Australian Government
Attorney-General's Department

Parliamentary Joint Committee on Intelligence and Security

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

Attorney-General's Department Supplementary Submission

January 2016

Contents

Introduction

During the public hearing into the Counter-Terrorism Legislation Bill (No. 1) 2015 (the Bill) on 14 December 2015, the Parliamentary Joint Committee on Intelligence (the Committee) requested the Attorney-General's Department take a number of questions on notice. In addition, the Committee asked the Attorney-General's Department to review the submissions made and the oral evidence given to the Committee and respond to the issues raised. This supplementary submission seeks to address each of those sets of issues. In accordance with the Committee's request, this submission also incorporates advice from the Australian Federal Police (AFP) where relevant.

Schedule 1 – Receiving funds for legal assistance

Schedule 1 of the Bill will expand an existing exception to the terrorist organisation funding offence in section 102.6 of the *Criminal Code Act 1995* (the Criminal Code) so that a lawyer can receive funds from a terrorist organisation for the purpose of providing legal advice in connection with the question of whether the organisation is a terrorist organisation. During the public hearing, the Committee asked the Department about the genesis of the amendment.

This amendment implements the Council of Australian Governments' (COAG) response to Recommendation 20 of the COAG's Review of Counter-Terrorism Legislation Report of 2013 (the COAG Review). The explanatory material accompanying Recommendation 20 referred to public submissions the Committee had received as well as the 2006 Report of the Security Legislation Review Committee (Sheller Report) and the 2006 PJCIS Review of Security and Counter Terrorism Legislation (2006 PJCIS Review) which also considered the scope of the existing exception provided by subsection 102.6(3) of the Criminal Code. A number of these submissions (including those provided by the Gilbert and Tobin Centre of Public Law and the Law Council of Australia), along with the Sheller Report and 2006 PJCIS Review argued in favour of expanding the exception for lawyers to receive funds from a terrorist organisation on the basis that the exception and the associated legal burden was unduly restrictive.

After considering these arguments the COAG Review recommended that the exception should be broadened "to exempt the receipt of funds from a terrorist organisation for the purpose of legal advice or legal representation in connection with criminal proceedings or proceedings relating to criminal proceedings (including possible criminal proceedings in the future) and in connection with civil proceedings" similar to those provided by paragraph 102.8(4)(d) of the Criminal Code.

The COAG response to Recommendation 20 of the COAG Review acknowledged that in matters where there is a question as to whether the entity is a terrorist organisation, the exception ought to be broadened to ensure that the organisation could expend its funds on legal assistance to contest that determination or allegation. However, the COAG response also stated there should be a limitation on the exception and it should not be so broad as to permit expenditure on legal services that would assist the organisation to flourish, such as general commercial or civil transactional work.

Schedule 2 – Control orders and young people

Reduction of minimum age

UNICEF Australia references the Parliamentary Joint Committee on Human Rights Thirty-second report of the 44th Parliament, which submits that the Explanatory Memorandum does not

outline how lowering the minimum age for the imposition of a control order to 14 years is "rationally connected to a legitimate objective", or how such a measure is "reasonable, necessary and proportionate". The Victorian Bar Association and the Australian Councils for Civil Liberties share these concerns and further submit that lowering the minimum age may foster rather than deter radicalisation of youth. The Gilbert and Tobin Centre of Public Law in their written submission agree that there is justification for lowering the age threshold for control orders to 14 years old, given clear evidence of young teenagers being involved in terrorist related activities.

A control order is a preventative measure, and is not punitive in nature nor is it a substitute for prosecution where the person has committed terrorism related conduct. Control orders are designed to manage and mitigate the risk or threat of certain activities being undertaken by young people at risk of engaging in violent extremism.

The AFP's submission to the Committee discusses the operational context for the proposed amendments, and how the extension of the existing regime to persons aged 14-15 is appropriate, proportionate and consistent with the objective of the control order regime to protect the Australian community from terrorist threats. The Explanatory Memorandum and the Department's first submission also discuss the additional or strengthened safeguards proposed in relation to all persons under 18.

Best interests of the young person

Interests of the young person as a primary consideration

The Gilbert and Tobin Centre of Public Law and others note that the Explanatory Memorandum states that the Bill provides for the best interests of the child to be considered by the issuing court when considering whether to issue a control order, however as it is not a 'paramount' consideration the Explanatory Memorandum overstates the compliance of the Bill with Article 3 of the Convention of the Rights of the Child. The Gilbert and Tobin Centre of Public Law and others further submit that the Explanatory Memorandum provides that the issuing court is required to consider the best interests of the child as a 'primary' consideration, however the Bill does not stipulate that.

The Law Council of Australia and the Australian Human Rights Commission submit that besides any inconsistency between the Explanatory Memorandum and the Bill the best interests of the child should be the 'primary consideration'.

The Law Council of Australia has suggested alternate drafting which would require the court to take into account the best interests of the child as a primary (but not the sole) consideration when determining whether the obligations, prohibitions and restrictions to be imposed on the child is reasonably necessary, appropriate and adapted under paragraph 104.4(1)(d) (see page 2 of their supplementary submissions).

The Committee has requested consideration be given to the drafting issues raised by the Gilbert and Tobin Centre of Public Law and others and has invited the Department to consider alternate drafting provided by those submitters.

Subsection 104.4(1) of the Criminal Code provides the test for making an interim control order. When deciding whether to impose a control order on a young person, the issuing court must be satisfied on the balance of probabilities that, for example, the order will substantially assist in preventing a terrorist act or the person has engaged in particular conduct, such as participating in training with a listed terrorist organisation. In conjunction with that consideration, the court must be satisfied on a balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on a person by the order are reasonably necessary, and reasonably

appropriate and adapted for the purposes of protecting the public from a terrorist attack, preventing the provision of support for or the facilitation of a terrorist attack or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

Proposed subsection 104.4(2) of the Criminal Code, specifies matters which the court must consider when determining what is "reasonably necessary, and reasonably appropriate and adapted", namely, the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances), and if the person is 14 to 17 years of age—the best interests of the person.

Given the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances), and if the person is 14 to 17 years of age—the best interests of the person, are both listed as factors the court must consider, it is clear that such considerations are important and hold relevance over other possible considerations. This is why the Explanatory Memorandum referred to the best interests of the person as a 'primary' consideration. However, it is appropriate that the court has the ability to consider any possible relevant factor and determine what weight it should be given. Accordingly, the suggested drafting changes are not appropriate.

The best interests of the child should not be a consideration when determining whether on a balance of probabilities the making of the order would substantially assist in preventing a terrorist attack, or any of the other matters listed at section 104.4(c) as that would fundamentally change the purpose of the test. This is why the Explanatory Memorandum referred to the safety and security of the community as the paramount consideration.

Additional factors the court must consider

The Law Council of Australia recommends in their submission and supplementary submission that the Bill should require the court, when considering what is in the best interest of the child, to give consideration to the additional factors set out in the Convention on the Rights of the Child for example sexual orientation, and the right to health.

The court is separately required to take into account the impact of each obligation, restriction and prohibition on the young person's circumstances when deciding whether to impose them. If a requested obligation, restriction and prohibition would, for example, significantly interfere with the young person's education, it would be open to the court not to impose that obligation, prohibition or restriction on the basis that it would not be reasonably appropriate in those circumstances (see subsection 104.4(2) of the Criminal Code).

Proposed paragraph 104.4(2A)(f) provides that the court must take into account any other matter the court considers relevant. Where the additional factors set out in the Convention are relevant, this provision already ensures the court must take that into account.

Procedural issues

Confidentiality of subject's name

The Gilbert and Tobin Centre of Public Law submit that the Bill should provide that the name of a young person who is the subject of a control order must not be disclosed to the public unless there are exceptional circumstances. They submit that if this recommendation is not adopted, the Statement of Capability should be amended to better reflect the Bill's impact on the rights of the young person.

Consistent with the processes for prosecutions for young persons, in most – if not all – instances it would be appropriate for the identity of the young person subject to the control

order to be subject to a non-publication order. Australian courts and tribunals have specific powers to make suppression orders under their establishing legislation.[1] Neither Division 104 of the Criminal Code or other Commonwealth legislation prohibits an issuing court from suppressing the name of the person who is the subject of the control order. As the decision to supress details of a person appearing before a court is an inherent power held by that court, it would be is not necessary to direct the court's use of its discretion. The Committee may wish to note that suppression orders have been applied by the court in relation to the current control orders.

Serving documents

The Law Council of Australia submits that a child who is the subject of the control order should also be served a copy of the relevant documents for example via their legal representative.

The Law Council of Australia also notes that existing section 104.12 of the Criminal Code places additional requirements on the AFP to inform the person of the effects of the order, and that the person may have appeal and review rights in relation to the order. It is submitted that those additional requirements should also be in place when an order is served on the parent or guardian as it is important that the parent or guardian of the child is fully aware of the effects of the order and review rights.

The Law Council of Australia further submits that the Bill as drafted only requires a copy of a varied, amended or extended control order to be served on a young person's parent or guardian in instances where that parent or guardian was served with a copy of the original interim order. As such, if the AFP was unable to serve a copy of the interim order on a parent or guardian then there is no obligation to attempt to serve a copy of a declaration, revocation or confirmed order on the parent or guardian.

The Muslim Legal Network submits that given they do not support the court appointed advocate regime, they also do not support the court appointed advocate being served with a copy of the control order. Consequently they submit that the control order documents 'must' be served on the parent or guardian. The Queensland Government also submits that there should be a positive obligation that a copy of the order must be served on the young person's parent or guardian except if it is not reasonably practical to do so.

Section 104.12(1) of the Criminal Code provides that as soon as practicable after an interim order is made in relation to a person – regardless of the person's age – the AFP must serve the order personally on the person. In addition, the Bill requires that where a person is 14 to 17 years of age, the person's court appointed advocate must also be served a copy of the order. Further, reasonable steps must be taken to serve a copy on the young person's parent or guardian.

A young person's legal representative will explain to the young person the effects of the order and the person's appeal and review rights, and further it is a role of the young person's court appointed advocate to ensure the person understands these matters.

The requirement to take reasonable steps to serve the order on a young person's parent or guardian will ensure a parent or guardian is served whenever possible. Service on a parent or guardian will occur unless it is not reasonably possible to do so. There are a number of reasons the AFP may be unable to serve a parent or guardian. It may be that a parent or guardian cannot be located. It may also be that it would be inappropriate to serve a parent or guardian because, for example, the young person is estranged from the parent. Providing that the AFP 'must' serve the parent or guardian could potentially frustrate the process in circumstances

[1] See, eg, *Federal Court of Australia Act 1976* (Cth) s 37AF

where the AFP is unable to effect service or where service would actually infringe on the young person's civil liberties and privacy, where they are estranged from the parent.

Further the Bill as drafted requires that the AFP must take reasonable steps to serve a copy of an annotated control order and notification on the parent or guardian who was served with a copy of the interim control order to ensure continuity in the service of documents relevant to the order. This is to ensure consistency with service to guarantee that the parent or guardian with prior information and knowledge of the order will be kept informed. The provision as drafted was not intended to exclude subsequent service on a parent or guardian in instances where it was not reasonably possible to serve a copy of the interim order.

Right to be heard

UNICEF Australia and the Australian Human Rights Commission raise concerns regarding the right of the child to be heard in the control order regime.

The young person who is the subject of the control order has the right to be heard. Division 104 of the Criminal Code specifically provides for the young person to adduce evidence or make submissions to the issuing court in relation to the confirmation or variation of the order (see paragraph 104.14(1)(c) of the Criminal Code).

Court appointed advocate

Model

The model in the Bill seeks to achieve the following outcomes:

- ensure the controls imposed by the control order and the consequences of failing to comply with them is fully explained to the child by an independent person (noting that interim control orders are generally obtained on an ex parte basis, such that the young person would not likely have legal representation at the time of service). The AFP will continue to be required to provide this and other information to the child at the time of service
- ensure there is an independent person who can provide the court with an assessment about what is in the child's best interests, and
- ensure, particularly in circumstances where the child does not have separate legal representation, that there is a legally qualified person from whom the child can obtain advice, and who can adduce evidence and make submissions for the child during proceedings.

The Gilbert and Tobin Centre of Public Law and the Muslim Legal Network submit that the need for the proposed court appointed advocate is questionable given the right of the child to have legal representation to act on their instructions, noting that a young person of 14 to 17 years of age would be able to give sufficiently clear instructions to a lawyer.

The Muslim Legal Network notes that under the NSW Care and Protection law, "best interest" lawyers are usually only appointed when children are under 12 years of age or are otherwise not capable of giving instructions. They also consider that in that system children who are 12 years or over are presumed capable of giving proper instructions to legal representation.

The Gilbert and Tobin Centre of Public Law and the Muslim Legal Network note that the family law environment, where a child is not a primary party to the proceedings, is different from the control order context where the child is a party to the proceedings and can therefore be legally represented. The Gilbert and Tobin Centre of Public Law and the Muslim Legal Network conclude that the adoption of the court appointed advocate based on the Independent Children's Lawyer under the Family Law Act is not a good model in the control order context.

Relationship between the court appointed advocate and the young person's legal representative

The Law Council of Australia raised a possible inconsistency between paragraphs 104.28AA(2)(e) and 4(a) and (b) concerning the matters which the court appointed advocate is required to disclose to the court. Paragraph 104.28AA(2)(e) requires that the court appointed advocate must ensure that the views expressed by the person in relation to the control order are fully put before the issuing court. Paragraphs 104.28AA(4)(a) and (b) state that the court appointed advocate is not under an obligation to disclose to the issuing court and cannot be required to disclose to the issuing court any information that the person communicates to the advocate.

However, it is possible to read these two provisions together in a consistent fashion. The distinction is between the use of the terms 'views' and 'information'. A young person's view is their position on a matter, while information could be anything communicated to the advocate. For example, the advocate may come to a view about what is in the best interests of the young person but despite holding that view the advocate would also be required to represent to the court the young person's view, even though the advocate does not believe that to be in the young person's best interests. The advocate would not, on the other hand, be required to provide to the court information revealed by the young person that informs either of those positions, but could do so if they thought it was in the interests of the young person, even if it was against the wishes of the young person.

The purpose of the requirement that the young person's views must be put to the court is to ensure that even when the advocate disagrees with a young person's view, the young person still has the right to have that view heard by the court (as that may be a relevant consideration for the court).

The purpose of subsections 104.28AA (4) and (5) is to allow the advocate to be an effective voice for the young person's best interests by allowing them to provide information to the court where it is in the young person's best interests, and to keep confidential information where it may not be in the young person's best interests for that information to be revealed.

The Law Council of Australia's suggested amendment which would require the legal representative to authorise any views expressed to the court by the appointed advocate about the best interests of the young person would hinder the ability of the advocate to provide information to the court which might not be in the young person's legal interests but which is in their 'best' interests.

The Gilbert and Tobin, the Muslim Legal Network, the Australian Councils for Civil Liberties and the Law Council of Australia also expressed broader concerns with elements of the proposed court appointed advocate model. These include the ability for the court appointed advocate to communicate with the court matters they believe to be in the child's best interests even when it is against the wishes of the child. It was submitted that a child's legal representative may advise the child not to communicate with the advocate, undermining the objective of the model

The Law Council of Australia in their supplementary submissions provide that the court appointed advocate should not be permitted to disclose information to the court against the wishes of the child and have provided suggested amendments to the Bill that accord with that position. The Law Council of Australia's suggested amendments also require the child's legal representative to "authorise" the court appointed advocate expressing any views about the child's best interests.

The Australian Human Rights Commission also expressed concerns about the qualifications of a court appointed advocate, submitting that they should have expertise in working with children and in child development.

The Committee has sought an assessment of alternate models proposed by the Gilbert and Tobin Centre of Public Law and the Muslim Legal Network, and clarification regarding how the court appointed advocate and the child's legal representative are intended to interact.

Alternative models

The Gilbert and Tobin Centre of Public Law propose an alternate model whereby instead of a court appointed advocate the issuing court receives evidence directly from a court appointed child welfare officer, similar to the power under section 62G of the *Family Law Act 1975* (Cth), where the court appoints a 'family consultant'. Unlike a court appointed advocate, the child welfare officer would not be a lawyer but rather a person qualified to make an assessment of the best interests of the child. It is therefore submitted that the child would not be confused as to the person's role.

There is no readily available information concerning similar international models. However, it may be possible to address the concerns raised in the submissions by amending the current role of the court appointed advocate and providing that the court may call for evidence from an expert (such as a child psychologist or community welfare officer) concerning what is in the best interests of the young person. The court appointed advocate would still be appointed by the court at the time of issuing the interim control order. The court appointed advocate would explain and ensure the young person understands the control order (in addition to the requirements placed on the AFP to explain the control order). In addition the court appointed advocate could assist the young person in seeking legal aid if they chose to do so.

However, any alternate model would be subject to agreement by the States and Territories as per the Intergovernmental Agreement on Counter-Terrorism Laws.

Guarantee of legal representation

The Australian Human Rights Commission and the Law Council of Australia submit that a child should be provided with security-cleared legal representation in all control order proceedings, and their lawyer should be entitled to attend and participate in all proceedings relating to the control order. Further, the Law Council of Australia in their supplementary submission proposes amendments to the Bill which would ensure entitlement to legal representation in control order proceedings when the subject of the proceedings is a young person.

The Committee has requested consideration be given to amending the Bill to require a lawyer to represent a person in all control order applications, regardless of the persons' age.

Neither Division 104 of the Criminal Code nor other Commonwealth legislation prohibits a person from obtaining legal representation for control order proceedings. Existing s 104.12 of the Criminal Code provides that the AFP must advise the person the subject of a control order of the right of that person and one or more representatives to adduce evidence or make submission if the control order is confirmed, revoked or varied. Consequently, the person will be made aware of their ability to engage a representative to appear on their behalf at the control order proceedings.

It is open to the person to obtain their own legal representation or apply for legal aid. The National Partnership Agreement on Legal Assistance Services sets priorities for the use of Commonwealth funding in family, civil and criminal law matters. However, legal aid commissions are independent, statutory bodies established under state and territory legislation. In order to manage finite resources, each legal aid commission determines the extent of assistance provided to a client in a particular matter. Means and merits tests are also imposed under guidelines established by each legal aid commission. Under the National Partnership Agreement on Legal Assistance Services, Commonwealth criminal law services should focus on:

- matters where the defendant is a child
- matters where the defendant is being charged with a criminal offence for which a sentence of imprisonment is likely to apply should the defendant be found guilty, and
- assisting persons being detained in custody.

Civil law services should focus on assisting people with civil law matters that are likely to have a significant adverse impact if not resolved. For example, where there are implications for a person's safety, health and wellbeing. (Family law priorities are also set out in the National Partnership Agreement, and utilise the majority of Commonwealth legal assistance funds.)

Public Interest Monitor

The Law Council of Australia submits that in addition to allowing for the involvement of the Queensland Public Monitor, consideration should be given to allowing the involvement of the Victorian Public Interest Monitor. Further, they consider proposed paragraph 104.14(4)(a) of the Criminal Code should include the words 'provided there has been reasonable notice of the court date' prior to paragraph 104.14(4)(a).

If the subject of the control order so chooses, the Victorian Public Interest Monitor can adduce evidence and make submissions pursuant to existing paragraph 104.14(1)(d) and can attend court to participate in control order proceedings as "a representative of the person".

Existing paragraph 104.5(1)(e) requires the issuing court to specify a day for the confirmation of the interim control order. Existing subsection 104.5(1A) provides that that day must be at least 72 hours after the control order is made. Further, subsection 104.5(1B) provides that, when specifying the day for the proposed confirmation, the court must take into account that the person subject to the control order may need time to prepare evidence or make submissions.

Prosecutions for breach

The Muslim Legal Network has raised concerns about a young person the subject of a control order being imprisoned for a maximum of five years under section 104.27 of the Criminal Code Criminal Code should they breach a control order. Further, they have raised concerns that the Bill does not include accepted principles in legislation concerning children in criminal proceedings.

Section 20C of the *Crimes Act 1914* (Cth) (Crimes Act) provides that a young person who is charged with a Commonwealth offence may be tried, punished or otherwise dealt with as if the offence was an offence against a law of the State or Territory.

Existing state and territory legislation already ensures that a young person who breaches a control order will be prosecuted in accordance with State and Territory criminal laws as they apply to children. It is, therefore, unnecessary to replicate those provisions.

Submissions from Blueprint for Free Speech provide that the Bill does not take into consideration the reduced capacity of a child from 14 years of age to hold the necessary intent to commit a crime.

Under the Criminal Code a person may be criminally responsible for an offence from the age of 10. Although between the ages of 10 to 14 there is an obligation on the prosecution to prove that the child knows right from wrong. Any prosecution for an offence must be supported by admissible evidence and both the physical and fault elements proved to the criminal standard beyond reasonable doubt. The Bill proposes to complement the obligation imposed on the AFP to explain the conditions and restrictions imposed by the control order with an additional explanatory role for the court appointed advocate to ensure understanding of the controls and potential consequences of breach.

Least interference

The Australian Human Rights Commission submitted in their initial and supplementary submissions that whenever a control order is imposed in relation to a person under 18 years of age, any obligations, prohibitions and restrictions imposed should constitute the least interference with the child's liberty, privacy or freedom of movement that is necessary in all the circumstances. Under the current legislation, the court considers whether the control order and the individual conditions of the control order are reasonably necessary, and reasonably appropriate and adapted. This test requires the court to consider the impact of each condition on the person's personal and financial circumstances, and the court has full discretion to refuse to include any of the proposed conditions, or to vary any of the conditions at confirmation. In this context, a 'least interference' test would substantially overlap with existing safeguards, which are appropriate and effective in ensuring that any conditions imposed are proportionate in limiting the person's liberty and privacy to address the risks to public safety for which the control order is sought.

In addition to the existing safeguards, the requirement in the Bill to consider the best interests of the child will ensure conditions placed on a young person are appropriate, proportionate and balanced against the specific risks which the control order is intended to address.

Successive control orders

The Muslim Legal Network submits that control orders for young people should not be able to be renewed after the initial three month period. The Australian Councils for Civil Liberties further submits that there should be a limitation of only two consecutive three month control orders on a child.

In order to renew a control order for a young person after the initial three month period the issuing court must be satisfied that the threshold for issuing a control order is still satisfied. A second or successive control order can only be made when the issuing court is satisfied on the balance of probabilities that, for example, the order will substantially assist in preventing a terrorist act (see the test for issuing a control order at section 104.4 of the Criminal Code.

Control orders are not punitive, and are a preventative tool to protect the Australian community from terrorist threats. It is appropriate that where such threats exist, and a court is satisfied of the requisite matters, control orders are available to manage the threat. The function and purpose of control orders would be seriously hindered if they were not available for renewal when that threshold is met.

Schedule 3 – Control orders and tracking devices

Mandatory conditions, including responsibility for maintenance

The Queensland Government submission noted that the court will have no discretion to amend the mandatory conditions that would apply in the event a tracking device is ordered to enforce a control order. This means the court cannot consider the particular circumstances of a child, including whether it is appropriate, or in fact possible, for the child to comply with the mandatory conditions.

With regard to the mandatory maintenance condition, the Queensland Government, along with the Gilbert and Tobin Centre of Public Law, the Law Council of Australia and others, expressed concern that the subject of an order may not have the capability to perform maintenance on a tracking device. The Queensland Government noted that minor subjects are more likely to negligently damage or fail to maintain equipment due to their developmental life stage. The

Law Council of Australia submits that the requirement for the subject to take 'reasonable steps' to ensure maintenance of the tracking device and related equipment should be removed as it creates confusion for the subject in unforeseen circumstances.

An issuing court will only impose as a condition of the order that the young person wear a tracking device if it determines on a balance of probabilities that the restriction is reasonably necessary, and reasonably appropriate and adapted for the purposes of protecting the public from a terrorist attack, preventing the provision of support for or the facilitation of a terrorist attack or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country. When determining what is "reasonably necessary, and reasonably appropriate and adapted", the issuing authority must consider the impact of the tracking device (including the mandatory conditions associated with the device, such as maintaining it in good working order) on the young person's circumstances and consider the best interests of the young person, for example their maturity, lifestyle, and right to receive education.

Consequently, a court will not impose the tracking device condition as a control on a young person in circumstances where the mandatory requirements such as maintaining good working order of the device are unreasonable and inappropriate.

Prosecution

Both the Gilbert and Tobin Centre of Public Law and the Queensland Government submit that the proposed section 104.5(3A) is too broad and may facilitate easier prosecution for acts committed for relatively innocuous reasons. The Gilbert and Tobin Centre of Public Law submit that if concern exists regarding the disabling of a subject's tracking device then that should be addressed by a clear prohibition of interference with the device.

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. The Bill provides for clear instructions to be given to the person to ensure that the tracking device remains charged and operational.

A tracking device which has run out of battery will render a requirement to wear a tracking device ineffective, but may not constitute interference with the device. Consequently, it is important that the Bill provides the ability to prosecute a person in circumstances where they not only interfere with the device but intentionally render it ineffective by letting it run out of battery.

Any prosecution for an offence must be supported by admissible evidence and both the physical and fault elements proved to the criminal standard beyond reasonable doubt.

Schedule 4 – Issuing court for control orders

Remove Federal Circuit Court as an issuing court

The submissions of the Gilbert and Tobin Centre of Public Law and the Australian Lawyers for Human Rights supported the removal of the Family Court as an issuing court, and suggested the Federal Circuit Court should also be removed as an issuing court. This was reiterated by Professor Lynch when providing oral evidence to the Committee on behalf of the Centre.

The Committee asked for further information concerning the rationale for the Federal Circuit Court being an issuing court for control orders.

The removal of the Family Court as an issuing court for control orders implements Recommendation 28 of the COAG Review of Counter-Terrorism Laws.

While COAG also recommended removing the Federal Circuit Court, both the Federal Court and the Federal Circuit Court exercise a range of functions relevant to the criminal law and counter-terrorism as part of their normal jurisdiction. It is therefore appropriate for both these courts to retain authority as issuing courts. This provides flexibility to ensure ready access to an issuing authority at a range of locations, including at short notice.

It is open to the Federal Circuit Court to discuss any concerns about a proposal to make an application for a control order with the AFP and whether the Federal Court would be better placed to consider any application.

Removing the Federal Circuit Court as an issuing court would limit the geographic locations for making applications and could delay consideration of a control order application, resulting in ongoing risk to the community.

What courts have issued control orders to date?

During the open hearing into the provisions of the Bill, the Hon Philip Ruddock MP asked for information about which courts had issued the control orders made to date.

The Family Court has never issued a control order under the Criminal Code.

Of the six control orders issued to date, two were issued in 2006 and 2007 by the Federal Magistrates Court (now called Federal Circuit Court), with four subsequently being issued by the Federal Circuit Court. Of these, three control orders were issued by the Federal Circuit Court of NSW during 2014 and 2015. The other order was issued by the Federal Circuit Court of Victoria.

How is an issuing court selected?

At the public hearing the committee asked how an issuing court is selected.

In making an application the AFP considers a range of issues, including availability and proximity of relevant Courts.

To date, when making an application to the court the AFP has followed the Federal Circuit Court Rules (2001) and practice and procedure notes issued from time to time by the Registry of the Federal Circuit Court. The processes for the bringing of applications in the Federal Circuit Court and Federal Court are similar. The AFP liaises with the Registry to arrange for an interim control order application to be heard, advising of the nature of the application (including that it be heard ex parte and as soon as possible). It is a matter for the Registry to determine the issuing court based on the availability of a judge to hear the application.

Defer consideration of issuing courts until after the INSLM's inquiry

Both Amnesty International and the Victorian Bar requested consideration of appropriate issuing courts for control orders should be deferred until the conclusion of the INSLM's current inquiry into control order safeguards.

The Government will give careful consideration to any recommendations from the INSLM flowing from his current inquiry.

Schedule 5 – Preventative detention orders

'Imminence' threshold test

At the public hearing, the Law Council of Australia suggested that the proposed 'imminence' threshold test does not require a sufficient possibility of the terrorist act being imminent and

this puts the proportionality and constitutionality of the proposed measure into question. Others, including the Australian Human Rights Commission, also express concern in their written submissions that the proposed amendment creates too low a threshold for obtaining a preventative detention order.

The Law Council of Australia suggested that instead of requiring there are reasonable grounds to suspect the terrorist act is' capable of being carried out, and could occur, within the next 14 days', the test could be that there are reasonable grounds to suspect that the terrorist act is 'likely to occur' within the next 14 days. Alternatively, the Law Council of Australia suggested the threshold could require some 'unacceptable risk of harm' to ensure proportionality of the regime.

The Gilbert and Tobin Centre of Public Law object to the preventative detention order regime broadly on the grounds that the necessity for the regime is not demonstrated. However, if retained, the Gilbert and Tobin Centre of Public Law support the introduction of a defined term of 'imminent terrorist act', submitting it will improve the clarity of provisions and enable preventative detention orders to extend to terrorist acts that are capable of occurring at any moment but for which no date has been set.

Currently, the issuing authority must be satisfied there are reasonable grounds to suspect that a terrorist act is imminent and is expected to occur, in any event, at some time in the next 14 days. The problem with this test is that even where police have grounds to suspect a person has the capacity to carry out a terrorist act at any time, neither the AFP nor the issuing authority may have information as to the time that has been selected to carry out that act – if indeed a time has been selected. For example, if a terrorist is prepared and waiting for a signal or instruction to carry out their act, the AFP may not be able to identify when that signal or instruction will be sent. Indeed the terrorist themselves may not know. Under the existing test, the AFP may not be able to seek a preventative detention order without information as to the expected timing. Accordingly, there is an operational gap in ability to deal with terrorist acts that are not planned to occur on a particular date, even where the preparations for that terrorist act may be in their final stages, or complete.

As the AFP noted in their submission to the Committee, if the point in time that an incident will take place is not known, the issuing authority may not be satisfied the act is expected to occur sometime in the next 14 days. The proposed amendment addresses this issue by placing the emphasis on the capacity for an act to be carried out in the next 14 days. If a terrorist act is capable of being carried out, and could occur, within 14 days, that terrorist act will meet the definition of an 'imminent terrorist act'. Accordingly, the proposed amendment ensures the AFP has the ability to apply for a PDO to safeguard the public against such risks where they are identified. The inclusion of a 14-day timeframe in which the act could occur retains the imminence requirement, but focusses on the capability of a person to commit a terrorist act, as opposed to the specific time in which the terrorist act is expected to occur.

The proposed phrase 'likely to occur' would not entirely overcome the problems with the existing phrase 'expected to occur' as it still places an emphasis on the probability of an act occurring within 14 days. As noted in the AFP submission, a terrorist act can be likely to occur at any moment in circumstances where a person has made plans or preparations to carry out an act, but has not yet selected a date for it to occur (for example, if a terrorist has concealed a bomb in a building with a remote detonator). In those circumstances, if the test for the issue of the PDO was that the terrorist act was 'likely to occur within 14 days', the AFP would still be required to provide evidence as to the likelihood of the act occurring within that set timeframe. This test may be impossible to meet if the terrorist had no particular timeframe for executing their plan, even if it could occur at any moment. The proposed amendments attempt to

address this problem by describing an imminent terrorist act as one that is capable of being carried out, and could occur, in the next 14 days.

The proposal that the test should refer to an 'unacceptable risk of harm' requires a balancing exercise to be undertaken between the relevant nature and degree of risk of harm to the community and the deprivation of a person's liberty for a limited period of time. However, this balancing exercise is already built into the preventative detention order regime under paragraphs 105.4(4)(c) and (d) which require that the issuing authority is satisfied that making the order would substantially assist in preventing an imminent terrorist act, and that detaining the person is reasonably necessary for the purpose of preventing a terrorist act. To the extent that the 'unacceptable risk' component is already a part of the preventative detention order regime, it would be undesirable and unnecessary to include it within the revised 'imminent' test.

Schedule 6 – Issuing authorities for preventative detention orders

Federal Circuit Court Judges should not be issuing authorities

The Gilbert and Tobin Centre of Public Law agreed with the amendment to remove the authority of Family Court judges to issue preventative detention orders, and suggested Federal Circuit Court Judges should also cease to be issuing authorities for the purposes of preventative detention orders.

For similar reasons to those outlined above with respect to the continued role of Federal Circuit Courts as issuing courts for control orders, it is appropriate for Federal Circuit Court Judges to retain the ability to be appointed as issuing authorities for the purposes of preventative detention orders.

No Family Court Judges have been appointed as issuing authorities for the purposes of the preventative detention order regime to date.

No preventative detention orders have been made under the Criminal Code to date. However, it is appropriate for Federal Circuit Court Judges to retain eligibility to be appointed as issuing courts to ensure flexibility and to facilitate access to an issuing authority at a range of locations, including at short notice, noting the urgency necessarily associated with the making of a preventative detention order to prevent an imminent terrorist attack.

Serving Judges should not be issuing authorities

The Gilbert and Tobin Centre of Public Law questioned whether serving state, territory or federal judges could perform the role of issuing authorities in their personal capacity, noting Chapter III of the Constitution prohibits the conferral of any functions on a serving judge in their personal capacity if those functions are incompatible with the independence or integrity of the judicial institution.

Division 105 authorises the Minister to appoint a Judge of a state or territory Supreme Court, or a Judge, or former judge of a superior court, or a President or Deputy President of the Administrative Appeals Tribunal as an issuing authority.

The Minister can only appoint a person who has provided written consent. This ensures persons appointed as an issuing authority have considered and understands the role. In exercising functions as an issuing authority, subsection 105.18(2) makes it clear that the functions conferred are conferred in a *personal capacity* and not as a court or a member of a court, regardless of whether the person is a current or former judge.

Procedural fairness

The Gilbert and Tobin Centre of Public Law submission claims the preventative detention regime lacks procedural fairness. This is not correct. Division 105 contains a number of safeguards and mechanisms to ensure procedural fairness.

This includes the appointment of independent issuing authorities to consider applications, the requirement for the issuing authority to consider *afresh* the merits of making the order, and the requirement for the issuing authority to be satisfied that there are reasonable grounds to suspect that the person will engage in a terrorist act, possesses a thing that is connected with the preparations for, or the engagement of a person in a terrorist or has done an act in preparation for or planning at terrorist act.

In addition, the AFP is required to provide the issuing authority with all relevant information, including information about previous preventative detention or control orders and any additional information requested by the issuing authority.

Schedule 8 – Monitoring of compliance with control orders etc

The control order regime, including any amendments made by the current Bill, will be reviewed by the INSLM and the PJCIS in advance of the sunsetting date in 2018. The Commonwealth, in consultation with the states and territories and law enforcement agencies, has determined that these new provisions are necessary to ensure the control order regime is appropriately adapted to the threat environment.

Threshold issue

Submissions by the Gilbert and Tobin Centre of Public Law, Australian Lawyers for Human Rights, Australian Human Rights Commission and Law Council of Australia suggest that monitoring warrants should only be available where police reasonably suspect/suspect on reasonable grounds that the person subject to the control order (the controlee) is not complying with the control order or is engaging in other terrorism-related activity. This would undermine the purpose of introducing these new warrants which is to enhance the preventative aspect of control orders by ensuring agencies can effectively monitor compliance with the conditions imposed by control orders, without the need to wait until conditions have been breached. This is also true for the control order monitoring powers proposed in relation to the *Telecommunications (Interception and Access) Act 1979* and *Surveillance Devices Act 2004*.

The former INSLM, in his 2012 annual report, noted that a control order itself is unlikely to have a significant deterrent effect on someone who is intent on causing harm through terrorist activity.[2] Enabling agencies to monitor a person's compliance with a control order is likely to increase the deterrence element, as the controlee will be aware that their behaviour can be more readily monitored. This is likely to enhance the preventative effect of control orders and increase their effectiveness in protecting the public from a terrorist act.

The proposal to provide warrants to monitor compliance of the conditions and restrictions of control orders recognises the gravity of the risk of potential breach of those orders and is a necessary and proportionate tool to ensure the effectiveness of the control order regime to mitigate the threat of control order subjects undertaking terrorist activities.

[2] Independent National Security Legislation Monitor, *Declassified Annual Report*. 20 December 2012, chapter II.

The concern that the proposed monitoring warrant provisions signifies a lower threshold is unwarranted, as in order to apply for a monitoring warrant, a Federal Court must first have been satisfied (on the balance of probabilities) that a control order should be issued. This requires the AFP to lead evidence to satisfy the court of a number of threshold issues outlined in Part 5.3 of the Criminal Code. This contrasts with a warrant issued for investigative purposes, where the information in the application has not been judicially considered.

Amending the Bill to incorporate the suggested 'reasonable suspicion' threshold effectively requires law enforcement to meet the same threshold that is currently required for the issue of a search, telecommunications interception or surveillance device warrant for investigative purposes. This would not address the gap which the proposed monitoring power provisions would fill – which is to equip law enforcement with appropriate tools to monitor the compliance by a control order subject with the terms of the control order.

If there were reasonable grounds to suspect that the control order subject was contravening the terms of the control order or engaging in terrorism-related conduct, given both categories of conduct constitute criminal offences, law enforcement would be able to apply for warrants under the existing provisions for search, telecommunications interception or surveillance device powers for the purposes of investigating the commission of an offence.

Given the gravity of the purposes for which a control order is made, the potential consequences of a breach of the order are very serious. If warrants were only available once police had a suspicion that an offence had occurred, a controlee might already have been able to provide support for terrorist activity or take preparatory steps for a terrorist act. If a person were able to perform these kinds of actions before law enforcement agencies could take any action, the preventative and protective purposes of control orders would be undermined.

Given the preventative and protective function served by control orders and the potentially catastrophic consequences in the event a control order subject engages in terrorism-related conduct or contravenes the terms of a control order, the Government considers the threshold proposed in the Bill for the issue of monitoring warrants in respect of control order subjects is appropriate.

Preventative purpose

The Gilbert and Tobin Centre of Public Law submission asserts that monitoring the activities of controlees at a range of locations with which they have a prescribed connection is punitive. The monitoring regime has been designed to enhance the protective and preventative purposes of control orders, and will extend the powers available to law enforcement to monitor the subjects of control order beyond the current power of a court to order a control order subject to wear a tracking device. The authorisation of the use of monitoring powers will be subject to additional judicial consideration following the issue of a control order. Further, a search can only be conducted in relation to premises that have a real and relevant connection with the person who is the subject of a control order. Rather than punishing a controlee, any search must be reasonably necessary and reasonably appropriate and adapted to the purposes of the 'prescribed purposes', which are:

- protecting the public from a terrorist act;
- preventing the provision of support for, or the facilitation of, a terrorist act;
- preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country; or
- determining whether the relevant control order has been, or is being, complied with.

A search warrant can only be issued where it is reasonably necessary and reasonably appropriate and adapted to the prescribed purposes. This ensures that less intrusive means of gathering information will be used where possible.

Oversight

Role of the Queensland Public Interest Monitor

The Queensland Government submits that where a monitoring warrant is applied for by an agency in Queensland, the issuing authority must have regard to any submissions made by the Queensland Public Interest Monitor (PIM).

Schedule 8 of the Bill creates a new search warrant regime for the purposes of monitoring compliance with a control order. The proposed regime is modelled on the standard search warrant regime in Division 2 of Part IAA of the Crimes Act and the *Regulatory Powers (Standard Provisions) Act 2014* (RPSP Act) which does not have a role for the PIM under the equivalent provision. The Bill seeks to maintain consistency with those provisions.

Safeguards

Concerns were raised by the Australian Lawyers for Human Rights and the Muslim Legal Network in relation to the lack of an effective remedy for misuse of these provisions. A person who has been affected by the exercise of the powers under proposed new Part IAAB may make a complaint to the Commonwealth Ombudsman, who has robust oversight powers to investigate complaints.

In addition, there are a number of safeguards in place to ensure the new powers are used appropriately and do not have an undue impact upon individuals' right to privacy, free speech or freedom of expression. These include the requirement that an issuing officer be satisfied of certain thresholds to prevent arbitrary use of the powers, the requirement that authorised persons and any persons assisting them must leave the premises if the occupier withdraws consent to the search, and procedural requirements to ensure transparent exercise of the powers. Moreover as discussed below there are existing rights of the person to seek remedies in relation to the unlawful exercise of police powers. Additionally, the Bill makes specific provision for certain remedies in new Part 1AAB, including the right to apply for compensation for damage to electronic equipment operated under Part 1AAB.

Privacy

Submissions by the Gilbert and Tobin Centre of Public Law, Australian Lawyers for Human Rights, the Australian Human Rights Commission, the Law Council of Australia and the Muslim Legal Network raised concerns about the potential invasion of privacy of third parties present at the premises when a search is executed. It is important to recognise that, although third parties present at premises may be questioned regardless of whether the premises are entered on the basis of consent or a premises monitoring warrant, they are under no obligation to provide information or documents unless a premises monitoring warrant is in force. Given that, even where a warrant is in force, any questioning or request for documents must be directed to one or more of the four prescribed purposes set out in paragraphs 3ZZKE(3)(c)-(f).

In addition, current search warrant provisions have the effect that third parties may be affected by the execution of a search warrant. A premises search warrant issued under section 3E of the Crimes Act may authorise police to conduct searches of third parties at or near those premises if there are reasonable grounds to suspect the person has evidential material or seizable items in their possession.[3] It is a matter for the issuing authority to determine, in the course of considering a search warrant application, whether it is appropriate for the warrant to authorise such searches.

[3] See paragraph 3F(1)(f) of the *Crimes Act 1914.*

'Issuing officer' for monitoring warrants

The Law Council of Australia's submission recommends the Committee clarify whether the power to issue monitoring warrants under proposed Part 1AAB of the Crimes Act may be able to be delegated. The Law Council of Australia comments that 'in some instances other federal search warrants can in fact be issued by the Registrar of a Local Court' and raises concerns that this may be the case in relation to monitoring warrants.

For the purposes of Part 1AA of the Crimes Act, 'issuing officer' is defined, in relation to search or arrest warrants, to include:

a) a magistrate; or

b) a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue search warrants for arrest, as the case may be (see section 3C).

This means that there may be instances in which a Commonwealth warrant, for example, a search warrant under section 3E of the Crimes Act, is issued by a justice of the peace or other court employee, for example a registrar, depending on the rules applicable in the court in which the application is made. Whether it is appropriate to authorise justices of the peace or other court employees in State or Territory courts to issue warrants is a matter for States and Territories to determine. Where the power to issue a Commonwealth warrant has been exercised by a justice of the peace or other court employee, this is done with appropriate regard to the legislative requirements for the issue of a warrant.

The definition of 'issuing officer' for the purpose of proposed Part 1AAB differs from the definition in existing Part 1AA, in that only a magistrate can be an 'issuing officer.' Accordingly, the power to issue monitoring warrants can only be exercised by magistrates. In addition, proposed section 3ZZSA (which mirrors existing section 4AAA of the Crimes Act) provides that the power to issue a monitoring warrant is conferred on magistrates in their personal capacity. Accordingly, the power to issue a monitoring warrant under proposed Part 1AAB is not delegable.

For completeness, although this is not raised by the Law Council of Australia, consistent with existing provisions in the *Surveillance Devices Act* and the *Telecommunications (Interception and Access) Act*, telecommunications interception and surveillance device warrants for control order purposes will be able to be issued by eligible judges or nominated AAT members. This is a power conferred in a personal capacity and is not delegable.

Schedules 9 and 10 – Telecommunications interception and surveillance devices

Issue

The suggestion that monitoring warrants are effectively automatic

The Gilbert and Tobin Centre of Public Law suggested in oral evidence that the Australian Federal Police will effectively be able to obtain monitoring warrants 'automatically' if the person is subject to a control order.

As indicated in the Explanatory Memorandum[4], agencies may only seek monitoring warrants where specified thresholds are met, and the issuing authority must be further satisfied of certain factors. First, all monitoring warrants require the issuing authority to be satisfied that

[4] See paragraphs 553-559 and 618-622 of the Explanatory Memorandum.

the power sought under the warrant is reasonably necessary for the purposes of (in the case of a search warrant), or is likely to substantially assist in connection with (in the case of an interception warrant) or would be likely to substantially assist in (in the case of a surveillance devices warrant):

- the protection of the public from a terrorist act; or
- preventing the provision of support for, or the facilitation of, a terrorist act; or
- preventing the provision of support for, or the facilitation of, the engagement in hostile activity in a foreign country; or
- determining whether the control order, or any succeeding control order, has been, or is being, complied with.

This element of the test requires consideration by the issuing authority of whether the particular power being sought is reasonably necessary or likely to substantially assist, within the context of the particular case and, in relation to the fourth limb (determining whether the control order has been, or is being, complied with), the terms of the particular control order. This consideration necessarily envisages that the issue of a monitoring warrant must consider the extent to which the grant of the warrants would assist in determining compliance. It will not necessarily be the case that such a warrant will assist, and will particularly depend on the conditions of a control order, and accordingly such a warrant can in no way be said to be 'automatic'.

Issuing authorities must also consider whether there is a possibility or risk that the person will engage in such conduct or breach the control order. The absence of any indications of a propensity or capacity to do so would for example weigh against the issuing of a warrant.

Moreover, in the case of monitoring warrants issued under the *Telecommunications (Interception and Access) Act 1979* and *Surveillance Devices Act 2004* (Cth), the Bill would require the issuing authority to, in essence, consider the appropriateness of issuing the warrant , having regard to a range of matters including:

- how much the privacy of any person would be likely to be interfered with
- how much the information obtained from surveillance would be likely to assist with preventing terrorism and related acts, and
- the existence of alternative methods for obtaining the information.

No less intrusive means

In its submission, the Australian Human Rights Commission recommended that monitoring warrants should only be granted where the relevant authority is satisfied that there are no less intrusive means of obtaining the information.[5]

Introducing a requirement that a warrant only be issued where there is 'no less intrusive means' would, in effect, make the privacy intrusiveness of the power the primary consideration for issuing a warrant. This would subordinate other relevant considerations, such as the relative likely effectiveness of the different powers, operational imperatives or risks posed by the use of the different powers.

For example, overt, physical surveillance may be less intrusive than an alternative power, but may also be likely to be significantly less effective than covert or electronic surveillance. The use of physical surveillance may also pose a greater risk to the safety of officers. Such an outcome would leave little scope for judgement on the part of the issuing authority in relation to whether, on balance, a monitoring warrant should be issued.

[5] The Australian Human Rights Commission submission to the PJCIS *Inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015*, p 18.

Proposed new subsections 46(5) and 46A(2B) in the *Telecommunications (Interception and Access) Act 1979* would require the issuing authority to be satisfied that the warrant should be issued, having regard to a range of matters, including:

- how much the privacy of any person or persons would be likely to be interfered with
- how much the information likely to be obtained by way of interception would be likely to assist
- to what extent methods other than telecommunications interception have been used by, or are available to the agency
- how much the use of these alternative methods to telecommunications interception would be likely to assist the agency, and
- how much the use of these alternative methods to telecommunications interception would be likely to prejudice the purpose(s) for which an application for the warrant has been made.

Similarly, under section 16 of the *Surveillance Devices Act 2004*, issuing authorities must have regard to the likely privacy intrusiveness and effectiveness of the surveillance powers, and the existence of any alternative means of obtaining the evidence or information sought to be obtained in determining an application for a SD warrant. These requirements to balance the competing public interest and the intrusion on the privacy of an individual have also been applied to the monitoring warrants.

Availability of SD without a warrant

In its submission, the Law Council of Australia raised a concern about the use of surveillance devices without a warrant - specifically in the context of a 'non law-enforcement person' assisting a law enforcement agency. The Law Council of Australia recommends an external, independent authorisation process in these circumstances.

The Bill makes the full range of surveillance options in the *Surveillance Devices Act 2004* available to monitor compliance with a control order subject to authorisation processes contained within the Act. The *Surveillance Devices Act 2004* does not prohibit the use of surveillance devices without a warrant in circumstances where the use of the device is lawful such as where no trespass is involved. This includes using an optical surveillance device (a camera) in public or enabling persons assisting police to record conversations to which they are a party or could be reasonably expected to overhear. Consistent with this the Bill does not require a warrant in those circumstances for the purpose of monitoring a control order.

B-Party warrants

In its submission the Law Council of Australia indicated concerns about B-party warrants in relation to monitoring control orders. Under the current law, a B-party warrant can be issued for the investigation of a 'serious offence', as defined under the *Telecommunications (Interception and Access) Act 1979*, which includes the offence of contravening a control order, under s 104.27 of the Criminal Code. The Bill will allow B-party warrants to be issued to monitor compliance with a control order. B-Party warrants assist interception agencies to counter measures adopted by persons of interest to evade telecommunications interception, such as adopting and discarding multiple telecommunications services. The ability, as a last resort, to intercept the communications of an associate of a person of interest will ensure that the utility of interception is not undermined by evasive techniques adopted by those subject to a monitoring warrant. B-Party warrants are subject to additional requirements to those that apply to other interception warrants:

- the person subject to the control order must be likely to communicate with the person whose service is to be intercepted,

- the issuing authority must be satisfied that the agency has exhausted all other practicable methods of identifying the telecommunications services used, or likely to be used, by the person subject to the control order, or that interception of the service used by the person subject to the control order would not otherwise be practicable, and
- the maximum period of 45 days for B-Party warrants is half that of the period applicable for other interception warrants, which acknowledges that B-Party interception involves a potential for greater privacy intrusion of persons who, though in contact with persons of interest, may not be involved in the commission of an offence.

Use of information from a control order that is subsequently declared void

The Muslim Legal Network (NSW) raised concerns about the admission into evidence of information relating to an interim control order that is subsequently declared void.[6] Under the Bill, information obtained under a control order that is subsequently declared void may be used, communicated, recorded or given in evidence in a proceeding when it is necessary to assist in preventing or reducing the risk of the commission of a terrorist act, serious harm to a person, serious damage to property or a purpose connected with a Commonwealth, State or Territory preventative detention order regime. That information may only be admitted into proceedings that would also achieve one of those purposes.

Paragraphs 179 and 180 of the Explanatory Memorandum explain the need for these provisions. The *Surveillance Devices Act 2004* and *Telecommunications (Interception and Access) Act 1979* impose strict prohibitions on when material obtained under those Acts may be admitted into evidence.[7] It is a criminal offence for a person to deal in information obtained under these Acts for any purpose, unless the dealing is expressly permitted under one or more of the exceptions to that general prohibition. These prohibitions expressly override the discretion of the judiciary, both at common law and under the *Evidence Act 1995 (Cth)*, to admit information into evidence where the public interest in admitting the evidence outweighs the undesirability of admitting it, given the manner in which it was obtained.

Consequently, the Bill permits agencies to use and adduce information in evidence in proceedings. The Bill does not affect a court's discretion to refuse to admit evidence, its duty to refuse to admit improperly obtained evidence in particular circumstances, or its determination of the weight to be given to particular evidence. Nor does the amendment impact on a party's right to challenge evidence in court.

Police immunity if control order declared void

In its submission, Australian Lawyers for Human Rights raised concern about the amendments providing immunity to police officers for acting in good faith once a control order has been declared void.[8] Absent immunity, law enforcement officers would potentially face retrospective criminal liability if a court were to declare a monitoring warrant void *ab initio*. In turn, failure to provide the immunity in the Bill could affect law enforcement agencies' willingness to act under the lawful authority of a monitoring warrant.

This immunity does not apply to acts done, or omitted to be done in bad faith, or where the person ought reasonably to have known that a control order had been declared void.[9] In

[6] New sections 65B of the SD Act, 299 of the TIA Act and 3ZZTC of the Crimes Act.
[7] See s 63 of the TIA Act and 45 of the SD Act.
[8] The Australian Lawyers for Human Rights submission to the PJCIS *Inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015*, p 6.
[9] See paragraphs 170 and 206 of the EM to the Bill which addresses the amendments to the SD Act and TIA Act respectively.

addition, the Bill does not affect the existing rights of persons to seek remedies in relation to the unlawful exercise of police powers.[10]

Deferred reporting

In its submission, Australian Lawyers for Human Rights argued against the proposed deferred reporting arrangements in relation to monitoring warrants.[11] The need for this provision is set out at paragraphs 160 and 197 of the Explanatory Memorandum to the Bill.[12] Due to the generally small number of control orders likely to be in force at any one time, immediate public reporting may enable an individual to determine or speculate as to whether they are subject to covert surveillance. In turn, there is a risk that the person may modify their behaviour to defeat the surveillance efforts. Conversely, public reporting that would effectively confirm that a person is not being monitored may increase the risk that the person will breach the conditions of the order based on a belief that their actions will not be detected. If the Minister determines not to include the information in the Annual Report, then the chief officer of an agency is under a positive obligation to request the Minister to include the information in the next report if appropriate. All information must still be reported to the Minister.

QLD Public Interest Monitor and deferred reporting

In its submission, the Queensland Government has recommended that the Bill be amended to require that before issuing a surveillance device warrant, issuing authorities must have regard to – in relation to an application by an interception agency of Queensland – any submissions made by the Queensland Public Interest Monitor.

Paragraph 45(5)(h) of the *Surveillance Devices Act 2004* (Cth) permits the use, recording, communication and admission into evidence of 'protected information' if it is necessary for the purposes of the functions conferred upon the Queensland Public Interest Monitor by either the *Police Powers and Responsibilities Act 2000* (QLD) or the *Crime and Misconduct Act 2001* (QLD). The Explanatory Memorandum to the *Surveillance Devices Act 2004* (Cth) also relevantly provides that:

> *Where a State or Territory's normal processes would require the approval of a body for a SD warrant application, for example the QLD Public Interest Monitor, that State or Territory can consult that body before making an application to an eligible Judge or AAT member and that body can be present when the application is determined. There is nothing in the Bill to prevent additional accountability.*

Under the proposed amendments, these arrangements will apply to the new class of monitoring warrants.

The Queensland Government has also recommended including a deferred reporting provision to allow the Queensland Public Interest Monitor to report on the use of surveillance device warrants in a subsequent report. However, the Department's understanding is that the Queensland Public Interest Monitor's annual reporting obligations relate to, in the context of control orders, the number of control orders confirmed, declared void, revoked or varied during the year, and the use of control orders generally, and in the surveillance devices context, to those issued under the aforementioned Queensland Acts. By comparison, public annual

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[10] For example, to apply for compensation for property damaged in the course of the exercise of a search warrant in certain circumstances.
[11] The Australian Lawyers for Human Rights submission to the PJCIS *Inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015*, p 5.
[12] In relation to the TIA Act, this is addressed in paragraph 197 of the EM to the Bill.

reporting on the operation of the *Surveillance Devices Act 2004* (Cth) is the responsibility of, and is undertaken by, the Commonwealth Attorney-General. Accordingly, the Department considers that the proposed amendment is unnecessary, as the Queensland Public Interest Monitor is not presently responsible for reporting on Commonwealth surveillance device warrants, and extending the Public Interest Monitor's role would duplicate existing public reporting.

Schedule 11 – Advocating Genocide

Breadth of the offence

Covers conduct already criminalised

In their submissions, the Gilbert and Tobin Centre of Public Law and the Human Rights Commission noted that the Criminal Code already includes an offence of 'incitement', which combined with the existing genocide offences in the Criminal Code. The Committee also acknowledged that the existing incitement offence in section 11.4 makes it possible for a person to incite the commission of any of the genocide provisions. This was also highlighted by the Gilbert and Tobin Centre of Public Law at the public hearing. Similarly, the Human Rights Commission suggested that the current offences capture much of the conduct proposed to be covered by the proposed new offence.

The proposed offence of 'advocating genocide' covers conduct that is not covered by existing Commonwealth offences. Proof that a person incited a genocide offence using the existing offences in section 11.4 and Subdivision B of Division 268 of the Criminal Code would require the prosecution to establish both that the person intentionally engaged in "inciting" conduct with the additional intention that a genocide offence occur. In contrast, the proposed new offence only requires the prosecution to prove that the person intentionally engaged in "inciting" conduct. There is no requirement to prove the person intended that a genocide offence occur. The lower threshold of 7 years imprisonment (as opposed to 10 years imprisonment for inciting genocide offences) reflects this difference. Where there is evidence that a person engaged in inciting conduct and also intended genocide would occur, the person would be charged with the more serious offence.

The offence seeks to ensure individuals whose actions and extremist statements are dangerous and could result in violence against groups within our society do not escape prosecution and punishment.

Too broad

At the public hearing the Human Rights Committee questioned whether the proposed offence went further than is necessary, given the existing legislation.

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

Alternative formulations

The Law Council of Australia suggested replacement of this proposed offence with a new offence in section 80.2A with an 'aggravating' element. The offence would combine the genocide offences in Division 268 and the drafting of the section 80.2A offence to define a group. The offence may be called 'urging genocidal violence against groups'.

The Law Council of Australia stated that there must be a possibility that the advocacy is capable of influencing others to act, and that this would be more consistent with other offences (eg advocating terrorism), and suggested the offence be amended in similar terms to the 'advocating terrorism' offence in existing section 80.2C of the Criminal Code.

The formulations proposed by the Law Council of Australia would not meet the policy objective of the proposed offence.

Applying an aggravating element to the offences in existing section 80A would not have the same coverage as the proposed offence. For example, the offences in existing section 80.2A of the Criminal Code require the prosecution to prove that a person urged "force or violence". In contrast, the existing genocide offences in the Criminal Code do not necessarily require force or violence. For example, genocide by deliberately inflicting conditions of life calculated to bring about physical destruction (section 268.5), genocide by imposing measures intended to prevent births (section 268.6) and genocide by forcibly transferring children (section 268.7) could all be undertaken without the use of force or violence.

Modelling the proposed offence on the recently enacted advocating terrorism offence would effectively replicate the existing offence of "inciting genocide" through the combination of the incitement offence in section 11.4 and the existing genocide offences in Division 268, render the proposed new offence redundant.

Coverage unclear

The Human Rights Committee submitted that the ambit of the proposed offence was unclear, such that it may infringe the right, in Article 15 of the International Covenant on Civil and Political Rights (ICCPR), that criminal offences be defined with sufficient precision to allow people to regulate their conduct. In their submission, the Muslim Legal Network raised concerns about whether the offence would apply in retelling of particular stories of the Old Testament (which are shared by the Abrahamic faiths) or whether 'sharing' or 'liking' a post on social media constitute advocacy.

The offence applies to the intentional advocacy of genocide of national, ethnic, racial or religious groups. It only applies to advocacy done publicly. The Bill defines the expression "advocates" and "genocide" and the Explanatory Memorandum provides additional guidance on the meaning of "publicly".

Meaning of 'advocates'

A number of submissions expressed concern about the meaning of the expressions 'advocates' and 'publicly'. The Human Rights Commission raised concern about the relatively vague nature of the notions of 'counselling, promoting, encouraging and urging', and requested that the Committee consider requiring greater precision in defining 'advocacy' to target the requisite conduct under the proposed offence.

The Human Rights Commission also noted that the crime of genocide requires an intent that the act of genocide will occur, whereas the proposed offence does not require that intent. The Human Rights Commission noted there was a gap between what the international standard is and what the standard will be under domestic law.

The terms 'counsel, promote, encourage or urge' were included in the definition of 'advocates' to ensure consistency in the meaning of 'advocates' with other uses of this term in other Criminal Code offences, including in the offence of 'advocating terrorism' in section 80.2C.

Meaning of 'publicly'

In their submissions, the Law Council of Australia, the Australian Councils for Civil Liberties, the Muslim Legal Network expressed concern about the absence of a definition of 'publicly'. The Muslim Legal Network noted the lack of a definition of 'publicly' was problematic and cast doubt on the application and scope of the offence. The Law Council of Australia noted that the absence of a definition of 'publicly' is inconsistent with the rule of law, as there is insufficient clarity to enable people to know what activity could be deemed illegal. The Law Council of Australia also queried the (implicit) distinction between 'publicly advocating' as opposed to 'privately advocating', and noted that there should not be a distinction between the two. Private advocacy could be more dangerous. The Law Council of Australia suggested that if the word 'publicly' is retained, the Bill or the Explanatory Memorandum should further clarify its meaning.

The proposed offence applies to the public advocacy of genocide. It is not aimed at capturing comments made in private. It is reasonable that genocide should not be publicly advocated and that reasonable steps should be taken to discourage behaviour that promotes such activity. The proposed offence bolsters Australia's commitment to implementing its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Article III states that genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are punishable acts. Article IV states that persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals. The amendment more fully addresses the "direct and public incitement to commit genocide" in Article III by ensuring that public advocacy of the forms of genocide reflected in sections 268.3 to 268.7 is punishable, even without any of the genocide-related acts actually having been carried out.

The Government considered it undesirable to define the expression 'publicly' in the Bill on the basis that this may lead to a narrow interpretation that could exclude some types of conduct sought to be captured by the proposed offence. However, the Explanatory Memorandum provides guidance for interpreting the term 'publicly'.

In the rapidly evolving modern technological world, the meaning of 'publicly' may have a different meaning than one which may have existed 30 years ago, before social media. To publicly advocate would include a statement made at a public rally attended by many people, or a statement on national television. However it will be a matter for the court to determine whether conduct constituting 'advocacy' was made 'publicly', taking into account the conduct and all the facts and circumstances.

The Law Council of Australia's posed the circumstance of 'a person advocating via some medium of public communication'. The offence would not apply where a person merely 'advocated' a benign activity, but could cover the situation where a person intentionally and publicly advocated 'genocide' by such a medium.

Proof of recklessness not required

The Law Council of Australia, the Muslim Legal Network and the Gilbert and Tobin Centre of Public Law expressed concern that the proposed new offence did not require proof of 'recklessness'. The Gilbert and Tobin Centre of Public Law suggested this meant the offence was akin to a strict liability offence, and would be made out where a person advocates

genocide, regardless of any intention they have as to whether another person will act on those words as a result. In addition, the Law Council of Australia noted that the offence has a too remote connection to the possibility that another person would potentially act on the statement.

These comments overlook the matters that must be proved by the prosecution beyond a reasonable doubt. The prosecution must prove the person "intentionally" made the relevant conduct or said the relevant statement. Inadvertent or reckless conduct would not be captured by the offence. In addition, the prosecution must also prove the person's conduct advocated "genocide" within the meaning of the offences in Division 268 of the Criminal Code. Advocating conduct that falls short of one of those offences would not be captured. In addition, the prosecution must prove the person's conduct occurred in public. Statements made or conduct undertaken in private would not be captured.

The genocide offences in Subdivision B of Division 268 of the Criminal Code are aimed at the destruction of the whole or part of a national, ethnical, racial or religious group. A person would 'advocate genocide' where the person intentionally urges or promotes or encourages the destruction of the whole or part of these groups.

Penalty

In their submissions, the Gilbert and Tobin Centre of Public Law and the Human Rights Commission noted that inciting genocide under the existing Criminal Code offences would carry a maximum penalty of 10 years imprisonment, a higher penalty than the penalty proposed for the proposed advocating genocide offence.

As noted above, the higher penalty reflects the additional element that must be proved by the prosecution and the more serious conduct of inciting genocide compared to advocating genocide.

Practical utility

The submissions from the Law Council of Australia and the Human Rights Commission queried whether the proposed new offence offered any practical benefit for law enforcement agencies. In particular, the Human Rights Commission requested the Committee to closely scrutinise the claimed justifications for the proposed offence, and examine whether there is persuasive evidence to support the assertion that the proposed new offence would have a significant effect in achieving its stated goals of preventing acts of genocide and reducing radicalisation. The Human Rights Commission also questioned whether the provisions were a necessary and proportionate measure to achieve its goals. The Committee also requested the Department provide a concrete example of what hypothetical speech/conduct is sought to be captured by this proposed provision.

As stated in oral evidence to the Committee, following the commencement of the "advocating terrorism" offence on 1 December 2014, the AFP has observed a moderation in the conduct and statements of some individuals who engage in "hate speech". The continuation of this trend following the commencement of the proposed new offence would be a very positive thing for the community.

Whether specific conduct, such as making or commenting on a particular post on the internet or the expression of support for committing genocide, is captured by the offence will depend on all the facts and circumstances. Whether a person has actually "advocated" the commission of a genocide offence will ultimately be a consideration for the court based on all the facts and circumstances of the case. Accordingly, it is difficult to provide the Committee with concrete examples of conduct or statements that a court would definitely find contravened the proposed

new offence. However, an individual giving a speech at a public rally along the following lines, in circumstances where the crowd becomes increasingly agitated, might be captured by the offence:

> '*We must all go and get all the* [members of a race]*, you must all go and kill them all*'.
>
> '*Do you want these* [race] *living in our community, bringing their trouble here?*
>
> [crowd answers 'No']
>
> '*Well if you don't want them here, it's time we got rid of / kill them all*'.

Effectiveness of 'good faith' defence

The Gilbert and Tobin Centre of Public Law noted it was difficult to see how a person could lawfully advocate genocide in good faith.

The 'good faith' defence in section 80.3 may exclude the types of activity raised by the Muslim Legal Network about retelling stories of the Old Testament. In particular, the good faith defence would apply where a person 'publishes in good faith a report or commentary about a matter of public interest' (paragraph 80.3(1)(f)).

Schedule 12 – Security assessments

Equivalent rights of review

The Inspector General of Intelligence and Security (IGIS) supports the Bill's proposal to amend the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to enable ASIO to furnish security assessments directly to State and Territory authorities beyond its current remit. The IGIS submits, however, this indirectly highlights the limitations of the safeguard in section 61 of the ASIO Act if a State or Territory authority were minded to make a decision or take action inconsistent with administrative decisions based on the security assessment.

The Law Council of Australia submits that it is important the power to provide a security assessment directly to States and Territories be available only if the equivalent rights of review for administrative decisions exist. The Law Council of Australia submits that an individual who successfully challenges a security assessment should be given the opportunity to have the State and/or Territory based decision revisited.

As outlined in the Explanatory Memorandum to the Bill, the accountability mechanisms already provided for in the ASIO Act in relation to rights of notice and review of security assessments will be maintained. For example, the subject of an adverse or qualified security assessment that is furnished by ASIO to a State or Territory authority will continue to have the right to apply to the Administrative Appeals Tribunal (Tribunal) for a review of the assessment, as is currently the case under section 54 of the ASIO Act.

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

Schedule 13 – Classification of publications etc

'Promotes' and 'Encourages'

The Bill amends paragraph 9A(2)(a) of the *Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act) to align the definition of 'advocates' in the Classification Act with the updated definition in the Criminal Code. Paragraph 9A(2)(a) of the Classification Act currently states that a publication, film or computer game advocates the doing of a terrorist act if it directly or indirectly 'counsels' or 'urges' the doing of a terrorist act.

Paragraph 9A(2)(a) was adapted directly from paragraph 102.1(1A)(a) of the Criminal Code as it stood in 2007. The Explanatory Memorandum to the amending Act, the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007*, notes that the definition of 'advocates' in the Classification Act should be the same as in the Criminal Code.

On 1 December 2014, the definition of 'advocates' in paragraph 102.1(1A)(a) of the Criminal Code was amended by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (the Foreign Fighters Act), so that in addition to 'counsels' or 'urges', an organisation advocates the doing of a terrorist act if it 'promotes' or 'encourages' the doing of a terrorist act. However, the definition of 'advocates' in the Classification Act was not similarly updated at the time.

The Law Council of Australia and Blueprint for Free Speech cite concerns with regard to amending paragraph 9A(2)(a) of the Classification Act to make the meaning of 'advocates' the doing of a terrorist act consistent with the revised definition in the Criminal Code.

The Law Council of Australia supports consistency of definitions across the Classification Act and the Criminal Code but has concerns with the current definition of 'advocates' and 'terrorist act' in the Criminal Code.

The Law Council of Australia recommended that the Independent National Security Legislation Monitor be required to review the definition of 'advocates' in both the Classification Act and the Criminal Code to ensure that it is not inconsistent with Australia's international obligations under Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

As outlined in the Explanatory Memorandum to the Bill, while Article 19(2) of the ICCPR provides for a general freedom of expression, Article 19(3) provides that this freedom may be limited where the limitations are provided for by law and are necessary for the protection of national security. Article 20(2) also requires that laws prohibit any advocacy for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

The limitation on the freedom of expression provided by Schedule 13 is reasonable, necessary and proportionate. As the Revised Explanatory Memorandum to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* explains, the inclusion of 'promotes' and 'encourages' (in the context of updating the Criminal Code in 2014) was intended to ensure coverage of a broader range of conduct that may be considered as advocating a terrorist act, beyond 'counsels' or 'urges'.

For example, a terrorist organisation could continue to have a significant influence in promoting or encouraging terrorism by others without necessarily engaging in terrorist acts itself, and without directly counselling or urging the doing of a terrorist act. Further, as the Committee noted in its Advisory report of 17 October 2014 on the same Bill, the primary purpose of the 2014 changes to the definition of advocates in the Criminal Code was to address the types of behaviour of terrorist organisations falling short of 'counselling' or 'urging'.

Blueprint for Free Speech has suggested that the proposed amendments are too broad and out of step with public opinion in Australia, and that broadening the definition of 'advocates' would result in damage to artistic freedom in Australia.

There is a public expectation that the Government act to prevent the dissemination of material that advocates the doing of a terrorist act in the Australian community. Schedule 13 of the Bill amends and clarifies the definition of advocates to ensure coverage of a broader range of conduct that may be considered as advocating the doing of a terrorist act beyond 'counsels' or 'urges'. Specifying that such content must be classified Refused Classification ensures that it cannot be sold or exhibited in Australia under relevant state and territory classification enforcement laws.

Schedule 13 is not intended to, and is unlikely to affect, artistic freedom. A publication, film or computer game will not advocate the doing of a terrorist act merely because it depicts, describes or discusses terrorist acts. Under the proposed changes to the definition of advocates, the content must directly or indirectly 'counsel, urge, promote or encourage' the doing of a terrorist act. The ordinary meaning of 'promotes' the doing of a terrorist act could include conduct or statements such as launching a campaign to commit terrorist acts, and the ordinary meaning of 'encourages' the doing of a terrorist act could include conduct or statements that inspire an individual to commit a terrorist act.

By way of example, Blueprint for Free Speech cautioned that the television series 'Homeland' could potentially fall within the scope of the amended definition of advocates. The Department is aware that a number of seasons of Homeland have been released on DVD and have been classified MA 15+ by the Classification Board, meaning that they are restricted from minors under 15 years old unless they are accompanied by a parent or guardian. Amending the definition of advocates is unlikely to result in legitimate artistic and entertainment content like Homeland being classified Refused Classification.

Subsection 9A(3) of the Classification Act provides a further protection to content providers by ensuring that a publication, film or computer game that depicts or describes a terrorist act does not advocate the doing of a terrorist act if that depiction or description could reasonably be considered to be done merely as a part of public discussion or debate or as entertainment or satire.

Schedule 14 – Delayed notification search warrants

Threshold requirement

The Australian Lawyers for Human Rights submission noted a concern regarding the lowering of the threshold requirement for the issue of a delayed notification search warrant. The Australian Lawyers for Human Rights also noted that while the proposed amendments will yield efficiencies in terms of obtaining delayed notification search warrants; the proposed amendments at the same time remove some of the levels of protections and oversight that were previously contained in the legislation.

While the Australian Councils for Civil Liberties oppose the delayed notification warrant scheme in principle on the basis of privacy concerns, it submits that should the provision proceed, then the current threshold is appropriate and should remain unchanged.

The purpose of this amendment is to clarify the requirements for the issue of a delayed notification search warrant. A literal reading of the provision as drafted in the Crimes Act would require a chief officer and an issuing officer to personally hold suspicions or beliefs that they are

not in a position to personally hold as persons removed from the investigation. This was not intended when the provision was drafted.

The intended operation of the regime was, as with other warrant regimes, to provide safeguards against abuse of the Delayed Notification Search Warrant regime by requiring the chief officer and eligible issuing officer to independently be satisfied that the eligible officer in fact does hold the requisite suspicions and belief, and that there are reasonable grounds for holding the suspicions and belief. In the case of the eligible issuing officer, this is to be achieved by receiving information from the eligible officer on oath or affirmation. For example, a search warrant may be issued under subsection 3E(1) of the Crimes Act if the issuing officer is satisfied that there are reasonable grounds for suspecting that there will be evidential material at a premises, rather than holding such a suspicion him/herself.

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

Schedule 15 – Protecting national security information in control order proceedings

Security clearances

The Protective Security Policy Framework (PSPF) sets out Commonwealth personnel security policy and guidelines, including for vetting individuals who require a security clearance. Only the Australian Government Security Vetting Agency (AGSVA) in the Department of Defence and specified authorised vetting agencies may issue security clearances for the Commonwealth. States and territories may either sponsor a request for a Commonwealth security clearance or conduct security vetting in accordance with the requirements of the PSPF. The process for seeking security clearances for legal counsel is the same as the process used for contractors of an Australian Government agency.

Under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act), there are existing provisions that enable a court to consider, in a closed hearing, whether national security information may be disclosed and if so, in what form. The court has the discretion to exclude non-security cleared parties, their non-security cleared legal representatives and non-security cleared court officials from the hearing where the court considers that disclosing the relevant information to these persons would likely prejudice national security. If a party's legal representative is not security cleared, does not wish to apply for a security clearance, or a clearance is unable to be obtained in sufficient time before the closed hearing, then the court may still hold the closed hearing and determine the matter without the assistance of a legal representative of the party. Alternatively, the court could decide to appoint a security cleared special counsel to represent the interests of the party during the closed hearing (although there has been no need for a security cleared special counsel to be appointed under the NSI Act to date). However, any information the court decides should not be disclosed under the NSI Act cannot be used in the substantive proceeding.

The purpose of the proposed amendments to the NSI Act is it to provide the court with two further options when the NSI Act has been invoked in a control order proceeding. First, the option to exclude a respondent's legal representative, even if they are security cleared, at the closed hearing to determine if or how the information should be disclosed in the substantive control order proceeding. Second, it provides the option for the court to still consider that evidence in the substantive control order proceeding, even if it cannot be disclosed to the party

or their lawyer (whether security cleared or not). The rationale for these amendments is that the evidence may be so sensitive that even a security cleared legal representative cannot see the information.

Numbers of security cleared legal counsel in Australia

At the public hearing, the Committee asked what are the numbers of security cleared legal counsel in Australia?

Under the PSPF, government agencies of the Commonwealth, states and territories are individually responsible for managing and maintaining security clearances they have sponsored. AGSVA has advised the Attorney-General's Department that legal counsel are not easily identifiable on security vetting databases as they are listed as contractors. Accordingly, a consolidated total number of security cleared legal counsel in Australia is not available.

The Department is aware of more than 40 legal counsel granted security clearances it engages for matters relating to classified information. Some of these legal counsel are employees of the Attorney-General's Department who would not be available to act for or on behalf of respondents.

Other security cleared legal counsel who have acted for non-Commonwealth clients in recent years would be available to appear for or on behalf of respondents. Potential legal counsel could also be located from either the bar association or legal aid commission of the relevant state or territory.

Timeframe for processing a security clearance

At the public hearing, the Committee asked how long would it take for a person's lawyer to receive a security clearance if they needed to obtain one for the purpose of the control order proceeding?

The timeframe for a person's lawyer to receive a security clearance depends on the level of clearance that is necessary to access the relevant security classified information.

In the Department's experience lawyers security cleared who have acted in matters relating to classified information generally require Negative Vetting 1 (NV1) and Negative Vetting 2 (NV2) level clearances, allowing them to access information classified SECRET and TOP SECRET respectively. AGSVA has advised that the current average processing time for a NV1 clearance is 154 days and a NV2 clearance is 188 days.

The sponsoring agency can request that a security clearance be prioritised to expedite the process. However, the process may involve delays even if it is prioritised. For example, a person who has a complex background may require a significantly greater investigation period which will impact on the period of time a clearance takes to process. The PSPF allows sponsoring agencies to grant a person temporary access to security classified information while a security clearance is being processed.

Relationship between security cleared lawyers and their client

At the hearing, the Committee also asked how security cleared lawyers manage conflict between the interests of their client and their national security responsibilities. If a security cleared lawyer received national security information that could not be disclosed to their client, then they would not be permitted to disclose that information to their client. Accordingly, the lawyer may have some limitations placed them in terms of seeking or obtaining instructions about any factual assertions that are made in that information. This is a departure from a lawyer's traditional obligation of full disclosure to his or her client.

Minimum standard of disclosure

The Australian Human Rights Commission and the Gilbert and Tobin Centre of Public Law both recommend a legislated minimum standard concerning the extent of the information to be given to a person the subject of an application for the confirmation of a control order, or an application for a variation or revocation of a control order, to ensure a person is made aware of the allegations against them and is in a position to challenge those allegations.

The amendments to the NSI Act will provide the court with the ability to make three new types of orders to protect national security information that may result in the court being able to consider information in a control order proceeding that the person the subject of the control order proceeding (or their legal representative) may not see.

Prior to making one of these new orders, under paragraph 38J(1)(c), the court must be satisfied that the subject of the control order proceeding has been provided sufficient notice of the allegation on which the control order request is based (even if the person has not been given notice of the information supporting those allegations). The Law Council of Australia has noted that this requirement may not give sufficient detail to a person to refute those allegations. The Gilbert and Tobin Centre of Public Law recommended that paragraph 38J(1)(c) be amended so that the court must be satisfied that the subject of the control order proceeding has been given sufficient notice of the allegations on which the control order request was based to *enable effective instructions to be given in relation to those allegations* (even if the relevant person has not been given notice of the information supporting those allegations).

The language that has been used in paragraph 38J(1)(c) is reflective of recent Australian case law that has considered the use of certain evidence in a judicial proceeding that is not made available to one of the parties to the proceeding. The provision reflects the observations that were made in *Assistant Commissioner Michael James Condon v Pompano [2013] HCA 7* in that it does not seek to deny the respondent knowledge of what the allegation is, but that it could deny (in some circumstances) knowledge of how the police will seek to prove the allegation.

When considering the effect of the proposed amendments to the NSI Act, it is important to consider the proposed amendments as a whole rather than considering the sections in isolation. There are several protections built into the legislation that mitigate any procedural unfairness. Prior to making one of the new orders, the court must consider whether the order would have a substantial adverse effect on the substantive control order proceeding (subsection 38J(5)). This requires the court to contemplate the effect that withholding the information from the respondent or their legal representative will have on procedural fairness for the subject of the control order proceeding. Furthermore, the proposed amendment to subsection 19(4) will confirm that the court has discretion to later order a stay of a control order proceeding, if one of the new orders has been made and later in the proceedings it becomes evident that the order would have a substantial adverse effect on the substantive control order proceeding.

Importantly, the court also has discretion to decide which order to make and the form the order should take. For example, if the AFP proposes to withhold an entire document from the subject of a control order, but use it in support of the control order application, the court may decide that only part of the document may be withheld and used, or that the entire document can be withheld and used but the person must be provided with a summary of the information it contains. This is often referred to as 'gisting'.

Furthermore, the normal rules of evidence apply to evidence sought to be introduced under these new orders, in accordance with the express terms of section 38J and the existing Criminal Code provisions (section 104.28A). The effect of those provisions is that if any material is withheld from the respondent but used in the proceeding, that material must otherwise be

admissible as evidence under the normal rules of evidence applicable in control order proceedings. There is also nothing in the new provisions that would dictate to the court what weight it should give to any evidence that is withheld (either in full or in part) from the respondent in the substantive control order proceeding.

Accordingly, the provisions enable the court to retain its capacity to act fairly and impartially, and also expressly require a court to consider the extent to which an order may have a substantial adverse effect in the circumstances of the particular case.

Special advocates

The Australian Human Rights Commission recommend the establishment of a system of special advocates to represent the subjects of control orders, and that those advocates be entitled to attend at all hearings in control order proceedings and have access to all material before the court. The Independent National Security Legislation Monitor is also conducting an inquiry into the advisability of introducing a system of 'special advocates' into the control order regime.

Various terms are used to describe a special advocate or special counsel role, each with slightly different functions. It may be helpful to describe the following variations as follows.

- A *special advocate*: a lawyer with an appropriate security clearance who represents the party who has been excluded from closed court hearings involving security-sensitive information. This person is not their ordinary or chosen legal representative. However, their role is to advocate for the party's interest. The United Kingdom and Canada have statutory mechanisms that provide for closed ex parte hearings and specially appointed advocates. However, as noted by the Gilbert and Tobin Centre of Public Law Centre, there has been some criticism of these systems, including the fact that special advocates are not permitted to communicate with individuals they are representing once they have seen classified material.
- A *security cleared counsel*: similar to a special advocate except they are the party's ordinary legal or chosen representative. This is reflective of the current role for legal representatives who are security cleared under the NSI Act.
- A *public interest monitor/advocate*: an advocate appointed under statute with an appropriate security clearance that has a role similar to an *amicus curiae*. The role of the monitor/advocate is to represent the public interest.

The Commonwealth recently legislated to establish Public Interest Advocates in the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*. The legislation requires ASIO and enforcement agencies to obtain 'journalist information warrants' before authorising the disclosure of telecommunications data relating to a journalist, or their employer, where a purpose of accessing the data is to identify a journalist's 'source'.

Section 180X of the amended *Telecommunications (Interception and Access) Act 1979* now requires the Prime Minister to appoint one or more persons as Public Interest Advocates, to make submissions to the Attorney-General (in the case of ASIO) or an issuing authority in relation to enforcement agencies' applications for journalist information warrants.

To date the Prime Minister has appointed eight former Commonwealth, State and Territory superior court justices as Public Interest Advocates. Under the DR Act, these former superior court justices are not required to hold a security clearance.

As the enabling legislation for Public Interest Advocates commenced on 13 October 2015, there is little information the Department can provide at this time as to how the role is functioning in practice.

Other similar roles include the Queensland Criminal Organisation Public Interest Monitor (under the *Criminal Organisations Act 2009*) and Public Interest Monitor (under the *Police Powers and*

Responsibilities Act 2000 (Qld), *Crime and Corruption Act 2001* (Qld) and *Telecommunications Interception Act 2009* (Qld)), the New South Wales Criminal Intelligence Monitor under the *Crimes (Criminal Organisations Control) Act 2012* (NSW) and the Victorian Public Interest Monitor under the *Public Interest Monitor Act 2011* (Vic).

When considering whether a special advocate role would be desirable as a way to provide greater procedural fairness to the respondent, it is important to consider the regime and its safeguards as a whole. The Bill, as it stands, provides an appropriate balance between the need to protect national security information in control order proceedings, and procedural fairness to the person to whom the control order relates. It preserves the independence and discretion of the court and instils it with the powers needed to mitigate unfairness to the subject of a control order proceeding. Further, the court retains its inherit discretion to appoint a special advocate if it is assessed as necessary and appropriate to the circumstances. However, if consideration were to be given to including a special advocate role, it may be preferable to draw upon the experience of existing monitor-type roles which are more developed and understood in the Australian context.

Schedule 16 – Dealing with national security information in proceedings

Discretion of the Attorney-General

The Law Council of Australia submits that proposed amendments to subsections 19(1A) and (3A) of the NSI Act, as currently drafted, suggest substantial executive discretion would be given to the Attorney-General to depart from the NSI Act or NSI Regulation. The Law Council of Australia recommends that the Bill be amended to clarify the application by Attorney-General (or representative) under subsection 19(1A) and (3A) is based on an arrangement between the parties about how to protect information in the proceeding.

To clarify, orders made by the court under subsections 19(1A) and (3A) do not require the consent of the parties. The reference to an agreement in paragraph 819 of the Explanatory Memorandum is inaccurate, and this paragraph will be amended. Unlike sections 22 and 38B, which enable the court to make orders giving effect to an agreement between the parties, subsections 19(1A) and (3A) give the court discretion to make such orders as it considers appropriate in relation to the disclosure, protection, storage, handling or destruction of national security information. The court must be satisfied that it is in the interest of national security to make such orders and that the orders are not inconsistent with the NSI Act or NSI Regulation.

The proposed amendments will allow the court to make an order that departs from the terms of the NSI Regulation. However, the court must still be satisfied that the order is appropriate, that it is in the interest of national security, and that it is consistent with the NSI Act. The Attorney-General may only apply for an order; the court retains the power to decide whether to make the order. Neither the court nor the parties have the ability to depart from the terms of the NSI Act, even if there is an agreement to do so.

Australian Lawyers for Human Rights also raised concerns with the potential for courts to set aside the NSI Regulation at the request of the Attorney-General. The court retains the discretion to refuse the Attorney-General's application if it does not consider that such an order would be appropriate, or if the court is not satisfied such an order would be in the interests of national security. In some circumstances, the owner of the information may be content for the relevant information to be stored or handled in a manner that departs from the NSI Regulation. In these circumstances, and in the absence of an arrangement under section 22 or 38B for that particular information, the Attorney-General should be able to apply for an order under

subsection 19(1A) or (3A) that is inconsistent with the NSI Regulation. This would further the NSI Act's objective of balancing the protection of national security information with the administration of justice.

Similar to the proposed amendments to sections 22 and 38B, the making of an order under subsection 19(1A) or (3A) should not apply to exclude the operation of the NSI Regulation entirely. It is intended that the NSI Regulation will continue to apply to protect the national security information to the extent that the NSI Regulation is not inconsistent with the order.

Schedule 17 – Disclosures of taxation information

Disclosure should be to specified agencies

The Law Council of Australia submits that consideration should be given to whether the range of agencies to which a taxation officer will be able to disclose information for the purposes of the Bill, should be listed in the Bill or in regulations. Alternatively, it is submitted that the Privacy Commissioner's views should be obtained on the amendments.

The IGIS notes that her position has oversight of any requests by ASIO for, and disclosures by ATO to ASIO for protected information. She submits that the Committee may wish to consider whether a similar exception in favour of other relevant oversight bodies is required to ensure that there can be appropriate oversight of disclosures made under the proposed provision.

Schedule 17 will authorise taxation officers to disclose information to an Australian government agency, for certain specified purposes. Those purposes are very limited. It is important that the amendment allows the ability to disclose information for the purposes of preventing, detecting, disrupting or investigating conduct that involves a threat related to security, to "any" Australian government agency because, as with bodies that have a role in preventing or taking steps to reduce a serious threat to an individual's life, health or safety or the public's health or safety (see s355-65(2) Table 1 item 9 of the *Taxation Administration Act 1953*), bodies that have a role in preventing, detecting, disrupting or investigating conduct that involves a matter of security vary over time.

Currently, the key agencies which are envisaged to seek disclosure under this provision are the National Disruption Group (NDG), which is comprised by officers from a range of Departments, and the Australian Counter-Terrorism Centre (ACTC). However, as we have already seen, the membership or composition of such bodies can change at short notice.

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

National security oversight mechanisms

The committee has also asked for additional information concerning the oversight mechanisms as they relate to national security legislative reform. The proposed amendments are introduced in the context of comprehensive oversight mechanisms, which exist to ensure Australia's law enforcement and intelligence agencies remain accountable for their activities. These

mechanisms include legislative protections and statutory restrictions on agencies' powers; ministerial oversight through regular reporting and requirements for ministerial authorisation for certain activities and warrants; parliamentary oversight; and the existence of dedicated oversight bodies charged with ensuring the accountability of law enforcement and intelligence agencies.

In particular, the IGIS has significant powers of oversight over the operational activities of the Australian Intelligence Community (AIC) and exercises significant powers, comparable to those of a royal commission, including obtaining information, requiring persons to answer questions and produce documents. The Independent National Security Legislation Monitor (INSLM), responsible for reviewing the operation, effectiveness and implications of counter-terrorism and national security legislation, and the Parliamentary Joint Committee on Intelligence and Security (PJCIS) ensure there is effective oversight of all aspects of Australia's security and intelligence agencies, while minimising duplication and overlap.

The Government is committed to ensuring our oversight bodies continue to have the tools they need to keep pace with essential legislative changes provided to our security agencies. In the past year, the Government has significantly enhanced the powers and resources of the independent oversight bodies that supervise our law enforcement and national security agencies. Such enhancements have included increased ongoing funding to the IGIS, significantly enhanced powers of the Commonwealth Ombudsman to oversight access to metadata by law enforcement agencies, enhanced annual reporting requirement for ASIO and law enforcement agencies ensuring that the public and Parliament are better-informed about the use of exceptional powers by these agencies, and expanded powers for the PJCIS to include enhanced oversight of ASIO and AFP's access to telecommunications data.

The oversight by these bodies, combined with statutory, parliamentary and ministerial oversight mechanisms, ensures that Australia's counter-terrorism legislation is appropriate and proportionate, maintains agencies' accountability for their activities, and provides a safeguard against any potential abuse of counter-terrorism powers.