



Australian Government
Attorney-General's Department

Parliamentary Joint Committee on Intelligence and Security

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

Attorney-General's Department Submission

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Introduction

1. The Attorney-General's Department welcomes the opportunity to provide the Parliamentary Joint Committee on Intelligence and Security (the Committee) with this submission as part of the Committee's examination of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015.
2. The Bill was introduced into the Senate on 12 November 2015 by the Attorney-General, Senator the Hon George Brandis QC, and referred to the Committee on that date for reporting by 15 February 2016.

Background

3. This Bill marks an important further step in the government's efforts to ensure Australia's national security laws and counter-terrorism framework remain current in the face of the evolving threat environment.
4. Australians currently face the most significant threat from terrorism in our nation's history. The Australian Government continues to work diligently towards combatting the threat from terror groups and individuals, both overseas and at home. Sadly, by any measure, the threat has only risen.
5. The escalating security crisis in Iraq and Syria poses an increasing terrorist threat to the security of all Australians both here in Australia and overseas. The Australian Government is particularly concerned about Australians who travel to conflict zones and return to Australia with skills and intentions acquired from fighting or training with prescribed terrorist groups. The Paris terrorist attacks in November 2015 regrettably highlight the capability of these groups and individuals to cause extensive harm and loss of life.
6. Our security and intelligence agencies estimate approximately 190 people in Australia are providing support to individuals and groups in the Syria/Iraq conflicts including through funding and facilitation, or are seeking to travel. In addition, around 110 Australians are believed to be participating in the conflicts in Syria and Iraq. The overwhelming majority of these people are young men and women. Approximately 30 Australians have returned from the conflict. These individuals pose a significant risk to Australia and Australians, having returned from Syria and Iraq with hands-on experience and training.

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7. Australia's national security legislation must provide law enforcement with appropriate tools to ensure the safety of the public and to ensure they are well equipped to prevent, detect, investigate, and respond to terrorist acts.

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

8. The measures introduced in this Bill reflect operational learnings from recent counter-terrorism investigations. The Bill also includes a number of recommendations from the Council of Australian Governments Review of Counter-Terrorism Legislation.

9. This Bill forms part of the Government's comprehensive reform agenda to strengthen Australia's national security and counter terrorism legislation. The Bill seeks to maintain a careful balance between enhancing our law enforcement capabilities and protecting individual rights. The provisions complement the suite of counter-terrorism measures introduced in 2014.

10. The Government has indicated its commitment to continually reviewing the counter-terrorism framework, and to bringing forward further reform where necessary to respond to the evolving counter-terrorism environment.

Control orders (Schedules 2, 3, 4, 8, 15 and 16)

11. The Bill makes a number of amendments to the control order regime in Division 104 of Part 5.3 of the *Criminal Code Act 1995* (Criminal Code) and associated amendments to other legislation. The utility of the control order regime was previously questioned by the former Independent National Security Legislation Monitor, Mr Brett Walker SC. In his 2012 report, Mr Walker recommended the repeal of the control order regime. It should be noted that this recommendation was made when the regime had only been used on two occasions. The present counter-terrorism environment is such that a further four control orders have been obtained since the threat level increased on 12 September 2014, with the Australian Federal Police (AFP) noting the continued need for the control order regime.

12. Specifically, the amendments in the Bill:

- reduce the minimum age for the imposition of a control order from 16 to 14 years
- imposes obligations on a person required to wear a tracking device under a control order to maintain the functionality of the device
- remove the ability of the Family Court to make, vary or void a control order
- protect sensitive information used in control order proceedings, and

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- create targeted powers to facilitate the monitoring of persons subject to a control order.

Young people (Schedule 2)

13. In Australia, a person as young as 10 years of age can be prosecuted for a criminal offence, including a terrorism offence. However, the control order regime currently only applies to persons at least 16 years of age. Tragically, as we have seen overseas, and more recently in Parramatta, children younger than 16 years of age are undertaking acts of terrorism.

14. These amendments are consistent with Australia's international obligations and include appropriate protections and accountability mechanisms. For example, the issuing court:

- can only make a control order if satisfied each of the controls requested would contribute to the prevention of domestic terrorism or hostile activities overseas or the support for or facilitation of domestic terrorism or hostile activities overseas
- must also consider the child's best interests when deciding whether to impose each of the controls requested
- must appoint an independent advocate to represent the child's interests, and
- can only make a control order for a maximum duration of 3 months.

Tracking devices (Schedule 3)

15. An issuing court can impose a requirement that a person wear a tracking device as one of the controls imposed by a control order. However, the court does not have the ability to impose a requirement that the person maintain the device in good working order, potentially undermining the imposition of a tracking device obligation.

16. This amendment requires an issuing court, when imposing a requirement that a person wear a tracking device, also impose a requirement that the person maintain the functioning of the device.

17. The steps that the AFP will be able to request and an issuing court will be able to impose, will include 'specified' steps to ensure the tracking device is or remains in good working order (for example, by agreeing to answer the phone if the AFP call because the device appears not to be working) and take 'reasonable' steps to ensure the device remains in good working order (for example, regular charging of the device).

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18. The amendments do not give an issuing court a discretion to impose the additional obligations in relation to maintaining the operation of the device. That is, the issuing court can either impose the requirement to wear a tracking device and the accompanying requirements to maintain the device or neither requirement. The rationale for this is that a requirement to wear a device without the accompanying requirements would be ineffective.

Issuing courts (Schedule 4)

19. Under the current provisions, a number of superior courts can make, vary or void a control order. To date, no control orders have been made, confirmed, varied or voided by a Family Court, and there are strong arguments that doing so would be outside the scope of the ordinary judicial functions undertaken by the Family Court.

20. COAG recommended (number 28) the removal of the Family Court from the list of issuing courts for the purposes of control orders.

21. The bill implements that recommendation.

Protection of national security information (Schedules 15 and 16)

22. Recent counter-terrorism investigations indicate acceleration from the initiation of an investigation to the point of disruption to ensure community safety. In these circumstances, it is necessary for the AFP to be able to rely on, and adequately protect, sensitive information in control order proceedings. Without additional measures it is possible some control order applications may not be able to proceed, or may be supported using less information (as the AFP would not be willing to disclose the information in the proceeding due to its sensitive nature and potential operational/safety risks of disclosure).

23. Consequently, the existing framework under the *National Security Information (Criminal and Civil Proceedings) Act 2004* will be amended to allow an application to be made to the court by the Attorney-General for an order to allow sensitive information to be used in the proceeding but not seen by the person who is the subject of the proceeding. The court will retain the ultimate discretion on whether to make this order. When deciding whether to make the order, the court will need to consider any unfairness to the person if they are not able to see the information. For example, if essentially all of the information in support of the application will be withheld from the person, then the court may decide that it is unfair and decline to make the order.

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Targeted monitoring powers (Schedules 8, 9 and 10)

24. The former Independent National Security Legislation Monitor noted in his 2012 report¹ that the efficacy of a control order depends largely upon the subject's willingness to respect a court order. Absent the ability to effectively monitor a person's compliance with the terms of a control order, there is no guarantee that a person will not breach the order or go on to commit a terrorist offence.

25. This is a view shared by law enforcement agencies. Existing Commonwealth powers in relation to the conduct of physical searches, telecommunication interception and surveillance devices are only available for the purposes of investigating an offence that has already been committed or is about to be committed. As a result, agencies presently have limited avenues to monitor the activities of persons who are subject to control orders, especially where those activities are taking place on private property or via electronic communications.

26. The proposed new monitoring powers resolve this issue by enabling the use of certain powers for monitoring, adopting a threshold appropriate to the monitoring of a person in relation to whom a superior court has already decided the relevant threshold for issue of a control order have been met and who therefore, by definition, is of security concern. The new regimes will allow monitoring to prevent breaches of control orders and to detect and prevent preparatory acts, planning and terrorist acts, as well as support and facilitation of terrorism or hostile activities in foreign countries.

27. With the increased use of the control order regime to address the risk posed by foreign fighters, these measures will ensure investigative tools are sufficiently adapted to monitoring the risk of possible breaches of control orders.

28. Given the gravity of the purposes for which a control order is made, compliance with its terms is clearly important. If compliance could only be monitored once there was information that a breach had occurred, the damage would have been done and lives may have been lost. These new powers underline the important protective value of imposing a control order on a person who has already been identified as being of security concern.

Preventative detention orders (Schedules 5, 6, 9 and 10)

29. The Bill amends the preventative detention order regime in Division 105 of Part 5.3 of the Criminal Code by:

¹ Independent National Security Legislation Monitor, *Declassified Annual Report*. 20 December 2012, chapter II.

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- clarifying the threshold for obtaining a preventative detention order, and
- removing the ability of a Family Court Judge to be appointed as an issuing authority.

Threshold for obtaining a preventative detention order (Schedule 6)

30. This amendment addresses the concern that the existing ‘imminence test’ in the PDO regime could be construed as requiring material to show the terrorist act must be one which will occur in the next 14 days. The redrafted provision replaces the ‘imminence’ test with a requirement that a PDO can be issued where ‘a terrorist act is capable of being carried out, and could occur, in the next 14 days’. This test correctly places the emphasis on capacity for an act to occur in the next 14 days, as opposed to an emphasis that a terrorist act will occur within the next 14 days.

31. This amendment seeks to address the possible compromise to the operational utility of the PDO regime by the 14-day requirement. It is often difficult, if not impossible, to establish with certainty that a terrorist act is expected to occur within exactly 14 days, and not, for instance 15 days. The former Independent National Security Legislation Monitor echoed these concerns in his Second Annual Report (20 December 2012).

32. For example, in a situation where the AFP has credible intelligence that a person is going to participate in the commission of a terrorist act within approximately the next 14 days, however, it is not certain that the act will occur within precisely 14 days, the amendment will facilitate the AFP to obtain a PDO in relation to the person. However, the AFP must still show that a terrorist act is capable of being carried out, and could occur, in the next 14 days, even if the information does not demonstrate conclusively that the terrorist act will occur in the next 14 days. The amendment will facilitate the AFP’s ability to take the person into PDO custody, disrupting the planning and preparation for the act.

33. In order to apply for and issue a PDO s 105.4 of the Criminal Code also requires the AFP and the issuing authority to:

- suspect on reasonable grounds that the person will engage in a terrorist act or
- the person possess a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
- the person has done an act in the preparation for, or planning, a terrorist act; and

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- the AFP and issuing authority are satisfied that making the order would substantially assist in preventing a terrorist act occurring and detaining the person is reasonably necessary for that purpose.

Issuing authorities (Schedule 5)

34. Under the preventative detention regime, a number of judges, tribunal appointees, and legal practitioners are currently eligible to be appointed as issuing authorities for the purposes of making continued preventative detention orders. To date, no Family Court judges have been appointed as issuing authorities under the scheme, and there are strong arguments that doing so would be outside the scope of the ordinary judicial functions undertaken by Family Court judges.

35. Consistent with the removal of the Family Court as an issuing court for the purposes of the control order regime, the bill removes the authority of Family Court judges to make continued preventative detention orders.

Dealing in telecommunications interception and surveillance devices information in connection with State and Territory preventative detention orders

36. In providing advice during the course of a recent counter-terrorism operation, the Department identified a risk that agencies may not be able to rely on lawfully intercepted information as part of an application for a preventative detention order in certain States and Territories. This risk arises due to the fact that, although agencies are permitted to *use* and *disclose* lawfully intercepted for a purpose connected with the investigation of any offence under Divisions 101 (Terrorism), 102 (Terrorist organisations) and 103 (Financing terrorism) of the Criminal Code, agencies may only *give in evidence* lawfully intercepted information in a proceeding if it is one of the categories of 'exempt proceedings' listed in section 5B of the *Telecommunications (Interception and Access) Act 1979*. At the Commonwealth level, and in approximately half of all States and Territories, applications for preventative detention orders are by way of an application to an 'issuing authority'. However, in the remaining States and Territories, applications are made by way of proceedings before a court. Accordingly, in these States and Territories, there is a risk that a court would determine that lawfully intercepted information may not be given in evidence in a proceeding for the application for a preventative detention order.

37. Subsequently, the Department determined that similar challenges would likely arise in relation to information obtained under the *Surveillance Devices Act 2004*.

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38. In the Department's view, this represents an anomaly in the legislation. Whether the application for a preventative detention order is made by an issuing authority acting in his or her personal capacity, or whether it is made by a court, should not affect the ability for telecommunications interception and surveillance device information to be relied upon as part of the application. This position is consistent with the 2005 COAG agreement that each State and Territory should establish its own preventative detention order regime, "to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact".

Information sharing (Schedules 12 and 17)

39. The Bill makes two sets of amendments to facilitate information sharing for purposes related to terrorism security. These amendments authorise the sharing of:

- ASIO security assessments to states and territories, and
- tax information for national security purposes.

Security assessments (Schedule 12)

40. There exists an increasing need to ensure security information is being shared efficiently at both the Commonwealth and State level. The current process by which ASIO security assessments can only be provided to a State or Territory via a Commonwealth agency (except in the rare circumstance of a designated special event) significantly hinders the timely provision of security assessments to relevant State agencies and places an unnecessary burden on Commonwealth resources.

41. The proposed amendment to section 40 of the ASIO Act will enable ASIO to furnish security assessments directly to a State or Territory (or an authority of a State or Territory) and will enhance the timely provision of security information to those authorities.

42. The accountability mechanisms already provided for in the ASIO Act in relation to rights of notice and review of security assessments will be maintained. For example, where an adverse or qualified security assessment in respect of a person is furnished by ASIO to a State or an authority of a State, that person will continue to have the right to make an application to the Administrative Appeals Tribunal (Tribunal) for a review of that assessment, as is currently the case under section 54 of the ASIO Act.

Disclosures of taxation information (Schedule 17)

43. The appropriate sharing of information is fundamental to the efforts of our law enforcement and other agencies in preventing, detecting, disrupting and investigating

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terrorist conduct, including terrorist planning and preparatory acts. Currently, there are restrictions in the *Taxation Administration Act 1953* to the sharing of relevant taxation information for these purposes. These amendments remove that restriction for national security purposes.

44. The amendment would authorise the disclosure of taxation information to any Australian government agency. However, the sharing of information can only occur where it is for the purposes of preventing, detecting, disrupting or investigating conduct that involves a threat related to security.

Offences and Defences (Schedules 1 and 11)

45. The Bill makes two sets of amendments to existing offences and the applicable defences. These amendments:

- create a defence for receiving funds for the provision of legal advice, and
- create a new offence prohibiting advocating genocide.

Defence for receiving funds for legal assistance (Schedule 1)

46. The purpose of the amendment is to broaden the limited range of circumstances in which a lawyer can receive funds from a terrorist organisation to cover circumstances where there is a question over the organisation's status as a terrorist organisation. It is appropriate that an organisation is able to fund a lawyer to provide them with advice or legal representation in order for them to contest a determination that it is a terrorist organisation. However, it is not appropriate for the exception to extend to receiving funds for legal services that could help the organisation flourish, such as in a commercial matter.

47. This amendment broadens the existing exception to the 'getting funds to, from or for a terrorist organisation' offence (s 102.6(3)) to lawyers who receive funds from a terrorist organisation for the purpose of providing legal advice or legal representation to a person or organisation in circumstances where there is a question over the status of the organisation as a terrorist organisation. This amendment is being made in response to Recommendation 20 of the COAG Review.

48. Under the existing exception a lawyer can receive funds from a terrorist organisation for the purpose of providing legal representation for a person in proceedings relating to Division 102 terrorist organisation offences only. The exception does not extend to receiving funds for the purpose of providing legal advice, nor does it extend to situations outside a proceeding under Division 102.

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49. There may be circumstances outside the scope of Division 102 where it is appropriate that a lawyer be able to receive funds for providing legal advice or representation. For example, a person could be facing prosecution for a financing terrorism offence under Division 103. Part of the prosecution case could be that the individual was providing or collecting funds for a terrorist organisation that is not 'listed' but falls within the meaning of the Criminal Code. A lawyer would be unable to receive funds from the organisation to provide legal advice or legal representation to the individual who has been charged under Division 103 of the Criminal Code for financing terrorism, even though there may be a legal question as to whether the organisation is a terrorist organisation.

50. In addition, the current exception may not apply for the purpose of providing legal advice on the potential delisting of a terrorist organisation on the basis that it does not fall within the meaning of a 'proceeding' relating to Division 102.

51. Recommendation 20 of the COAG Review recommended the exception extend to criminal proceedings or proceedings related to criminal proceedings as well as civil proceedings in a defined and limited number of circumstances. The COAG response to the COAG Review supported this recommendation in part but considered the range of circumstances in which the exception ought to apply should be more limited. For this reason the proposed amendment to s 102.6(3) in this Bill does not implement COAG Recommendation 20 in full but still serves to broaden the limitations of the current defence and thereby expand the range of circumstances in which a lawyer can receive funds from a terrorist organisation.

Offence for advocating genocide (Schedule 11)

52. Australia has a long and deep commitment to free speech. However, inciting acts of violence is not a legitimate or acceptable exercise of free speech. In the current threat environment, the use of social media by hate preachers means the speed at which persons can become radicalised and could prepare to carry out acts such as genocide, may be accelerated.

53. Consistent with Article III (c) of the Genocide Convention and offences enacted by some of Australia's closest allies, including the United States, Canada and Ireland, the proposed new offence prohibits 'direct and public incitement' to commit genocide.

54. This offence will supplement existing offences, such as those in Division 80 of the Criminal Code that prohibit urging violence and advocating terrorism, and will be

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available as another tool available to law enforcement to intervene earlier in the radicalisation process to prevent and disrupt further engagement in terrorist activity.

Clarifications (Schedules 13 and 14)

55. The Bill makes two sets of amendments to clarify the application of existing legislation. These amendments:

- update the definition of “advocates” in the Classification (Publications, Films and Computer Games) Act 1995, and
- clarify the requirements for the making of a delayed notification search warrant.

Classification of publications (Schedule 13)

56. The definition of “advocates” in the Criminal Code was amended in 2014. This amendment brings the definition of “advocates” in the *Classification (Publications, Films and Computer Games) Act 1995* into line with the updated definition in Division 102 of the Criminal Code.

Delayed notification search warrants (Schedule 14)

57. The delayed notification search warrant regime was inserted into the Crimes Act in 2014. As enacted, the chief officer considering whether to authorise the making of an application for a delayed notification search warrant, the police officer making the application (the eligible officer), and the issuing officer considering whether to make the warrant would all be required to personally hold the suspicions and belief set out in the regime.

58. This was not intended when that provision was drafted. Accordingly, these amendments clarify that the eligible officer holds the requisite suspicions and belief on reasonable grounds, and that the chief officer and eligible issuing officer are satisfied that the eligible officer holds the suspicions and belief, and that there are reasonable grounds for holding the suspicions and belief.

Issues raised by jurisdictions

59. The Department undertook lengthy consultation with the States and Territories during the drafting of the Bill. A majority of states and territories agreed to the text of the amendments to Part 5.3 of the Criminal Code before the Bill was introduced, consistent with the requirements of the relevant 2004 Inter-Governmental Agreement.