issuing officer:

That there are reasonable grounds for the eligible officer to have:

- (i) The suspicions mentioned in paragraphs 3ZZBA(a) and (b); and
- (ii) The belief mentioned in paragraph 3ZZBA(c).
- 5.31 In its submission, the Attorney-General's Department stated that the requirement that the chief officer and eligible issuing officer personally suspect or believe 'was not intended when the provision was drafted'.²⁹ The AFP made the same point, commenting in relation to thresholds and oversight that:

The AFP does not consider that the amendments in the Bill in any way lower the existing threshold for the application and issuing of [delayed notification search warrants (DNSW)]. Rather, the amendments ensure that the chief officer approving the application for a DNSW and, importantly, the issuing officer determining the application for a DNSW, are clearly separate from, and independent of, the relevant investigation. This is consistent with other types of warrants for which law enforcement may apply, where persons with oversight of the application and deciding the application must be satisfied that there are reasonable grounds for the officer making the application to have the relevant suspicions or belief.

The AFP considers that it would be both inappropriate and inconsistent with existing criminal law procedures regarding the issuing of warrants if an issuing officer in relation to an application for a DNSW were required to personally hold the relevant suspicions and belief, as it would then bring into question their independence and ability to provide proper oversight of executive actions undertaken by law enforcement.³⁰

Matters raised in evidence

5.32 The joint councils for civil liberties reiterated their opposition to delayed notification search warrants on the basis of a person's right to be notified of a violation of their privacy, and argued that the proposed amendment lowers the threshold for such warrants. The councils acknowledged

²⁹ Attorney-General's Department, Submission 9, p. 13.

³⁰ Australian Federal Police, Submission 3, p. 17.

- however that 'the lower threshold is consistent with other existing Commonwealth laws relating to search warrants'.³¹
- 5.33 The Muslim Legal Network (NSW) and Law Council of Australia raised similar concerns about the potential impact of delayed notification search warrants on personal rights and liberties.³² The Law Council of Australia supported the proposed amendment, however, on the basis that it would provide consistency with analogous search warrant provisions.³³
- 5.34 Australian Lawyers for Human Rights also reiterated concerns about delayed notification search warrants and argued that the proposed amendments 'remove some of the levels of protection and oversight that were previously contained in the legislation'.³⁴

Committee comment

5.35 The Committee notes that the proposed amendment in Schedule 14 will provide consistency with other search warrant provisions in the *Crimes Act 1914* and address an unintended consequence of initial drafting. The Committee accepts the Government's explanation that

this amendment does not seek to lower the threshold for issuing a delayed notification search warrant, rather it clarifies the threshold to ensure that it is correctly interpreted in a fashion consistent with other search warrant provisions in the Crimes Act.³⁵

- 5.36 The Committee examined the delayed notification search warrant scheme during its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014. The Committee accepted the precedents for the scheme in other jurisdictions as well as the safeguards and accountability mechanisms, and made several recommendations in its report.³⁶
- 5.37 The Committee supports the amendment as outlined in the Bill.

³¹ Joint councils for civil liberties, *Submission* 17, p. 19.

³² Muslim Legal Network (NSW), *Submission 11*, pp. 39–40; Law Council of Australia, *Submission 6*, p. 29.

³³ Law Council of Australia, Submission 6, p. 29.

³⁴ Australian Lawyers for Human Rights, Submission 4, p. 4.

³⁵ Attorney-General's Department, Submission 9.1, p. 33.

³⁶ Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter- Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, October 2014, pp. 13–29.*

Disclosure by taxation officers (Schedule 17)

- 5.38 It is an offence under section 355-25 of the *Taxation Administration Act* 1953 (TA Act) for taxation officers to disclose protected information. The TA Act sets out, however, a number of exceptions to this offence.³⁷
- 5.39 Schedule 17 of the Bill will create an additional exception to the offence provision by inserting a new item into Table 1 at subsection 355-65(2) of Schedule 1 of the TA Act. Table 1 sets out exceptions for disclosures relating to social welfare, health or safety. Taxation officers would be authorised to disclose information to an Australian government agency where the disclosure

is for the purpose of preventing, detecting, disrupting or investigating conduct that relates to a matter of security as defined by section 4 of the *Australian Security Intelligence Organisation Act* 1979.³⁸

5.40 The Attorney-General's Department argued in its submission that:

The appropriate sharing of information is fundamental to the efforts of our law enforcement and other agencies in preventing, detecting, disrupting and investigating terrorist conduct, including terrorist planning and preparatory acts. Currently, there are restrictions in the *Taxation Administration Act 1953* to the sharing of relevant taxation information for these purposes. These amendments remove that restriction for national security purposes.³⁹

- 5.41 The Department noted that the amendments would authorise the disclosure of taxation information to any Australian Government agency, but emphasised that this could only occur where it is for the purpose of preventing, detecting, disrupting or investigating conduct that involves a threat related to security.⁴⁰
- 5.42 The Australian Federal Police similarly supported the amendment, commenting that in the current threat environment 'it is vitally important

³⁷ See, for example, section 355-65 and section 355-70 of the TA Act.

³⁸ Item 1, Schedule 17 to the Bill.

³⁹ Attorney-General's Department, Submission 9, p. 11.

⁴⁰ Attorney-General's Department, *Submission 9*, p. 11. The definition of Australian Government agency in section 995-1 of the *Income Tax Assessment Act 1997* includes Commonwealth, State and Territory agencies.

that information is able to be shared between government agencies to address terrorism threats at the earliest stage possible'.⁴¹

Matters raised in evidence

5.43 In her submission, the IGIS made the following comments in relation to oversight arrangements for this schedule:

While the amendment in the Bill uses the ASIO Act definition of 'security', the IGIS will not necessarily have oversight of disclosures made under this provision unless they are made to an [Australian Intelligence Community (AIC)] agency. Where an AIC agency is a member of a multi-agency or multi-jurisdictional body that is the recipient of protected taxation information, the IGIS would expect that the agency would provide information about such disclosures on request by the IGIS. As a matter of practice, the IGIS probably would not expect to review such information in routine inspections without specifically requesting details particularly if an AIC agency is not the lead agency for a multiagency body. Other oversight bodies, such as the Commonwealth Ombudsman and relevant State and Territory oversight bodies, may also need to consider if and how they will review disclosures of protected taxation information made to multi-agency and multijurisdictional bodies.

Noting that there is currently a specific exception for ASIO officers to disclose protected taxation information provided by the ATO to the IGIS, the Committee may wish to consider whether a similar exception in favour of other relevant oversight bodies is required to ensure that there can be appropriate oversight of disclosures made under the proposed provision.⁴²

- 5.44 While noting that the purpose of disclosure (as outlined in paragraph 5.39 above) would act as a limitation on disclosure, the Law Council of Australia questioned whether this limitation is proportionate given that disclosure may be made to *any* Australian government agency.⁴³
- 5.45 In response, the Attorney-General's Department stated it is important that the amendment allow disclosure to any Australian government agency

⁴¹ Australian Federal Police, Submission 3, p. 18.

⁴² Inspector-General of Intelligence and Security, Submission 8, p. 3.

⁴³ Law Council of Australia, Submission 6, p. 37.

because 'bodies that have a role in preventing, detecting, disrupting or investigating conduct that involves a matter of security vary over time'.44

5.46 It is envisaged that the key agencies that would seek disclosure under the proposed exception are the National Disruption Group and the Australian Counter-Terrorism Centre. The membership or composition of both can change at short notice. The Explanatory Memorandum notes that:

The amendment is drafted to ensure that Australian government agencies that are not currently member agencies of national security bodies such as the National Disruption Group, but that could be represented by that Group at short notice, will be covered by the exception.⁴⁷

5.47 The Department went on to argue:

This amendment will ensure that ATO officers have the ability to disclose relevant information which would support effective coordinated responses to terrorist threats. It would be of grave concern should an attack occur and on review the ATO held information that would have contributed to early notice and possible disruption, but they were prevented from lawfully sharing this information with other government bodies because they were not listed in a Schedule. Limiting the purposes for disclosure will ensure that bodies that are not involved in addressing national security threats will not be able to receive such information, and that disclosure only occurs where required for those specified purposes.⁴⁸

5.48 The Muslim Legal Network (NSW) raised concerns about the retrospective application of this schedule, arguing that it should apply prospectively to information obtained on or after the date of the commencement.⁴⁹

Committee comment

- 5.49 The Committee acknowledges the concerns of the Law Council of Australia that information may be disclosed to *any* Australian
- 44 Attorney-General's Department, Submission 9.1, p. 38.
- 45 The National Distribution Group coordinates joint Commonwealth and State and Territory agency capabilities to prevent, disrupt and prosecute terrorism related activities. Explanatory Memorandum, pp. 133–134.
- 46 Attorney-General's Department, Submission 9.1, p. 38.
- 47 Explanatory Memorandum, p. 135.
- 48 Attorney-General's Department, Submission 9.1, p. 38.
- 49 Muslim Legal Network (NSW), Submission 11, p. 42.

Government agency. The Committee notes, however, that the proposed wording 'an Australian government agency' has been used elsewhere in Table 1 at section 355-65(2) of the TA Act. Item 9, for example, provides for disclosure to an Australian government agency where the record or disclosure is necessary for the purpose of preventing or lessening a serious threat to an individual's life, health or safety, or a serious threat to public health or public safety.⁵⁰

- 5.50 Any disclosure of information will be limited by the requirement that it relate to a matter of security as defined by section 4 of the ASIO Act. The Committee accepts that this is an appropriate limitation. Further, where disclosure is made to an AIC agency, it will fall within the oversight of the IGIS.
- 5.51 Where the disclosure is to a multi-agency or multi-jurisdictional body, the Committee notes the IGIS's suggestion that an exception, similar to that already existing for ASIO officers at section 355-185 of the TA Act, be considered to allow disclosure to other oversight bodies. The Committee did not receive any additional evidence on this matter, but supports mechanisms to facilitate appropriate oversight for agencies that do not fall with the IGIS's jurisdiction. The Committee considers a similar exception should be made for disclosure to the Commonwealth Ombudsman. As, in some instances, disclosure may be made to a multi-jurisdictional body, future consideration could also be given to an exception for state and territory oversight bodies.

Recommendation 20

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

Concluding comments

- 5.52 The Committee is mindful that this Bill responds to recent operational experience and will give effect to some of the recommendations of the 2013 COAG Review of Counter-Terrorism Legislation.
- 5.53 The Committee notes that the security risks to Australia are increasing, with law enforcement having to act more quickly to counter current and emerging threats. The Committee accepts that experience has shown that additional measures are required to enhance the ability of security and law enforcement agencies to respond to these threats and protect the Australian community from terrorism. On this basis, the Committee fully supports the intent of the Bill.
- 5.54 The recommendations the Committee has made in this report are intended to further strengthen the provisions of the Bill, including its safeguards, transparency and oversight mechanisms.
- 5.55 While some submitters reiterated their in-principle opposition to the control order and preventative detention order regimes, the Committee has not in this inquiry examined the merit of these regimes, but has instead focused on the provisions of the Bill before the Parliament.
- 5.56 As noted earlier, the control order and preventative detention order regimes (Divisions 104 and 105 of the Criminal Code) will sunset on 7 September 2018.
- 5.57 The *Intelligence Services Act* 2001 requires the Committee to review the 'operation, effectiveness and implications' of Divisions 104 and 105 of the Criminal Code no later than 7 March 2018. This review will be the opportunity to examine operational experience and assess whether these regimes should continue to exist and in what form.
- 5.58 The Committee commends its recommendations to the Parliament and recommends the Bill be passed.

Recommendation 21

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

Dan Tehan MP

Chair

February 2016