
The Parliament of the Commonwealth of Australia

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

Parliamentary Joint Committee on Intelligence and Security

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Canberra

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Membership of the Committee

Chair Mr Dan Tehan MP

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Hon Bruce Scott MP

Senator David Bushby

Senator the Hon Stephen Conroy

Senator David Fawcett

Senator Katy Gallagher

Senator the Hon Penny Wong



Terms of reference

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



List of abbreviations

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

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

List of recommendations

2 Applying for control orders

Recommendation 1

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to expressly state that when the issuing court determines whether each of the obligations, prohibitions and restrictions imposed on a young person is reasonably necessary, and reasonably appropriate and adapted for the purpose of:

- protecting the public from a terrorist act;
- preventing the provision of support for or the facilitation of a terrorist act; or
- preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country,

then the best interests of the young person is a primary consideration, and the safety and security of the community is the paramount consideration.

Recommendation 2

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to expressly provide that a young person has the right to legal representation in control order proceedings.

The Committee further recommends that the Bill be amended to remove the role of the court appointed advocate. The Committee considers that given the existing safeguards in the control order regime, the ability of the issuing court to have recourse to expert evidence and concerns regarding the operation of the court appointed advocate, a more effective and appropriate safeguard is to ensure the right of a young person to legal representation.

Recommendation 3

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to provide that, on each occasion, an Australian Federal Police (AFP) member must take reasonable steps to serve personally on at least one parent or guardian of the young person all notifications and copies of orders associated with a control order.

This requirement should continue irrespective of whether the AFP member, having taken reasonable steps previously, has not been able to serve a copy of the interim control order personally on at least one parent or guardian of the young person.

Recommendation 4

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended such that the minimum standard of information disclosure outlined in proposed paragraph 38J(1)(c) of the *National Security Information (Criminal and Civil Proceedings Act) 2004* reflects the intent of Recommendation 31 of the Council of Australian Governments Review of Counter-Terrorism Legislation, namely that the subject of the control order proceeding be provided 'sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations'.

Recommendation 5

The Committee recommends that a system of special advocates be introduced to represent the interests of persons subject to control order proceedings where the subject and their legal representative have been excluded under the proposed amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004* contained in Schedule 15 of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015.

Legislation to introduce a special advocates system should be introduced to the Parliament as soon as practicable and no later than the end of 2016. The Committee accepts that there is an increasing need to rely on and protect sensitive national security information in control order proceedings. Accordingly, the Committee supports the amendments proposed in Schedule 15 and considers they should proceed without delay. The Committee notes that this approach does not preclude the court from exercising its existing discretion to appoint special advocates on an ad hoc basis.

Recommendation 6

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to require that, as part of the Attorney-General's annual reporting obligations to the Parliament under section 47 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*, the Attorney-General must also annually report on:

- the number of orders under proposed section 38J that were granted by the court, and
- the control order proceedings to which the orders granted by the court under proposed section 38J relate.

Recommendation 7

The Committee recommends that the Explanatory Memorandum to the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended to correctly reflect the proposed amendments in Schedule 16 of the Bill.

The Explanatory Memorandum should clarify that the agreement of the parties is not required under subsections 19(1A) and (3A) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* and that the Attorney-General alone can make an application for the court to make an order that is inconsistent with the National Security Information (Criminal and Civil Proceedings) Regulation 2015. The court has the discretion to make such an order where it is satisfied that it is in the interests of national security to do so.

3 Monitoring of persons subject to control orders**Recommendation 8**

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

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

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

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

Recommendation 9

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

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

Recommendation 10

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

Recommendation 11

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

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

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

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

Recommendation 12

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

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

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

Recommendation 13

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

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

Recommendation 14

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

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

4 Other amendments to the Criminal Code**Recommendation 15**

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

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

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

Recommendation 16

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

Recommendation 17

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

Recommendation 18

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

5 Amendments to other legislation**Recommendation 19**

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

Recommendation 20

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

Recommendation 21

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

