



*Australian Council
for Civil Liberties*

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

(16/12/2015)

A joint submission from:

NSW Council for Civil Liberties

Liberty Victoria

Queensland Council for Civil Liberties

South Australian Council for Civil Liberties

Australian Council for Civil Liberties

The councils for civil liberties across Australia (New South Wales Council for Civil Liberties, Liberty Victoria, Queensland Council for Civil Liberties, South Australia Council for Civil Liberties and the Australian Council for Civil Liberties) are grateful for the opportunity to make this submission to the inquiry by the Parliamentary Joint Committee on Intelligence and Security (PJCS) into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 ('the Bill')

1. THE CONTEXT

The recent brutal terrorist attacks in Sydney, Paris, Lebanon and other places are a tragic reminder of the shared threat of global terrorism. The joint civil liberties councils ('the CCLs') accept the need for strong and effective laws to deal with this situation: laws which are necessary to meet the terrorist threat, which will help keep us safe and which do not unjustifiably encroach on our rights and liberties. It is clearly important that intelligence and security agencies and police have adequate powers and resources to do their job in the context of the heightened threat of terrorist activity.

There is no serious debate on this fundamental goal in the Australian community.

The debate that has been running between many community, legal, civil liberties and human rights groups and the Government since 9/11 is about the effectiveness of strategies, the proportionality of measures taken to achieve the goal - especially in their impact on fundamental rights and liberties- and the likelihood of serious unintended consequences from some actions.

Australia has been subject to a veritable avalanche of counter-terrorism laws since 9/11 with a particularly intense flurry under the Abbott Government. The current tranche of proposed extensions to counter-terrorism laws is the fourth in 12 months and the Government has already indicated its endorsement of a further set of proposals for the new year.

The CCLs are deeply concerned that much of this hyper legislative activity is increasingly driven by electoral politics which is exacerbated by an open determination from the Opposition not to dissent from the core national security agenda of the Government. In such a context, it is not surprising that the intelligence and police agencies will argue strenuously at every opportunity for new laws providing increased powers and the removal of safeguards and constraints that would in the recent past been unthinkable.

In our view, many of Australia's counter-terrorism laws post 9/11 have been unnecessary in that appropriate laws and powers already existed. A disturbing number of the counter-terrorism measures have been disproportionate and seriously and unjustifiably undermine longstanding democratic processes, rights and liberties.¹

¹ See ALRC list of Commonwealth statutes-many of which are security/counter-terrorism related- which breach traditional freedoms. Although not all are unjustified-this list should be ringing alarm bells for those who are concerned to protect core freedoms as a central element of our democratic way of life. Australian Law Reform Commission: *Interim Report on Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*. (Report 127), July 2015. See also a similar list of state and Commonwealth statutes with a gloomy analysis as to the impact on Australian democratic values in George Williams: *'The Legal Assault on Australian Democracy'*. Sir Richard Blackburn Lecture, ACT Law Society, 12 May 2015. (Submission 76 in response to the ALRC Review)

For many of these new laws there is no convincing evidence that they will make Australians or the world safer. We have –with many others- argued that some of them are more likely to make us less safe.

Cumulatively this stream of counter-terrorism legislation has had a deeply disturbing effect. Laws which seriously breach long held liberties and rights, key principles of the rule of law and basic democratic values are increasingly numerous and increasingly unremarkable. They are no longer confined to counter-terrorism and national security measures. Our fear that this would occur would now seem to be irrefutable fact.

The CCLs support some of the measures proposed in this Bill but we view the major proposals as unnecessary and disproportionate and argue for their withdrawal or significant amendment.

2. EXEMPTION OF RECEIVING FUNDS FOR LEGAL ASSISTANCE FROM A TERRORIST ORGANISATION - SCHEDULE 1

The Bill proposes to amend the Criminal Code to ensure that the receipt of funds from a terrorist organisation is not a criminal offence when the purpose is to provide 'legal advice or legal representation in connection with the question of whether the organisation is a terrorist organisation'.²

The CCLs support this proposal. We agree with the rationale in the Explanatory Memorandum:

*It is appropriate that an organisation is provided with an opportunity to contest a determination that it is a terrorist organisation. The amendment will enable a lawyer to receive funds from a terrorist organisation in cases where it seeks to challenge its status as a terrorist organisation.*³

The amendment will implement one of the COAG Committee Report recommendations⁴ relating to exceptions for lawyers receipt of funds from a terrorist organisation.

We note however that the Explanatory Memorandum makes it clear that there is no intention to act on the related COAG Committee recommendation that the legal burden on the defendant be reduced to an evidential one⁵. In our view this was a reasonable recommendation and should be incorporated in this Bill.

The CCLS support the proposed amendment to the Criminal Code - new 102.6(3)(aa) and substitution of new 102.8(4)(d)(ii) - to exempt the receipt of funds from a terrorist organization from criminalization when the purpose is for providing legal advice or representation in connection with 'the question of whether the organization is a terrorist organization'.

² Proposed new paragraph 102.6(3)(aa) and amended subparagraph 102.8(4)(d)(ii).

³ Counter-Terrorism Legislation Amendment Bill (no. 1) 2015 Explanatory Memorandum. (EM) par 221.

⁴ Council of Australian Governments Review of Counter-Terrorism Legislation 2013 (COAG Committee Report 2013) Recommendation 20.

⁵ EM par222. COAG Committee Report 2013, Recommendation 19. COAG Governments did not accept this recommendation.

3. CONTROL ORDERS TO BE IMPOSED ON PERSONS AGED 14-15 - SCHEDULE 2

3.1. CCLs opposition to current control orders and preventative detention orders regimes

The CCLs reaffirm their longstanding and consistent opposition to the control orders and preventative detention orders regimes.

We will not reiterate the detailed arguments that have been previously put at the time of their introduction, the COAG review in 2012 and subsequent amendment in 2014⁶.

The CCLs considered view is that the control orders and preventative detention orders regimes should be repealed as unnecessary and unjustified encroachments on rights and liberties and rule of law principles.

It is obvious that this is unlikely to occur before the scheduled March 2018 review by the PJCS. The CCLs have therefore engaged with the proposed amendments in this Bill with the view of supporting proposals which will ameliorate existing or proposed provisions and critiquing those amendments which will exacerbate unjustified breaches of liberties and rights.

3.2. Proposed imposition of control orders for children aged 14-15

The Bill proposes to amend Division 104 of the Criminal Code so that control orders can be imposed on children aged 14 and 15. Currently the regime only applies to adults and children aged 16 and 17.

It is clear that some –and likely a growing number- of school age children in Australia are being drawn into forms of violent extremism which in some instances might lead to terrorist acts at home and overseas. We have recent examples which appear to be manifestations of this in Sydney.

The Government and the community obviously must do all that we can to manage and counter this disturbing and violent trend.

The CCLs are fully supportive of this objective. We are not, however, persuaded that this proposal is necessary or that it will achieve the desired outcome. We share the views of other legal and community members that the overall impact is likely to be counter-productive and likely to exacerbate the alienation and antagonism of young Muslims – and their communities - in Australia.

Our general opposition to control orders is that they undermine the rule of law in that the conditions imposed are coercive and punitive and breach important liberties and rights and should not be imposed without a fair trial process and conviction. This is so for adults. The significance of such an unnecessary breach of rights and liberties is considerably greater when the imposition is on school age children. It is a very serious step.

It is therefore surprising that the Government has not provided substantive evidence supporting the imposition of control orders on children. The Explanatory Memorandum has a cursory explanation:

⁶ See for example: NSWCCCL Submission to Senate Legal and Constitutional Committee Inquiry Into The Provisions Of The Anti-Terrorism Bill (No 2) 2005, November 2005; NSWCCCL: Submission to COAG Review of Australia's Counter-Terrorism Legislation 2012; FF and original bill COAG submissions; Submission Of Civil Liberties Councils Across Australia To The Parliamentary Joint Committee On Intelligence And Security Inquiry Into The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill; 3rd October 2014;

“These amendments respond to incidents in Australia and overseas that demonstrate children as young as 14 years of age are organising and participating in terrorism related conduct. With school-age students being radicalised and engaging in radicalising others and capable of participating in activity which poses a threat to national security, the age limit of 16 years is no longer sufficient for control orders to prevent terrorist activity.”⁷

This appears to take as a given that the imposition of a control order is both a necessary and the most effective way of responding to this ‘radicalisation’ trend and of preventing terrorist activity.

In our view it is certainly not necessary. There are adequate existing provisions within the criminal law to deal with any of the behaviours that are being addressed under the control order regime. The report of the Human Rights Committee on this Bill is correct in its observation that:

Neither the statement of compatibility nor the explanatory memorandum explains in detail how the current criminal law does not adequately provide for the protection against terrorist acts by 14 and 15 year olds. ⁸

It is difficult to see how control orders will be particularly effective in preventing terrorist acts. They can only be imposed on known persons of risk. Terrorist attacks have been carried out in most contexts by persons unknown to authorities. The imposition of a control order is likely to undermine the capacity to garner further useful intelligence of the person’s network and any possible terrorism related plans.

But the major argument against the extension of the regime to cover 14-15 year old children relates to the fact that they **are** school age children. They are far more susceptible and vulnerable than adults. The potential damage to a child from the punitive and coercive orders that can be imposed is likely to have serious, long term implications. The disruption of their liberties and rights under this proposal will be considerable.

The HR Committee report and the Statement of Compatibility with Human Rights both identify the considerable number of human rights that the proposed control orders regime to cover children 14-17 will engage and limit including:

- right to equality and non-discrimination;
- right to liberty;
- right to freedom of movement;
- right to a fair trial and the presumption of innocence
- right to privacy;
- right to freedom of expression;
- right to freedom of association;
- right to the protection of the family
- obligation to consider the best interests of the child.⁹

⁷EM, Par 229, p42.

⁸ Parliamentary Joint Committee on Human Rights, Thirty-second Report of the 44th Parliament, 1st December 2015. November 2015) (HR Committee 2015)

Given that the CCLs are of the view that there is no convincing evidence as to the effectiveness or the necessity of the control order proposal, the infringement of these rights and liberties is, in our view, neither proportional nor justified.

There is also an obvious issue about the logical consequences of this proposal. If it is acceptable to impose control orders on 14 year olds – why is it not acceptable to extend them to 12 year olds?

This has already been suggested as necessary by the previous secretary of the Commonwealth Attorney-General's Department¹⁰. In fact, as the Explanatory Memorandum reminds us, the age at which a young person can be prosecuted for a criminal offence in Australia is 10 years of age¹¹. If, as is not inconceivable, a child of 10 emerges as being involved in a terrorist related group or activity, what is the logic which would prevent another extension of the control orders regime to include children as young as 10?

The current proposed age reduction may well be setting a very unfortunate precedent.

It is highly likely that the imposition of control orders on 14-15 year olds will generate anger and alienation within the child's immediate family and community and more generally within the Muslim community in Australia. We do not know of any current or historical examples which would suggest this kind of provision will reduce the threat of terrorism or make the community safer. Nor is it likely to be effective in constraining the alienation of Muslim youth and the growth of 'radicalism'- including in some instances the embracing of violent strategies.

To proceed with an unnecessary law which is likely to be counter-productive does not appear to be good policy.

The CCLs strongly oppose the proposal to lower the minimum age at which control orders can be imposed to include 14 and 15 year old children.

The CCLs argue that if control orders are maintained they should only be imposed on adults of 18 and over.

The CCLS recommend that the proposed amendment to reduce the minimum age at which control orders can be imposed to 14 is withdrawn.

3.3. Safeguards for control orders imposed on children

The Bill proposes a number of safeguards to limit the impact on the rights and liberties of the child subject of the control orders. If this proposal is to proceed, the CCLs welcome these and support some of them fully – eg the requirement that for a person under the age of 18 the AFP must provide the AG with information on the person's age when applying for an interim control order.¹² Others we

⁹ Relating largely to the International Covenant on Civil and Human Rights (ICCPR) and the Convention on the Rights of the Child (CRC). HR Committee 2015, Par 1.53. EM par9, p8. (For the Bill generally).

¹⁰ Roger Wilkins quoted in the SMH supported the inclusion of 12 year olds as "the best and most sensible way of dealing with this problem". SMH 18/11/2015.

¹¹ EM p42

¹² Proposed paragraph 104.2(3)(ba)

consider to be inadequate and suggest amendments. Overall, we consider there are stronger additional safeguards which are essential to limit the disproportionate effect of this proposal which should be included in the Bill.

3.4. Best interests of the child

The proposed new subsection 104.4(2)(b) of the Criminal Code inserts a requirement that if the person is 14 to 17 years of age, the court when considering whether to impose the requested controls ‘must take into account’ the best interests of the person. In addition, new sub-section 104.4(2A) lists matters which must be taken into account in considering the best interests of the child:

- (a) the age, maturity, sex and background (including lifestyle, culture and traditions) of the person;
- (b) the physical and mental health of the person;
- (c) the benefit to the person of having a meaningful relationship with his or her family and friends;
- (d) the right of the person to receive an education;
- (e) the right of the person to practise his or her religion;
- (f) any other matter the court considers relevant.

This amendment reflects article 3.1 of the CRC:

“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 CCLs support these amendments relating to the best interest of the child in so far as they go.

The requirement to consider the best interests of the child is potentially a powerful safeguard. However, as drafted there are problems both with its application in the control orders process and the weight it is to be given.

The CRC is explicit that the ‘best interests of the child’ must be a ‘primary’ consideration. The Explanatory Memorandum seems to be in agreement with that:

*The Family Law Act requires the best interests of the child to be treated as “the paramount” consideration, when considering whether to make certain orders. In contrast, the paramount consideration with respect to control orders is the safety and security of the community. Accordingly, rather than being the paramount consideration, the issuing court will be required to consider the child’s best interests as a primary consideration. New subsection 104.4(2A) treats the child’s best interests as “a primary” consideration.*¹³

Though the Explanatory Memorandum speaks of ‘a primary consideration’ there is no specification in the Bill that ‘best interests’ of the child constitute a ‘primary’ consideration.

¹³ EM, par 84, p16

The CCLs agree that where there is an immediate threat to the 'safety and security of the community', it is reasonable that this may be the paramount consideration. However, the best interests of the child should in **all** contexts be 'a primary consideration.' It is not enough to assert this in the Explanatory Memorandum. It is important that it be stipulated in the legislation.

The CCLs recommend the Bill be amended to include the word 'primary' in 104.4(2)(b) so that it is clear that the best interests of the child are a 'primary' consideration.

The CCLs recommend a similar amendment be made to the new paragraph 104.24(2)(b) so that it is clear that the best interests of the child are a primary consideration in approving any variations in the orders.

It is not clear why the best interests of the child are not specified as a primary consideration at all key stage of the control order process. The HR committee report points out that the Statement of Compatibility does not fully explain why the best interests of the child test does not apply to the initial step of the control order application process.¹⁴ The best interest of the child should be a primary consideration in the court's decision to make an interim or a confirmed control order – as well as in deciding on the particular controls to be imposed.

The CCLs recommend that the Bill be amended to require the court to consider the best interests of the child as a primary consideration in the initial decision to make an interim order and any decision to confirm a control order.

3.5. Three months maximum for a control order

The CCLs support the continuation of the three months maximum duration for a confirmed control order on a child aged 14-17 years. However it is weakened as a safeguard by the ability for the court to make successive control orders for children under subsection 104.28(3).

Though unlikely, the CCLs consider that this unrestrained capacity is inappropriate. There should be a limitation of two 3 months control orders on a child. If there is need for ongoing preventative controls a charge should be laid and tested in court.

The CCLs support the continuation of the three months maximum duration for a confirmed control order on a person aged 14-17 years.

The CCLs recommend that the provision allowing successive control orders to be issued for a person aged 14 to 17 should be restricted to a total of two successive three months control orders.

3.6. Court appointed advocate

The proposed new subsection 104.28AA(2) of the Criminal Code requires the court to appoint a lawyer as an advocate of the child in relation to the interim control order, any proceedings relating to the confirmation of the control orders and any variation or revocation of the confirmed order.

¹⁴ HR Committee, par 174, p14.

The CCLs support this as a positive safeguard provision but note that the specified role of the advocate is a limited one. The role of the advocate will not ensure that the rights of the child as set out in the CRC will be proportionally protected:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. (CRC, Article 12)

The court appointed advocate must:

- ensure, as far as practicable in the circumstances, that the person understands the relevant information- taking into account the person's age, language skills, mental capacity and any other relevant factor
- form an independent view, based on the evidence available to the advocate, of what is in the best interests of the person
- act in what the advocate believes to be the best interests of the person
- if satisfied that the adoption of a particular course of action is in the best interests of the person, make a submission to an issuing court suggesting the adoption of that course of action;
- ensure that any views expressed by the person in relation to the control order matters are fully put before an issuing court;
- endeavour to minimise any distress to the person associated with the control order matters¹⁵.

These roles will provide constructive support for the best interest of the child- as understood by the advocate.

However the court appointed advocate is explicitly **not** the child's legal representative and is not obliged to act on the child's instructions.¹⁶ The Statement of Compatibility emphasises that the advocate is acting for the child's best interests- not as the child's legal representative.¹⁷

Accordingly 'the court appointed advocate may disclose to an issuing court any information that the person communicates to the advocate if the advocate considers the disclosure to be in the best interests of the person' – 'even if the disclosure is made against the wishes of the person'.¹⁸

¹⁵ Proposed new section 104.28AA (2)

¹⁶ Proposed new section 104.28AA(3)

¹⁷ EM p17

¹⁸ Proposed new sections 104.28AA(5) and (6)

Furthermore, even if the advocate has high level security clearances (and there is no specified requirement for this) s/he may not have access to any of the closed hearings, or access to classified evidence or witnesses. The advocate cannot interrogate evidence.

Clearly these limitations on the role of the court appointed advocate severely restrict the usefulness of the role in ensuring a fair process for the child.

The child is able to have their own legal representative but this person would not have access to any sensitive, confidential evidence or be present at closed hearings.

COAG recommendation re Special Advocates

The significant limitations of the role of the court appointed advocate raise the important issue of the COAG Committee recommendation advocating a system of special advocates:

The Committee recommends that the Government give consideration to amending the legislation to provide for the introduction of a nationwide system of 'Special Advocates' to participate in control order proceedings. The system could allow each State and Territory to have a panel of security-cleared barristers and solicitors who may participate in closed material procedures whenever necessary including, but not limited to, any proposed confirmation of a control order, any revocation or variation application, or in any appeal or review application to a superior court relating to or concerning a control order.¹⁹

The CCLs strongly support this proposal which has been implemented in the UK in similar circumstance. Such a system, although it has some weaknesses - especially relating to communication with the controlee - would be a very significant safeguard for adults as well as children who are subject to a control order application.²⁰

This COAG Committee recommendation – along with the other recommendations relating to control orders - are currently subject to an inquiry by the INSLM. It is our understanding that the INSLM report will feed into the Government's and Parliament's consideration of the current Bill. It would be particularly inefficient if it did not.

The CCLs support the proposed requirement for a court appointed advocate for persons aged 14-17 but note it has significant limitations as an effective safeguard for the rights of the child to a fair hearing.

Separate from this, the CCLs strongly support the introduction of a system of Special Advocates as proposed by the COAG committee to participate in control order proceedings to provide more effective safeguards for persons subject to control order proceedings.

¹⁹ COAG Committee report, Recommendation 30. Special advocates were also by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014, tabled on 20 November 2014.

²⁰ See discussion in the COAG report: Ibid pp.49ff

The CCLs note that it would be sensible for the INSLM's report on Special Advocates and other safeguards relating to the control orders regime (recommended by the COAG Committee) to be considered before the Parliament considers the current Bill.

4. REMOVE FAMILY LAW COURT AUTHORITY - SCHEDULES 4 AND 6

The CCLs agree the reasons in the Explanatory Memorandum and support the proposed amendments to remove the Family Law Court as an issuing authority for control orders.

5. DEFINITION OF 'IMMINENT' TERRORIST ACT FOR PDOS- SCHEDULE 5

The purpose of the Preventative Detention Order (PDOs) regime in Division 105 of the Criminal Code is to allow a person to be taken into custody and detained for a short period of time, being no longer than 48 hours under the Commonwealth regime, in order to prevent an imminent terrorist act occurring, or to preserve evidence of, or relating to, a recent terrorist act.

Under existing subsection 105.4(5), in order to obtain a PDO to prevent a terrorist act, a terrorist act must be one that is "imminent" (paragraph 105.4(5)(a) and must be one that is "expected to occur, in any event, at some time in the next 14 days" (paragraph 105.4(5)(b).

The purpose of the amendments in this Schedule is to clarify how the "imminent" test in subsection 105.4(5) operates. The amendments achieve this by:

- *adopting a new defined term of "imminent terrorist act", and*
- *clarifying that the thresholds applicable to the AFP member and issuing authority under subsection 105.4(4) apply to the "imminent" test in subsection 105.4(5).²¹*

The CCLs have consistently opposed Preventative Detention Orders (PDOS) and were disappointed recommendations from the INSLM and the COAG committee proposing their repeal were not acted on by the Government²².

The current definition of an 'imminent terrorist act' is that it must be 'imminent' and 'expected to occur, in any event, at some time in the next 14 days'.

This will be replaced by the considerably broader definition. An 'imminent' terrorist act is 'capable of being carried out within the next 14 days' and 'could occur within the next 14 days'. 105.4(5)

The effect is to lower the threshold from likely to occur immediately and expected within 14 days to a requirement that it is 'capable' of being carried out in 14 days. The second part - 'and could occur within 14 days' – is open-ended.

²¹ EM Paras 370-373, p60

²² COAG committee 2013: Recommendation 39 which applied to the Commonwealth, state and territory legislation; INSL annual report 2012 Recommendation 111.

Noting both that the key objective of the PDOS regime is to ‘prevent an imminent terrorist act occurring’ and that the protection from arbitrary detention is a core right, this is too low a threshold.

We note that there has been pressure –especially from the NSW Government post the recent terrorist killing of a NSW police employee at Parramatta –to increase significantly the period of detention allowable under PDOS²³. This possibility adds to the significance of any lowering of the thresholds at the Commonwealth level.

If the RDOs regime is to continue there should be an amendment to the definition. The current ‘imminence’ threshold is unclear and should be reworded to align more closely with the suggestion of the INSLM: ‘threshold tests for them should require that both the AFP applicant and the issuing authority are each satisfied that there is a sufficient possibility of the terrorist act occurring sufficiently soon so as to justify the restraints imposed by the PDO’.²⁴

The CCLS do not support the PDOS regime and will continue to argue for its repeal.

The CCLS do not support the proposed amendment to the ‘imminence’ threshold and recommend it not be proceeded with in its current form.

The CCLS recommend that the current unclear ‘imminence’ threshold be amended to a set of words which clearly indicate ‘immediacy of a terrorist act is likely’ reflecting the advice of the INSLM in his 2012 annual report.

6. MONITORING COMPLIANCE WITH A CONTROL ORDER - SCHEDULES 8, 9 AND 10

The proposed amendments in these three schedules will create a significant expansion in monitoring and surveillance powers including a new type of warrant (a ‘monitoring’ warrant) for the purpose of monitoring an individual’s compliance with a control order. The provisions are remarkable because the monitoring/surveillance powers are not dependent on any suspicion that the person has or is likely to commit any offence.

The Human Rights Committee has accurately summarised the proposals in these terms:

*“The Crimes Act and other Commonwealth legislation confer a range of investigative powers on law enforcement and intelligence agencies. The committee considers that the significant change proposed by these measures is the power to search premises, intercept telecommunications and install surveillance devices for the purposes of monitoring compliance with a control order **in the absence of any evidence (or suspicion) that the order is not being complied with and/or any specific intelligence around planned terrorist activities.**”²⁵*

²³ NSW PDOS regime allows 14 days detention.

²⁴ INSLM annual report 2012 Rec III/2.

²⁵ HR Committee report, par 1.134, p25. CCLS emphasis.

It then observes, again correctly, that:

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

The powers also involve significant intrusions into the privacy of individuals unrelated to the person who is subject to a control order, including people who use computers at the same education facilities as a person subject to a control order.”²⁶

The CCLs are uneasy with this new suite of monitoring and surveillance powers. We are not convinced that the extensive existing monitoring and surveillance powers are not adequate to allow effective, legitimate monitoring of persons subject to a control order.

We do note that the Explanatory Memorandum does at various points assert this is not the case: eg

“However, Australian law does not provide adequate powers for law enforcement agencies to monitor compliance with controls under a control order to sufficiently reduce the risk that a person will engage in terrorist act planning or preparatory acts while subject to a control order”²⁷.

There may be greater justification for a blanket authority to monitor persons who have a control order if the purpose was indeed restricted to reducing ‘the risk that a person will engage in terrorist act planning or preparatory acts while subject to a control order.’

The statement of compatibility implies this is the case in its summative justification of the new powers. It defines the legitimate objective as: “to assist law enforcement officers prevent serious threats to community safety. The potentially intrusive nature of the powers is balanced by their use solely in respect of terrorism offences, which constitute the gravest threat to the safety of Australians”.²⁸

The problem is the Bill, as drafted, allows monitoring for possible breaches of the control order conditions as a sufficient purpose for issuing a warrant. The Human Rights Committee correctly points out that some of the breaches of a control order could be very minor matters: eg. being 30 minutes late for curfew or talking innocently on the phone in breach of an order.²⁹

Just as those who are jailed do not give up all of their human rights surely those who are the subject of a control order have not given up all their rights. This is particularly so when it is likely that those subject to control orders will have not been convicted of any criminal offence. Their right to privacy must remain substantially intact.

²⁶ ibid

²⁷ EM par 395, p66

²⁸ SOC, EM para 50, p12

²⁹ HR Committee report, p59

The CCLs query why a person who is already subject to the extensive restrictions on their liberty of a control order should be subject to the further invasion of their privacy on the basis of purely past conduct- which may not include a conviction for any unlawful act. Surely this further invasion of rights must be justified, having regard to the restrictions already imposed, on the basis of a threat of future misconduct.

The CCLs also hold greater concerns at the related, significant invasion of the right to privacy of innocent third party persons which is consequent to these proposals.

The CCLs register their deep concern with the proposals in schedules 8, 9 and 10 to allow authorisation of highly intrusive monitoring and surveillance regimes on individuals who are subject to a control order – and related third party persons- without evidence or reasonable suspicion that a terrorist act or other serious offence is likely to be committed. These proposals should not proceed in their current form.

6.1. Monitoring warrants for compliance with control orders - Schedule 8

The amendments in this Schedule create a “monitoring warrant” regime in a new Part IAAB of the Crimes Act to apply to individuals subject to a control order and to premises with a ‘prescribed connection’ to the individual. The issuing authority will not have to be satisfied that an offence has or is going to occur.

The powers under these warrants are very intrusive and invasive of the privacy of persons under a control order. The general monitoring powers are set out in proposed section 3ZZKB but the most intrusive and disturbing powers are included in proposed section 3ZZKC and relate to the operation of electronic equipment.

These powers include: operating electronic equipment and use of any storage devices on the premises and, if relevant data is found, extra powers come into play. These include: print and remove documents from premises; transfer relevant data to any storage device and remove from the premises.

These days it is likely that electronic devices will have a vast amount of an individual’s personal information stored and will also be connected to the net and off-site data storage.

The potential intrusiveness of these operating electronic powers is exacerbated by the very broad definition of premises which have a ‘prescribed connection’ with the person subject to the control order.

The ‘prescribed connections’ for a premise are listed in proposed section 3ZZJC: and include: the person is the legal or beneficial owner, has a legal or equitable estate or interest in, occupies or resides in, has possession or control of, performs employment duties in or carries on a business in, performs voluntary work on the premises. Or the premises are used by a school, college, university or other educational institution; and the person attends the premises in his or her capacity as a student at the school, college, university or other educational institution.

This is an very broad definition.

Can any electronic equipment the person may have used in these places be operated by the AFP under this warrant? Clearly innocent third party persons will potentially have their right to privacy seriously intruded upon under these monitoring warrants.

The CCLs accept the need for effective monitoring of persons subject to a control order to ensure they do not breach their conditions. But we are not convinced that the 'monitoring warrants' in their current expansive form are appropriate.

The CCLs do not support the proposed monitoring warrants in their current form.

The CCLs recommend that the PJCIS seek a detailed response from the Attorney General to the proportionality issues raised by the Parliamentary Human Rights Committee in relation to the proposed control orders monitoring warrants regime.

The CCLs also recommend that the PJCIS seek advice from the Privacy Commissioner on the privacy implications of the proposed control orders monitoring warrants regime.

6.2. Telecommunications Interception Warrants- Schedule 9

The proposed amendments to the *Telecommunications (Interception and Access) Act 1979* (TIA Act) will allow agencies to apply for a covert telecommunications interception (TI) warrant for the purpose of monitoring compliance with a control order. The intercepted information can be used in any proceedings of the control order and in connection with Commonwealth, state and territory PDOs. New deferred reporting arrangements will allow agencies to defer public reporting on the use of a warrant relating to a control order.

Material collected under the warrant will be able to be used in relation to a PDO even if the control order has been declared void.³⁰

Agencies will be able to apply for warrants in relation to the person subject to the control order and to third parties. Access may also be authorised to stored communications and telecommunications data.

There is no requirement for there to be any suspicion that the person subject to a control order is likely to breach the conditions or has done so for these warrants. In fact a warrant can be applied for before a control order has been served on the person (new section 6T).

The CCLs have the same general reservations about the proposed TI surveillance proposed within this section as we have for the control order monitoring warrants in section 8. There do not need to be substantive grounds beyond the fact that the person is subject to a control order.

In addition there are specific concerns.

B-Party Warrants

The CCLs have consistently opposed B-Party TI warrants on the basis that they are a serious and unjustifiable invasion of a non-suspect person's right to privacy. There is no restriction on who the B-

³⁰ EM par 532, 533, P82.

party will be. It could be a spouse, a child, a parent, the person's lawyer, a clergyman. All their conversations may be monitored, not just those with the suspected transgressor.

B-Party warrants are contrary to Article 17 of the United Nations International Covenant on Civil and Political Rights, to which Australia is a signatory:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Everyone has the right to the protection of the law against such interference or attacks.

In 2006 we strongly argued against the introduction of B-Party warrants when they were proposed in the Telecommunications (Interception) Amendment Bill 2006. At the time we described the proposal as a "major intrusion on the privacy of innocent persons—perhaps the greatest that has been proposed since the Federal Parliament began".³¹

The CCLs strongly oppose this proposed expansion of B-Party TI warrants both on the basis of the general principled opposition and because it will lower the existing threshold for third party warrants.

The proposal effectively lowers the threshold for which a B-Party warrant may be issued from investigation of a serious offence punishable by 7 years imprisonment to a control order breach punishable by 5 years imprisonment. As pointed out by the Human Rights committee a control order breach can be of a minor kind.³²

The proposal for B-Party warrants in new section 46 should be withdrawn.

If the proposal for B-Party warrants is not withdrawn the threshold for issuing a B-Warrant should be significantly higher. The NSWCCCL has previously argued that the requirement should be credible imminent threat of death.³³

The CCLS reaffirm their opposition to B-Party telecommunication interception warrants as unwarranted and disproportionate invasion of the right to privacy.

The CCLS recommend the proposal for B Party warrants for TI warrants in new section 46 of the TIA Act be removed from the Bill as an unwarranted breach of the right to privacy of non- suspects persons.

If it is decided to retain the provision for B-Party warrants the proposal should be reviewed to significantly lift the threshold for issuing of a warrant to be at least aligned with the current provisions in the TIA Act.

³¹ NSWCCCL submission to Senate Legal and Constitutional Committee's Inquiry into the Provisions of the Telecommunications (Interception) Amendment Bill 2006, 13 March 2006 (NSWCCCL Sub TIA Bill 2006) pp12ff.

³² HR Committee report, p59

³³ NSWCCCL Sub TIA Bill 2006

6.3. Surveillance Devices–Schedule 10.

The proposed amendments to the Surveillance Devices Act 2004 (SD Act) allow applications to be made for surveillance devices, including listening devices and devices to record computer activity, to be issued in relation to persons the subject of control orders.

The CCLs have the same general unease in relation to these proposals as we do to the monitoring and surveillance proposals in schedules 8 and 9.

7. CREATION OF NEW OFFENCE OF PUBLICLY ADVOCATING GENOCIDE- SCHEDULE 11

The amendments in Schedule 11 create a new offence of publicly advocating genocide . The offence applies to advocacy of genocide of people who are outside Australia or the genocide of national, ethnic, racial or religious groups within Australia.³⁴

We do not support the proposal to define ‘advocates’ as “counsel, promote, encourage or urge” for the same reasons we outline in relation to the proposed amendment to advocating an act of terrorism in the Classification Act in Schedule 13.

What is meant by ‘publicly’ is not defined but the EM indicates it would include, but not be limited to:

- causing words, sounds, images of writing to be communicated to the public, a section of the public, or a member of members of the public
- conduct undertaken in a public place, or
- conduct undertaken in the sight or hearing of people who are in a public place³⁵.

We are concerned at the vagueness of this explanation of the ambit of ‘publicly’.

We are not convinced that the new offence is necessary.

The CCLs may make further more detailed comment on this proposal.

The CCLs do not support the proposed new offence of publicly advocating genocide in its current form and consider further evidence is necessary to demonstrate the necessity for a new offence.

8. EXPANSION OF DEFINITION OF ‘ADVOCATES’ IN CLASSIFICATION ACT- SCHEDULE 13:

The proposed amendment to the Classification (Publications, Films and Computer Games) Act 1955 will expand the current definition of ‘advocates’ as it applies to the doing of a terrorist act.

Currently the Act defines “advocates” as: directly or indirectly “counsels” or “urges” the doing of a terrorist act.

It is proposed to add ‘promotes’ and ‘encourages’ to this definition. In our view this will significantly and inappropriately expand the meaning of ‘advocates’ with unwarranted implications for freedom of speech.

³⁴ EM par 681

³⁵ EM par 686

The Explanatory Memorandum indicates that the amendments are to align the definition of “advocates” in the Classification Act with the updated definition in the Criminal Code. This Criminal Code definition was amended by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 in December 2014.³⁶

While the CCLs appreciate that consistency of definitions between the Criminal Code and the Classification Act is appropriate, we cannot support the proposed amendment.

We opposed the same amendment when it was proposed in the Foreign Fighters Bill³⁷ and more recently, in our submission in response to the Australian Law Reform Commission’s *Interim Report on Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* where we urged its further review by the INSLM with a view to its repeal.³⁸

It is worth noting that the ALRC in that Interim Report identified the ‘advocating of terrorism’ offence as one which might be reviewed on the grounds that it unjustifiably interfered with freedom of speech.

We maintain our opposition to the expansion of the definition of ‘advocates’ the doing of an act of terrorism in the Classification Act for the same reasons.

The CCLs do not support the proposed amendment to expand the definition of ‘advocates the doing of an act of terror’ in the classification Act as it unjustifiably interferes with freedom of speech.

The CCLs recommend the proposal of the ALRC in their *Interim Report on Traditional Rights and Freedoms* that the advocacy of terrorism offence in the Criminal Code might be the subject of review by the INSLM to ensure it does not unjustifiably interfere with freedom of speech be acted upon.

9. DELAYED NOTIFICATION WARRANTS –SCHEDULE 14

The CCLs oppose delayed notification warrants in principle.³⁹ A search of a person’s premises, particularly a person who is an innocent third party, represents a serious violation of that person’s right to privacy. That such persons are entitled to be notified of that violation of their privacy is fundamental to ensuring that such powers are not abused.

For that reason, if they are to be permitted, it is important that the threshold requirements for their issue are strong.

³⁶ EM p114

³⁷ Joint CCLs Submission to the PJCS Inquiry into The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill, 3rd October 2014 (CCLs Submission Foreign Fighters Bill 2014)

³⁸ CCLS Submission to the Inquiry on Traditional Rights and Freedoms: Encroachments by Commonwealth Laws 18th October 2015, pp.13-15.

³⁹ The CCLs opposed the introduction of deferred notification warrants in the Foreign Fighters Bill and argued for strong thresholds and a maximum deferral time of 90 days. Joint CCLS submission Foreign Fighters Bill 2014.

Currently section 3ZZBC requires the eligible officer to “suspect on reasonable grounds” that the relevant conditions are satisfied and the issuing officer is required to “satisfied, by information on oath or affirmation, that the conditions for issue are met”.

The purpose of the amendments is to clarify the threshold requirements for the issue of a delayed notification search warrant. The amendments clarify that, while an eligible officer applying for a delayed notification search warrant must actually hold the relevant suspicions and belief set out in section 3ZZBA, the chief officer and eligible issuing officer need only be satisfied that there are reasonable grounds for the eligible officer to hold the relevant suspicions and belief.⁴⁰

This lowers the threshold.

The CCLs consider the current threshold is appropriate and would prefer it to remain unchanged. However we note that the lower threshold is consistent with other existing Commonwealth laws relating to search warrants.⁴¹

10. BROADEN SECRECY PROVISIONS IN NSI ACT FOR CONTROL ORDER PROCEEDINGS- SCHEDULE 15

The Explanatory memorandum summarises the proposed amendments to the National Security Information (Criminal and Civil Proceedings) Act 2004 as

..”enabling a court to make three new types of orders in control order proceedings under Division 104 of the Criminal Code. The effect of these court orders will be to allow an issuing court to consider information in control order proceedings (subject to the rules of evidence and other safeguards) which is not disclosed to the subject of the control order or their legal representative.”⁴²

Specifically the three new orders provide that:

- the subject of the control order and their legal representative may be provided with a redacted or summarised form of the national security information. (new subsection 38J(2))
- the subject of the control order and their legal representative may not be provided with any information contained in the original source document. (new subsection 38J(3)), or
- a witness may be called and the information provided by the witness need not be disclosed to the subject of the control order or their legal representative. (new subsection 38J(4)).

The court however, may consider all of the information contained in the original source document or provided by the witness.

Additionally, a new power is given to enable the court to exclude a party and their legal representative from a closed hearing as to whether or not national security information may be

⁴⁰ EM para 720, p115

⁴¹ Eg Section 3E Crimes Act

⁴² EM.Par 750, p119

disclosed and whether to call a witness even if the legal representative has a security clearance. (new section 38(l)). There is nothing to indicate that the court appointed advocate could not also be excluded from these closed hearings.

The Public Interest Disclosure Act would be amended to include the new orders under section 35J as 'designated publication' so that the information could not be published.

These amendments will greatly extend the secrecy provisions within the control orders regime. Lack of access to information which is used to justify the imposition of a control order and the particular controls which will be imposed on a person is a serious interference with the rights of the person to a fair court process. These proposals will greatly exacerbate the existing problems relating to fairness and the right know the grounds for allegations. The capacity of the person subject to a control order application (and their legal representative) will be in an even more compromised position in terms of capacity to contest the supporting grounds for this.

The CCLs acknowledge that there is a range of existing and new safeguards that are said to ensure the limitations on access to information are not disproportionate- including:

- The court must be satisfied that the person to be the subject of a control order has been given notice of the allegations on which the control orders request was based
- In determining whether to make any of the three new orders under revised section 38J, the court must consider:
 - the risk to prejudice to national security if an order were not made
 - whether an order under section 38J would have a substantial adverse effect on the substantive hearing in the proceeding, and
- Under the the revised section 38J the court is not required to give the greatest weight to protect national security- as is the case under existing section 38L

The Explanatory Memorandum claims that:

*"under revised section 38J, the court must be satisfied that the subject of the control order (or proposed control order) still has been given sufficient notice of the allegations on which the control order request was based, even if the individual may be denied notice of the information supporting those allegations". This 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"*⁴³

This is an optimistic description. The requirement in the Bill, as quoted above does not specify 'sufficient' notice. It is difficult to comprehend how, in the context of orders where **no** content information is provided to the person or their legal representative, there could be such confidence that an effective defence against the allegations could be mounted.

⁴³ EM par 765, p122

The CCLs are disturbed by these additional secrecy provisions to the control orders processes. We agree that it is necessary to protect sensitive intelligence/security information but extensive protections already exist within the legislation. Given the existing provisions for protection of sensitive information, the CCLs are not convinced these additional provisions are necessary to adequately protect national security information.

The CCLs consider these proposed additional secrecy provisions are excessive and recommend they be withdrawn

Alternatively, if the provisions are not withdrawn, The CCLs recommend the safeguards should be strengthened by implementing the recommendation of the COAG committee for a required minimum standard of disclosure in relation to control order applications such that: ‘the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to these allegations. This protection should be enshrined in Division 104 wherever necessary.’⁴⁴

(NOTE Additionally– and regardless of other decisions- the CCLs have recommended in relation to proposals in schedule 2 a special advocate system should be implemented to improve the fairness of the control orders process.)

11 SUMMARY OF RECOMMENDATIONS

Schedule 1

- 1. The CCLs support the proposed amendment to the Criminal Code - new 102.6(3)(aa) and substitution of new 102.8(4)(d)(ii) - to exempt the receipt of funds from a terrorist organization from criminalization when the purpose is for providing legal advice or representation in connection with ‘the question of whether the organization is a terrorist organization’.**

Schedule 2

- 2. The CCLs considered view is that the control orders and preventative detention orders regimes should be repealed as unnecessary and unjustified encroachments on rights and liberties and rule of law principles.**
- 3. The CCLs argue that if control orders are maintained they should only be imposed on adults of 18 and over.**
- 4. The CCLs recommend that the proposed amendment to reduce the minimum age at which control orders can be imposed to 14 is withdrawn.**
- 5. The CCLs recommend the Bill be amended to include the word ‘primary’ in 104.4(2)(b) so that is clear that the best interests of the child are a ‘primary’ consideration.**

⁴⁴ COAG committee Recommendation 31.

6. The CCLs recommend a similar amendment be made to the new paragraph 104.24(2)(b) so that it is clear that the best interests of the child are a primary consideration in approving any variations in the orders.
7. The CCLs recommend that the Bill be amended to require the court to consider the best interests of the child as a primary consideration in the initial decision to make an interim order and any decision to confirm a control order.
8. The CCLs support the continuation of the three months maximum duration for a confirmed control order on a person aged 14-17 years.
9. The CCLs recommend that the provision allowing successive control orders to be issued for a person aged 14 to 17 should be restricted to a total of two successive three months control orders.
10. The CCLs support the proposed requirement for a court appointed advocate for persons aged 14-17 but note it has significant limitations as an effective safeguard for the rights of the child to a fair hearing.
11. Separate from this, the CCLs strongly support the introduction of a system of Special Advocates as proposed by the COAG committee to participate in control order proceedings to provide more effective safeguards for persons subject to control order proceedings.
12. The CCLs note that it would be sensible for the INSLM's report on Special Advocates and other safeguards relating to the control orders regime (recommended by the COAG Committee) to be considered before the Parliament considers the current Bill.

SCHEDULES 4 AND 6

13. The CCLs agree the reasons in the Explanatory Memorandum and support the proposed amendments to remove the Family Law Court as an issuing authority for control orders.

14. SCHEDULE 5

15. The CCLs do not support the PDOS regime and will continue to argue for its repeal.
16. The CCLs do not support the proposed amendment to the 'imminence' threshold and recommend it not be proceeded with in its current form.
17. The CCLs recommend that the current unclear 'imminence' threshold be amended to a set of words which clearly indicate 'immediacy of a terrorist act is likely' reflecting the advice of the INSLM in his 2012 annual report.

SCHEDULES 8,9,10

18. The CCLs register their deep concern with the proposals in schedules 8, 9 and 10 to allow authorisation of highly intrusive monitoring and surveillance regimes on individuals who are subject to a control order – and related third party persons- without evidence or reasonable suspicion that a terrorist act or other serious offence is likely to be committed. These proposals should not proceed in their current form.

19. The CCLs do not support the proposed monitoring warrants in their current form.
20. The CCLs recommend that the PJCS seek a detailed response from the Attorney General to the proportionality issues raised by the Parliamentary Human Rights Committee in relation to the proposed control orders monitoring warrants regime.
21. The CCLs also recommend that the PJCS seek advice from the Privacy Commissioner on the privacy implications of the proposed control orders monitoring warrants regime.
22. The CCLs reaffirm their opposition to B-Party telecommunication interception warrants as unwarranted and disproportionate invasion of the right to privacy.
23. The CCLs recommend the proposal for B Party warrants for TI warrants in new section 46 of the TIA Act be removed from the Bill as an unwarranted breach of the right to privacy of non- suspects persons.
24. If it is decided to retain the provision for B-Party warrants the proposal should be reviewed to significantly lift the threshold for issuing of a warrant to be at least aligned with the current provisions in the TIA Act.

Schedule 11

25. The CCLs do not support the proposed new offence of publicly advocating genocide in its current form and consider further evidence is necessary to demonstrate the necessity for a new offence.

Schedule 13

26. The CCLs do not support the proposed amendment to expand the definition of 'advocates the doing of an act of terror' in the classification Act as it unjustifiably interferes with freedom of speech.
27. The CCLs recommend the proposal of the ALRC in their *Interim Report on Traditional Rights and Freedoms* that the advocacy of terrorism offence in the Criminal Code might be the subject of review by the INSLM to ensure it does not unjustifiably interfere with freedom of speech be acted upon.

SCHEDULE 15

28. The CCLs consider these proposed additional secrecy provisions are excessive and recommend they be withdrawn
29. Alternatively, if the provisions are not withdrawn, The CCLs recommend the safeguards should be strengthened by implementing the recommendation of the COAG committee for a required minimum standard of disclosure in relation to control order applications such that: 'the applicant must be given sufficient information about the allegations against him

or her to enable effective instructions to be given in relation to these allegations. This protection should be enshrined in Division 104 wherever necessary.”⁴⁵

11. CONCLUDING COMMENTS

The joint CCLs trust that these comments will be of assistance to the PJCS in its assessment of the Counter-Terrorism Legislation Amendment Bill (No 1) 2015. The CCLs have again combined for our submission on this counter-terrorism Bill because of the ongoing national importance of the issue and our deep concerns that the Government and the Parliament do not lose sight of the imperative that our rights and liberties have to be carefully balanced with the security and safety of the community in a way that does not fundamentally undermine our democracy.

This submission was coordinated by Dr Lesley Lynch, Vice President of the NSW Council for Civil Liberties on behalf of the joint CCLs. The submission was written by Dr Lesley Lynch and Michael Cope, President of the Queensland Council for Civil Liberties. We thank Michael Cahill, Vice Chair of the Criminal Bar Association of Victoria for his contribution to this submission.

With regards

Dr Lesley Lynch
Vice President NSWCCCL.
17/12/15

Contact in relation to this submission: Dr Lesley Lynch

⁴⁵ COAG committee Recommendation 31.