

UNCLASSIFIED



AFP

AUSTRALIAN FEDERAL POLICE



Parliamentary Joint Committee on Intelligence and Security

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

December 2015

Submission by the
Australian Federal Police

UNCLASSIFIED

UNCLASSIFIED

Executive Summary	3
Introduction	4
Use and purpose of control orders	5
Obligations, prohibitions and restrictions.....	6
Balancing prevention and risk management	6
Control orders for young people aged 14 years and above	7
Safeguards for control orders for young people.....	8
Ensuring the effectiveness of control orders	9
Control orders and tracking devices	9
Powers to monitor compliance with the conditions of a control order.....	10
Protecting sensitive information in control order proceedings.....	11
Protection of human sources	11
Limitations of existing protections for sensitive information	12
Safeguards for the protection of sensitive information in control order proceedings.....	12
Use and purposes of preventative detention orders	13
‘Imminence’ test for PDOs	14
Thresholds for PDOs	15
Other Measures	16
Advocating genocide.....	16
Delayed Notification Search Warrants.....	16
Disclosure of taxation information.....	17
Conclusion	18

UNCLASSIFIED

Executive Summary

In 2014, the Government enacted a range of targeted counter-terrorism measures to modernise the legislative framework available to law enforcement and national security agencies to more effectively facilitate their work to detect, deter, investigate and disrupt terrorist threats and protect the community.

The Counter-Terrorism Legislation Amendment Bill (No.1) 2015 (the Bill) continues this work, and addresses operational gaps identified as a result of the challenges experienced by law enforcement and national security agencies over the past 12 months.

The AFP considers the measures in the Bill will enable the AFP to better use the legislative tools provided by successive Parliaments to address the current and evolving terrorist threat. These measures will enhance the ability of the AFP and partner agencies to counter the threat terrorism and violent extremism poses to the safety and security of Australians.

The AFP supports pivotal measures contained in the Bill which:

- improve the efficacy of the control order regime;
- clarify the circumstances in which preventative detention orders may be obtained; and
- ensure the requirements under which information can be obtained to support law enforcement activities and operations are properly defined.

UNCLASSIFIED

Introduction

1. The Australian Federal Police (AFP) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security (the Committee_ inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 ('the Bill'). This submission seeks to explain the operational context for the proposed legislative reforms, and will address several key measures contained in the Bill.
2. It is important, in this evolving environment, to continue to review the ongoing efficacy of the tools available to address terrorist threats to the Australian community, including the control order and preventative detention order regimes. The AFP is committed to protecting the safety of the community in a proportionate and accountable manner, and welcomes scrutiny of the measures in the Bill by the Parliament and the public.
3. The Australian Government raised the terror alert level to 'high' on 12 September 2014. The terrorism threat to Australia remains significant, and the environment continues to evolve. While the threat level remains unchanged, it is now classified as 'probable' under the new National Terrorism Threat Advisory Scheme (NTTAS) established in November 2015. This means that individuals or groups have developed both an intent and capability to conduct a terrorist attack in Australia.
4. Since the initial raising of the terror threat in September 2014, the operational pace has continued to increase, as has the number of ongoing investigations. In the 2014–15 financial year alone, the AFP conducted eight disruption activities that resulted in 25 people being charged with a number of terrorism and other related offences.
5. The speed of radicalisation, and the trend towards smaller, opportunistic plots, dictate that police must act quickly in the interest of ensuring community safety. This increasingly necessitates taking matters to operational resolution at early stages of an investigation when, and if, an imminent threat has been identified. The tragic murder of Mr Curtis Cheng in October 2015 by a 15 year old highlights the high cost to the community when threats remain undisrupted, as well as underscoring the increasingly young age of those being radicalised.
6. The fact that measures to prevent and disrupt terror threats addressed by the Bill have been used infrequently does not mean the existence of these tools is unwarranted. Rather, it highlights the commitment of law enforcement agencies, including the AFP, to using such measures judiciously and in accordance with the public interest. That there are only a small number of persons who have been found to warrant the use of these measures thus far is not predictive of the future. With the current terrorism threat level at 'probable', there is likely to be increased need to apply such measures in the near future.
7. The amendments in the Bill address the increased need to ensure the effective operation of existing preventative and risk mitigation mechanisms, such as control orders and preventative detention orders, while safeguarding accountability and strengthening existing requirements. The AFP considers strengthening these short-medium term preventative tools does not weaken the criminal justice system. On the contrary, it ensures that traditional arrest, charge and criminal prosecution are not used as blunt instruments applied indiscriminately to address the risk a person may pose to the safety of the community.
8. It is also important to acknowledge that the availability of such tools does not mean that law enforcement can prevent every terrorist attack. It will continue to be a challenge for law enforcement and intelligence partners to detect, assess, mitigate and act on ever-adapting, often trans-jurisdictional threats to the community in a timely and proportionate manner. While the

UNCLASSIFIED

underlying factors heightening the challenge are complex, the preventative tools provided for in the legislation are important in responding to, and managing and mitigating, those factors.

Use and purpose of control orders

9. The overriding need to protect the community from harm means that law enforcement must identify emerging threats and constantly balance the need to investigate and collect evidence while a terrorist threat develops, against the need to protect the community from the impact should the threat be realised.
10. In the current fluid and evolving terrorism threat environment, police may have sufficient intelligence to establish serious concern regarding the threat posed by an individual or group, but may not have sufficient time or evidence to commence criminal prosecution. In these circumstances, control orders provide a mechanism to manage the threat in the short to medium term. Use of a control order is thus considered in conjunction with and complementary to criminal prosecution options, and allows a balance to be achieved between mitigating the risk to community safety posed by an individual and allowing criminal investigations to continue.
11. As at 30 November 2015, control orders have been sought six times, with four in relation to current operations. These control order applications have been made in an environment of heightened national threat level. All of these applications were made after the threat level increased on 12 September 2014. This is reflective of the increased operational tempo and the heightened threat environment.
12. Approximately 120 Australians are fighting in Syria and Iraq, and around thirty Australians have already returned. Compared to the earlier period of heightened conflict in Afghanistan, the security challenge posed by Australians participating in the conflict in Syria and Iraq is much greater. Between 1990 and 2010, thirty Australians travelled to Afghanistan or Pakistan to train at extremist camps and/or fight with extremists, of whom twenty-five returned to Australia, with nineteen engaging in activities of security concern following their return. Eight were subsequently convicted of terrorism-related offences, and five are still serving prison sentences.
13. A control order is a preventative measure, and is not intended to be punitive in nature nor as a substitute for prosecution. They will also not be appropriate as an option in every circumstance. Where a person poses a significant risk to the community and there is sufficient evidence to charge a person with an offence, it would generally be difficult to justify placing a person on a control order as an alternative to criminal prosecution, and the AFP would seek to progress such prosecutions in cooperation with the Commonwealth Director of Public Prosecutions.
14. Lower intensity interventions such as voluntary participation in community-based programs are appropriate where a person is not considered to pose a risk to public safety. However, as valuable as such programs are, they are not appropriate when a person is not willing to voluntarily change their behaviours, and their activities indicate that the person is further down the path of radicalisation and is at serious risk of engaging in terrorist activity. Control orders can play an important role in providing a mechanism to manage and mitigate the risk posed by an individual where laying charges is not justified by the evidence available at a particular point in time, and the person would otherwise be unwilling to take steps to change their behaviour.

UNCLASSIFIED

Obligations, prohibitions and restrictions

15. While they do not replace arrest powers, control orders allow police to more effectively monitor a person's movements and associations, thereby reducing the risk of future terrorist activity. Specifically, control orders are used to:
- prohibit a person from possessing certain articles that might be used in preparation for, or during, a terrorist attack;
 - separate a person from associates involved in extremist or terrorist activity; and
 - remove the ability and impetus of a person to perpetrate an offence.
16. The specific obligations, prohibitions and restrictions imposed on a person by a control order are approved by a court and will depend on the person's individual circumstances. The court must be satisfied that each individual condition is reasonably necessary and reasonably appropriate and adapted to the individual's circumstances. This means that the AFP must present sufficient evidence regarding the nature of the threat posed by the individual, and justify how each obligation, prohibition or restriction proposed to be imposed on the person is reasonable and proportionate in light of that threat.
17. In making an application for a control order, the AFP carefully considers the available evidence and the individual's circumstances. The conditions which can be imposed on an individual are limited in two ways:
- by subsection 104.5(3) of the Criminal Code, which clearly defines the types of obligations, prohibitions and restrictions which can be imposed on a person; and
 - by the evidence available regarding the individual's circumstances.
18. The types of obligations, prohibitions and restrictions provided for in subsection 104.5(3) of the Criminal Code are broadly expressed. This means they can be tailored to allow an individual to continue his or her ordinary lifestyle to the greatest extent possible, while moderating the specific conduct or activities which make the person a risk to community safety. For example, a person may be able to continue his or her employment/education and practice of religion. As the purpose of a control order is not punitive, any obligations, prohibitions or restrictions imposed on a person must be specifically aimed at mitigating the ability and motivation of the person to engage in a terrorist act, the provision of support for or the facilitation of a terrorist act, or the provision of support for or facilitation of the engagement in a hostile activity in a foreign country. Any attempt to place broad, unjustified conditions on a person is likely to be censured and dismissed by the issuing court.

Balancing prevention and risk management

19. Division 104 of the Criminal Code, which sets out the legislative regime governing control orders, clearly identifies the protective and preventative purposes for which control orders may be used. One important obligation that may be placed on a person under subsection 104.5(3) is a requirement that the person participate in specified counselling or education, subject to the person's agreement to participate in the counselling or education. While participation cannot be mandated, the imposition of a control order may encourage a person to agree to participate in light of the gravity of the circumstances.
20. In conjunction with other conditions, a requirement to participate in specified counselling or education can be effective in assisting an individual to reconsider their behavioural choices. In particular, non-association requirements prohibiting a person from communicating with known extremists, or conditions limiting a person's exposure to materials which may encourage or

UNCLASSIFIED

facilitate their involvement in violent extremism or restricting the channels through which they may be able to access such material, can assist in removing a person from harmful influences. Such conditions also assist in reducing the ability of a person, and any associates, to commit a terrorism-related act.

21. Control orders can therefore benefit both the community and the person subject to the control order. They give individuals who have engaged in conduct or activities of concern an opportunity to remain in the community and largely continue with their ordinary lives (for example, in relation to their participation in schooling, work, and cultural or religious practices), while requiring them to discontinue or minimise activities which may enable or drive them to participate in terrorist activity. Maintaining connection to society through participation in ordinary activities is of benefit to the individual, both in relation to their personal interests and from a remedial perspective.
22. By contrast, law enforcement considers exposure to the criminal justice system should remain limited to circumstances where there is sufficient evidence to support criminal prosecution. This is because the implications are serious and have an impact on society as well as the individual. Contact with the formal justice system can increase a person's sensitivity to factors that make them vulnerable to extremist ideology. Incarceration as a result of prosecution not only significantly curtails an individual's personal freedom, but may also increase a person's exposure to undesirable influences and risks further alienation from society. Where a person has already displayed susceptibility to ideologies promoting violent extremism, incarceration may, in some circumstances, be linked to further radicalisation.

Control orders for young people aged 14 years and above

23. Recent events have clearly demonstrated the vulnerability of young people to ideologies espousing violent extremism. Law enforcement and intelligence partners have observed both the attraction of terrorist groups to minors, as well as the "grooming" of minors by adults. With the internet providing easy access to propaganda and recruiters, both domestic and international, through social media, young people are at risk of falling prey to terrorist groups who promise a sense of purpose, belonging and excitement. Worryingly, law enforcement is also observing that adults are increasingly looking to use young people to evade law enforcement surveillance and/or attention.
24. The AFP believes that the availability of control orders as a measure to manage and mitigate certain activities engaged in by young people at risk of engaging in violent extremism is important given these trends. The vulnerability of young people to violent extremism demands proportionate, targeted measures to divert them from extremist behaviour. Strong safeguards are also required to ensure that such measures are appropriate and accountable in light of their youth.
25. The AFP considers that, for young people, all available measures to limit engagement with the formal criminal justice system are critical to mitigating the threats posed by violent extremism. While early intervention through voluntary programs is ideal, it should be recognised that young people who are most susceptible to violent extremism are unlikely to participate in such programs of their own accord. Control orders fill a gap by allowing law enforcement to actively manage and divert those young persons who are of greatest concern and vulnerability before they reach the point where there is clear evidence that they have been involved in terrorist activity. They also encourage (but do not mandate) such persons to participate in counselling or education to assist them in the process of reforming their beliefs and behaviours.

UNCLASSIFIED

Safeguards for control orders for young people

26. It is essential the control order regime maintains an appropriate balance between the need to protect the community from harm, and the preservation of the civil liberties of persons who are considered to pose a risk to the community. The AFP recognises this balance should be adjusted to take into account the difference between young people and adults, and considers the safeguards included in the Bill are appropriate in this regard.
27. It is important to note the safeguards included in the Bill will operate in addition to, or where they are more stringent, instead of, the robust safeguards already provided for in the control order regime. Under the existing control order regime, 16 to 17 year olds can be subject to a control order for a duration of no longer than three months. The Bill extends the additional safeguards for young persons to include all minors aged 14 years or above, as well as imposing the three month limit on control orders for all young persons.
28. The Bill also includes the following key safeguards for control orders for young people aged 14 to 17 years:
- a requirement that information about the young person's age be given to the Attorney-General when seeking his or her consent to request a control order;
 - a requirement that reasonable steps be taken to serve a control order personally on at least one parent or guardian of the young person;
 - a requirement that the court take into account the best interests of the young person when determining whether each of the obligations, prohibitions or restrictions to be imposed on the person is reasonably necessary, and reasonably appropriate and adapted, including:
 - the age, maturity, sex and background (including lifestyle, culture and traditions) of the young person;
 - the physical and mental health of the young person;
 - the benefit to the young person of having a meaningful relationship with his or her family and friends;
 - the right of the young person to receive an education;
 - the right of the person to practise his or her religion; and
 - any other matter the court considers relevant;
 - a requirement that the court appoint an independent advocate for the young person (in addition to any legal representation the young person may have);
 - a requirement that the control order be served personally on the court appointed advocate; and
 - requirements that the court appointed advocate:
 - ensure the young person understands, as far as practicable in the circumstances, the information served on them in accordance with the statutory requirements;
 - form an independent view based on the evidence available to the advocate of what is in the best interests of the young person;
 - act in what the advocate believes to be the best interests of the young person; and
 - endeavour to minimise any distress to the young person associated with the control order.

UNCLASSIFIED

29. Considered in the context of the control order regime as a whole, including the safeguards which apply to all control orders, the AFP considers the above safeguards for control orders for young people strike an appropriate balance between the protective purposes of control orders and the civil liberties of young people. The safeguards which apply generally to all control orders will be discussed in further detail below.

Ensuring the effectiveness of control orders

30. As discussed above, the AFP considers control orders to be a valuable mechanism for removing a person's impetus and ability to participate in terrorist activity.

31. However, a control order is only as effective as the ability of police to monitor and enforce the subject's compliance with the conditions imposed by the control order. While the imposition of a control order may in itself be sufficient to deter some individuals from engaging in the behaviours or activities restricted under the order, in some cases, individuals have attempted to subvert their conditions.

32. The Bill seeks to rectify such issues identified through operational experience in relation to the monitoring and enforcement of conditions imposed on a person by a control order. In particular, it seeks to ensure that:

- where a condition to wear a tracking device is imposed, actions to jeopardise the operation of the device constitute a clear breach of the obligation; and
- search, telecommunications interception and surveillance powers can be used by law enforcement to monitor compliance with the conditions of a control order.

Control orders and tracking devices

33. Under the current control order regime, a court may impose on a person a requirement to wear a tracking device if it determines that such a requirement is reasonably necessary, and reasonably appropriate and adapted, for the purposes of protecting the public from a terrorist act or preventing the provision of support for, or the facilitation of, a terrorist act or engagement in a hostile activity in a foreign country. In making such a determination, the court must take into account the impact of the requirement on the person's circumstances, including the person's financial and personal circumstances.

34. For a requirement to wear a tracking device to be imposed, it must be substantiated by the available evidence, and be proportionate to the risks posed by the person, taking into account the impact on the person's individual circumstances. That is, the risks posed by the person are addressed by the ability of law enforcement to monitor his or her whereabouts. For example, monitoring of the person's location may provide assurance that he or she is not attending restricted places or associating with specified people.

35. In order for the requirement to wear a tracking device to be effective, the tracking device must remain operational while the requirement is in place. A tracking device which has run out of battery, or which has been damaged, will render a requirement to wear a tracking device ineffective.

36. The Bill provides for clear instructions to be given to the person to ensure that the tracking device remains charged and operational. It is important that the law is clear that if a person has allowed the battery of a tracking device to run flat, or has tampered with the tracking device, he

UNCLASSIFIED

or she has breached his or her requirement to wear a tracking device. This is consistent with the spirit in which such a requirement is imposed on a person.

37. Similarly, it is important that the law provides clear authority for the AFP to access premises and take actions to install, and on occasion, inspect and maintain equipment associated with the operation of a tracking device. Without such access, the proper operation of the tracking device may be impaired when the person is present in certain areas. The Bill provides express authority for the AFP to access premises and undertake actions to install and maintain the tracking device and related equipment.

38. The Bill recognises that a requirement to wear a tracking device does not mean that the person's compliance with the requirement can be subject to examination at any time. Accordingly, it also provides for a requirement that the person:

- report to specified persons at specified times and places to allow the tracking device to be inspected; and
- notify the AFP as soon as practicable (within 4 hours) after becoming aware that the tracking device or associated equipment is not in good working order.

These requirements are intended to balance the impact on the person's privacy with the need to ensure the tracking device remains operational.

Powers to monitor compliance with the conditions of a control order

39. As with any laws restricting the freedom of persons to engage in specified conduct, the legal and practical ability of authorities to monitor and enforce compliance is a key factor in promoting voluntary compliance amongst the population. Law enforcement is restricted in its ability to monitor and enforce compliance with control orders both by operational resourcing, and gaps in the drafting of laws.

40. It is imperative that law enforcement has adequate powers to monitor a person's compliance with the conditions of the control order. Without sufficient powers to monitor compliance, community safety may be put at risk if the person does not choose to comply with the conditions of the order and breaches go undetected.

41. Currently, law enforcement is only able to apply for a search warrant, or a warrant to use telecommunications interception or a surveillance device, if the requisite threshold in relation to the commission of an offence is met. This means law enforcement is unable to apply for such warrants until and unless it is suspected that an offence has occurred.

42. The ability to use search, telecommunications interception and surveillance powers only after an offence is suspected of being committed undermines the preventative and protective purposes of control orders. The breach of the conditions of a control order may mean a person has been able to progress, or provide support to, terrorist plots or activity, regardless of whether a terrorist act has occurred.

43. The knowledge that law enforcement is able to use its powers to actively monitor compliance provides a strong disincentive to a person to breach the conditions of a control order. Search, telecommunications interception and surveillance powers are particularly relevant to monitoring a person's compliance with obligations, prohibitions and restrictions in relation to:

- the possession of specified articles or substances;
- communication or association with specified individuals;
- access or use of specified telecommunications or technology, including the internet; and

UNCLASSIFIED

- the carrying out of specified activities.
44. Clearly, these obligations, prohibitions and restrictions can be critical to removing the ability of a person to carry out an offence and separating them from others who may encourage, or be involved in, terrorist activity. Where a person seeks to conceal their contravention of such conditions, search, telecommunications interception and surveillance powers may be necessary to detect those breaches.
45. The AFP considers the Bill strikes an appropriate balance between enabling search, telecommunications interception and surveillance powers to be used to monitor compliance with control orders conditions, and ensuring there is sufficient accountability and oversight of the use of these powers.

Protecting sensitive information in control order proceedings

46. The investigation of terrorism and related offences, as with the investigation of other serious and organised criminal offences, often relies on sensitive sources. The very nature of terrorism means that its planning and preparation is concealed, in order to induce shock and terror when an attack occurs unexpectedly. Those involved in terror plots adjust and adapt their means of communication and the sourcing of materials and support to evade surveillance by law enforcement and intelligence partners. Moreover, the environment in Australia is influenced by the terror threat in overseas jurisdictions, and international links between persons suspected of terrorist involvement are increasingly common.
47. This means that it is an increasingly difficult challenge for law enforcement to detect terrorist activity through ordinary surveillance methodologies. As a result, law enforcement increasingly relies on sensitive intelligence sources to identify persons of interest and their associates. These sources may include domestic and international intelligence partners, who may require use of their intelligence to be restricted in order to protect ongoing operations overseas. In other cases, undercover or community sources may be invaluable in identifying persons posing a risk to community safety. All of these sources must be strongly and robustly protected, not only to maintain the confidentiality and integrity of law enforcement and intelligence operations and methodologies, but also to maintain the trust with which law enforcement has been provided this information. Without this trust, the ability of law enforcement and its partners to obtain vital intelligence will be severely eroded.

Protection of human sources

48. Human sources are especially significant in the counter-terrorism environment. Due to their status, they are particularly vulnerable and require a high level of protection. As with other people who assist police, they may experience a high risk of retaliation from persons who are dangerous and motivated. Where an individual is a member of a community in which persons of interest reside, if it is revealed they are a human source, they may face retaliation from those who believe they have betrayed their own, or be targeted by those sympathetic to extremist ideologies. Protection of these sources is not only vital to maintaining the integrity of law enforcement investigations, but also to ensuring that lives are not put at risk.
49. As discussed above, control orders are not punitive and do not authorise the detention of individuals. As the person subject to a control order remains in the community, the risk to an identified human source is even greater than in ordinary criminal proceedings. The protection of community sources is also more difficult due to a range of factors, in particular where sources are part of a tight-knit community and are unable to be closely protected without raising

UNCLASSIFIED

suspicion. In such circumstances, the protection of the source and the information provided by the source during control order proceedings is paramount.

Limitations of existing protections for sensitive information

50. The AFP acknowledges that the *National Security (Criminal and Civil Proceedings) Act 2004* ('the NSI Act'), when invoked in relation to proceedings, provides a significant level of protection to sensitive information. Under the NSI Act, the court may order that information:

- may be disclosed with appropriate deletions, redactions and summaries of information or facts;
- may be disclosed; or
- must not be disclosed.

Similarly, the court may order that a witness may be called, or must not be called.

51. However, under the existing NSI Act, the court cannot allow evidence to be adduced in court if it has been withheld from the person subject to an application for a control order or their legal representative. This means that the evidence that law enforcement may rely on to apply for a control order is limited to evidence that can be disclosed (subject to any order made) to the person and their legal representative.

52. In the current threat environment, it is increasingly likely that law enforcement will need to rely on evidence that is extremely sensitive, such that its disclosure, even to a security-cleared lawyer, could jeopardise the safety of sources and the integrity of investigations. Although some applications will be able to be made without relying on such evidence, there is a substantial risk that the inability to rely on sensitive information may mean that control orders are unable to be obtained in relation to persons posing a high risk to the safety of the community.

Safeguards for the protection of sensitive information in control order proceedings

53. The AFP supports robust safeguards to ensure that the protection of sensitive information in control order proceedings is appropriately balanced to protect the rights of the individual. In addition to the safeguards included in the control order regime in Division 104 of the Criminal Code itself (discussed above), it is important to recognise that the measures included in the Bill extend the existing NSI Act, and do not alter its overarching framework.

54. The AFP acknowledges that the protection of sensitive information in control order proceedings may raise concerns about whether the information available to the person to whom the control order application relates is sufficient for the person to address the allegations against them. Under the current legislative requirements in the Criminal Code, and in accordance with the rules of court and common law obligations, the AFP provides significant and detailed information to the subject of a control order. This will not change under the Bill's measures.

55. As civil proceedings subject to the usual rules of evidence and legal requirements, an application for a control order requires both the court and the person to whom the request for a control order relates to be provided with substantial documentation. The AFP does not, and will not, make an application for a control order unless it considers the risk posed by a person is so significant as to justify the bringing of proceedings, consistent with its obligation to act as a model litigant, and taking into account the significant resources required to support a control order application. As a matter of practice, control order applications prepared by the AFP are drafted on the best available admissible evidence, and under statutory requirements, the Attorney-General's consent must be obtained in order to proceed with an application.

UNCLASSIFIED

56. In particular, the AFP provides the subject of a control order with all relevant information prior to a confirmation hearing. This includes the statement of facts (including any facts relating to why the order should not be made) and summary of grounds on which the order should be granted, any other details required to enable the person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order, and all the information referred to in section 104.12 of the Criminal Code regarding service and explanation (including appeal and review rights).
57. The measures in the Bill to expand the range of orders which are able to be made by a court under the NSI Act will not affect the person's rights to receive the information referred to in the paragraph above under the Criminal Code requirements for control orders. Notwithstanding this, the Bill does provide for a range of additional safeguards in relation to the additional orders that will be able to be made under the NSI Act. These safeguards include:
- the requirement that the court be satisfied that the person has been given notice of the allegations on which the control order request was based;
 - the requirement that the court have regard to any substantial adverse effect that an order may have on the substantive control order proceeding;
 - the discretion of the court to refuse to exclude the person and their legal representative from closed hearing proceedings; and
 - the power of the court to stay proceedings if an order made would have a substantial adverse effect on the substantive control order proceeding.
58. It is important to recognise that the making of an order under the amendments included in the Bill is subject to the court's discretion, as are the existing orders available under the NSI Act. It is thus open to the court to determine that another order, for example, to redact or summarise the sensitive information, would strike a more appropriate balance between protecting sensitive information and protecting procedural fairness to the person to whom the control order application relates. The AFP considers that courts are well equipped to make judgments as to the *weight* that should be given to a piece of sensitive intelligence in relation to a particular set of facts, and that this enables them to make a reasonable judgment as to how to draw the balance between the risk of prejudice to national security, any substantial adverse effect on the substantive control order proceeding, and any other matter considered relevant.
59. In light of the safeguards described above, the AFP considers the measures in the Bill strike an appropriate balance between the need to protect sensitive information in control order proceedings, and procedural fairness to the person to whom the control order relates.

Use and purposes of preventative detention orders

60. Preventative detention orders (PDOs) are protective tools that can be used for two purposes:
- to prevent an imminent terrorist act from occurring; or
 - to preserve evidence of, or relating to, a recent terrorist act.
61. Each Australian jurisdiction has its own PDO regime. The Commonwealth PDO regime is established in Division 105 of the Criminal Code, and allows a person to be detained for an initial duration of up to 24 hours, and may be extended for a period of up to a total period of 48 hours from the time the person is first taken into custody.

UNCLASSIFIED

62. In the current threat environment, situations can unfold rapidly. PDOs can assist police in situations where there is credible intelligence that a terrorist attack is imminent and that certain persons may be involved, but where that intelligence does not provide sufficient basis for police to meet the threshold to arrest a person for the commission of a specific terrorism offence. PDOs enhance the ability of law enforcement to act to protect public safety, without being required to wait until sufficient evidence is available to support arrest and charge.

63. To date, the AFP has used PDOs sparingly:

- no Commonwealth PDOs have been used;
- three PDOs have been issued under NSW legislation (Operation Appleby);
- one PDO has been issued under Victorian legislation (Operation Rising).

64. All references to PDOs in the discussion below relate to the Commonwealth PDO regime.

'Imminence' test for PDOs

65. A PDO can only be issued by an issuing authority where:

- there are reasonable grounds to suspect that the subject:
 - will engage in a terrorist act that is imminent and is expected to occur, in any event, at some time in the next 14 days;
 - possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act that is imminent and is expected to occur, in any event, at some time in the next 14 days; or
 - has done an act in preparation for, or planning, a terrorist act that is imminent and is expected to occur, in any event, at some time in the next 14 days; and
- the issuing authority is satisfied that making the order would substantially assist in preventing a terrorist act that is imminent and is expected to occur, in any event, at some time in the next 14 days, from occurring; and
- the issuing authority is satisfied that detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose of substantially assisting in preventing a terrorist act that is imminent and is expected to occur, in any event, at some time in the next 14 days, from occurring.

66. That is, the issuing authority must be satisfied that there are reasonable grounds to suspect that a terrorist act is imminent and is expected to occur at some time in the next 14 days. This formulation, that a terrorist act be 'imminent' but also expected to occur 'at some time in the next 14 days', poses difficulties for law enforcement when making an application in that it appears to require a particular point in time at which the event is expected to occur to be nominated.

67. However, it is difficult to predict the precise point in time that an incident will take place. This is because a person may not necessarily have a clear timeframe in mind, despite possessing clear intentions to undertake an act and having made significant preparations to do so. A person may also change their plans subject to external events or stimuli, including becoming aware of law enforcement surveillance.

68. The intention of the Bill is not to expand the meaning of 'imminent', but rather to clarify its meaning. That is, it seeks to address the underlying factors which make a terrorist act 'likely to occur at any moment':

UNCLASSIFIED

- the intent of a person to commit a terrorist act in the near future (within the next 14 days); and
 - the actual capability of a person to commit a terrorist act in the near future (within the next 14 days).
69. The AFP notes that consideration of capability is a key element of the NTTAS, and the amendments to the imminence test are consistent with the approach taken by the Government to the assessment of terrorist threats.
70. The AFP also considers that this approach more closely reflects the traditional approach to framing criminal offences in providing for separate limbs relating to the person's state of mind and actual conduct. Whereas the current formulation focuses more on the intent of a person to commit a terrorist act in the near future, the Bill makes clear that the precise time at which the event may occur is not an issue provided there is an intent that an act will occur and the person is able to undertake the relevant act in the next 14 days.
71. The ability of a person to carry out a terrorist act would be determined by their level of planning and preparation, i.e. whether the person has the necessary mental preparation and physical resources to do so.

Thresholds for PDOs

72. Under the existing formulation in Division 105 of the Criminal Code, the requirements for the application and issue of a PDO are contained in subsection 105.4(4), while the requirement that a terrorist act be 'imminent' is contained in subsection 105.4(5). The existing legislation thus artificially separates the thresholds that must be met for a PDO to be issued from the preventative purpose for which the PDO is to be used.
73. The Bill aims to rectify this by clarifying that the requirement that the terrorist act be 'imminent' is read as part of the requirements for the application and issue of a PDO, rather than as a separate requirement. That is, an AFP member must suspect on reasonable grounds, and an issuing authority must be satisfied that there are reasonable grounds to suspect, that a person:
- will engage in an imminent terrorist act (that is capable of being carried out, and could occur, within the next 14 days); or
 - possesses a thing that is connected with the preparation for, or the engagement of a person in, an imminent terrorist act (that is capable of being carried out, and could occur, within the next 14 days); or
 - has done an act in preparation for, or planning, an imminent terrorist act (that is capable of being carried out, and could occur, within the next 14 days).
74. This amendment also makes clearer the existing requirements that the AFP member and issuing authority must be satisfied that:
- making the PDO would substantially assist in preventing an imminent terrorist act (that is capable of being carried out, and could occur, within the next 14 days) occurring; and
 - detaining the person for the period of the PDO (which cannot exceed a total of 48 hours) is reasonably necessary for the purpose of substantially assisting in preventing an imminent terrorist act (that is capable of being carried out, and could occur, within the next 14 days) occurring.
75. The AFP considers that the amendment in the Bill clarifies the existing test. Rather than expanding the current test, the amendment ensures that the relevant requirements for

UNCLASSIFIED

application and issue are read together, and reinforces that the stated purpose of a PDO is to prevent an imminent terrorist act.

Other Measures

Advocating genocide

76. Schedule 11 of the Bill introduces a new Criminal Code offence of 'advocating genocide', to supplement the existing offence of 'advocating terrorism'. 'Genocide' is defined with respect to the offences in Subdivision B of Division 268 of the Criminal Code, which relate to the killing, causing of serious bodily or mental harm, infliction of conditions upon life intended to bring about physical destruction, imposition of measures to prevent birth, and forcible transfer of children, in relation to persons belonging to a particular national, ethnical, racial or religious group.
77. The AFP is concerned about the impact those who advocate genocide and terrorism, (commonly termed 'hate preachers'), have on the current crime environment. The new 'advocating genocide' offence is directed at those who supply the motivation and imprimatur for violence. This is particularly the case where the person advocating genocide holds significant influence over other people who sympathise with, and are prepared to fight for, the genocide cause.
78. In the current threat environment, the use of social media is accelerating the speed at which persons can become radicalised and prepared to carry out violent acts including genocide. In the AFP's view, it is no longer the case that explicit statements are required to inspire others to take potentially devastating action in Australia or overseas. The cumulative effect of more generalised statements, when made by a person in a position of influence and authority, can still have the impact of directly encouraging others to undertake a range of violent acts, including genocide, overseas or in Australia. The AFP therefore require tools, such as the new 'advocating genocide' offence, to intervene earlier in the radicalisation process to prevent and disrupt further engagement in genocide.
79. Where the AFP has sufficient evidence, existing offences of incitement (section 11.4 of the Criminal Code) or urging violence (in Division 80 of the Criminal Code) would be pursued. These offences require the AFP to prove that the person intended to incite or urge violence or a crime and intended the crime or violence to be committed. There will not always be sufficient evidence to meet the threshold of intention in relation to the second aspect. This is because persons advocating genocide can be very deliberate about the precise language they use, even though their overall message still has the impact of encouraging others to engage in genocide.
80. As those who advocate genocide and terrorism continue to adjust their language to avoid criminal prosecution, the AFP considers that it is important that relevant offences continue to be reviewed for efficacy.

Delayed Notification Search Warrants

81. Schedule 14 amends the *Crimes Act 1914* to clarify threshold requirements for the issue of delayed notification search warrants (DNSWs). The amendments clarify the chief officer of the agency applying for the DNSW, and eligible issuing officer, need not personally hold the relevant suspicion or belief. Rather, they clarify that the chief officer and eligible issuing officer must be satisfied on reasonable grounds that the officer applying for the DNSW holds the relevant suspicions and belief.

UNCLASSIFIED

82. A DNSW can only be issued where the 'conditions for issue' set out in section 3ZZBA of the *Crimes Act 1914* are met. That is, the officer applying for the DNSW must:
- suspect, on reasonable grounds, that one or more eligible offences have been, are being, are about to be or are likely to be committed; and
 - suspect, on reasonable grounds, that entry and search of the premises will substantially assist in the prevention or investigation of one or more of those offences; and
 - believe, on reasonable grounds, that it is necessary for the entry and search of the premises to be conducted without the knowledge of the occupier of the premises or any other person present at the premises.
83. Due to the way in which this section was drafted, it is not clear on the face of the legislation that it is the officer applying for the DNSW, rather than the persons approving the application and issuing the warrant, who must hold the necessary suspicions and belief.
84. It is important to note that subsection 3ZZBC(3) requires that an application for a DNSW must be supported by an affidavit setting out the grounds on which the warrant is sought. Similarly, the issuing officer may request further information relating to the application, and may require that the information be provided on oath or affirmation: subsection 3ZZBC(4).
85. It is an offence, punishable by 2 years' imprisonment, for a person to make a statement that the person knows to be false or misleading in a material particular when making an application for a DNSW. In conjunction with the requirements that an application be supported by sworn or affirmed statements (including affidavits), there are robust requirements that must be met for a DNSW to be issued.
86. The AFP does not consider that the amendments in the Bill in any way lower the existing threshold for the application and issuing of DNSWs. Rather, the amendments ensure that the chief officer approving the application for a DNSW and, importantly, the issuing officer determining the application for a DNSW, are clearly separate from, and independent of, the relevant investigation. This is consistent with other types of warrants for which law enforcement may apply, where persons with oversight of the application and deciding the application must be satisfied that there are reasonable grounds for the officer making the application to have the relevant suspicions or belief.
87. The AFP considers that it would be both inappropriate and inconsistent with existing criminal law procedures regarding the issuing of warrants if an issuing officer in relation to an application for a DNSW were required to personally hold the relevant suspicions and belief, as it would then bring into question their independence and ability to provide proper oversight of executive actions undertaken by law enforcement.

Disclosure of taxation information

88. Schedule 17 amends the *Taxation Administration Act 1953* to include a new subsection 335-65(2) in Schedule 1, which creates exceptions to the offence prohibiting disclosure of protected information by taxation officer. This measure will allow disclosure of taxation information to an Australian government agency for the limited purpose of preventing, detecting, disrupting or investigating conduct related to a matter of security (as defined in the *Australian Security Intelligence Organisation Act 1979*).
89. The amendments will supplement existing exemptions to allow disclosure of information by the Australian Taxation Office to the Australian Counter-Terrorism Committee and the National Disruption Group.

UNCLASSIFIED

90. In the current threat environment, it is vitally important that information is able to be shared between government agencies to address terrorism threats at the earliest stage possible. This includes the sharing of information with non-traditional law enforcement agencies, to prevent and disrupt terrorist activity before an attack occurs.

Conclusion

91. The terrorist threat in Australia remains 'probable', and continues to evolve and adapt in an attempt to frustrate law enforcement and intelligence partners' counter-terrorism efforts. Technology and the use of persons not known to law enforcement, including young persons below the age of 18, continue to pose challenges to the detection and prevention of terrorist acts.
92. In the current environment, the AFP believes that it is important to continue to review the efficacy of the range of measures available to law enforcement to address the terrorism threat. The AFP does not consider that relying solely on traditional arrest, charge and prosecution is sufficient or appropriate to protect public safety. Rather, the AFP considers that there are circumstances in which alternative interventions to manage and mitigate risk are in the best interests of the person who poses a risk to the community, and to the community itself.
93. The Bill includes a range of measures designed to ensure that existing mechanisms such as control orders and preventative detention orders remain adapted and appropriate to the current threat environment. Where these mechanisms have been expanded, such as the introduction of control orders for 14 and 15 year olds' and to provide additional protections for the use of sensitive information in control order proceedings, the measures are proportionate to the heightened risk environment, and safeguards have been strengthened to ensure an appropriate balance is struck between the protection of public safety and the rights of the individual. Other measures clarify the operation of existing legislation and do not alter the current balance.
94. The AFP is committed to protecting public safety in an accountable manner, and acknowledges the significant trust that the community places in it to use its powers in a proportionate and reasonable manner and consistent with the purposes for which such powers have been conferred. The AFP considers that the measures in the Bill will enable it to better protect the community from terrorism, while safeguarding accountability and civil liberties.