

**SHARPENING THE LEARNING CURVE:
LESSONS FROM THE COMMONWEALTH
PARLIAMENTARY JOINT COMMITTEE OF
INTELLIGENCE AND SECURITY REVIEW
EXPERIENCE OF FIVE IMPORTANT ASPECTS OF
TERRORISM LAWS**

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The rapid passage of four tranches of far reaching Commonwealth terrorism law has highlighted the review role of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and its interactions with and influence over legislative process. This article focuses on five specific legislative examples from these terrorism law reforms. From these five examples, significant deficiencies in content and process are highlighted, raising troubling questions about review methodologies and implications for Australian democracy. The wisdom of the PJCIS exercising a de facto monopoly on Parliamentary review and committee deliberation (including future review of legislative changes it supported) of terrorism legislation is questioned. A model more clearly integrating broader participation and Parliamentary Committee and other review contributions is conducive to a proper functioning of conventional rights protection within legislative process. Reforms of PJCIS review are proposed to those ends.

CONTENTS

I	Introduction: The Issues Arising from the Review of the Five Important Aspects of Terrorism Laws	2
II	Assessing the PJCIS Review Experience of the Five Important Aspects of Terrorism Laws	13
A	Section 35P ASIO Act 1979 (Cth) Special Intelligence Operation:	

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	civil and criminal immunities from legal process and prohibitions on, and criminal penalties for, the disclosure of Special Intelligence Operation information.....	13
B	Extending the application of Division 104 of <i>Criminal Code</i> (Cth) control orders in the context of foreign fighter participation and assistance	19
C	Declared areas offences and foreign fighters: <i>Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014</i> (Cth).....	25
D	Broadening the coverage and increasing the penalties for unlawful disclosure of national security information: <i>National Security Legislation Amendment Act (No 1) 2014</i> (Cth).....	29
E	Journalist information disclosure warrants: <i>Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015</i> (Cth).....	31
III	Common Issues Arising from PJCIS Review of These Five Problematic Terrorism Law Legislative Examples – and Pointers and Lessons for Reform	37

I INTRODUCTION: THE ISSUES ARISING FROM THE REVIEW OF FIVE IMPORTANT ASPECTS OF TERRORISM LAWS

The experience of recent, rapid and serial terrorism law reform in the Commonwealth Parliament and the review role of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in reviewing proposed legislation, revealed some distinctive characteristics in the nature of legislative process, worthy of analysis and commentary. In particular, four sets of legislation¹ displayed identifiable themes and consequences potentially raising issues for the character and integrity of the legislative process itself – the very liberal democratic institutional process sought to be protected from terrorism.

These identifiable and overarching themes and consequences can be loosely described as the reinstatement of urgency as a legislative paradigm for terrorism laws; the lack of proper consideration and application of existing completed terrorism law reviews in the PJCIS review and subsequent

¹ Namely the *National Security Legislation Amendment Act (No 1) 2014* (Cth), the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), the *Counter-Terrorism Legislation Amendment Act No 1 2014* (Cth) and the *Telecommunications (interception and Access) Amendment (Data Retention) Bill 2014* (Cth).

enactment process; a potential legislated overloading of the ex post facto review functions of the Inspector General of Intelligence and Security (IGIS) and the Independent National Security Legislation Monitor (INSLM); disregard shown to, and the delaying of, existing legislated review mechanisms; and the interactions of terrorism law reform with Parliamentary based and other contemporary human rights protection mechanisms.

The reinstatement of urgency as a legislative feature of terrorism law enactment,² in the four terrorism related laws in 2014 and early 2015, created conditions conducive to these problems and terrorism law review and enactment issues. Corroboration of the reinstatement of legislative urgency is demonstrated by the continuous terrorism related legislative agenda commencing with the introduction into the Commonwealth Parliament of the National Security Legislation Amendment Bill (No 1) 2014 (Cth) on 16 July 2014 and concluding with the passage of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth) on 20 March 2015. The PJCIS produced a report for each of the four pieces of legislation referred to it.³

The finer details of urgency in the legislative agenda are reflected in the rapidity of the introduction of this legislation, the tight reporting timeframes for the PJCIS, including adverse commentary by the PJCIS on inadequate time to conduct its inquiries and a failure to meet a reporting deadline, early closing

² For commentary on the characteristics of the earlier emergence of urgency as a legislative operating principle, see Andrew Lynch 'Legislating with Urgency – The Enactment of the Anti-Terrorism Act (No 1) 2015' (2006) 30 *Melbourne University Law Review* 747; Andrew Lynch 'Legislating Anti-Terrorism: Observations on Form and Process' in Victor V Ramraj, Michael Hor, Kent Roach and George Williams (eds) *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed 2012), 151; Greg Carne 'Hasten Slowly: Urgency, Discretion and Review – A Counter-Terrorism Legislative Agenda and Legacy' (2008) 13 *Deakin Law Review* 49; Greg Carne 'Prevent, Detain, Control and Order : Legislative Process and Executive Outcomes in enacting the *Anti-Terrorism Act (No 2) 2005* (Cth) (2007) 10 *Flinders Journal of Law Reform* 17, 49-50 and Martin Krygier 'War on Terror' in Robert Manne (ed) *Dear Mr Rudd Ideas for a Better Australia* (Black Inc 2008), 137.

³ See Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014* (September 2014), hereafter *PJCIS Advisory Report September 2014*; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014), hereafter *PJCIS Advisory Report October 2014*; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (November 2014) hereafter *PJCIS Advisory Report November 2014*; and Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia *Advisory report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (February 2015), hereafter *PJCIS Advisory Report February 2015*.

dates relative to referral dates for public submissions on the Bills, public hearings confined to Canberra and in close proximity to the reporting date and expedited passage of the Bills relative to their date of introduction.⁴ Collectively, these various steps in the legislative and review processes demonstrate intense time frames.

⁴ See Greg Carne, 'Re-Orientating Human Rights Meanings and Understandings?: Reviving and Revisiting Australian Human Rights Exceptionalism Through A Liberal Democratic Rights Agenda' (2015) 17 *Flinders Law Journal* 1, 41-42; See *National Security Legislation Amendment Bill (No 1) 2014* (Cth)- introduced to the Commonwealth Parliament 16 July 2014, referred to the PJCIS for inquiry on 16 July 2014 and report by 8 September 2014; following an extension, submissions were requested by 6 August 2014; the PJCIS advised the Attorney General on 4 September 2014 that 'due to delays in the receipt of some evidence and the need to provide due scrutiny to certain issues raised the Committee intended to report to the Parliament in the week of 22 September 2014'; two public hearings were held in Canberra on 15 August 2014 and 18 August 2014; the legislation passed the Commonwealth Parliament on 1 October 2014: see *PJCIS Advisory Report September 2014*, above n 3, 3-4 and George Brandis 'National Security Legislation Amendment Bill (No 1) 2014' (Attorney General Media Release, 1 October 2014)

<<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/1October2014-NationalSecurityLegislationAmendmentBillNo12014.aspx>>; *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* - introduced into the Commonwealth Parliament on 24 September 2014, referred to the PJCIS for inquiry on 24 September 2014, submissions to the PJCIS were required by 3 October 2014 and the PJCIS to report by 17 October 2014; three public hearings were held in Canberra on 2 October, 3 October and 8 October 2014; the PJCIS commented adversely on the tight timeframe for the conduct of its inquiry and advised that 'for the third tranche of proposed legislation, a longer timeframe will be required to deal with the complexity of the legislation and allow sufficient time for public consultation'; the legislation passed the Commonwealth Parliament on 30 October 2014: see *PJCIS Advisory report October 2014*, above n 3, 2-4 and George Brandis, 'Parliament passes Foreign Fighters Bill' (Attorney General Media Release 30 October 2014) <<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/30October2014-ParliamentPassesForeignFightersBill.aspx>> ; see *Counter-Terrorism Legislation Amendment Bill (No 1) 2014* - introduced into the Commonwealth Parliament on 29 October 2014, referred to the PJCIS for inquiry on 29 October 2014, with submissions requested by 10 November 2014 and the PJCIS to report on 20 November 2014; one public hearing was held in Canberra on 13 November 2014; the PJCIS commented adversely on the tight timeframe for the conduct of its inquiry and advised that 'The intensive nature of the inquiry and the short timeframes placed significant demands on the Committee. While the Committee recognises and understands that this resulted from exceptional circumstances, it would have been preferable if more time had been available for the inquiry': *PJCIS Advisory Report November 2014*, above n 3, 2-3; the legislation passed the Commonwealth Parliament on 2 December 2014: see George Brandis, 'Parliament passes counter-terrorism legislation' (Attorney General Media Release 2 December 2014) <<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/2December2014-ParliamentPassesCounter-TerrorismLegislation.aspx>>; see *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Cth)- introduced into the Commonwealth Parliament on 30 October 2014; referred to the PJCIS for inquiry on 21 November 2014 and the PJCIS to report by 27 February 2015, with submissions to the PJCIS requested by 19 January 2015: see *PJCIS Advisory Report February 2015*, above n 3, 1-2 ; three public hearings were held in Canberra on 17 December 2014, 29 January 2015 and 30 January 2015 and the legislation passed the Commonwealth Parliament on 26 March 2015: see George Brandis 'Data Retention Bill passed by Parliament' (Attorney General Media Release 26 March 2015) <<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/26-March-2015-Data-Retention-Bill-passed-by-Parliament.aspx>> .

This practice of legislative urgency has constrained and contracted deliberative and scrutiny practices of reviews in many ways. It has created potential flaws and deficiencies in legislation – such that even where these are identified, a momentum is still produced which makes acceptable that legislation be urgently enacted and remediation (if it is to occur at all) to happen in later review processes. This practice significantly undermines the credibility of Parliamentary processes, creates potential injustices in application and leaves such laws open to constitutional challenge.⁵

The practice reveals more of a commitment to an advantageous political agenda of safety and security, rather than to measures inherently reflecting and reinforcing deliberative, participatory and accountability based principles of parliamentary based democracy. A troubling consequence is that that default bipartisanship principles underpinning expedited passage of this 2014 and early 2015 legislation, with similar default bipartisanship in the hearing and reporting processes of the PJCIS, have subtly weakened these democratic institutional values.

In one sense, nothing is new. The 2005 Commonwealth terrorism legislative reforms⁶ were also enacted within a practice of urgency. At the time, significant drafting issues were identified concerning sedition law reforms, but nevertheless the legislation was enacted, followed by ex post facto review by the Australian Law Reform Commission. Then, as in the more recent legislative enactments, political factors propelled substandard legislation, discrediting and undermining the parliamentary process in its handling of serious national security issues. The present legislative deficiencies in drafting, subject matter overreach, and in an insufficiency of accountability mechanisms mean that special reliance is placed on Executive discretion in the administration and application of the laws - to prevent both egregious abuses of rights and to

⁵ A more recent example is found in the stripping of Australian citizenship by infringement of legislated facts, which may involve a Parliamentary exercise of Chapter III judicial power, and hence a breach of the Chapter III separation of powers doctrine: see *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) and Helen Irving and Rayner Thwaites, 'Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)' (2015) 26 *Public Law Review* 137.

⁶ For discussion of the 2005 Commonwealth law terrorism law reforms, introduced following the London bombings, see Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventive Detention' (2007) 10 *Flinders Journal of Law Reform* 105; Carne, 'Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes In Enacting The *Anti-Terrorism Act (No 2) 2005* (Cth)' above n 2; Anthony Reilly 'The processes and consequences of counter-terrorism law reform in Australia: 2001-2005' (2007) 10 *Flinders Journal of Law Reform* 81.

ensure that intelligence and law enforcement resources are optimally utilised. As the Executive has seized a governmental advantage in national security issues for politically advantageous purposes, the Opposition's default bi-partisan response has also emerged for national interest reasons, but also as a political stratagem to neutralise or contain such government advantage.

Word limits of this article preclude an examination of these broader thematic issues of the review and enactment processes, flowing from the legislative urgency paradigm, as identified above. It is intended to analyse these broader thematic issues elsewhere. Instead, the present article focuses on the detail of selected, specific legislative examples of the above themes and consequences, drawn from each of the four 2014 and early 2015 terrorism legislative reforms. This analysis highlights some significant deficiencies from the legislative review and enactment process, discrediting the present review and enactment methodology of terrorism laws, whilst raising troubling implications for traditional understandings and conceptions of Australian democracy.

A brief identification of the five prominent controversial 2014 and early 2015 examples is useful as the direct product of the expedited, bi-partisan legislative process identified. Such identification demonstrates consequential flaws from that process, including the review and recommendations of the PJCIS. It further confirms that there are various deficiencies in the recommendations from the review and reporting work of the PJCIS, which are adopted into Government responses and amendments to Bills.

The notable legislative examples selected for present purposes are the prohibitions and restrictions on reporting and communication under the amendments introducing s 35P Special Intelligence Operations into the ASIO Act 1979 (Cth); the broadening of the application of the control orders scheme in Division 104 of the *Criminal Code* (Cth) to apply to situations including those tenuously connected to primary foreign fighter offences; the introduction of declared area provisions in Division 119 of the *Criminal Code* (Cth) relating to foreign fighters, with reverse onus provisions and a relatively narrow range of exempt categories for presence within a declared area; a significant expansion of the circumstances and penalties for unlawful disclosure of national security information,⁷ with a narrowly conceived authorised public

⁷ Through amendments to the *ASIO Act 1979* (Cth) and the *Intelligence Services Act 2001* (Cth).

interest disclosure mechanism to the Inspector General of Intelligence and Security; and a bipartisan agreement producing a narrowly based and potentially flawed warrant scheme to access the meta data of journalists under the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth).

A further consequence is that such legislation is likely to be revisited in the future - perhaps out of necessity or increasingly in response to adopted PJCIS recommendations justifying legislative passage only by affording a subsequent role in the legislation to the IGIS or the INSLM. Significant periods of time elapse before such ex post facto review processes are legislatively activated, by which time practices mandated by the original flawed legislation become normalised. This means that the subsequent review might be directed towards refining, extending and legitimating such practices. In turn, the review process can itself become enmeshed with and institutionalise some of the problems of the original legislative process.

The narrow membership base of the PJCIS and the executive controls over its investigatory activities are undoubtedly significant contributory factors to the deficiencies in the review process and the consequent legislation. The homogeneity of membership – Coalition government and Labor Opposition only – is one of the distinctive characteristics of the PJCIS. Unlike the Senate Legal and Constitutional Committee, which conducted a number of reviews of terrorism legislation during the Howard Government era, it does not have non major party membership, nor is there an equivalent capacity in the PJCIS for the role performed by the participating Senators (ie non Committee member Senators) on the Senate Legal and Constitutional Committee. Members of the PJCIS are appointed under s 14 of the *Intelligence Services Act 2001* (Cth).⁸ The nomination and appointment process to the PJCIS provides for a non-binding consultation process in relation to both membership from the House of Representatives⁹ and membership from the Senate.¹⁰ Accordingly, there is no

⁸ See *Intelligence Services Act 2001* (Cth) s 28 (2) The Committee is to consist of 11 members, 5 of whom must be Senators and 6 of whom must be members of the House of Representatives; and s 28 (3) of the *Intelligence Services Act 2001* (Cth) A majority of the Committee's members must be Government members.

⁹ *Intelligence Services Act 2001* (Cth) s 14 (1) The members who are members of the House of Representatives must be appointed by resolution of the House on nomination of the Prime Minister; s 14 (2) Before nominating the members, the Prime Minister must consult with the Leader of each recognised political party that is represented in the House and does not form part of the Government.

obligation to include even one member of the PJCIS from outside of the Government and Opposition, which represents an increasingly narrow membership profile given the decline in percentage of first preference votes for the major parties and the larger number of minor parties and independents now in both the House of Representatives and the Senate. The composition of the PJCIS during the 2013-2016 Parliamentary term (in which the four pieces of legislation discussed in this article were reviewed) reflects the above processes – a total of six Government members and five Opposition members.¹¹

Similarly, the investigatory capacity of the PJCIS is circumscribed in several respects. Section 29 of the *Intelligence Services Act 2001* (Cth) provides for the functions of PJCIS. Importantly, PJCIS has no self-activating inquiry or investigatory role, with the powers relevant to the present legislative inquiries clearly derivative and reliant on referral.¹² Furthermore, a range of significant subject matters, which might on occasions be ancillary to such legislative review, are excluded from the functions of the Committee.¹³

The issues relating to the restricted major party membership and restrictions on review functions of the PJCIS are compounded in the present circumstances of review of five major aspects of terrorism laws. This is because there is no competing or contesting alternative Parliamentary Committee review of these laws, and that the emerging practice of the PJCIS has been to recommend accrual to itself of future review obligations over Bills it has recommended be legislated, subject to its suggested minor and moderate changes.

¹⁰ *Intelligence Services Act 2001* (Cth) s 14 (3) The members who are Senators must be appointed by resolution of the Senate on the nomination of the Leader of the Government in the Senate; s 14 (4) Before nominating the members, the Leader of the Government in the Senate must consult with the Leader of each recognised political party that is represented in the Senate and does not form part of the Government; s 14 (5) In nominating the members, the Prime Minister and the Leader of the Government in the Senate must have regard to the desirability of ensuring that the composition of the Committee reflects the representation of recognised political parties in the Parliament.

¹¹ See Former Committee Membership on the PJCIS website: <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Former_Committee_Membership>.

¹² See *Intelligence Services Act 2001* (Cth) s 29 (1) (b) ‘The functions of the Committee are (b) to review any matter in relation to ASIO, ASIS, AGO, DIO, ASD or ONA referred to the Committee by (i) the responsible Minister; or (ii) a resolution of either House of the Parliament’; s 29 (2) ‘The Committee may, by resolution, request the responsible Minister to refer a matter in relation to the activities of ASIO, ASIS, AGO, DIO, ASD or ONA (as the case may be) to the Committee, and the Minister may, under paragraph (1)(b), refer that matter to the Committee for review.’

¹³ See *Intelligence Services Act 2001* (Cth) s 29 (3).

This reality is in stark contrast to the relative status and review arrangements of earlier examples of terrorism legislation where the review functions and activities of the PJCIS and its predecessors¹⁴ were secondary to, and largely subordinate to, the review of terrorism laws by the Senate Legal and Constitutional Legislation and References Committees. The ascendancy of the PJCIS as the dominant and exclusive Parliamentary Review Committee emerges from a concatenation of circumstances.

Commentators have remarked upon the volume of terrorism laws enacted in Australia since the September 11 2001 terrorist attacks in the United States.¹⁵ In the initial years of terrorism law enactments, the Senate Legal and Constitutional Legislation and References Committees conducted more detailed inquiries than the Parliamentary Joint Committee on ASIO, ASIS and DSD. The Senate Committee inquiries were by comparison with the 2014-2015 PJCIS inquiries, of longer duration, with more public hearings and in various locations, a greater diversity of witness submissions, displayed greater engagement and analysis of legal and policy questions and allowed for much broader Parliamentary representation through both Senator Members of the Senate Legal and Constitutional Affairs Committee, as well as non-member participating Senators in those reviews.¹⁶ In contrast, the Parliamentary Joint

¹⁴ The predecessors to the PJCIS were respectively the Parliamentary Joint Committee on ASIO (1988 to 2001) and the Parliamentary Joint Committee on ASIO, ASIS and DSD (2002 to 2005). The Committee was re-established in 2005, following the passage of the *Intelligence Services Legislation Amendment Act 2005* (Cth), as the Parliamentary Joint Committee on Intelligence and Security: see History of the Intelligence and Security Committee on PJCIS website: <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/History_of_the_Intelligence_and_Security_Committee>.

¹⁵ See Kent Roach, *The 9/11 Effect: Comparative Counter Terrorism* (Cambridge University Press, 2011), 309-310; George Williams 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136; George Williams, 'The Legal Legacy of the 'War on Terror'' (2013) 12 *Macquarie Law Journal* 3, 6-7; Keiran Hardy and George Williams, 'Terrorist Traitor Or Whistleblower? Offences and Protections in Australia For Disclosing National Security Information' (2014) 37 *University of New South Wales Law Journal* 784, 789 fn 27; Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread Of Anti-Terror Laws In Australia' (2014) 38 *Melbourne University Law Review* 362, 365; David Wright Neville, 'The Politics of Fear: Counter-Terrorism and Australian Democracy' (Working Paper No 27) (2006) *Real Instituto Elcano* 19 October 2006, 9 and Nicola McGarrity, Rishi Gulati and George Williams, 'Sunset Clauses in Australian Anti-Terror Laws' (2012) 33 *Adelaide Law Review* 307, 310.

¹⁶ Between 2002 and 2005, the Senate Legal and Constitutional Committee engaged in several significant reviews of proposed terrorism laws – Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Bills* (8 May 2002); *Inquiry into the Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (18 June 2002); *Inquiry into the Anti-terrorism Bill 2004* (11 May 2004); *Inquiry into the Anti-Terrorism Bill (No 2) 2004* (6 August 2004); *Inquiry into the Provisions of the National Security Information (Criminal*

Committee on ASIO, ASIS and DSD inquiries, whilst important, may properly be assessed as involving a lesser degree of legal and policy analysis about the same subject matter of inquiry.¹⁷ This is demonstrated most clearly when both Committees conducted inquiries on the same subject matter.¹⁸ A further explanation lies in the fact that the former Parliamentary Joint Committee on ASIO, ASIS and DSD was not re-established as the more broadly based Parliamentary Joint Committee on Intelligence and Security until December 2005, following the passage of the Intelligence Services Legislation Amendment Bill 2005 (Cth).¹⁹

The first point of change appears with the election of the Labor government in 2007. The volume of terrorism related legislation to be reviewed by either committee decreased significantly in the time of the Labor government, changing the dynamics of the preceding constancy and urgency of review. However, this contraction of legislative volume in the years 2007-2013 was offset for future purposes by Attorney General Roxon to the PJCIS in May 2012 referring extensive terms of reference of inquiry²⁰ into potential reforms to Australia's national security legislation. The reference comprised '18 specific reform proposals containing 44 separate items across three different reform

Proceeding) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 (19 August 2004); *Provisions of the Anti-Terrorism Bill (No 2) 2005* (28 November 2005); *Provisions of the National Security Information Legislation Amendment Bill 2005* (11 May 2005). Further significant inquiries were subsequently conducted and reports made by the Senate Legal and Constitutional Legislation Committee in 2010: see *Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010 (provisions)* (24 November 2010) and by the Senate Legal and Constitutional Standing Committee in 2008: see *Independent Reviewer of Terrorism Laws Bill 2008 [No 2] (provisions)* (14 October 2008).

¹⁷ See Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (23 September 2002); *Review of Division 3 Part III of the ASIO Act 1979- ASIO's questioning and detention powers* (30 November 2005); and *Review of Security and Counter Terrorism Legislation* (4 December 2006)

¹⁸ For example, contrast the Senate Legal and Constitutional Committee report *Inquiry into the Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, above n 16 with the Parliamentary Joint Committee on ASIO, ASIS and DSD *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, above n 17.

¹⁹ See Parliamentary Joint Committee on Intelligence and Security website 'History of the Intelligence and Security Committee', above n 14.

²⁰ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* (May 2013) (hereafter *PJCIS Potential Reforms Report May 2013*) Appendix E *Discussion Paper Equipping Australia Against Emerging and Evolving Threats* (July 2012) (hereafter *Discussion Paper July 2012*).

areas²¹ – Interception and the TIA Act, Telecommunications Security Sector Reform and Australian Intelligence Community Legislation Reform.²² These reform proposals represented an ambitious potential program and amounted to a wish list for Australia’s intelligence agencies.

The election of the Abbott government later in 2013 after the release of the PJCIS report in May 2013 (which endorsed many recommendations for reform),²³ and a rise of new forms of terrorism, including ISIS, provided both a groundswell for legislative reform and review, as well as a political moment to play to the Coalition’s perceived strengths and comparative advantage on national security issues. This opportunity was activated under the stewardship of Prime Minister Abbott. It follows that national security political capital would be more readily secured for the Coalition through a softer form of review of Bills conducted by the PJCIS, the membership being restricted to Government and Opposition parties. Further, the PJCIS would operate within an agreed, compliant framework of bipartisanship so its recommendations would be more predictable. This would be in contrast to previous review examples of the Senate Legal and Constitutional Affairs Committee, with broader membership,²⁴ more inclusive participatory practices,²⁵ and located within the Senate where the Government did not control a majority. This reality is starkly demonstrated in the circumstances backgrounding the review of the Counter-Terrorism (Foreign Fighters) Bill 2014 (Cth).²⁶ Noting that both

²¹ *PJCIS Potential Reforms Report May 2013*, above n 20, vii-viii.

²² It is the third of these categories – Australian Intelligence Community Legislation Reform - where Attorney General Roxon re-set the agenda for renewed, urgent and far reaching terrorism law reforms, by dividing the subject matter content into the categories of ‘Matters the government wishes to progress’, ‘Matters the Government is considering’ and ‘Matters on which the Government expressly seeks the views of PJCIS’ - see *Discussion Paper July 2012*, above n 20, 40-56.

²³ *PJCIS Potential Reforms Report May 2013*, above n 20, xxxiii-xxxiv.

²⁴ A survey from the reports submitted by the Senate Legal and Constitutional Affairs Committee from 12 February 2014 to 17 March 2016 (coinciding with the term of the Abbott and Turnbull governments) reveals that the typical membership of the Senate Legal and Constitutional Affairs Legislation Committee was one member of the Australian Greens, two members of the Labor Opposition and three members of the Coalition government. A survey of the membership of the Senate Legal and Constitutional Affairs References Committee in the same time frame revealed an even broader membership – the Coalition government generally having no more than two members, typically Labor Opposition having three members and an Independent or Green member as well, with the latter non major party member on occasions chairing the Committee. Various inquiries by the Senate Legal and Constitutional References Committee also included further involvement from additional participating members of the Senate who were not formal members of the relevant Committee.

²⁵ As indicated by the inclusion of membership of the Australian Greens, and in the role of participating members of the Senate in the Senate Legal and Constitutional References Committee.

²⁶ See *PJCIS Advisory Report October 2014*, above n 3.

the Senate Legal and Constitutional Affairs Legislation Committee and the PJCIS had been tasked with review of this Bill,²⁷ the PJCIS Coalition majority report stated:²⁸

As noted above, the Bill has been referred to this committee and also to the Parliamentary Joint Committee on Intelligence and Security. That committee has made a public call for submissions and has held public hearings. This committee's website will direct interested parties to the relevant Parliamentary Joint Committee on Intelligence and Security inquiry webpage. Given that the Bill, which primarily concerns intelligence and security matters, has already been referred to the Parliamentary Joint Committee on Intelligence and Security, the committee has decided not to duplicate the work of that committee by conducting a parallel inquiry.

In contrast, the comments of the Australian Labor Party²⁹ and the Australian Greens³⁰ highlight both the procedural breaches and narrowing of review perspectives occasioned by the majority vote of the Committee.³¹

This manoeuvre highlights the most important aspect that during this period of serial counter-terrorism lawmaking, the more robust Senate scrutiny practices have been bypassed. The Coalition choice in the majority Committee report – implies in that instance that intelligence and security matters are not the proper province of the Senate Legal and Constitutional Legislation Committee, despite the fact that the Senate referred the Bill to the Committee, and the significant history of Senate Committee review of national security Bills. It leaves as open and unresolved the question of whether the review function of the PJCIS has been preferred in order to avoid the rigour of prior

²⁷ See Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (hereafter *Senate Legal and Constitutional Affairs Legislation Committee October 2014 report*).

²⁸ *Ibid* 1.

²⁹ *Ibid* 3 under the heading 'Additional comments by the Australian Labor Party'.

³⁰ *Ibid* 5 under the heading 'Dissenting Report of the Australian Greens'.

³¹ 'Despite the fact that the Senate clearly expressed its will that this committee inquire into and report on the Bill concurrently with the Parliamentary Joint Committee on Intelligence and Security, this has not occurred... It is a well-established procedure that, when the Senate refers a Bill to a committee 'for inquiry and report', the inquiry and report should occur. The Australian Labor Party regrets that this committee has failed to follow this well-established procedure in this case': above n 29; 'The Australian Greens opposed the subsequent decision of the government-dominated Legal and Constitutional Affairs Legislation committee not to call for or accept submissions, nor hold hearings into the Bill. This refusal to hold a full inquiry effectively renders the Senate's decision to refer the Bill to that committee meaningless. The Australian Greens are excluded from the Parliamentary Joint Committee on Intelligence and Security (as are any Senators or MPs who are not from Labor or the Coalition parties) and, as such, have no avenue to explore this Bill through a full committee inquiry process. The PJCIS does not reflect the make up of the Senate and the report of that Committee does not represent the views of the Australian Greens': above n 30.

Senate Committee practices in relation to national security laws. This hypothesis is given further credibility by the fact in conducting the four sets of reviews, the PJCIS has consolidated a subsequent review role of legislation, enacted partly in that form because of its recommendations.³²

These examples raise the questions of the wisdom of the PJCIS (with its present membership configuration, responsiveness to Government mandated time frames and inquiry methodology) exercising a de facto monopoly on Parliamentary review and committee deliberation (including the future review of legislative changes it originally supported) of national security legislation. Further, the issue is raised of whether a model integrating broader participation and Parliamentary Committee contribution might be both preferable and more conducive to improved legislation – of a type consistent with conventional expectations of how Parliament will approach rights questions, and observe behavioural norms around proposals detracting from rights. The background and circumstances of PJCIS reviews of these five important aspects of terrorism laws provide important illumination in helping to unravel the complexities of such questions.

II ASSESSING THE PJCIS REVIEW EXPERIENCE OF THE FIVE IMPORTANT ASPECTS OF TERRORISM LAWS

A *Section 35P ASIO Act 1979 (Cth) Special Intelligence Operation: civil and criminal immunities from legal process and prohibitions on, and criminal penalties for, the disclosure of Special Intelligence Operation information*

The provisions relating to the creation of a special intelligence operations regime for ASIO – including immunity from civil and criminal liability otherwise arising in relation to such operations, and the prohibition on

³² See in particular s 29 of the *Intelligence Services Act 2001* (Cth) s 29 (1) (bb) (i) to (iv) and the extensive range of subsequent review functions to be conducted by PJCIS (relating to operation, effectiveness and implications) on a variety of matters by 7 March 2018 – such as ASIO questioning and detention powers, *Crimes Act 1914* (Cth) powers in relation to terrorism acts and terrorism offences, control orders, preventative detention orders and foreign fighter provisions; and in s 29 (1)(ca) of the *Intelligence Services Act 2001* (Cth) ‘to review, by 1 December 2019, the operation, effectiveness and implications of the sections 33AA (renunciation by conduct) s 35 (service outside Australia in armed forces of an enemy country or a declared terrorist organisation), s 35AA (declared terrorist organisation) and s 35A (conviction for terrorism offences and certain other offences) of the *Australian Citizenship Act 2007* and any other provision of that Act as far as it relates to those sections...’

disclosure of information relating to such operations, were inserted into the *ASIO Act 1979* (Cth) by the *National Security Legislation Amendment Act (No 1) 2014* (Cth).³³

Schedule 3 of the *National Security Legislation Amendment Act (No 1) 2014* (Cth) created a protective regime for special intelligence operations by inserting a new Division 4 (comprising s 35A- 35R) at the end of the existing Part 3 of the *ASIO Act 1979* (Cth). This provided for an application process to conduct a special intelligence operation (s.35C), immunity for participants in special intelligence operations from civil and criminal liability under the laws of the Commonwealth, a State or a Territory, subject to certain conditions (s.35K) and created substantial offences for the unauthorised disclosure of information relating to a special intelligence operation (s.35 P).³⁴

These reforms were a part of the Bill referred to the PJCIS for review, which reported on it in Chapter 3 of the Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014 (Cth).³⁵ The final enacted legislation, drawing from the PJCIS recommended amendments and the Attorney-General's response to both the report and to further issues arising from the surrounding political process, is striking in that issues which significantly impacted upon democratic norms and human rights were resolved in favour of executive demands and discretions, even after certain changes recommended by the PJCIS were accepted by the Government Response to the Report.³⁶

³³ For a brief summary of the Bill, see George Williams and Keiran Hardy 'National Security Reforms Stage One: Intelligence Gathering and Secrecy' (2014) (November) *Law Society of New South Wales Journal* 68; Duncan McConnel 'Implications of National Security Law Reform' (2015) 37 *Bulletin of Law Society of South Australia* 18; Spencer Zifcak 'Proportionality Lost Australia's new counter-terrorism laws' (2015) 133 *Arena Magazine* 20, 21-22.

³⁴ S 35 P (1) created an offence with a penalty of five years imprisonment for the disclosure of information and that the information relates to a special intelligence operation. s 35P (2) created an offence with a penalty of ten years imprisonment if the additional requirements in (c) either of (i) the person intends to endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation; or (ii) the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation.

³⁵ *PJCIS Advisory Report September 2014*, above n 3.

³⁶ George Brandis 'Government response to committee report on National Security Legislation Amendment Bill (No 1) 2014' (Attorney General Media Release 19 September 2014) <<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/ThirdQuarter/19September-2014GovernmentResponseToCommitteeReportOnNationalSecurityLegislationAmendmentBillno-12014.aspx>> with attached document 'Government response: Parliamentary Joint Committee on Intelligence and Security Advisory Report on the National Security Legislation Amendment Bill (No

Interestingly, the issue of special intelligence operations fell in 2013 into the second category of reform proposals – matters the Government is considering- in the terms of reference for the PJCIS Inquiry into Potential Reforms of Australia’s National Security Legislation.³⁷ In 2013, the PJCIS recommended that the *ASIO Act 1979* (Cth) ‘be amended to create an authorised intelligence operations scheme, subject to similar safeguards and accountability arrangements as apply to the Australian Federal Police controlled operations regime’ in the *Crimes Act 1914* (Cth).³⁸ The 2014 amendments constituting the Special Intelligence Operation scheme simply fall short of this standard. Likewise, substantial concerns raised in submissions to the PJCIS inquiry remain in the enacted legislation, which incorporated the limited recommendations from the PJCIS 2014 review.³⁹

There are several key problems with the Special Intelligence Operation provisions. First, there is no sunset clause on the operation of the Special Intelligence Operation provisions, which would have provided a useful restraint reinforcing other review processes for the legislation.⁴⁰ The conferral of immunities of conduct from civil and criminal liability is extensive – only conduct which involves the participant in a Special Intelligence Operation that (i) cause the death of, or serious injury to, any person; or (ia) constitutes torture; or (ii) involves the commission of a sexual offence against any person; or (iii) causes significant loss of, or serious damage to, property⁴¹ is not immunised under the legislative scheme. Interestingly, the removal of torture from the immunised categories of conduct was a late concession, made only by the Attorney General in response to concerns raised by cross bench senators,⁴²

1) (Report tabled 17 September 2014)
<<https://www.attorneygeneral.gov.au/MediaReleases/Documents/ResponsePJCISreportNSLAB.pdf>> .

³⁷ *PJCIS Potential Reforms Report May 2013*, above n 20, 108

³⁸ *Ibid.* 112, Recommendation 28. See also *PJCIS Advisory Report September 2014*, above n 3, 59.

³⁹ In particular, see Recommendations 9, 10, 11, 12 and 13 of the *PJCIS Advisory Report September 2014* above n 3, noting that the last three of these recommendations relate to the offence provisions of the Special Intelligence Operations.

⁴⁰ For the need to both include, and carefully draft, the sunset clauses in national security legislation to ensure a maximum impact of public and Parliamentary accountability, see McGarrity, Gulati and Williams, above n 15, 307, 322, 324-332 and Andrew Lynch ‘The Impact of Post-Enactment Review on Anti-Terrorism Laws: Four Jurisdictions Compared’ (2012) 18 *Journal of Legislative Studies* 63, 77-8.

⁴¹ Section 35K (1)(e) of *ASIO ACT 1979* (Cth).

⁴² Senator Leyonhjelm and Senator Day.

and to ensure expeditious passage of the legislation.⁴³ Such a concessional response revealed the Government's supine approach to human rights matters at the intersection with terrorism law reform. Additionally, there was no exclusion of conduct amounting to cruel, inhuman or degrading treatment or punishment from the civil and criminal immunities conferred by the scheme. Similarly, beyond torture, the threshold for inapplicability of civil and criminal immunity for conduct is set particularly high – causing the death or, or serious injury to any person;⁴⁴ involving the commission of a sexual offence against any person;⁴⁵ and causing significant loss of, or serious damage to, property.⁴⁶

The most significant issue however relates to the creation of specific offences for unauthorised disclosure of information relating to a Special Intelligence Operation.⁴⁷ Two offences were created – one dealing with mere disclosure,⁴⁸ the other dealing with disclosure which has a particular intention or set of consequences that are related to the disclosure.⁴⁹ The first offence, in particular, by focusing upon disclosure of Special Intelligence Operation information, without a further intention or consequence, is likely to create a significant chilling effect upon public debate and accountability, and directly impact upon media reporting of national security matters encompassing the public interest and the role of journalists in a functioning democracy. This issue was treated in a remarkably blasé and complacent manner by the Opposition leader, Mr Shorten, who, consistent with a declared bipartisanship, denied that

⁴³ See 'Torture will be explicitly prohibited in new counter-terrorism laws', *ABC News on Line* 22 September 2014 <<http://www.abc.net.au/news/2014-09-22/brandis-amends-anti-terrorism-laws-to-explicitly-ban-torture/5759846>>: 'Attorney-General George Brandis has rejected the concerns, but said he would change the Bill to 'avoid the debate being diverted' 'I don't want the discussion of this important issue to be diverted by an issue that is effectively a red herring', he said, 'So this morning, in consultation with the Director-General of ASIO and in consultation with the Prime Minister, I've decided to add an explicit prohibition in relation to torture so far as it concerns special intelligence operations. I want to stress that there is absolutely no necessary legal reason to do this'.

⁴⁴ *ASIO Act 1979* (Cth) s 35K (e) (i).

⁴⁵ *ASIO Act 1979* (Cth) s 35K (e) (ii).

⁴⁶ *ASIO Act 1979* (Cth) s 35K (e) (iii).

⁴⁷ *ASIO Act 1979* (Cth) s 35P.

⁴⁸ *ASIO Act 1979* (Cth) s 35 P (1) A person commits an offence if (a) the person discloses information; and (b) the information relates to a special intelligence operation Penalty: Imprisonment for 5 years.

⁴⁹ *ASIO Act 1979* (Cth) s 35P (2) A person commits an offence if (a) the person discloses information; and (b) the information relates to a special intelligence operation; and (c) either (i) the person intends to endanger the health and safety of any person or prejudice the effective conduct of a special intelligence operation; or (ii) the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation Penalty: Imprisonment for 10 years.

there were any difficulties.⁵⁰ The Attorney General similarly denied that there had been legislative over reach.⁵¹ Further serious issues arise in relation to these offences – there is no time limit on the prohibition of disclosure of Special Intelligence Operations, meaning that the offences can be invoked long after the cessation of the relevant Special Intelligence Operation; there is no public interest defence for disclosures highlighting illegalities and improprieties (either for the elements of the crime itself, or to act as a mitigating factor in sentencing) for s 35P (1) simple disclosures; and for s 35(1) disclosures, the penalty of five years imprisonment is disproportionate.

The shortcomings in the Government and Opposition responses in degrading these public interest considerations is reflected in minimalist amendment recommendations of the PJCIS, accepted by the Government, and constituting minor adjustments at the margins of the problem, rather than substantive responses to the public interest concerns. These matters included some additional exceptions to the prohibition on disclosure;⁵² clarification of the Explanatory Memorandum (not the legislation itself) that the Commonwealth DPP is required to take into account the public interest in making decisions about the commencement or continuation of a prosecution for s 35 P offences;⁵³ and that a note about the s 5.6(2) Criminal Code recklessness standard as applying to the fault element in the s 35P offences should be inserted to the provision.⁵⁴

⁵⁰ See 'Interview with Opposition Leader Bill Shorten Iraq; National Security Legislation' *ABC Lateline*, 1 October 2014 <<http://billshorten.com.au/lateline-iraq-national-security-legislation>> 'There was a Bill put forward, the relevant parliamentary committee looked at it, we proposed 17 amendments, we think we've put more protections around the rights of journalists and whistleblowers than existed before Labor's intervention and on that basis, we have supported the national security legislation. When it comes to fighting terror, it's not Liberal or Labor, it's one approach, that is, the priority of security...I don't believe that journalists doing their jobs will face 10 years in jail. I don't accept that argument. I understand why some people make it'.

⁵¹ See 'Torture will be explicitly prohibited in new counter-terrorism laws, Attorney General George Brandis says', above n 43: 'Senator Brandis said the Government had been "very careful" not to over-reach when drafting the Bill. My approach to this has always been to give the agencies and the police the powers they need, but also to give them no more than they need'.

⁵² Namely, disclosures of information for the purpose of obtaining legal advice; disclosures in the course of inspections by IGIS, or as part of a complaint to IGIS or other disclosure made to IGIS; and communication of information by IGIS staff to IGIS or other staff within IGIS in course of their duties: see *PJCIS Advisory Report September 2014*, Recommendation 11 and s 35P (3) (e), (f) and (g) of the *ASIO Act 1979* (Cth).

⁵³ See Recommendation 12 of *PJCIS Advisory Report September 2014* and note at end of s 35 P of the *ASIO Act 1979* (Cth).

⁵⁴ S 5.6 (2) of the *Criminal Code* (Cth) specifies recklessness as the fault element for the physical element of an offence that consists of a circumstance or result. Applying in s 35P (1) to the

Ultimately, the glaring legal and policy inadequacy of the bi-partisan support for the s 35 P disclosure offences, as mediated through the work of the PJCIS, was exposed in the INSLM report of the impact on journalists of section 35P of the *ASIO Act 1979* (Cth).⁵⁵ The INSLM recommended an overhaul of the offence provisions, by creating separate disclosure offences for those inside and outside the intelligence community. The recommendation meant that the outsider basic offence should include the additional physical element that the disclosure of the information will endanger the health and safety of any person or prejudice the effective conduct of an SIO (with a default element of recklessness); while the outsider aggravated offence should have a fault element of knowledge that circumstances will endanger the health or safety of any person or prejudice the effective conduct of a Special Intelligence operation.⁵⁶ Outsiders would have available a defence of prior publication.⁵⁷ The Government Response⁵⁸ supports the adoption of a new s 35P offence structure, purporting to support and commit to the changes recommended by the INSLM⁵⁹ and gives qualified, reserved support to an outsider defence of prior publication.⁶⁰

circumstance that the ‘information relates to a special intelligence operation’, s 5.4 (1) states that ‘A person is reckless with respect to a circumstance if (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.’

⁵⁵ Australian Government, Independent National Security Legislation Monitor *Report on the impact on journalists of section 35P of the ASIO Act* The Hon Roger Gyles AO QC (Department of Prime Minister and Cabinet, October 2015).

⁵⁶ See *Ibid*, Executive Summary, 2-4.

⁵⁷ The defendant would need to satisfy the court that (a) the information in question had previously been published (b) having regard to the nature and extent of that prior publication and the place where it occurred, the defendant had reasonable grounds to believe that the second publication was not damaging and (c) the defendant was not, in any way directly or indirectly involved in the prior publication.

⁵⁸ See George Brandis, ‘Government response to INSLM report on the impact on journalists of section 35P of the ASIO Act 1979’ (Attorney General Media Release) 2 February 2016 <<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/FirstQuarter/2-February-2016-Government-response-to-INSLM-report-on-the-impact-on-journalists-of-section-35P-of-the-ASIO-Act-1979.aspx>>.

⁵⁹ *Ibid*. ‘The Government has accepted and will implement all of the recommendations made by the Monitor providing added safeguards to journalists reporting on national security’.

⁶⁰ *Ibid* – response to Recommendation 6 ‘The Government considers that prior to any secondary publication, an individual must take reasonable steps to ensure the proposed publication is not likely to cause harm. The Government will work with stakeholders to amend section 35P to include a defence of prior publication’.

B *Extending the application of div 104 of Criminal Code (Cth) control orders in the context of foreign fighter participation and assistance*

The control orders regime was introduced in 2005 into the *Criminal Code* (Cth) (with preventative detention provisions) in the aftermath of the London bombings⁶¹ and was found constitutionally valid by a majority of the High Court of Australia in *Thomas v Mowbray*.⁶² The control orders regime was significantly amended by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).⁶³ Further amendments are mooted in 2016 by the *Counter-Terrorism Legislation Amendment Bill (No 1) 2016* (Cth).⁶⁴

It may be that the sheer growth in numbers of persons with suspected linkages to terrorism, particularly from ISIS linked foreign fighter activity, is the real reason for this significant expansion in the reach of the control order regime. This is a difficult and pressing question of intelligence and law enforcement agency priorities, logistics, costs, resources and risk assessment, observing that around 400 persons require dedicated surveillance.⁶⁵ This

⁶¹ See *Anti-Terrorism Act (No 2) 2005* (Cth) adding Division 104 (Control orders) and Division 105 (Preventative Detention Orders) to the *Criminal Code* (Cth). See Carne, 'Prevent, Detain, Control and Order: Legislative Process and Executive Outcomes in enacting the *Anti-Terrorism Act (No 2) 2005* (Cth)', above n 2.

⁶² (2007) 233 CLR 307- Hayne J and Kirby J dissented.

⁶³ See s 104.2 (b) of the *Criminal Code* for the relevant amendments extending the circumstances where a control order could be sought to include engagement in hostile activity in a foreign country, or conviction in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or a terrorist act. For a brief summary of the Bill, see George Williams and Keiran Hardy 'National Security Reforms Stage Two Foreign Fighters' (2014) (December) *Law Society of New South Wales Journal* 68; Duncan McConnell, above n 33, 18; Spencer Zifcak, above n 33, 20, 22, 23.

⁶⁴ See George Brandis, 'New Counter-Terrorism Legislation' (Attorney General Media Release 12 November 2015) <<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FourthQuarter/12-November-2015-New-Counter-Terrorism-Legislation.aspx>>. The measures include allowing 'a control order to be imposed on persons 14 years or older'; 'making less complex the monitoring of individuals subject to control orders through enhanced search, telecommunications interception and surveillance device powers' and providing 'greater protection to sensitive information in control order proceedings'. See also the post 2016 election announcement: George Brandis, 'Strengthening counter-terrorism legislation' (Attorney General Media Release 25 July 2016): 'Early in the new Parliament we will introduce the Counter-Terrorism Legislation Amendment Bill (No 1) 2016' <<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/25-July-2016-Strengthening-counter-terrorism-legislation.aspx>>.

⁶⁵ See 'Radio National Breakfast with Fran Kelly' (Attorney General Media Transcript 16 November 2015) <<https://www.attorneygeneral.gov.au/transcripts/Pages/2015/FourthQuarter/16-November-2015-Radio-National-Breakfast-with-Fran-Kelly.aspx>>; 'Interview with Graham Richardson Sky News' (Attorney General Media Transcript 18 November 2015) <<https://www.attorneygeneral.gov.au/transcripts/Pages/2015/FourthQuarter/18-November-2015-Interview-with-Graham-Richardson-Richo-Program-Sky-News.aspx>>.

resourcing matter for the surveillance of those alleged to be connected with terrorism or terrorist acts is shaping a legislative agenda.

Furthermore, the issues backgrounding an enlarged set of circumstances where control orders can be sought, are relevant to immediate future developments, 'as the Attorney-General's Department and the Australian Federal Police have flagged the possibility of further enhancements to the control order regime given ongoing examination of the application process and purposes for which a control order can be sought.'⁶⁶ It is this prospect of the continued expansion of the pre-conditions for the grant of control orders and the likely expansions or interventions in pre-crime and post-conviction and expiration of sentence (offering an alternative to charge and conviction) that warrants some scrutiny of the role of PJCIS review in this matter.

There are two significant issues arising from the PJCIS Review and the expansion of the grounds for control orders. The first issue related to the PJCIS approach to the contemplated expansion of circumstances in which a control order might be sought. The reforms altering the level of offence at which a control order could be sought were said by the PJCIS to reflect a changed security environment and the likelihood of risk.⁶⁷

The Committee also supports the expanded grounds on which a control order can be sought. The Committee supports these powers being as effective as possible, particularly given the changing threat environment. The Committee considers that the existing ground (providing training to, or receiving training from, a listed terrorist organisation) is unnecessarily narrow and does not adequately capture the range of circumstances where a person may present a risk...As such the Committee supports amendments to address existing gaps in the circumstances in which control orders can be sought and issued.

⁶⁶ See George Brandis 'Government Response to committee report on Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014' (Attorney General Media Release 22 October 2014), Recommendation 10

<<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/22October2014-Governmentresponsetocommitteereportonthecounterterrorismlegislationamendmentforeignfightersbill.aspx>>. See also *PJCIS Advisory Report October 2014*, above n 3, 60, 61 and Brandis, 'New Counter Terrorism Legislation' (Attorney General Media Release 12 November 2015), above n 64. On 5 February 2016 the Government tabled Part 1 of the INSLM report *Control Order Safeguards- (INSLM Report) Special Advocates And The Counter-Terrorism Legislation Amendment Bill (No 1) 2015* - see George Brandis, 'Government tables INSLM's report on control order safeguards' (Attorney General Media Release 5 February 2016) <<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/FirstQuarter/5-February-2016-Government-tables-INSLMs-report-on-control-order-safeguards.aspx>>.

⁶⁷ *PJCIS Advisory Report October 2014*, above n 3, 59.

The Bill expanded the grounds on which a control order could be sought to situations where the person participated in training with a terrorist organisation, engaged in hostile activity in a foreign country, or had been convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or a terrorist act.⁶⁸ The issue of being convicted in a foreign country of an offence relating to terrorism, a terrorist organisation or a terrorist act as the basis for a control order was commented upon by the PJCIS,⁶⁹ resulting in the modified requirement of s 104.2(2)(b) of the *Criminal Code* (Cth).⁷⁰ However, the PJCIS refused to engage with the procedural, human rights and substantive legal standards in foreign jurisdictions which would lead to such convictions, justifying its stance on a separation of powers – international comity rationale.⁷¹

Likewise, the possibility of persons convicted of relatively minor terrorism related offences being subjected to control orders was discounted,⁷² as the PJCIS rejected submissions supporting inclusion of an ‘additional requirement that there be a link to some ongoing threat or danger before a control order can be issued’.⁷³ Effectively, the acceptance of this possibility⁷⁴ was premised on the

⁶⁸ Ibid, 55. See now s 104.2 (b) of the *Criminal Code* (Cth).

⁶⁹ *PJCIS Advisory Report October 2014*, above n 3, 60.

⁷⁰ *Criminal Code* (Cth) s 104.2 (2)(b) (iv) been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence (within the meaning of subsection 3(1) of the *Crimes Act 1914*). The s 3(1) definition of ‘terrorism offence’ in the *Crimes Act 1914* (Cth) is exhaustive: (a) an offence against Subdivision A of Division 72 of the *Criminal Code*; or (aa) an offence against Subdivision B of Division 80 of the *Criminal Code*; or (b) an offence against Part 5.3 or 5.5 of the *Criminal Code*; or (c) an offence against either of the following provisions of the *Charter of the United Nations Act 1945*: (i) Part 4 of that Act; (ii) Part 5 of that Act, to the extent that it relates to the *Charter of the United Nations (Sanctions – Al-Qaida) Regulations 2008*.

⁷¹ *PJCIS Advisory Report October 2014*, above n 3, 60 ‘The Committee recognises that the criminal justice systems of other countries may not align with, or meet the standards in place in Australia. However, the Committee does not consider it to be appropriate for a court in issuing a control order to examine the merits of a foreign conviction.’

⁷² Division 101 of the *Criminal Code* includes a range of terrorism offences providing variously for penalties of life imprisonment, and 25, 15 and 10 years imprisonment. An example is s 104.4 of the *Criminal Code* (Cth) which creates offences regarding the possession of things connected with terrorist acts.

⁷³ *PJCIS Advisory Report October 2014*, above n 3, 59.

⁷⁴ For instance, conviction for the s 101.4 offence of possessing a thing connected with a terrorist act. A conviction might be sustained under s 101.4 (2) if (a) the person possesses a thing; and (b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b). Under s 101.4 (3) a person would commit the subsection (2) offence even if (a) a terrorist act does not occur or (b) the thing is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act;. Under s 101.4 (5), s 101.4(2) will not apply if the possession of the thing was not intended to facilitate preparation for, the engagement of a person in,

exercise of executive discretion in seeking control orders in the first place, and the claim ‘that the existing process for issuing a control order requires some level of ongoing threat’.⁷⁵ However, this later claim confuses the threshold issue of the circumstances at law justifying the making and imposition of a control order, with the proportionality issues as appropriate and adapted to individual circumstances, and therefore falling within the scope of Commonwealth constitutional power underpinning the legislation.

The second major issue arising from the PJCIS review is the Committee’s approach to two existing and completed reviews relating to control orders under Division 104 of the *Criminal Code* (Cth). These two reviews were the separately conducted COAG Review (Whealy QC review)⁷⁶ and the Independent National Security Legislation Monitor Second Annual Report.⁷⁷

The PJCIS insufficiently engaged with the recommendations in these two reports, which were raised in various submissions to the PJCIS inquiry.⁷⁸ The COAG Review recommended in May 2013 that:⁷⁹

on the material before it, the control order system should continue at the present time. We believe that the clear purpose of protecting the community and preventing a terrorist attack in Australia presently warrants the continuance of the legislation. There remains a genuine risk of terrorist activity in this country, although the level should not be exaggerated. On that basis, control orders are, for the time being, necessary and justified in the counter-terrorism legislative scheme. We consider however that the present safeguards are inadequate and that substantial change should be made to provide greater safeguards against abuse...

or assistance in a terrorist act – provided the defendant satisfies an evidential burden in relation to these matters as they apply. Under s 13.3 (3) and 13.3 (6) of the *Criminal Code* an ‘evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

⁷⁵ *PJCIS Advisory Report October 2014*, above n 3, 59 citing the s 104.4(1)(d) requirement that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, to listed purposes (i), (ii) and (iii).

⁷⁶ Australian Government *Council of Australian Governments Review of Counter-Terrorism Legislation* (Report)(Attorney-General’s Department, Canberra, 2013).

⁷⁷ Australian Government *Independent National Security Legislation Monitor Second Annual Report* (Department of Prime Minister and Cabinet, Canberra, December 2012).

⁷⁸ See, for example, the submission contributions on this point of the Australian Human Rights Commission, the Gilbert and Tobin Centre of Public Law, the Human Rights Law Centre and the Law Council of Australia: *PJCIS Advisory Report October 2014*, above n 3, 52-53, 56.

⁷⁹ *Council of Australian Governments Review of Counter-Terrorism Legislation*, above n 76, 54, (See also Recommendation 26).

The COAG Review then proceeded to make several consequential recommendations - dealing with the basis for seeking the Attorney-General's consent, changes to the definition of an issuing court, circumscribing control orders as of last resort and emphasising criminal prosecution as a preferable approach, the introduction of Special Advocates, the provision of a minimum standard of disclosure of information to the controllee, a prohibition against relocation orders, hours limitation on curfews and communications restrictions, and a least interference principle applying to terms of an interim control order and oversight of control orders by the Commonwealth Ombudsman.⁸⁰

The INSLM Second Annual Report for 2012 recommended that 'The provisions of Division 104 of Part 5.3 of the Code should be repealed. Consideration should be given to replacing them with Fardon type provisions authorising (control orders) against terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and presenting a continuing dangerousness'⁸¹ Earlier in the INSLM 2012 Report, it was observed:⁸²

Even if by misfortune those numbers were to increase appreciably, the proper response need not and should not involve (control orders) in their present form. Instead, the twofold strategy obtaining elsewhere in the social control of crime should govern. First, investigate, arrest, charge, remand in custody or bail, sentence in the event of conviction, with parole conditions as appropriate. Second, and sometimes alternatively, conduct surveillance and other investigation with sufficient resources and vigour to decide whether the evidence justifies arrest and charge.

The PJCIS effectively sidestepped these larger issues raised by both the COAG and INSLM reviews by commenting:⁸³

⁸⁰ Ibid, Recommendations 27, 28, 29, 30, 31, 33, 34, 35, 37, 38, pages xiii to xv.

⁸¹ *Independent National Security Legislation Monitor Second Annual Report*, above n 77, Recommendation 11/4, 44.

⁸² Ibid, 48.

⁸³ *PJCIS Advisory Report October 2014*, above n 2, 58-59. A further review of the control order regime was commenced by INSLM, arising from the Government Response to Recommendation One of the *PJCIS Advisory Report November 2014*: See George Brandis, 'Government Response To The Committee Report On The Counter-Terrorism Legislation Amendment Bill (No 1) 2014' (Attorney General Media Release 25 November 2014) 'The Government supports the next Monitor considering the recommendations of the Council of Australian Governments review in light of the proposed expansion of the control order regime and will task the next Monitor on their appointment with conducting such a review' <<https://www.attorneygeneral.gov.au/MediaReleases/Pages/2014/FourthQuarter/25November2014-GovernmentResponseToCommitteeReportOnTheCounter-TerrorismLegislationAmendmentBillNo1-2014.aspx>> The INSLM web page previously noted under

The Committee recognises that any proposed amendments to the control order regime are likely to trigger significant debate over the continued existence of these powers. On the basis of evidence provided, the Committee is satisfied that it is necessary and appropriate that the AFP continue to have access to these powers in the fight against terrorism...Given the scope of this inquiry, the Committee proposes to confine its consideration to the amendments proposed in this legislation. It is appropriate that broader issues raised by submitters be considered as part of a more comprehensive review of the operation of the control order regime.

Accordingly, the PJCIS failed to seriously engage with the many improvements suggested by the Whealy COAG Committee recommendations, let alone contemplate the more substantial reforms canvassed by the INSLM. These recommendations were not sufficiently scrutinised, considered, adapted or integrated with the PJCIS finding that ‘the existing ground (providing training to, or received training from, a listed terrorist organisation is unnecessarily narrow and does not adequately capture the range of circumstances where a person may present a risk’⁸⁴ and the extension of categories for which a control order could be sought. Instead, the approach of the PJCIS to support this extension is shaped and backgrounded more by considerations of resourcing and a preference for, and flexibility of, executive discretion (in place of more substantive restraints of the kind recommended in the COAG Committee report). The PJCIS disappointingly deflects, rather than engages, critiques and improves upon the recommendations of both the COAG Committee and the INSLM. An interesting rejoinder to the PJCIS approach to the COAG Review is found in the INSLM Inquiry into control order safeguards.⁸⁵

the heading ‘Current inquiries’ that the INSLM ‘is considering submissions received in relation to the reference from the Prime Minister concerning certain safeguards attached to the control order regime...but further work is being delayed pending consideration of the proper scope of this inquiry...the Government has foreshadowed a further package of legislative amendments to counter-terrorism laws to be introduced...further progress on this inquiry will await knowledge of the contents of that package. Accordingly, on 29 January 2016 the INSLM completed Part 1 of the report on whether a system of special advocates should be implemented in relation to the control order regime. On 20 April 2016, Part 2 of the Control Order Safeguards Report was completed, which examined the additional recommended safeguards in the 2013 *Council of Australian Government Review of Counter-Terrorism Legislation* regarding the control order regime. See INSLM Reviews and Reports website at < <http://www.inslm.gov.au/reviews-reports> >.

⁸⁴ *PJCIS Advisory Report October 2014*, above n 3, 59.

⁸⁵ See Independent National Security Legislation Monitor, *Control Order Safeguards- (INSLM Report) Special Advocates and The Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, 10: ‘That the recommendation of the COAG Review as to the introduction of a system of special

C *Declared areas offences and foreign fighters: Counter-Terrorism
Legislation Amendment (Foreign Fighters) Act 2014 (Cth)*

The declared areas provisions were introduced by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth)*⁸⁶ and were seen as a response to the troubling issue of Australian nationals and permanent residents travelling abroad with the intention of engaging in ISIS led terrorism activities.

Two sets of problems emerge in relation to the foreign fighters issues from the PJCIS review and report⁸⁷ and the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) amending Division 119 part 5.5 of the *Criminal Code (Cth)*. Amongst the four pieces of 2014 and early 2015 legislation, this legislation perhaps displays the greatest concentration and reliance of executive discretion for its fair administration.

The first problem relates to the breadth of the declared areas foreign fighter offences, including standards of proof and recognised exemptions. The severity of some aspects of the application of the declared areas legislation is striking, and emerges from difficulties and problems of proof in the evidentiary circumstances linking the alleged involvement of Australian nationals and residents with overseas conflict zones involving ISIS in the Middle East.

The PJCIS was assured about the importance and the consequences of the legislation, comfortable about the risks involved, as well as the capacity of future review responding to outstanding controversies:⁸⁸

The Committee received compelling evidence in its inquiry about limitations of existing offences in regard to foreign incursions and their reliance on foreign evidence. These limitations have meant that the existing set of laws in this area have not been strong enough to deal with the current threat posed by Australians travelling overseas to fight in foreign conflicts on behalf of listed terrorist organisation...the Committee is convinced that the new offence for entering, or remaining in, a declared area is necessary...the Committee notes that there are a range of existing important safeguards in the Bill that would make it unlikely that any prosecution would proceed against a person who entered a declared area against their will, or who remained in a declared area when it was not safe to leave...Some members of the Committee

advocates into the control order regime be accepted and implemented, if proposed s 38J of the NSI Act in Schedule 15 of the 2013 Bill is to become law.⁷

⁸⁶ For a brief summary of the Bill, see George Williams and Keiran Hardy, above n 63; Duncan McConnel, above n 33, 18-19; Spencer Zifcak, above n 33, 23.

⁸⁷ *PJCIS Advisory Report October 2014*, above n 3.

⁸⁸ *Ibid*, 103, 104, 105.

questioned whether the legitimate concerns presented in evidence had been adequately addressed, particularly in relation to the evidential burden and limited range of legitimate purposes for travel to declared areas. The Committee notes that the proposed INSLM and Parliamentary Joint Committee on Intelligence and Security reviews leading into the sunset provision will enable this to be more fully explored.

The above approach reflects the general disposition (as seen in other situations) of the PJCIS favouring significant latitude in the exercise of executive discretion, with expectations of moderation and reasonableness in the application and decision making processes under terrorism legislation, including prosecution. By floating the prospect of further review and a sunset provision, the PJCIS was able to disengage from the more problematic issues raised in the submissions and manage and navigate differing committee membership views, making a series of modest recommendations.⁸⁹ However, some significant issues were not ameliorated by the recommendations and subsequent amendments upon enactment of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), indicate a continuing legislative overreach.

According to the Explanatory Memorandum for the Bill,⁹⁰ the fault elements of both knowledge and recklessness will apply in relation to the fact of declaration of an area within the terms of s 119 (3). As a consequence, where a person enters into or remains in a declared area in a foreign country – under a standard where such person may not have actual knowledge of the declaration of the area – before or subsequent to entry – under s 119 (3), the defendant is put to an evidential burden to satisfy at least one of the seven sole purpose legitimate purposes under s 119.2 (3) or an additional purpose (as yet unspecified) prescribed by regulations under s 119.2 (3) (h).

Accordingly, because persons who have entered into, or remained in a declared area, without actual knowledge of that declaration under s 119.3 are potentially subject to a criminal charge and criminal trial process without more – there is no need for the prosecution to show a terrorist related intent relating to the entry or remaining in the prescribed area (this form of intent is imputed from the circumstances of the declaration under s 119.3 that a listed terrorist organisation is engaging in hostile activity in the declared area).

⁸⁹ Ibid, Recommendations 18, 19, 20 and 21 of the *PJCIS Advisory Report 2014*. The Government Response supported each of these recommendations: see Brandis, above n 66 (Schedule)

⁹⁰ *Explanatory Memorandum to Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Cth), 47.

There are assumptions in the PJCIS report and the legislation of adequate safeguards – in particular, the requirement of the written consent of the Attorney General for the institution of proceedings under Division 119 of the Criminal Code (Cth) and the s 119.2 (3) listing of exceptions (on an evidential burden for the accused) to the application of the s 119.2 offence. However, this means that an entirely innocent person may be subject to the processes of charge, arrest, remand in custody or bail, and with the consent of the Attorney General to a prosecution, be obliged to satisfy at trial an evidential burden in relation to the legitimate purposes of s 119.2 (3). That section further requires that the entry into, or remaining in, the area has to be solely for one or more of the purposes listed in s 119.2 (3) (a) to (h).

The s 119.2 offence (which carries a penalty of 10 years imprisonment) would operate most onerously in the case of a person who enters an undeclared area which is then subsequently declared and remains in that area (without knowledge that the area has been declared under s 119.3) subsequent to the declaration. In practical terms in this situation, s 119.2 works both to impute an intention of ill motives (until rebutted on an evidential burden) and to impute an awareness of the declaration by the application of the recklessness criterion as the fault element in relation to the continuing presence in the now declared area.

Further, note 2 in the text after s 119.2 (5) states that ‘Sections 10.1 and 10.3 also provide exceptions to subsection (1) of this section (relating to intervening conduct or event and sudden or extraordinary emergency respectively)’. However, s 10.1 of the *Criminal Code* (Cth) ‘intervening conduct or event’ states that ‘A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if (a) the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and (b) the person could not reasonably be expected to guard against the bringing about of that physical element’.

However, fault elements of knowledge and recklessness apply to the physical element of entry into and remaining in the declared area in the s 119.2 offence, so these are clearly not physical elements to which absolute liability or strict liability applies. Hence a person prosecuted for the s 119.2 offence could not on this point avail themselves of the intervening conduct or even defence.

The second issue relates to the presence of pro-Western fighters in prescribed areas. A significant issue arises with the additional, if underplayed complication, of the presence of Australian citizens or residents in these areas fighting for pro-Western groups opposed to ISIS. These individuals or groups are also prima facie subject to the s 119.2 offence of entering or remaining in a declared area in a foreign country.⁹¹ Rather than providing for a general defence added to s 119.2 (3) as to substantive criminal liability, or for sentencing mitigation purposes, of entering or remaining in a declared area whilst participating with, or being involved with, an allied force, s 119.2 (4) states that the substantive s 119.2 (1) offence does not apply if the person enters in, or remains in the area...with (b) any other armed force if a declaration under subsection 119.8(1) covers the person and the circumstances of the person's service in or with the force.⁹² Accordingly, this exemption is reliant upon ministerial action in making such a declaration. If the declaration is made under s 119.8, the exception will in any case only apply under s 119.4 if the defendant satisfies an evidential burden.⁹³ It awaits to be seen how this legislative arrangement will operate and be applied in the case of a returning Australian citizen or resident who has engaged in participatory or supportive activities with pro-Western groups opposed to ISIS.⁹⁴ In practical terms, it appears to leave undue reliance upon the making of a Ministerial declaration, or alternatively (on a political assessment of public opinion) exercising an informal discretion not to prosecute.

⁹¹ S 119.2 (1) *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*.

⁹² S 119.8 of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) provides the declaratory process- stating in (1) The Minister may, by legislative instrument, declare that section 119.1 or 119.2 does not apply to a specified person or class of persons in any circumstances or specified circumstances if the Minister is satisfied that it is in the interests of the defence or international relations of Australia to permit the service of that person or class of persons in those circumstances in or with (a) a specified armed force in a foreign country; or (b) a specified armed force in a foreign country in a specified capacity.

⁹³ See Note to s 119.2 (4) A defendant bears an evidential burden in relation to a matter in subsection (4).

⁹⁴ See 'Foreign Fighters grilled by Crime Commission as organised crime links increase' *Sydney Morning Herald* (Sydney) 31 January 2016.

D *Broadening the coverage and increasing the penalties for unlawful disclosure of national security information: National Security Legislation Amendment Act (No 1) 2014 (Cth)*

The significant expansion of situations involving unauthorised disclosure of national security information and substantial increases in penalties was brought about by the *National Security Legislation Amendment Act (No 1) 2014 (Cth)*.⁹⁵ Such significant expansion of circumstances and penalties for unlawful disclosure of national security information,⁹⁶ through the creation of multiple offences, owes much to the perceived consequences overseas of unauthorised national security information releases by Edward Snowden and Julian Assange.⁹⁷ It is also most likely influenced by a consideration of the protection of intelligence obtained under the intelligence sharing arrangements of the Five Eyes intelligence countries⁹⁸ and the need for these nations to have continuing, absolute confidence in the security of their intelligence information shared with their partner countries.

Indicative of the executive orientation in the protection of information is the failure to include carefully constructed public interest disclosure provisions, or defences leading to a reduction of charge or sentence, in circumstances where disclosure is made of illegalities and improprieties in the conduct of intelligence agencies, or protection or mitigation for journalist disclosures and journalist sources in such circumstances. The initial legislative drafting of the Bill was sufficiently poor as to demonstrate little regard for accountability principles in these circumstances, even within the narrow scope of disclosure to the Inspector General of Intelligence and Security.

The PJCIS cited the main concerns of submissions to this inquiry, centred around new offences and increased penalties,⁹⁹ but peremptorily dismissed

⁹⁵ For a basic outline of this legislation, see Williams and Hardy, above n 33, 68.

⁹⁶ For a discussion of the extant legislation criminalising the communication of national security information by members of the intelligence services, see Keiran Hardy and George Williams 'Terrorist, Traitor or Whistleblower? Offences and Protections In Australia For Disclosing National Security Information' (2014) 37 *University of New South Wales Law Journal* 784.

⁹⁷ The attitude of the Commonwealth Attorney General to the activities of Edward Snowden is most clearly outlined in George Brandis, 'Securing our Freedoms' (Speech to the Centre for Strategic and International Studies, Washington DC 8 April 2014) <<https://www.attorneygeneral.gov.au/Speeches/Pages/2014/Second%20Quarter%202014/8April2014SecuringourFreedoms.aspx>>.

⁹⁸ United States, United Kingdom, Canada, Australia and New Zealand under the UKUSA Signals Interception Agreement.

⁹⁹ *PJCIS Advisory Report September 2014*, above n 3, 64.

them. It stated that ‘these issues were addressed in detail by the Department and ASIO in a supplementary submission to the inquiry...The Committee appreciates the necessity of offences for unauthorised handling and communication of information held by intelligence agencies, and recognises the Bill’s intent to close legislative gaps and strengthen the integrity of the existing secrecy provisions.’¹⁰⁰

The severe approach by the Government on this issue (supported by the dismissal of various legally based concerns raised by IGIS in evidence)¹⁰¹ is perhaps best reflected in the multiplicity of new, tailored disclosure offences and the penalties attaching to them. There is a very significant penalty increase in the foundation offence in the *ASIO Act 1979* (Cth) of communicating sourced ASIO information or matter from 2 years to 10 years.¹⁰² New and substantial extended offences were also inserted in the *ASIO Act 1979* (Cth) of unauthorised dealing with records¹⁰³ and unauthorised recording of information or matter,¹⁰⁴ both offences carrying a penalty of three years imprisonment.

These arrangements form a template allowing for a raft of new protection of intelligence information offences for the other national security and intelligence agencies included under the *Intelligence Services Act 2001* (Cth).¹⁰⁵ Commencing with the communication of certain information matter, the penalty for such disclosures in ASIS, AGO and ASD is increased to ten years imprisonment,¹⁰⁶ whilst new comparable communication of certain information offences (with a penalty of ten years imprisonment) are introduced for ONA and DIO.¹⁰⁷ Schedule 6 of the *National Security Legislation Amendment Act (No 1) 2014* (Cth) also introduced offences of unauthorised dealing with records¹⁰⁸ and unauthorised recording of information or matter,¹⁰⁹

¹⁰⁰ Ibid, 65, 66.

¹⁰¹ Ibid, 66.

¹⁰² See amended s 18(2) of the *ASIO Act 1979* (Cth) as amended by Item 2 Schedule 6 of the *National Security Legislation Amendment Act (No 1) 2014* (Cth).

¹⁰³ S 18A of the *ASIO Act 1979* (Cth).

¹⁰⁴ S 18B of the *ASIO Act 1979* (Cth).

¹⁰⁵ The *Intelligence Services Act 2001* (Cth) includes provisions relating to the Australian Secret Intelligence Service (ASIS), the Australian Signals Directorate (ASD), the Australian Geospatial Intelligence Organisation (AGO), the Defence Intelligence Organisation (DIO) and the Office of National Assessments (ONA).

¹⁰⁶ See amended ss 39, 39A and 40 of the *Intelligence Services Act 2001* (Cth).

¹⁰⁷ See new s 40A and s 40 B of the *Intelligence Services Act 2001* (Cth).

¹⁰⁸ See ss 40C, 40E, 40G, 40 J and 40 L of the *Intelligence Services Act 2001* (Cth) as introduced by Schedule 6 of the *National Security Legislation Amendment Act (No 1) 2014* (Cth).

each with a penalty of three years imprisonment, for each of the five intelligence agencies falling under the *Intelligence Services Act 2001* (Cth).¹¹⁰ The coverage is therefore comprehensive and it is likely that for reasons of deterrence and emphasis, that the offences are separately drafted to apply to each intelligence agency.

In another modest amendment responding to a recommendation of the PJCIS report, disclosure provisions were modified under the *Public Interest Disclosure Act 2013* (Cth) to clarify the permitted disclosures from personnel of these intelligence agencies to the Inspector General of Intelligence and Security. Some relatively minor ameliorative changes to the legislation's deficient drafting were made only after the PJCIS responded in its inquiry to submissions regarding information preparation for and communication of information to IGIS.¹¹¹ However, it was the submission¹¹² and evidence¹¹³ of the IGIS herself that is ultimately persuasive on this point – leading to Recommendation 14 of the PJCIS Report¹¹⁴ and the acceptance of that recommendation in the Government Response,¹¹⁵ subsequently reflected in amendments to the Bill.

E *Journalist information disclosure warrants: Telecommunications*
(Interception and Access) Amendment (Data Retention) Act 2015 (Cth)

The fourth and equally controversial piece of terrorism legislation related to the creation of legal obligations for internet service providers to store and retain meta data for intelligence, law enforcement and investigative purposes, ultimately enacted in the *Telecommunications (interception and Access)*

¹⁰⁹ See ss 40D, 40F, 40 H, 40 K and 40 M of the *Intelligence Services Act 2001* (Cth) as introduced by Schedule 6 of the *National Security Legislation Amendment Act (No 1) 2014* (Cth).

¹¹⁰ Namely the Australian Secret Intelligence Service, the Australian Geospatial Organisation, the Australian Signals Directorate, the Office of National Assessments and the Defence Intelligence Organisation.

¹¹¹ *PJCIS Advisory Report September 2014*, above n 2, 65, reference to Submission 5.

¹¹² *Ibid*, reference to Submission 4.

¹¹³ Commonwealth, *Committee Hansard (PJCIS)* 15 August 2014, 6 and cited in *PJCIS Advisory Report September 2014*, above n 2, 65.

¹¹⁴ *PJCIS Advisory Report September 2014* above n 3, Recommendation 14.

¹¹⁵ See Brandis, above n 36, response to recommendation 14 of *PJCIS Advisory Report September 2014* <<https://www.attorneygeneral.gov.au/MediaReleases/Pages/2014/ThirdQuarter/19September-2014GovernmentResponseToCommitteeReportOnNationalSecurityLegislationAmendmentBillno-12014.aspx>>.

Amendment (Data Retention) Act 2015 (Cth). This fourth piece of legislation was not backgrounded by the same level of review that the subject matters of the other three pieces of legislation had received. The PJCIS Report of the Inquiry into Potential Reforms of Australia's National Security Legislation (May 2013) stated in Recommendation 42 that:¹¹⁶

There is a diversity of views within the Committee as to whether there should be a mandatory data retention regime. This is ultimately a decision for the Government. If the Government is persuaded that a mandatory data retention scheme should proceed, the Committee recommends that the Government publish an exposure draft of any legislation and refer it to the Parliamentary Joint Committee on Intelligence and Security for examination.

Ultimately, in spite of the diversity of views of the PJCIS, no exposure draft was produced. However, the methodology and timing of the consideration of this legislation was an improvement upon the three previous tranches of terrorism legislation, each with their discrete problems identified above. The timing of the Parliamentary Committee reports on the fourth tranche of national security legislation, the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth)¹¹⁷ allowed more interactive opportunities between the two Committees – the PJCIS and PJCHR. The Bill was introduced into the House of Representatives on 30 October 2014.¹¹⁸ The Attorney General referred the Bill to the PJCIS on 21 November 2014, with a request to report by 27 February 2015.¹¹⁹ The PJCIS had already sketchily examined proposals for a mandatory data retention program (the core subject matter of the present Bill) as part of the earlier inquiry of a range of potential reforms of Commonwealth national security legislation.¹²⁰ The PJCHR conducted an examination of the present Bill as part of its Fifteenth

¹¹⁶ *PJCIS Potential Reforms Report May 2013*, above n 20, Recommendation 42, 192.

¹¹⁷ For a brief overview discussion of this Bill, see George Williams and Keiran Hardy, 'National Security Reforms Stage Three: Metadata' (2015) (February) *Law Society of New South Wales Journal* 70 and Duncan McConnel, above n 33, 18, 19.

¹¹⁸ See Commonwealth, *Parliamentary Debates*, House of Representatives, 30 October 2014, 5 (Malcolm Turnbull); George Brandis and Malcolm Turnbull, 'Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014' (Attorney General and Minister for Communications Joint Media Release 30 October 2014) <<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/30October2014-TelecommunicationsInterceptionAndAccessAmendmentDataRetentionBill2014.aspx>>.

¹¹⁹ *PJCIS Advisory Report February 2015*, above n 3, 2.

¹²⁰ *PJCIS Potential Reforms Report May 2013*, above n 20, Chapter 5 'Data Retention'.

Report of the 44th Parliament¹²¹ and reported to the Parliament on 14 November 2014. This timing meant that public submissions to the inquiry into the Bill by the PJCIS and the PJCIS report itself could make some reference to and engage with the recommendations of the report of the PJCHR¹²² Accordingly, the human rights compliance issues of the Bill could not be marginalised by the timing of legislative debate and passage. However, what it is striking is that relatively little positive response was made to the recommendations of the PJCHR report through the medium of the PJCIS Advisory Report and ultimately in the Government Response to that report.¹²³

The most prominent aspect arising from the Telecommunications (Interception and Access) Amendment (Data Retention) Bill related to the chilling impact upon political and public interest deliberation and communication (through the sourcing and dissemination of information) arising through the internal approval processes which allow availability of personal meta data to intelligence services and law enforcement agencies, facilitating the identification of a web of contacts and associations of targeted individuals. In this sense the Telecommunications (Interception and Access) Amendment (Data Retention) Bill is best contextually appreciated as providing a complementary legislative interface with the preceding Executive interests to secure national security data through the inclusion of all Australian intelligence and national security agencies, as well as significantly enhanced penalties in the *National Security Legislation Amendment Act (No 1) 2014* (Cth).¹²⁴ Of

¹²¹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fifteenth Report of the 44th Parliament Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Bills introduced 20-30 October 2014* (hereafter *PJCHR Fifteenth Report of the 44th Parliament*). See the discussion of human rights compatibility of the *Telecommunications (interception and Access) Amendment (Data Retention) Bill 2014* (Cth) at pages 10-22 of that report, which focuses on rights under Art 17 ICCPR (right to privacy) Art 19 ICCPR (right to freedom of opinion and expression) and Art 2 ICCPR (right to an effective remedy)

¹²² See for example, *PJCIS Advisory Report February 2015* at 38, 63, 98, 247.

¹²³ George Brandis and Malcolm Turnbull, 'Government Response To Committee Report On The Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014', (Media Release Attorney General Hon George Brandis and Minister for Communications Hon Malcolm Turnbull 3 March 2015) <<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/Government-Response-To-Committee-Report-On-The-Telecommunications-Interception-And-Access-Amendment-Data-Retention-Bill.aspx>>.

¹²⁴ See *PJCIS Advisory Report September 2014*, above n 3, 20-21, 55-59 (Protection for Special Intelligence Operations) and 27-28 and 64-66 (Offences for unauthorised handling and communication of information) and the *National Security Legislation Amendment Act No 1 2014* (Cth). The *National Security Legislation Amendment Act 2014* (Cth) is discussed in the immediately preceding section of this article 'Broadening the coverage and increasing the penalties for unlawful

particular interest to the Executive in controlling national security information and in the construction of a national security narrative around terrorism laws, is the issue of access to the meta data of journalists. The two pieces of legislation can be properly seen as conjointly operating, for example, in accessing the meta data of journalists in the investigation and tracing of the leakage of national security information from Australian intelligence agencies, where prima facie breaches of one or more offences under the *National Security Legislation Amendment Act (No 1) 2014* (Cth) have arisen.

The question of confidentiality of journalist sources emerged at the PJCIS inquiry into the Bill. The PJCIS noted ‘the capacity for telecommunications data to be used to identify confidential sources’, recognising that this may have a chilling effect on public debate and acknowledging ‘the importance of recognising the principle of press freedom and the protection of journalists’ sources’.¹²⁵ It then recommended ‘that the question of how to deal with the authorisation of a disclosure or use of telecommunications data for the purpose of determining the identity of a journalist’s source’¹²⁶ be separately reviewed by the PJCIS. This clearly flagged the issue as one unexpectedly complicated and important, such that a separate inquiry was warranted. The Government Response supported this approach,¹²⁷ but with the salutary rider (premised upon a formal, rather than more substantive and consequential conception of the rule of law) that ‘The Government notes that Australia’s existing legal framework is founded on robust legal principles to provide fair and equal treatment of all subject to its laws’.¹²⁸ On 4 March 2015, the Attorney General referred this additional question to the PJCIS for inquiry and report.¹²⁹

However, prior to the PJCIS conducting its further inquiry, amendments providing for a journalist information warrant scheme were introduced into the Bill.¹³⁰ These amendments now form Division 4C of the *Telecommunications*

disclosure of national security information from the intelligence agencies – the *National Security Legislation Amendment Act (No 1) 2014* (Cth).

¹²⁵ *PJCIS Advisory Report February 2015*, above n 3, 257, 258.

¹²⁶ *Ibid*, 258 Recommendation 26.

¹²⁷ Brandis and Turnbull, above n 123, Response to Recommendation 26.

¹²⁸ *Ibid*.

¹²⁹ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the authorisation of access to telecommunications data to identify a journalist’s source* (March 2015), 1 (hereafter *PJCIS Inquiry Report March 2015*).

¹³⁰ Such was the speed of these amendments that they ‘passed the House of Representatives on 19 March 2015 and the Senate on 26 March 2015’: *Ibid*, 2.

(*Interception and Access*) Act 1979 (Cth), applying where the making of an authorisation has a specific purpose ‘to identify another person whom the eligible person knows or reasonably believes to be a source’.¹³¹ The scheme is a product of a bipartisan arrangement reached with the Opposition,¹³² and consequently carries a strong element of political expediency over the proper safeguarding of the public interest in the right to know and informed democratic deliberation, even about national security matters, central to the craft of journalism. Significantly, the PJCIS endorsed this approach, even where the effect was to exclude direct consideration of public submissions and expert witnesses.¹³³

Separate authorisation processes exist for journalist information warrants in relation to ASIO and for enforcement agencies.¹³⁴ The scheme may fairly be described as controversial, through the weighting of disclosure interests of journalist sources,¹³⁵ the definition of who constitutes a journalist for the warrant,¹³⁶ and the circumscribed role of the Public Interest Advocate.¹³⁷ The limitations of the Public Interest Advocate scheme again arose with the appointment of two retired Supreme Court judges to carry out that role,¹³⁸

¹³¹ See s 180 G (1)(b) and s 180 H (2)(b) of the *Telecommunications (Interception and Access) Act 1979* (Cth).

¹³² See *PJCIS Inquiry Report March 2015*, above n 129, 2: ‘The development of these amendments reflects the spirit of bipartisanship that has characterised the cooperative work of the Committee in its consideration of a mandatory data regime. The Committee supports these amendments to protect journalists’ sources’.

¹³³ *Ibid*, 2, ‘Given these developments, the Committee has determined to conclude its formal inquiry on the matter’.

¹³⁴ See Chapter 4 Subdivision B and Chapter 4 Subdivision C respectively of the *Telecommunications (Interception and Access) Act 1979* (Cth).

¹³⁵ See s 180 L (2) b and s 180 T (2) b of the *Telecommunications (Interception and Access) Act 1979* (Cth), noting that in both instances the relevant decision maker – The Attorney General or Issuing Authority – has a general capacity in reaching his or her decision whether to issue the warrant to consider other matters they personally consider relevant- s 180 L (2)(b)(vi) and s 180 T (2)(b)(vi).

¹³⁶ The phrase repeatedly used in the *Telecommunications (Interception and Access) Act 1979* (Cth) is ‘(i) a person who is working in a professional capacity as a journalist; or (ii) the employer of such a person’ As such, new media, social media and citizenship journalism are in all events excluded, significantly limiting the check and balance on accessing the meta data of those generating public commentary through modern technology and modern platforms and non traditional means, such persons often being the first to engage breaking national security related stories. .’

¹³⁷ s 180 x of the *Telecommunications (Interception and Access) Act 1979* (Cth).

¹³⁸ See ‘Ex-judges to defend journalists’ sources’ *Sydney Morning Herald* (Sydney) 25 January 2016, 5; ‘Malcolm Turnbull appoints ex judges to defend journalist under data retention laws’ *Brisbane Times* (Brisbane) 24 January 2016 - the latter article is critical of the fact that the two retired judges have no background in media or journalism and that the Public Interest Advocate scheme operates in secret. Journalists are not notified that a warrant application has been made, there is an offence for revealing that a warrant has been sought and that the Public Interest Advocates cannot consult with the journalists against whom the warrants are being sought.

with no publicity surrounding the appointments and knowledge of the appointments emerging through a Freedom of Information request.¹³⁹ These renewed and continuing criticisms of the bipartisan arrangement clearly reflect earlier conceptual questions and responses raised by the PJCIS and PJCHR reviews. The scheme – while pre-empting further review by the PJCIS – obviously did not assimilate the more rigorous warrant protections advanced by the PJCHR.

The legislative amendment instituting a warrant scheme for the specific subject matter of journalist information¹⁴⁰ and sources forms a narrow exception to the general access provisions to meta data, unrestricted by a warrant process. This is in stark contrast to the approach of the PJCHR. The PJCHR proportionality analysis led to a recommendation of a warrant application process to apply for all requests to access meta data.¹⁴¹ This was on the basis of findings by the Court of Justice of the European Union (drawing upon the principles of the European Convention of Human Rights) that ‘the absence of a requirement that access to data be subject to prior review by a court or independent administrative body’ was a relevant factor in the Court’s finding that EU mandatory data retention law was invalid, as that aspect of the law was not limited to what was strictly necessary.¹⁴² Again, the PJCIS response to the warrant scheme question was predictable within the framework approach as noted above – the balancing methodology with its security bias was quite explicit.¹⁴³ This framework prioritised an acceptance of Government evidence relating to the efficacy of meta data use,¹⁴⁴ re-casting the accountability aspect

¹³⁹ See ‘Ex-judges to defend journalists’ sources’ *ibid* and ‘Malcolm Turnbull appoints ex judges to defend journalists under data retention laws’, *ibid*.

¹⁴⁰ Division 4C of the *Telecommunications (Interception and Access) Act 1979* (Cth).

¹⁴¹ See *PJCHR Fifteenth Report of the 44th Parliament*, above n 121, 18 para 1.59 ‘The committee therefore recommends that, so as to avoid the unnecessary limitation on the right to privacy that would result from a failure to provide for prior review, the Bill be amended to provide that access to retained data be granted only on the basis of a warrant approved by a court or independent administrative tribunal, taking into account the necessity of access for the purpose of preventing or detecting serious crime and defined objective grounds...’

¹⁴² See the discussion relating to the judgment of the Court of Justice of the European Union in *Digital Rights Ireland Ltd (C-293/12) and Karntner Landesregierung ors (C-594/12) v Minister for Communications, Marine and Natural Resources* in PJCHR Report, 18.

¹⁴³ See *PJCIS Advisory Report February 2015*, above n 3, 245, para 6.172 ‘The formulation of safeguard and oversight mechanisms in this context requires a careful balancing of competing public interests – maximising accountability, integrity and protection of liberty while minimising adverse impacts on both the ability and agility of agencies to perform their legitimate functions of enforcing the law and safeguarding the Australian community’.

¹⁴⁴ *Ibid*, para 6.173 ‘the Committee has received compelling evidence that the introduction of a warrant process (judicial or ministerial) for access to telecommunications data would significantly

of the framework response to rely upon existing ex post facto oversight and review mechanisms.¹⁴⁵ This propelled the PJCIS to recommend against a warrant scheme of general application wherever meta data access was sought, so as a consequence, there was no need for a Government Response on this point.

The PJCHR in its human rights assessment of the Bill also engaged in a proportionality analysis regarding the right to freedom of opinion and expression (Article 19 of the ICCPR) and a right to an effective remedy (Article 2 of the ICCPR), with a particular focus upon the undisclosed retention and subsequent re-access of, and re-use of, such meta data.¹⁴⁶ It recommended that consideration be given to include a notification mechanism (including delayed notification) to subjects of application for access to the meta data, with an ability to challenge such applications for access.¹⁴⁷ This measure did not directly arise, nor was canvassed within, the PJCIS Report, and appears to have been subsumed in the generalised ex post facto review type safeguards by the Commonwealth Ombudsman, the Inspector General of Intelligence and Security and the PJCIS itself,¹⁴⁸ invoked as adequate safeguards around this complicated issue.

III COMMON ISSUES ARISING FROM PJCIS REVIEW OF THESE FIVE PROBLEMATIC TERRORISM LAW LEGISLATIVE EXAMPLES – AND POINTERS AND LESSONS FOR REFORM

The five exceptional and problematic legislative examples from 2014 and 2015 set out above both confirm and demonstrate the potential for significantly flawed legislation and for the ongoing concentration of executive power in terrorism law reforms orchestrated through a renewed urgency driven legislative process. This is particularly so with the bipartisan basis (in outlook

impede the operational effectiveness of agencies and that this would be to the detriment of the protection of the Australian community’

¹⁴⁵ Ibid, parag 6.174 ‘After close consideration of the evidence, the Committee concludes that the existing internal authorisation regime contained in the TIA Act is appropriate, noting the other safeguards and oversight mechanisms that apply’.

¹⁴⁶ See *PJCHR Fifteenth Report of the 44th Parliament*, above n 121, 20-21.

¹⁴⁷ Ibid, 21, parag 1.74.

¹⁴⁸ See *PJCIS Advisory Report February 2015*, above n 3, Chapter 7 ‘Safeguards and oversight’.

and in membership) and the largely exclusive review role of the PJCIS – with its modest and uncontroversial recommendations for amendment of these bills and its emergent practice to deflect and defer more difficult, controversial matters in its recommendations to IGIS and INSLM.

The five legislative examples and the involvement of PJCIS in their review signal some likely ongoing features in the evolution and the development of Australian terrorism law. The PJCIS role has become central to a Government conceived review and legislative role around Australian terrorism laws, occupying a prominent part of the Government's legislative agenda. Evolving characteristics associated with the role of the PJCIS review and its interrelation with Parliamentary practice in the passage of terrorism laws are important factors which help illuminate reasons for the significant flaws in the examples discussed.

A large issue flagged from the legislative and review practices around the 2014 and early 2015 terrorism law reforms is the temporality – in multiple senses – of much terrorism legislation. That temporality reflects a fragility in the status quo of terrorism legislation and the contingent nature of the legislation deferring to a set of Executive determined time pressures, an Executive favourable model of 'balance' and expectations of consensual bi-partisanship.

Such temporality has induced some of the problems identified in the five examples discussed. Temporality in one sense exists through the Government stated practice of terrorism laws being under a constant state of review,¹⁴⁹ necessarily involving the PJCIS in multiple reviews. The PJCIS has become the Parliamentary committee of choice for Government to refer proposed terrorism legislation to, but increasingly also, in reviewing legislation the subject of earlier PJCIS review recommendations. The potential or perceived Committee self-interest or conflicts in endorsing earlier recommended measures then incorporated into legislation, now the subject of such re-review,

¹⁴⁹ See the ambit statements in Tony Abbott, 'Prime Minister of Australia Statement to Parliament On National Security' (Prime Minister Of Australia Statement to Parliament 22 September 2014) *Sydney Morning Herald* (Sydney) 22 September 2014 <<http://www.smh.com.au/federal-politics/political-news/tony-abbott-national-security-statement-to-parliament-20140922-10kccx.html>>: 'So today I pledge that our security agencies will have all the resources and authority that they reasonably need...if the police and security agencies can make a case for more resources and for more powers, the government's strong disposition is to provide them'. See also Andrew Lynch, 'The Brandis Agenda' *Inside Story* 4 December 2013 <<http://insidestory.org.au/the-brandis-agenda>>

has neither been recognised or factored into the review processes, nor in assessing the merits of PJCIS recommendations.

A further issue of temporality arises in relation to the reintroduced and reinvigorated Government paradigm of legislative urgency – the PJCIS itself has complained of the inadequate and truncated time frames to conduct and complete its reviews,¹⁵⁰ such practices excluding or reducing the opportunity for considered and detailed public and expert submissions to the Committee review processes. Temporality emerges also as a response to time pressures arising in this context of the paradigm of legislative urgency and constant review of terrorism laws – that of the willingness of the PJCIS to divert and deflect the most problematic legislative issues through bipartisan agreement, picking up most of the preferred Executive-orientated approaches but externalising beyond the PJCIS further review responsibilities unable to be instantly engaged. This includes in PJCIS recommendations a specified subsequent review or participatory role for IGIS or INSLM, thereby outsourcing major review responsibilities, otherwise properly addressed in the formative stages of the legislation by the PJCIS itself. Arguably, this deferral and outsourcing undermines the credibility and centrality of the PJCIS providing recommendations to steer Parliament away from present excesses, predictable errors and anticipated adverse consequences arising from the bill presently the subject of scrutiny.¹⁵¹ It signals that it is acceptable for Parliament to enact a bill where a significant issue has been identified, but not resolved, and to do so in a manner inconsistent with assumptions around Parliamentary practice and

¹⁵⁰ See for example, *PJCIS Advisory Report October 2014*, above n 3, 3: ‘Nearly every submission to the inquiry commented on the short timeframes. The intensive nature of the inquiry and the short timeframes placed significant demands on the Committee. While the Committee recognises and understands that this resulted from exceptional circumstances, it would have been preferable if more time had been available for that inquiry’. The last two sentences of the preceding quote are repeated in the separate and subsequent report: *PJCIS Advisory Report November 2014*, above n 3, 3.

¹⁵¹ Two clear and recent examples of this fundamentally flawed legislative process emerging out of the PJCIS review process are the draconian character of s 35P *ASIO Act* prohibitions on the reporting of Special Intelligence Operations, and on the disregard shown by the PJCIS in relation to the COAG Committee recommendation regarding Special Advocates- matters contrarily responded to in the reports of the *INSLM Report on the impact on journalist of section 35P of the ASIO Act* (21 October 2015), above n 55 and *Control Order safeguards – (INSLM Report) Special Advocates And The Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (29 January 2016), above n 66. For these matters, see the relevant discussion in this article above under the headings, ‘Section 35 P *ASIO Act* 1979 (Cth) Special Intelligence Operation – civil and criminal immunities from legal process and prohibitions on, and criminal penalties for, the disclosure of Special Intelligence Operation information’ and ‘Extending the application of Division 104 of *Criminal Code* (Cth) control orders in the context of foreign fighter participation and assistance’.

legislative process of restraint and circumspection as aiding the protection of rights.¹⁵²

The temporality of this legislation is further evident because the legislation emerging from and enacted subsequent to the PJCIS review process provides a less than optimal legislated response to an identified public policy question, meaning it is likely to have to be revisited and remedially amended in the future. The conduct of these review processes – as a precursor to legislative enactment – also symbolically treats the Parliamentary process with less consideration and respect than it demands,¹⁵³ ironically as legislated responses to terrorism are meant to secure and safeguard the foundations, values and institutions of liberal democracy, including the institution of the Commonwealth Parliament. This conduct subtly undermines in the public sphere Parliamentary esteem and Parliament as an institution such that bipartisan invocations of national interest in the rapid passage of serial terrorism laws lose credibility and more accurately resemble accretions of executive power.

The five problematic legislative examples also raise the issue of PJCIS review as a legitimating process, providing demonstrable public reassurance in the enactment and normalisation of ongoing terrorism laws,¹⁵⁴ and a distraction from increasing concentrations of executive power and discretion within them. That PJCIS role has been critical in having each of the five selected legislative examples passed, for it assumes, drawing upon principles of Parliamentary

¹⁵² See George Williams, 'The Legal Assault on Australian Democracy The Annual Blackburn Lecture' (2015) 236 *Ethos* 18, 18, 23 which notes the traditional assumptions that the 'preservation of Australian democracy depends upon legislators exercising self-restraint' and that 'Over the course of many decades, Australian parliamentarians have usually not sought to pass laws that undermine Australia's democratic system' have been increasingly breached and contested since September 2001, so that 'Past conventions and practices that lead parliamentarians to exercise self-restraint with regard to democratic principles were put aside in the name of responding to the threat of terrorism'. On a similar theme see also George Williams, 'The Legal Legacy Of The 'War On Terror'' (Annual Tony Blackshield Lecture, Macquarie Law School, Macquarie University, 10 October 2013) (2013) 12 *Macquarie Law Journal* 3, 15-16.

¹⁵³ For criticism of the lack of respect shown to the Parliamentary process in legislating for these national security laws, see Gabrielle Appleby, 'The 2014 Counter-Terrorism Reforms In Review' (2015) 26 *Public Law Review* 4, 10.

¹⁵⁴ The normalisation of terrorism laws, through the removal or reduction of their characteristic of exceptionality, allows legal principles and models from those laws to be migrated to other legal policy areas, a phenomenon noted by other commentators: see Ananian-Welsh and Williams, above n 15; George Williams, 'The Legal Assault on Australian Democracy', above n 152, 23; Gabrielle Appleby and John Williams 'The Anti-Terror Creep: Law and Order, the States and the High Court of Australia' in Nicola McGarrity, Andrew Lynch and George Williams (eds) *Counter-Terrorism and Beyond The Culture of Law and Justice after 9/11* (Routledge, 2010), 150.

sovereignty and the involvement of the PJCIS, that the Commonwealth Parliament and its members will act in way both responsible about and conducive to the protection of rights and liberties.

However, that assumption must be seen as contested in relation to terrorism laws, as starkly illustrated in the five examined examples. The claim that the Parliament and in this case its relevant Committee - the PJCIS will adequately act, both procedurally and substantively in such a conducive manner warrants some scepticism. Several factors identified in this article contest this assumption about the work of the PJCIS.

Bi-partisanship¹⁵⁵ by the Opposition in relation to the work of the PJCIS has narrowed a critical and contested function and the scope of recommendatory responses, as well as exacerbating the Government's reinvigorated legislating with urgency paradigm in relation to terrorism laws. Expressions of bipartisanship by the Labor Opposition¹⁵⁶ may work on a political level to neutralise or cushion the political advantage for the Government of portfolio national security matters, but bipartisanship guaranteeing the enactment of legislation, and within an intense and abbreviated time frame, severely circumscribes effective committee review. At

¹⁵⁵ Indeed, bipartisanship has been absorbed into the culture and language of the Committee: see *PJCIS Inquiry Report March 2015*, above n 3, 2 'The development of these amendments reflects the spirit of bipartisanship that has characterised the cooperative work of the Committee in its consideration of a mandatory data regime'.

¹⁵⁶ Both the Leader of the Opposition Mr Shorten and the Shadow Attorney General Mr Dreyfus have articulated this bipartisan approach: see 'New antiterrorism laws: Shadow AG Mark Dreyfus', *ABC Radio National RN Breakfast*, 22 September 2014 <<http://www.abc.net.au/radionational/programs/breakfast/new-antiterrorism-laws-shadow-ag-mark-dreyfus/5759376>>; 'Radio Interview -3AW- National Security' Radio 3AW interview with Opposition Leader Mr Bill Shorten, 23 September 2014 <<http://billshorten.com.au/radio-interview-3aw-national-security>>; 'Our disconcerting certainty in battling terrorism', *ABC The Drum*, 25 September 2014 <<http://www.abc.net.au/news/2014-09-25/green-our-disconcerting-certainty-in-battling-terrorism/5767916>>; 'Lateline - Iraq: National Security Legislation', *ABC Lateline* interview with Opposition Leader Mr Bill Shorten, 1 October 2014, above n 50; 'ABC Radio National - Tony Abbott's broken promise on the Petrol Tax: National security legislation', *ABC Radio National* interview with Opposition Leader Mr Bill Shorten, 29 October 2014 <<http://billshorten.com.au/abc-radio-national-tony-abbotts-broken-promise-on-the-petrol-tax-national-security-legislation>>; 'Press Conference Melbourne - National Security Legislation: Ebola' (transcript of Press Conference with Mr Bill Shorten, Opposition Leader and Mr Mark Dreyfus Shadow Attorney-General, Melbourne, 17 October 2014) <<http://billshorten.com.au/press-conference-melbourne-national-security-legislation-ebola>>; George Brandis, 'Parliament Passes Counter-Terrorism Legislation', above n 4; 'Prime Minister Tony Abbott to simplify terror warnings and appoint counter-terrorism coordinator as part of a new anti-extremism strategy', *ABC News* (online), 23 February 2015 <<http://www.abc.net.au/news/2015-02-23/tony-abbott-to-announce-new-government-anti-extremism-strategy/6200042>> .

its worst, the potential for effective scrutiny and review is compromised by prior agreement to support the passage of the legislation.

Another factor has been the apparent willingness of the PJCIS to concede too readily to executive favoured perspectives for new powers (facilitated through the adoption of a 'balance paradigm' where executive national security interests will always be given a weighted preference in the formulation of the balance against rights and liberties),¹⁵⁷ by highlighting a tempering of laws through the exercise of executive discretion and a standard series of identified safeguards, such as IGIS, INSLM and PJCIS itself.

Furthermore, the lack of timing of both PJCIS review and Government responses to PJCIS review to properly assimilate in some circumstances, the inquiry and recommendations of the PJCHR on the same legislation, might be interpreted as a statement to the Parliament and the community of the relative merits of these bodies' assessments of the legislation's implications upon human rights. This is a most striking contradiction as the PJCHR was established principally to reinforce Parliamentary review and protection of rights, in the context of a rejection of the introduction of a Commonwealth statutory charter of rights, seen as impinging upon Parliamentary sovereignty. It is perhaps reflected by the fact that the PJCIS displays in its reports an insufficient understanding of, and engagement with, broader human rights responses to terrorism issues –such as the Concluding Observations of the Human Rights Committee, CERD Committee and CAT Committee respectively in relation to Australia's periodic reports under the ICCPR, CERD and CAT;¹⁵⁸ the Human Rights Council's First and Second Universal Periodic

¹⁵⁷ For critiques of the balancing model of national security and terrorism legislative enactments, and its inbuilt bias towards Executive orientated interests, see Simon Bronitt 'Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' in Miriam Gani and Penelope Matthew *Fresh Perspectives on the War On Terror* (ANU Press, 2008), 65; Simon Bronitt "Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?" (2003) 14 *Public Law Review* 76; Simon Bronitt and James Stellios 'Sedition, Security and Human Rights: 'Unbalanced' Law Reform in the 'War on Terror' ' (2006) 30 *Melbourne University Law Review* 923; Christopher Michaelson 'Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29 *University of New South Wales Law Journal* 1; Greg Carne 'Remedying the Past or Losing International Human Rights in Translation?- 'Comprehensive' Responses To Australian National Security Legislation Reviews' (2009) 13 *UWVSLR* 37, 41-43, 46; Carne 'Brigitte and the French Connection: Security Carte Blanche or A La Carte?', above n 2, 573, 613-614.

¹⁵⁸ *International Covenant of Civil and Political Rights*, opened for signature 19 December 1966, 999 *UNTS* 171 (entered into force 23 March 1976); Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of The Covenant Concluding observations of the Human Rights Committee* UN Document CCPR/C/AUS/CO/5 7 May 2009, paragraph 11, page 3; Human Rights Committee, *List of issues prior to the submission of sixth periodic report of Australia*

Reviews of Australia;¹⁵⁹ to the work of the Special Rapporteur on the Protection and Promotion of Human Rights while Countering Terrorism;¹⁶⁰ and indeed to the report of the International Commission of Jurists on aspects of Australian terrorism laws.¹⁶¹

(CCPR/C/AUS/6) adopted by the Committee at its 106th session UN Document CCPR/C/AUS/Q/6 paragraphs 7 and 8, page 2; *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969): Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention Concluding observations of the Committee on the Elimination of Racial Discrimination* UN Document CERD/C/AUS/CO/15-17 13 September 2010, paragraph 12, page 3; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987): Committee Against Torture, *Consideration of Reports Submitted By States Parties Under Article 19 Of the Convention Concluding Observations of the Committee Against Torture* UN Document CAT/C/AUS/CO/3 22 May 2008 paragraph 10, page 3; Consideration of reports submitted by States parties under article 19 of the Convention *Follow up responses of Australia to the concluding observations of the Committee against Torture* UN Document CAT/C/AUS/CO/3) 20 January 2014 paragraphs 4 to 18, pages 2-5; Committee Against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia* UN Document CAT/C/AUS/CO/4-5 23 December 2014, paragraph 14, 5.

¹⁵⁹ Human Rights Council, First Universal Periodic Review Australia: *Human Rights Council Report of the Working Group on Universal Periodic Review Australia* UN Document A/HRC/17/10 24 March 2011; Human Rights Council, Second Universal Periodic Review Australia: *Summary prepared by Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 c of the annex to Human Rights Council resolution 5/1 and paragraph 5 of annex to Council resolution 16/21 Australia* UN Document A/HRC/WG.6/23/AUS/3 10 August 2015.

¹⁶⁰ See for example Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Australia: Study on Human Rights Compliance While Countering Terrorism* UN Document A/HRC/4/26/Add.3 14 December 2006; Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ten areas of best practice in countering terrorism* UN Document A/HRC/16/51 . The subsequent Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism from 2011 onwards, Mr Ben Emmerson, has focused in the Special Rapporteur annual reports upon quite specific topics: *Annual report 2012 Framework principles for securing the human rights of victims of terrorism* UN Document A/HRC/20/14 4 June 2012; *Annual report 2013 Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives* UN Document A/HRC/22/52 1 March 2013; *Annual report 2014 Civilian impact of remotely piloted aircraft* UN Document A/HRC/25/59 11 March 2014.

¹⁶¹ *Assessing Damage Urging Action Report of the Eminent Jurists panel on Terrorism, Counter-Terrorism and Human Rights* (International Commission of Jurists, 2009). The eminent panel held its Australia national hearings in Sydney and Canberra from 14 to 17 March 2006. There are various references to Australian terrorism law and practice in the report. See in particular *Ibid*, 4-75 (interrogation and arrest powers for the purpose of intelligence gathering) 112-113 (control orders) 114 (listing of terrorist organisations), 152-153 (access to evidence in national security proceedings).

An additional consideration from the identified five examples is the structural dynamic of legislative reactivity¹⁶² within which the PJCIS operates, which further challenges traditional assumptions about Parliamentary practice and the protection of rights. The constitutional reality is that few outer limits exist for Commonwealth terrorism legislation enacted in circumstances of such legislative reactivity. In the absence of a constitutional or statutory charter of rights, such limits that do exist are in the form of the law being characterised as a law with respect to one or more heads of Commonwealth constitutional power; and a few express¹⁶³ or implied¹⁶⁴ constitutional constraints upon such power. A further factor underlining the seriousness of these influences in the ongoing PJCIS review agenda of terrorism laws – though not arising directly in the five examples presently considered – is the horizontal spread of criminal culpability through the pre-emptive and preventative terrorism law enactments.¹⁶⁵

The context and dynamic in which the PJCIS operates in reviewing terrorism legislation also includes the fact that national security issues constitute political capital and advantage for the Government, possibly encouraging the introduction of multiple and serial terrorism legislation.¹⁶⁶ The degree to which that politicised aspect will indirectly impinge upon the review function of the PJCIS may vary longitudinally, reflecting the different emphases

¹⁶² This is the characteristic legislative reactivity to the latest iteration of terrorism events or developments, either national or international. See, for example, Jessie Blackbourn and Nicola McGarrity, 'How Reactive Law- Making Will Limit The Accountability Of ASIO' *Inside Story* <<http://insidestory.org.au/how-reactive-law-making-will-limit-the-accountability-of-asio>>.

¹⁶³ Namely the five express rights in the Commonwealth Constitution – s 51 (xxxii) acquisition of property on just terms, s 80 trial by jury, s 92 freedom of interstate movement, s 116 freedom of religion and s 117 freedom from discrimination regarding the basis of inter-state residence.

¹⁶⁴ Such as the implications derived from the separation of Chapter III judicial power in the *Commonwealth Constitution*, the implied freedom of political communication and intergovernmental immunities immunising the reach of Commonwealth laws into State functions.

¹⁶⁵ See, for example, Tamara Tulich, 'A View Inside The Preventive State Reflections on a Decade of Anti-Terror Law' (2012) 21 *Griffith Law Review* 209 and Tamara Tulich, 'Prevention and Pre-emption in Australia's Domestic Anti-Terrorism Legislation' (2012) 1 *International Journal of Crime and Justice* 53.

¹⁶⁶ The consequences of an Australian over-reactivity to terrorism events through the practice of enacting yet more laws (rather than other policy responses, such as the way in which existing laws are used, is demonstrated in the multiplicity of post 2001 Australian terrorism laws, in comparison to other major common law jurisdictions): See Roach, above n 15, 309-310; Williams, 'A Decade of Australian Anti-Terror Laws', above n 15; Williams, 'The Legal Legacy of the "War on Terror"', above n 15, 6-7; Hardy and Williams, above n 96, 789 fn 27; Ananian-Welsh and Williams, above n 15, 365; a McGarrity, Gulati and Williams, above n 15, 310.

and tone between the National Security Statements of Prime Minister Abbott¹⁶⁷ and the first National Security Statement of Prime Minister Turnbull.¹⁶⁸ However, without the presence of minor party members and cross bench senators on the PJCIS, the capacity for different perspectives contributing to recommendations leading to improved legislation is excluded from that context and the construction of bipartisanship, along distinctively executive lines, is enforced.

The review role of the PJCIS as discussed in relation to the five problematic legislative examples points to a need for significant reform of PJCIS processes, practices and membership. Such reform should ideally locate its review and recommendations more rigorously in conformity with democratic assumptions, values and conventions characteristically associated with a Parliamentary based model of rights protection, to restrain and temper legislative excesses, enthusiasms and animation of terrorism law reform for political motives. Overarching PJCIS reform would ideally be part of a more comprehensive series of framework accountability reforms relating to Australian intelligence agencies.¹⁶⁹ Such developments are desirable given the significant issues highlighted by the five problematic legislative examples – all generated within the space of one legislative year and with PJCIS intricately involved in that process – as the Committee of choice for review of these laws, and indeed having a sustained and significant legislated future review agenda.

In considering reform of the processes, practices and membership of the PJCIS in the aftermath of the review experience of five important aspects of

¹⁶⁷ See Tony Abbott, 'Prime Minister of Australia Statement to Parliament on National Security 22 September 2014' (Prime Minister Of Australia Statement to Parliament 22 September 2014) *Sydney Morning Herald* (Sydney) 22 September 2014 <<http://www.smh.com.au/federal-politics/political-news/tony-abbott-national-security-statement-to-parliament-20140922-10kccx.html>>; Tony Abbott, 'Prime Minister of Australia National Security Statement 23 February 2015' *Sydney Morning Herald* (Sydney) 23 February 2015 <<http://www.smh.com.au/federal-politics/political-news/prime-minister-tony-abbotts-full-national-security-statement-20150223-13m2xu.html>>.

¹⁶⁸ See Malcolm Turnbull, 'Prime Minister of Australia National Security Statement' (Prime Minister of Australia Statement to Parliament 24 November 2015) <<https://www.pm.gov.au/media/2015-11-24/national-security-statement>>. See also Malcolm Turnbull 'Magna Carta and the Rule of Law in the Digital Age' (Speech delivered at the Sydney Institute, 7 July 2015) <<http://www.malcolmtturnbull.com.au/media/speech-to-the-sydney-institute-magna-carta-and-the-rule-of-law-in-the-digit>>.

¹⁶⁹ See John Faulkner 'Surveillance, Intelligence and Accountability: an Australian Story' <<http://www.senatorjohnfaulkner.com.au/wp-content/uploads/2016/03/JF-INTEL.pdf>> (Senator Faulkner was a previous member of the PJCIS); 'Greater oversight of spies needed, says Faulkner' *Australian Financial Review* (Sydney) 23 October 2014; Frank Moorehouse, 'Rethinking intelligence' *The Saturday Paper* (Sydney) 23 January 2016, 7.

terrorism laws, it is instructive to return to first principles which informed the establishment of an original oversight intelligence and security Committee:¹⁷⁰

Although Justice Hope (who conducted the Royal Commission on Australia's Security and Intelligence Agencies) had recommended against the establishment of such a parliamentary oversight Committee...the Government argued that...further improvement [to existing oversight and accountability measures] can be obtained by directly involving the Parliament – on both sides and in both Houses- in imposing the discipline of an external scrutiny of the intelligence and security agencies quite independent of the Executive. While the Government has been conscious also of the need to carefully protect intelligence and security information, it believes that appropriate arrangements can be made to ensure that a small but informed parliamentary committee would operate effectively in the public interest (emphasis added).

At a more immediate level, it is desirable that PJCIS review of national security laws re-captures this essence of external scrutiny independent of the executive, operating effectively in the public interest. Commitment to bipartisanship and bipartisan only membership of the PJCIS is most likely at odds with these principles, forming a major obstacle to their realisation. This is particularly the case as the Government and Opposition members of the PJCIS are more likely to be beholden to their own party rooms, respectively to the Executive in the form of the Cabinet and the Shadow Cabinet, with robust, independent scrutiny plausibly diminishing the prospects of a frontbench career.

At a minimum, the commitment of the Opposition Labor Party to PJCIS bipartisanship and its conception should be reinvented and made subject to, and tempered by, three qualifying principles of a practical nature which are likely to improve both legislative process and enhance safeguards.

First, reform of the PJCIS membership, to reflect a more diverse, non - major party presence in both the House of Representatives and the Senate, as confirmed by the minor party and independent representation following the 2016 Federal election.

Second, reasserting the rights of the Senate to conduct parallel inquiries on terrorism law and national security topics, thereby facilitating broader

¹⁷⁰ See PJCIS web page, above n 14, under the heading 'History of the Intelligence and Security Committee The Parliamentary Joint Committee on ASIO – 1988 to 2001'.

representation, responding substantively to existing Labor concerns¹⁷¹ that the Senate Legal and Constitutional Committee actually carry out the clearly expressed will of the Senate, whilst creating comparable reports against which the recommendations of the PJCIS can be deliberated and contested. Ideally, this re-assertion of the Senate Legal and Constitutional Committee role should extend to an enhanced role for the References Committee, which in practice in the 2013-2016 Parliament had a combined Labor and Green\Independent majority of four over two members of the Government parties, and was on occasions chaired by an Australian Green or Independent Senator.

Third, the work of the PJCHR in reviewing national security and terrorism legislation and assessing its compliance with Australia's seven major United Nations human rights treaty obligations needs to be critically integrated in the assessment of the recommendations of the PJCIS by the practical measures of affording the same institutional status to the PJCHR by allowing adequate timing of Parliamentary deliberations on progress of national security legislation and digestion of the PJCHR recommendations on the same legislation. The importance of such reforms is underlined both by the fact that the PJCIS has acquired, by recommended legislative amendment, a substantial review agenda in the immediate future, but also by the fact that in its relationship and interaction with COAG reviews, the PJCHR and the Independent National Security Legislation Monitor, it needs to cultivate greater acknowledgment, maturity towards and contemplation of the work of these other reviewers.

¹⁷¹ 'Despite the fact that the Senate clearly expressed its will that this committee inquire into and report on the Bill concurrently with the Parliamentary Joint Committee on Intelligence and Security, this has not occurred. This committee has, therefore expressly refused to do that which the Senate has explicitly asked it to do': statement of Senator Jacinta Collins, Labor Deputy Chair of the Senate Legal and Constitutional Affairs Legislation Committee: *Senate Legal and Constitutional Affairs Legislation Committee October 2014 report*, above n 27, 3.

