

REVIEWING THE REVIEWER: THE ROLE OF THE PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY — CONSTRUCTING OR CONSTRICTING TERRORISM LAW REVIEW?

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I INTRODUCTION

In 2014, the Abbott Government, in following up national security reforms initiated by its predecessor¹ and in responding to the rise of Islamic State and its variants and the issue of foreign fighters, introduced into and had enacted by the Commonwealth Parliament three significant pieces of legislation: the *National Security Legislation Amendment Act (No 1) 2014* (Cth) (*'NSLA Act'*),² the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (*'Foreign Fighters Act'*),³ and the *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (Cth) (*'CTLA Act'*).

These enactments followed a National Security Committee of Cabinet request to Attorney-General Brandis in May 2014 'to undertake a comprehensive review of all of the Commonwealth counterterrorism laws to make sure that they were strong enough, while at the same time, not going too far, not violating the rule of law or the rights of individuals which are part of our own liberal democratic heritage'.⁴ The Abbott Government subsequently introduced into the Parliament a fourth piece of legislation, the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Cth) (*'Data Retention Bill'*). This legislation, following referral for inquiry and report by the Parliamentary

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1 The Gillard and Rudd Governments. See Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* (2013) 1 (*'PJICIS Report May 2013'*). The PJICIS was subsequently provided with a discussion paper containing terms of reference: Attorney-General's Department (Cth), 'Equipping Australia Against Emerging and Evolving Threats' (Discussion Paper, July 2012) (*'Discussion Paper July 2012'*). This is attached as Appendix E to the *PJICIS Report May 2013*.

2 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(10) *Bulletin of Law Society of South Australia* 18, 18.

3 See George Williams and Keiran Hardy, 'National Security Reforms Stage Two: Foreign Fighters' [2014] (December) *Law Society of New South Wales Journal* 68; McConnel, above n 2, 18–19.

4 David Koch and Natalie Barr, Interview with George Brandis, Attorney-General (Television Interview, 18 November 2015) <<http://pandora.nla.gov.au/pan/21248/20151218-1442/www.attorneygeneral.gov.au/transcripts/Pages/2015/FourthQuarter/18-November-2015-Interview-with-David-Koch-and-Natalie-Barr-Sunrise-Seven-Network.html>>.

Joint Committee on Intelligence and Security ('PJCIS')⁵ was enacted by the Commonwealth Parliament on 26 March 2015 and came into operation on 13 October 2015.⁶

From one perspective, the PJCIS review of such terrorism legislation is a practical manifestation of the Australian model of rights protection founded on parliamentary sovereignty, instead of a statutory or constitutional charter of rights existing in comparable common law based democracies.⁷ Review can be considered as consistent with such parliamentary sovereignty, as review is conducted either by parliamentary committees such as the PJCIS or by individuals or committees tasked under parliamentary authority. In 2014 and 2015, that review was largely conducted within the parliamentary paradigm of overlapping Government and Opposition interests, as reflected in their exclusive membership of the PJCIS and its established review methodologies.

From another perspective, the configuration and operation of the PJCIS review of these terrorism laws speaks to broader democratic questions of parliamentary processes and public deliberation — particularly as to the conduct of the reviews, the purposes underlying them and the application of review recommendations. Because the Australian legislative approach has been articulated as one of constant review of terrorism laws and ongoing legislative activity relating to terrorism matters,⁸ the invocation of the various forms of review is of enhanced significance. The implications of these review processes warrant closer examination, as it is conventional wisdom that review is always a beneficial activity. Nevertheless, both the review of terrorism laws and different forms of such review have a chequered history.

Reviews engaging terrorism law reform — past, contemporaneous and future — speak both broadly and particularly about pre-legislative and legislative democratic

5 Respectively on 21 November 2014 and 27 February 2015. See Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015) ('PJCIS Advisory Report February 2015').

6 George Brandis, 'The Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015' (Media Release, 13 October 2015) <<http://pandora.nla.gov.au/pan/21248/20151218-1442/www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FourthQuarter/13-October-2015-Data-Retention-Act.html>>.

7 See, eg, *Human Rights Act 1998* (UK); *New Zealand Bill of Rights Act 1990* (NZ); *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'); *United States Constitution* amends I–X; *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2. For the Australian parliamentary rights protection model, see Daryl Williams, 'Against Constitutional Cringe: The Protection of Human Rights in Australia' (2003) 9(1) *Australian Journal of Human Rights* 1; Dianne Otto, 'From "Reluctance" to "Exceptionalism": The Australian Approach to Domestic Implementation of Human Rights' (2001) 26 *Alternative Law Journal* 219; Brian Galligan and F L Morton, 'Australian Exceptionalism: Rights Protection Without a Bill of Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 17; George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 *Statute Law Review* 58.

8 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 2014, 9957 (Tony Abbott); Tony Abbott, 'Tony Abbott National Security Statement to Parliament', *Sydney Morning Herald* (online), 22 September 2014 <<http://www.smh.com.au/federal-politics/political-news/tony-abbott-national-security-statement-to-parliament-20140922-10kccx.html>>.

processes and assumptions. The qualities and characteristics engaged by such reviews include impacts upon the scope of democratic freedoms, increases in the concentration of executive power, the shaping of parliamentary practices and parliamentary precedents, reorientating assumptions about participatory democratic characteristics, and the resolution of parliamentary legislative priorities.⁹

Further influences have also emerged around the review processes¹⁰ at a pre-legislative and legislative stage in relation to terrorism laws — these include a reconstruction of executive-citizen relations around an oft-cited mantle of public safety¹¹ and a revisitation and reinvigoration of urgency as a legislative process,¹² the latter sometimes producing the need for amendments following passage of, and experience with, such hastily passed legislation.¹³ Where the PJCIS revisits legislation arising from an earlier deficient review process, the potential for conflicting self-interest becomes apparent.

The 2014–15 PJCIS review of new terrorism laws therefore raises a number of controversial issues, in relation to Australian national security law, policy and practice. Founded upon a conventional, if unstated, assumption that PJCIS review of terrorism laws is a positive activity, such review warrants much closer examination.¹⁴

- 9 See George Williams, ‘The Legal Assault on Australian Democracy: The Annual Blackburn Lecture’ (2015) 236 *Ethos* 18, 18, 23 (including traditional, now contested, assumptions of legislators exercising restraint and not usually enacting laws undermining Australian democracy); George Williams, ‘The Legal Legacy of the “War on Terror”’ (2013) 12 *Macquarie Law Journal* 3, 15–16; Greg Carne, ‘Sharpening the Learning Curve: Lessons from the Commonwealth Parliamentary Joint Committee of Intelligence and Security Review Experience of Five Important Aspects of Terrorism Laws’ (2016) 41(1) *University of Western Australia Law Review* 1, 40.
- 10 In the reviews of terrorism laws conducted by the PJCIS — see completed inquiries at Parliamentary Joint Committee on Intelligence and Security, *Completed Inquiries and Reports*, Parliament of Australia <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/completed_inquiries>. Influences may also be discernible in reviews by the Parliamentary Joint Committee on Human Rights and by the Senate Legal and Constitutional Affairs, Legislation and References Committees.
- 11 Safety as a terrorism law primary consideration has featured in both Abbott and Turnbull Government statements: see Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2015, 13483–6 (Malcolm Turnbull, Prime Minister); Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 2014, 9957 (Tony Abbott, Prime Minister); ‘Prime Minister Tony Abbott’s Full National Security Statement’, *Sydney Morning Herald* (online), 23 February 2015 <<http://www.smh.com.au/federal-politics/political-news/prime-minister-tony-abbotts-full-national-security-statement-20150223-13m2xu.html>>.
- 12 For the previous emergence of urgency as a legislative operating paradigm in Howard Government terrorism legislation, 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 et al (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(2) *Deakin Law Review* 49.
- 13 Andrew Lynch, ‘The Impact of Post-Enactment Review on Anti-Terrorism Laws: Four Jurisdictions Compared’ (2012) 18 *Journal of Legislative Studies* 63, 65, 76.
- 14 See Dominique Dalla-Pozza, ‘Promoting Deliberative Debate? The Submissions and Oral Evidence Provided to Australian Parliamentary Committees in the Creation of Counter-Terrorism Laws’ (2008) 23(1) *Australasian Parliamentary Review* 39 (parliamentary committees’ inconsistent review record of earlier terrorism laws as enablers and full contributors to a deliberative parliamentary process; ibid 65, (highlighting serial limits of review).

This article, informed by the above developments and background factors, focuses upon various identifiable themes and consequences for the Australian legal and political system arising from the enactment in 2014–15¹⁵ of these four far-reaching terrorism laws, through the medium of the PJCS review processes of that legislation — prior to, contemporary with, and after legislative enactment.

The article first looks at the process of introduction, review and passage of the 2014–15 terrorism laws through the conduct of review within a renewed and revitalised urgency paradigm. This paradigm has re-emerged and intensified from the earlier Howard Government legislative experience, creating new incremental accretions of executive power and discretion. This process has precedential consequences for the scope of government power in its relationship with the citizen within and beyond the counterterrorism legislation,¹⁶ and in detrimental effects upon the integrity of the legislative process itself, including parliamentary review processes.

The renewal and revitalisation of the urgency paradigm in the PJCS review and enactment of 2014–15 terrorism laws, within this framework of PJCS bipartisanship, it is then argued, has exposed and highlighted a series of distinctive, *broad and thematic* issues and problems associated with the PJCS review processes for those laws.

15 These laws are identified by Attorney-General Brandis respectively as the first, second, third and fourth tranches of terrorism laws. The fifth tranche of terrorism laws — the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) ('*CTLA Bill 2015*') — is not a substantive focus of this article, nor is the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth), the latter Bill firmly identified with the Minister for Immigration and Border Protection Hon Peter Dutton MP. See George Brandis, 'National Security Legislation' (Media Release, 12 October 2015) <http://pandora.nla.gov.au/pan/21248/20151218-1442/www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FourthQuarter/12-October-2015-National-Security-Legislation.html>; George Brandis, 'New Counter-Terrorism Legislation' (Media Release, 12 November 2015) <<http://pandora.nla.gov.au/pan/21248/20151218-1442/www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FourthQuarter/12-November-2015-New-Counter-Terrorism-Legislation.html>>; George Brandis and Peter Dutton, 'Government Responds to Report on the Australian Citizenship (Allegiance to Australia) Bill' (Media Release, 10 November 2015) <[http://pandora.nla.gov.au/pan/21248/20151218-1442/www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FourthQuarter/10-November-2015-Government-responds-to-report-on-the-Australian-Citizenship-\(Allegiance-to-Australia\)-Bill.html](http://pandora.nla.gov.au/pan/21248/20151218-1442/www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FourthQuarter/10-November-2015-Government-responds-to-report-on-the-Australian-Citizenship-(Allegiance-to-Australia)-Bill.html)>; George Brandis, Address to the Centre for Independent Studies' (Speech delivered at the Centre for Independent Studies, Sydney, 6 November 2015) <<http://pandora.nla.gov.au/pan/21248/20151218-1442/www.attorneygeneral.gov.au/Speeches/pages/2015/FourthQuarter/6-November-2015-Address-to-the-Centre-for-Independent-Studies.html>>. Reference in this article to the '2014–15 terrorism legislation' is a shorthand for the *NSLA Act*, the *Foreign Fighters Act*, the *CTLA Act* and the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) ('*Data Retention Act*').

16 Migration of legislative practices and adaptation of legislative content from terrorism law reform to other areas of law has attracted criticism: see 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; Williams, 'The Legal Assault on Australian Democracy', above n 9, 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; Greg Carne, 'Beyond Terrorism: Enlarging the National Security Footprint through the *Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011* (Cth)' (2011) 13(2) *Flinders Law Journal* 177; Carne, 'Sharpening the Learning Curve', above n 9, 40.

This article then proceeds to examine in some depth four major broad and thematic issues.¹⁷ It commences with a critique of the lack of application of existing completed reviews on the same subject matter being engaged by the PJCIS review and subsequent legislative process. It then examines the fact that PJCIS review has led to a significant increase in the review workload of the Inspector-General of Intelligence and Security ('IGIS') and the Independent National Security Legislation Monitor ('INSLM'), disproportionate to their resourcing, with the prospective roles of the IGIS and INSLM used as an assuaging and justificatory accountability measure, as time and other constraints prevent the PJCIS from adequately and contemporaneously addressing issues in its own reviews. A further emergent factor around the 2014–15 legislation is then discussed, namely a preparedness to legislatively remove or postpone existing legislated and timetabled review mechanisms, originally included in the negotiated passage of legislation, which itself was the product of earlier extensive parliamentary review.

It is then argued that the review role of the PJCIS in 2014–15 can be further understood by the PJCIS and the executive's preference for a certain construction of rights — through the marginalisation of Australia's Human Rights Framework,¹⁸ including the reports of the Parliamentary Joint Committee on Human Rights ('PJCHR') on the reviewed Bills.

Singularly and cumulatively these four broad thematic issues associated with the PJCIS review in 2014–15 and the legislative process produced serious, identifiable legislative deficiencies, reflecting an over-reliant, misguided confidence in PJCIS review as an accountability mechanism. It is argued that the 2014–15 review and legislative process has produced an interlocking array of national security laws where national security policy is expedited, extensive executive discretion in the administration of laws is conferred and a formulaic, consensual bipartisanship neutralises deep critical thinking about an ongoing expansion of laws, whilst encouraging expeditious passage of legislation.

The article then briefly identifies and explores this contracted reshaping of democratic practice. It is concluded that there is a need for serious revision of PJCIS review processes. Several reforms are then proposed for the broader topic of parliamentary review of national security laws, involving a reconfiguration and

17 Discussion and analysis of these broad and thematic issues occurs under four headings: Part III: Existing Completed Terrorism Law Reviews — Their Relationship to the 2014–15 PJCIS Review and Enactment Process and Subsequent Developments; Part IV: Justifying Legislative Expansions by Assigning Further Tasks to IGIS and INSLM Review Processes — Potentially Overloading Ex Post Facto Review Model Functions?; Part V: The Disregard and Delaying of Existing and Extensively Negotiated Legislated Review Mechanisms; Part VI: Interactions of PJCIS Review with PJCHR Human Rights Review of Terrorism Law Reforms.

18 Attorney-General's Department (Cth), *Australia's Human Rights Framework* (2010). Australia's Human Rights Framework was the Rudd Government response to and rejection of the Brennan Committee *National Human Rights Consultation Report* recommendation for a Commonwealth statutory charter of rights: National Human Rights Consultation Committee, *National Human Rights Consultation: Report* (2009) xxxiv, recommendation 18. See Robert McClelland, 'Australia's Human Rights Framework' (Media Release, 21 April 2010) <http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_21April2010-AustraliasHumanRightsFramework.html>.

recalibration of the activities, approaches and review relationships of the PJCIS with parliamentary-based and other review bodies. Consistent with the values set out in the Prime Minister's November 2015 national security statement,¹⁹ it is argued that such PJCIS reforms are now compelling. This is particularly so as ongoing PJCIS and other review processes are enmeshed in the new legislation — that legislation being the product of deliberative, parliamentary and democratic reconstructions that occurred within the 2014–15 terrorism law reforms.

II THE NEW MEDIUM OF BIPARTISANSHIP REINVIGORATING THE LEGISLATIVE URGENCY PARADIGM: CONSEQUENCES FOR PJCIS LEGISLATIVE REVIEWS

Terrorism law reform by the Howard Government following the 11 September 2001 attacks was characterised principally by the volume of enacted legislation in relation to comparable common law jurisdictions²⁰ and the speed and urgency in that legislative enactment.²¹ These urgency-orientated practices produced identifiable characteristics and consequences — namely compressed parliamentary review committee proceedings, enacted legislation with identified flaws requiring subsequent review or remediation, the marginalisation in the review of legislation of international human rights law principles, distortions of the meanings of rights from the *Universal Declaration of Human Rights* ('UDHR')²² and the utilisation of national security language and policy as a politically advantageous tool for the Government, with expectations of cooperative compliance from the Opposition. The volume of the enacted counterterrorism laws produced a substantial legislative catalogue, inviting a revisitation and revision in future years, particularly with changing internal and external security circumstances.

- 19 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2015, 13483–6 (Malcolm Turnbull, Prime Minister).
- 20 See Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 309–10; George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136; Williams, 'The Legal Legacy of the "War on Terror"', above n 9, 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 n 27; Ananian-Welsh and Williams, above n 16, 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; Nicola McGarrity, Rishi Gulati and George Williams, 'Sunset Clauses in Australian Anti-Terror Laws' (2012) 33 *Adelaide Law Review* 307, 310.
- 21 See Lynch, 'Legislating Anti-Terrorism', above n 12; Lynch, 'Legislating with Urgency', above n 12; Anthony Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001–2005' (2007) 10 *Flinders Journal of Law Reform* 81, 91–5; Martin Krygier, 'War on Terror' in Robert Manne (ed), *Dear Mr Rudd: Ideas for a Better Australia* (Black Inc Agenda, 2008) 127, 137–8; Carne, 'Hasten Slowly', above n 12; 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.
- 22 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948). See Greg Carne, 'Reconstituting "Human Security" in a New Security Environment: One Australian, Two Canadians and Article 3 of the *Universal Declaration of Human Rights*' (2006) 25 *Australian Year Book of International Law* 1.

This history of volume and urgency of terrorism laws in the post-9/11 decade is largely, but not exclusively, associated with the Howard Government.²³ As Williams observes:²⁴

From 11 September 2001 to the fall of the Howard Liberal-National Coalition government at the federal election held on 24 November 2007, the federal Parliament enacted 48 of these laws, an average of 7.7 pieces of legislation each year. On average, a new anti-terror statute was passed every 6.7 weeks during the post-9/11 life of the Howard government ... The pace at which anti-terror laws have been passed by the federal Parliament has since slowed. During the time of the Rudd and Gillard governments from 24 November 2007 to 11 September 2011, only 6 anti-terror laws were passed. This is an average of 1.6 pieces of legislation per year, or a new anti-terror law every 32.8 weeks.

Distinctive features of legislative urgency practice around terrorism laws emerged during the Howard Government, with this practice substantiated in several writings.²⁵ A brief unpacking of key features of legislative urgency from the Howard era is instructive. A useful taxonomy of this paradigm of Howard era legislative urgency is advanced by Reilly²⁶ who identifies four distinct phases of terrorism law enactment²⁷ and two typical background circumstances triggering legislative urgency.²⁸ Commentators have made repeated, pointed and shared assessments about distinctive circumstances of legislative urgency arising from this era.

The first major piece of post-9/11 legislation was the Security Legislation Amendment (Terrorism) Bill 2002 (Cth).²⁹ Noteworthy about this Bill was its long gestation of six months after 9/11, its introduction late on a sitting day, the overt pressure to pass the Bill, and its passage through the House of Representatives

23 The Howard Government held office from 11 March 1996 to 3 December 2007.

24 Williams, 'A Decade of Australian Anti-Terror Laws', above n 20, 1144–5 (citations omitted). See also George Williams, 'Ten Years of Anti-Terror Laws in Australia' (2012) 112 *Precedent* 9, 10.

25 See the list of scholarly articles and contributors regarding legislative urgency above n 12.

26 Reilly, above n 21.

27 Ibid 84–90. 'The First Phase — The Legislative Response to the Terrorist Attacks of 11 September 2001': at 84; 'The Second Phase — October 2002 — Terrorist Bombings in Bali': at 86; 'The Third Phase — 2004 — Terrorist Bombings in Madrid': at 88; 'The Fourth Phase — June 2005 — The London Bombings': at 89.

28 These two circumstances are identified as where 'the rush to legislate was principally manifested through the rapid introduction and enactment of legislation in the immediate aftermath of a terrorist attack' and where 'there were significant delays by the executive in developing Bills for introduction to Parliament, followed by intense pressure on Parliament to quickly approve the Bills': *ibid* 95.

29 This Bill was introduced with four other Bills — the Suppression of the Financing of Terrorism Bill 2002 (Cth); the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (Cth); the Border Security Legislation Amendment Bill 2002 (Cth) and the Telecommunications Interception Legislation Amendment Bill 2002 (Cth).

less than 24 hours after its introduction.³⁰ Another early piece of far-reaching terrorism legislation was the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth). The extraordinary provisions in the original Bill, including proposals to confer rolling powers of incommunicado detention on the Australian Security Intelligence Organisation ('ASIO'),³¹ combined again with a lack of a Government Senate majority, creating the circumstances conducive to review, meant that the Government asserted urgency around this Bill throughout 2002, and at the end of 2002 sittings,³² with a modified Bill eventually passed in June 2003.³³ Significant amendments to the ASIO legislation were made by the ASIO Legislation Amendment Bill 2003 (Cth), a mere five months later, with urgency issues propelled by the Brigitte incident and the amendments passed in eight days and without reference to a parliamentary inquiry.³⁴

This legislative urgency tendency was given greater impetus with the Howard Government obtaining a majority in the Senate after the 2004 election.³⁵ Two Bills demonstrated fresh issues of urgency — the Anti-Terrorism Bill 2005 (Cth) and the Anti-Terrorism Bill (No 2) 2005 (Cth).³⁶ In the first of the two Bills, the urgency issue was framed by the proposed legislative change from referent 'the terrorist act' to 'a terrorist act',³⁷ which 'would strengthen the capacity of law enforcement agencies to effectively respond to' an identified terrorist threat.³⁸ The urgency manifesting in the legislative process was reflected in the recall of the Senate specifically for the Bill, and the fact that the Bill was passed in less than a day.³⁹ The circumstances of the *Anti-Terrorism Act (No 2) 2005* (Cth) illustrate

30 The Bills were introduced into the House of Representatives on 12 March 2002 and passed the House on 13 March 2002. See Reilly, above n 21, 92; Williams, 'A Decade of Australian Anti-Terror Laws', above n 20, 1164; Lynch, 'Legislating with Urgency', above n 12, 776–7; Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (University of New South Wales Press, 2004) 196. The lack of a Government majority in the Senate meant that the Senate Legal and Constitutional Legislation Committee was able to conduct an inquiry: Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Bills* (2002). The Bills were enacted on 27 June 2002.

31 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth).

32 Reilly, above n 21, 92–3.

33 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003 (Cth). See Greg Carne, 'Brigitte and the French Connection: Security Carte Blanche or A La Carte?' (2004) 9 *Deakin Law Review* 573, 582–7.

34 Reilly, above n 21, 93; Carne, 'Brigitte and the French Connection', above n 33, 587.

35 See Williams, 'A Decade of Australian Anti-Terror Laws', above n 20, 1164. The Howard Government changed approach to Senate review processes after its July 2005 Senate majority: see John Halligan, Robin Miller and John Power, *Parliament in the Twenty-First Century: Institutional Reform and Emerging Roles* (Melbourne University Press, 2007) 255–9.

36 The *Anti-Terrorism Act 2005* (Cth) provisions were found in parts of a draft Bill which dealt with a number of anti-terrorism strategies proposed by the Commonwealth and upon which the states and territories agreed at the Council of Australian Governments in September 2005. Those sections were hurriedly extracted and presented to the Commonwealth Parliament as a short Bill for urgent passage in early November 2005.

Lynch, 'Legislating with Urgency', above n 12, 748–9 (citations omitted).

37 *Anti-Terrorism Act 2005* (Cth) sch 1. See also Lynch, 'Legislating with Urgency', above n 12, 753–4.

38 *Ibid* 749.

39 Reilly, above n 21, 94; Lynch, 'Legislating with Urgency', above n 12, 752.

further and different aspects of the urgency principle,⁴⁰ around the introduction of control orders and preventative detention. An additional, later, example of urgency-related legislative practice appeared with the *Telecommunications (Interception) Amendment Act 2006* (Cth), demonstrated by inadequate time for inquiry by the Senate Legal and Constitutional Legislation Committee and for subsequent parliamentary debate, followed by a failure to implement recommended safeguards from the Senate Committee report.⁴¹

This association of the Howard Government with both the volume and urgency of terrorism laws is consistent and persistent. It can be partly explained by the natural ascendancy, and political advantage, over national security issues synonymous with the Coalition and a willingness to serially legislate to such advantage. There was a significant contraction in terrorism lawmaking between 2007–13, a period coinciding with the Rudd and Gillard Governments.⁴² This occurrence diminished the need for reviews of proposed legislation by the PJCIS⁴³ and the Senate Legal and Constitutional Affairs Legislation and References Committees.⁴⁴ This substantial reduction in legislation during the Labor Governments changed the earlier dynamics of the constancy and urgency of review. The absence of an urgency paradigm around terrorism-related legislation during the Labor Governments is further demonstrated by the extended, more relaxed time frames for introduction, review and passage of the six Labor anti-terror Bills referred

- 40 These aspects include government attempts to forestall scrutiny of the Council of Australian Governments ('COAG')-endorsed Bill by withholding details from public release, very tight timelines for introduction of the Bill, review of the Bill and the receipt of submissions by the Senate Legal and Constitutional Legislation Committee and debate in Parliament: see Reilly, above n 21, 94–5; Carne, 'Prevent, Detain, Control and Order?', above n 21, 43–6, 49–50; Williams, 'A Decade of Australian Anti-Terror Laws', above n 20, 1165–6; Lynch, 'Legislating with Urgency', above n 12, 752–3.
- 41 See Williams, 'A Decade of Australian Anti-Terror Laws', above n 20, 1166; Carne, 'Hasten Slowly', above n 12, 77, 82–4.
- 42 Williams notes that only six terrorism-related laws were passed by the Commonwealth Parliament during the Labor Government to the 10th anniversary of 9/11: Williams, 'A Decade of Australian Anti-Terror Laws', above n 20, 1145. These laws were the *Customs Amendment (Enhanced Border Controls and Other Measures) Act 2009* (Cth); *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth); *Independent National Security Legislation Monitor Act 2010* (Cth) ('*INSLM Act*'); *National Security Legislation Amendment Act 2010* (Cth); *Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011* (Cth); and *Defence Legislation Amendment (Security of Defence Premises) Act 2011* (Cth). See also the statistics on Australian anti-terror laws in this period: Williams, 'A Decade of Australian Anti-Terror Laws', above n 20, 1144–6. See also Carne, 'Sharpening the Learning Curve', above n 9, 10.
- 43 PJCIS reviews conducted during the Labor Governments were confined to listings of terrorist organisations under the *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*'), annual reports of Committee activities and reviews of the administration and expenditure of Australian intelligence agencies. The exception was the *Inquiry into Potential Reforms of National Security Legislation: see PJCIS Report May 2013*, above n 1. The *PJCIS Report May 2013* did not generate major terrorism-related legislation in the final months of the Labor Government.
- 44 Reviews conducted during the term of the Labor Government by the Senate Legal and Constitutional Affairs Committee included Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010 [Provisions]* (2010); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Independent Reviewer of Terrorism Laws Bill 2008 [No 2]* (2008).

to above.⁴⁵ Indeed, Williams pointedly commented that ‘[t]he change of federal government in late 2007 marked a shift in how Australia’s anti-terror laws have been made. Few new laws have since been enacted and those that have been have involved a more satisfactory process.’⁴⁶

The foundations for a return to future legislative urgency were set by Attorney-General Roxon in May 2012, by a broadly-based reference to a new PJICIS inquiry.⁴⁷ Three reform areas were listed.⁴⁸ Different priorities were set by the Attorney-General,⁴⁹ including in the third of the reform areas. The breadth of the third area — Australian Intelligence Community legislation reform — bears the likely imprint of an Australian intelligence agencies agenda of significantly expanded and connected powers.⁵⁰

A series of factors and their timing produced circumstances of renewed, substantial and urgent terrorism law reforms. The *PJICIS Report May 2013* recommended many reforms to the Australian Intelligence Community legislation;⁵¹ the Coalition parties won back government in September 2013;⁵² and newly emergent terrorism methods⁵³ and entities⁵⁴ constituted circumstances politically amenable to the Coalition speedily and extensively legislating against a background of its perceived national security credentials.⁵⁵

The 2014–15 terrorism legislation experience revisited, revised and indeed exacerbated many of the urgency-related legislative characteristics synonymous with the Howard Government. The first characteristic was the confining of review

45 See Williams, ‘A Decade of Australian Anti-Terror Laws’, above n 20, 1144–5. The legislative timelines of the six relevant Labor Government pieces of anti-terrorism legislation corroborate these observations, for example, the *Customs Amendment (Enhanced Border Controls and Other Measures) Act 2009* (Cth): introduced House of Representatives 3 December 2008, third reading 12 February 2009, introduced Senate 10 March 2009, third reading and passage of the Bill 14 May 2009, assent to the Bill 22 May 2009. A similar search by the author on the Commonwealth Parliament website for each of the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth), the *INSLM Act*, the *National Security Legislation Amendment Act 2010* (Cth), the *Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011* (Cth) and the *Defence Legislation Amendment (Security of Defence Premises) Act 2011* (Cth) confirms regular, and not expedited timeframes for debate, Committee referral and report (where applicable) and enactment, denying any application of the urgency paradigm: Parliament of Australia, *Bills and Legislation* <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation>.

46 Williams, ‘A Decade of Australian Anti-Terror Laws’, above n 20, 1167 (citations omitted).

47 *PJICIS Report May 2013*, above n 1; *Discussion Paper July 2012*, above n 1. The terms of reference are included: at *Discussion Paper July 2012*, above n 1, 6–11. On this and following points, see Carne, ‘Sharpening the Learning Curve’, above n 9, 10–11.

48 Being telecommunications interception and security, data retention and Australian Intelligence Community legislation reform: *PJICIS Report May 2013*, above n 1, xxiii–xxxiv.

49 These groupings were (a) reforms the Government wishes to progress; (b) reforms the Government is considering progressing; and (c) reforms on which the Government is expressly seeking the views of the PJICIS: *Ibid.*, xiv.

50 See Carne, ‘Sharpening the Learning Curve’, above n 9, 10–11.

51 *PJICIS Report May 2013*, above n 1, xxix–xxxiii.

52 The Abbott Government was sworn into office on 18 September 2013, following the 7 September 2013 election.

53 Such as ‘lone wolf’ and ‘low-tech’ attacks using commonly available instruments and vehicles.

54 Such as IS or its successors.

55 See Carne, ‘Sharpening the Learning Curve’, above n 9, 11.

of proposed legislation by exclusive reference to the PJCIS and not, as in the Howard era, involving the Senate Legal and Constitutional Affairs Committee.⁵⁶ The Senate Legal and Constitutional Affairs Committee had previously conducted a number of reviews of national security legislation, producing recommendations for significant amendments.⁵⁷ The Senate Legal and Constitutional Affairs Committee engaged with contemporary issues with greater depth, rigour and legal analysis than the PJCIS and its predecessor committee.⁵⁸ The consequence of presently restricting inquiries to the PJCIS is that a narrower band of parliamentary opinion is involved in the specialist PJCIS review, deliberative and report writing activities than is the case with Senate committee reviews, as independents and crossbenchers are not members of the PJCIS.⁵⁹ The opportunity for participating senators (who are not formally members of the Senate committee) to involve themselves in an inquiry is also not available in the operations of the PJCIS.

Furthermore, the issue of bipartisanship in these terrorism law reviews has created complicating issues affecting the quality of PJCIS review and subsequent legislation. Traditionally, bipartisanship on committees has been considered a strength, in contrast to adversarial approaches in the chamber:⁶⁰

Australian parliamentary committees have traditionally valued consensus as an aim in their deliberations, in the belief that a consensual report will carry more weight; many MPs interviewed supported a consensus approach within committees as more productive than the adversarial approach ...

There is support for this consensus from a number of sources based on two principal arguments: committees are different from the chamber; and particular types of committee work, such as scrutiny, require non-partisanship to be effective.

- 56 See Gabrielle Appleby, 'The 2014 Counter-Terrorism Reforms in Review' (2015) 26 *Public Law Review* 4, 5–6, noting that the Greens sponsored a motion to refer the National Security Legislation Amendment Bill (No 1) 2014 (Cth) ('*NSLA Bill*') to the Senate Standing Committee on Legal and Constitutional Affairs, which was defeated; likewise the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) ('*Foreign Fighters Bill*') was referred to the Senate Legal and Constitutional Affairs Legislation Committee, but 'the Senate Committee did not conduct a public inquiry and ultimately decided against issuing a parallel report at all': Appleby, above n 56, 6.
- 57 The major terrorism law reviews conducted by the Senate Legal and Constitutional References Committee or the Senate Legal and Constitutional Legislation Committee were: Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill 2004* (2004); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002); Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002).
- 58 Namely, the Parliamentary Joint Committee on ASIO, ASIS and DSD. See Carne, 'Sharpening the Learning Curve', above n 9, 9.
- 59 See the membership of the PJCIS: Parliament of Australia, *Committee Membership* <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Committee_Membership>.
- 60 Halligan, Miller and Power, above n 35, 227, 228 quoting Raymond Holzheimer, *An Examination of the Purpose and Effectiveness of Committees of Inquiry of the Australian Commonwealth Parliament* (PhD Thesis, University of Queensland, 1980) 15, 230 quoting Nevil Johnson, 'Departmental Select Committees' in Michael Ryle and Peter G Richards (eds), *The Commons under Scrutiny* (Routledge, 3rd revised ed, 1988) 168–9.

An attraction of committees is they ‘introduce a non-partisan area into a political arena to deal with questions considered unsuitable for parliamentary debate ...’

A second type of argument ... prescribes non-partisanship as a precondition for committee performance. ... [C]ommittees have ‘recognised that partisan politics have as a rule got to be held in check if they are to achieve anything ... disputes in committees are restrained by the presence of government majorities and by the realisation that the very effort of inquiry is likely to be unproductive and perhaps nugatory if members focus chiefly on their disagreements’.

Unlike committee work, bipartisanship in the parliamentary chamber has the capacity to close debate. However, the situation of PJCS review in the instant circumstances and its relationship to the Government terrorism law agenda provided several complicating factors contesting the conventional, positive notion of committee bipartisanship articulated above.⁶¹ Within the experience of these 2014–15 terrorism laws, such bipartisanship has substantively evolved.⁶²

The bipartisanship produced is attenuated, contingent and has been crafted as a pragmatic effort by the Opposition to control and contain Government political advantage over national security issues.⁶³ This response has been informed by the historical experience of a lack of substantive bipartisanship and combative approaches around legislative processes following earlier reviews.⁶⁴ Restricted membership of the PJCS — limited to Government and Opposition — has further deterred more independent and robust Opposition scrutiny. In the absence of independently sourced amendments, alternative views are perceived as disputative, overtly political and extending the legislative timetable. Consensual sounding responses, with in-principle support, to sight unseen draft legislation mentioned in Government media releases, have become more common. An extension of these principles (facilitated with the Opposition leader’s agreed expedition of legislative passage where the Government did not control a majority of Senate votes)⁶⁵ has exerted additional pressure of conformity, under a rubric of bipartisanship, in the passage of terrorism laws.⁶⁶

61 Halligan, Miller and Power, above n 35, 227–8, 230. See the text extract above.

62 The *starting point* of such bipartisanship in 2014–15 is stated in Carne, ‘Sharpening the Learning Curve’, above n 9, 11: ‘the PJCS would operate within an agreed, compliant framework of bipartisanship so its recommendations would be more predictable.’

63 Known as the political colloquialism of avoiding being wedged on this issue by the Government (a Government political objective of creating internal party conflict for the Opposition).

64 See Lynch, ‘Legislating with Urgency’, above n 12, 776, 778–9, referring to the 2005 and earlier processes involving a ‘combative attitude to the enactment of counter-terrorism laws’: at 776.

65 The Opposition leader, Mr Shorten, agreed to such an approach: see ABC Radio National, *New Antiterrorism Laws: Shadow AG Mark Dreyfus* (22 September 2014) <<http://www.abc.net.au/radionational/programs/breakfast/new-antiterrorism-laws-shadow-ag-mark-dreyfus/5759376>>.

66 Examples of the Opposition elevating bipartisanship (within an expedited model) to a central operating principle on national security laws include *ibid*; Nick McCallum, Interview with Bill Shorten, Leader of the Opposition (Radio Interview, 23 September 2014) <<http://billshorten.com.au/radio-interview-3aw-national-security>>; Fran Kelly, Interview with Bill Shorten, Leader of the Opposition (Radio Interview, 29 October 2014) <<http://billshorten.com.au/abc-radio-national-tony-abbotts-broken-promise-on-the-petrol-tax-national-security-legislation>>; Bill Shorten and Mark Dreyfus, ‘Press Conference: Melbourne — National Security Legislation: Ebola’ (Press Conference, 17 October 2014) <<http://billshorten.com.au/press-conference-melbourne-national-security-legislation-ebola>>.

The potential for effective scrutiny and review by the PJCIS has been compromised by bipartisanship incorporating such prior agreement to support passage of legislation.⁶⁷ This issue was illustrated in relation to metadata laws, where Prime Ministerial communications in public and to the Opposition leader repeatedly pressed the rapid passage of legislation.⁶⁸ The capacity of both Government and Opposition members of the PJCIS to effectively review is also constrained by such constructed bipartisanship where career advancement to shadow ministerial and ministerial positions potentially makes it wise for a PJCIS member to conform to practices consistent with the stated bipartisanship.

Such bipartisanship underpinned the renewed urgency paradigm around terrorism laws in 2014–15. It abbreviated an effective critical Opposition review function and reduced the number of amendments (including safeguards) able to be negotiated in a significantly time-pressured and politically intensified environment. Instead of fulfilling a wholly effective role of parliamentary-based rights supervision (including insisting on full consideration and integration of the PJCHR reports, a legislative reform introduced by the predecessor Labor Government) the Opposition's bipartisan approach compromised the potential scope of review.

Bipartisanship, as it evolved in and from the 2014–15 experience, can therefore be said to have given new life to the legislative urgency paradigm around terrorism laws, to the point now that legislative urgency has become synonymous with, and a normative presumption to, the enactment of terrorism laws, which are in a continuous state of revision and renewal. Invocations of bipartisanship in terrorism law reform have become a default tool to pre-emptively and presumptively shape and direct imminent legislative debate, to render as legislatively necessary what would once have been considered exceptional or extraordinary,⁶⁹ as well as to garner a core of major party legislative votes in a Senate with a historically high number of crossbench senators.⁷⁰ It has crystallised new practices around the norm of legislative urgency for terrorism laws.

67 See Carne, 'Sharpening the Learning Curve', above n 9, 41–2.

68 'Tony Abbott Wants Metadata Laws Passed by March', *Sydney Morning Herald* (online), 5 February 2015 <<http://www.smh.com.au/digital-life/digital-life-news/tony-abbott-wants-metadata-laws-passed-by-march-20150204-136kv5.html>>; 'Bill Shorten Slams Tony Abbott for Politicising Metadata Retention Laws', *Sydney Morning Herald* (online) 17 February 2015 <<http://www.smh.com.au/digital-life/digital-life-news/bill-shorten-slams-tony-abbott-for-politicising-metadata-retention-laws-20150216-13ftkm.html>>; Michelle Grattan, 'Shorten Likely to Stay Glued to Abbott on National Security', *The Conversation* (online) 17 February 2015.

69 These bipartisan-related phenomena are clearly indicated in the Prime Minister's 2017 national security statement: Commonwealth, *Parliamentary Debates*, House of Representatives, 13 June 2017, 6173 (Malcolm Turnbull, Prime Minister). After outlining a number of enacted terrorism matters and formative proposed responses to terrorism, including a present review of Australian Defence Force support for counterterrorism and a review of the Australian Intelligence Community, it is stated 'I will report back to the House with the government's response to these initiatives and seek bipartisan support in the knowledge that we should all be united on public safety and national sovereignty': at 6173.

70 'The Senate in the 45th Parliament contains its largest cross-bench of 21 senators (7 Australian Greens and 14 others), compared with 18 senators (10 Australian Greens and 8 others) at the end of the 44th Parliament. Previously, the highest number had been 13 senators, in 2002–2005.': Parliament of Australia, *Senate* (1 August 2017) <http://www.aph.gov.au/About_Parliament/Senate>.

The third major characteristic is that the PJCIS restricted membership was compounded by the exceptionally compressed time frames,⁷¹ impacting adversely upon the number, diversity and quality of public and peak body submissions to the PJCIS inquiry process. This created pressures for those civil society organisations and individuals researching and writing submissions for the PJCIS around complex legislation — potentially diminishing the depth, quality and analysis of such submissions, as well as hindering an appreciation of how the proposed legislation would fit within Australia's existing suite of counterterrorism laws. The intense time pressures created by tight reporting deadlines for the PJCIS in the Attorney-General's references were unfavourably commented upon both by the PJCIS and those making submissions.⁷²

The reduced public hearing times settled upon by the PJCIS in response to the Government-expedited process meant that Government, and other groups called to give witness submission evidence to PJCIS (having made written submissions to the PJCIS), were drawn from a narrower profile of expertise (a noticeable exclusion being witness submissions produced by expert individuals) than was applicable under the previous, more expansive review of the Senate Legal and Constitutional Affairs Committee, and the broader profile of witnesses in the parliamentary committee review processes (Senate committees and the specialist joint intelligence agency committee) in the Howard Government. This renewed urgency paradigm further communicated a Government perception of the relative unimportance of community-based deliberative contributions to the expansion of Australia's counterterrorism laws.

These factors have contributed to a situation of relatively few substantive amendments to each piece of legislation, a standard form of Government response to the PJCIS inquiries, which forestalls a more typical Senate negotiation for the Bill (through the bipartisan membership of the PJCIS subsequently being translated into majority Government and Opposition support in the Senate), and sometimes, the curious amendment of the Explanatory Memorandum of the Bill instead of amendment of the Bill itself. Amendment of the latter would have provided both greater clarity and a binding status, rather than reliance upon

71 See, eg, Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014* (2014) 2–3 ('PJCIS Advisory Report September 2014'): referral to PJCIS 16 July 2014, call for submissions 18 July, extended deadline 6 August, PJCIS reporting deadline 8 September; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) 2 ('PJCIS Advisory Report October 2014'): referral to PJCIS 24 September 2014, call for submissions 25 September, deadline 3 October; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (2014) 2 ('PJCIS Advisory Report November 2014'): referral to PJCIS 29 October 2014, call for submissions 30 October, deadline 10 November.

72 See, eg, *PJCIS Advisory Report October 2014*, above n 71, 3, commenting on '[t]he intensive nature of the inquiry and the short timeframes plac[ing] significant demands on the [PJCIS]' and the preference for more time. These issues are repeated in the separate and subsequent report: *PJCIS Advisory Report November 2014*, above n 71, 3.

accessing the *Acts Interpretation Act 1901* (Cth)⁷³ for subsequent interpretive interactions with the legislation.⁷⁴

During the Abbott Government, the reinvigoration of urgency as a legislative paradigm for terrorism laws included direct exhortations by the Prime Minister, with comments made asserting expectations and exerting pressure for swift passage of the legislation.⁷⁵ Similarly, comments in 2015 in a joint media conference with Prime Minister Abbott and Australian Federal Police (‘AFP’) Commissioner Colvin regarding the close and cooperative working relationship between the AFP and the PJCIS on the retention of metadata under the *Data Retention Bill*,⁷⁶ provided expectations of the co-option of the PJCIS review process to Government interests, instead of its broader obligations to the Parliament and to its statutory foundations.⁷⁷ Such urgency pressures for PJCIS review are exacerbated where impulsiveness, reactivity and a predictability of introducing still more new laws is frequently the first response, or default position, to the latest terrorism incident.

The interventionist and expediting comments of Prime Minister Abbott and the Attorney-General reflect the larger executive-centric character of national security reforms and their transformative quality, in which traditional democratically mandated rights and accountability mechanisms may be considered obstructive to, and a nuisance around, a higher governmental duty to protect the Australian people. This practice of Prime Minister Abbott and the Attorney-General to assert executive dominance and precedence over regular parliamentary practice (and indirectly over the parliamentary committee review process) is mirrored in the rescheduling of legislatively timetabled reviews (a topic that will be examined later in this article). That executive dominance and precedence was also reflected by the then chair of the PJCIS, Mr Tehan, making public forecasts about the Government’s national security legislative and policy developments. Such activities (in reality or perception) might be seen as government advocacy,

73 Section 15AB of the *Acts Interpretation Act 1901* (Cth) allows the use of extrinsic material in the interpretation of an Act. Material under s 15AB(2) which may be considered in the interpretation of a provision of an Act includes (e) ‘any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted’.

74 For a brief discussion of these implications in the example of the amended s 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*), see Appleby, above n 56, 8–9.

75 See, eg, ‘Govt Wants Metadata Laws by March’, *SBS News* (online), 4 February 2015 <<https://www.sbs.com.au/news/govt-wants-metadata-laws-by-march>>; ‘Tony Abbott Wants Metadata Laws Passed by March’, above n 68; ‘PM Abbott Steps Up Metadata Push’, *SBS News* (online), 18 February 2015 <<http://www.sbs.com.au/news/article/2015/02/18/pm-abbott-steps-metadata-push-0>>; George Brandis, ‘PJCIS Report into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014’ (Media Release, 27 February 2015) <[http://pandora.nla.gov.au/pan/21248/20150925-1049/www.attorneygeneral.gov.au/MediaReleases/Pages/2015/FirstQuarter/27-February-2015-PJCIS-Report-into-the-Telecommunications-\(Interception-and-Access\)-Amendment-\(Data-Retention\)-Bill-2014.html](http://pandora.nla.gov.au/pan/21248/20150925-1049/www.attorneygeneral.gov.au/MediaReleases/Pages/2015/FirstQuarter/27-February-2015-PJCIS-Report-into-the-Telecommunications-(Interception-and-Access)-Amendment-(Data-Retention)-Bill-2014.html)>; Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2015, 13483–6 (Malcolm Turnbull, Prime Minister).

76 Tony Abbott, Michael Keenan and Andrew Colvin, ‘Joint Press Conference, Melbourne’ (Media Release, 5 February 2015) <<http://pandora.nla.gov.au/pan/143015/20150209-0000/www.pm.gov.au/media/2015-02-05/joint-press-conference-melbourne.html>>.

77 Under pt 4 of the *Intelligence Services Act 2001* (Cth) (*Intelligence Services Act*).

given that these contentious matters might subsequently be introduced as Bills, and then referred to the PJCIS for review and report to the Parliament.⁷⁸

As indicated in the introduction to this article, the renewal and revitalisation of the urgency paradigm in the PJCIS review and enactment of 2014–15 terrorism laws, consequentially exposed and elevated a series of distinctive, broad and thematic problematic issues associated with PJCIS review processes. Our attention now turns to examining four major broad and thematic issues emerging from the PJCIS 2014–15 legislative review and enactment processes.⁷⁹ By looking at those PJCIS reviews through the lens of these broader thematic issues, a clearer appreciation of the legislative process and legislative formation from the 2014–15 terrorism laws reviews may be obtained. Recommendations and proposals for reform of PJCIS review can then be devised, responding to the reality of a constant, ongoing review of terrorism laws.

III EXISTING COMPLETED TERRORISM LAW REVIEWS: THEIR RELATIONSHIP TO THE 2014–15 PJCIS REVIEW AND ENACTMENT PROCESS AND SUBSEQUENT DEVELOPMENTS

One thematic issue in the review and passage of the first three pieces of legislation⁸⁰ was the relationship of present PJCIS review to existing completed reviews which engaged with the same broad subject matter.⁸¹ Usually, the earlier review reports and their recommendations were not properly addressed and integrated within the later PJCIS review. This practice has extended to ignoring earlier recommendations and failing to identify them as a valuable resource in formulating the present legislative response.

78 Dan Tehan, 'New Measures to Strengthen Australian Citizenship' (Media Release, 15 June 2015) <<http://www.dantehan.com.au/2015/06/new-measures-to-strengthen-australian-citizenship/>>; Dan Tehan, 'Protecting Our Country and Investing in Our Security' (Media Release, 12 May 2015) <<http://www.dantehan.com.au/2015/05/protecting-our-country-and-investing-in-our-security/>>; David Speers, Interview with Dan Tehan (Television Interview, 24 August 2014) <<http://www.dantehan.com.au/2014/09/sky-news-pm-agenda-intelligence-legislation-and-terrorism/>>.

79 Because of word limits in the present article, five specific, problematic legislative examples emerging from the four sets of terrorism laws in 2014–15 and PJCIS review have been analysed and critiqued in a separate academic article: Carne, 'Sharpening the Learning Curve', above n 9, including items such as the prohibitions and restrictions on reporting and communication under the amendments introducing special intelligence operations into the *ASIO Act*, with civil and criminal immunities attaching to those participating in these operations; the broadening of the application of the control orders scheme in the *Criminal Code* div 104 to apply to situations remotely and tenuously connected to primary foreign fighter offences; the introduction of declared area provisions in the *Criminal Code* relating to foreign fighters, with reverse onus provisions and a fairly narrow and exclusive set of exemptions for presence within a declared area; a significant expansion of the circumstances and penalties for unlawful disclosure of national security information, with a narrowly conceived authorised disclosure mechanism to the IGIS; and the controversial journalist warrant scheme for metadata access under the *Data Retention Act*.

80 Namely the *NSLA Act*, the *Foreign Fighters Act* and the *CTLA Act*.

81 The fourth piece of legislation, the *Data Retention Act*, was not backgrounded by the same level of review: see *PJCIS Report May 2013*, above n 1, 192, recommendation 42, noting the diversity of Committee views, and that if a mandatory data retention scheme is to proceed, a legislation exposure draft and referral to the PJCIS should occur. Ultimately no exposure draft was produced.

The first three pieces of legislation were enacted against the background of significant prior reviews of aspects of terrorism laws. However, the content of these reviews, largely because of expedited legislative processes, was neither adequately incorporated into the PJCS review processes nor into subsequent parliamentary debate. The failure to adequately integrate the content of these reviews into the legislative process provides for a deficiency in that process and potential future problems in the legislation. It signals to the broader community that legislative reactivity is preferred over a more measured and multifactorial approach.⁸²

The first review — the COAG review⁸³ — was instituted as part of earlier terrorism law reforms⁸⁴ and was released in May 2013. It made, inter alia, extensive recommendations regarding improvements and safeguards around the control order provisions of div 104 of the *Criminal Code*.⁸⁵

The second set of reviews — the four INSLM reviews — were produced from 2011–14, parts of which are relevant to the three 2014 pieces of legislation dealing with control orders and foreign fighters.⁸⁶ Various relevant recommendations were made in the *INSLM Annual Report 2012*⁸⁷ regarding control orders.⁸⁸ However, the subsequent 2014 legislative processes were insufficiently responsive to, nor provided with adequate time to digest, as an integral part of those legislative reforms, those relevant parts of the INSLM reports.

The 2014 INSLM report⁸⁹ was a truncated report, as the term appointment for the INSLM may not exceed three years and the inaugural appointee was appointed for three years.⁹⁰ It is noteworthy in two ways.

82 On this point, see generally Carne, ‘Sharpening the Learning Curve’, above n 9, 24: ‘Accordingly, the PJCS 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.’

83 Council of Australian Governments, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) (‘COAG Review Report’).

84 The 2005 terrorism law reforms, including the *Anti-Terrorism Act (No 2) 2005* (Cth). See Carne, ‘Prevent, Detain, Control and Order?’, above n 21. The terms and scope of the COAG review were settled in Council of Australian Governments, ‘Council of Australian Governments’ Meeting’ (Communiqué, 10 February 2006) Attachment G COAG Communiqué of 11 February 2006: *COAG Review Report*, *ibid* 2.

85 *COAG Review Report*, above n 83, 54–63. See Carne, ‘Sharpening the Learning Curve’, above n 9, 22–4, for a discussion of the recommendations made.

86 The 2011 INSLM report flagged a series of control order questions for examination in 2012: Bret Walker, *Independent National Security Legislation Monitor — Annual Report 16 December 2011* (2012) 69 [41]–[45] (‘*INSLM Annual Report 2011*’); appendix 3, ‘Issues for Consideration’, items 41 to 45, including item 42, ‘[d]o international comparators support or oppose the effectiveness and appropriateness of control orders and preventative detention orders’; the 2012 INSLM report extensively reviewed *Criminal Code* div 104 control orders: Bret Walker, *Independent National Security Legislation Monitor — Declassified Annual Report 20 December 2012* (2013) 6–44 (‘*INSLM Annual Report 2012*’).

87 *INSLM Annual Report 2012*, above n 86, 6–44.

88 See Carne, ‘Sharpening the Learning Curve’, above n 9, 23–4.

89 Bret Walker, *Independent National Security Legislation Monitor — Annual Report 28 March 2014* (2014) (‘*INSLM Annual Report 2014*’).

90 *Ibid* 1.

First, the initial chapter ‘Summary and General Comment’ makes pointed remarks about the lack of responsiveness to past INSLM recommendations:

The official silence since those recommendations [in the *INSLM Annual Report 2013*] were made prompts repetition of the comment first expressed in the [*INSLM Annual Report 2013*]: ‘When there is no apparent response to recommendations that would increase powers and authority to counter terrorism, some skepticism may start to take root about the political imperative to have the most effective and appropriate counter-terrorism laws’.⁹¹

These remarks were made against the background of the Abbott Government decision to abolish the INSLM, with the Independent National Security Legislation Monitor Repeal Bill 2014 (Cth) designed ‘to reduce bureaucracy and streamline government’.⁹² This lack of responsiveness to the INSLM recommendations by the PJCIS may well reflect a broader Government unwillingness to engage the INSLM recommendations. Indeed, such broader and more consistent engagement and adoption of INSLM recommendations in 2014 by a PJCIS chaired by a Government member and with majority Government membership, would have been at odds with the executive decision to abolish the INSLM, particularly as a stated objective of such abolition was “‘to reduce bureaucracy and streamline government” by removing “duplication of responsibilities and between different levels of Government”’.⁹³ It is open to speculation whether PJCIS majority Government members engaging with the INSLM recommendations in any substantial manner might have produced adverse consequences within internal Government and Coalition political party processes.

Second, the *INSLM Annual Report 2014* includes a significant Chapter III, ‘Australians and Armed Conflicts Abroad’, within which there is a section titled ‘Proscription of Unapproved Fighting by Australians Abroad?’, highlighting concerns about the risks posed to Australian domestic security through the return to Australia ‘of trained and desensitized (perhaps radicalized) Australians from foreign conflicts such as Syria ... regardless what side, party, faction or group the returning Australian had fought with’.⁹⁴

The *INSLM Annual Report 2014* also engaged the other side of the problem, namely that ‘it surely makes sense to consider the effectiveness of Australia’s [counterterrorism laws] to prevent, by criminally sanctioned deterrents, such as Australians going abroad for those purposes in the first place.’⁹⁵ Likewise, the report examines at some length terrorism-related passport cancellation and

91 Ibid 2, quoting Bret Walker, *Independent National Security Legislation Monitor — Annual Report 7 November 2013* (2013) 6 (*INSLM Annual Report 2013*). See also the comments of the INSLM about lack of government responsiveness to the cumulative recommendations of the INSLM annual reports, focusing upon three specific recommendations: at 4–6.

92 *INSLM Annual Report 2014*, above n 89, 3, quoting Explanatory Memorandum, Independent National Security Legislation Monitor Repeal Bill 2014 (Cth).

93 *INSLM Annual Report 2014*, above n 89, 3, quoting Explanatory Memorandum, Independent National Security Legislation Monitor Repeal Bill 2014 (Cth).

94 *INSLM Annual Report 2014*, above n 89, 27.

95 Ibid 28.

citizenship issues⁹⁶ and made nine recommendations. The most significant recommendations included interim passport suspensions related to the issue of an adverse security assessment⁹⁷ and consideration of a power to revoke the citizenship of Australians, ‘where to do so would not render them stateless, where the Minister [for Immigration] is satisfied that the person has engaged in acts prejudicial to Australia’s security and it is not in Australia’s interests for the person to remain in Australia.’⁹⁸ The report also made some observations about a scheme for ASIO authorised intelligence operations, recommending that consideration should be given to the introduction of legislation ‘to provide ASIO officers and ASIO human sources with protection from criminal and civil liability for certain conduct in the course of authorized intelligence operations.’⁹⁹

The history of three pieces of 2014 legislation reveals a PJCIS review process and subsequent legislative enactment which has neither consistently nor optimally engaged with these earlier reviews. This is reflected in the significant expansion of the control order arrangements in the *CTLA Act* without incorporating the additional safeguards of the *COAG Review Report*, or in replacing control orders with the conduct-based scheme advocated by the *INSLM Annual Report 2012*.¹⁰⁰ Further, the measured tone of the *INSLM Annual Report 2014* raised an expectation of considered government review, in contrast to the expedited and broad legislative drafting pertaining to foreign fighter activity and passport and citizenship issues in the *Foreign Fighters Act*.

Significantly, two¹⁰¹ of the three 2014 PJCIS reports make relatively little reference to the existing completed reviews — the *COAG Review Report* and the annual INSLM reports, even though both of these reports incorporate superior research and analysis on specific topics than the PJCIS reports. Increased reference to the existing completed reviews is made in the *PJCIS Advisory Report October 2014*, itself a more voluminous report than the two other 2014 PJCIS reports. In general, the *PJCIS Advisory Report October 2014* refers to the *COAG Review Report* for two purposes — first, to confirm that the Government is yet to respond to its recommendations¹⁰² (and hence allow the PJCIS to presently disengage from those matters), and second, to note the AFP’s assertion that the security environment has changed since the *COAG Review Report* was submitted.¹⁰³

96 Ibid 37–58.

97 Ibid 48, recommendation V/4.

98 Ibid 57, recommendation V/9.

99 Ibid 73, recommendation VI/9.

100 See *INSLM Annual Report 2012*, above n 86, 44: ‘replacing them with *Fardon* type provisions authorizing [control orders] against terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness’.

101 *PJCIS Advisory Report November 2014*, above n 71; *PJCIS Advisory Report September 2014*, above n 71.

102 *PJCIS Advisory Report October 2014*, above n 71, 155.

103 Ibid 64. By citing this AFP argument the PJCIS could more readily and subsequently consider the *COAG Review Report* recommendations as superseded, or decline to engage substantively with that report.

Reference to the four INSLM annual reports and the views of the INSLM (the former INSLM Bret Walker SC appeared as a witness at the Canberra PJCIS public hearing on 8 October 2014¹⁰⁴) is consistently used to confirm the continuing opinion (even with the evolution of the security environment) of the former INSLM as to the recommended removal of control orders and preventative detention.¹⁰⁵

Such reference is more proactively used by the PJCIS to support a variety of government claims for expanded national security powers in the *Foreign Fighters Bill*.¹⁰⁶ The support of the former INSLM (with or without citation of the relevant annual INSLM reports from 2011 to 2014) is therefore mobilised by the PJCIS to support expansions of power — access to delayed notification search warrants (including secrecy provisions attaching to such warrants);¹⁰⁷ for a change to a subjective test for an applicant for a preventative detention order (compared with the existing objective test);¹⁰⁸ for strengthening of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) and its incorporation into the *Criminal Code*,¹⁰⁹ as well as the exclusion of intent for the commission of these offences;¹¹⁰ of increased proposed penalties for foreign fighter offences based on comparable offences in the *Criminal Code*;¹¹¹ amending the *Foreign Evidence Act 1994* (Cth) to permit greater judicial discretion regarding the use of foreign material in terrorism-related proceedings;¹¹² in liberalising the threshold circumstances for the obtaining of ASIO questioning warrants;¹¹³ and in failing to actively support the introduction of a special advocates scheme relating to the operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), by citing both the concerns of the INSLM as to the inadequate address of fair trial issues in such schemes, along with the fact that the Government had yet to respond to the COAG review report.¹¹⁴

This reality of little reference being made to the existing completed reviews in two of the PJCIS reviews is corroborated in the Government responses to the three 2014 PJCIS reports. Two of the Government responses made reference to

104 Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 8 October 2014, 38–45 (Bret Walker).

105 *PJCIS Advisory Report October 2014*, above n 71, 53, 63.

106 *Ibid* 59.

107 *Ibid* 20–3.

108 *Ibid* 65 [2.254]. In this instance, the PJCIS highlights the Explanatory Memorandum to the Bill, which advocates not only maintaining, but extending, the application of PDO's through the introduction of a subjective test – responding to, and at odds with INSLM's recommended removal of PDO's entirely in the *INSLM Annual Report 2012*, above n 86. This ultimately leads 'on balance' in the report to the PJCIS supporting 'the continued operation of the PDO regime': *PJCIS Advisory Report October 2014*, 68.

109 *Ibid* 81–2, 87.

110 *Ibid* 88.

111 *Ibid* 89.

112 *Ibid* 110, 114–15.

113 *Ibid* 125–6, 128–9.

114 *Ibid* 154–5.

the PJCIS exhortations to the government to appoint a new INSLM.¹¹⁵ Two other recommendations of the PJCIS inquiries, which made direct or indirect reference to past inquiries, received Government responses — recommendation 1 of the *PJCIS Advisory Report November 2014*¹¹⁶ and recommendation 13 of the *PJCIS Advisory Report October 2014*.¹¹⁷ In both instances, the recommendations relate to failures of the PJCIS to respond to important earlier subject matters of existing reviews discussed above.

The first example¹¹⁸ is illustrative. The INSLM, acting on the referral of the Prime Minister,¹¹⁹ produced a 2016 report¹²⁰ providing a range of conclusions on the *COAG Review Report* recommendations relating to control orders. The role of special advocates was given particular prominence,¹²¹ with the INSLM recommending that a system of special advocates be introduced in *National Security Information*

115 George Brandis, ‘Government Response to Committee Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014’ (Media Release, 25 November 2014) <<http://pandora.nla.gov.au/pan/21248/20150925-1049/www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/25November2014-GovernmentResponseToCommitteeReportOnTheCounter-TerrorismLegislationAmendmentBillNo1-2014.html>>; George Brandis, ‘Government Response to Committee Report on National Security Legislation Amendment Bill (No 1) 2014’ (Media Release, 19 September 2014) <<http://pandora.nla.gov.au/pan/21248/20150925-1049/www.attorneygeneral.gov.au/Mediareleases/Pages/2014/ThirdQuarter/19September-2014GovernmentResponseToCommitteeReportOnNationalSecurityLegislationAmendmentBillno-12014.html>>.

116 A recommendation that

in light of the proposed expansion of the control order regime, the Government task the newly appointed INSLM to consider whether the additional safeguards [to the control orders scheme] recommended in the 2013 Council of Australian Governments Review of Counter-Terrorism Legislation should be introduced. Particular consideration should be given to the advisability of introducing a system of ‘Special Advocates’ into the regime

(*PJCIS Advisory Report November 2014*, above n 71, ix) was supported by the Government: Brandis, ‘Government Response to Committee Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014’, above n 115, recommendation 1.

117 A recommendation that the *INSLM Act* ‘be amended to require the INSLM to finalise a review of’ control orders (*Criminal Code* div 104), preventive detention orders (*Criminal Code* div 105), the stop, search and seizure powers relating to terrorism offences in *Crimes Act 1914* (Cth) div 3A (*Crimes Act*) and the ASIO questioning and questioning and detention warrant regime in the *ASIO Act*: George Brandis, ‘Government Response to Committee Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014’ (Media Release, 22 October 2014) <<http://pandora.nla.gov.au/pan/21248/20150925-1049/www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/22October2014-Governmentresponssetocommitteereportonthecounterterrorismlegislationamendmentforeignfightersbill.html>>: ‘Pursuant to section 7 of the *Independent National Security Legislation Monitor Act 2010*, the Government will request that the INSLM review the operation of the control order regime (Division 104) ... within 12 months of the date of the next Federal election / by 7 September 2017’.

118 Namely recommendation 1 of the *PJCIS Advisory Report November 2014*, above n 71, ix.

119 Pursuant to s 7 of the *INSLM Act*, referring ‘whether the additional safeguards recommended in the 2013 Council of Australian Governments Review of Counter-Terrorism Legislation in relation to the control order regime should be introduced, with particular consideration given to the advisability of introducing a system of special advocates into the regime, as recommended’ (in the *PJCIS Advisory Report November 2014*, above n 71, ix, recommendation 1: Roger Gyles, *Control Order Safeguards — (INSLM Report) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (2016) 1 (*INSLM January 2016 Report*). See also *PJCIS Advisory Report November 2014*, above n 71, ix, recommendation 1, prompting the Prime Ministerial referral to the INSLM.

120 The INSLM report consisted of two instalments — *INSLM January 2016 Report*, above n 119, and Roger Gyles, *Control Order Safeguards Part 2* (2016) (*INSLM April 2016 Report*).

121 *PJCIS Advisory Report November 2014*, above n 71, ix, recommendation 1.

(*Criminal and Civil Proceedings*) Act 2004 (Cth) proceedings.¹²² In Part 2 of the report,¹²³ the INSLM reached conclusions¹²⁴ concerning several of the additional *COAG Review Report* recommendations relating to control orders.¹²⁵

The reluctance or failure of the PJCS to engage with the earlier *COAG Review Report* material on control orders in its own review,¹²⁶ and an apparent PJCS enthusiasm for recommending that matters be referred off to the INSLM¹²⁷ (to facilitate accelerated, urgent passage of instant legislation), produced subsequent protraction, circularity and convolution, as aspects of the control orders matters ultimately returned in a 2016 PJCS review of subsequent legislation.¹²⁸ This review required various PJCS recommendations, several now finally arriving at an endorsement of the *COAG Review Report* approaches,¹²⁹ following the INSLM reference and conclusions.

The remarkable point here is the set of contradictions arising from the urgency paradigm — first, review matters outsourced by the PJCS to the INSLM (to expedite passage of the Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth)) then re-emerging for PJCS consideration and recommendation because of further proposed, significantly extended legislation on the same subject matter, namely control orders¹³⁰ requiring a fresh consideration of additional safeguards (such as those originally proposed by the *COAG Review Report*, but not addressed by the PJCS). Second (and ironically), because of the complexity created through the PJCS's initial failure to address additional safeguards (and subsequently,

122 See *INSLM January 2016 Report*, above n 119, 10; *INSLM April 2016 Report*, above n 120, 9–11. The content addressing special advocates in the *INSLM January 2016 Report* reflects the prominence of this matter.

123 *INSLM April 2016 Report*, above n 120.

124 'Conclusions' is the word chosen by the INSLM: see, eg, *ibid* 6.

125 Recommendations 27 (basis for seeking the Attorney-General's consent), 28 (definition of 'issuing court'), 29 (information sharing between the AFP and Commonwealth Director of Public Prosecutions), 30 (special advocates), 31 (minimum standard of information disclosure to controlee), 33 (relocation condition), 34 (curfew condition), 35 (communication restrictions), 37 (least interference principle), and 38 (Commonwealth Ombudsman oversight): *COAG Review Report*, above n 83, xiii–xv. The INSLM noted that recommendations 26 (retention of control orders) and 36 (limit on duration of control order of 12 months) were accepted, not requiring any action, and that recommendation 32 (information on appeal rights) was implemented: *INSLM April 2016 Report*, above n 120, 19.

126 See Carne, 'Sharpening the Learning Curve', above n 9, 23–4.

127 See *PJCS Advisory Report November 2014*, above n 71, ix, recommendation 1.

128 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (2016) (*PJCS Advisory Report February 2016*).

129 *Ibid*. Recommendation 5 (relating to special advocates — the PJCS now supporting a COAG Committee proposal for special advocates, which had previously arisen: at xiv); recommendation 4 'reflects the intent of Recommendation 31 of the Council of Australian Governments Review of Counter-Terrorism Legislation': at xiv; recommendation 9 'that for a monitoring warrant in relation to a premises or person, the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 be amended to reflect the intent of Recommendation 37 of the Council of Australian Governments Review of Counter-Terrorism Legislation': at xvi. See also recommendations 13–14 of the *PJCS Advisory Report February 2016*, above n 128, xviii, invoking recommendation 37 of the *COAG Review Report*, above n 83.

130 Counter-Terrorism Legislation Amendment Bill (No 1) 2016 (Cth) (*CTLA Bill 2016*). See George Brandis, 'Two Bills to Bolster the Fight against Terrorism' (Media Release, 15 September 2016) <<http://pandora.nla.gov.au/pan/21248/20161101-1107/www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Two-bills-to-bolster-the-fight-against-terrorism.html>>.

the intervening 2016 federal election), the legislative timetable extended over 12 months between the introduction of the first Bill¹³¹ and the passage of its replacement.¹³² The point in November 2016 where this legislation could finally be passed was arrived at largely because the inadvertently extended legislative timetable created enough time for the INSLM conclusions to be absorbed¹³³ and for the Opposition to ensure that all recommendations of the PJCIS report were to be implemented to ensure passage of the revised 2016 Bill.¹³⁴

The 2016 Bill also had to address earlier deficiencies of the 2014 PJCIS review¹³⁵ regarding prohibitions of, and penalties for, disclosures of information in relation to *ASIO Act* s 35P special intelligence operations. A reference was made from the Prime Minister regarding this related question of s 35P of the *ASIO Act* to the INSLM under s 7 of the *INSLM Act*.¹³⁶ The INSLM report recommended:

Section 35P should be redrafted to treat insiders and outsiders separately, with one part dealing with third parties and another part dealing with insiders. There should be a basic offence (penalty five years imprisonment) and an aggravated offence (penalty 10 years imprisonment) in relation to both insiders and outsiders.¹³⁷

The Government response to the *INSLM October 2015 Report* recommendations stated that '[t]he Government has accepted and will implement all of the recommendations made by the Monitor providing added safeguards to journalists reporting on national security.'¹³⁸ Timing considerations meant that this matter was not further considered by the PJCIS,¹³⁹ as the original *CTLA Bill 2015* was

131 *CTLA Bill 2015*: introduced into the Senate on 12 November 2015, and lapsed at prorogation of the Parliament on 17 April 2016.

132 *CTLA Bill 2016*: introduced into the Senate on 15 September 2016, passed by the Senate 9 November 2016, introduced into the House of Representatives 10 November 2016, and passed by the House of Representatives 22 November 2016.

133 A perusal of the references to the *INSLM January 2016 Report* in the *PJCIS Advisory Report February 2016*, above n 128, 4–5, 37, 45–6, 69–70, 72–3, 77–8, 102; and in the references to the *INSLM January 2016 Report* in Commonwealth, *Parliamentary Debates*, Senate, 8 November 2016, 2110 (Nicholas McKim), 2114 (Nick Xenophon), 2206 (Richard Di Natale), 2212 (David Leyonhjelm), 2217 (George Brandis); Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 2016, 3973 (Mark Dreyfus).

134 *CTLA Bill 2016*. Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 2016, 3973 (Mark Dreyfus):

Labor members pursued improvements to the bill through the Parliamentary Joint Committee on Intelligence and Security to ensure that the bill was fit for purpose. Our work resulted in 21 substantial recommendations for improvements to the bill and following negotiations with the government, we were able to reach agreement on the implementation of these recommendations.

135 See *PJCIS Advisory Report September 2014*, above n 71, 55–9 for discussion of special intelligence operations offence provisions. See also recommendations 9–13: at x–xii.

136 Roger Gyles, *Report on the Impact on Journalists of Section 35P of the ASIO Act* (2015) 1 (*INSLM October 2015 Report*).

137 *Ibid* 3.

138 George Brandis, 'Government Response to INSLM Report on the Impact on Journalists of Section 35P of the *ASIO Act 1979*' (Media Release, 2 February 2016) <<http://pandora.nla.gov.au/pan/21248/20161101-1107/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.html>>.

139 See *PJCIS Advisory Report February 2016*, above n 128.

introduced into the Senate in November 2015, prior to the Government response to the *INSLM October 2015 Report*,¹⁴⁰ and did not contain amendments to sch 18 (with a set of amendments largely reflecting the INSLM recommendations regarding s 35P of the *ASIO Act*), which were only included in the later *CTLA Bill 2016*.¹⁴¹

The earlier, separate response to recommendation 21 of the *PJCIS Advisory Report October 2014*¹⁴² indicated a new matter of Government support to the recommendation in that ‘the Government will refer the declared area offence to the INSLM for review and report 12 months after the next Federal election.’¹⁴³ This further matter was subsequently reviewed by the INSLM.¹⁴⁴

IV JUSTIFYING LEGISLATIVE EXPANSIONS BY ASSIGNING FURTHER TASKS TO IGIS AND INSLM REVIEW PROCESSES: POTENTIALLY OVERLOADING EX POST FACTO REVIEW MODEL FUNCTIONS?

A further development contemporaneous to the significant extensions of executive-based powers in the 2014–15 terrorism legislation, was the assuaging and justificatory Government response providing for increased review functions of the IGIS, whilst reversing the earlier abolition of the office and functions of the INSLM.

This response was promoted as a claimed safeguard on newly sought and acquired security powers — to the extent of becoming a default position in the

140 Brandis, ‘Government Response to INSLM Report on the Impact on Journalists of Section 35P of the *ASIO Act 1979*’, above n 138.

141 See George Brandis and Michael Keenan, ‘Parliament Passes Counter-Terrorism Legislation Amendment Bill (No 1) 2016’ (Media Release, 22 November 2016) <<http://pandora.nla.gov.au/pan/21248/20170201-0710/www.attorneygeneral.gov.au/Mediareleases/Pages/2016/FourthQuarter/Parliament-passes-Counter-Terrorism-Legislation-Amendment-Bill-No1-2016.html>>, noting the implementation of the *INSLM October 2015 Report* recommendations on s 35P of the *ASIO Act*. The PJCHR gave qualified approval to sch 18 of the *CTLA Bill 2016* regarding s 35P: see Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Report 7 of 2016* (2016), 83 (‘*PJCHR Scrutiny Report October 2016*’).

142 Brandis, ‘Government Response to Committee Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014’, above n 117.

143 Ibid.

144 Independent National Security Legislation Monitor, *Certain Matters Regarding the Impact of Amendments to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2 May 2016) <<https://www.inslm.gov.au/reviews-reports/certain-matters-regarding-impact-amendments-counter-terrorism-legislation-amendment>> (emphasis added):

On 2 May 2016, the INSLM completed a report on the impacts of certain amendments proposed to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 by the Parliamentary Joint Committee on Intelligence and Security. This was a matter referred to the INSLM by the Prime Minister. ... The INSLM noted that all of the recommendations acted to moderate the impact of the legislation. The INSLM did not propose any amendment to the provisions (as, by the time the INSLM’s report has been written, the Committee’s recommendations had been implemented).

Government's seeking and justification of expanded executive authority.¹⁴⁵ This standardised Government response appeared both excessive and unwarranted — as the review function is typically *ex post facto* in its application,¹⁴⁶ and in the case of the INSLM,¹⁴⁷ applied to generic subject matters, instead of particularised circumstances.¹⁴⁸ The IGIS role is a distinctively reactive model, operating as an audit examination of whether procedures have been followed, without necessarily considering larger policy questions or being proactively and preventatively focused.¹⁴⁹ This model is attractive to government as it quarantines controversial issues, preserves quite substantial security-related restrictions on the release of review information by the IGIS, and allows the IGIS's discretion (in a resource-stretched environment) to set the operational priorities for review.

The scope of the added responsibilities raises resourcing issues in both budget and staffing for the IGIS. From the terrorist attacks of 11 September 2001, Australia's security and intelligence agencies have received very significant increases in powers, budgets and resources.¹⁵⁰ Such increases have not been correspondingly replicated for review and supervisory bodies such as the IGIS. The expansion and liberalisation of intelligence agency powers has been further augmented by dismantling the informational, operational and cooperative barriers between ASIO and other Australian intelligence agencies,¹⁵¹ creating a new security paradigm which emphasises information and role sharing and interchangeability of staff. There is a strong argument that the resourcing and conceptual methodology of the existing IGIS and INSLM model has not sufficiently evolved to address the challenges of new intelligence agency operating principles.

145 The default nature of the position is seen in the various referrals on from the PJCS recommendations to the IGIS and INSLM in the Government Responses to the three PJCS reports: Brandis, 'Government Response to Committee Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014', above n 115; Brandis, 'Government Response to Committee Report on National Security Legislation Amendment Bill (No 1) 2014', above n 115; Brandis, 'Government Response to Committee Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014', above n 117.

146 See Lynch, 'The Impact of Post-Enactment Review on Anti-Terrorism Laws', above n 13, 76–7, identifying several substantiated difficulties associated with *ex post facto* review.

147 Perceived deficiencies in the PJCS review processes of the 2014 terrorism legislation prompted the Greens to introduce the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014 (Cth), which would have enabled the INSLM to review proposed national security laws: see Appleby, above n 56, 10.

148 See the functions of the INSLM in s 6 of the *INSLM Act* and s 7 (capacity of the Prime Minister to refer matters to the INSLM). Given the delays in the appointment of a new INSLM following the reversal of the Government decision to abolish the INSLM, two of the government responses when mentioning the INSLM were of a broad nature: Brandis, 'Government Response to Committee Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014', above n 115; Brandis, 'Government Response to Committee Report on National Security Legislation Amendment Bill (No 1) 2014', above n 115.

149 See *Inspector-General of Intelligence and Security Act 1986* (Cth), ss 4, 8 ('*IGIS Act*').

150 From 2001 to 2011, ASIO's staff trebled and there was a sixfold increase in its budget: Sally Neighbour, 'Hidden Agendas', *The Monthly* (Melbourne) November 2010, 28, 32.

151 See the cooperative arrangements amongst the various intelligence agencies in the *Intelligence Services Act* s 13A; Carne, 'Beyond Terrorism', above n 16, 194–202.

The *PJCIS Advisory Report September 2014* makes five recommendations impacting upon the work of the IGIS.¹⁵² The Government response to recommendations 7, 8 and 10 of the PJCIS report expresses satisfaction with the discretionary powers of the IGIS in relation to the oversight provisions relating to training for, and the use of force by, ASIO against persons, as well as satisfaction with the discretionary powers of the IGIS in relation to periodic inspection powers of ASIO records, as they relate to the new special intelligence operations.¹⁵³ From one perspective, the omission to include more specific monitoring requirements in the responsibilities of the IGIS, with its reliance on IGIS discretion, provides for a weaker accountability framework than might otherwise be achieved through more specific legislated obligations.

The *PJCIS Advisory Report October 2014* makes two recommendations which impact upon the work of the INSLM.¹⁵⁴ The Government response to recommendation 13¹⁵⁵ and to recommendation 21¹⁵⁶ indicates that the Government will refer these matters for review, after the federal election, under s 7 of the *INSLM Act*.

The *PJCIS Advisory Report November 2014* makes a number of recommendations impacting upon the work of IGIS¹⁵⁷ and a further recommendation impacting upon the work of INSLM.¹⁵⁸ The Government response on this occasion to some

152 See recommendations 6–8, 10 and 15 of the *PJCIS Advisory Report September 2014*, above n 71, x–xii. Recommendation 15, relating to funding, called for the IGIS annual budget to ‘be supplemented to the extent required to provide for the new oversight requirements associated with the National Security Legislation Amendment Bill (No 1) 2014 ... [and] other proposed measures to expand the powers of intelligence agencies’: at xii.

153 Brandis, ‘Government Response to Committee Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014’, above n 115.

154 See *PJCIS Advisory Report October 2014*, above n 71, xiv–xvi, recommendations 13 and 21.

155 That the INSLM review the operation of control orders, preventative detention, stop, search and seizure powers and the ASIO questioning and detention warrant scheme: Brandis, ‘Government Response to Committee Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014’, above n 117.

156 That the INSLM review the operation of the foreign fighters declared areas provisions: *ibid*.

157 See recommendations 8–11, 13–14 of the *PJCIS Advisory Report November 2014*, above n 71, xi–xii.

158 See *ibid* ix, recommendation 1: that INSLM be tasked to consider whether the additional control order safeguards included in the *COAG Review Report* should be introduced.

of these recommendations — namely recommendations 10,¹⁵⁹ 11,¹⁶⁰ 13¹⁶¹ and 14¹⁶² of the *PJCIS Advisory Report November 2014* — is to provide amendments to the IGIS legislation to specify that for this topic of emergency authorisations, the IGIS has obligatory reporting and oversight requirements, but with repeated emphasis upon the independence, discretion, statutory basis and ministerial and parliamentary reporting chain underpinning the IGIS role.¹⁶³ In contrast, the Government response to recommendation 8 of the *PJCIS Advisory Report November 2014*,¹⁶⁴ dealing with oral emergency ministerial authorisations under the *Intelligence Services Act*, accepts, without advancing any legislative amendment, the expressed intention of the IGIS ‘to pay close attention to emergency authorisations, and that the [*IGIS Act*] provides a sufficient legislative basis for such oversight’.¹⁶⁵

Situated within the expansion and liberalisation of security intelligence agency powers above, such additions to the role of the IGIS raise two critical questions. First, there is no apparent mechanism to review the performance of the IGIS itself in discharging these significantly enhanced and discretionary based obligations to ensure scrutiny and the operation of checks and balances. Indeed, the Government responses emphasise the independent nature of the IGIS,¹⁶⁶

159 That ‘the [IGIS] be required to oversight within 30 days all emergency authorisations given by agency heads under proposed section 9B of the *Intelligence Services Act 2001*’: *ibid* xi.

160 ‘[T]hat the [IGIS] be required to notify the [PJCIS] within 30 days of all emergency authorisations issued under proposed section 9B and inform the [PJCIS] whether the *Intelligence Services Act 2001* was fully complied with in the issuing of the authorisation’: *ibid*.

161 That

the [IGIS] be required to oversight within 30 days, all instances in which an agreement to an emergency authorisation from the Attorney-General was required and not obtainable, and instead:

- authorisation was given with the agreement of the Director-General of Security, or
- authorisation was given without the agreement of either the Attorney-General or the Director General of Security.

Ibid xii.

162 That

the [IGIS] be required to notify the [PJCIS] within 30 days of all instances in which agreement to an emergency authorisation from the Attorney-General was required and not obtainable, and instead:

- authorisation was given with the agreement of the Director-General of Security, or
- authorisation was given without the agreement of either the Attorney-General or the Director-General of Security

and inform the [PJCIS] whether the *Intelligence Services Act 2001* was fully complied with in the issuing of the authorisation.

Ibid.

163 Brandis, ‘Government Response to Committee Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014’, above n 115.

164 That

the [IGIS] provide close oversight of:

- all ministerial authorisations given orally under proposed subsection 9A(2) of the *Intelligence Services Act 2001*, and
- all oral agreements provided by the Attorney-General under the proposed amendments to ... the *Intelligence Services Act 2001*.

Ibid xi.

165 Brandis, ‘Government Response to Committee Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014’, above n 115.

166 *Ibid*.

presumably to build credibility into the nature of the safeguards, whilst providing distance for the government from review methods settled upon by IGIS. The multiple allocation of new functions to the IGIS has become a default position for government without looking behind the statutory independence of the office, and is advanced in a political way as justifying this reform.

Secondly, although the Government response to recommendation 15 of the first of the 2014 PJCIS reports¹⁶⁷ confirmed both increases in ‘the annual budget of the IGIS to provide for the new oversight requirements in relation to the measures in the National Security Legislation Amendment Bill (No 1) 2014’¹⁶⁸ and that the government would, ‘in consultation with the IGIS, continue to monitor the resourcing needs ... to ensure it is resourced to perform effective oversight of the measures’ in future Bills,¹⁶⁹ this response fails to address the incremental expansion of legislatively based national security activities, and to provide the IGIS and INSLM with a sustainable financing formula and resourcing mechanism. The quantum of national security laws and the associated monitoring and review activities are so significant that what is required is a legislatively fixed minimum budgetary allocation for the IGIS and INSLM. Ideally, this allocation would be a mathematical proportion of the overall budgetary appropriation to members of Australia’s intelligence community. This might be achieved through a hypothecated efficiency dividend on those intelligence agencies (with ever-increasing budgets, resources and personnel) supervised by the IGIS and INSLM.¹⁷⁰

V THE DISREGARD AND DELAYING OF EXISTING AND EXTENSIVELY NEGOTIATED LEGISLATED REVIEW MECHANISMS

A further issue deserving analysis is the government disregard shown to review mechanisms incorporated into already existing legislation (and which were the product of extensive earlier negotiation for legislative passage, following earlier extensive parliamentary review), which the 2014 legislation sought to amend.

This development is at odds with existing timelines for conducting those legislated reviews. Such practice will undermine credibility, continuity and reliability in the model of negotiated parliamentary amendments to terrorism laws, as it indicates an executive preparedness to subsequently overturn or defer carefully constructed, legislated checks and balances.

Most remarkable has been the casual preparedness to remove these carefully constructed and scheduled legislated PJCIS obligations to review earlier terrorism

167 Brandis, ‘Government Response to Committee Report on National Security Legislation Amendment Bill (No 1) 2014’, above n 115.

168 Ibid.

169 Ibid.

170 See *PJCIS Advisory Report September 2014*, above n 71, 70–2 for a discussion of relevant submissions.

legislation according to a prescribed timetable. The seriousness of interfering with negotiated, established and legislated timelines for review of controversial national security legislation is highlighted by the fact that accompanying legislative sunset clauses were enacted in just two pieces of Commonwealth terrorism legislation — pt III div 3 of the *ASIO Act*, as amended by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) (ASIO questioning and ASIO questioning and detention powers); and pt 5.3 divs 104 (control orders) and 105 (preventative detention) of the *Criminal Code* and div 3A of the *Crimes Act* (stop, question, search and seizure powers) created by the *Anti-Terrorism Act (No 2) 2005* (Cth).¹⁷¹

The proposed substitution of a 10-year renewal of the legislation by simple legislative amendment signalled an executive boldness that far-reaching powers be given a further expanded and amended operation, jettisoning the previous review arrangement. This issue arose in the PJCIS inquiry into and review of the *Foreign Fighters Bill*, through two initial proposals.

First, that Bill proposed the extension of sunset clauses in relation to the control order¹⁷² and preventative detention¹⁷³ regimes in the *Criminal Code* and in relation to certain terrorism investigatory powers in the *Crimes Act*.¹⁷⁴ The substantive provisions relating to control orders, preventative detention and investigatory powers in relation to terrorist acts and terrorism offences were introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth) following agreement of COAG¹⁷⁵ in the wake of the 2005 London bombings.¹⁷⁶ A COAG communiqué of 27 September 2005 confirmed that the new laws would be reviewed after five years,¹⁷⁷ which led in 2012 to the *COAG Review Report*.¹⁷⁸ At the time of the 2014 PJCIS inquiry,¹⁷⁹ the Government had not responded to or implemented the *COAG Review Report* recommendations, nor was there any indication of its intentions relating to that report. Later, on 25 November 2014, a *partial* response was made in relation to

171 See McGarrity, Gulati and Williams, above n 20, 310–12.

172 The first reading of the *Foreign Fighters Bill* sch 1 items 86–7 proposed amendments to the *Criminal Code* ss 104.32(1)–(2), omitting respectively the words ‘10 years after the day on which this Division commences’ and ‘the end of 10 years after the day on which this Division commences’ and substituting the phrase ‘15 December 2025’.

173 The first reading of the *Foreign Fighters Bill* sch 1 items 107–8 proposed amendments to the *Criminal Code* ss 105.53(1)–(2) omitting respectively the words ‘10 years after the day on which this Division commences’ and ‘the end of 10 years after the day on which this Division commences’ and substituting the phrase ‘15 December 2025’.

174 The first reading of the *Foreign Fighters Bill* sch 1 items 43–5 proposed amendments to the *Crimes Act* ss 3UK(1)–(3), omitting the then-current phrase ‘the end of 10 years after the day on which the Division commences’ and substituting ‘15 December 2025’. Division 3A of the *Crimes Act* provides additional investigatory powers in relation to terrorist acts and terrorism offences.

175 Council of Australian Governments, ‘Council of Australian Governments’ Special Meeting on Counter-Terrorism’ (Communiqué, 27 September 2005) <<http://webarchive.nla.gov.au/gov/20070829161850/http://coag.gov.au/meetings/270905/index.htm>>.

176 On the introduction of these laws, 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?’, above n 21.

177 Council of Australian Governments, ‘Special Meeting on Counter-Terrorism’, above n 175, 3.

178 *COAG Review Report*, above n 83.

179 *PJCIS Advisory Report October 2014*, above n 71.

this issue, namely that the INSLM consider the expanded safeguards proposed by the COAG Committee in light of the presently expanded control order regime.¹⁸⁰

The first reading of the Bill proposed reimposition of a lengthy 10-year sunset clause, but without mandating an obligatory review process at any stage during the currency of the continued powers, up to and including the new expiry date of 2025.¹⁸¹ The Government eventually conceded some, but not all, ground in its response to recommendation 13 of the *PJCIS Advisory Report October 2014*, amending the Bill to provide that the provisions would now sunset on 7 September 2018¹⁸² and that review of the three sets of legislative provisions by the PJCIS would be completed by 7 March 2018.¹⁸³

Second, an amendment proposed by the first reading of the Bill to s 29(1)(bb) of the *Intelligence Services Act* would remove the then extant legislative PJCIS obligation to review by 22 January 2016 the operation, effectiveness and implications of pt III div 3 of the *ASIO Act* — that is, the special and controversial ASIO questioning warrants and ASIO questioning and detention warrants.¹⁸⁴ The amendment extraordinarily proposed that no review of pt III div 3 of the *ASIO Act* be conducted for a period of 20 years (the last review being conducted in November 2005).¹⁸⁵

This was strikingly presumptuous given the exceptional nature of the powers, particularly with their envisaged expansion in the present Bill by the removal

180 Brandis, 'Government Response to Committee Report on the Counter-Terrorism Legislation Amendment Bill (No 1) (2014)', above n 115, recommendation 1. Developments arising from government delays responding to the *COAG Review Report*, the eventual referral of *COAG Review Report* items regarding control orders to the INSLM, and the subsequent, circularised revisiting of these issues by the PJCIS, are discussed under the preceding heading: 'III Existing Completed Terrorism Law Reviews: Their Relationship to the 2014–2015 PJCIS Review and Enactment Process and Subsequent Developments'.

181 See the first reading of the *Foreign Fighters Bill* sch 1 items 43–5, 86–7, 107–8.

182 *Foreign Fighters Bill* sch 1 items 86–7, amending *Criminal Code* ss 104.32(1)–(2) (control orders); *Foreign Fighters Bill* sch 1 items 107–8, amending *Criminal Code* ss 105.53(1)–(2) (preventative detention orders); *Foreign Fighters Bill* sch 1 items 43–5, amending *Crimes Act* ss 3UK(1)–(3) (terrorism investigatory powers).

183 The PJCIS will now under the *Intelligence Services Act* s 29(1)

- (bb) ... review, by 7 March 2018, the operation, effectiveness and implications of ...
 - (ii) Division 3A of Part IAA of the *Crimes Act 1914* and any other provision of that Act as far as it relates to that Division;
 - (iii) Divisions 104 and 105 of the *Criminal Code* and any other provision of the *Criminal Code Act 1995* as far as it relates to those Divisions;
 - (iv) sections 119.2 and 119.3 of the *Criminal Code* and any other provision of the *Criminal Code Act 1995* as far as it relates to those sections; and ...
- (c) ... report the Committee's comments and recommendations to each House of the Parliament and to the responsible Minister.

184 See Lisa Burton, Nicola McGarrity and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) 36 *Melbourne University Law Review* 415; Greg Carne, 'Gathered Intelligence or Antipodean Exceptionalism?: Securing the Development of ASIO's Detention and Questioning Regime' (2006) 27 *Adelaide Law Review* 1.

185 Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *ASIO's Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005).

of the last resort criterion — the repeal of s 34D(4)(b) of the *ASIO Act* and its replacement constituting a lowering of the Attorney-General's consent threshold (the *existing standard* being that the powers are only used where other methods of gaining that intelligence would be ineffective).¹⁸⁶

It is important to outline why the original 2016 review process was incorporated into the *Intelligence Services Act*, so as to fully understand the presumptive attitudes of the government in altering the expiration and review of this legislation, and its casual attempt to alter legislated arrangements which had been the subject of earlier extensive parliamentary review prior to passage of the legislation.¹⁸⁷

The initial version of the legislation imposed a three-year sunset clause — for the then s 34Y of the *ASIO Act* it was then stated:

the questioning and detention powers established by Division 3 of Part III of the Act will cease to be in force from 23 July 2006. The Committee's review [was] thus designed to precede and inform consideration by the Government and the Parliament of the need to legislate again for these provisions or some variation of them.¹⁸⁸

The PJCAAD in its November 2005 review recommended continuation of the legislation, with a *five-year* sunset clause to come into effect on 22 November 2011, and that the PJCIS be required 'to review the operations, effectiveness and implications of the powers in Division 3 Part III and report to the Parliament on 22 June 2011',¹⁸⁹ that is, within a *five-year* time frame.

The PJCAAD emphasised the linkage between a sunset clause and mandated committee review as an effective accountability mechanism:

The Committee would also note that, in something so amorphous as a war on terrorism, where the end point might be difficult, or indeed impossible, to define, it is even more important that extraordinary legislation, developed to deal with these exceptional circumstances, be reviewed regularly and publicly to ensure that the extraordinary does not become ordinary by default.

The Committee finds the arguments in favour of retaining the sunset clause the more compelling. A sunset clause, which means that the *legislation must be introduced anew, ensures that the public and parliamentary debate on the need for the powers will be regularly held and of the most focussed kind*. The debate on the legislation will necessarily be more extensive if it must go through a Committee review, such as the current one, and then be debated as legislation in

186 First reading of the *Foreign Fighters Bill* sch 1 item 28.

187 This review process extended over 18 months in 2002 and 2003, and involved three Parliamentary Committee reports: Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002); 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* (2002); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002).

188 Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers*, above n 185, vii.

189 *Ibid* xvii, recommendation 19.

the chambers of the House of Representatives and the Senate. Only a sunset clause will achieve this.¹⁹⁰

The existing 10-year sunset clause and review cycle — reflected in s 34ZZ of the *ASIO Act* and in s 29(1)(bb) of the *Intelligence Services Act* — were the result in early 2006 of the government's rejection of a five-year cycle as recommended by the Parliamentary Committee and the government preference for a 10-year cycle.¹⁹¹

Significantly, however, the Hon Philip Ruddock (then Attorney-General,¹⁹² later a member of the PJCS¹⁹³ and PJCHR,¹⁹⁴ including chair of the PJCHR)¹⁹⁵ on 29 March 2006 in a second reading speech on the ASIO Legislation Amendment Bill 2006 (Cth), accepted the necessity for Parliamentary Committee review of ASIO's terrorism-related questioning and detention powers:

A key feature of the bill is to amend the current sunset clause provision, which would otherwise cause the questioning and detention powers to cease on 22 July 2006.

The government accepts the [PJCAAD]'s arguments about the need for ongoing review and a further sunset period, but considers that the 5½-year period recommended by the [PJCAAD] is insufficient in the current environment.

We consider a period of 10 years to be more appropriate.

Recent experience with statutory reviews has demonstrated that they are resource intensive and do have an impact on operational priorities.

The 10-year period is consistent with state and territory government views about the time needed to properly make an assessment of the recently enacted antiterrorism package of legislation.

190 Ibid 106–7 (emphasis added).

191 See 'Parliamentary Joint Committee on Intelligence and Security: Report on the Operation, Effectiveness and Implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* — Government Response' (Media Release, March 2006) 7–8 <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcaad/asio_ques_detention/govt%20response.pdf>.

192 From 7 October 2003 to 3 December 2007.

193 From 12 March 2008 to 9 May 2016.

194 From 3 March 2015 to 9 May 2016.

195 Mr Ruddock retired from the Commonwealth Parliament at the 2016 election and was appointed as Australia's Special Envoy on Human Rights: see Malcolm Turnbull, 'The Honourable Philip Ruddock MP' (Media Release, 8 February 2016) <<https://www.malcolmturnbull.com.au/media/the-honourable-philip-ruddock-mp>>; Malcolm Turnbull, 'Remarks with Philip Ruddock on the Announcement of His Retirement from Parliament' (Media Release, 8 February 2016) <<http://pandora.nla.gov.au/pan/154649/20160315-0001/www.pm.gov.au/media/2016-02-08/remarks-philip-ruddock-announcement-his-retirement-parliament.html>>; Stephanie Anderson and Dan Conifer, 'Philip Ruddock to Retire from Politics after 42-Year Career', *ABC News* (online), 8 February 2016 <<http://www.abc.net.au/news/2016-02-08/liberal-mp-philip-ruddock-to-retire-from-politics/7149306>>. Mr Ruddock, as Howard Government Attorney-General, advanced some reinvented interpretations of UDHR rights in terrorism law reforms. Traditional UDHR rights, protecting the individual against excesses of state power, were reconfigured to a new right of safety and security, with a community-orientated focus: see Carne, 'Reconstituting "Human Security" in a New Security Environment', above n 22.

The longer period will also ensure that the legislation can be used over a period the government assesses there is likely to be a need for these powers.

Accordingly, the bill extends the sunset clause and the [PJCAAD] review period by 10 years so that the [PJCAAD] will be required to review the legislation by 22 January 2016 and the legislation will cease to have effect on 22 July 2016.¹⁹⁶

It was unconscionable in these circumstances to proceed with sch 2 item 32 of the Bill (amending the *ASIO Act*) and sch 2 item 33 of that Bill (amending the *Intelligence Services Act*) removing the existing review arrangements, being an affront to the PJCIS's partially accepted recommendation, as reflected in the 2006 legislative enactment.¹⁹⁷

Furthermore, these types of amendments from the Bill (a) set a dangerous precedent whereby the legislated periodic review accountability mechanisms over exceptional powers can be set aside through executive claims of present expediency,¹⁹⁸ and (b) also produce a legislative elision or slippage from the exceptional, unusual nature of such powers to their legislative normalisation and permanence.

In 2014, the government finally recognised the earlier missed point and conceded some ground.¹⁹⁹ It stated that the ASIO powers would sunset on 7 September 2018 and that review by the PJCIS, reviewing the operation, effectiveness and implications of pt III div 3 of the *ASIO Act*, would be completed by 7 March 2018.²⁰⁰

In addition, the Government response indicated that under s 7 of the *INSLM Act*, the government would request the INSLM to review the above four subject matters — control orders, preventative detention, stop, search and question powers and ASIO questioning and detention powers — by 7 September 2017.²⁰¹ The timing of this INSLM review means that it will inevitably inform the various PJCIS

196 Commonwealth, *Parliamentary Debates*, House of Representatives, 29 March 2006, 6 (Philip Ruddock, Attorney-General).

197 *ASIO Legislation Amendment Act 2006* (Cth) amending s 34ZZ of the *Australian Security Intelligence Organisation Act 1979* (Cth) and s 29(1)(bb) of the *Intelligence Services Act 2001* (Cth).

198 The present example demonstrates an exclusive initial focus on the desirability of extending control order and preventative detention provisions, instead of a broader, integrated and holistic assessment of the emergent issue of foreign fighters within the suite of established checks and balances.

199 The salient point is that in 2014, the PJCIS failed to defend the earlier legislatively installed and timetabled review arrangements from 2006, which itself was a rejection of the tougher position taken in 2005 by the PJCIS predecessor's recommendation. (The quoted statements of Mr Ruddock as Attorney-General in 2006 are not found or referenced in the *PJCIS Advisory Report October 2014*.) The government 'concession' in 2014 comprised a two-year delay on review of arrangements legislatively settled in 2006 — demonstrating the vulnerability of timetabled legislated reviews to executive expedience, discretion and dilution.

200 '[T]o review, by 7 March 2018, the operation, effectiveness and implications of ... (i) Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* and any other provision of that Act as far as it relates to that Division': *Intelligence Services Act* s 29(1)(bb).

201 See Roger Gyles, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 3–4 in relation to review of ASIO and other questioning powers; Independent National Security Legislation Monitor, *Review: Current Review — INSLM Statutory Deadline Reviews* <<https://www.inslm.gov.au/current-review-work>>.

reviews identified above to be conducted and concluded by 7 March 2018.²⁰² The regard and interaction of the PJCIS with the work of the INSLM will accordingly become of increasing importance.

VI INTERACTIONS OF PJCIS REVIEW WITH PJCHR HUMAN RIGHTS REVIEWS OF TERRORISM LAW REFORM

The review role of terrorism laws by the PJCIS is most properly understood within a range of executive contextual matters, which both constrain and marshal that role. Mention has already been made of the constructed and enforced bipartisanship of the 2014–15 terrorism law reforms, the agreed expedited legislative process, the effects of restricted membership of the PJCIS, along with the present executive practice of not referring terrorism legislation for separate, and competing review by the Senate Legal and Constitutional Committee.²⁰³ Of further significance was Prime Minister Abbott's 2014 statement to Parliament on national security, identifying a confronting dichotomy between security and liberty, whilst giving priority to the former:

Regrettably, for some time to come, Australians will have to endure more security than we are used to, and more inconvenience than we would like. Regrettably, for some time to come, the delicate balance between freedom and security may have to shift. There may be more restrictions on some so that there can be more protection for others.²⁰⁴

The language of balance in earlier terrorism law iterations has been seen as highly problematic,²⁰⁵ with this present example being a bald executive assertion that such balance may be realigned in accordance with executive assessments.²⁰⁶ This framing of a security and liberty divide alerts us to a politically favourable, populist aspect for the Government in its promotion of a national security agenda, and with it, a certain antipathy towards human rights, especially those grounded

202 *Intelligence Services Act* ss 29(1)(bb)(i)–(iv).

203 See the discussion under the earlier heading, 'II The New Medium of Bipartisanship Reinvigorating the Legislative Urgency Paradigm — Consequences for PJCIS Legislative Reviews'.

204 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 2014, 9957 (Tony Abbott, Prime Minister). Similarly stark, dichotomous comments are found in 'Prime Minister Tony Abbott's Full National Security Statement', above n 11.

205 See Simon Bronitt, 'Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E 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 Michaelsen, 'Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29(2) *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 *University of Western Sydney Law Review* 37, 41–3; Carne, 'Brigitte and the French Connection', above n 33, 613–14; Carne, 'Sharpening the Learning Curve', above n 9, 42.

206 The problematic language of balance in national security has been alike favoured by Coalition and Labor Attorneys-General, even being adopted by the Director-General of Security: see David Irvine, 'Freedom and Security: Maintaining the Balance' (2012) 33 *Adelaide Law Review* 295.

in international human rights conventions. Implicit here is an attitudinal inevitability about the expansion of security and the reification of protection, as mediated by executive government.

The superior status of the national security interest in the context of parliamentary reviews of terrorism legislation becomes apparent in the contrasting government responses to legislative reviews of terrorism laws conducted by the PJCHR under s 7(a) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ('*Parliamentary Scrutiny Act*').²⁰⁷ This Act was introduced in the rejection of a Commonwealth statutory charter of rights for Australia and crafted as a parliamentary sovereignty model for protection of human rights.²⁰⁸ The ascendancy of the national security interest in the circumstances of the 2014–15 terrorism legislation, providing for an executive-led security agenda over a more integrated human rights approach, is demonstrated in several examples.

The PJCHR reported on the *Foreign Fighters Bill*,²⁰⁹ raising questions about whether the Bill's limitations on Australia's international human rights obligations²¹⁰ were 'reasonable, necessary and proportionate to the achievement of a legitimate objective'.²¹¹ However, these PJCHR questions and recommendations were ignored in the expedited passage of the Bill, with the PJCHR report tabled on 28 October 2014, the Bill passing the Senate on 29 October 2014 and passing the House of Representatives the next day. Indeed, the PJCHR noted

207 Under the legislation, the PJCHR has the function of examining Bills that come before either House of Parliament for compatibility with the seven core human rights treaties to which Australia is a party and then report to Parliament: at s 7(a). The legislation also has a requirement that each new Bill introduced into Parliament is accompanied by a statement of compatibility with international human rights obligations: at s 8.

208 See McClelland, 'Australia's Human Rights Framework', above n 18; Robert McClelland, 'Enhancing Parliamentary Scrutiny of Human Rights' (Media Release, 2 June 2010) <http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_2June2010-Enhancingparliamentaryscrutinyofhumanrights.html>.

209 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Fourteenth Report of the 44th Parliament* (2014) 3–69 ('*PJCHR Foreign Fighters October 2014 Report*').

210 Namely, the seven major United Nations international human rights conventions to which Australia is a party: see *Parliamentary Scrutiny Act* s 3(1) (definition of 'human rights') (emphasis in original) *human rights* means the rights and freedoms recognised or declared by the following international instruments:

- (a) the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);
- (b) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5);
- (c) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);
- (d) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);
- (e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ([1989] ATS 21);
- (f) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4);
- (g) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12).

211 *PJCHR Foreign Fighters October 2014 Report*, above n 209, 5, 11.

the apparent urgency with which the national security legislation is being passed through the Parliament is inimical to legislative scrutiny processes, through which the committee's assessments and dialogue with legislation proponents is intended to inform the deliberations of senators and members of the Parliament in relation to specific legislative proposals.²¹²

Likewise, the PJCHR on 1 October 2014 reported on the *NSLA Bill*, noting that

the statement of compatibility prepared by the Attorney-General's Department identifies a number of human rights engaged by the bill. However, the statement of compatibility does not provide sufficient information on each proposed measure for the committee to presently and fully assess the compatibility of the bill with Australia's human rights obligations. ...

In the absence of detailed information in relation to the proposed measures it will be difficult for the committee to conclude that the proposed measures are compatible with human rights.²¹³

However, the Bill had been reported on by the PJCIS on 17 September 2014,²¹⁴ and the Government had responded to the PJCIS report on 19 September 2014, accepting all of the 17 recommendations in the PJCIS report.²¹⁵ The Bill then passed the Senate on 25 September 2014, subsequently passing the House of Representatives on 1 October 2014, the *same day* that the PJCHR reported on the Bill in the critical terms cited above.

The timelines in these two initial sets of legislative reviews clearly indicate that the formal and structured human rights review process conducted by the PJCHR²¹⁶ under its precise legislative authority, was overtaken by the expedited legislative process for terrorism matters, clearly subordinated to the government preferred PJCIS review methodology. Importantly, the practical marginalisation of the reports of the PJCHR (its framework legislation, the *Parliamentary Scrutiny Act* being enacted through the Parliament by a Labor government) was facilitated through bipartisan cooperation by the Labor Opposition, given that the Government did not possess a Senate majority. This incident visibly compromises the Shorten Opposition on human rights legislative methodology, in contrast to the stated position of the most recent Labor governments.²¹⁷ This is particularly so given the far-reaching human rights implications arising from this legislation.²¹⁸

However, the fourth tranche of national security legislation, the *Data Retention Bill*, was not so chronologically compromised, as the timing of activities on the

212 *PJCHR Foreign Fighters October 2014 Report*, above n 209, 5.

213 Commonwealth, *Parliamentary Debates*, Senate, 1 October 2014, 7542 (David Fawcett).

214 *PJCIS Advisory Report September 2014*, above n 71.

215 Brandis, 'Government Response to Committee Report on National Security Legislation Amendment Bill (No 1) 2014', above n 115.

216 The Committee identified that the principles of reasonableness, necessity, and proportionality in relation to the achievement of a legitimate objective 'is the analytical framework the committee applies when exercising its statutory function of examining bills for compatibility with human rights': *PJCHR Foreign Fighters October 2014 Report*, above n 209, 5.

217 McClelland, 'Australia's Human Rights Framework', above n 18; McClelland, 'Enhancing Parliamentary Scrutiny of Human Rights', above n 208.

218 See Appleby, above n 56, 5, 7.

Bill between the PJCIS and PJCHR allowed, theoretically at least, for substantive interaction between the two parliamentary committees.²¹⁹ In practice, however, there was a lost opportunity. A fairly minimalist response was made to the PJCHR report recommendations²²⁰ in the PJCIS advisory report²²¹ and subsequently in the Government response to the PJCIS advisory report.²²²

Two *framework* observations can be made about the approach in the *PJCIS Advisory Report February 2015* on the data retention legislation. First, the PJCIS report clearly favours, and proceeds from, the contentious and contestable assumption that accessing historical communications data (metadata) is less privacy intrusive than accessing the content of those communications. This view is consistent with the argument put in the Explanatory Memorandum to the Bill.²²³ Second, proceeding from that premise, the PJCIS report highlighted certain assumptions about the PJCIS methodology:

[T]he Committee weighed evidence provided by law enforcement and security agencies (both in public and private) that the continued availability of historical telecommunications data was critical for efforts to deal with the current national security environment and the ongoing threat posed by other serious criminal offences; against the financial implications and privacy and data security concerns associated with the proposal.

The Committee focused on ensuring the Bill incorporates adequate safeguards and accountability mechanisms for the proper application of the laws into the future.²²⁴

The issue of safeguards and accountability factors are most clearly demonstrated in the responses of the PJCIS (which in turn are addressed by the Government

219 For a timeline of the activities of the Parliament, the PJCIS and the PJCHR on the Bill, see Carne, 'Sharpening the Learning Curve', above n 9, 32–3 (citations omitted), noting that

[t]he PJCHR conducted an examination of the present Bill as part of its Fifteenth Report of the 44th Parliament 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 PJCHR ...

220 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Fifteenth Report of the 44th Parliament* (2014) ('*PJCHR Fifteenth Report to 44th Parliament*'). See the discussion of human rights compatibility of the Bill, focusing on rights under the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17 (right to privacy), art 19 (right to freedom of opinion and expression), art 2 (right to an effective remedy) ('*ICCPR*'): *PJCHR Fifteenth Report to 44th Parliament*, 10–22.

221 *PJCIS Advisory Report February 2015*, above n 5.

222 George Brandis and Malcolm Turnbull, 'The Australian Government Has Responded to the Inquiry of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014' (Media Release, 3 March 2015) <<http://pandora.nla.gov.au/pan/21248/20150925-1049/www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/Government-Response-To-Committee-Report-On-The-Telecommunications-Interception-And-Access-Amendment-Data-Retention-Bill.html>>. See also Carne, 'Sharpening the Learning Curve', above n 9, 33.

223 Explanatory Memorandum, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth), 3, 14; *PJCIS Advisory Report February 2015*, above n 5, 49–55.

224 *PJCIS Advisory Report February 2015*, above n 5, 3.

response) in its report engaging with the recommendations or matters raised by the PJCHR in its report on the *Data Retention Bill*.²²⁵

The first of these matters — that the type of data obliged by law to be retained for the purposes of access be defined²²⁶ — was responded to positively by the *PJCIS Advisory Report February 2015*²²⁷ and in turn accepted in the Government response.²²⁸ The next issue raised by the PJCHR was to ensure proportionality of the Bill's measures by raising the threshold level of offence to access data, being “‘necessary” for the investigation of specified serious crimes, or categories of serious crimes’,²²⁹ this approach extending through submissions at the PJCIS hearings to ‘serious contraventions of the law or serious national security issues’.²³⁰ The PJCIS *rejected* this threshold approach of confining access to data to serious crime or serious national security matters, keeping faith with the two general organising principles (mentioned above) in affirming a decidedly data facilitative approach. In allowing data access in *all levels of criminal matters*, the *PJCIS Advisory Report February 2015* recommended the much weaker measure of amending s 180F of the *Telecommunications (Interception and Access) Act 1979* (Cth) so that the internal authorising officer for data access be required to have regard to a range of factors.²³¹ The Government response supported this recommended amendment.²³² Significantly, no Government response was made to the similar observational recommendation made by the PJCIS report that a range of factors also be considered in authorising data access in national security matters, the recommendation noticeably falling short of advocating legislative change.²³³

The next matter raised the complications for legal professional privilege of broad metadata access, arising in the context of general professional obligations

225 *PJCHR Fifteenth Report to 44th Parliament*, above n 220

226 *Ibid* 14.

227 See *PJCIS Advisory Report February 2015*, above n 5, xii, recommendation 2, that the Bill ‘be amended to include the proposed data set in primary legislation’.

228 Brandis and Turnbull, ‘The Australian Government Has Responded to the Inquiry of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014’, above n 222. The Government responded to recommendation 2 by agreeing to ‘amend the Bill to include the proposed data set in the *Telecommunications (Interception and Access) Act 1979*’.

229 *PJCHR Fifteenth Report to 44th Parliament*, above n 220, 17.

230 *PJCIS Advisory Report February 2015*, above n 5, 250.

231 *Ibid* 251, recommendation 25.

232 See Brandis and Turnbull, ‘The Australian Government Has Responded to the Inquiry of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014’, above n 222. The acceptance is reflected in the amended s 180F of the *Telecommunications (Interception and Access) Act 1979* (Cth).

233 ‘A similar requirement should apply in respect of authorisations made by ASIO officers. The Committee notes that this could be achieved by appropriate amendments to the mandatory guidelines issued to ASIO by the Attorney-General’: *PJCIS Advisory Report February 2015*, above n 5, 251.

of confidence.²³⁴ Again, the PJCIS response was reflexive, crafted within the framework approach advised above, invoking and applying the contentious background distinction between access to data and access to content, the former claimed to be less intrusive as to privacy.²³⁵

In relation to legal professional privilege, the Attorney-General's Department submitted that

[a]t common law, legal professional privilege attaches to the content of privileged communications, not to the fact of the existence of a communication between a client and their lawyer ... This distinction is demonstrated in the routine practice of parties to proceedings filing affidavits of documents listing documents ... thereby disclosing the fact of the existence of the document. ...

[T]he data retention regime, and agencies' powers to access telecommunications data more broadly, do not affect or authorise the disclosure of the content of any communication, including any privileged communication.²³⁶

This led the PJCIS to the conclusion that 'the Committee does not consider, on the evidence available, that there is a need for additional legislative protection in respect of accessing telecommunications data that may relate to a lawyer.'²³⁷ This approach meant there was no need to provide a formal Committee recommendation. As a result, there was no Government response to this issue, producing the consequence that access to metadata was not to be constrained by questions of legal professional privilege.

The related question of metadata and the confidentiality of journalist sources also appeared at the PJCIS inquiry into the Bill, but was not directly raised by the PJCHR. The history of this matter reveals a more rigorous set of human rights standards imposed in relation to PJCHR review than *ex post facto* safeguards mentioned in PJCIS review.²³⁸ This is primarily evident in the PJCHR proportionality analysis, engaging with the *ICCPR* arts 19 (freedom of expression and opinion) and 2 (right to an effective remedy)²³⁹ and recommending a warrant application process as applying for all requests to access metadata.²⁴⁰ In contrast, the PJCIS recommended metadata issues touching upon a potential identification of a journalist source be the subject of a separate review by the PJCIS,²⁴¹ which

234 *PJCHR Fifteenth Report to 44th Parliament*, above n 220, 17 [1.53]–[1.54] observed that '[t]he committee is concerned that the communications data of persons subject to an obligation of professional secrecy may be accessed and that accessing this data could impact on legal professional privilege.' The PJCHR requested the Attorney-General's advice 'as to whether such data could, in any circumstances, impact on legal professional privilege, and if so, how this is proportionate with the right to privacy'.

235 This claim was disputed by the Law Council of Australia: see *PJCIS Advisory Report February 2015*, above n 5, 257.

236 Attorney-General's Department, Submission No 27 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, 16 January 2015, 21 (citations omitted). The *PJCIS Advisory Report February 2015* endorsed this position, accepting the privileged *content* distinction from access to telecommunications data: *ibid.*

237 *PJCIS Advisory Report February 2015*, above n 5, 257.

238 *Ibid* 263–300. See also the discussion in Carne, 'Sharpening the Learning Curve', above n 9, 34–7.

239 See *PJCHR Fifteenth Report to 44th Parliament*, above n 220, 19–22.

240 *Ibid* 18 [1.59].

241 *PJCIS Advisory Report February 2015*, above n 5, 257–8.

was subsequently supported in the Government response,²⁴² which articulated a formalistic equal treatment under law argument.²⁴³ However, instead of a separate PJCIS review, the government implemented a bipartisan agreement²⁴⁴ to introduce a journalist information warrant scheme.²⁴⁵ The PJCIS was satisfied to exclude the evidentiary and deliberative processes of submissions and witnesses, by closing the inquiry.²⁴⁶

A clear prioritisation of PJCIS recommendations occurred over PJCHR recommendations, the former being more amenable and flexible to an executive-driven legislative process and executive objectives in the drafting of legislation.²⁴⁷ Further, this prioritisation is contextually consistent with previous legislative reforms (as reflected in the *NSLA Act*) in relation to unauthorised disclosure of national security information.²⁴⁸ That legislation created a range of new offences with significantly higher penalties and asserted greater executive control over national security information.²⁴⁹

The lesser regard shown by the government to the reports of the PJCHR on the terrorism law Bills, with preference of the views expressed by the Attorney-General's Department, ASIO and enforcement agencies, resonates on two levels concerning review mechanisms within a parliamentary framework of rights protection applying to terrorism law reforms. First, there is a consistent, overt prioritisation of passing the terrorism legislation over a detailed assimilation of human rights measures into the legislative draft, which necessarily would draw upon the concentrated work of the PJCHR. Even a modestly short delay was not facilitated for the *Data Retention Bill* to allow for proper consideration and assimilation of the PJCHR reports. Second, the PJCHR's assessment of Bills against the seven core human rights treaties to which Australia is a party²⁵⁰

242 Brandis and Turnbull, 'The Australian Government Has Responded to the Inquiry of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014', above n 222.

243 Ibid.

244 See 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* (2015), 1–2 ('*PJCIS Inquiry Report March 2015*').

245 Introduced as *Telecommunications (Interception and Access) Act 1979* (Cth) pt 4-1 div 4C.

246 'Given these developments, the Committee has determined to conclude its formal inquiry on the matter': *PJCIS Inquiry Report March 2015*, above n 244, 2.

247 See Carne, 'Sharpening the Learning Curve', above n 9, 34–7.

248 Hardy and Williams, 'Terrorist, Traitor, or Whistleblower?', above n 20 (discussion of legislation criminalising communication of national security information by members of the intelligence services, predating the introduction of the *NSLA Act*).

249 See *PJCIS Advisory Report September 2014*, above n 71, 20–1, 55–9; and discussion of offences for unauthorised handling and communication of information: at 26–8, 64–6.

250 See *Parliamentary Scrutiny Act* ss 3, 7; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981); *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) ('*CAT*'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

importantly adopts a broader perspective amenable to the United Nations ('UN') model of counterterrorism which seeks to integrate effective responses to terrorism with the observance of human rights.²⁵¹ The disregard shown to these measures in the 2014–15 legislative review processes is the more ironic as the government is now citing obligations about compliance with UN Security Council resolutions as the basis for enacting counterterrorism measures.²⁵² However, the government has given a strong credibility weighting in favour of PJCIS review over review conducted by the PJCHR.

A clear appreciation of the PJCIS review orientation (marginalising the influence upon, or incorporation of, the structured PJCHR human rights analysis of draft terrorism laws into PJCIS review) emerges by recalling that the 2014–15 review developments originated with the preceding Labor administration.²⁵³ Attorney-General Roxon sponsored, first, the *Discussion Paper July 2012*;²⁵⁴ and subsequently, the May 2012 referral for the PJCIS to inquire into a package of potential reforms to Australia's national security legislation,²⁵⁵ which led to the *PJCIS Report May 2013*.²⁵⁶ In 2014–15, the recommendations from that report advanced a consensus-based, bipartisan preliminary support for aspects of the PJCIS reviews. This engagement with the *Discussion Paper July 2012* and the Attorney-General's 2012 reference positively responded to a wish list (or aspirational index) of legislative reforms sought by intelligence and security and law enforcement agencies. Informing that approach, Ms Roxon's predecessor as Attorney-General, Robert McClelland, had rejected the recommendations of the Brennan National Human Rights Consultation Committee²⁵⁷ that the

251 As evidenced in SC Res 2249, UN SCOR, 7565th mtg, UN Doc S/RES/2249 (20 November 2015) Preamble, [9] following the October 2015 Paris bombings, '[r]eaffirming that Member States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law' and '[r]eaffirms that those responsible for committing or otherwise responsible for terrorist acts, violations of international humanitarian law or violations or abuses of human rights must be held accountable': at [4].

252 Malcolm Turnbull, 'Magna Carta and the Rule of Law in the Digital Age' (Speech delivered at the Sydney Institute, 7 July 2015) n 13 <<https://www.malcolmtturnbull.com.au/media/speech-to-the-sydney-institute-magna-carta-and-the-rule-of-law-in-the-digital>>.

253 This highlights another aspect of bipartisanship — see the earlier discussion under the heading 'The New Medium of Bipartisanship Reinvigorating the Legislative Urgency Paradigm — Consequences for PJCIS Legislative Review'.

254 *Discussion Paper July 2012*, above n 1.

255 Nicola Roxon, 'Public Consultation for National Security Legislation Reform' (Media Release, 4 May 2012) <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/1610277/upload_binary/1610277.pdf;fileType=application%2Fpdf#search=%22media/pressrel/1610277%22>.

256 *PJCIS Report May 2013*, above n 1. The referral by the Attorney-General to the PJCIS comprised 18 specific reform proposals, with 44 separate items, across three different groupings: (a) those the Government wishes to progress (b) those the Government is considering progressing and (c) those on which the Government is expressly seeking the views of the PJCIS: see above n 49.

257 National Human Rights Consultation Committee, above n 18.

Commonwealth enact a legislative charter of rights,²⁵⁸ opting instead for the human rights scrutiny model based around the legislated PJCHR.²⁵⁹

The recommendations of the PJCIS in consistently affording a lower status to human rights matters, particularly those raised by the PJCHR, is almost predictable, given the vagueness in the documents and process at the commencement of the 2012 PJCIS inquiry, including the lack of draft legislation.²⁶⁰ Indeed, the *PJCIS Report May 2013* noted that ‘given the lack of detail and the absence of draft legislation, the Committee’s conclusions are often qualified or suggest areas where further work is needed.’²⁶¹ Such imprecision facilitates greater executive discretion in choosing which human rights compliance issues might be discounted or marginalised. These issues in the 2014–15 PJCIS terrorism law reviews were also reinforced by the Attorney-General simultaneously promoting liberal democratic rights²⁶² — expression, association, religion and property — as authentically constituting traditional rights and freedoms,²⁶³ truncating the role of UN-sourced international human rights at the intersection with terrorism law review processes.²⁶⁴ Confirmation and continuity of the marginal or relegated influence of PJCHR reports on PJCIS review of terrorism laws has again been demonstrated in a 2015–16 PJCIS review.²⁶⁵ Most of these references to the PJCHR are either bare factual statements or have at best peripheral influence upon the recommendations of the PJCIS, the exception being PJCHR commentary (alongside other non-PJCHR commentary) about the best interests of the child being a primary factor to take into account when considering

258 Stephen Smith and Robert McClelland, ‘Reaffirming Our Commitment to International Human Rights Obligations’ (Media Release, 21 April 2010) <http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_21April2010-ReaffirmingourCommitmenttoInternationalHumanRightsObligations.html>; McClelland, ‘Australia’s Human Rights Framework’, above n 18.

259 See *Parliamentary Scrutiny Act*.

260 The PJCIS noted ‘the lack of any draft legislation or detail about some of the potential reforms was a major limitation and made the Committee’s consideration of the merit of the reforms difficult. This also made it hard for interested stakeholders to effectively respond to the terms of reference’: *PJCIS Report May 2013*, above n 1, viii. It commented further on the negative impact on conducting the inquiry and obtaining witness evidence caused by this lack of information, particularly in relation to data retention proposals.

261 *Ibid* ix.

262 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.

263 Tim Wilson, ‘The Forgotten Freedoms’ (Speech delivered at the Sydney Institute, 13 May 2014) <<https://www.humanrights.gov.au/news/speeches/forgotten-freedoms>>; Tim Wilson, ‘Rights and Responsibilities 2014’ (Discussion Paper, Australian Human Rights Commission, 2014); Australian Human Rights Commission, *Rights and Responsibilities: Consultation Report 2015* (2015).

264 Consistent with a neoliberal conception of small government, this limited set of rights is argued as best advanced through non-legislative means, such as individual initiative and advocacy: Wilson, ‘Rights and Responsibilities 2014’, above n 263.

265 See *PJCIS Advisory Report February 2016*, above n 128. In the relevant sections of that report (chapters 1–4, primarily dealing with proposed control order reforms) reference is made to the Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Thirty-Second Report of the 44th Parliament* (2015) (‘PJCHR December 2015 Report’). See *PJCIS Advisory Report February 2016*, above n 128, 25 n 22, 26 n 25, 30 n 34, 37 n 56, 40 n 69, 57 n 106, 60 n 114, 68 n 140.

whether each of the obligations, prohibitions or restrictions of the control order is reasonably necessary, or reasonably appropriate and adapted, is incorporated into PJCIS recommendation 1.²⁶⁶ The marginalisation of the PJCHR and other bodies is reflected in the subsequent parliamentary debates around enactment of the Counter-Terrorism Legislation Amendment Bill (No 1) 2016 (Cth).²⁶⁷ The later release of the two subsequent PJCHR reports — the *PJCHR Scrutiny Report March 2016* and the *PJCHR Scrutiny Report October 2016* — occasioned minimal influence on parliamentary debate and no discernible influence on the drafting of the 2016 version of the Bill.²⁶⁸

VII CONCLUSION

The compressed 2014–15 PJCIS terrorism law review and legislative experience provides a predictive template²⁶⁹ for future terrorism law review and enactment. Importantly, such a template operates against significant background factors — a framework of constant review of terrorism laws,²⁷⁰ including a first response of reaching for new laws in the aftermath of the latest terrorist incident; an incremental concentration of executive power transforming the relationship of the citizen to the state; an open-ended struggle against ISIS or ISIS successor-inspired terrorism, in the absence of a constraining framework of a statutory or constitutional bill of rights; the timing of review and enactment of new

266 Indeed, in chapters 1–4, the *PJCIS Advisory Report February 2016*, above n 128, recommendations appear more influenced (see especially recommendations 4–5) by the work of the *INSLM January 2016 Report*, above n 119, and by the *COAG Review Report*, above n 83, than by the *PJCHR December 2015 Report*, above n 265. Importantly, the later reports of the PJCHR — Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Thirty-Sixth Report of the 44th Parliament* (2016) (*PJCHR Scrutiny Report March 2016*) on the *CTLA Bill 2015* and the *PJCHR Scrutiny Report October 2016*, above n 141, on the *CTLA Bill 2016* — were tabled after the February 2016 tabling of the *PJCIS Advisory Report February 2016*.

267 The Counter-Terrorism Legislation Amendment Bill (No 1) 2016 (Cth) was introduced into the Senate on 15 September 2016, debated on 8–9 November 2016, passed the Senate on 9 November 2016, introduced into the House of Representatives on 10 November 2016, and debated and passed on 22 November 2016. The parliamentary debates for both chambers reveal two things. First, where debate refers to review bodies other than the PJCIS, there is limited reference to the INSLM — chiefly in relation to sch 18 added to the 2016 version of the Bill and dealing with special intelligence operations, the subject of the *INSLM October 2015 Report*, above n 136 — and even more limited reference to *COAG Review Report*, above n 83, contributions: see Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 2016, 3972, 3974 (Mark Dreyfus). Second, only a single reference is made to the work of the PJCHR: see Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 2016, 3978–9 (Graham Perrett).

268 The emphasis in the Attorney-General media releases is of a direct, focused reliance upon the PJCIS recommendations shaping the *CTLA Bill 2016*: see Malcolm Turnbull and George Brandis, ‘Strengthening Counter-Terrorism Legislation’ (Media Release, 25 July 2016) <<http://pandora.nla.gov.au/pan/21248/20160801-0041/www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/25-July-2016-Strengthening-counter-terrorism-legislation.html>>; Brandis, ‘Two Bills to Bolster the Fight against Terrorism’, above n 130; Brandis and Keenan, above n 141.

269 That is an enabling set of review and legislative cultural practices for the passage of serial terrorism legislation.

270 Confirmation of the continuous review of terrorism laws continued in 2016: see Commonwealth, *Parliamentary Debates*, Senate, 15 September 2016, 1033 (George Brandis, Attorney-General); Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 2016, 3967–71 (Michael Keenan).

terrorism legislation as a potentially populist governmental device playing upon community fear to distract from other difficult political issues;²⁷¹ to reset political discussion around related topics;²⁷² and add to an already substantial compendium of counterterrorism laws.²⁷³ This latter point was demonstrated in 2016, with the enactment of the successor Bill to the lapsed 2015 Bill,²⁷⁴ along with further legislation agreed upon at the April 2016 COAG meeting relating to a nationally consistent post-sentence detention scheme for terrorism offenders.²⁷⁵

The trend from the three 2014 pieces of legislation, the subsequent 2015 metadata and further terrorism-related legislation indicates an enlarging and enveloping array of national security laws relying extensively upon executive discretion to ensure that egregious abuses of power do not occur. A renewed volume of legislative

- 271 Within one week of significant expressions of Liberal Party room discontent in early 2015 leading to the initial failed spill motion on Prime Ministerial leadership, Prime Minister Abbott signalled further significant national security law changes, providing a new national security statement on 23 February 2015: see 'Prime Minister Tony Abbott's Full National Security Statement', above n 11; and the release of the joint review by Commonwealth and state officials into the Martin Place siege in Sydney of December 2014: Department of the Prime Minister and Cabinet, Australian Government and Premier and Cabinet, NSW Government, *Martin Place Siege: Joint Commonwealth - New South Wales Review* (January 2015) <https://www.pmc.gov.au/sites/default/files/publications/170215_Martin_Place_Siege_Review_1.pdf> ('*Martin Place Review*'), including border, residency, citizenship and Centrelink matters. See also Carne, 'Sharpening the Learning Curve', above n 9, 44–5.
- 272 The *Martin Place Review* was announced on 17 December 2014: see Tony Abbott and Mike Baird, 'Martin Place Siege — Joint Commonwealth - New South Wales Review' (Media Release, 17 December 2014) <<http://pandora.nla.gov.au/pan/143015/20150209-0000/www.pm.gov.au/media/2014-12-17/martin-place-siege-joint-commonwealth-new-south-wales-review.html>> (making clear that the review report would be prepared by the end of January 2015). See also Louise Yaxley, 'Tony Abbott Flags Crackdown on National Security ahead of Release of Sydney Siege Review', *ABC News* (online), 16 February 2015 <<http://www.abc.net.au/news/2015-02-15/pm-flags-tough-stance-on-border-security-ahead-of-siege-report/6108120>>. These further prospective laws were signalled prior to the handing down by the PJCS of its report on metadata laws and Parliament's passage of metadata laws. Reference was made leading up to the release of the *Martin Place Review* (Abbott, Keenan and Colvin, above n 76) (and with specific reference to the Martin Place siege) and in the 'Prime Minister Tony Abbot's Full National Security Statement', above n 11, as to the urgency of the Parliament passing the metadata legislation. The *Martin Place Review* circumstances were clearly used to mobilise urgency in relation to the metadata legislation (PJCS review of that legislation then occurring) as well as for further planned legislation. The Commonwealth did not delay its response to the *Martin Place Report*: see Tony Abbott and Mike Baird, 'Martin Place Siege Review Released' (Media Release, 22 February 2015) <<http://pandora.nla.gov.au/pan/143015/20150509-0113/www.pm.gov.au/media/2015-02-22/martin-place-siege-review-released.html>>.
- 273 See Brandis, 'New Counter-Terrorism Legislation', above n 15. The *CTLA Bill 2015*, since passed as the amended 2016 Bill, was identified as 'the fifth tranche of national security legislation'. See also Carne, 'Sharpening the Learning Curve', above n 9, 44.
- 274 *CTLA Bill 2016*. See Turnbull and Brandis, 'Strengthening Counter-Terrorism Legislation', above n 268.
- 275 Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth). See George Brandis, 'COAG to Strengthen National Security Legislation' (Media Release, 1 April 2016). <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/4476883/upload_binary/4476883.pdf;fileType=application%2Fpdf#search=%22media/pressrel/4476883%22>; George Brandis, 'Meeting of Attorneys-General on Post Sentence Preventative Detention' (Communiqué, 5 August 2016) <<http://pandora.nla.gov.au/pan/21248/20161101-1107/www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Communique-Meeting-of-Attorneys-General-on-post-sentence-preventative-detention.html>>; Brandis, 'Two Bills to Bolster the Fight against Terrorism', above n 130. The *CTLA Bill 2016* passed the Parliament on 22 November 2016 and the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) passed the Parliament on 1 December 2016. For commentary on the latter, see Greg Carne, 'As Safe As Houses? : Commonwealth Continuing Detention Of High Risk Terrorist Offenders', (2017) 28 *Public Law Review* 198.

activity has paralleled a multiplicity of topics carrying a national security label,²⁷⁶ with responses to national security agency requests being given priority.²⁷⁷

These characteristics of a composite, expanding body of law are trending towards the preferred statutory model of the former Director-General of Security, David Irvine, for general legislation.²⁷⁸ General legislation would provide a legal umbrella or framework for national security activities, accord intelligence agencies broad discretion and accommodate intelligence agency interpretative and priority shifts. The general legislation model presumes that intelligence and law enforcement agencies act with propriety and restraint, and are risk averse. It is sceptical about additional legislated checks and balances emerging from the PJCIS and other review processes and reports, and may question the value of contributions of civil society institutions, law academic and professional law associations, with their insistence on safeguards, to such reviews where operating legislation is being adjusted.²⁷⁹

The ongoing enhancement of executive authority under counterterrorism legislation, the expedited, executive-driven process of PJCIS review and enactment, and the volume of new laws creates risks that the legislative process will be differentially reshaped around a harmonised but inaccurate conception of what constitutes security against terrorism. Importantly, this conception limits the scope to ask critical questions about the necessity of such laws, their proportionality to an agreed risk of harm, or whether means other than further laws are the optimal method of mitigating identified terrorism risks. The issues of expedition and urgency around review and enactment of terrorism laws have been exacerbated by the emergence of 24-hour news cycle in the post-Howard Government years, with the corresponding rise of social media linked to that news cycle. The need for the Government to be seen to respond to, and for the Opposition to be positively disposed towards, rapid security policy pronouncements, can produce impulsiveness and overreach, rather than more measured and effective responses calibrated to an evolving terrorism threat.

The review and legislative functions in such a harmonised national security claim are then contracted in democratic characteristics. A further risk is that this legislative model is able to be migrated to topics similarly perceived as

276 Consistent with an expanded conception of 'national security' from 2008: see Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12549–61 (Kevin Rudd, Prime Minister); Carne, 'Beyond Terrorism', above n 16, 211–15.

277 This has been criticised as a failure to learn past legislative lessons: Jessie Blackbourn and Nicola McGarrity, 'How Reactive Law-Making Will Limit the Accountability of ASIO', *Inside Story* (online), 24 July 2014 <<https://insidestory.org.au/how-reactive-law-making-will-limit-the-accountability-of-asio/>>.

278 Michelle Grattan, 'Grattan on Friday: In Conversation with ASIO Chief David Irvine', *The Conversation* (online), 15 August 2014 <<http://theconversation.com/grattan-on-friday-in-conversation-with-asio-chief-david-irvine-30536>>; David Irvine, 'Evolution of Terrorism — And What It Means for Australia' (Speech delivered at the Australian Institute of International Affairs, Sydney, 12 August 2014) <<http://www.internationalaffairs.org.au/wp-content/uploads/2014/08/EVOLUTION-OF-TERRORISM-Speech-AIIA-12-8-14.pdf>>.

279 See David Irvine, 'Diligence in the Shadows — ASIO's responsibility' (Speech to the National Press Club, Canberra, 27 August 2014); Frank Moorehouse, 'ASIO Head's Ground-Breaking Speech Sheds a Lot of Litter', *Sydney Morning Herald* (Sydney), 29 August 2014; Michelle Grattan, 'Grattan on Friday: In Conversation with ASIO Chief David Irvine', above n 278.

urgent and involving significant risk — such as criminal unlawful association legislation, and in border protection against asylum seekers.²⁸⁰ Further enduring characteristics of the 2014–15 legislative experience are likely to be the enabling set of review and legislative cultural practices for the passage of serial terrorism legislation. The ultimate fact is that no outer limits (as might be set through a statutory charter of rights or the acknowledgment of Australia’s international human rights treaty obligations) exist as to Commonwealth terrorism legislation — save for constitutional characterisation questions and the few express or implied constitutional constraints²⁸¹ over Commonwealth legislative and executive power. These liberty-reducing methodologies have been authored and shared between Government and Opposition, contesting the longstanding assumption that Commonwealth parliamentary sovereignty, conventions and practices are guarantors of rights.²⁸²

The contestation of parliamentary sovereignty as a guarantor of rights was further overlain by the views of Attorney-General Brandis and Prime Minister Abbott in relation to internationally based and identified human rights. This particular human rights discourse has received greater emphasis than in previous rounds of terrorism law reform, through the absence of robust Senate Legal and Constitutional Affairs Committee review and reporting. Whether the more circumspect language of the national security statement of 24 November 2015²⁸³ of Prime Minister Turnbull²⁸⁴ translates in the longer term into more carefully calibrated legislation reflecting more meaningful PJCIS review processes, is yet to be determined.

These factors from the 2014–15 terrorism legislative experience, as examined in the content of the four thematic headings of this article,²⁸⁵ point to the need for reform of PJCIS review if more than purely rhetorical meaning is to be derived from Prime Ministerial comments that²⁸⁶

280 Ananian-Welsh and Williams, above n 16.

281 Such as the five express rights in the *Commonwealth Constitution* — acquisition of property on just terms under s 51(xxxi), jury trials under s 80, freedom of interstate movement under s 92, freedom of religion under s 116 and freedom from discrimination regarding the basis of interstate residence under s 117; the implied freedom of political communication in the *Commonwealth Constitution*; and implications derived from the separation of ch III judicial power in the *Commonwealth Constitution*. See also Carne, ‘Sharpening the Learning Curve’, above n 9, 44.

282 Williams argues that such parliamentary practice in relation to terrorism laws has ‘expose[d] structural problems with Australia’s system of law’, challenging democratic assumptions and conventions, ‘values, rule of law principles and human rights’ in their applicability in the contemporary Australian polity: Williams, ‘The Legal Legacy of the “War on Terror”’, above n 9, 15–16. See also Williams, ‘The Legal Assault on Australian Democracy’, above n 9, 23.

283 See Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2015, 13483–6 (Malcolm Turnbull, Prime Minister); Tim Legrand, ‘Moderation Not Machismo: Turnbull’s New Tenor of Counter-Extremism Policy’, *ABC News* (online), 25 November 2015 <<http://www.abc.net.au/news/2015-11-25/legrand-turnbulls-new-tenor-of-counter-extremism-policy/6971716>>.

284 The scepticism is warranted, as Mr Turnbull was Abbott Government Minister for Communications with portfolio responsibility for the advocacy and passage of the intrusive metadata legislation, the *Data Retention Act*.

285 The discussion under the thematic headings Parts III–VI above.

286 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2015, 13483–6 (Malcolm Turnbull, Prime Minister).

[f]or all freedom-loving nations, the message could not be clearer: if we want to preserve the values that underpin our open, democratic societies, we will have to work resolutely with each other to defend and protect the freedoms we hold dear. ... And the strongest weapons we bring to this battle are ourselves, our values and our way of life. Our unity mocks their attempts to divide us. Our freedom under law mocks their cruel tyranny. Our mutual respect mocks their bitter intolerance.

Reforms to PJCIS review processes are therefore now compelling. Such reforms may relate to legislative changes of the PJCIS mandate, or methodology and procedural changes relating to review of terrorism laws by the PJCIS and more broadly by the Parliament itself, including its committees.

Further, the 2014–15 review experience of terrorism laws by the PJCIS has revealed significant methodological shortcomings, analysed under the four thematic headings in this article,²⁸⁷ as well as becoming an integrated institutional part (through its review methodologies and recommendations) of the government legislative process.

The first issue warranting reform is the undesirability of the PJCIS exercising a *de facto* monopoly of parliamentary review of terrorism laws. The problems of bipartisanship, restricted and exclusionary membership of the PJCIS, a shared cultural deference to the executive on national security matters and the emergent practice of the PJCIS conducting subsequent reviews of legislative issues which were based on its earlier recommendations, fails to provide the optimal conditions for rigorous and fully independent review of national security laws. To address such factors, it is desirable that the Senate Legal and Constitutional Committee reintroduce itself into review of proposed terrorism laws. This would broaden the participatory role of parliamentarians, particularly from minor and crossbench senators, increase the level and depth of committee legal expertise and ensure that the PJCIS review methodology is provided with a contested and competitive perspective.

A further issue emerges relative to the features of bipartisanship and deference. This is the willingness of the PJCIS to give preferential weighting to executive expressed interests for expanding national security powers in examined legislation, by deflecting, deferring or failing to seriously engage with competing, expert analyses on aspects of terrorism laws — namely the first four reports of the INSLM; the recommendations of the COAG Committee review of terrorism laws; and the international human rights treaty based assessments of the PJCHR.

The PJCIS approach traversing these review forums highlights the shortcomings of the ‘balance’ paradigm,²⁸⁸ whereby executive interests will be given a weighted preference in the formulation of the balance between competing, rather than integrated and reconciled, interests. The approach of the PJCIS is on occasions to make recommendations on the existing legislative proposals, unimpeded by other recommendations involving the IGIS in a supervisory role, the INSLM in subsequent review or the PJCHR in contemporaneous review.

The PJCIS report interactions with these other competing, expert analytical views give insufficient credit or seriousness to their substance and methodology. One

287 The discussion under the thematic headings Parts III–VI above.

288 For criticism of the balancing approach, see above n 205.

suggestion for reforming the relationship between the PJCIS and these other bodies emerges in the paper of former Senator John Faulkner,²⁸⁹ who recommended a comprehensive review of the oversight of Australian intelligence agencies, as well as a stronger relationship between the PJCIS, the IGIS and the INSLM.²⁹⁰ The government announced on 7 November 2016 the establishment of an Independent Intelligence Review,²⁹¹ with terms of reference, inter alia, including review of ‘the effectiveness of current oversight and evaluation arrangements’.²⁹² However, the review committee was comprised exclusively of senior, experienced and established figures from the national security and intelligence community,²⁹³ who, whilst bringing eminent skills to the task, ideally should have been balanced by review committee appointees with other perspectives, particularly those with broader legal review and accountability framework portfolio experience. In this respect, the Independent Intelligence Review is properly contrasted with the much more broadly-based membership of two significant prior review committees formed as a result of legislative or broader deliberative processes: the Security Legislation Review Committee²⁹⁴ and the COAG Review of Counter Terrorism Legislation.²⁹⁵

Other proposals have emerged in the reforms in the Parliamentary Joint Committee on Intelligence and Security Amendment Bill 2015 (Cth),²⁹⁶ sponsored by the

289 Senator the Hon John Faulkner was a member of the PJCIS (9 December 2005 – 11 February 2008; 16 November 2010 – 6 February 2015). See John Faulkner, ‘Surveillance, Intelligence and Accountability: An Australian Story’, 46–7 <<http://apo.org.au/system/files/41934/apo-nid41934-60111.pdf>>. See also ‘Greater Oversight of Spies Needed, Says Faulkner’, *The Australian Financial Review* (online), 23 October 2014 <<http://www.afr.com/news/politics/greater-oversight-of-spies-needed-says-faulkner-20141023-11aw8z>>; Frank Moorhouse, ‘Rethinking ASIO’s Role with a Citizen’s Impact’, *The Saturday Paper* (online), 23 January 2016 <<https://www.thesaturdaypaper.com.au/opinion/topic/2016/01/23/rethinking-asios-role-with-citizens-compact/14534676002795>>.

290 Faulkner, above n 289.

291 Malcolm Turnbull, ‘Independent Intelligence Review’ (Media Release, 7 November 2016) <<https://www.pm.gov.au/media/2016-11-07/independent-intelligence-review>>, noting that ‘[t]he review will consider the ongoing suitability of legislative and oversight provisions’.

292 Department of the Prime Minister and Cabinet, Commonwealth of Australia, 2017 *Independent Intelligence Review* (2017) 12.

293 Professor Michael L’Estrange AO, Mr Stephen Merchant PSM and Sir Iain Lobban KCMG CB. For biographical details of the reviewers, see *ibid*.

294 Known also as the Sheller Committee. See Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (2006). The Committee was established pursuant to the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 4(1), as amended by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth) sch 2 item 1. The Committee was chaired by the Hon Simon Sheller AO QC, a retired New South Wales Supreme Court judge, and additionally comprised two Law Council of Australia representatives, the IGIS, the Commonwealth Privacy Commissioner, a nominee of the Attorney-General’s Department, the Commonwealth Human Rights Commissioner and the Commonwealth Ombudsman. It accordingly had strong, senior legal and accountability framework membership and expertise.

295 The COAG review arrangements relating to the scope, form and process of review were agreed at a COAG meeting on 10 February 2006, and recorded in the COAG communiqué of 10 February 2006: see *COAG Review Report*, above n 83, 2. The COAG Review Committee was chaired by Hon Anthony Whealy QC, a retired New South Wales Court of Appeal judge, and comprised the South Australian Ombudsman, an Assistant Commissioner of Queensland Police, the Deputy Commonwealth Director of Public Prosecutions, a retired Victorian County Court judge (who was a current Victorian Law Reform Commissioner) and an Assistant Commissioner of the AFP. Again, this represented broader legal, accountability and institutional membership and expertise.

296 This Bill lapsed at the dissolution of the 44th Parliament on 9 May 2016; it was restored to the Notice Paper on 31 August 2016, with the second reading adjourned on 13 October 2016.

Leader of the Opposition in the Senate, Senator Wong, including authorisations for the INSLM and IGIS to both provide copies of reports to the PJCIS and for INSLM and the National Security Adviser to be able to be consulted by the PJCIS.²⁹⁷ Further, as the PJCIS has in 2014–15 used the technique of recommending referral of substantive instant review matters to the INSLM at a future date, rather than substantively and contemporaneously engaging itself on such matters, the comments of the outgoing INSLM, Bret Walker SC, are apposite in crafting legislative reform:

The INSLM Act itself is a statute related to the [relevant counterterrorism laws]. In the opinion of the outgoing INSLM, it should be improved in two respects. First ... there should be an express power for the INSLM to report on a matter or matters within the statutory mandate but more urgently or particularly than by the annual report. Second ... there should be no possibility of reappointment of the INSLM. The nature of the task should not only involve quasi-judicial tenure (during the term of appointment) so as to remove fear of the Executive, but there should as well be no hope of preferment from the Executive.²⁹⁸

The main point from the 2014–15 experience and subsequent confirmatory experience is that the PJCIS needs to acknowledge and engage more substantively and seriously (and less peremptorily and dismissively) with other credible viewpoints from alternative, experienced and specialised review sources, such as the three identified above — the INSLM, the COAG Committee and the PJCHR.²⁹⁹ It is submitted that a combination of legislative reforms and PJCIS procedural and attitudinal change is desirable to bring about more informed and balanced legislative review and subsequent constructive amendments in ongoing counterterrorism legislative reform.

A further desirable recalibration for the PJCIS relates to its knowledge of and interactions with the legal and policy responses to terrorism of the UN human rights system, as affecting its appraisal of domestic terrorism legislative proposals. At the most basic level, this demands time and space in the PJCIS review process to consider in good faith the recommendations of the PJCHR report on the instant terrorism legislation being reviewed — as assessed by the PJCHR on principles of legality, necessity and proportionality and against the human rights obligations

297 See Parliamentary Joint Committee on Intelligence and Security Amendment Bill 2015 (Cth) sch 1 items 1, 3, 10; Commonwealth, *Parliamentary Debates*, Senate, 8 November 2016, 2209–10 (Jenny McAllister).

298 *INSLM Annual Report 2014*, above n 89, 2–3. In addition, the appointment of an INSLM for a continuing, fixed term, rather than the present arrangements of an acting appointment, is highly desirable: see George Brandis, ‘INSLM’s Report on Certain Questioning and Detention Powers in Relation to Terrorism’ (Media Release, 8 February 2017) <<http://pandora.nla.gov.au/pan/21248/20170501-0114/www.attorneygeneral.gov.au/MediaReleases/Pages/2017/FirstQuarter/Inslms-report-on-certain-questioning-and-detention-powers-in-relation-to-terrorism.html>>; Malcolm Turnbull ‘Appointment of an Acting Independent National Security Legislation Monitor’ (Media Release, 24 February 2017). The media releases reflect cumulative and extended delays in appointing an INSLM for a clear term (following the decision to reprove the INSLM position from abolition) and appointing Dr J Renwick as the *second* ‘acting Independent National Security Legislation Monitor’ (replacing Hon R Gyles QC) for ‘an *initial* period of 12 months while preparatory arrangements for his permanent appointment are made’: Malcolm Turnbull, ‘Appointment of an Acting Independent National Security Legislation Monitor’ (Media Release, 24 February 2017) <<https://www.pm.gov.au/media/2017-02-24/appointment-acting-independent-national-security-legislation-monitor>>.

299 See Carne, ‘Sharpening the Learning Curve’, above n 9, 47.

of the seven major UN treaties on human rights to which Australia is a party.³⁰⁰ The failure to consider the PJCHR reports on the *Foreign Fighters Bill* and the *NSLA Bill* represents a breach of the spirit of the *Parliamentary Scrutiny Act* and its intended operation as part of Australia's Human Rights Framework. The failure of the government and the PJCIS to wait for and consider the reports of the PJCHR evidences a significant marginalisation of human rights principles in its review of proposed and prospective terrorism laws.

Government appraisals (echoed through opposition bipartisanship) channelled through the PJCIS also need to become more literate about and responsive to the integrated manner in which the UN human rights system — both treaty-based and charter-based — seeks to address terrorism within a human rights framework. In fact, 'an integrated human rights approach in counter terrorism policy and legislation is ... consistently reflected in the approach advocated by several different United Nations institutional bodies and forums engaging with the intersection of terrorism and human rights.'³⁰¹ Ironically, greater awareness of the UN human rights treaty-based and charter-based responses to terrorism on the PJCIS would contribute to a substantively more *balanced* appraisal — a favoured metaphor of legislators Government and Opposition alike — than presently applies, including taking more seriously the PJCHR reports, based as they are on Australia's seven major international human rights treaty obligations.

This resource of the UN human rights responses to terrorism historically has not been meaningfully absorbed into PJCIS deliberations and reports, to shape recommended legislative responses to terrorism, where raised in submissions to its inquiries. It is a remarkable feature of the PJCIS review work that little attention or reference is made in its various reports³⁰² to UN commentary relevant to Australian terrorism laws in 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*,³⁰³ to the Human

300 See the statement of the PJCHR analytical framework: *PJCHR December 2015 Report*, above n 265, v.

301 Carne, 'Remedying the Past or Losing International Human Rights in Translation?', above n 205, 52 (citations omitted).

302 Also including earlier PJCIS reports on proposed terrorism law reforms: see *ibid.*, 65–76.

303 See *ibid.* 65–8. On the *ICCPR*, see Human Rights Committee, *Concluding Observations of the Human Rights Committee*, 95th sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) 3 [11]; Human Rights Committee, *List of Issues Prior to the Submission of the Sixth Periodic Report of Australia (CCPR/C/AUS/6) Adopted by the Committee at Its 106th Session (15 October – 2 November 2012)*, UN Doc CCPR/C/AUS/Q/6 (9 November 2012) 2 [7]–[8]. On the *CERD*, see 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*, 77th sess, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010) 3 [12]. On the *CAT*, see Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture*, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) 3 [10]; Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Addendum — Follow-Up Responses of Australia to the Concluding Observations of the Committee against Torture*, UN Doc CAT/C/AUS/CO/3/Add.1 (20 January 2014) 2–5 [4]–[18]; Committee against Torture, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia*, UN Doc CAT/C/AUS/CO/4-5 (23 December 2014) 5 [14].

Rights Council's first and second Universal Periodic Reviews of Australia;³⁰⁴ to the work of the Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism;³⁰⁵ and indeed to the report of the International Commission of Jurists on aspects of Australian terrorism laws.³⁰⁶

The PJCS also needs to cultivate, as a working principle, a focused appreciation of the limits of legislative purchase on terrorism issues when reviewing proposed terrorism laws. It would be a refreshingly honest approach if the PJCS, as an informing principle of its reviews, publicly acknowledged the extraordinary amount of Australian counterterrorism legislation enacted after 11 September 2001 in comparison to similar democracies. This should include acknowledgment of the complicated interactions (possibly with unforeseen or unintended consequences) produced between the different pieces of legislation in an evolving terrorism environment. Such an approach might encourage greater caution, and much more lateral and constructive engagement with other review reports, in PJCS review recommendations.

In recognising that limits exist to legislative efficacy, the PJCS needs to consciously articulate its recommendations regarding prospective legislation within a broader spectrum of identified terrorism issues — including how proposed terrorism legislation interacts with and affects other programs, such as community education and engagement and de-radicalisation programs. The PJCS also needs to address the fact that the legacy of such a vast body

304 Human Rights Council, *Report of the Working Group on Universal Periodic Review: Australia*, 17th sess, Agenda Item 6, UN Doc A/HRC/17/10 (24 March 2011); Human Rights Council, *Summary Prepared by the 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 the Annex to Council Resolution 16/21: Australia*, 23rd sess, UN Doc A/HRC/WG.6/23/AUS/3 (10 August 2015).

305 See, eg, Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council'*, 4th sess, Agenda Item 2, UN Doc A/HRC/4/26/Add.3 (14 December 2006) annex ('*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*'); Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin: Ten Areas of Best Practice in Countering Terrorism*, 16th sess, Agenda Item 3, UN Document A/HRC/16/51 (22 December 2010). 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: Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson: Framework Principles for Securing the Human Rights of Victims of Terrorism*, 20th sess, Agenda Item 3, UN Doc A/HRC/20/14 (4 June 2012); Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson: Framework Principles for Securing the Accountability of Public Officials for Gross or Systematic Human Rights Violations Committed in the Course of States-Sanctioned Counter-Terrorism Initiatives*, 22nd sess, Agenda Item 3, UN Doc A/HRC/22/52 (17 April 2013); Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson*, 25th sess, Agenda Item 3, UN Doc A/HRC/25/59 (11 March 2014).

306 International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009) 74–5, 112–14, 152–3, with various references to Australian terrorism law and practice in the report.

of counterterrorism legislation will self-generate new issues as the security environment changes, which may indirectly or directly impact on the work of the PJCIS.

Similarly, the PJCIS in reviewing proposed terrorism laws needs to make assessments in a way which openly appraises successes and failures of earlier counterterrorism activities pursued under legislation, as well as expenditures involved for expectations and likelihood of counterterrorism success on the present legislative proposal. The present PJCIS approach assumes a continuing expansion of intelligence agency and law enforcement powers, budgets and personnel, without testing legislative proposals as to whether they provide the most effective, and best prioritised, use of resources for counterterrorism responses.

The PJCIS accordingly needs, in several ways, to broaden its frame of reference in reviewing proposed laws. This is not a straightforward task, as the PJCIS reviews have been conducted in time-pressured circumstances where there has been intense focus upon instant legislation, rather than a more holistic approach of that legislation's connections to multiple pieces of Australian terrorism law, counterterrorism policy and non-legislative responses to terrorism. To achieve these improvements requires more than a broadening of membership,³⁰⁷ methodology, relations with other reviewers, and improved knowledge of human rights. It may well require liberalisation and greater independence of the PJCIS legislative mandate³⁰⁸ and an ability to more closely control its own work patterns and to instigate inquiries on its own initiative.³⁰⁹ These are the challenges ahead if the PJCIS and other review mechanisms (with whom the PJCIS must more substantively engage) are to work in a manner that reconciles and mutually reinforces the goals of countering terrorism (and its extreme recent and non-negotiable manifestation in the form of ISIS and its successors) and upholding human rights and democratic freedoms. To do anything less than this will provide a fillip and incremental gains to totalitarian groups such as ISIS, ISIS successors and Al-Qaeda in their ongoing attempts to undermine Western democratic traditions and institutions.

307 See Carne, 'Sharpening the Learning Curve', above n 9, 46.

308 Through necessary amendments to the *Intelligence Services Act*.

309 See Faulkner, above n 289, 42–5. These matters are also modestly advanced in the Parliamentary Joint Committee on Intelligence and Security Amendment Bill 2015 (Cth) sch 1 items 6, 8.