

## **Schedule 1 – Proposed amendments to the *Criminal Code Act 1995***

### **Summary of proposed amendments**

- 2.1 Schedule 1 to the Bill contains:
- implementation of Recommendation 8 of the Committee’s previous inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Foreign Fighters Bill), and
  - proposed amendments to the control order regime in Division 104 of the *Criminal Code Act 1995* (the Criminal Code).

### **Implementation of previous recommendation**

- 2.2 The Foreign Fighters Bill, which received royal assent on 3 November 2014, included an amendment to the Criminal Code to provide that a regulation specifying an organisation to be a ‘terrorist organisation’ could be updated to include another name the organisation is known by, or to remove a name that the organisation is no longer known by.<sup>1</sup>
- 2.3 In its report on the Foreign Fighters Bill, the Committee recommended that ‘the Attorney-General notify the Committee of any proposed Regulation to alter the listing of a terrorist organisation by adding or removing a name or alias’, and that the Committee ‘have the power to

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1 Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Foreign Fighters Bill), Schedule 1, item 67.

determine if it wishes to review any proposed changes to listings'.<sup>2</sup> The Government indicated its support for this recommendation in a media release on 22 October 2014.<sup>3</sup>

- 2.4 In referring the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (the Bill) to the Committee, the Attorney-General advised that, while the Government had agreed to the recommendation, it had required agreement from the states and territories before it could be implemented.<sup>4</sup>
- 2.5 The Bill proposes to implement the Committee's recommendation through an amendment to section 102.1A of the Criminal Code. The amendment would extend the Committee's existing power to review and report on listings of terrorist organisations to include the addition of aliases or removal of former names.<sup>5</sup>

### **Amendments to the control order regime**

- 2.6 Division 104 of the Criminal Code sets out a control order regime which allows 'obligations, prohibitions and restrictions' (conditions) to be imposed on a person 'for the purpose of protecting the public from a terrorist act'. Subject to the consent of the Attorney-General, an interim control order is applied for by a senior member of the Australian Federal Police (AFP) to an issuing court, which makes the order if it is satisfied 'on the balance of probabilities' that the conditions in the order are 'reasonably necessary, and reasonable appropriate and adapted'. An interim control order is subject to confirmation by the court as soon as practicable, but at least 72 hours after the interim order is made. A confirmed control order can last up to 12 months, and successive orders may be issued.<sup>6</sup>
- 2.7 The terms of a control order may, for example, prohibit a person from being at a specified place, leaving Australia, or communicating with specified individuals; or require the person to remain at specified places at certain times of day, wear a tracking device, or report to authorities at

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2 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, Recommendation 8, p. 50.

3 Attorney-General, 'Government response to committee report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014', *Media Release*, 22 October 2014.

4 Division 2 of the *Inter-Governmental Agreement on Counter-Terrorism Laws 2004* requires the Commonwealth to consult with and obtain the majority support of the states and territories before introducing any legislation to amend Part 5.3 of the *Criminal Code Act 1995*.

5 Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (CTLA Bill), Schedule 1, item 1.

6 *Criminal Code Act 1995*, Division 104.

specified times and places. Contravening the conditions of a control order is an offence carrying a maximum penalty of imprisonment for five years.<sup>7</sup>

- 2.8 The Foreign Fighters Bill introduced a range of amendments to the control order regime. These amendments included changing the threshold for the AFP to make an application for a control order, amending the criteria for applying for and issuing a control order, and extending the duration of the sunset clause applying to the regime. The Bill also implemented two recommendations from the 2013 Council of Australian Governments (COAG) Review of Counter-Terrorism Legislation.<sup>8</sup>
- 2.9 During its inquiry into the Foreign Fighters Bill, the AFP informed the Committee that further urgent changes to the control order regime would be necessary 'in light of recent operational experience'. The AFP's submission indicated that the changes being considered included streamlining the application process for control orders 'in a way that does not detract from any important accountability mechanisms or safeguards' and expanding the preventative purposes for which a control order can be applied.<sup>9</sup>
- 2.10 In its report on the Foreign Fighters Bill, the Committee recommended that, should further changes to the control order regime be proposed, the amendments be referred to the Committee 'with appropriate time for inquiry and review'.<sup>10</sup>
- 2.11 The Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 proposes to amend the control order regime by
- expanding the objects of the control order regime, and subsequently the grounds upon which a control order can be requested and issued, to include:
    - ⇒ 'preventing the provision of support for or the facilitation of a terrorist act', and
    - ⇒ 'preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country',
  - replacing the current requirement for the AFP to provide all documents that will subsequently be provided to the issuing court with a

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7 *Criminal Code Act 1995*, sections 104.5 and 104.27.

8 Foreign Fighters Bill, Schedule 1, items 70-87.

9 Australian Federal Police, *Submission 36* to the Committee's inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, pp. 5-6.

10 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. 61.

requirement that the AFP provide the Attorney-General with a draft of the interim control order, information about the person's age and a summary of the grounds for the request when seeking consent to apply for a control order,

- replacing the existing requirement for the AFP member to provide an explanation as to why 'each' obligation, prohibition and restriction should be imposed with a requirement to provide an explanation as to why 'the control order' should be made or varied,
- replacing the existing requirement for the issuing court to be satisfied on the balance of probabilities that 'each' obligation, prohibition and restriction 'is reasonably necessary, and reasonably appropriate and adapted' with a requirement to be satisfied on the balance of probabilities that 'the control order' to be made or varied 'is reasonably necessary, and reasonably appropriate and adapted',
- authorising an issuing court to make, confirm or vary a control order by removing one or more of the requested obligations, prohibitions or restrictions where doing so would allow the court to be satisfied that the order 'is reasonably necessary, and reasonably appropriate and adapted' to achieving one of the regime's objects,
- providing that an issuing court must take into account that the parties may need to prepare when setting a day for the confirmation hearing,
- extending the time before the material provided to an issuing court must subsequently be provided to the Attorney-General from 4 hours to 12 hours where a request for an urgent interim control order has been made to an issuing court, and
- ensuring the AFP Commissioner can apply for a variation of a control order in 'appropriate circumstances'.<sup>11</sup>

2.12 The Explanatory Memorandum to the Bill outlined that the proposed amendments were drafted in response to issues identified during recent counter-terrorism operations:

Australia faces a serious and ongoing terrorist threat which has recently been raised by the return of Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas ('foreign fighters'). This heightened threat environment has seen an increased operational tempo from Australia's law enforcement agencies to protect the public from

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11 CTLA Bill, *Explanatory Memorandum*, pp. 4-5, 7.

terrorist acts, including some widely noted counter-terrorism operations conducted by Joint Counter-Terrorism Teams comprising the Australian Federal Police and state police.

The amendments in this Bill to further strengthen and enhance the operation of the control order regime in Part 5.3 of the Criminal Code have been developed in response to operational issues identified following these counter-terrorism raids.<sup>12</sup>

## Matters raised in evidence

2.13 No significant concerns were raised by inquiry participants in regard to the proposed implementation of the Committee's previous recommendation on oversight of changes to names and aliases of terrorist organisations, with some participants registering their support for the proposed amendment.<sup>13</sup>

2.14 Several submitters to the inquiry noted in-principle objections to the existence of control orders, both in their current form and with the proposed amendments.<sup>14</sup> Amnesty International, for example, re-iterated comments it made in the Foreign Fighters inquiry that

... control orders are in breach of a person's right to a fair trial as the imposition of a control order is tantamount to 'trying' and 'sentencing' a person without the fair trial guarantees required in criminal cases. In addition, Amnesty International is concerned control orders violate the right to liberty and security of the person, the right to freedom from arbitrary detention and the right to freedom of movement, the right to freedom of religion, the rights to freedom of expression and association, and the right to be presumed innocent. Although international human rights law allows for some limitations to these rights under prescribed certain circumstances including national security, Amnesty International does not believe that the use of control orders to restrict the rights

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12 CTLA Bill, *Explanatory Memorandum*, p. 1.

13 Dr A J Wood of the Australian National University, however, suggested that the word 'may' in the clause should be replaced with the word 'must', thereby requiring the Committee to review each change to a terrorist organisation's name or alias. See *Submission 11*, p. [3]. See also Law Council of Australia, *Submission 16*, p. 6.

14 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 2; Amnesty International, *Submission 2*, p. [1]; Australian Lawyers for Human Rights, *Submission 6*, p. 4; NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7*, pp. 3-4; Senator David Leyonhjelm, *Submission 15*, p. [2]; Law Council of Australia, *Submission 16*, p. 9.

and remove the rights of individuals who have not been convicted of any crime can be adequately justified.<sup>15</sup>

- 2.15 Specific matters raised by inquiry participants with regard to the proposed amendments to the control order regime are discussed below.

## **Broadening the application of the control order regime**

- 2.16 In its submission to the inquiry, the AFP explained that it had identified 'serious risks' in its assessment of the current operating environment that control orders would 'greatly assist in mitigating'. It added that the existing control order regime, including the amendments made through the Foreign Fighters Bill, would 'not be available to manage those who seek to facilitate or support terrorist acts or persons travelling overseas to participate in hostile activities'. The submission explained the AFP's rationale for seeking an expanded control order regime:

The AFP considers that the overriding purpose of the control order regime should be to prevent terrorism. Preventing or disrupting persons who provide critical support to those activities is equally important and effective as preventing or disrupting those directly involved in those acts of terrorism or hostility. This means targeting both persons directly committing acts of terrorism or hostile activities overseas (which the regime currently addresses), and persons who provide critical support to those activities (without whom the act or hostility could not occur).<sup>16</sup>

- 2.17 At the public hearing, the AFP said that its operating environment had 'totally changed' since the declaration of a caliphate in Syria and Iraq and the continuation of people travelling to that region.<sup>17</sup> The AFP also expanded on its rationale for the proposed broadening of the grounds for control orders:

We are still seeing people travel to the conflict zone. We are interdicting where possible but some are slipping through the net ... And now, more than ever, our ability to not only interdict people who would attempt to engage in the conduct of a terrorist activity on Australia but also put control orders on enablers and supporters is of crucial importance. We are finding that facilitators and others are slightly out of our reach. We would like to be in a

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15 Amnesty International Australia, *Submission 2*, p. [1].

16 Australian Federal Police, *Submission 5*, p. 2.

17 Assistant Commissioner Neil Gaughan, *Committee Hansard*, Canberra, 13 November 2014, p. 26.

position whereby we could stop people from travelling, and we see control orders as being one way that we can put some controls on the enablers and supporters.<sup>18</sup>

- 2.18 The inability of the AFP and its state and territory partners to target facilitators and enablers was described as a 'gap', with control orders being 'one tool' which it could employ to help target those persons.<sup>19</sup> The AFP further explained that efforts focused on 'enablers and supporters' could have a positive downstream effect on its other counter-terrorism efforts:

The issue, I suppose is what we are trying to get here is the enablers and supporters, which we believe we do not currently have sufficient controls or ability to take action against. As I have said previously in evidence today, if we can take the enablers out of play, to some extent I think we can have a downstream impact to stop other issues. That is what I mean by saying that it is not a substantial change. We are just trying to capture another group that we have missed.<sup>20</sup>

- 2.19 Other participants in the inquiry argued that there was not sufficient justification for broadening the objects of the control order regime and the grounds under which they could be sought and obtained. The Gilbert + Tobin Centre of Public Law, for example, argued that the general claim that the proposed changes to the control order regime would assist in efforts against Islamic State and returning foreign fighters was 'not sufficient to justify the significant expansion of measures that have already been discredited by major inquiries'. In particular, it highlighted the 2012 review of the control order regime by the Independent National Security Legislation Monitor (INSLM), which concluded that control order powers were 'not effective, not appropriate and not necessary' and recommended repeal of the existing regime.<sup>21</sup>
- 2.20 The Australian Human Rights Commission registered its concern that the Bill proposed to increase the availability of control orders 'without introducing any of the additional safeguards' recommended by the COAG Review of Counter-Terrorism Legislation. In line with a COAG recommendation, the Commission argued for an additional requirement

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18 Assistant Commissioner Gaughan, *Committee Hansard*, Canberra, 13 November 2014, p. 25.

19 Assistant Commissioner Gaughan, *Committee Hansard*, Canberra, 13 November 2014, pp. 25, 27.

20 Assistant Commissioner Gaughan, *Committee Hansard*, Canberra, 13 November 2014, p. 30.

21 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 2; Independent National Security Legislation Monitor, *Declassified Annual Report*, 20 December 2012, pp. 4, 44.

for the issuing court to 'be satisfied that imposing each of the obligations, prohibitions and restrictions is the least restrictive way of achieving the purpose for which the control order is sought'.<sup>22</sup> At the public hearing, the Commission also called for the implementation of COAG's recommendation to introduce a nationwide network of 'special advocates' to participate in control order proceedings:

... which would mean that you would have a trained lawyer able to articulate the concerns and maybe to work with the court when it makes a control order to ensure that each of the elements of that control order is appropriate, given the suspicions or concerns that the intelligence agency might have.<sup>23</sup>

- 2.21 In response to a question at the hearing about whether the findings of the COAG and INSLM reviews of controls orders were still relevant to the current operating environment, Professor George Williams expressed concern about the 'piecemeal' approach being taken to modifying the control order regime and called for a new 'proper' review of the legislation:

I note here the fact that we are coming back again to control orders so soon after the prior amendments illustrates problems with the way these laws are being made in that we are not having the more considered response to those [past] reviews that we ought to be having.<sup>24</sup>

- 2.22 The Law Council of Australia expressed concern that the proposed new ground for a control order to be sought to 'substantially assist in preventing the provision of support for or the facilitation of a terrorist act' was 'too low a threshold' to justify the 'substantial deprivation of liberty' enabled under control orders. It argued the Explanatory Memorandum to the Bill did not explain why individuals engaged in support and facilitation of terrorist acts and hostile activity activities 'should not be simply arrested, charged and prosecuted'.<sup>25</sup>

- 2.23 At the public hearing, the AFP informed the Committee that while the 'primary intent' of law enforcement agencies was to arrest and prosecute persons involved in 'foreign fighter activity', that preferred option was not always available. The AFP discussed the example of the recent 'Operation
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22 Australian Human Rights Commission, *Submission 14*, pp. 5, 6; Council of Australian Governments Review of Counter-Terrorism Legislation, May 2013, p. 59.

23 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 13 November 2014, p. 12.

24 Professor George Williams, *Committee Hansard*, Canberra, 13 November 2014, p. 20.

25 Law Council of Australia, *Submission 16*, p. 8.

Appleby' raids, in which agencies decided to intervene to disrupt planned terrorist activity 'primarily based on public safety issues', but that intervention was 'at the cost of evidence collection'.<sup>26</sup>

- 2.24 The Attorney-General's Department added that, due the speed in which threats were developing in the current environment, law enforcement agencies often no longer had time to wait until a standard of evidence sufficient for prosecution could be gathered before intervening in a situation:

The speed with which people are moving from an intention to developing capability is quite startling and it is not something we have seen before ... In the past, there was some difficulty in developing capabilities while making skills. What we are seeing now is that people are able to use things they already have in their home. They can move from intention to capability within days or weeks. The luxury of allowing a situation to unfold for the purposes of gathering evidence, with an eye to prosecution, may not exist anymore. I think we saw that with the Operation Appleby situation, effectively, where the AFP and state police were forced move to disrupt an activity rather than, ideally, letting enough time run so that they could collect enough evidence to prosecute.<sup>27</sup>

- 2.25 The AFP further explained that the 'balance of probabilities' test in the control order regime was an easier threshold to meet than the 'beyond reasonable doubt' threshold for criminal prosecution, highlighting the challenge law enforcement agencies currently face in trying to take action against 'facilitation groups':

I would say there is a handful of facilitation groups operating up and down the coast that, at the moment, are just far away enough from law enforcement that we cannot arrest them. If we had sufficient evidence we would arrest them ... when we have the evidence we will definitely go down the path of prosecution. Unfortunately, we are just not quite there. But I think there is an expectation that we actually do something about it.<sup>28</sup>

- 2.26 On further questioning, the AFP advised the Committee that there had been around five occasions in the last 20 months in which it had

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26 Assistant Commissioner Gaughan, *Committee Hansard*, Canberra, 13 November 2014, p. 25.

27 Ms Jamie Lowe, First Assistant Secretary, National Security Law and Policy Division, Attorney-General's Department, *Committee Hansard*, Canberra, 13 November 2014, pp. 28-29.

28 Assistant Commissioner Gaughan, *Committee Hansard*, Canberra, 13 November 2014, p. 26.

contemplated using a control order and not proceeded with it. On at least three of those occasions, the application could have proceeded if the additional grounds proposed in the Bill had been in place.<sup>29</sup>

- 2.27 Several participants argued that the proposed new grounds for the issue of control orders were too vaguely defined, raising concerns that the orders could be used to constrain free speech or be applied against innocent third parties.<sup>30</sup>
- 2.28 In a joint submission, the NSW Council for Civil Liberties and the Muslim Legal Network (NSW) argued that the broadening of the AFP's grounds to apply for a control order would 'reinforce the concept that the AFP are not reasonable, responsible or accountable' and would 'further damage the relationship between communities and law enforcement agencies'.<sup>31</sup>
- 2.29 The Gilbert + Tobin Centre for Public Law suggested that, if the proposed new grounds for seeking and issuing control orders were to be enacted, they should 'be linked directly to existing criminal offences, such as funding or supporting terrorist organisations'.<sup>32</sup> At the public hearing, Professor George Williams explained that the absence of a clear link to 'actual offences' meant that control orders 'might be imposed in a much broader range of circumstances than the criminal law would otherwise prescribe'.<sup>33</sup>
- 2.30 The Law Council of Australia similarly questioned whether there was 'sufficient legal certainty' in the scope of activities capable of being captured under the proposed new grounds, and recommended the Bill or Explanatory Memorandum be amended to clarify what activities would be captured by the terms 'supports' and 'facilitates'.<sup>34</sup> The Council also recommended that, if an expansion of the regime was to be progressed, the first of the proposed new grounds for a control order to be issued should be amended to require that 'the person has provided support for or otherwise facilitated a terrorist act'.<sup>35</sup>

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29 Assistant Commissioner Gaughan, *Committee Hansard*, Canberra, 13 November 2014, p. 33.

30 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 3; Amnesty International, *Submission 2*, p. [2]; NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7*, p. 6; Senator David Leyonhjelm, *Submission 15*, p. [2]; Law Council of Australia, *Submission 16*, pp. 11-12.

31 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7*, p. 6.

32 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 4.

33 Professor Williams, *Committee Hansard*, Canberra, 13 November 2014, p. 21.

34 Law Council of Australia, *Submission 16*, pp. 11-12.

35 Law Council of Australia, *Submission 16*, p. 12.

## **Amendments to the control order process**

2.31 As outlined above, in addition to expanding the objects of the control order regime and the grounds upon which control orders can be sought and obtained, the Bill proposes to make a number of changes to the process by which control orders are applied for, issued, confirmed and varied. Elements of these changes that attracted significant comments from participants in the inquiry are discussed below.

### **Information provided to Attorney-General before consent**

2.32 Some inquiry participants raised concerns about the Bill's proposal to reduce the amount of information provided to the Attorney-General in considering whether to give his or her consent to a request for an interim control order. If passed, the Bill would remove the existing requirement for a senior AFP member to provide the Attorney-General with the full draft of the request that would subsequently be provided to the issuing court, which includes

- a statement of the facts relating to why the order should be made,
- if the member is aware of any facts relating to why the order should not be made – a statement of those facts,
- an explanation as to why each of the obligations, prohibitions and restrictions should be imposed on the person,
- if the member is aware of any facts relating to why any of those obligations, prohibitions or restrictions should not be imposed on the person – a statement of those facts,
- the outcomes and particulars of all previous requests for interim control orders (including the outcomes of the hearings to confirm the orders) in relation to the person,
- the outcomes and particulars of all previous applications for variations of control orders made in relation to the person,
- the outcomes of all previous applications for revocations of control orders made in relation to the person,
- the outcomes and particulars of all previous applications for preventative detention orders in relation to the person, and

- information (if any) that the member has about any periods for which the person has been detained under an order made under a corresponding State preventative detention law.<sup>36</sup>
- 2.33 The existing requirement to provide the Attorney-General with a draft of the interim control order; any information about the person's age; and a summary of the grounds on which the order should be made would continue to apply.<sup>37</sup>
- 2.34 Dr Greg Carne submitted that the proposed amendments, by reducing the amount of information provided to the Attorney-General, would weaken the control order regime's internal accountability measures. Dr Carne suggested the amendments could result in particularly sensitive information never being provided to the issuing court.<sup>38</sup>
- 2.35 Mr Bruce Baer Arnold suggested that while the proposal may be 'bureaucratically convenient', its rationale was 'unclear' and it would 'remove a check that was accepted by previous Parliaments'.<sup>39</sup>
- 2.36 The NSW Council for Civil Liberties and the Muslim Legal Network (NSW) submitted that the proposed amendment could 'give rise to an AFP member essentially "cherry-picking" the information put to the Attorney-General, greatly impacting on the Attorney General's ability to make an informed decision'.<sup>40</sup>
- 2.37 The Law Council of Australia similarly submitted that that the proposal would make the Attorney-General's supervisory role less effective, as his or her decision would be based on a 'reduced pool of evidence'. The Law Council recommended that
- ... the AFP should also be required to provide to the Attorney-General a summary of the evidence (if any) that may suggest that a control order should *not* be made.<sup>41</sup>
- 2.38 In its submission to the inquiry, the AFP indicated that the procedural requirements for the initial seeking of consent for a control order would be 'streamlined' by the proposed amendments 'without diminishing the level of accountability under the control order regime':

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36 *Criminal Code Act 1995*, subsection 104.2(3).

37 CTLA Bill, Schedule 1, items 8 and 9.

38 Associate Professor Greg Carne, University of New England, *Submission 4*, pp. 3-5.

39 Mr Bruce Baer Arnold, *Submission 9*, p. 5.

40 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7*, p. 7.

41 Law Council of Australia, *Submission 16*, p. 13.

Currently, the legislation practically requires the AFP to have its entire case ready – akin to a sizeable brief of evidence – before the AFP can apply to the court for an interim order. It also requires the Attorney-General to consider all of the information that would be provided to the court, despite the fact that the Attorney-General is only required to consent to an application being made. The time taken to consider this information (which may run to more than 100 pages) delays the ability to lodge an application with the court, consequently delaying the commencement of the control order conditions.<sup>42</sup>

- 2.39 The Attorney-General's Department stated in its submission that the current requirements were 'unnecessarily onerous' and did not 'recognise the different roles of the Attorney-General and the issuing court'. The Department argued that the Attorney-General's decision on whether to consent to a control order application had 'some analogies to seeking the Attorney-General's consent to prosecute a person for a serious criminal offence', for which a full brief of evidence was not required.<sup>43</sup>

### **Deadline for obtaining Attorney-General's consent**

- 2.40 The Criminal Code currently allows for an interim control order to be requested from an issuing court by electronic means or in person if a senior AFP member considers it necessary because of urgent circumstances. The Attorney-General's consent is not required to be given prior to such requests being made, however, if his or her consent is not obtained within four hours of the request the order ceases to be in force.<sup>44</sup>
- 2.41 The Bill proposes to increase the amount of time available for the AFP to obtain the Attorney-General's consent from four hours to 12 hours. The Bill's Explanatory Memorandum states that this proposal
- ... reflects the fact that it may not always be practical or even possible to seek the Attorney-General's consent within 4 hours of making a request for an urgent interim control order. For example, the Attorney-General may be in transit between the east and west coasts of Australia and unable to be contacted for a period of more than 4 hours.<sup>45</sup>

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42 Australian Federal Police, *Submission 8*, p. 4.

43 Attorney-General's Department, *Submission 5*, p. 6.

44 *Criminal Code Act 1995*, section 104.10.

45 CTLA Bill, *Explanatory Memorandum*, p. 24.

- 2.42 Some inquiry participants registered concerns that the proposed increase in time to 12 hours was not adequately justified.<sup>46</sup>
- 2.43 The Law Council of Australia, while accepting that four hours may not be sufficient, emphasised the importance of the Attorney-General considering the order in a timely manner and recommended the time limit in the Bill be 'reconsidered to a shorter period, such as an additional two hours'.<sup>47</sup>
- 2.44 The Australian Human Rights Commission similarly agreed that some extension to the period for obtaining the Attorney-General's consent was 'reasonable', but recommended that the period be limited to eight hours.<sup>48</sup>

### **Consideration of obligations, prohibitions and restrictions**

- 2.45 The Bill proposes to replace the existing requirement for a senior AFP member, when requesting, confirming or varying a control order, to provide an explanation as to why 'each' of the proposed conditions should be imposed with a requirement to provide an explanation of why 'the control order' should be made or varied. The Bill also proposes to replace the existing requirement for the issuing court to be satisfied that, on the balance of probabilities, 'each' condition is 'reasonably necessary, and reasonably appropriate and adapted' with a requirement to consider 'the control order' as a whole against the same test.<sup>49</sup>

- 2.46 In its submission to the inquiry, the Attorney-General's Department explained that

... in practice, the justification for one requested obligation, prohibition or restriction is likely to be substantially similar – if not identical – to the justification for one or more of the other requested obligations, prohibitions and restrictions.

and that, in a situation where three controls were being sought all with the same justification

... it would be more practical and judicious to require the AFP to provide one set of facts in support of all three requested controls, and for the issuing court to consider them together.<sup>50</sup>

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46 Associate Professor Greg Carne, University of New England, *Submission 4*, p. 5; NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7*, pp. 9–10.

47 Law Council of Australia, *Submission 16*, p. 15.

48 Australian Human Rights Commission, *Submission 14*, p. 6.

49 CTLA Bill, Schedule 1, items 9, 12, 13, 26, 27, 28, and 29.

50 Attorney-General's Department, *Submission 5*, p. 7.

- 2.47 Dr A J Wood supported the proposed changes in his submission, indicating that the approach of considering the control order application as a whole appeared 'sensible and more practical' than individually considering each obligation, prohibition and restriction.<sup>51</sup>
- 2.48 Dr Greg Carne, however, suggested the move to consideration of control orders as a whole amounted to a 'subtle change' in the way the issuing court assesses their proportionality, and the test in the Bill would operate 'subtly more executive orientated manner'. Dr Carne submitted that this change, combined with other changes proposed in the Bill, would 'arguably place the revised control order regime in the Bill on less solid constitutional ground than the original legislation'.<sup>52</sup>
- 2.49 The NSW Council for Civil Liberties and the Muslim Legal Network (NSW) similarly questioned the constitutional validity of the proposed control order amendments. They suggested the move to explanation and consideration of control orders as a whole would 'substantially lower the burden on the AFP and will adversely impact upon the individual's civil liberties and human rights', and that it would result in the court's power to vary or revoke control orders being 'substantially limited'.<sup>53</sup>
- 2.50 The Australian Human Rights Commission also opposed the proposed changes to the way control orders were considered, referring to the amendments as a 'less targeted proportionality analysis'. The Commission submitted that, 'given the extreme nature of control orders', there was 'value in considering the impact of each of the obligations, prohibitions and restrictions individually rather than as a whole'.<sup>54</sup> At the public hearing, however, the Commission acknowledged that 'as a matter of practice', the issuing court was still likely to consider challenges to the particular components of a requested control order.<sup>55</sup>
- 2.51 Professor George Williams similarly acknowledged at the hearing that a court would not be obliged to accept a control order that included inappropriate conditions due to the absence of a requirement to consider each condition individually. He argued, however, that the proposed wording 'removes a rigorous standard of justification that otherwise is required', and suggested the court should be required to be satisfied that,

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51 Dr A J Wood, Australian National University, *Submission 11*, p. [3].

52 Dr Carne, *Submission 4*, pp. 4-5.

53 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7*, pp. 7, 9, 11.

54 Australian Human Rights Commission, *Submission 14*, p. 6.

55 Professor Triggs, *Committee Hansard*, Canberra, 13 November 2014, pp. 12-13.

on the balance of probabilities, each element of the order was reasonably necessary:

That would remove doubt about it. It would also mean that not only limits on communication but limits on personal liberty – in fact, each aspect – are looked at and each aspect must be justified as being necessary.<sup>56</sup>

2.52 The Law Council of Australia pointed out that, apart from reducing the burden on the AFP member requesting the control order, there was no indication in the Explanatory Memorandum as to why the amendments were thought to be necessary or appropriate. The Council submitted that

... the risk with removing the requirement that each item be fully considered is that some restrictions imposed by the control order will not be carefully assessed. As a result, the order may be granted containing inappropriate or unnecessary restrictions on a person's liberty.<sup>57</sup>

2.53 In its submission, the AFP expanded on the rationale for the proposed change to consideration of the control order as an 'integrated whole':

By considering the conditions and obligations as a whole – which supports the integrated approach the AFP takes to considering the application of such conditions and obligations, the issuing court is in a better position to assess the overall effect of the conditions / obligations on the individual, the level of imposition the conditions / obligations have on the individual, thus ensuring the rights of the individual are properly balanced with the requirements for law enforcement to prevent and ameliorate the risk of terrorist act(s).<sup>58</sup>

2.54 At the public hearing, the AFP indicated that, further to the improved efficiency of reducing duplication in control order documentation, changing the requirement to consider the order as a whole would be a 'more digestible way of approaching the problem'. It contended that the changes would not result in any reduced level of scrutiny, as the issuing court would still need to be 'satisfied on the balance of probabilities that the order is reasonably appropriate and adapted'.<sup>59</sup>

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56 Professor Williams, *Committee Hansard*, Canberra, 13 November 2014, pp. 20, 22.

57 Law Council of Australia, *Submission 16*, p. 14.

58 Australian Federal Police, *Submission 8*, p. 5.

59 Mr Tony Alderman, Coordinator Legislation Program, Australian Federal Police, *Committee Hansard*, Canberra, 13 November 2014, pp. 29, 36.

- 2.55 The AFP and Attorney-General's Department also pointed out that, even though the control order would be considered at an integrated level, the court would have the specific power to excise particular elements if it was not satisfied they were necessary and appropriate.<sup>60</sup>

## Committee comment

- 2.56 The Committee welcomes the implementation of its previous recommendation that it have the opportunity to review changes to the name or alias of terrorist organisations listed under the Criminal Code. This measure will ensure that the Committee is able to maintain its existing oversight of the listing process and conduct further inquiries as necessary.
- 2.57 The Committee also welcomes the opportunity to inquire into the proposed amendments to the control order regime, in line with a recommendation in its previous report. While noting concerns raised by some participants about the short timeframe for the inquiry, the Committee appreciates that introducing these provisions to the Parliament in a separate Bill, rather than as amendments to the (recently enacted) Foreign Fighters Bill, has provided an opportunity for scrutiny by the Committee.
- 2.58 During its inquiry, the Committee received compelling evidence from the AFP that, even with the passage of the Foreign Fighters Bill, there remain significant gaps in the ability of law enforcement agencies to deal with the current threat posed by Australians seeking to provide support to terrorist organisations, or engage in conflict on behalf of such organisations overseas.
- 2.59 The Committee recognises that the proposed extension of the control order regime would enable law enforcement agencies to take action in situations where they do not yet have sufficient evidence 'beyond reasonable doubt' to proceed with a prosecution, but nonetheless are satisfied 'on the balance of probabilities' that intervention is needed to prevent a person from providing support to or facilitating terrorism, either in Australia or abroad. The Committee notes the AFP's evidence that such early intervention may come at the expense of evidence collection, and that arrest, charge and prosecution remains its preferred approach.

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60 Mr Alderman, *Committee Hansard*, Canberra, 13 November 2014, p. 29; Ms Lowe, Attorney-General's Department, *Committee Hansard*, Canberra, 13 November 2014, p. 36.

- 2.60 The Committee strongly agrees that arrest, charge and prosecution under criminal offences is always preferable. However, the Committee also accepts that there are increasingly situations in which security interests require action to be taken by police at a time before the standard of evidence required for criminal prosecution can be obtained. In the current environment, these situations require not only the capacity to directly prevent terrorist acts, but also to prevent persons from providing support for or facilitating terrorist acts.
- 2.61 Nonetheless, the Committee recognises that the proposed broadening of the grounds for control orders to be sought and obtained is a substantial expansion of the current regime. The amendments proposed in the Bill would expand the purpose for which a control order can be applied. The Committee's evidence indicated that, while community protection has been the purpose of the control order regime in the past, under the amended regime control orders can be used as a prevention and disruption tool.<sup>61</sup>
- 2.62 The Explanatory Memorandum notes that only two control orders have been issued under the existing control order regime since it was introduced in 2005.<sup>62</sup> Evidence provided to the Committee suggests that, under the proposed amendments and current heightened security threat, control orders will be sought more often than they have been in the past.
- 2.63 Given this, the Committee believes it is vitally important that adequate safeguards are in place to ensure control orders do not deprive persons of their liberties to any extent beyond what is necessary. Some members of the Committee had concerns about the control order regime, including that control orders could be re-issued after 12 months without reasonable attempts being made to obtain a prosecution.
- 2.64 The Committee is conscious that the Bill's proposal to expand the control order regime takes place in a context in which the majority of the 2013 COAG Review of Counter-Terrorism Legislation's recommendations to strengthen safeguards in the *existing* control order regime have not yet been implemented.
- 2.65 The Committee strongly believes that, in the absence of proof beyond reasonable doubt, control orders should impose the minimum interference on a person's rights and liberties that is necessary to achieve the regime's objectives. The Committee notes the existing requirement to this effect (as amended in the Bill) that an issuing court must be 'satisfied on the balance

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61 Australian Federal Police, *Submission 5*, p. 2; Assistant Commissioner Neil Gaughan, *Committee Hansard*, Canberra, 13 November 2014, p. 30.

62 CTLA Bill, *Explanatory Memorandum*, p. 7.

of probabilities' that the proposed control order is *reasonably necessary, and reasonably appropriate and adapted* for meeting the regime's objectives, and that in making this determination the court must take into account *the impact of the order on the person's circumstances (including the person's financial and personal circumstances)*.<sup>63</sup>

- 2.66 However, the COAG review observed that the inability of persons who are the subject of a control order application to access restricted information about their case could 'result in a fair trial not being afforded to the person sought to be controlled'. The review recommended that a nationwide system of 'Special Advocates' – who would be able to access classified information and act on behalf of individuals – should be considered for introduction. The review further recommended that a 'minimum standard of disclosure of information' be introduced for individuals over whom control orders are being sought.<sup>64</sup>
- 2.67 Some members of the Committee were of the view that the introduction of a system of 'Special Advocates' should be considered.
- 2.68 The Committee considers that the extended delay in appointing an Independent National Security Legislation Monitor (INSLM) leaves a gap in accountability and oversight of the control order regime, and recommends that this appointment should be finalised as a matter of absolute urgency.
- 2.69 The Committee considers that the INSLM should be tasked with undertaking a review of the COAG proposals and advising of any of the recommendations relating to control orders that should be implemented. In undertaking this review, the INSLM should take into account the significant changes to the security environment and the control order regime that have taken place since the COAG review was completed. The changing nature of the security threat was highlighted in an Australia-New Zealand Counter-Terrorism Committee 'Context Statement' provided to the Committee on a confidential basis.<sup>65</sup>

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63 CTLA Bill, proposed paragraph 104.4(1)(d) and subsection 104.4(2).

64 Council of Australian Governments Review of Counter-Terrorism Legislation, May 2013, p. 59.

65 *Exhibit 1*.

## **Recommendation 1**

**The Committee recommends that the Government finalise the appointment of the Independent National Security Legislation Monitor (INSLM) as a matter of absolute urgency.**

**Further, the Committee recommends that, in light of the proposed expansion of the control order regime, the Government task the newly appointed INSLM to consider whether the additional safeguards recommended in the 2013 Council of Australian Governments Review of Counter-Terrorism Legislation should be introduced. Particular consideration should be given to the advisability of introducing a system of 'Special Advocates' into the regime.**

- 2.70 The Committee notes concerns raised by participants about the lack of clarity in the definition of the proposed new grounds for issuing a control order: 'preventing the provision of support for or the facilitation of a terrorist act' and 'preventing the provision of support for or the facilitation of engagement in a hostile activity in a foreign country'. The Committee accepts that further clarity of the key terms in these grounds would assist the public and judiciary, and agrees that, where possible, the grounds should be based on existing criminal offences.

## **Recommendation 2**

**The Committee recommends that, to the extent possible, the terms 'supports' and 'facilitates' in the proposed amendments to the control order regime be based on language in the existing Criminal Code and that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 and its Explanatory Memorandum be amended to reflect this.**

- 2.71 In relation to proposed amendments to the process underpinning the control order regime, the Committee accepts that there is likely to be room for improvement given the limited use the powers have had since their introduction in 2005. The Committee also accepts that, provided safeguards are not materially weakened, streamlining certain parts of the process in order to reduce administrative burdens is a legitimate goal, particularly given the time constraints under which control order applications may need to be lodged.
- 2.72 The Attorney-General's role in the control order process is to give consent, where appropriate, for the AFP to request an interim order from the

issuing court. It remains the role of the issuing court to determine, based on all the information available, whether the control order should be issued. To assist the Attorney-General with his or her decision on whether or not to give consent, it is appropriate that he or she be made aware of the key facts relating to the person on whom the order is being sought. However, the Committee does not agree with the view of some inquiry participants that this means the Attorney-General must be provided with all documents that will subsequently be provided to the issuing court, as is currently required, which may run into hundreds of pages.

- 2.73 The Bill proposes to only require a draft of the interim control order, any available information on the person's age, and a summary of the grounds on which the order is being sought to be provided to the Attorney-General. The Committee considers that, as suggested by the Law Council of Australia, it would be helpful if the Attorney-General was also provided with a summary of any facts relating to why the control order should *not* be made.

### Recommendation 3

**The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to require that, when seeking the Attorney-General's consent to request an interim control order, the Australian Federal Police must provide the Attorney-General with a statement of facts relating to why the order should be made, and any known facts as to why it should not be made.**

- 2.74 The Bill also proposes to increase the amount of amount of time available for the AFP to obtain the Attorney-General's consent from four hours to 12 hours after an urgent request for a control order has been made. The Committee considers that, while it is conceivable that the Attorney-General (or acting Attorney-General) may be unable to provide consent within four hours due to domestic air travel commitments, it is very unlikely that he or she will be non-contactable for more than eight hours. The Committee therefore suggests that, to ensure the integrity of the Minister's important role in the process is not diminished, the proposed time limit in the Bill be reduced to eight hours.

**Recommendation 4**

**The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to require that the Attorney-General's consent to an urgent interim control order be obtained within eight hours of a request being made by a senior member of the Australian Federal Police.**

- 2.75 The Committee noted the argument presented by some inquiry participants that requiring a request for a control order, and court consideration of that request, to address the order as a whole, rather than each of its elements individually, would amount to a substantial weakening of the issuing court's ability to properly scrutinise the order. The Committee considers there would be benefits in the conditions proposed for a control order being considered in an integrated, holistic manner, rather than individually.
- 2.76 The Committee notes evidence that the court would, in practice, retain its ability to scrutinise the individual elements of an order. This ability is confirmed in the Bill's provisions allowing the court to excise any condition which it did not consider to be 'reasonably necessary, and reasonably appropriate and adapted'.<sup>66</sup> The Committee is of the view that this aspect of the court's authority should be more clearly stated in the Explanatory Memorandum.

**Recommendation 5**

**The Committee recommends that proposed section 104.4 in the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to ensure that an issuing court retains the authority to examine the individual obligations, prohibitions and restrictions in a draft control order to determine whether each condition is reasonably necessary, and reasonably appropriate and adapted.**

- 2.77 The Committee did not find the arguments compelling, however, for the AFP not to be required to provide detail to the issuing court on why each of the obligations, prohibitions and restrictions in a draft control order is necessary and proportionate. While accepting that the current requirements may lead to some duplication in the documentation, it would not appear to be an onerous administrative burden for the AFP to

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66 CTLA Bill, proposed subsection 104.1(3) and paragraph 104.4(1)(d).

copy the same explanation from one condition to another where the explanation is the same. Retaining the current requirements would support better due diligence on the part of the AFP and may assist the court in its deliberations. The Committee therefore recommends that the elements of the Bill proposing to amend these requirements be removed.

### **Recommendation 6**

**The Committee recommends that proposed paragraphs 104.3(d) and 104.23(2)(b) in the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to retain the current requirement that the Australian Federal Police explain why each of the obligations, prohibitions and restrictions proposed in a draft control order should, or should not, be imposed on the person.**

- 2.78 The Committee considers control orders, particularly in their proposed expanded form, to be extraordinary powers that will be required only for so long as a heightened threat from terrorism to the community remains. The Committee was satisfied, based on both the public and private evidence it received, that these powers are needed at the present time. However, the Committee believes that the ongoing need for these powers to exist should remain subject to regular scrutiny.
- 2.79 The Committee was therefore pleased that the Government implemented its previous recommendation to ensure the control order powers – including the amendments proposed in the Bill – will ‘sunset’ in September 2018 and be subject to prior reviews of the regime by the INSLM and this Committee. The Committee anticipates that the ongoing need for the expanded control order regime provided for in this Bill, as well as the processes underpinning it, will be subject to close scrutiny in those reviews.

