THE LAW SOCIETY
OF NEW SOUTH WALES

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6 March 2019

Mr Jonathan Smithers
Chief Executive Officer
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By email: christopher.brown@lawcouncil.asn.au

Dear Mr Smithers,

Counter-Terrorism (Temporary Exclusion Orders) Bill 2019

Thank you for the opportunity to contribute to a Law Council submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the *Counter-Terrorism (Temporary Exclusion Orders) Bill 2019* ("the Bill).

The views of the Law Society have been informed by our Human Rights Committee and Public Law Committee.

The Law Society opposes the passage of the Bill for the reasons set out below. We have significant rule of law and human rights concerns in respect of the proposed scheme.

1. The intention of the Bill

The Bill seeks to create a new scheme for allowing the Minister to make a Temporary Exclusion Order ("TEO") and a Return Permit. The scheme would apply to Australians aged 14 and over returning from overseas in respect of whom the Minister has "reasonable grounds" to suspect that they may engage in terrorism related activity, as defined at s 10(2) of the Bill, upon their return to Australia.

The TEO can be made for a period of up to two years. As soon as practicable after a TEO is made, the Minister must "cause such steps to be taken as are, in the opinion of the Minister, reasonable and practicable, to bring to the attention of the person the content of the order". The penalty for entering Australia if a TEO is in force is two years' imprisonment.

If the person is being deported to Australia or makes an application in a specified format, the Minister must give the person a Return Permit that allows them to enter Australia. The Minister has discretion to attach a number of "pre-entry" and "post-entry" conditions to a Return Permit, including that the person must not return to Australian within 12 months of the Return Permit being issued, that they must return on a specified day, and that – once they are back in Australia – the person must provide updates as to their place of residence, employment, and intention to use certain telecommunications technology.

2. Relevant treaty provisions

Article 12(4) of the International Covenant on Civil and Political Rights ("ICCPR"), which Australia has ratified, stipulates that "[n]o one shall be arbitrarily deprived of the right to enter his own country". In its General Comment 27 of 1999, the UN Human Rights Committee ("UN HR Committee") provided guidance as to the interpretation of Article 12(4), stating that "[t]he right of a person to enter his or her own country recognizes the special relationship of a person to that country." [1] The UN HR Committee went on to state that:

> The reference to the concept of arbitrariness in this context [in the ICCPR] is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.

Article 3(1) of the UN Convention on the Rights of the Child ("UN CRC"), which Australia has also ratified, provides that:

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

By providing that the best interests of the child are "a primary consideration" rather than "the" primary or the paramount consideration, Article 3(1) of the UN CRC allows decision-makers to balance the best interests of the child against other considerations.[2] In its General Comment 13 of 2013, the UN Committee on the Rights of the Child considered Article 3(1) of the UN CRC, and advised that:

> If harmonization [between the rights of other persons and the child's best interests] is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations.[3]

The High Court of Australia considered the implications of Article 3(1) of the UN CRC in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh [1995] HCA 2* ("*Ah Hin Teoh*") in the context of a father's deportation, and the impacts on his children. Mason CJ and Deane J stated at 39 that:

> A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it.[4]

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[1] UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)* (2 November 1999), CCPR/C/21/Rev.1/Add.9.

[2] Australian Human Rights Commission, "Human Rights Brief 1: The Best Interests of the Child" (March 1999). Available at: https://www.humanrights.gov.au/publications/human-rights-brief-no-1

[3] UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (29 May 2013), CRC /C/GC/14, 39.

[4] *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20, 39.

3. The Law Society's concerns with the Bill

3.1. Potential incompatibility with Article 12(4) of the ICCPR

As outlined above, Article 12(4) of the ICCPR provides that no one shall be "arbitrarily" deprived of the right to enter his or her own country, and the UN HR Committee considers there are "few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable". The Statement of Compatibility with Human Rights accompanying the Bill states that the limitation it places on an individual's right to enter Australia is not arbitrary for the following reasons.

> The preconditions for issuing a TEO and return permit are provided for by law and is predictable, and is justified by being reasonable, necessary and proportionate. Further, the Minister cannot make a TEO unless they suspect on reasonable grounds that making the order would substantially assist in one of the purposes listed in s 330.3(2)(a) or that the person has been assessed by ASIO to be direct or indirect risk to security for reasons related to politically motivate violence. Importantly, the Minister must issue a return permit upon application, which facilitates that Australian's controlled return within 12 months.

Notwithstanding this defence of the Bill's compatibility with Article 12(4) of the ICCPR, we are concerned at the breadth of the grounds under which the Minister can make a TEO, preventing a citizen from returning for up to two years, without being required to determine whether that individual has citizenship or residency status, or is eligible for citizenship or residency status, in a different country.

Clause 10(2) of the Bill requires that the Minister "suspect on reasonable grounds" that the TEO would assist in preventing a terrorist act, prevent training from being provided to a terrorist organisation, prevent the provision of support for a terrorist act, or prevent the provision of support to an organisation that would help it engage in a terrorist act. The broad scope of this section, coupled with the speculative nature of the grounds for applying a TEO, and the lack of any right to merits review, raise the possibility that the operation of the Bill could amount to arbitrary deprivation of the right to enter one's country of citizenship. We note that the provisions of this Bill can apply to people who have never been convicted of an offence.

We note that the Explanatory Memorandum (at [30]) sets out that clauses 10(2)(a) and (b) are mutually exclusive, and that cl 10(2)(a) enables the Minister to take preventative steps in the absence of an ASIO assessment. The Bill however is silent on what happens if ASIO subsequently reaches a different conclusion to the Minister in respect of whether the person is a risk to security for reasons related to politically motivated violence.

Clauses 10(5) and 11(5) of the Bill leave open the possibility for the Minister to issue an indefinite series of TEOs against a person, especially as the Minister may revoke Return Permits at any time on their own initiative (cl 13(1)). As there is nothing in the Bill to limit this possibility, this aspect of the Bill is not consistent with the assertion made in paragraph 27 of the Statement of Compatibility with Human Rights that TEOs will not exclude the subject of a TEO from entering Australia permanently.

The Law Society is concerned about cl 10(6) (providing notice of the TEO to the person), given that a person subject to a TEO may be liable for imprisonment for two years if they enter Australia while subject to a TEO (clause 8). Clause 10(6) requires only that the Minister take such steps as are reasonable and practicable, in the Minister's opinion, to bring to the person's attention the content of a TEO, which could include electronic communications (see Explanatory Memorandum at [35]). There is no requirement of

effective notification. Further to this point, cl 13, which deals with the variation or revocation of a Return Permit, sets out in similar terms the Minister's notification obligations (cl 13(2)). A variation or revocation of a Return Permit takes immediate effect when the Minister varies or revokes the permit (cl 13(3)). However, in circumstances where the Minister has revoked a Return Permit and a person is already in transit and notice has not been effective, that person may then be liable for a two-year imprisonment term.

3.2. Rights to freedom of movement, freedom of expression, liberty and security of person, association, work, education and participation in cultural life

In addition to the concerns set out in respect of the TEO scheme, we have significant concerns about the proposed Return Permits scheme, both in respect of executive overreach, and in respect of various human rights.

Clause 12(6) permits the Minister to attach a very broad range of conditions to a Return Permit. For example, cl 12(6)(j) could require that if the person accesses or uses (or intends to use) "specified forms of telecommunication or other technology" in Australia, the person must: (1) notify a specific person or body of the use or access or intended use or access; and/or (2) provide a specified person or body with sufficient information to enable the specific telecommunications service, account or device to be identified. The Explanatory Memorandum at [50] sets out a very broad range of examples of the types of information about telecommunication devices that may be required. This includes phone numbers, international mobile equipment identity numbers, SIM cards, email and all social media accounts, and computers or tablet devices. Presumably this would include the use of any messaging services, online or otherwise, whether those communications are sent or received, solicited or unsolicited.

Given how onerous such conditions might be in respect of individual liberty, we note that cl 12(8) sets out a very low threshold test for the imposition of these conditions – only that the Minister be satisfied that the conditions are reasonably necessary, and reasonably appropriate and adapted. The Minister is not even required to justify each individual condition as reasonably necessary, appropriate and adopted, only the conditions taken together (Explanatory Memorandum at [53]).

Again the Law Society queries whether it is appropriate for the Minister to be able to exercise such a broad discretion, given that non-compliance may result in two year imprisonment. We note also that the individual may also be, at the same time, subject to other counter-terror schemes including Control Orders and Preventative Detention orders.

3.3. Executive overreach and potential for infringement of Chapter III of the Constitution

The Law Society is deeply concerned that the proposed scheme represents significant executive overreach. TEOs may be issued without judicial oversight, onerous conditions may be attached to Return Permits by the Minister alone, and terms of imprisonment are applicable where there is a breach of either, including in respect of children as young as 14 years of age.

In respect of both TEOs and Return Permits, we note that in the case of *Djalic v MIMIA* [2004] FCAFC 151, the Full Court of the Federal Court of Australia affirmed that:

> "It is a fundamental principle of the Australian Constitution, flowing from Chapter III, that the adjudication and punishment of criminal guilt for offences against a law of the

> Commonwealth is exclusively within the province of courts exercising the judicial power of the Commonwealth."[5]

The Full Court went on to state that Commonwealth legislation will collide with Chapter III of the Constitution if "on its true construction, it authorises the Executive to impose punishment for criminal conduct".[6]

3.4. Limitations on due process and procedural fairness

There are features of the Bill which, in our view, interfere with established common law principles and procedural fairness.

Clause 16, which provides that the consequence of providing false or misleading information or documents in response to a condition imposed on a Return Permit is an offence, sets out that the defendant bears the evidential burden of proof that the information or documents provided are not false or misleading in a material particular (cl 16(2)). The penalty for failing to prove that the information or documents are not false or misleading in a material particular is a two-year imprisonment term.

Of greater concern is cl 17 which states that "[t]he Minister is not required to observe any requirements of procedural fairness in exercising a power under this Act." Given that cl 10(7) explicitly states that TEOs are not legislative instruments for the purposes of the *Legislation Act 2003* (Cth) and given the significance of the measures and penalties proposed by the Bill, we submit that if the Bill passes, it should be amended to require the Minister to follow procedural fairness, and should also provide for merits review of decisions taken under the Bill.

While the Explanatory Memorandum states that a person subject to a TEO or Return Permit will have access to judicial review, if procedural fairness safeguards are explicitly removed by the Bill we query the effectiveness of such review in safeguarding the rights of individuals.

Administrative and judicial review become particularly critical accountability mechanisms when parliamentary and legislative accountability mechanisms, such as public scrutiny, repeal, sunsetting and disallowance, are not applicable, as is the case in this instance.

This is of particular concern, especially as it is proposed that this scheme will apply to children as young as 14.

The Statement of Compatibility with Human Rights suggests that the exclusion of procedural fairness is required, lest the policy intention of the Bill be frustrated (at [54]). We suggest that if this is indeed the case, this indicates that the desired policy settings are not compatible with the rule of law.

3.5. Potential impact of the Bill on children

The inclusion of children as young as 14 within the scope of the Bill is of serious concern. We attach for the Law Council's information submissions made by the Law Society in 2016 in respect of the extension of control orders to children as young as 14 by the Counter-Terrorism Amendment Bill (No 1) 2016. We reiterate the concerns made in that submission in respect of the applicable age threshold, and in respect of the best interest of children.

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[5] *Djalic v MIMIA* [2004] FCAFC 151, 58.
[6] Ibid. 73.

This Bill fails even to include additional protections for children who are subject to a TEO. We note that other elements of the counter-terrorism framework in Australia applicable to children under 18, including the provisions of the *Criminal Code Act 1995* (Cth) that provide for preventative detention orders, include special rules and safeguards for children.

As noted above, both the UN HR Committee and the High Court of Australia have affirmed the best interests of the children should be accorded high priority, and are not to be viewed simply as one of many competing priorities. We submit that by explicitly relegating the best interests of the child beneath the protection of the community in section 10(3), the Bill may not be in compliance with Australia's obligations under the ICCPR. Furthermore, we are concerned that by specifying the protection of the community is the "paramount consideration", while the best interests of the child are a "primary consideration", the Bill impinges upon the role of relevant decision-makers, as outlined by Mason CJ and Deane J in *Ah Hin Teoh*, namely to "look to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it."

3.6. Ability to achieve the aims of the Bill under existing legislation

The Explanatory Memorandum accompanying the Bill states that its purpose is "to ensure that if these Australians [who have travelled to joint terrorist organisations overseas] do return, it is with forewarning and carefully managed by authorities." The Explanatory Memorandum does not clearly make the case, however, that powers available under existing counter-terrorism legislation are inadequate for achieving this purpose. For example, Division 104 and 105 of the *Criminal Code Act 1995* (Cth) allow considerable obligations, prohibitions and restrictions to be imposed on a person in the form of a Control Order or Preventative Detention Order to achieve the purpose of protecting the public from a terrorist act or preventing the provision of support for a terrorist act. The Second Reading Speech delivered by the Minister regarding the Bill, while making reference to the "constantly evolving [terrorist] threat" facing Australia, also fails to clearly state how existing legislation is inadequate to achieve the stated aims of the Bill. Further, effective border control mechanisms (such as Customs and Immigration procedures at ports of entry) should also provide effective safeguards in respect of managing the entry and exit of individuals who may represent a risk to security.

Thank you for the opportunity to provide comments on this issue. Questions may be directed to Andrew Small, Policy Lawyer, at (02) 9926 0252 or andrew.small@lawsociety.com.au.

Yours sincerely,

Elizabeth Espinosa
President

Enc.

THE LAW SOCIETY
OF NEW SOUTH WALES

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26 September 2016

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Jonathan.

Dear Mr Smithers,

Counter-Terrorism Legislation Amendment Bill (No 1) 2016

I write to you on behalf of the Law Society of NSW in relation to the Counter-Terrorism Legislation Amendment Bill (No 1) 2016 (Cth) ("2016 Bill").

The Law Society notes that the Parliamentary Joint Committee on Intelligence and Security ("PJCIS") issued an advisory report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) ("2015 Bill") in February 2016.[1] We note that the 2016 Bill purportedly implements all 21 recommendations of the report.[2]

The Law Society has previously provided input to a submission by the Law Council of Australia on the 2015 Bill, which outlined a number of concerns with the proposed reforms. This letter is attached.

We remain concerned about those aspects of the 2015 Bill identified in our earlier letter to the Law Council that have not been addressed by the PJCIS recommendations or the 2016 Bill. We provide the following additional comments on the PJCIS recommendations and the 2016 Bill.

1. General concerns

As a matter of general principle, the Law Society opposes the use of control orders. The Law Society considers that, from a human rights perspective, the use of control orders, including monitoring of control order subjects, is likely to be inconsistent with provisions of the *International Covenant on Civil and Political Rights* ("ICCPR")[3] and the United Nations ("UN") *Convention on the Rights of the Child* ("CRC").[4] These include the rights to liberty;[5] a fair trial;[6] freedom of movement,[7] expression,[8] and association;[9] and privacy.[10]

[1] Parliamentary Joint Committee on Intelligence and Security, Parliament of the Commonwealth of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (2016).
[2] Attorney General Senator the Hon. George Brandis QC, 'Two Bills to Bolster the Fight Against Terrorism' (Media Release, 15 September 2016).
[3] Opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976).
[4] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[5] Article 9, ICCPR; Article 37, CRC.
[6] Article 14, ICCPR; Article 40, CRC.

The Law Society reiterates that control orders, including monitoring of persons subject to control orders, are extraordinary measures, and if they are retained as government policy, they should be used sparingly, especially with children.

2. Age threshold

Schedule 2 of the 2016 Bill lowers the age for the imposition of a control order from 16 years to 14 years.

The Law Society is concerned that the PJCIS report found the proposed lowering of the age for the imposition of a control order to 14 years to be "justified and in principle, a reasonable and necessary measure for protecting the community from harm."[11] We note that the PJCIS also stated that "early intervention and disruption through the judicious use of control orders is a preferable outcome to the involvement of a young person in the formal criminal justice system."[12]

However, the Law Society notes that the imposition of a control order would act as an initial step in the child's potential contact with the criminal justice system, noting the significant penalty for a breach.

The Law Society reiterates that control orders do not require proof of an offence, and their effect may be significantly more onerous than a criminal sentence.

The Law Society remains concerned that children of this age may be unable to understand the ramifications of such an order, considering the complex nature of the issues involved and the fact that their brains are still developing. We note that in recent studies, significant concern has been expressed that children do not understand bail conditions and the consequences of non-compliance.[13] In a 2011 study conducted by Charles Sturt University, the authors stated that "[i]t is probable that the failure to fully understand bail obligations may reflect the youth and immaturity of young people."[14]

The Law Society notes that the *Criminal Code Act 1995* (Cth) ("Criminal Code") provides that an Australian Federal Police ("AFP") member must ensure that the control order subject understands the effect of an interim control order or the effect of additional obligations, prohibitions and restrictions imposed by a varied control order, taking into account the person's age, language skills, mental capacity and any other relevant factor.[15] However, we are concerned that the Criminal Code states that a failure to comply with this requirement does not make the control order ineffective to any extent.[16]

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[7] Article 12, ICCPR.
[8] Article 19, ICCPR; Article 13, CRC.
[9] Article 22, ICCPR; Article 15 CRC.
[10] Article 17, ICCPR; Article 16, CRC.
[11] Parliamentary Joint Committee on Intelligence and Security, Parliament of the Commonwealth of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (2016) 44 [2.80].
[12] Ibid.
[13] McFarlane, K, McGrath, A, Westerhuis, D, and Tyson, G, *Juvenile Remand: An Understanding of the Issues in the Juvenile Justice Field*, Report for the NSW Government Juvenile Remand Working Group (2011); Heller, E and Mathis, M, *Breaching Bail – A Young Person's Perspective* (2012), Juvenile Justice NSW.
[14] McFarlane, K, McGrath, A, Westerhuis, D, and Tyson, G, *Juvenile Remand: An Understanding of the Issues in the Juvenile Justice Field*, Report for the NSW Government Juvenile Remand Working Group (2011) 43.
[15] Sections 104.12(1) and 104.26(1), Criminal Code.
[16] Ibid, ss 104.12(4) and 104.26(4).

3. Best interests

In accordance with recommendation 1 of the PJCIS report, Schedule 2, items 3 and 26 of the 2016 Bill require the issuing court to take into account the "best interests of the person" as "a primary consideration" where the person is a child, and the objects of Division 104 of the Act,[17] such as protecting the public from a terrorist act, as "a paramount consideration in all cases".

The Law Society reiterates its concern about whether prioritising national security interests ahead of the best interests of the child strikes the right balance, and indeed whether it is consistent with Australia's implementation of the CRC.

We note that the UN Committee on the Rights of the Child ("UNCRC") in its General Comment No 14 stated that:

> [t]he expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness.[18]

Recognising that the best interests of the child might conflict with other interests or rights, including those of the public, the UNCRC stated that potential conflicts between the best interests of a child and the rights of other persons must:

> ... be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise... If harmonisation is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.
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> 40. Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.[19]

The Law Society recommends that the 2016 Bill be amended to expressly recognise both the best interests of the child and the objects of Division 104 of the Act, such as protecting the public from a terrorist act, as primary considerations, which the issuing court would need to balance, based on the individual circumstances of the case.

4. Service of documents

In accordance with recommendation 3 of the PJCIS report, Schedule 2 of the 2016 Bill provides that an AFP member must take reasonable steps to serve personally on at least

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[17] The objects of Division 104 are to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for one or more of the following purposes:
(a) protecting the public from a terrorist act;
(b) preventing the provision of support for or the facilitation of a terrorist act;
(c) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

[18] Committee on the Rights of the Child, *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) para 37.

[19] Ibid, paras 39-40.

one parent or guardian of the child all notifications and copies of orders associated with a control order. It is unclear whether references to a "parent" or "guardian" in the Criminal Code include a legal guardian (for example, where the state is the legal guardian of a child in care).

The Law Society notes that the *Children and Young Persons (Care and Protection) Act 1998* (NSW) defines a "parent" as "a person having parental responsibility for the child or young person", and "parental responsibility" as "all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children".[20] We suggest that the 2016 Bill be amended to provide in Division 104 of Part 5.3 of the Criminal Code a definition of "parent" or "guardian" that reflects the definition of "parent" in the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

The 2015 Bill had provided that, if the person is 14 to 17 years of age, an AFP member must also serve all such documents personally on the person's court-appointed advocate.[21] We also note that, in accordance with recommendation 2 of the PJCIS report, Schedule 2, item 5 of the 2016 Bill expressly provides that all persons have the right to legal representation in control order proceedings, and removes the role of the court-appointed advocate.

In light of the above, the Law Society recommends that the 2016 Bill be amended to provide that an AFP member must also serve personally on the person's legal representative all notifications and copies of orders associated with a control order.

5. Conditions of control orders and penalties for breach

The Law Society is concerned that the 2016 Bill retains, and the PJCIS report made no recommendations with regard to, the proposal that conditions including curfews of up to 12 hours in any 24-hour period can be attached to a control order. We are also concerned that the 2016 Bill does not provide for, and the PJCIS report gave no consideration to, a lower penalty for breach of a control order by a child. We consider that a child may not be able to meet other conditions of a control order due to their lack of autonomy. For example, a child may not be able to fulfil reporting requirements where their parent does not transport them to report to authorities, or non-association conditions where they include young people in the same school or extended family members or friends with whom the child's family associates. We reiterate our strong concerns about the use of curfews as conditions attached to control orders for children, and in particular the excessive nature of the relevant penalties for breach of control order conditions by children.

The Law Society notes that Schedule 3, item 3 of the 2016 Bill provides that a control order subject who is required to wear a tracking device commits an offence if they engage in conduct that results in interference with, or disruption or loss of, a function of the tracking device, and that the offence carries a maximum penalty of five years' imprisonment. We note that the Explanatory Memorandum for the 2016 Bill states that the term "engage in conduct" is defined in subsection 4.1(1) of the Criminal Code and includes acts and omissions, such as a control order subject failing to charge a tracking device. We are concerned that there is no requirement of intention or recklessness with regard to conduct. The Law Society considers that this offence should require a mental element, and should also provide for a defence of reasonable excuse.

The Law Society queries where a child will be held if they breach the conditions of a control order. We consider that children should not be held in adult or police custody.

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[20] Section 3, *Children and Young Persons (Care and Protection) Act 1998* (NSW).
[21] Proposed subsections 104.12(6)(a), 104.12A(2)(c)(i), 104.12A(4)(b)(iv), 104.17(4)(a), 104.20(3)(b)(i), 104.23(3)(c)(i) and 104.26(5)(a), 2015 Bill.

Schedule 2 of the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) provides that children other than Aboriginal or Torres Strait Islander children should not be placed in a cell unless:

> (a) no other secure accommodation is available and the custody manager for the child considers that it is not practicable to supervise the child if the child is not placed in a cell, or
> (b) the custody manager considers that a cell provides more comfortable accommodation than other secure accommodation in the police station.[22]

It also provides that:

> (3) Such a child should not be placed in a cell with a detained person or protected suspect who is not a child except in exceptional circumstances that make it necessary for the well-being of the child.[23]

The Law Society recommends that the 2016 Bill be amended to include provisions that reflect the above safeguards for children in Schedule 2 of the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW).

6. Monitoring

In accordance with recommendation 9 of the PJCIS report, Schedule 8, item 1 of the Bill requires an issuing officer to have regard to whether the exercise of monitoring powers under a warrant in relation to a premises or person "would be likely to have the least interference with any person's liberty and privacy that is necessary in the circumstances". Schedule 9, items 21 and 24 and Schedule 10, item 13 of the Bill provide that the Judge or nominated Administrative Appeals Tribunal member must have regard to whether the interception of telecommunications under a warrant, or the use of a surveillance device under a warrant, "is likely to have the least interference with any person's privacy". These provisions purportedly implement recommendations 13 and 14 of the PJCIS report, even though they do not incorporate the recommendation that such measures be "necessary in all the circumstances".[24]

The Law Society notes that all persons have the right to protection from arbitrary or unlawful interference with their privacy under article 17 of the ICCPR. Additionally, children's right to privacy is protected under article 16 of the CRC. The Special Rapporteur on counter-terrorism stated that the following considerations apply with respect to permissible limitations to the right to privacy under article 17 of the ICCPR, as elaborations of the notions of "unlawful" and "arbitrary":

(a) Any restrictions must be provided by the law;
(b) The essence of a human right is not subject to restrictions;
(c) Restrictions must be necessary in a democratic society;
(d) Any discretion exercised when implementing the restrictions must not be unfettered;
(e) For a restriction to be permissible, it is not enough that it serves one of the enumerated legitimate aims; it must be necessary for reaching the legitimate aim;

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[22] Clause 6(2), Part 2, Schedule 2, *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW). Note: clause 5, Part 2 provides for separate safeguards for Aboriginal and Torres Strait Islander children.
[23] Ibid, clause 6(3), Part 2, Schedule 2.
[24] Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2016 (Cth) 104 [675, 677], 120 [766, 768].

(f) Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected; and
(g) Any restrictions must be consistent with the other rights guaranteed in the ICCPR.[25]

Should the monitoring of persons subject to control orders be adopted, the Law Society recommends that the 2016 Bill be amended to incorporate all of the above considerations into the test for monitoring of persons subject to control orders.

The Law Society notes that additional reporting requirements have been incorporated into the 2016 Bill, in accordance with recommendations 11 and 12 of the PJCIS report. We recommend that the 2016 Bill be amended to require relevant authorities to report on the number and ages of children subject to control orders with respect to whom monitoring warrants, telecommunications interception warrants and surveillance device control order warrants have been issued.

7. National security information

Schedule 15, Part 1, item 21 of the Bill provides for a minimum standard of disclosure, which requires that the subject of the control order proceedings be given "sufficient information about the allegations on which the control order request was based to enable effective instructions to be given in relation to those allegations".

The Law Society welcomes the recommendation that the subject be provided with information about the allegations against them, and not just notice of the allegations. However, we query whether the 2016 Bill should provide for an avenue of appeal in circumstances where the subject of the control order proceedings has not been provided sufficient information about the allegations against them to enable effective instructions to be given in relation to those allegations.

The Law Society emphasises that children, by virtue of their unique vulnerability and their physical and mental immaturity, are entitled to special safeguards and care in international law.[26] These include such measures of protection as are required by the child's status as a minor, on the part of the State.[27] We query whether the proposed minimum standard of disclosure provides sufficient protection for a child who is the subject of control order proceedings, and whether it is consistent with the principle in article 3 of the CRC that the best interests of the child be a primary consideration in all actions concerning them.

8. Special advocates

Schedule 15, Part 2 of the Bill provides for a system of special advocates to represent the interests of persons subject to control order proceedings where the subject and their legal representative have been excluded.

The Law Society supports this recommendation in principle, where the control order subject and their legal representative have been excluded from proceedings. However, we consider that control order subjects and their legal representatives should not be excluded from proceedings generally, particularly given the far reaching consequences of a control order

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[25] Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN Doc A/HRC/13/37 (28 December 2009) paras 17-18.
[26] Preamble, CRC; *Declaration of the Rights of the Child.*
[27] Article 24(1), ICCPR.

being imposed, including potentially limiting a person's rights to privacy and freedom of movement, expression and association. We note that all persons are entitled to a right to a fair trial and to procedural fairness under the ICCPR. We query whether the exclusion of a control order subject and their legal representative from proceedings is consistent with these rights.

9. Dealing with national security information in proceedings

Schedule 16 of the Bill provides that a court may make orders inconsistent with the *National Security Information (Criminal and Civil Proceedings) Regulation 2015* ("NSI Regulation"), on an application by the Attorney-General or their representative, where the Attorney-General wishes to depart from the NSI Regulation in relation to particular national security information.

The Law Society considers that the 2016 Bill should be amended to achieve the intention stated in the Explanatory Memorandum for the 2015 Bill. That is, that a court may only make orders inconsistent with the NSI Regulation, on an application of the Attorney-General or their representative, where there is an agreement between the parties to depart from the NSI Regulation in relation to particular national security information.

Thank you for considering this letter. Should you have any questions or require further information, please contact Meagan Lee, Policy Lawyer on (02) 9926 0214 or email Meagan.Lee@lawsociety.com.au.

Yours sincerely,

Michael Tidball
Chief Executive Officer

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Crim:JEeh1067267

9 December 2015

Mr Michael Brett Young
Secretary General
Law Council of Australia
DX 5719 Canberra

By email: Natasha.Molt@lawcouncil.asn.au

Dear Mr Brett Young,

Counter-Terrorism Legislation Amendment Bill

Thank you for your memo dated 19 November 2015 requesting input for a submission by the Law Council of Australia on the Counter-Terrorism Legislation Amendment Bill (No.1) 2015 ("the Bill").

I write to you on behalf of the Juvenile Justice Committee of the Law Society of NSW (the "Committee"). The Committee represents the Law Society on criminal justice issues as they relate to the legal needs of children and young people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee details its concerns as follows:

1. Age threshold

The Explanatory Memorandum to the Bill ("EM") appears to justify lowering the age threshold to 14 years by reference to the fact that it is above the age of criminal responsibility. The Committee notes that there is no direct correlation between criminal responsibility and control orders. As the EM states, control orders should be made sparingly, especially in relation to children. Control orders do not require proof of a crime and their effect may be significantly more onerous than a criminal sentence.

The Committee is also concerned that children of this age may be unable to understand the ramifications of such an order considering the complex nature of the issues involved and the fact that their brains are still developing.

2. Best interests

The Committee notes that, when considering whether to impose a control order on a child aged between 14 and 17 years the suggestion is that the child's best interests are to be taken into account as a primary consideration, not the primary consideration for the court (with the safety and security of the community taking precedence as the primary consideration). The Committee queries whether this strikes the right balance, and indeed whether it is consistent with Australia's implementation of the Convention on the Rights of the Child ("CROC").

3. Penalties for breach

The Committee notes that conditions including curfews of up to 12 hours in any 24 hour period can be attached to a control order, in view of the fact the penalty for breaching a control order is up to 5 years imprisonment. The Committee has strong concerns about the use of curfews as conditions attached to control orders, and in particular the excessive nature of the relevant penalties for breach of such conditions by children.

4. Legal representative

The Committee notes the proposal outlined in paragraph 89 of the EM where the issuing court must appoint a 'best interests' advocate for a child after issuing an interim control order. This provision is modelled on those in ss 68L and 68LA of the *Family Law Act 1975* (Cth). Given that proceedings will initiate under Commonwealth legislation, the Committee queries whether state Legal Aid bodies will be obliged to provide funding for these advocates.

Where the proposals allow for the potential for a child to have their own legal representative as well as a best interests advocate, this may be confusing for the child and may cause conflicts between representatives. It may also lead the child to choose not to have a legal representative, believing erroneously that they are being legally represented by the best interests advocate.

If it is alleged that the child is a danger to the community and the safety of the community has been allocated the greatest priority, the Committee submits that a child must have access to their own independent legal representative.

5. Disclosure of information

Pursuant to the Bill, the court appointed 'best interests' advocate may disclose to a court any information that the child communicates to the advocate, even if the disclosure is against the wishes of the child (proposed s 104.28AA(5) and (6)). Where these proceedings are more akin to criminal rather than family proceedings, it is a real concern that an advocate is permitted to breach client confidentiality and disclose information that may incriminate the child. This is a serious infringement of the child's right to silence and clearly not in the best interests of the child.

6. Service of documents

The Bill provides that documents are to be served upon the best interests advocate and the child's parents/guardians. However, there is no provision for the service of the documents upon the child themselves. The Committee is of the view the child should also be served with relevant documents (e.g. via their direct legal representative).

Under current legislation (s.104.13 of the *Criminal Code Act 1995*), a lawyer may attend the place specified in the order in order to obtain a copy of the order. That lawyer is not however entitled to request, be given, or see a document other than the order. This would include, for example, a statement of facts evidencing why the order should or should not be made. The Committee submits that this is unacceptable, indicates a lack of transparency and the Bill should be amended to allow lawyers access to relevant documents.

7. Public interest monitor

The proposed legislation allows for the involvement of the Queensland Public Interest Monitor, which is appropriate. However, the Committee is concerned it does not allow for the involvement of the Victorian Public Interest Monitor. Given the proposed expansion of control orders to younger children, consideration should be given to the inclusion of other State/Territory Ombudsmen (and/or the creation of a NSW Public Interest Monitor). The involvement of the Ombudsman or Public Interest Monitor is particularly pertinent given the proposal in the Bill to subject those under control orders not only to the conditions of the order, but also to a regime of monitoring via search warrants, surveillance device warrants and telecommunications warrants.

8. National security information

Under the current legislation, information which is alleged to be national security information may be placed before the court but not disclosed to the accused or their representative. The Bill seeks to broaden these provisions. The Committee is concerned that this may undermine the child's rights to both fair process and transparency (see CROC Article 40), particularly given the potential consequences.

9. Monitoring

In relation to restrictions on the young person's use of social media (see paragraphs 100 – 104 of the EM), the Committee queries how a breach of such conditions will be monitored and policed.

Noting the comments in the EM that control orders are 'extraordinary measures which are to be used sparingly', 'especially .... with children', the Committee queries how their use in respect of 14 to 17 year olds will be monitored.

Should you have any questions regarding this letter I would be grateful if you could direct them to Elaine Heaney (Senior Policy Advisor to the Committee) by email at elaine.heaney@lawsociety.com.au. Miss Heaney can also be reached by telephone on 02 9926 0310.

Yours sincerely,

Michael Tidball
Chief Executive Officer