

Committee report on Counter-Terrorism Bill welcome, however concerns remain

The Parliamentary Joint Committee on Intelligence and Security's (PJCIS) report on the Counter-Terrorism Bill 2015 is a welcome step, but concerns remain and should be carefully addressed by Parliament, according to the Law Council of Australia.

The changes proposed by the Bill are significant and, if enacted, would include: permitting control orders for children as young as 14; establishing a strict monitoring compliance with control order regime; preventing an affected individual from accessing evidence used against them in control order proceedings; and lowering the threshold for the issuance of preventative detention orders (PDOs).

The Law Council noted that the PJCIS report proposes important amendments to the Bill, which accord or partly accord with recommendations of organisations such as the Law Council of Australia. These include:

- clarifying that the best interests of the young person are to be a 'primary' consideration in determining the terms of the control order;
- clarifying that the parents or guardian of a child are also to be notified of control order applications or variations;
- expressly providing that a young person has the right to legal representation in control order proceedings;
- introducing a system of special advocates to represent control order subjects who do not have access to information withheld from them;
- requiring a minimum standard of information to be disclosed to a control order subject to allow effective instructions to be given in relation to allegations;
- requiring issuing officers for monitoring powers to have regard to whether the measures constitute the least interference with the liberty or privacy of any person that is necessary in all the circumstances;
- an additional 'reckless' threshold for the offence of advocating genocide and to remove the requirement of 'public' advocacy; and
- enhanced reporting requirements.

However, Law Council of Australia President-elect Fiona McLeod SC said issues remained with the legislation.

"The proposed monitoring control order regime would involve significant intrusions into the privacy of individuals, potentially unrelated to the subject of a control order. For example, it may impact on monitoring computers in educational institutions where the privacy of many students may be affected," Ms McLeod said.

"Before a proposed monitoring warrant is issued there must — as a minimum — be a reasonable suspicion that a control order is not being complied with, or that the individual who is the subject of a control order is engaged in terrorist-related activity.

Ms McLeod also highlighted the proposed system of ‘special advocates’ under which a panel of security-cleared barristers and solicitors could act on the subject’s behalf in closed material proceedings.

“The Law Council remains concerned that a subject of a control order may not have access to information used against them in a control order proceeding,” she said.

“The proposed system of special advocates, requires careful consideration by the Parliament to ensure that this concern is mitigated as much as possible.

“It must include a minimum set of standards that addresses difficulties encountered with such schemes in other comparable overseas jurisdictions. For example, practical support must be available and adequate funding should be provided without burdening existing legal aid funding.

“The appointment of the special advocate should be a last resort, where the trial judge is satisfied that no other alternative will adequately meet the interests of fairness to the affected individual. Special advocates must also be appointed under a process that is subject to the full and free discretion of the court.”

Ms McLeod raised concerns about a PJCIS recommendation that the amended test for the issuing of a preventative detention order (PDO) no longer require that there be an ‘imminent’ terrorist act, which is capable of being carried out within a 14-day period.

“PDOs are a form of imprisonment without charge, trial or conviction, which has always been justified on the basis of an imminent threat to public safety,” she said.

“If the PDO regime is to be retained, it should continue to require the imminence threshold and the terrorist act should be one that is likely to occur, within the next 14 days. Otherwise, a person may be detained without charge on the basis of a mere theoretical possibility that a terrorist act could occur.”

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