

# Chapter 1

## New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 23 to 26 November 2015, legislative instruments received from 30 October to 12 November 2015, and legislation previously deferred by the committee.

1.2 The report also includes the committee's consideration of responses arising from previous reports.

1.3 The committee generally takes an exceptions based approach to its examination of legislation. The committee therefore comments on legislation where it considers the legislation raises human rights concerns, having regard to the information provided by the legislation proponent in the explanatory memorandum (EM) and statement of compatibility.

1.4 In such cases, the committee usually seeks further information from the proponent of the legislation. In other cases, the committee may draw matters to the attention of the relevant legislation proponent on an advice-only basis. Such matters do not generally require a formal response from the legislation proponent.

1.5 This chapter includes the committee's examination of new legislation, and continuing matters in relation to which the committee has received a response to matters raised in previous reports.

### **Bills not raising human rights concerns**

1.6 The committee has examined the following bills and concluded that they do not raise human rights concerns. The following categorisation is indicative of the committee's consideration of these bills.

1.7 The committee considers that the following bill does not require additional comment as it either does not engage human rights or engages rights (but does not promote or limit rights):

- Aged Care Amendment (Red Tape Reduction in Places Management) Bill 2015.

1.8 The committee considers that the following bill does not require additional comment as it either promotes human rights or contains justifiable limitations on human rights (and may contain both justifiable limitations on rights and promotion of human rights):

- Credit Repayment (Protecting Vulnerable Borrowers) Bill 2015.

## Instruments not raising human rights concerns

1.9 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.<sup>1</sup> Instruments raising human rights concerns are identified in this chapter.

1.10 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

## Deferred bills and instruments

1.11 The committee has deferred its consideration of the following bills:

- Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015;
- Family Law Amendment (Financial Agreements and Other Measures) Bill 2015;
- Interactive Gambling Amendment (Sports Betting Reform) Bill 2015; and
- Labor 2013-14 Budget Savings (Measures No. 2) Bill 2015.

1.12 The committee continues to defer its consideration of the Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542] (deferred 23 June 2015).<sup>2</sup>

1.13 The committee also continues to defer the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 1) [F2015L01422] pending a response from the Minister for Foreign Affairs regarding a number of related instruments.<sup>3</sup>

1.14 As previously noted, the committee continues to defer one bill and a number of instruments in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation.<sup>4</sup>

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1 See Parliament of Australia website, 'Journals of the Senate', [http://www.aph.gov.au/Parliamentary\\_Business/Chamber\\_documents/Senate\\_chamber\\_documents/Journals\\_of\\_the\\_Senate](http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate).

2 See Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (23 June 2015) 2.

3 See the entry 'Instruments made under the Autonomous Sanctions Act 2011 and the Charter of the United Nations Act 1945' in Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 15-38. The instrument was deferred by the committee in Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 2.

4 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015); and Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015).

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## Response required

1.15 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

### **Counter-Terrorism Legislation Amendment Bill (No. 1) 2015**

*Portfolio: Attorney-General*

*Introduced: Senate, 12 November 2015*

#### **Purpose**

1.16 The Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 (the bill) seeks to make amendments to a number of Acts: the *Criminal Code Act 1995* (the Criminal Code), the *Crimes Act 1914* (the Crimes Act), the *Surveillance Devices Act 2004* (the SD Act), the *Telecommunications (Interception and Access) Act 1979* (TIA Act), the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act), the *Classification (Publication, Films and Computer Games) Act 1995*, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the NSI Act), the *Taxation Administration Act 1953*, the *Administrative Appeals Tribunal Act 1975* and the *Public Interest Disclosure Act 2013*.

1.17 Key amendments in the bill are set out below.

1.18 Schedule 1 seeks to amend the Criminal Code to ensure that the offence provision of receiving funds from a terrorist organisation does not apply to the provision of legal advice or legal representation in certain circumstances.

1.19 Schedule 2 seeks to amend the Criminal Code to enable control orders to be imposed on persons aged 14 and 15 years of age.

1.20 Schedule 3 seeks to amend the Criminal Code to impose an obligation on a person required to wear a tracking device, to maintain that device in good operational order.

1.21 Schedules 4 and 6 seek to amend the Criminal Code to remove the authority of the Family Court of Australia to issue control orders and preventative detention orders (PDOs).

1.22 Schedule 5 seeks to amend the Criminal Code to define the meaning of 'imminent' for the purposes of obtaining a PDO.

1.23 Schedule 7 seeks to amend the Criminal Code to specify the application of Schedules 2 and 3 in relation to current and ongoing investigations.

1.24 Schedule 8 seeks to amend the Crimes Act to establish regimes to monitor the compliance of individuals subject to a control order through search warrants, surveillance device warrants and telecommunications interception warrants.

1.25 Schedule 9 seeks to amend the TIA Act to grant agencies the power to obtain telecommunications interception warrants to monitor a person subject to a control

order, to monitor their compliance with that control order, and to permit the chief officer of a specified agency to defer public reporting on the use of that warrant in certain circumstances.

1.26 Schedule 10 seeks to amend the SD Act to allow law enforcement officers to apply to an issuing authority for a surveillance device warrant for the purposes of monitoring compliance with a control order.

1.27 Schedule 11 seeks to amend the Criminal Code to create a new offence prohibiting conduct advocating genocide.

1.28 Schedule 12 seeks to amend the ASIO Act to enable the Australian Security Intelligence Organisation (ASIO) to furnish security assessments directly to states and territories.

1.29 Schedule 13 seeks to amend the *Classification (Publications, Films and Computer Games) Act 1995* to broaden the range of conduct that may be considered as advocating the doing of a terrorist act, including if it 'promotes' or 'encourages' the doing of a terrorist act.

1.30 Schedule 14 seeks to amend the Crimes Act to clarify the threshold requirements for the issue of a delayed notification search warrant.

1.31 Schedule 15 seeks to amend the NSI Act to broaden protections for national security information in control order proceedings, and to allow an issuing court to consider information in these proceedings which is not disclosed to the subject of the control order or their legal representative.

1.32 Schedule 16 seeks to amend the NSI Act to enable a court to make an order that is inconsistent with regulations made under the Act if the Attorney-General has applied for the order, and the parties agree, and to enable the regulations to continue to apply to the extent they provide for ways of dealing with national security information in criminal and civil proceedings.

1.33 Schedule 17 seeks to amend the *Taxation Administration Act 1953* to enable the disclosure of certain information to government agencies.

1.34 Measures raising human rights concerns or issues are set out below.

## **Background**

1.35 The committee has previously considered three bills in relation to counter-terrorism and national security, namely the National Security Legislation Amendment Bill (No. 1) 2014,<sup>1</sup> the Counter-Terrorism Legislation Amendment

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1 See Parliamentary Joint Committee on Human Rights, *Thirteenth Report of the 44th Parliament* (1 October 2014) 6-13; and Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 33-60.

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(Foreign Fighters) Bill 2014 (the Foreign Fighters Bill),<sup>2</sup> and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.<sup>3</sup>

### **National security and human rights**

1.36 As noted in its previous analysis of national security legislation, the committee recognises the importance of ensuring that national security and law enforcement agencies have the necessary powers to protect the security of all Australians. Moreover, the committee recognises the specific importance of protecting Australians from terrorism. The Australian government has the responsibility to ensure that laws and operational frameworks support the protection of life and security of the person. In addition, Australia has specific international obligations to detect, arrest and punish terrorists.

1.37 In this respect, the committee notes that the threat of terrorism in Australia has heightened in recent times, as the Attorney-General has explained:

Since 12 September 2014, when the National Terrorism Public Alert level was raised to High, 26 people have been charged as a result of 10 counter-terrorism operations around Australia. That's more than one third of all terrorism related arrests since 2001.<sup>4</sup>

1.38 In addition, there have been terrorist attacks in Sydney, Melbourne and Parramatta in recent times which suggest the heightened terrorism threat may require additional legislative responses.<sup>5</sup> For example, one of those attacks was by a 15 year old and the bill seeks to lower the age at which control orders may be applied to 15 year olds.

1.39 Legislative responses to issues of national security are likely to engage a range of human rights. For example, legislative schemes aimed at the prevention of terrorist acts may seek to achieve this through measures that limit a number of traditional freedoms and protections that are characteristic of Australian society and its system of government.

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2 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 3-69; Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 56-100; and Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 82-101.

3 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 7-21; and Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 129-162.

4 The Hon. Senator George Brandis QC, Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, second reading speech, *Senate Hansard 12 November 2015*, 27.

5 The Hon. Senator George Brandis QC, Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, second reading speech, *Senate Hansard 12 November 2015*, 27.

1.40 Human rights principles and norms are not to be understood as inherently opposed to national security objectives or outcomes. Rather, international human rights law allows for the balancing of human rights considerations with responses to national security concerns.

1.41 International human rights law allows for reasonable limits to be placed on most rights and freedoms as long as the limitation is reasonable, necessary and proportionate to achieve a legitimate objective.<sup>6</sup> This is the analytical framework the committee applies when exercising its statutory function of examining bills for compatibility with human rights. The committee expects proponents of legislation, who bear the onus of justifying proposed limitations on human rights, to apply this framework in the statement of compatibility required for bills.

1.42 The bill contains 17 schedules of amendments. The analysis below relates to six of those schedules and, in the interests of timely reporting, focuses on the most serious human rights issues. Accordingly, the committee has concluded that 11 of the schedules in the bill do not require further explanation or are otherwise likely to be compatible with human rights.

1.43 In relation to the remaining six schedules, much of the analysis below is targeted at ensuring that, while law enforcement agencies and intelligence agencies have appropriate and effective powers, those powers are not broader than is necessary and are subject to appropriate safeguards. The procedural guarantees provided for by international human rights law recognises that human error and mistakes are possible, and such safeguards seek to minimise the harm caused by any such errors and provide redress where appropriate. Such safeguards are not intended to thwart legitimate efforts to ensure the safety of Australians.

1.44 The following analysis contains repeated requests for more information which are necessary because of pervasive shortcomings in the statement of compatibility for the bill. International human rights law requires evidence and reasoning to justify limitations on human rights, and broad references to terrorism and the current national security environment may not provide a sufficient basis to assess the human rights compatibility of proposed legislation. What is required is a succinct explanation of where there is a purported deficiency in the current legal framework and an explanation as to how the bill seeks to address that deficiency. Without this, it is difficult for the committee to assess whether a measure supports a legitimate objective and is rationally connected to that objective. Notwithstanding this, the committee notes that the Attorney-General's second reading speech on the bill explains:

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6 Although some absolute rights cannot be limited: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; and the right to recognition as a person before the law.

The measures introduced in this Bill reflect lessons learned from recent counter-terrorism investigations and operational activity.<sup>7</sup>

1.45 Statements of compatibility should provide a standalone analysis of the compatibility of a bill and should be easy to read and clear.<sup>8</sup> This is especially the case where significant limitations on rights are provided for in a bill. In this regard, the statement of compatibility for the bill has a number of deficiencies that are explained below.

### **Schedule 2—Extending control orders to 14 and 15 year olds**

1.46 The bill proposes to amend the control orders regime under Division 104 of the Criminal Code to allow for control orders to be imposed on children aged 14 or 15 years of age. Currently, control orders may only be imposed on adults and children aged 16 or 17 years of age.

1.47 The committee has previously considered the control orders regime as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014<sup>9</sup> and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.<sup>10</sup> The bill's expansion of the control orders regime to children aged 14 and 15 years of age raises the threshold question of whether the existing control orders regime is compatible with human rights.

1.48 The control orders regime is necessarily coercive in nature. The former Independent National Security Legislation Monitor (INSLM) noted:

They [control orders] are striking because of their provision for restraints on personal liberty without there being any criminal conviction or even charge.<sup>11</sup>

1.49 The control orders regime grants the courts power to impose a control order on a person at the request of the Australian Federal Police (AFP), with the Attorney-General's consent. The terms of a control order may impose a number of obligations, prohibitions and restrictions on the person subject to the order. These include:

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7 The Hon. Senator George Brandis QC, Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, second reading speech, *Senate Hansard 12 November 2015*, 27.

8 See Appendix 2; Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) [http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights\\_ctte/guidance\\_notes/guidance\\_note\\_1/guidance\\_note\\_1.pdf](http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf).

9 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) 3.

10 See Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (November 2014) 7.

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

- requiring a person to stay in a certain place at certain times;
- preventing a person from going to certain places;
- preventing a person from talking to or associating with certain people;
- preventing a person from leaving Australia;
- requiring a person to wear a tracking device;
- prohibiting access or use of specified types of telecommunications, including the internet and telephones;
- preventing a person from possessing or using specified articles or substances; and
- preventing a person from carrying out specified activities, including in relation to their work or occupation.

1.50 The steps for the issue of a control order are:

- a senior AFP member must obtain the Attorney-General's written consent to seek a control order on prescribed grounds;
- once consent is granted, the AFP member must seek an interim control order from an issuing court, which must be satisfied on the balance of probabilities:
  - (i) that making the order would substantially assist in preventing a terrorist act; or
  - (ii) that the person has provided training to, received training from or participated in training with a listed terrorist organisation; or
  - (iii) that the person has engaged in a hostile activity in a foreign country; or
  - (iv) that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act; or
  - (v) that the person has been convicted in a foreign country for an equivalent offence; or
  - (vi) that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or
  - (vii) that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country; and
- the court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of:
  - (i) protecting the public from a terrorist act; or



- (ii) preventing the provision of support for or the facilitation of a terrorist act; or
- (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country; and
- the AFP must subsequently seek the court's confirmation of the order, with a confirmed order able to last up to 12 months.

1.51 The control orders regime clearly imposes a range of limitations on personal liberty and engages and limits multiple human rights.

1.52 Schedule 2 also provides for an issuing court to appoint a lawyer as an advocate to act on behalf of a child between the ages of 14 and 17 who is subject to an interim control order. This measure engages and limits article 12 of the Convention on the Rights of the Child (CRC). This issue deals with a discrete part of the control orders regime and will be dealt with separately below.

### ***Multiple rights***

1.53 The control orders regime, and the amendments to that regime proposed by the bill, engage and limit a number of human rights, including:

- right to equality and non-discrimination;<sup>12</sup>
- right to liberty;<sup>13</sup>
- right to freedom of movement;<sup>14</sup>
- right to a fair trial and the presumption of innocence;<sup>15</sup>
- right to privacy;<sup>16</sup>
- right to freedom of expression;<sup>17</sup>
- right to freedom of association;<sup>18</sup>
- right to the protection of the family;<sup>19</sup>

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12 Articles 2, 16 and 26, International Covenant on Civil and Political Rights (ICCPR). Related provisions are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child (CRC) and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

13 Article 9, ICCPR.

14 Article 12, ICCPR.

15 Article 14, ICCPR.

16 Article 17, ICCPR, and article 16, CRC.

17 Article 19, ICCPR and articles 13 and 14, CRC.

18 Article 22, ICCPR.

- prohibition on torture and cruel, inhuman or degrading treatment;<sup>20</sup>
- right to work;<sup>21</sup> and
- right to social security and an adequate standard of living.<sup>22</sup>

1.54 The proposed expansion of the control orders regime to children aged 14 and 15 years of age also engages the obligation to consider the best interests of the child and a range of rights set out in the CRC which are consistent with the rights outlined above.<sup>23</sup>

*Compatibility of the measure with multiple rights*

*Threshold assessment of control orders—legitimate objective*

1.55 The statement of compatibility focuses primarily on the proposed change to the age threshold for control orders rather than dealing more broadly with the human rights implications of the control orders regime. Any measure that limits human rights must be demonstrated to seek to achieve a legitimate objective and be rationally connected to, and a proportionate way to achieve, the objective in order to be justifiable in international human rights law.

1.56 The committee has previously concluded that the control orders regime pursues the legitimate objective of providing law enforcement agencies with the necessary tools to respond proactively to the evolving nature of the threat presented by those wishing to undertake terrorist acts in Australia.<sup>24</sup>

*Threshold assessment of control orders—rational connection*

1.57 In addition to seeking to achieve a legitimate objective, a measure that limits rights must be rationally connected to that objective (that is, it must be likely to achieve its objective). There may be doubt as to whether control orders are rationally connected to that objective as they may not necessarily be the most effective tool to prevent terrorist acts. For example, the former INSLM has stated:

The effectiveness, appropriateness and necessity of COs [control orders] are all reduced or made less likely if it is feasible that comparatively early in the course of offending a person may be charged with a terrorism offence. Australia's inchoate or precursor terrorism offences under the

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19 Articles 23 and 24, ICCPR.

20 Article 7, ICCPR, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

21 Article 6, International Covenant on Economic, Social and Cultural Rights (ICESCR).

22 Article 9 and 11, ICESCR.

23 Article 3, CRC.

24 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) 3.

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[Criminal] Code are striking in that they criminalise conduct at a much earlier point than has traditionally been the case.<sup>25</sup>

1.58 The particular character of terrorism laws has also been recognised in Australian domestic courts which have noted, for example:

Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, eg well before an agreement has been reached for a conspiracy charge.<sup>26</sup>

1.59 In terms of the evidence required for a control order, the former INSLM has also noted:

...the kind and cogency of evidence in support of an application for a CO [control order] converges very closely to the kind and cogency of evidence to justify the laying of charges so as to commence a prosecution...Nothing was obtained in private hearings [primarily with law enforcement and intelligence agencies investigating these issues] suggesting to the contrary.<sup>27</sup>

1.60 Notwithstanding this, the committee notes the government's advice as set out above at paragraph [1.37] that the terrorism threat has subsequently evolved and that control orders have now been used four times since the committee last considered counter-terrorism legislation in late 2014. In addition, the current INSLM is currently conducting an inquiry into control orders and was originally due to report in February 2016.

1.61 Accordingly, while there may be some doubt that control orders are an effective tool to respond to terrorism, above and beyond Australia's traditional criminal justice response of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt, there have been significant recent developments in the counter-terrorism space in recent times.

*Threshold assessment of control orders—proportionality*

1.62 In terms of proportionality there may be questions as to whether control orders are the least rights restrictive response to terrorist threats, and whether

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25 Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) 30.

26 *Lodhi v R* [2006] NSWCCA 121 per Spigelman CJ at [66].

27 Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) 30.

control orders contain sufficient safeguards to appropriately protect Australia's human rights obligations.

1.63 For example, amendments introduced by the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 allow control orders to be sought in circumstances where there is not necessarily an imminent threat to personal safety.<sup>28</sup> The protection from imminent threats has been a critical rationale relied on for the introduction and use of control orders rather than ordinary criminal processes. In the absence of an imminent threat it is difficult to justify as proportionate the imposition of a significant limitation on personal liberty without criminal charge.

1.64 In addition, the issuing criteria for a control order set out in section 104.4 of the Criminal Code requires that each proposed condition of a control order must be reasonably necessary, and reasonably appropriate and adapted, to the purpose of protecting the public from the threat of a terrorist act. However, there is no requirement that the conditions be the least rights restrictive measures to protect the public.

1.65 In 2013, a review of counter-terrorism legislation prepared for the Council of Australian Governments (COAG) recommended:

...section 104.5 [of the criminal code] should be amended to ensure that, whenever a control order is imposed, any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person's liberty, privacy or freedom of movement that is necessary in all the circumstances.<sup>29</sup>

1.66 This was rejected by COAG and separately by the Australian government.<sup>30</sup> This appears to be based on a view that a least rights restrictive approach may be 'less than what is reasonably necessary for public protection'.<sup>31</sup> However, a least rights restrictive approach would not mean that public protection would become a secondary consideration in the issuance of a control order. It would simply require a decision-maker to take into account any possible less invasive means of achieving public protection. In the absence of such requirements it is difficult to characterise

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28 For example, in its submission to the Parliamentary Joint Committee on Intelligence and Security (PJCS) inquiry into the bill the Law Council of Australia warned that control orders could be sought against persons to prevent online banking, online media or community and/or religious meetings. See, Law Council of Australia, *Submission 16*, Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Counter-Terrorism Legislation Amendment Bill (No.1) 2014.

29 Recommendation 37, Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013).

30 See Attorney General's Department, *Submission 1*, INSLM, Inquiry into Control Order Safeguards (November 2015) 2.

31 See Attorney General's Department, *Submission 1*, INSLM, Inquiry into Control Order Safeguards (November 2015) 2.

the control orders regime as the least rights restrictive approach for protecting national security, and to assess the proposed measures as a proportionate way to achieve their stated objective.

*Applying control orders to 14 and 15 year olds—legitimate objective*

1.67 Turning to the specific amendments in Schedule 2, which would allow the AFP to seek a control order for children aged 14 or 15 years of age, the statement of compatibility does not explicitly set out the legitimate objective of these measures. However, the explanatory memorandum explains:

These amendments respond to incidents in Australia and overseas that demonstrate children as young as 14 years of age are organising and participating in terrorism related conduct. With school-age students being radicalised and engaging in radicalising others and capable of participating in activity which poses a threat to national security, the age limit of 16 years is no longer sufficient for control orders to prevent terrorist activity.<sup>32</sup>

1.68 However, to be capable of justifying a proposed limitation of human rights, a legislation proponent must provide a reasoned and evidence-based explanation as to how the measures address a pressing or substantial concern. Neither the statement of compatibility nor the explanatory memorandum explain in detail how the current criminal law does not adequately provide for the protection against terrorist acts by 14 and 15 year olds.

*Applying control orders to 14 and 15 year olds—rational connection*

1.69 In addition, as outlined above, it is not clear from the statement of compatibility how the measures are rationally connected to a legitimate objective.

*Applying control orders to 14 and 15 year olds—proportionality and safeguards*

1.70 In terms of proportionality, the bill makes a number of significant legislative changes to control orders applying to children aged 14 to 17 years of age, including:

- the AFP must give information as to the person's age to the Attorney-General in the application for consent to a control order;
- in determining each of the obligations, prohibitions and restrictions under the control order, the court must consider whether they are reasonably necessary and reasonably appropriate and adapted and also whether they are in the best interest of the child. In determining a child's best interests, the court must consider: the age, maturity, sex and background of the person, their physical and mental health, maintenance of family relationships, the right to education, their right to practise their religion and any other matter the court considers relevant;

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32 Explanatory Memorandum (EM) 42.

- that control orders for 14 to 17 year olds are limited to a three month duration instead of the 12 months which applies to adults; and
- after imposing an interim control order on a child, a court must appoint an independent advocate in relation to the interim control order, any confirmation, variation or revocation of that control order and any other orders.

1.71 The committee considers that many of these provisions provide safeguards for the purposes of international human rights law (and relative to the control orders regime that applies to adults).

1.72 However, for the reasons set out below, it has not been fully explained in the statement of compatibility whether these safeguards will fully ensure that the control orders regime will impose only proportionate limitations on the multiple human rights identified above.

*Applying control orders to 14 and 15 year olds—proportionality and best interests of the child considerations*

1.73 In relation to the requirement for a court to consider the best interests of the child when assessing each of the proposed obligations, prohibitions and restrictions under a control order, the statement of compatibility explains:

...the issuing court will be required to consider the child's best interests as a primary consideration. New subsection 104.4(2A) treats the child's best interests as "a primary" consideration.<sup>33</sup>

1.74 However, the court is not required to consider the child's best interests when initially considering whether, on the balance of probabilities, a control order is necessary in accordance with the legislative criteria. In the case of an imminent threat to life it would appear entirely appropriate that the legislative criteria focus primarily on national security issues. However, as explained above at paragraph [1.63], control orders may now be obtained in circumstances removed from imminent threats and in circumstances where it may be more appropriate to lay charges for a precursor offence. Accordingly, it has not been fully explained in the statement of compatibility why the best interests of the child test does not apply to this initial step of the control order application process.

1.75 In addition, while the court must consider the best interests of the child in determining each of the proposed obligations, prohibitions and restrictions under the control order, the word 'primary' (as in a 'primary consideration') is not included in the proposed provision or referred to in the explanatory memorandum to the bill. A court applying these provisions would presumably interpret the intention of the parliament to be that the best interests of the child should not be the primary consideration. However, the CRC requires that the best interests of the child be 'a

primary consideration' and not just 'a consideration'. Accordingly, it is unclear how this provision is consistent with Australia's obligations under the CRC.

Applying control orders to 14 and 15 year olds—proportionality and the right to liberty

1.76 The statement of compatibility states:

A control order does not authorise detention. A child will not be separated from family and will be able to attend school.<sup>34</sup>

1.77 However, there is nothing in the legislation that would prevent a child being separated from their family or being denied access to school. All the bill requires is that a court must consider the benefit of a child having a meaningful relation with their family and their right to receive an education when determining the conditions of a control order. It does not prevent an order being made that separates a child from their family or requires them not to attend a particular school.

1.78 In addition, a control order may include a requirement that a person be confined to a particular place and subject to a curfew of up to 12 hours in a 24 hour period. This would appear to meet the definition of detention (or deprivation of liberty) under international human rights law, which is much broader than being placed in prison. The United Nations Human Rights Committee has explained:

Examples of deprivation of liberty include police custody, arraigo, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport as well as being involuntarily transported.<sup>35</sup>

1.79 In terms of the proportionality of such detention, the UK courts have found that curfews of 18 hours per day amount to disproportionate deprivations of liberty, and that curfews of 12 to 14 hours may not be disproportionate.<sup>36</sup>

1.80 The European Court of Human Rights and the UK House of Lords have held that control order conditions must be considered cumulatively, such that a nine hour curfew combined with other stringent measures may effectively amount to a deprivation of liberty.<sup>37</sup>

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34 EM 15.

35 United Nations Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and Security of person)*, UN Doc CCPR/C/GC/35, 1-2 [Footnotes omitted].

36 *Secretary of State for the Home Department v JJ & Others* [2007] UKHL 45; *Secretary of State for the Home Department v E & Another* [2007] UKHL 47; *Secretary of State for the Home Department v MB & AF* [2007] UKHL 46; *Guzzardi v Italy*, Application 7367/76, Decision of 11 June 1980.

37 *AP v Secretary of State for the Home Department* [2010] UKSC 24. See also *Guzzardi v Italy*, Application 7367/76, Decision of 11 June 1980.

1.81 In assessing what constitutes a deprivation of liberty, the issue is the length of the period for which the individual is confined to their residence. Other restrictions imposed under a control order, which contribute to the controlee's social isolation, may also be taken into account along with the period of the curfew.<sup>38</sup> Accordingly, the statement of compatibility has not fully explained whether the detention that may be imposed as part of a control order under this bill is proportionate.

*Applying control orders to 14 and 15 year olds—proportionality and limited use of control orders*

1.82 The statement of compatibility also notes that control orders are not intended to be used often:

A control order would only be issued against a child, especially one as young as 14, in the rare circumstance that it was required to prevent a child from being involved in a terrorist act. This includes protecting a child who may be acting under the direction or influence of an extremist group or individual. In these circumstances, the wellbeing and best interests of a child may be adversely affected if a control order is not issued in relation to that child. For example, the issuing of a control order in relation to a child may prevent the child's contacting the group or individual who may be encouraging the child to engage in terrorist-related conduct.<sup>39</sup>

1.83 However, in this example, it is unclear why it is not possible to target the individuals that are encouraging the child to be involved in a terrorist act rather than the child. If it is because those individuals are outside of Australia's jurisdiction, it would be possible to limit the imposition of a control order on a child to circumstances where it was not possible to control the individuals seeking to influence the child. It would be useful if the statement of compatibility explained whether these provisions impose a proportionate limitation on the rights of children.

1.84 The statement of compatibility also states:

Control orders are used infrequently, with only six ever issued as at November 2015 (with none having been issued for people aged under 18 years of age). This reflects the policy intent that these orders do not act as a substitute for criminal proceedings. Control orders are a protective and preventative mechanism subject to numerous legislative safeguards that preserve the fundamental human rights of a person subject to a control order. The nature of the restrictions imposed by control orders will always be subject to the overarching legislative requirements that include consideration by the issuing court that any limitation is "reasonably necessary" and "reasonably appropriate and adapted" to protecting the public from a terrorist act. While there is an expectation that the number

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38 *AP v Secretary of State for the Home Department* [2010] UKSC 24.

39 EM 18.



of control orders made will increase in coming years, the small number of control orders made to date and the small number relative to investigations and prosecutions reflects the policy intent that they are extraordinary measures which are to be used sparingly – and this is especially so with children.<sup>40</sup>

1.85 The policy intent that the limitation on human rights be imposed rarely is a relevant consideration in assessing proportionality. However, policy intent, in and of itself, is an insufficient safeguard for the purposes of international human rights law. As set out above at paragraph [1.63], a control order may be granted in circumstances that are much broader than seeking to stop a terrorist act. In this respect, to characterise the regime as providing for 'extraordinary measures' does not reflect the breadth of circumstances in which a control order may be granted, including that such an order would substantially assist in the prevention of, the support for, or the facilitation of, a terrorist act. Such support or facilitation does not need to be direct or critical to the carrying out of the terrorist act, and the terrorist act does not need to be imminent.

1.86 In addition, there is no requirement that the court consider whether there are other criminal justice alternatives that may achieve the protection of the public but impose less restrictions on a person subject to the control order.

1.87 The issues outlined above raise questions as to the proportionality of Schedule 2, which could have been explained more fully in the statement of compatibility.

**1.88 The committee has assessed the amendments to lower the age at which a person may be subject to a control order to 14 years of age against multiple human rights in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.**

1.89 As set out above, the amendments engage and limit multiple human rights. The committee therefore seeks the advice of the Attorney-General as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether the measures are rationally connected to that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

## **Schedule 2—Court-appointed advocate for children**

1.90 Item 46 of Schedule 1 to the bill would insert a new section 104.28AA in the Criminal Code to provide for an issuing court to appoint a lawyer as an advocate to act on behalf of a child between the ages of 14 and 17 who has been made subject to an interim control order.

1.91 The court-appointed advocate would not be acting as the child's legal representative and, as such, is not obliged to act on the instructions or wishes of the child.

1.92 The committee considers that the introduction of court-appointed advocates for children engages and limits the right of the child to be heard in judicial and administrative proceedings.

### ***Right of the child to be heard in judicial and administrative proceedings***

1.93 Article 12 of the CRC provides that state parties shall assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting the child. The views of the child must be given due weight in accordance with the age and maturity of the child.

1.94 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

### ***Compatibility of the measure with the right of the child to be heard in judicial and administrative proceedings***

1.95 The bill provides that the court-appointed advocate of a person must:

(b) form an independent view, based on the evidence available to the advocate, of what is in the best interests of the person; and

(c) act in what the advocate believes to be the best interests of the person;  
[and]

(e) ensure that any views expressed by the person in relation to the control order matters are fully put before an issuing court...<sup>41</sup>

1.96 However, the court-appointed advocate is not required to take into account the wishes of the child or act on their instructions during any court proceedings, and is able to act independently and make recommendations as to a specific course of action which may be explicitly in opposition to the wishes of the child. As the explanatory memorandum says:

...the advocate is an independent party who is responsible for representing the young person's best interests rather than the expressed wishes of the young person.<sup>42</sup>

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41 See item 46 of Schedule 2 to the bill, proposed new section 104.28AA(2).

1.97 Further, the court-appointed advocate is authorised to disclose to the court any information provided to the advocate by the child, if the advocate believes that the disclosure is in the best interests of the child.<sup>43</sup> This disclosure is authorised even in situations where it may be against the wishes of the child.<sup>44</sup>

1.98 The explanatory memorandum stipulates that the bill allows that such information does not necessarily have to be disclosed in order to 'facilitate a relationship of trust and open communication between the young person and the advocate'.<sup>45</sup> However, the bill enables an advocate to disclose this should they so choose.

1.99 The statement of compatibility for the bill notes that the proposed new section 104.28AA is modelled on sections 68L and 68LA of the *Family Law Act 1975*, which provide for the appointment of an independent children's lawyer. The statement explains that the significant difference between the provisions in that Act and those in the current bill is that the court-appointed advocate is not acting as the child's legal representative but rather as an advocate for the child's best interests.<sup>46</sup>

1.100 However, as set out above at paragraphs [1.53] to [1.54], the imposition of control orders imposes severe restrictions on the human rights of those subject to it. As such, the use of advocates in such proceedings is entirely different from the family law context where issues relating to children are primarily related to a child's residential or custody arrangements with his or her parents or guardians.

1.101 Further, the recommendations of the advocate are not required to take into account a consideration of the age of the child, or an individual assessment of their maturity. The primary obligation under the CRC is to support decision making by minors consistent with their maturity and capacity. The children affected by these amendments would be between the ages of 14 and 17, and likely to have strong or well-formed opinions regarding how their situation is handled before the courts.

1.102 The statement of compatibility states that a child may also engage their own independent legal representative.<sup>47</sup> However, the ability of the court-appointed advocate to make recommendations against the wishes of the child nevertheless engages the right as set out above at paragraphs [1.93] to [1.94].

1.103 The statement of compatibility does not address this right and, accordingly, it would be useful for the Attorney-General to provide further information in relation to the right of the child to be heard in judicial and administrative proceedings.

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42 EM 55.

43 See item 46 of Schedule 2 to the bill, proposed new section 104.28AA(4).

44 See item 46 of Schedule 2 to the bill, proposed new section 104.28AA(4).

45 EM 55.

46 EM, Statement of Compatibility (SoC) 17.

47 EM, SoC 17.

1.104 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law.

1.105 **The committee has assessed amendments allowing for the court-appointed advocate for children against article 12 of the Convention on the Rights of the Child (right of the child to be heard in judicial and administrative proceedings).**

1.106 **As set out above, the amendments engage and limit the right of the child to be heard in judicial and administrative proceedings. The committee therefore seeks the advice of the Attorney-General as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether the measures are rationally connected to that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

#### **Schedule 5—'Imminent' test and preventative detention orders**

1.107 Currently, a preventative detention order (PDO) can be applied for if it is suspected, on reasonable grounds, that a person will engage in a terrorist act, possesses something in connection with preparing for or engaging in a terrorist act, or has done an act in preparation for planning a terrorist act.<sup>48</sup> The terrorist act must be one that is imminent and expected to occur, in any event, at some time in the next 14 days.<sup>49</sup>

1.108 Schedule 5 of the bill seeks to change the current test of 'imminent' for the grant of (PDOs), by providing a new definition of 'imminent terrorist act' as one that it is suspected, on reasonable grounds, is capable of being carried out, and could occur, within the next 14 days.

1.109 As PDOs allow for the detention of a person for up to 48 hours, and the amendments would broaden the basis on which a PDO can be made, the bill engages and limits the right to liberty.

#### ***Right to liberty***

1.110 Article 9 of the ICCPR protects the right to liberty—the procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. The prohibition against arbitrary detention requires that the state should not deprive a person of their

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

49 See subsection 105.4(5) of the Criminal Code.

liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

1.111 Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require the detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary.

*Compatibility of the measure with the right to liberty*

1.112 The statement of compatibility states that the change to the imminent test engages but does 'not impact upon the right' to liberty.

1.113 However, the proposed amendments would lower the threshold on which a PDO can be sought, so that instead of an event being 'expected to occur' within the next 14 days it need only be 'capable of being carried out' and 'could occur' within the next 14 days. In this regard, the measure limits the right to liberty, and accordingly it is necessary to understand whether the measure pursues a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

1.114 First, the statement of compatibility states that the legitimate objective of the PDO regime as a whole is to prevent an imminent terrorist act occurring and preserve evidence of, or relating to, a recent terrorist act.<sup>50</sup>

1.115 However, the statement of compatibility does not provide an explanation of the legitimate objective for lowering the threshold as to when an act is considered to be 'imminent'. While the explanatory memorandum states that the current test can be interpreted as 'imposing impractical constraints on law enforcement agencies' in certain circumstances,<sup>51</sup> it does not provide evidence or explanation as to the nature of those circumstances so that the committee can understand the practical reasons for the legislative change. In addition, the objective for the measure is somewhat unclear, because the explanatory memorandum states that a PDO may be necessary when a terrorist act could occur within 'months', but the statement of compatibility characterises PDOs as being 'clearly preventative [in] nature' and employed only in 'emergency circumstances where traditional law enforcement powers are unavailable'.<sup>52</sup>

1.116 In this respect, it would be useful for the statement of compatibility to fully articulate the reasoning and evidence underpinning the legitimate objective to be achieved by the proposed change to the imminent test.

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50 EM, SoC 22.

51 EM 60.

52 EM, SoC 22.

1.117 Second, noting that the objective of the PDO regime generally is to prevent an imminent terrorist act from occurring, it has not been fully explained how the amendments lowering the threshold of what is considered to be imminent is rationally connected to that objective.

1.118 In particular, there has been some debate as to the effectiveness of the PDO regime. In 2013 the *Council of Australian Governments Review of Counter-Terrorism Legislation* (the COAG review) extensively reviewed the PDO regime. It concluded that the PDO scheme 'is, as presently structured, neither effective nor necessary' and recommended that the PDO scheme be repealed.<sup>53</sup>

1.119 The finding of the COAG review expanded on the concerns raised in 2012 by the former INSLM, who questioned the efficacy and proportionality of PDOs taking into account their particular character and the extent of their use. The INSLM noted:

The combination of non-criminal detention, a lack of contribution to CT [(counter-terrorism)] investigation and the complete lack of any occasion so far considered appropriate for their use is enough to undermine any claim that PDOs constitute a proportionate interference with liberty.<sup>54</sup>

1.120 The INSLM noted that the case for extraordinary powers for policing of terrorism related offences, above the traditional powers and approaches to the investigation and prosecution of criminal behaviour, had not been established:

There has been no material or argument demonstrating that the traditional criminal justice response to the prevention and prosecution of serious crime through arrest, charge and remand is ill-suited or ill-equipped to deal with terrorism. Nor has this review shown that the traditional methods used by police to collect and preserve evidence, eg search warrants, do not suffice for the investigation and prosecution of terrorist suspects. There is, by now, enough experience in Australia of police operations in the detection and investigation, and support for prosecution, of terrorist offences. There is therefore substantial weight to be given to the lack of a demonstrated functional purpose for PDOs as a matter of practical experience.<sup>55</sup>

1.121 Notwithstanding this evidence, the committee notes the government's advice, set out above at paragraph [1.37], that the terrorism threat has subsequently evolved; and, as such, this evidence may be outdated in the current security environment. Accordingly, it would be useful for the Attorney-General to provide

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53 *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) 70 and recommendation 39.

54 Independent National Security Legislation Monitor, *Declassified annual report* (20 December 2012) 45.

55 Independent National Security Legislation Monitor, *Declassified annual report* (20 December 2012) 52-53.

more information as to how the measure is rationally connected to the objective of preventing imminent terrorist acts.

1.122 Third, to assess whether lowering the imminent threshold is compatible with the right to liberty it is necessary to assess whether the current PDO regime, together with the proposed amendments, provides sufficient safeguards so as to be proportionate to the objective sought to be achieved.

1.123 In this respect, the statement of compatibility states that the right to liberty is safeguarded by the existing provisions in the PDO regime, and because the basis on which PDOs can be granted 'highlights the clearly preventative nature of the PDO power'.<sup>56</sup> In particular, the statement of compatibility points to certain requirements of subsection 105.4(4)—namely, that there is a reasonable suspicion that a person will engage in a national terrorist act; and that the AFP member and issuing authority must be satisfied of three key matters:

- the terrorist act is imminent;
- making the order would substantially assist in preventing an attack; and
- detaining the person is reasonably necessary to achieve the preventative purpose.

1.124 However, the committee notes that the PDO regime necessarily involves significant limitations on human rights. This is because it allows the imposition of a PDO on an individual without the normal criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt. Effectively, PDOs permit a person's detention by the executive without charge or arrest.<sup>57</sup>

1.125 It is clear that the current requirement that a terrorist act be imminent and expected to occur, in any event, at some time in the next 14 days is intended to be a safeguard on the use of PDOs because it restricts their use, as the statement of compatibility says, to emergency circumstances where traditional law enforcement powers are unavailable.<sup>58</sup>

1.126 However, the amendments make two changes to this safeguard. First, the current test requires that the act be both 'imminent' (which is undefined) and

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57 It should also be noted that while the PDO is restricted to a maximum of 48 hours detention, there is an agreement with the states and territories that there is a nationally consistent regime for PDOs. The main difference is that while federal PDOs are restricted to 48 hours detention, state and territory PDOs can enable the detention of a person for up to 14 days. Any changes to the imminent threshold at the federal level are likely to be reflected in the nationwide PDO regime: see Council of Australian Governments, Inter-governmental Agreement on Counter-terrorism Laws (25 June 2004) which provides for consultation between the Commonwealth and the states and territories on amendments to counter-terrorism laws.

58 EM, SoC 22.

expected to occur, in any event, within 14 days. The proposed new definition would, in effect, remove the requirement that the act be imminent according to the common definition of the term (that is, almost certain to happen very soon or likely to occur at any moment). For example, a person could be detained, without arrest or charge, for up to two days where it is reasonably suspected that they possess a thing that is connected with preparing for a terrorist act that is capable of being carried out and could occur within the next 14 days.

1.127 Second, the changes would mean that a terrorist act would be imminent if it was capable of being carried out and could occur in the next 14 days, without there being a need to suspect that such an act is likely to occur within the next 14 days—as the explanatory memorandum notes, this could mean that the act could occur within months.

1.128 While these changes may be based on operational advice it is not clear from the information provided in the statement of compatibility that these amendments are proportionate to their objective.

**1.129 The committee has assessed the amendments to lower the threshold of when an attack is considered to be 'imminent' for the purposes of a preventative detention order against article 9 of the International Covenant on Civil and Political Rights (right to liberty).**

**1.130 As set out above, the amendments engage and limit the right to liberty. The committee therefore seeks the advice of the Attorney-General as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective; and**
- **whether the measures are rationally connected to that objective;**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

### **Schedules 8 to 10—Monitoring compliance with control orders**

1.131 Schedule 8 seeks to establish a regime of monitoring warrants to permit a police constable to enter, by consent or by monitoring warrant, premises connected to a person subject to a control order. A person subject to a control order may also, by consent or monitoring warrant, be subject to a search of their person including a frisk search. A search must be for a prescribed purpose including protecting the public from a terrorist act or determining whether a control order is (or has been) complied with.

1.132 Schedule 9 seeks to amend the TIA Act to allow law enforcement agencies to obtain warrants for the purposes of monitoring compliance with a control order. It would allow telecommunications interception information to be used in any



proceedings associated with that control order. The power to use telecommunications interception for monitoring purposes is a covert power.

1.133 Schedule 10 seeks to amend the SD Act to allow law enforcement agencies to obtain warrants to monitor a person who is subject to a control order to detect breaches of the order. The amendments would allow surveillance device information to be used in any proceedings associated with that control order. They would also extend the circumstances in which agencies may use less intrusive surveillance device without a warrant, to include monitoring of a control order, and allow protected information obtained under a control order warrant to be used to determine whether the control order has been complied with. The power to use surveillance devices for monitoring purposes will remain a covert power.

1.134 The Crimes Act and other Commonwealth legislation confer a range of investigative powers on law enforcement and intelligence agencies. The committee considers that the significant change proposed by these measures is the power to search premises, intercept telecommunications and install surveillance devices for the purposes of monitoring compliance with a control order in the absence of any evidence (or suspicion) that the order is not being complied with and/or any specific intelligence around planned terrorist activities.

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

1.136 The powers also involve significant intrusions into the privacy of individuals unrelated to the person who is subject to a control order, including people who use computers at the same education facilities as a person subject to a control order.

1.137 Accordingly, these schedules engage and limit the right to privacy.

### ***Right to privacy***

1.138 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

1.139 Privacy is linked to notions of personal autonomy and human dignity: it includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy requires that the state does not arbitrarily interfere with a person's private and home life.

1.140 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

*Compatibility of the measures with the right to privacy*

1.141 The statement of compatibility states that the measures limit the right to privacy and concludes that any such limitation is justified:

[The legitimate objective of the measures]...is to assist law enforcement officers prevent serious threats to community safety. The potentially intrusive nature of the powers is balanced by their use solely in respect of terrorism offences, which constitute the gravest threat to the safety of Australians.<sup>59</sup>

1.142 Assisting law enforcement officers to prevent serious threats to community safety is likely to be a legitimate objective for the purposes of international human rights law and, as the monitoring powers may assist in law enforcement efforts, the measures are rationally connected to that objective.

1.143 In relation to proportionality, the primary expansion in investigative powers provided for by the measures is in relation to compliance with a control order. Control orders necessarily include very broad and significant restraints on an individual's liberty. A breach of any condition of a control order is a criminal offence punishable by five years imprisonment.

1.144 As set out above at paragraph [1.49], the conditions of a control order could include requiring a person to stay in a certain place at certain times, preventing a person from going to certain places and preventing a person from possessing or using a telephone or the internet. A breach of a control order could be relatively minor—for example, breaching a curfew by 30 minutes or talking innocently on a phone in breach of an order.

1.145 If these intrusive powers were used solely in respect of terrorism offences and not in relation to potentially minor breaches of a control order, it is likely that the measures in this bill would be compatible with international human rights law. However, as the powers are much broader, more information would assist the committee to assess whether these powers impose only a proportionate limitation on the right to privacy.

1.146 A monitoring warrant may be obtained not just in relation to the place that a person subject to a control order is ordinarily resident but also in relation to premises to which the person has a 'prescribed connection'. This includes the place where such a person goes to school or university, a place where they work or undertake voluntary work and even a friend's place. Under these measures it would therefore be possible, for example, to obtain a monitoring warrant for a university library to determine whether a person subject to a control order, who is a student at that university, has used the library to access the internet in breach of their control order.

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59 EM 12.

1.147 In relation to telephone intercepts, agencies will be able to apply for telecommunications service warrants (A-party (control order subject) and B-party (third party)) and named person warrants. An interception warrant may also authorise access to stored communications and telecommunications data associated with the service or device.

1.148 The statement of compatibility explains:

The amendments establish a number of safeguards to ensure that any interference with privacy is for a legitimate objective and implemented in a proportionate manner...[T]he judge or nominated AAT member must have regard to the privacy of any person or persons would be likely to be interfered with by intercepting under a warrant communication made to or from the telecommunications service...The judge or AAT member must also have regard to what extent methods...that do not involve intercepting communications have been used by or are available to the agency seeking the warrant, [and] how much the use of such methods would be likely to assist...<sup>60</sup>

1.149 A telecommunications warrant can be obtained where it would assist in determining compliance with a control order, and there is no requirement that there be a suspicion of a breach of the warrant or that there be any investigation on foot. Importantly, the privacy of the control order subject and third parties communicating with that person are required to be considered before a telecommunications intercept warrant may be issued. In addition, the issuing authority must have regard to alternatives for obtaining that evidence without the interception. However, while the provisions require the consideration of privacy, it is not a determinative factor. There is no requirement that the warrants only be issued where the evidence cannot be obtained by less intrusive means.

1.150 Moreover, warrants to intercept telecommunications can be obtained not just in relation to the person subject to the control order but also in relation to any person that they are likely to communicate with (B-Party warrants). While there are strict rules around such interception, including the exhaustion of certain practical alternatives, given the breadth of control order conditions and that the purpose of such interception is simply to monitor compliance, it would be useful if more information was provided to explain whether the ability to issue B-Party warrants is appropriate in the circumstances.

1.151 In relation to surveillance devices, such devices can currently be obtained only when the issuing authority is satisfied that there are reasonable grounds for suspecting that a relevant offence has been, is being, or is likely to be, committed. Under the bill the only requirement for the use of such devices is that it would substantially assist in determining the control order has been, or is being, complied with. Any surveillance device that monitors where a person subject to a control order

goes and who they talk to is likely to meet this test. There is no requirement that such devices only be placed in properties connected with the control order subject. The bill would also allow the use of certain devices without a warrant for the purposes of monitoring compliance with a control order—this could include tracking the movement of vehicles that the control order subject may travel in.

1.152 In relation to surveillance devices, the statement of compatibility states:

Only people who are subject to a control order will have their right to privacy limited by these amendments.<sup>61</sup>

1.153 However, a surveillance device may be authorised if it would substantially assist in determining that the control order has been, or is being, complied with. This would include listening into conversations between people in the home, car, workplace, or university of a control order subject, and thus would limit the right to privacy of those third parties. Accordingly, it appears that the privacy implications of the use of surveillance devices could extend to innocent third parties in addition to the control order subject.

1.154 The statement of compatibility also states:

Judicial oversight prior to the use of a privacy-intrusive surveillance device requires law enforcement agencies to demonstrate the necessity and proportionality of surveillance to an independent party. This is an important safeguard.<sup>62</sup>

1.155 The bill requires the judge or Administrative Appeals Tribunal member to have regard to the likely value of information sought to be obtained in determining whether the control order is complied with and the possibility that the person has or will contravene the control order. These are not strict conditions that require the surveillance device to be used only when necessary or as a last resort when less intrusive means are not available to determine compliance with the control order.

1.156 In terms of transparency, the bill would also introduce new deferred reporting arrangements which, in certain circumstances, will permit delayed public reporting on the use of telecommunications intercepts and surveillance devices in relation to a control order.

1.157 The statement of compatibility explains:

Due to the small number of control orders which are issued, immediate reporting of any warrants or authorisations of surveillance devices may enable an individual to determine whether they are the subject of surveillance. If a person knows, or suspects that there is a control order surveillance device warrant in place, they are more likely to be able to modify their behaviour to defeat those lawful surveillance efforts. Also, if a person knows or suspects that a surveillance device warrant is not in force,

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61 EM 28.

62 EM 28.

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the deterrence value of the control order is limited to the extent that the person believes they can engage in proscribed activity without risk of detection. Deferred reporting balances the public interest in timely and transparent reporting with the need to preserve the effectiveness of control orders to prevent individuals from committing terrorist acts.<sup>63</sup>

1.158 While this sets out why there are legitimate reasons for delayed notifications, the reporting requirements provide transparency around the use of very intrusive investigative tools. Transparency is an important safeguard that is relevant to the assessment of the proportionality of the measures. Accordingly, the reduction in transparency needs to be considered in assessing whether these measures impose a proportionate limitation on the right to privacy.

**1.159 The committee has assessed the investigative powers in Schedules 8, 9 and 10 of the bill against article 17 of the International Covenant on Civil and Political Rights (right to privacy).**

**1.160 As set out above, the amendments engage and limit the right to privacy. The statement of compatibility explains how that limitation achieves a legitimate objective and is rationally connected to that objective. However, further information would assist in determining that the limitation is proportionate. The committee therefore seeks the advice of the Attorney-General as to whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

#### **Schedules 9 and 10—Use of information obtained under warrant if interim control declared void**

1.161 Schedules 9 and 10 of the bill seek to include new provisions in the TIA Act and the SD Act to allow for the use of information intercepted or accessed under a warrant relating to an interim control order that is subsequently declared to be void.<sup>64</sup> This relates to the proposed new interception and surveillance warrants as described at paragraphs [1.132] to [1.133] above.

1.162 The bill would ensure that, where a warrant was issued on the basis that an interim control order was in force, and a court subsequently declares that order to be void, any information obtained under the warrant (while in force) can be used, recorded or given as evidence. The information can only be used if the person using it reasonably believes that doing so is necessary to prevent or reduce the risk of the commission of a terrorist act, serious harm to a person or serious damage to property, and only for purposes relating to a PDO.<sup>65</sup>

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63 EM 29.

64 See item 53 of Schedule 9 (proposed new section 299) and item 39 of Schedule 10 (proposed new section 65B).

65 See item 53 of Schedule 9 (proposed new section 299) and item 39 of Schedule 10 (proposed new section 65B).

1.163 The use of information obtained under a warrant relating to an interim control order that is subsequently declared void engages and may limit the right to a fair hearing and fair trial, in particular the right to equality of arms.

***Right to a fair trial and fair hearing***

1.164 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, and to cases before both courts and tribunals. The right is concerned with procedural fairness and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.165 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

***Compatibility of the measure with the right to a fair trial and fair hearing***

1.166 The right to a fair trial encompasses the right to equality of arms, which is an essential component of the right to a fair trial. It requires that a defendant must not be placed at a substantial disadvantage to the prosecution. The UN Human Rights Committee's General Comment 32 notes that this means:

...the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or unfairness to the defendant.<sup>66</sup>

1.167 Allowing one party in an application for a PDO to rely on evidence or information obtained under a warrant for an interim control order that is subsequently declared to be void engages and may limit the rights of a person subject to that order to equality of arms.

1.168 However, the statement of compatibility has not addressed this right specifically. In discussing the amendments in general terms the statement of compatibility explains that they reflect the public interest in protecting the public from terrorist acts and serious harm and preventing serious damage to property. It states:

Notwithstanding that the underlying order in relation to which the warrant was made is no longer valid, there remains a strong justification for allowing the information be used to prevent significant harm to the public.<sup>67</sup>

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66 United Nations Human Rights Committee, *General Comment 32: Right to equality before courts and tribunals and to a fair trial* (2007) paragraph 13.

67 EM, SoC 32.

1.169 The committee notes that preventing serious harm to the public is a legitimate objective for the purposes of international human rights law. It is also clear that the measures are likely to be rationally connected to this objective (that is, they are likely to be capable of achieving that objective). However, further information would assist in clarifying that the measures are proportionate to that objective.

**1.170 The committee has assessed the amendments allowing the use of information intercepted or accessed under a warrant relating to an interim control order that is subsequently declared to be void against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial and fair hearing).**

**1.171 As set out above, the amendments engage and may limit the right to a fair trial and fair hearing. The committee therefore seeks the advice of the Attorney-General as to whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

#### **Schedule 15—Non-disclosure of information to the subjects of control orders and their legal representatives**

1.172 Currently, the NSI Act allows a court to prevent the disclosure of information in federal criminal and civil proceedings where it would be likely to prejudice national security (except where this would seriously interfere with the administration of justice). A range of protections for sensitive information is available, including allowing such information to be redacted or summarised, and preventing a witness from being required to give evidence.

1.173 Schedule 15 of the bill would amend the NSI Act to allow a court to make the new types of orders restricting or preventing the disclosure of information in control order proceedings such that:

- the subject of the control order and their legal representative may be provided with a redacted or summarised form of national security information (although the court may consider all of the information contained in the original source document);<sup>68</sup>
- the subject of the control order and their legal representative may not be provided with any information contained in the original source document (although the court may consider all of that information);<sup>69</sup> or
- the subject of the control order and their legal representative may not be provided with evidence from a witness in the proceedings (although the court may consider all of the information provided by the witness).<sup>70</sup>

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68 See item 19 of Schedule 15 to the bill, proposed new subsection 38J(2).

69 See item 19 of Schedule 15 to the bill, proposed new subsection 38J(3).

70 See item 19 of Schedule 15 to the bill, proposed new subsection 38J(4).

1.174 The court may make such orders where it is satisfied that the subject of the control order has been given sufficient notice of the allegations on which the control order request was based, even if they have not been given notice of the information supporting those allegations.<sup>71</sup>

1.175 In addition, currently under the NSI Act a court can hold a closed hearing to decide whether information potentially prejudicial to national security may be disclosed (and, if so, in what form); and whether to allow a witness to be called.<sup>72</sup> The court has the discretion to exclude non-security cleared persons from the hearing if their presence would be likely to prejudice national security.

1.176 The bill would further provide that a court may order, on the application of the Attorney-General, that one or more specified parties to the control order proceeding and their legal representative cannot be present during closed hearing proceedings. This would apply even where the legal representative has security clearance;<sup>73</sup> and prevent any record of the closed hearing being made available to the legal representative.<sup>74</sup>

1.177 Excluding the subject of the control order and their legal representative from accessing information and evidence that supports the making of a control order, and from hearings to decide whether to restrict such information, engages and limits the right to a fair hearing.

### ***Right to a fair trial and fair hearing***

1.178 The right to a fair trial and fair hearing is described above at paragraphs [1.164] to [1.165].

### ***Compatibility of the measure with the right to a fair trial and fair hearing***

1.179 The statement of compatibility acknowledges that the measures in Schedule 15 limit the right to a fair hearing and particularly the principle of equality of arms, which requires that all parties have a reasonable opportunity to present their case under conditions that do not disadvantage them against other parties to the proceedings.

1.180 The statement of compatibility states that the objective of the measure is to protect national security information where disclosure may be likely to prejudice national security. It explains:

In some circumstances, the information will be so sensitive that the existing protections under the NSI Act are insufficient. The inadvertent or

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71 See item 19 of Schedule 15 to the bill, proposed new subsection 38J(1).

72 See section 38I of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the NSI Act).

73 See item 12 of Schedule 15 to the bill.

74 See item 15 of Schedule 15 to the bill.



deliberate disclosure of such national security information may endanger the safety of individuals as well as the general public, or jeopardise sources and other intelligence methods. In the absence of the amendments contained in Schedule 15, a control order may not be able to be obtained because of the inability to provide such information to the issuing court.<sup>75</sup>

1.181 The committee notes that protecting national security is a legitimate objective for the purposes of international human rights law.

1.182 However, it would be useful to have additional evidence and reasoning that explains why the existing NSI Act provisions are insufficient, and examples as to when information cannot currently be provided in support of a control order application. For the reasons set out below, it is unclear why the existing arrangements for protecting information on national security grounds are insufficient.

1.183 The NSI Act currently allows the Attorney-General to issue a non-disclosure certificate or witness exclusion certificate, which requires the court to hold a closed hearing to determine whether the information should be excluded, disclosed in full or disclosed only as a summary or statement of the facts.<sup>76</sup> This means that the subject of the control order and their legal representative can already be excluded from a hearing, unless the legal representative has security clearance.

1.184 In addition, the existing definition of 'information' under the NSI Act is drafted broadly, and includes 'information of any kind, whether true or false and whether in a material form or not'; and an opinion and a report of a conversation, whether or not in the public domain.<sup>77</sup> This allows scope for different types of information to be prescribed as protected and sensitive, and on that basis to be withheld from persons subject to civil proceedings (which includes control order proceedings).

1.185 Further, the Criminal Code also currently allows information to be withheld from the subject of a control order. Specifically, an interim control order must set out a summary of the grounds on which the order is made, but not if that information is likely to prejudice national security.<sup>78</sup> When confirmation of an interim control order is sought, the affected person must be served with such details as to allow them 'to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order'. However, information is

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75 EM, SoC 24.

76 See Part 3A of the NSI Act.

77 See section 7 of the NSI Act which states that 'information' means that which is defined in section 90.1 of the Criminal Code.

78 See section 104.5(2A) of the Criminal Code.

not required to be served or given if it would prejudice national security (or carry other, broader risks).<sup>79</sup>

1.186 Noting these existing arrangements for the protection of information in control order proceedings, the main purpose of the bill appears to be to provide for circumstances where the subject of a control order and their legal representative may not be provided with any details at all about the information being relied on, but which can still be considered by a court, in control order proceedings.

1.187 In addition to seeking to achieve a legitimate objective, a measure that limits human rights must also be rationally connected to, and a proportionate way to achieve, its legitimate objective. The statement of compatibility states that the measures are proportionate as the court has 'the inherent capacity' to act fairly and impartially, and there are safeguards in the NSI Act.<sup>80</sup>

1.188 First, the statement of compatibility notes that proposed new section 38J(1)(c), which provides that the court is to be satisfied that the subject of a control order 'has been given notice of the allegations on which the control order request was based', will apply even where no information supporting those allegations has been given. This means that the subject of the control order:

...has sufficient knowledge of the essential allegations on which the control order request is sought (or varied), such that they are able to dispute those allegations during the substantive control order proceedings.<sup>81</sup>

1.189 The explanatory memorandum gives an example of how this might work in practice:

...if a control order application alleged the subject had attended a terrorist training camp in a foreign country, the subject may only be informed of that allegation in general terms, if a court was satisfied disclosure of further and more detailed information about the person's attendance at that terrorist training camp would involve an unacceptable risk to sensitive national security intelligence sources.<sup>82</sup>

1.190 However, providing a person with 'notice of the allegations' on which a control order request is based may not give sufficient detail to a person to be able to dispute the allegations against them. In relation to the example provided above, it would be sufficient for a person to be told of the allegation that they had attended 'a terrorist training camp' without any detail of when or where the camp was held. In the absence of such information the person may not be able to provide exonerating evidence (for example an alibi or alternative explanation for their presence at the camp) to effectively challenge the allegation.

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79 See subsections 104.12A(2) and (3) of the Criminal Code.

80 EM, SoC 24.

81 EM, SoC 24.

82 EM 122.

1.191 The European Court of Human Rights has held that it is permissible to place restrictions on the right to a fully adversarial procedure if there are strong national security grounds that require certain information to be kept secret.<sup>83</sup> However, while information can be withheld from a person, sufficient information about the allegations against the person must be provided to enable them to give effective instructions in relation to those allegations.<sup>84</sup> The UK courts have said in relation to control orders that the standard of disclosure is relatively high, and 'where detail matters, as it often will, detail must be met with detail'; and there must be 'a real opportunity for rebuttal'.<sup>85</sup> A bare allegation without detail of what, when and where an act is said to have occurred (for example, that a person was involved in 'a terrorist act'), may not enable a person to lead evidence to refute that allegation.

1.192 The COAG review extensively reviewed all aspects of the control orders regime.<sup>86</sup> It noted that the existing legislation may limit the right to a fair trial, and recommended that it be amended to provide for a minimum standard concerning the extent of the information to be given to the subject of a control order. It stated:

It is intended to enable the person and his or her ordinary legal representatives of choice to insist on a minimum level of disclosure to them. The minimum standard should be: "the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations."<sup>87</sup>

1.193 The proposed amendments have not been enacted.

1.194 In addition, unlike schemes in jurisdictions such as Canada and the United Kingdom, which allow a special advocate to be involved in proceedings and seek instructions from an affected person (albeit without disclosing the full information to the person), the scheme in the NSI Act and as proposed to be amended would allow a person's legal representative to be excluded entirely from a hearing or from accessing the information.

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83 See *A and Others v the United Kingdom*, European Court of Human Rights, Application no. 3455/05 (19 February 2009) 205.

84 See *A and Others v the United Kingdom*, European Court of Human Rights, Application no. 3455/05 (19 February 2009) 220. See also the recent judgment of *Sher and Others v the United Kingdom*, European Court of Human Rights, Application no. 520/11 (20 October 2015) which states, at 149, that 'the authorities must disclose adequate information to enable the applicant to know the nature of the allegations against him and have the opportunity to lead evidence to refute them. They must also ensure that the applicant or his legal advisers are able effectively to participate in court proceedings concerning continued detention'.

85 See *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28 per Lord Hope at paragraph 87 and per Lord Scott at paragraph 96.

86 *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013), available at: <http://www.ag.gov.au/Consultations/Documents/COAGCTReview/Final%20Report.PDF>.

87 *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) 59, recommendation 31.

1.195 With regard to these considerations, it is unclear why it is necessary to exclude a person's legal representative, even if they are security-cleared, from a hearing to determine if information will be considered by the court but not provided to the subject of the control order. Excluding a person's legal representative in such circumstances does raise questions as to how the measure may be compatible with the principle of equality of arms.

1.196 Second, the statement of compatibility notes that, in addition to having regard to the potential prejudice to national security in not making an order to exclude information, the court must have regard to whether making the order 'would have a substantial adverse effect on the substantive hearing in the proceeding'. The statement of compatibility states that the court must therefore expressly contemplate the effect of any potential order on a party's ability to receive a fair hearing.<sup>88</sup>

1.197 However, consideration of 'a substantial adverse effect on the substantive hearing' is not the same as requiring the court to consider whether restricting information would limit a person's right to a fair hearing—rather, it requires consideration of the overall effect on the hearing, including in relation to ensuring a control order may be imposed.

1.198 Third, the statement of compatibility notes the general discretion of the court not to make (control) orders:

Where a legislative scheme departs from the general principles of procedural fairness, the question for the judiciary will be whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid practical injustice.<sup>89</sup>

1.199 It is unclear how a court's discretion nevertheless may ensure procedural fairness to both parties. While the discretion of the court not to make a relevant order is important to whether a fair hearing will be achieved in a particular instance, the committee's analysis of the compatibility of the legislation itself must look to whether the legislation would enable an order to be made that may unjustifiably limit the right to a fair hearing.

**1.200 The committee has assessed the amendments allowing a court to rely on information when making or varying a control order that has not been disclosed to the person subject to the control order or their legal representative against article 14 of the International Covenant on Civil and Political Rights (right to a fair hearing).**

**1.201 As set out above, the amendments engage and limit the right to a fair hearing. The committee therefore seeks the advice of the Attorney-General as to:**

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88 EM, SoC 25.

89 EM, SoC 25.

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective (particularly whether there is evidence demonstrating that the existing powers under the *National Security Information (Criminal and Civil Proceedings) Act 2004* and the *Criminal Code Act 1995* to redact or summarise information or exclude witnesses are insufficient); and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective (particularly whether it is proportionate to exclude a security-cleared legal representative from a hearing as to whether information should be withheld from the subject of a control order; and for allegations on which a control order request is based to be provided to the subject of a control order, without a requirement that sufficient information is provided to allow a real opportunity to rebut those allegations).

## **Privacy Amendment (Protecting Children from Paparazzi) Bill 2015**

*Sponsor: Mr Katter MP*

*Introduced: House of Representatives, 23 November 2015*

### **Purpose**

1.202 The Privacy Amendment (Protecting Children from Paparazzi) Bill 2015 (the bill) seeks to amend the *Privacy Act 1988* to insert a new criminal offence provision for persons who harass the children of celebrities or any other person in certain circumstances.

1.203 Measures raising human rights concerns or issues are set out below.

### **Offence of causing a victim to be annoyed or distressed**

1.204 The new criminal offence provision in the bill prohibits engaging in conduct in relation to a child under 16 years which causes the child, or would be likely to cause a reasonable person in the position of the child, to be annoyed, alarmed, tormented, or terrorised, or causes emotional distress, and the conduct is engaged in because of the vocation or occupation of a parent, carer or guardian of the child. The prohibited conduct involves attempting to photograph or record the child's image or voice, and following or lying in wait for the child.

1.205 The committee considers that the bill promotes the right to privacy and the rights of the child. The committee also considers that the new offence provision prohibiting conduct that causes a victim to be annoyed or distressed engages and limits the right to freedom of expression.

### ***Right to freedom of expression***

1.206 The right to freedom of opinion and expression is protected by article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to freedom of opinion is the right to hold opinions without interference and cannot be subject to any exception or restriction. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

1.207 Under article 19(3), freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*)<sup>1</sup>, or public health or morals. Limitations must be prescribed by

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1 'The expression 'public order (*ordre public*)'...may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*): Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

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law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.<sup>2</sup>

*Compatibility of the measure with the right to freedom of expression*

1.208 The statement of compatibility does not acknowledge that any rights are engaged by the bill, and as such has not explained how an offence for conduct that annoys, alarms, or distresses a person is a justifiable limit on the freedom of expression.

1.209 The offence prohibiting conduct that annoys, alarms or distresses a person is very broad. It would prohibit conduct that might be simply irritating to a person, such that they feel annoyed. The offence captures conduct by any person engaging in the conduct in a public space, regardless of whether they are in fact 'paparazzi' or simply members of the public. Even if the conduct does not actually annoy, alarm or distress the child in question, a person can still be convicted if their conduct is found to be 'likely to cause a reasonable person in the position of the victim' to be annoyed, alarmed or distressed.

1.210 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought, including whether there are less restrictive ways to achieve the same aim. The right to freedom of expression includes a right to use expression or behave in a way 'that may be regarded as deeply offensive'.<sup>3</sup> The right to freedom of expression protects not only favourable information and ideas but also those that offend, shock or disturb because 'such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society'.<sup>4</sup> The distribution of media depicting celebrities and their children is still protected by freedom of expression regardless of the worth or merit of such information. The right to freedom of expression, however, can be permissibly limited and the content of the information being communicated will be relevant to whether the limitation is proportionate.

1.211 In order to limit the right to freedom of expression it must be demonstrated that there is a specific threat that requires action which limits freedom of expression, and it must be demonstrated that there is a direct and immediate connection between the expression and the threat.<sup>5</sup> It is not clear to the committee that the broad wording of the offence meets these criteria.

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2 See UN Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, paras 21-36 (2011).

3 See UN Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 11.

4 *Handyside v United Kingdom* (1976) 1 EHRR 737.

5 See UN Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 35.

1.212 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1, and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

**1.213 The committee's assessment against article 19 of the International Covenant on Civil and Political Rights (right to freedom of expression) of the offence provision for conduct that annoys, alarms, or causes distress raises questions as to whether the offence is compatible with the right to freedom of expression.**

**1.214 As set out above, the offence provision for conduct that annoys, alarms, or causes distress engages and limits the right to freedom of expression. The statement of compatibility does not justify that limitation for the purposes of international human rights law. In accordance with paragraph [1.212], the committee therefore seeks the advice of the legislation proponent as to:**

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation on free expression and that objective; and**
- **whether the limitation on free expression is a reasonable and proportionate measure for the achievement of that objective.**



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## Migration Regulations 1994 - Specification of Required Medical Assessment - IMMI 15/119 [F2015L01747]

*Portfolio: Immigration and Border Protection*

*Authorising legislation: Migration Regulations 1994*

*Last day to disallow: Exempt from disallowance*

### **Purpose**

1.215 The Migration Regulations 1994 - Specification of Required Medical Assessment - IMMI 15/119 (the instrument) prescribes classes of people who are required to take medical assessments when entering Australia.

1.216 Measures raising human rights concerns or issues are set out below.

### **Medical assessments for certain visa applicants**

1.217 The instrument specifies that certain visa applicants are required to take certain medical tests in order to satisfy decision makers that they meet the health requirements for the visa for which they have applied.

1.218 The instrument alters the arrangements set by the previous instrument<sup>1</sup> in a number of ways, including moving from a 'three tiered' system, specifying countries as 'low', 'medium' and 'high' risk, to a two tiered system. Most significantly, the instrument reduces the period of temporary stay for which a medical assessment is generally not required from 12 to six months.

1.219 The instrument would see more people who intend to spend between six and 12 months in Australia needing to undergo a medical assessment before they are granted a visa. As a result, more people may have their applications rejected on health grounds. The required medical tests may exclude individuals who have a medical condition that is a disability for the purposes of international human rights law.

1.220 The committee understands and supports the importance of protecting the Australian community from public health risks and containing public expenditure on health care and services. It considers that appropriate health checks are required in order to better promote the right to health. However, as these changes widen the circumstances in which persons with a disability may not be granted a visa, the instrument engages the right to equality and non-discrimination for persons with a disability, and the committee requires further information to properly assess the impact of the instrument on this right.

1.221 The committee also notes that subjecting individuals to medical testing will also engage and limit the right to privacy, but considers that in the context of the visa application process this is likely to be a justifiable limitation.

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1 Migration Regulations 1994 - Specification of Required Health Assessment - IMMI 14/042 [F2014L00981].

***Right to equality and non-discrimination (rights of persons with disabilities)***

1.222 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

1.223 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.224 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or on the basis of disability),<sup>2</sup> which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.<sup>3</sup> The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.<sup>4</sup>

1.225 The Convention on the Rights of Persons with Disabilities (CRPD) further describes the content of these rights, describing the specific elements that State parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

1.226 Article 5 of the CRPD guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability.

***Compatibility of the measure with the right to equality and non-discrimination***

1.227 The instrument is not accompanied by a statement of compatibility as the instrument is not specifically required to have such a statement under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act). However, the committee's role under section 7 of the Act is to examine all instruments for compatibility with human rights (including instruments that are not required to have statements of compatibility).

1.228 The instrument widens the circumstances in which temporary visa applicants may have the grant of a visa refused on health grounds. As persons with a disability necessarily have pre-existing health conditions, they may be disproportionately affected by this instrument. The concept of indirect discrimination in international

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2 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

3 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989).

4 *Althammer v Austria* HRC 998/01, [10.2].

human rights law looks beyond the form of a measure and focuses instead on whether the measure could have a disproportionately negative effect on particular groups in practice. However, under international human rights law such a disproportionate effect may be justifiable.

**1.229 As stated above, the committee understands and supports the importance of protecting the Australian community from public health risks and containing public expenditure on health care and services; and considers that appropriate health checks are required in order to better promote the right to health. However, as the instrument is not accompanied by a statement of compatibility, the committee does not have enough information before it to establish if the instrument does impact disproportionately on persons with disabilities and, if so, whether any such disproportionate effect is justifiable.**

**1.230 The committee considers that the requirement for medical assessments for temporary visa applicants engages and may limit the right to equality and non-discrimination under articles 2 and 26 of International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities.**

**1.231 Noting that the instrument was not accompanied by a statement of compatibility, the committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- whether the proposed changes are aimed at achieving a legitimate objective;**
- whether there is a rational connection between the limitation and that objective; and**
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

## **Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015 [F2015L01658]**

*Portfolio: Attorney-General*

*Authorising legislation: Telecommunications (Interception and Access) Act 1979*

*Last day to disallow: 22 February 2015 (Senate)*

### **Purpose**

1.232 The *Telecommunications (Interception and Access) Act 1979* (the Act) prohibits the Australian Security Intelligence Organisation (ASIO) or enforcement agencies from authorising access to telecommunications data relating to a journalist, or their employer where the purpose is to identify a journalist's source, unless a warrant has been obtained (a journalist information warrant).<sup>1</sup>

1.233 The Act requires that when considering an application for a journalist information warrant, the minister (in the case of ASIO) or the issuing authority (in the case of enforcement agencies) is satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source. The Act provides that in making that assessment, the minister or issuing authority is to have regard to any submissions made by a 'Public Interest Advocate' (PIA).<sup>2</sup>

1.234 The *Telecommunications (Interception and Access) Amendment (Public Interest Advocate and Other Matters) Regulation 2015* (the regulation) prescribes the process requirements for applying for a journalist information warrant and matters relating to the performance of the role of a PIA, including:

- providing that only the most senior members of the legal profession may be appointed as PIAs and prescribing levels of security clearance for certain PIAs;
- requiring that agencies provide a PIA with a copy of a proposed request or application for a journalist information warrant or notify a PIA prior to making an oral application; and
- enabling PIAs to receive further information (or a summary of further information) provided to the minister or issuing authority by agencies and to prepare new or updated submissions based on that information.

1.235 Measures raising human rights concerns or issues are set out below.

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1 See Division 4C of Part 4-1 of Chapter 4 of the *Telecommunications (Interception and Access) Act 1979*.

2 See subparagraphs 180L(2)(b)(v) and 180T(2)(b)(v) of the *Telecommunications (Interception and Access) Act 1979*.

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## Background

1.236 The Act was amended by the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (the bill) to introduce the journalist information warrant and PIA schemes. The committee commented on the bill in its *Fifteenth Report of the 44<sup>th</sup> Parliament*, its *Twentieth Report of the 44<sup>th</sup> Parliament* and its *Thirtieth Report of the 44<sup>th</sup> Parliament*.<sup>3</sup> Because the journalist information warrant and PIA schemes were introduced as amendments to the bill they did not form part of the committee's consideration.

1.237 The committee considers that the journalist information warrant and PIA schemes that were introduced as amendments to the bill improve the compatibility of the bill. Requiring a warrant before journalist's metadata can be accessed ensures that there is at least some assessment of both the law enforcement need for the metadata and the importance of protecting journalists' sources which contribute to reporting in the public interest *before* the metadata is accessed by law enforcement agencies.

### Role of Public Interest Advocate in journalist information warrant process

1.238 The regulation prescribes the process for a PIA to make a submission regarding an application for a journalist information warrant. However, the regulation does not make provision for the PIA to access or speak with the journalist or other person affected by an application for a journalist information warrant, nor does it guarantee that any submission or input from the PIA regarding such an application would, in fact, be considered prior to the issuance of a warrant. The regulation also provides the minister with a discretion to provide the PIA with only a summary of any further information provided to the minister or issuing authority relating to proposed journalist information warrant requests or applications.

1.239 The committee considers that the regulation, while seeking to better promote the protection of privacy and the right to freedom of expression by prescribing a warrant process for accessing journalist's metadata, also engages and may limit multiple rights.

### Multiple rights

1.240 Accessing telecommunications data relating to a journalist, or their employer, where the purpose is to identify a journalist's source, together with the journalist information warrant and PIA scheme, engages and may limit multiple rights, including:

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3 See Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (November 2014) 10-22; Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 39-74; and Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 133-139.

- right to an effective remedy;<sup>4</sup>
- right to a fair hearing;<sup>5</sup>
- right to privacy;<sup>6</sup> and
- right to freedom of expression.<sup>7</sup>

1.241 Accessing a journalist's metadata may limit their right to privacy as the information can reveal important information about the personal life of the journalist including who they contact and where they travel.

1.242 Accessing a journalist's metadata can limit freedom of expression because it may make it harder for journalists to find sources for important news reporting in the public interest if sources know that they may be identified by metadata.

1.243 As the approval process for accessing a journalist's metadata does not include notifying the party whose data is accessed, that person will not know if their data is accessed improperly and, as such, would be unable to seek redress. This engages the right to an effective remedy (though it is noted that any limitation on this right may be justifiable).

1.244 The right to a fair hearing may also be engaged by the regulation, as it does not make provision for the PIA to access or speak with the journalist or other person affected by an application for a journalist information warrant, nor does it guarantee that any submission or input from the PIA regarding such an application would in fact be considered prior to the issuance of a warrant. While it may be justifiable not to notify individuals in advance that their metadata may be accessed, where metadata access occurs on an ex parte basis, even with the involvement of a PIA, it may not be fully in accordance with the procedural guarantees provided for by the right to a fair hearing.

#### *Compatibility of the measures with multiple rights*

1.245 The statement of compatibility states that the regulation engages and promotes the rights to freedom of expression and privacy. However, it provides no assessment of any limitation on those rights or of the compatibility of the measures with the rights to an effective remedy or a fair hearing.

1.246 The statement of compatibility states that the measures:

...facilitate independent scrutiny of application for warrants enabling access to data in certain circumstances.

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4 Article 2 of the International Covenant on Civil and Political Rights (ICCPR).

5 Article 14, ICCPR.

6 Article 17, ICCPR.

7 Article 19, ICCPR.

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...ensure the [Public Interest] Advocates are appropriately skilled and independent and able to advocate in the public interest.<sup>8</sup>

1.247 While the committee considers that the journalist information warrant and PIA schemes seek to better promote the protection of privacy and the right to freedom of expression by prescribing a warrant process for accessing journalist's information, the regulation may lack sufficient safeguards to appropriately protect these rights, as well as the right to an effective remedy and a fair hearing. In particular:

- the regulation does not enable the PIA to seek instructions from any person affected by the journalist information warrant (namely the journalist or their potential sources). As such, the journalist has no opportunity to provide instructions to the PIA on the substance of an application for a journalist information warrant, or to present a case against such an application, limiting the effectiveness of the PIA. The committee notes there may be circumstances where a journalist could not be notified in advance of a warrant being sought, for example when it might jeopardise an ongoing investigation. However, the committee notes that the PIA scheme is established in such a way that the PIA cannot seek instructions from any person who may be affected by a warrant in any circumstance, including where it would have no impact on an ongoing investigation;
- under the regulation the minister has the discretion to provide the PIA with only a summary of further information provided to the minister or issuing authority relating to proposed journalist information warrant requests or applications. As such, the PIA may not be in a position to effectively mount a case against an application for a journalist information warrant. It is unclear why it is necessary to provide PIAs with only a summary of further information if the intention of the regulation is to ensure PIAs are able to advocate in the public interest; and
- the regulation provides no procedural guarantees to ensure the PIA is able to make a submission on an application for a journalist information warrant prior to the issuance of a warrant. The regulation sets out a process by which a PIA must be notified of an application, but it does not require that the application for a warrant be stayed pending any submission from a PIA. As a result, a journalist information warrant may be issued without the benefit of any possible submissions that could be made by the PIA.

1.248 The committee notes that the statement of compatibility refers to a range of procedural safeguards that apply to the journalist information warrant regime. However, it is unclear whether the measures identified above operate to facilitate

the independent scrutiny of applications for journalist information warrants or ensure that PIAs are able to advocate in the public interest.

**1.249 The committee's assessment against articles 2, 14, 17 and 19 of the International Covenant on Civil and Political Rights (right to an effective remedy, fair hearing, privacy and freedom of expression) of the journalist information warrant and public interest advocate (PIA) schemes, and the process by which a person's data can be accessed without their knowledge, raises questions as to the compatibility of the regulation with these rights.**

**1.250 As set out above, the amendments engage and may limit the right to an effective remedy, fair hearing, privacy and freedom of expression. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Attorney-General as to whether the limitation is proportionate to the stated objective, in particular:**

- **whether the process that does not provide an affected journalist, in any circumstance, with an opportunity to provide instructions to the PIA on the substance of an application for a journalist information warrant, or to present a case against such an application, is a reasonable and proportionate limitation (though the committee emphasises that it recognises there may be circumstances where prior notification would be inappropriate, in particular where it might jeopardise an ongoing investigation);**
- **whether giving the minister the discretion to provide a PIA with only a summary of further information provided to the minister or issuing authority relating to proposed journalist information warrant requests or applications is a reasonable and proportionate limitation; and**
- **whether permitting a journalist information warrant to be issued without the benefit of any possible submissions that could be made by the PIA is a reasonable and proportionate limitation.**