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8 December 2015

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

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

Thank you for the opportunity to make a submission to the inquiry into the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (the Bill). We are writing this submission in our capacity as members and affiliates of the Gilbert + Tobin Centre of Public Law, at the Faculty of Law, University of New South Wales. We are solely responsible for the views and content in this submission.

Our submission addresses Schedules 2, 3, 4, 5, 6, 8, 11 and 15 of the Bill. Before turning to the specific provisions of these Schedules, we want to reiterate our long-standing opposition to the control order regime in Division 104 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*). Our concerns have been expressed in parliamentary submissions made by members of the Gilbert + Tobin Centre of Public Law since the introduction of this regime by way of the *Anti-Terrorism Act (No 2) 2005* (Cth).

The control order regime represents a means of avoiding the regular judicial procedures for testing and challenging evidence in criminal proceedings prior to the deprivation of a person's liberty. The use of a lower standard of proof by the courts charged with issuing control orders is of particular concern, as is the fact that a person may be subject to an order without seeing all of the evidence against him or her.

In submissions made in relation to the Counter-Terrorism Legislation (Foreign Fighters) Bill 2014 and the Counter-Terrorism Legislation Amendment Bill (No 1) 2014, some of the current authors noted that the control order regime was being expanded in ways that contradicted the recommendations of the former Independent National Security Legislation Monitor (INSLM), Bret Walker QC, in his 2012 Annual Report and the 2013 Report of the

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Council of Australian Governments Review of Counter-Terrorism Legislation (COAG Review). The INSLM recommended repeal of the regime, describing the powers as ‘not effective, not appropriate and not necessary’.¹ The COAG Review recommended that the regime undergo ‘substantial change’.² Importantly, these recommendations were made not only on the basis of principled concerns, but also with regard to practical considerations on the basis of classified information held by the police and intelligence services.

Whilst we do not disagree in principle with the lowering of the age at which a control order can be imposed to 14 years, the current Bill represents yet another extension of a discredited regime. It is notable that this continual expansion conflicts with the experience in the United Kingdom, where control orders were replaced in 2011 with the less intrusive and more targeted regime of Terrorism Prevention and Investigation Measures (TPIMs).³

Our concern, then, is not limited to the impact of these orders upon individual liberty. We share the view expressed by the former INSLM that the availability of control orders has been of limited value to the police in practice and may unhelpfully distract from, and even hinder, more traditional and effective methods of investigation and the laying of charges under Australia’s extensive regime of terrorism offences.⁴ There is little reason to believe that the lowering of the age of those who may be subject to a control order will see the regime assume a greater importance in Australia’s national security legislative framework.

Schedule 2 – Control orders for young people

A Lowering the age limit for control orders

The control order regime already applies to minors aged 16 and 17. The current Bill proposes to lower the age at which a person may be subject to a control order to 14 years old. The Attorney-General stated in his Second Reading Speech that the justification for this proposal was that ‘recent counter terrorism operations have unfortunately shown that people as young as 14 years of age can pose a significant risk to national security’.⁵

We are in basic agreement with the proposal to lower the age threshold. It is true that there exists clear evidence of young teenagers being involved in terrorism-related activities. Furthermore, 14 reflects the age at which a young person is regarded by the law as being criminally responsible.⁶ Although control orders are civil in character, this is significant because breach of an order carries criminal sanctions.

B ‘Appropriate safeguards’

¹ Independent National Security Legislation Monitor, *Declassified Annual Report – 20 December 2012*, Commonwealth of Australia, 4.

² Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 54.

³ *Terrorism Prevention and Investigation Measures Act 2011* (UK) c 23.

⁴ Independent National Security Legislation Monitor, *Declassified Annual Report – 20 December 2012*, Commonwealth of Australia, 26-29.

⁵ Commonwealth, *Parliamentary Debates*, Senate, 12 November 2015, 28 (George Brandis).

⁶ A minor aged from 10 to under 14 years of age may be charged with a criminal offence. However, the *doli incapax* rule applies such that there is a presumption that he or she is not criminally responsible. This presumption may be rebutted by the prosecution establishing that the minor knew (or, in some jurisdictions, was capable of knowing) that what he or she was doing was wrong.

The lowering of the age threshold for control orders is accompanied by the claim that this is subject to ‘appropriate safeguards’. As a matter of general principle, we support the addition of special procedures in respect of the issuing of a control order over a minor. However, the claim in the Explanatory Memorandum (EM) that the Bill contains provisions which ensure consistency with the Convention on the Rights of the Child (the CRC) is simply not correct.

(1) ‘Best interests’

Art 3 of the CRC provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The EM acknowledges this requirement and claims it is respected by the addition of s 104.4(2)(b) which provides that the issuing court ‘must take into account if the person is 14 to 17 years of age – the best interests of the person’. A list of factors explaining the meaning of ‘best interests’ is added by s 104.4(2A), and the EM states that this has been ‘adapted from the *Family Law Act 1975* (Cth) and is consistent with Article 3 of the CRC’.⁷

However, the EM distinguishes the obligation under the *Family Law Act* to treat the best interests of the child as the ‘paramount consideration’ by saying that the ‘paramount consideration with respect to control orders is the safety and security of the community’.⁸ Accordingly, the EM is frank that ‘Division 104 does not require that the imposition of the control order must be in the best interests of the child’.⁹ The prioritising of security over the child’s best interests is understandable given the context of Division 104, but we merely point out that the Bill’s compatibility with the CRC is, ultimately, substantially qualified.

Even allowing for that, the EM overstates the true position under the Bill when it offers the assurance that ‘the issuing court will be required to consider the child’s best interests as a primary consideration’ and that ‘[n]ew subsection 104.4(2A) treats the child’s best interests as “a primary” consideration’.¹⁰ That is simply not the case. Although the specific aspects of ‘best interests’ are articulated, the Bill does *not* require the court to give these any particular (let alone ‘primary’) weight in its determination that each of the obligations, prohibitions and restrictions to be imposed on an adult person by the order is ‘reasonably necessary, and reasonably appropriate and adapted’. Under the existing law (and in a provision retained by the Bill for those over the age of 18 and renumbered as s 104.4(2)(a)), the issuing court makes that determination by taking into account ‘the impact of the obligation, prohibition or restriction on the person’s circumstances (including the person’s financial and personal circumstances)’. As those circumstances may be taken to touch upon or cover the same matters listed as relevant to the child’s ‘best interests’, the failure to accord any special weight to the latter as a ‘primary consideration’ means that the Bill’s purported solicitude for the interests of children is not borne out by the legislation.

More generally, the EM displays a worrying inconsistency in the assertions it makes about the rights of children as they may be affected by the amendments. Not only does this involve

⁷ Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) 44.

⁸ Ibid 16.

⁹ Ibid 18.

¹⁰ Ibid.

the assertion of legal consequences that are not in fact provided by the Bill, but also ones that potentially conflict with the acknowledged priority of safeguarding the community. For example, the EM states that a ‘child will not be separated from family and will be able to attend school’.¹¹ No provision in the Bill provides these guarantees. Although the child’s access to family and education is recognised as amongst their ‘best interests’ in s 104.4(2A), the terms available for inclusion in a control order have the clear potential to restrict the child in either respect should the issuing court find that to do so is ‘reasonably necessary, and reasonably appropriate and adapted’ to the preventative purposes of the scheme. Indeed, keeping that possibility open seems desirable from a security point of view.

(2) *Court-appointed advocates*

The Bill’s creation of a position of court appointed advocate (CAA) in s 104.28AA is problematic and should be reconsidered.

The CAA appointed by the issuing court is a lawyer, who is empowered under s 104.28AA(2)(d) to ‘make a submission’ to the court with regard to what is in the best interests of the child. The benefit of the CAA is that it adds to the process an advocate whose sole purpose is to make a clear and comprehensive argument in favour of (what he or she considers) the child’s best interests. This provides the judge with a point of view that focuses *only* on the child, which can then be balanced against other compelling interests, namely, national security.

However, the need for the CAA in this regard is questionable given the child’s right to his or her own legal representation, acting on his or her instructions (which, with children aged between 14 and 17 years, we might expect can be given with sufficient understanding and clarity). In contrast, the Bill is explicit that the CAA, in distinction, is not the child’s legal representative and is not obliged to act on the child’s instructions (s 104.28AA(3)).

Despite the EM’s attempt to assert some antecedent for the CAA in the power of the Family Court to appoint an independent children’s lawyer, and the strong similarity between the text of s 104.28AA and parts of s 68LA of the *Family Law Act 1975* (Cth) (*FLA*), this breaks down upon reflection of the very different nature of the relevant proceedings.

The Family Court may, under s 68L of the *FLA*, order that a child’s interests in proceedings before it are to be independently represented by a lawyer. This may be either at the Court’s own initiative or that of some other person, including the child. This power reflects the fact that the child is not a primary party to the action but may have an interest in proceedings that require some representation of their views or circumstances. Basically, the independent children’s lawyer provides the child with a voice in proceedings where they would otherwise not have one. By contrast, an application by the AFP to an issuing court for the making of a control order over a child is a proceeding in which the child is without doubt the primary party, confronted by the power of the state. Control orders are civil orders that enable the imposition of liberty-depriving conditions and the breach of which carry criminal consequences. Accordingly, the child is entitled to full and independent legal representation, acting on his or her instructions and respecting the confidentiality of lawyer-client communications. The EM notes that ‘the child may also have their own independent legal

¹¹ Ibid 15.

representation’,¹² and indeed it is hard to imagine they would not do so in light of the serious consequences that attend the issuance of a control order and also the constrained nature of the CAA’s role in proceedings to determine whether an interim order should be made or subsequently confirmed.

In its contemplation of the co-existence of a CAA and the child’s own legal representation, the Bill has great novelty. It is not difficult to imagine the likely tensions between these two advocates in seeking to fulfil their respective functions. For example, subsections 104.28AA(5) and (6) permit the CAA to disclose information communicated to him or her by the child if he or she believes that to be in the child’s best interests even when this is against the wishes of the child. It may be anticipated that the child’s own legal representative would simply advise him or her to not communicate with the CAA as a way of avoiding the prospect of such disclosure.

There are other difficulties with the CAA proposal. Under s 104.28AA(2)(b), the CAA is to ‘form an independent view, based on the evidence available to the advocate, of what is in the best interests of the person’. That wording essentially mirrors s 68L(2)(a) of the *FLA*. However, under that legislation, the independent children’s lawyer is presumably an advocate experienced in family law matters and one whose task is made considerably easier by the fact that the child’s best interests are not being placed in competition with national security priorities. Additionally, s 68M of the *FLA* (and as further elaborated upon by the Guidelines for Independent Children’s Lawyers (Guidelines))¹³ provides for the independent children’s lawyer to obtain a report ‘about the child’ from a family consultant or expert. The Guidelines confirm that the independent children’s lawyer ‘is not bound to make submissions which adopt the recommendations made by the report writer or any expert called in the proceedings’.¹⁴ But at least the possibility of the independent children’s lawyer being informed by some specialist opinion is expressly provided for by the Act. By contrast, it is not clear what ‘evidence’ the CAA is to base his or her independent view upon under s 104.28AA(2)(b). What qualifications or experience are necessary to equip the CAA personally to determine the child’s best interests is unstated by the Bill.

In light of these observations, serious consideration should be given to abandoning the requirement for appointment of a CAA. Instead, the issuing court should be required to receive evidence directly from a court appointed child welfare officer. This would be similar to the power under s 62G of the *FLA* for the court to direct a ‘family consultant’ to give a report if in any proceedings ‘the care, welfare and development of a child who is under 18 is relevant’. The role of family consultants is outlined in Part III of the *FLA*. As the Guidelines explain, ‘[e]vidence given by an expert or Family Consultant or other expert [sic] is one part of the total evidence and must be evaluated within that context’.¹⁵ Adoption of a similar approach in the current context would not require the court to defer to the expert assessment of the child’s best interests – but it would address the concerns about the CAA’s potential lack of expertise and his or her ability under the Bill to determine the best interests of the child without any recourse to expert opinion. It would also avoid the problematic overlay of

¹² Ibid 17. Section 104.28AA(1)(b) provides that the issuing court may make an order to secure independent legal representation for the child in addition to the appointment of a CAA.

¹³ *Guidelines for Independent Children’s Lawyers* (6 December 2007) 8-9
<<http://www.nationallegalaid.org/assets/Family-Law/ICL-guidelines-6-12-07.pdf>>.

¹⁴ Ibid 9.

¹⁵ Ibid.

the CAA with the child's own legal representation, while ensuring the issuing court still receives material that is directly focused on the child's best interests.

(3) Confidentiality of control orders for minors

The Children's Commissioner at the Australian Human Rights Commission has expressed concern that issuing control orders for a person as young as 14 may be 'counter-productive, and potentially lead young people to become even more angry and alienated'.¹⁶ One of the reasons is that a young person subject to a control order would likely find friends, members of the community and possibly even family no longer want to associate with him or her. A potential way of remedying this may be to include in the Bill a provision that the name of a minor subject to a control order must not – unless there are exceptional circumstances – be disclosed to the public.

In light of these various concerns the current statement of compatibility, prepared pursuant to s 8 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), is inaccurate. At the very least that statement should be amended to better reflect the Bill's potential impact on the rights of the child.

Schedule 3 – Control orders and tracking devices

Proposed s 104.5(3A) is overly broad and we do not support it in its current form. Specifically, the inclusion of sub-ss (a) and (e) appears designed merely to facilitate the easier prosecution under s 104.27 of persons subject to a control order who abscond.

If concerns exist about the disabling of tracking devices that a subject is required to wear, then the provision should address that by a clear prohibition of interference with the device. Sub-sections 104.5(3A)(a) and (e) are problematic in their expectation that controlees know how to perform maintenance on a tracking device and whether or not it is in 'good working order'. It should be the responsibility of the police to ensure the technology is in working order.

Schedule 4 – Issuing court for control orders

The conferral by the *Anti-Terrorism Act (No 2) 2005* (Cth) of jurisdiction upon the Family Court of Australia to issue control orders was always inappropriate. None of Australia's few control orders has been sought from the Family Court. We believe that – even in the context of the other changes the Bill makes to the control order regime which increase the potential for a minor to be made subject to a control order – there is no justification for the Family Court to possess jurisdiction to issue such an order. Judges of this Court are very unlikely to have the experience in national security matters which is necessary in order to assess whether to issue such an order and, if so, what conditions to impose. We therefore support Schedule 4 of the Bill.

We would, however, recommend that the Bill go a step further and also extinguish the power of the Federal Circuit Court to issue a control order. Unlike the Family Court, the Federal Circuit Court – in its earlier incarnation as the Federal Magistrates Court – *has* issued control

¹⁶ Megan Mitchell, 'The human rights of children are at risk if control orders are placed on 14-year-olds', *SMH*, 16 October 2015 <<http://www.smh.com.au/comment/the-human-rights-of-children-are-at-risk-if-control-orders-are-placed-on-14yearolds-20151015-gkanfv.html>>.

orders. Nevertheless, given the exceptional nature of control orders and the role that the issuing court is required to take in balancing the protection of the community against the liberty of the individual (who may not even have been charged with a criminal offence), we submit that it is appropriate that only the Federal Court of Australia be vested with the power to issue a control order.

Schedule 5 – Preventative detention orders

In accordance with the earlier submissions made by members of the Gilbert + Tobin Centre of Public Law, our primary recommendation is for the wholesale repeal of the preventative detention order (PDO) regime in Division 105 of the *Criminal Code*. The necessity of PDOs is questionable. Once sufficient evidence is available to prove that a terrorist act is capable of occurring within 14 days, one would expect such information could be used to: charge those associated with the act with preparatory or other terrorism offences (especially in combination with the inchoate offences of attempt, conspiracy and incitement); obtain control orders over relevant persons; or, obtain ASIO Questioning or Questioning and Detention warrants over relevant persons. Control orders and ASIO warrants are issued on similar grounds but both have distinct advantages over PDOs. Control orders are a much more flexible and longer-term measure. ASIO warrants permit the interrogation of the person and may enable up to seven-days detention.¹⁷ By contrast, no questioning of someone held under a PDO is possible. The secrecy and compulsory nature of interrogation under an ASIO warrant are further reasons why they would likely be a more useful measure than PDOs in preventing an imminent terrorist act. PDOs were not used at all for almost a decade after their introduction in 2005. Although authorities have used these orders more recently, their newfound utility does not alter the fundamental problems with the regime that have been raised by earlier reviews.

It is clear that PDOs fill a very slight gap in Australia's anti-terrorism measures. They are useful only in the absence of sufficient evidence to support an arrest, and when an ASIO warrant would not be available because questioning the person would not substantially assist a terrorism investigation. It appears that PDOs are, therefore, valuable in permitting the detention of a person as part of a criminal investigation that does not necessarily involve him or her. This is starkly at odds with basic criminal justice and rule of law values.

We reiterate previous submissions of the Centre to this Committee and echo Recommendation III/4 of the INSLM's 2012 report in recommending the repeal of the PDO provisions. The concerns raised with respect to the necessity and effectiveness of PDOs and their impact on rule of law values and civil liberties stand, regardless of whether imminence is defined by reference to expectation or capacity.

If, however, the PDO regime is to remain in place, we do not oppose the proposal in the Bill to introduce a defined term, 'imminent terrorist act'. When a PDO is issued to prevent a terrorist act, that act must be 'imminent and expected to occur, in any event, in the next 14 days'. This aspect of the provisions is of crucial importance, but it is awkwardly phrased. The requirement that the terrorist act be expected to occur within 14 days is restrictive and conceivably fails to capture terrorist acts that could occur on very short notice but for which no date has been set. The inclusion of the phrase 'in any event' appears to broaden the scope

¹⁷ For further discussion and comparison of these counter-terrorism measures, see Rebecca Ananian-Welsh, 'Preventative Detention Orders and the Separation of Judicial Power' (2015) 38(2) *UNSWLJ* 756, 779-780.

of the test, but the full impact of that phrase is unclear. Similar concerns were raised by the INLSM in his 2012 report.¹⁸

In light of the considerable impact on liberty (possibly even without any suspicion of unlawful behaviour) of the PDO provisions, any amendments that would broaden the reach of the scheme should be approached with caution. The proposed amendment introducing a defined term of ‘imminent terrorist act’ would shift the focus of the provisions from the expectation that the act will occur within 14 days, to merely whether the act is *capable* of occurring within 14 days. In this instance the proposed amendment would improve the clarity of the provisions and properly enable PDOs to extend to terrorist acts that are capable of occurring at any moment but for which no date has necessarily been set.

Schedule 6 – Issuing authorities for preventative detention orders

For essentially the same reasons as given above in respect of Schedule 4, we agree that the power of the Family Court to issue PDOs should be repealed. We also make a recommendation corresponding to our earlier one in Schedule 4 concerning the Federal Circuit Court, and submit that it also be stripped of jurisdiction to issue PDOs.

More generally, we are of the opinion that the constitutional validity of appointing serving state, territory or federal judges as issuing authorities under the PDO regime remains questionable.

Chapter III of the Constitution prohibits the conferral of any functions on a serving judge in his or her personal capacity, when those functions are incompatible with the independence or integrity of the judicial institution.¹⁹ Since the enactment of the PDO provisions in 2005, this area of law has been subject to major developments. In particular, in *Wainohu v New South Wales* (2011) 243 CLR 181, the High Court held that the incompatibility restriction on the permissible functions of judges extended to judges of state and territory courts. In that case, the Court struck down legislation purporting to confer functions on judges of the New South Wales Supreme Court on the basis that the judge was under no obligation to give reasons for his or her decision.

PDOs are issued in proceedings lacking any semblance of fair process. For example, the person subject to the order may only present his or her case to the issuing authority through the detaining officer. The involvement of serving state, territory or federal judges in a scheme that brings about the detention of citizens in proceedings lacking procedural fairness undermines the integrity of the judicial institution and could be struck down on this basis.²⁰ In order to avoid this risk of constitutional invalidity, the role of issuing authority ought not be conferred on serving judges of any court.

We understand that the involvement of judges in this scheme is for the purpose of protecting the rights of the person subject to the PDO. We recognise that the importance of safeguards such as this is heightened because of the abbreviated process and impact of the orders on individual liberty. The risk of constitutional invalidity highlights the need for improved

¹⁸ Independent National Security Legislation Monitor, *Declassified Annual Report – 20 December 2012*, Commonwealth of Australia, 51.

¹⁹ *Grollo v Palmer* (1995) 184 CLR 348; *Wainohu v New South Wales* (2011) 243 CLR 181.

²⁰ Rebecca Ananian-Welsh, *Preventative Detention Orders and the Separation of Judicial Power* (2015) 38(2) *UNSWLJ* 756.

procedural fairness in PDO proceedings. If PDOs cannot be issued in proceedings that bear even the minimum standards of procedural fairness – such as the capacity for the person to know the case against him or her and to present his or her case directly to the issuing authority – the PDO provisions should be repealed.

Schedule 8 – Monitoring of compliance with control orders etc

The Bill would provide increased monitoring of individuals subject to control orders through powers to search premises and conduct ordinary and frisk searches of those individuals. Searches of premises would be available where: a control order is in force; the person has a ‘prescribed connection’ with particular premises; and the occupier of the premises consents to the search or the entry is made under a monitoring warrant.²¹ Ordinary or frisk searches of a person subject to a control order would similarly be available where the person consents to the search or the search is conducted under a monitoring warrant.²²

Where a person consents to a search, the search powers must be exercised for one of the purposes listed below.²³ Where a person does not consent, a monitoring warrant must be sought from a magistrate.²⁴ A monitoring warrant may be issued where a magistrate is satisfied that access to premises or power to search is reasonably necessary for the purposes of:

- 1) protecting the public from a terrorist act; or
- 2) preventing the provision of support for, or the facilitation of, a terrorist act; or
- 3) preventing the provision of support for, or the facilitation of, the engagement in a hostile activity in a foreign country; or
- 4) determining whether the control order has been, or is being, complied with.²⁵

The first three of these purposes overlap with those for which control orders can be made,²⁶ whereas the fourth ensures that police officers can monitor compliance with the terms of a control order. A magistrate must ‘have regard’ to the possibility that a person has engaged in, is engaged in or will engage in a terrorism-related offence or contravene the order,²⁷ but is not actually required to be satisfied of the existence of any of these possibilities, on reasonable grounds or otherwise.

The fourth ground set out above is problematic as it will essentially provide a blanket authorisation for police officers to conduct searches for the purpose of monitoring whether a person is complying with an order. A monitoring warrant may be issued provided that the magistrate has regard to the possibility that the order may be breached,²⁸ and is satisfied that the powers are reasonably necessary to determine whether the person is complying with the order.²⁹ This does not require any reasonable suspicion that the person is doing anything suspicious or unlawful – but merely that the exercise of the powers is reasonably necessary to ensure that the person is not engaged in such behaviour.

²¹ Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) sch 8, Item I, cl 3ZZKA.

²² Ibid cl 3ZZLA.

²³ Ibid cls 3ZZKA(1)(c)-(f), 3ZZLA(1).

²⁴ Ibid cls 3ZZKA(2)(b), 3ZZLA(2)(b).

²⁵ Ibid cls 3ZZOA(2), 3ZZOB(2).

²⁶ *Criminal Code Act 1995* (Cth) s 104.1.

²⁷ Counter-Terrorism Legislation Amendment Bill (No 1) 2015(Cth) sch 8, Item 1, cls 3ZZOA(4), 3ZZOB(4).

²⁸ Ibid cls 3ZZOA(2)(c)(ii), 3ZZOB(2)(b)(i).

²⁹ Ibid cls 3ZZOA(2), 3ZZOB(2).

This is concerning as monitoring warrants would provide extensive powers for police to invade the privacy of those subject to control orders. A monitoring warrant to search a person would authorise police to: conduct an ordinary or frisk search of the person; search things found in the person's possession; record fingerprints; take samples from things found during a search; and seize any evidentiary material.³⁰ A monitoring warrant to search premises would authorise police to: enter private premises; search for and record fingerprints; take samples and photographs; inspect and make copies of any documents; and use electronic equipment to record relevant data.³¹ A constable may also ask questions and seek production of documents, and it is an offence punishable by 30 penalty units for a person to fail to comply with such a request.³² Both types of warrant allow police officers to use reasonable force in executing the warrant.³³

We believe that a magistrate should be authorised to issue a monitoring warrant to search premises or a person not merely on the pretext that a person *might* breach a control order but only where a police officer suspects on reasonable grounds that the person is failing to comply with an order. This is not an unreasonably high threshold. It would, however, significantly reduce the prospect that the monitoring powers are used in such a way that they amount to an additional regime and surveillance overlaying the specific conditions attached to a control order by the issuing court.

We also believe that the definition of a 'prescribed connection' triggering a warrant to search premises should be narrowed. The Bill states that a person will have a prescribed connection to premises not only where he or she owns, occupies or resides in those premises,³⁴ but also in relation to premises used by a school, college, university or other educational institution which the person attends as a student.³⁵ The list of possible premises also includes places where a person is employed, carries on a business or conducts voluntary work.³⁶ In combination with the powers set out above, this will allow extensive monitoring of controlees at their homes, workplaces and educational institutions.

The danger of introducing extensive powers to monitor the activities of controlees at their home, workplaces and educational institutions is that it may make it more likely that a court will conceive of control orders as a punitive measure. The constitutionality of the control order legislation was upheld in *Thomas v Mowbray* (2007) 233 CLR 307 partly on the basis that control orders were not punitive measures and therefore did not breach the separation of powers by allowing the executive to administer punishment absent a judicial finding of criminal guilt. The EM shows an appreciation of this point when it says 'control orders are not a punitive measure but a preventative measure'.³⁷ However, a new constitutional challenge to the legislation on this ground is more likely to succeed if the current Bill is passed adding such extensive and intrusive powers to the operation of control orders.

³⁰ Ibid cls 3ZZLB, 3ZZLC.

³¹ Ibid cls 3ZZKB, 3ZZKC.

³² Ibid cl 3ZZKE. This is only available where the search is conducted under a monitoring warrant; a person will not be required to answer questions or produce documents where they consent to a search.

³³ Ibid cls 3ZZKG, 3ZZLD.

³⁴ Ibid cl 3ZZJC(a)-(b).

³⁵ Ibid cl 3ZZJC(g).

³⁶ Ibid cl 3ZZJC(d)-(f).

³⁷ Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth), 15.

Schedule 11 – Offence of advocating genocide

The Bill would create a new offence in s 80.2D of the *Criminal Code* that would be made out where a person ‘publicly advocates genocide’.³⁸ ‘Advocate’ is defined to mean ‘counsel, promote, encourage or urge’. The offence would be punishable by seven years’ imprisonment.

While advocating genocide is undoubtedly serious and abhorrent conduct, we believe the offence as drafted is problematic from a criminal law perspective as it goes beyond the incitement of violence. It does so in two respects.

First, like the offence of advocating terrorism introduced by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth),³⁹ the notion of ‘advocating’ genocide offence extends to the ‘promotion’ of violence.⁴⁰ Ordinarily, incitement of violence captures a range of speech acts such as ‘urging’, ‘commanding’, ‘advising’ or ‘encouraging’ a person to commit an unlawful act.⁴¹ Each of these alternatives suggests that incitement requires a person’s words to operate directly on an intended audience in some way. Promotion, by contrast, could encompass a general statement of support that is posted online or through some other means, with no particular audience in mind. It is thus a less determinate form of speech to which to attach criminal liability.

Second, the offence does not include any requirement that the person intends that another person will commit genocide on the basis of his or her words. Ordinarily, for a person to incite violence, they must ‘intend that the offence incited be committed.’⁴² Indeed, in this respect the proposed offence goes beyond even the terms of the offence of advocating terrorism, which at least requires that the person be ‘reckless’ as to whether another person will engage in terrorism as a result.⁴³ The proposed offence is akin to a strict liability offence, as it will 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. The person’s advocacy of genocide must be intentional (ie. the person must intend to speak the words),⁴⁴ but that is a different fault requirement to saying that the person must intend somebody to act on those words.

It is notable that a defence for acts done in good faith, which currently applies to the other speech offences in Division 80 of the *Criminal Code*,⁴⁵ would be available. However, it is not clear what work this defence would do in the case of advocating genocide. That defence applies, for example, where a person urges another person to ‘lawfully’ procure a change in law, policy or practice.⁴⁶ It is difficult to see how a person could lawfully advocate genocide in good faith.

We recommend that the offence should be removed from the Bill. By this, we do not suggest that such speech plays a legitimate role in a functioning democracy. Rather, the proposed

³⁸ Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) sch 11, Item 4.

³⁹ *Criminal Code Act 1995* (Cth) s 80.2C.

⁴⁰ Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) sch 11, Item 4, cl 80.2D(3).

⁴¹ *R v Chonka* [2000] NSWCCA 446 [77].

⁴² *Criminal Code Act 1995* (Cth) s 11.4(2).

⁴³ *Ibid* s 80.2C(1)(b).

⁴⁴ *Ibid* s 5.6(1).

⁴⁵ *Ibid* s 80.3.

⁴⁶ *Ibid* s 80.3(1)(c).

offence goes beyond accepted understandings of when speech acts should attract criminal liability.

We agree with the Attorney-General's statement in the Second Reading Speech that the incitement of violence is not an exercise of free speech and should be criminalised.⁴⁷ However, this justification does not support the offence of advocating genocide because that goes significantly beyond the law of incitement. To the extent that the offence includes speech that amounts to incitement, its enactment is entirely superfluous since the incitement of genocide is already a criminal offence. A person may be found guilty under s 11.4 of inciting any of the genocide offences in the *Criminal Code*, including genocide by killing, serious bodily or mental harm, imposing measures to prevent births, or forcibly transferring children.⁴⁸ The penalty for inciting these offences is 10 years' imprisonment,⁴⁹ which is a higher penalty in any case than the proposed offence.

Schedule 15 – Protecting national security information in control order proceedings

The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (*NSIA*) establishes a process of special, closed hearings for the determination of claims that disclosure of information in a substantive hearing is likely to prejudice national security. This closed hearing 'is concerned essentially with disclosure as between the parties'.⁵⁰ The court must determine whether a witness may be called or whether the information in question is to be disclosed and, if so, in what form, for instance redacted or in summary.⁵¹ The *NSIA* does not, as the EM to the Bill makes clear, 'permit evidence to be adduced in the substantive proceeding that has been withheld from the affected party or their legal representative'.⁵²

The Bill proposes to insert into the *NSIA* a regime of special court orders for the *disclosure* and *consideration* of sensitive information in proceedings to impose, confirm or vary a control order under Division 104 of the *Criminal Code* (control order proceedings). It allows a court to consider sensitive information that the controlee, or proposed controlee, and legal representative have not seen. Proposed s38J would create three special court orders. The new orders enable a court to consider all of the information:

- contained in an original source document in control order proceedings, even where the relevant person and their legal representative have only been provided with a redacted or summarised form of the document (proposed sub-s 38J(2)).
- contained in an original source document in control order proceedings, even where the relevant person and their legal representative have not been provided with any information contained in the original source document (proposed sub-s 38J(3)).
- provided by a witness, even where the information provided by the witness is not disclosed to the relevant person or their legal representative (proposed sub-s 38J(4)).

Proposed section 38J will only apply to control order proceedings if:

⁴⁷ Commonwealth, *Parliamentary Debates*, Senate, 12 November 2015, 29 (George Brandis).

⁴⁸ *Criminal Code Act 1995* (Cth) ss 286.3-286.7.

⁴⁹ *Ibid* s 11.4(a).

⁵⁰ *R v Lodhi* [2006] NSWSC 571 [82] (Whealy J).

⁵¹ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31.

⁵² Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) 122.

- the Attorney-General has issued a civil non-disclosure certificate or a civil witness exclusion certificate under the *NSIA*;
- the Attorney-General has requested the court to make one of the new orders;
- the court has held a closed hearing for the purpose of determining whether to make one of the new orders under s 38J.

Because control orders are preventive measures, national security information is often relied upon to support an application for an order. There is a tension between relying upon, and preserving the confidentiality of, national security information in court proceedings while maintaining the fairness and integrity of those proceedings. We believe that sensitive information should be protected in control order proceedings. However, we believe that the proposed legislative scheme enabling judicial reliance upon secret evidence in control order proceedings does not ensure procedural fairness. Accordingly, we do not support Schedule 15 of the Bill in its current form.

A *Procedural fairness*

The EM says that a fair hearing is guaranteed by ‘the inherent capacity of the court to act fairly and impartially as well as the safeguards built into the [*NSIA*]’.⁵³ We disagree. The new orders will enable a judge to rely on evidence that has not been disclosed to the relevant person or their legal representative or challenged, for example, through cross examination. The person in respect of whom the order is sought is therefore unable to test the veracity of the case against them, nor respond to it in full. The court must rely upon evidence that has not been the subject of nor withstood adversarial challenge.

In the United Kingdom, the simple involvement of a judge in closed material proceedings has been deemed insufficient to guarantee a fair hearing. In *Al Rawi v The Security Service* [2011] UKSC 34, Lord Kerr made the following comments in a case about secret evidence:

The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.⁵⁴

Proposed sub-s 38J(5)(b) provides that, in deciding whether to make an order under s 38J, the court must have regard to the ‘substantial adverse effect on the substantive hearing in the proceeding’. The EM states that this will direct the court to expressly contemplate ‘the effect of any potential order under revised section 38J on a party’s ability to receive a fair hearing’.⁵⁵ It is difficult to see how the effect of an order could *not* diminish the party’s ability to receive a fair hearing.

In the United Kingdom, special advocates are used as a protective mechanism to mitigate the unfairness to a TPIM subject where secret evidence is led in closed material proceedings. A special advocate is a security-cleared counsel who has been appointed to the Attorney

⁵³ Ibid 24.

⁵⁴ *Al Rawi v The Security Service* [2011] UKSC 34 (United Kingdom Supreme Court (UKSC)) [93].

⁵⁵ Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) 25.

General’s panel of special advocates.⁵⁶ If the Home Secretary wishes to rely upon ‘closed’ material – that is, material the Home Secretary asserts would damage the public interest if disclosed – a special advocate must be appointed.⁵⁷ In closed material proceedings, special advocates perform two functions: testing the cogency of the Home Secretary’s case for non-disclosure (disclosure function), and representing the interests of the TPIM subject in closed hearings (representative function).⁵⁸

A similar system of Special Advocates was proposed by the COAG Committee in its 2013 *Review of Counter-Terrorism Legislation*. However, we note that the United Kingdom’s special advocates system has been heavily criticised for not affording fairness.⁵⁹ These criticisms centre on aspects of the process that inhibit fairness, as well as practical matters that hinder the special advocates from fulfilling their functions. A particular source of complaint has been the fact that special advocates are not permitted to communicate with the individuals they are representing once they have seen classified material. We note the difficulty in creating a special advocates system that would ensure fairness while preserving the secrecy of national security information.

B Safeguards in the NSIA

(1) Exclusion from s 38I closed hearings

The *NSIA* provides that a party and legal representative may be excluded from a closed hearing in a civil proceeding if they have not been given security clearance at the appropriate level, and ‘the disclosure would be likely to prejudice national security’.⁶⁰ Remarkably, the Bill proposes that the controlee, or proposed controlee, and legal representative may be excluded from a closed hearing in a control order proceeding, *even if* they have appropriate security clearance (proposed sub-s 38I(3A)). This is triggered by a request by the Attorney-General or representative to the Court. Proposed sub-s 38I (3A) does not outline the basis upon which this determination may be made. It simply states that if the Attorney-General or representatives request it, the Court ‘may make that order’.

The need for this further exception is questionable. It would appear that a person who would fall within proposed sub-s 38I(3A) would also fall under s 38I(3). If proposed subs 38I(3A) is retained, the basis for the exclusion should mirror s 38I(3).

⁵⁶ Andrew Boon and Susan Nash, ‘Special Advocacy: Political Expediency and Legal Roles in Modern Judicial Systems’ (2006) 9 *Legal Ethics* 103; Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates* (HC 2004–05, 323–I) [69]–[74].

⁵⁷ Civil Procedure Rules 1998 80.1(b), 80.19.

⁵⁸ *Ibid* 80.20; Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates* (HC 2004–05, 323–I) 24; Aileen Kavanagh, ‘Special Advocates, Control Orders and the Right to a Fair Trial’ (2010) 73 *Modern Law Review* 836.

⁵⁹ These concerns have been raised chiefly by the special advocates themselves, and are also a by-product of the review and oversight of the JCHR, the Constitutional Affairs Committee and the Independent Reviewer of Terrorism Legislation (although Lord Carlile’s criticism as Independent Reviewer arose in the context of his overarching support of control orders legislation): see, for example, Lord Carlile, *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (Stationery Office 2011) 48–50; Aileen Kavanagh, ‘Special Advocates, Control Orders and the Right to a Fair Trial’ (2010) 73 *Modern Law Review* 836, 838; Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation* (2009–10, HL 64, HC 395 [54]–[73].

⁶⁰ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) sub-ss 38I(2)–(3).

(2) *Submissions re argument for non-disclosure*

While a controlee may be excluded from the hearing, he or she has the benefit of a statutorily guaranteed opportunity to make submissions in respect of an argument for non-disclosure. Section 38I(4) of the *NSIA* provides that the controlee and legal representative have an opportunity to make submissions in response to an argument by the Attorney-General or representative that:

- (a) any information should not be disclosed; or
- (b) the witness should not be called to give evidence in the proceeding.

While exclusion from the closed hearing would undoubtedly prejudice the controlee's ability to make relevant submissions, it can be argued that the legislative guarantee to make submissions in respect of an argument for non-disclosure implies that the essence of the case for non-disclosure be provided to the controlee.⁶¹

This should be clarified by the legislation. We recommend the insertion of a legislative minimum standard of information that must be given to the relevant person and legal representative about the case for non-disclosure to enable them to make submissions pursuant to s 38I(4).

D *Safeguards in Schedule 15*

Schedule 15 contains safeguards designed to ensure procedural fairness, including preserving the discretion of the court to make orders under Schedule 15; preserving the right of the court to stay a control order proceeding where an order under proposed s 38J would have a substantial adverse effect on the substantive control order proceeding; and preserving the power of the court to control the conduct of civil proceedings.

(1) *Minimum standard of disclosure*

Proposed sub-s 38J(1)(c) provides that, before making an order under s 38J, the court must be satisfied that the relevant person has been 'given notice of the allegations on which the control order request was based (even if the relevant person has not been given notice of the information supporting those allegations).' The EM states '[t]his ensures that the subject (or proposed subject) of the control order has sufficient knowledge of the essential allegations on which the control order request is sought (or varied), such that they are able to dispute those allegations during the substantive control order proceedings.'⁶² We do not agree that, as currently drafted, sub-s 38J(1)(c) achieves this.

In the United Kingdom, the House of Lords, following the decision of the European Court of Human Rights,⁶³ held that for control order proceedings to be fair, the controlled person must be given 'sufficient information to enable his special advocate effectively to challenge the

⁶¹ For example, see Luke Beck, 'Fair Enough? The National Security Information (Criminal and Civil Proceedings) Act 2004' (2011) 16 *Deakin Law Review* 405, 415.

⁶² Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) 24.

⁶³ *A v United Kingdom* [2009] ECHR 301 (European Court of Human Rights).

case that is brought against him'.⁶⁴ This is often referred to as the 'gist' or the 'essence' of the case against them.⁶⁵ Lord Phillips articulated the effect of this decision as:

This establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.⁶⁶

Crucially this threshold requires sufficient information '*to enable effective instructions to be given in relation to those allegations*' This is the standard that was recommended by the COAG Committee in 2013 in relation to the minimum disclosure of information in Division 104 of the *Criminal Code*.⁶⁷

We believe that the formulation provided by the COAG Committee regarding a minimum standard of disclosure is preferable to the current Bill. We recommend sub-s 38J(1)(c) be reformulated as follows:

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).

(2) *Interaction with the provisions in Division 104 of the Criminal Code*

The EM states that 'although there are existing references in Division 104 of the Criminal Code to national security redactions, there are no provisions in that Division which permit evidence to be used and considered by an issuing court in a control order confirmation (or variation) proceeding that the subject of the control order cannot access and contest.'⁶⁸

We disagree and, in line with the COAG Committee, believe that Division 104 of the *Criminal Code* provides that information deemed by the executive as likely to prejudice national security may indeed be withheld from the controlee at each stage of the control order

⁶⁴ *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28 (HL) [85] (Hoffmann LJ).

⁶⁵ *Secretary of State for the Home Department v AN* [2008] EWHC 372 (Admin) [9] (Mitling J); Ministry of Justice, *Justice and Security* (Green Paper, Cm 8194, 2011). Although 'gist' quickly gained currency, the special advocates have argued that it is an inaccurate descriptor as the minimum disclosure standard articulated in *AF (No 3)* may in fact encompass more than what the term 'gisting' implies: Special Advocates, *Justice and Security Green Paper: Response to Consultation from Special Advocates* (Justice and Security Consultation, December 2011) [33].

⁶⁶ *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28 (HL) [59], cited with approval by Carnwath LJ (Maurice Kay and Lloyd LJ concurring) in *AT v Secretary of State for the Home Department* [2012] EWCA Civ 42 (England and Wales Court of Appeal (Civil Division)) [35].

⁶⁷ Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) Recommendation 31, 59-60.

⁶⁸ Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) 121.

process. This occurs without recourse to the courts to review non-disclosure. The interaction of Schedule 15 and Division 104 needs to be further considered.

The *Criminal Code* provides for information deemed likely to prejudice national security within the meaning of the *NSIA* by the executive to be withheld from the controlee and his or her legal representative at each step in the control order process. The *NSIA* defines ‘likely to prejudice national security’ as ‘a real, and not merely a remote, possibility that the disclosure will prejudice national security’, and ‘national security’ is broadly defined as Australia’s defence, security, international relations or law enforcement interests.⁶⁹ The withholding of information deemed to meet this definition by the executive occurs without adversarial challenge or independent adjudication of the question of non-disclosure.

From the initiation of the control order process, the AFP may withhold information deemed likely to prejudice national security. In obtaining written consent to request an interim control order, the AFP must provide the Attorney-General with certain background and supporting information including a summary of the grounds for making the interim order.⁷⁰ However, this summary is not required to include information likely to prejudice national security within the meaning of the *NSIA*.⁷¹ If the court grants an interim control order, the order made must include, amongst other things, a summary of the grounds on which the order was made.⁷² Again, however, the *Criminal Code* expressly provides that the summary is not required to include information likely to prejudice national security within the meaning of the *NSIA*.⁷³

The confirmation process is also affected. If the AFP elects to confirm the interim order, the AFP is obliged to personally serve on the controlee copies of the documents contained in the initial request to the Attorney-General and ‘any other details required to enable the person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order’.⁷⁴ However, the withholding provisions of the *Criminal Code* are again engaged. Documents may be excluded from service if their disclosure would be likely to prejudice national security. Indeed, this provision adopts the widest non-disclosure test, providing for the exclusion from service of material the disclosure of which is likely ‘to be protected by public interest immunity’, ‘to put at risk ongoing operations by law enforcement agencies or intelligence agencies’, or ‘the safety of the community, law enforcement officers or intelligence officers’.⁷⁵ It is not clear whether the controlee is nevertheless entitled to know the essence of the case against him or her, or whether the withholding of information may permissibly inhibit the controlees entitlement ‘to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order’.

We share the concerns raised by COAG Committee regarding the potential for unfairness to the controlee through the withholding of national security information at each stage in the

⁶⁹ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 8, 17.

⁷⁰ *Criminal Code Act 1995* (Cth) s 104.2(3).

⁷¹ *Ibid* s 104.2(3A).

⁷² *Ibid* s 104.5(1)(h).

⁷³ *Ibid* s 104.5(2A).

⁷⁴ *Ibid* s 104.12A(2). The AFP member is also required to supply the controlee with a statement of any facts that he or she is aware of relating to why any of the obligations, prohibitions or restrictions should not be imposed on the controlee.

⁷⁵ *Ibid* s 104.12A(3).

control order process.⁷⁶ The COAG review recommended two safeguards to remedy unfairness to a controlee in control order proceedings: the use of special advocates in proceedings that are closed to avoid disclosure of national security information, and a guaranteed minimum standard of disclosure to a controlee.⁷⁷

We recommended that Division 104 of *Criminal Code* be amended, wherever necessary, to provide for a minimum standard of information in control order proceedings. We join with the COAG Committee's recommendation that the minimum standard should be:

the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations.⁷⁸

Yours sincerely,

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⁷⁶ Tamara Tulich 'Adversarial Intelligence? Control Orders, TPIMs and Secret Evidence in Australia and the United Kingdom' (2012) 12(2) *The Oxford University Commonwealth Law Journal* 341; Andrew Lynch, Tamara Tulich and Rebecca Welsh, 'Secrecy and Control Orders: The Role and Vulnerability of Constitutional Values in the United Kingdom and Australia' in D. Cole, F. Fabbrini & A. Vidaschi (eds) *Secrecy, National Security & the Vindication of Constitutional Law* (Edward Elgar Publishing, 2013).

⁷⁷ Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 59-60.

⁷⁸ Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) Recommendation 31, 59-60.