



Law Council  
OF AUSTRALIA

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# Adequacy of safeguards relating to the control order regime

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## **Independent National Security Legislation Monitor**

**30 September 2015**

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## Acknowledgement

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## Executive Summary

1. The Law Council is pleased to participate in the Independent National Security Legislation Monitor's (INSLM) review of the adequacy of the safeguards relating to the control order regime in Division 104 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).
2. The Law Council has previously recommended the repeal of the control order regime.<sup>1</sup> Control orders can involve significant restrictions on a person's liberty without following the normal criminal process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt.<sup>2</sup> Moreover, control orders can result in reduced likelihood of prosecution and conviction as individuals may be less likely to engage in self-incriminating behaviour.<sup>3</sup>
3. The former INSLM described control orders as 'not effective, not appropriate and not necessary' for persons who have not been convicted of terrorist offences;<sup>4</sup> and noted that police should instead rely on their established powers to take action against suspected criminals through the traditional law enforcement approach of arrest, charge and prosecution. He therefore recommended the provisions of Division 104 of Part 5.3 of the Criminal Code be repealed. If control orders were to be maintained, he suggested that consideration should be given to replacing them with 'Fardon type provisions'<sup>5</sup> authorising control orders against terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness.<sup>6</sup> The former INSLM's position remained the same up to his 28 March 2014 *Annual Report*.<sup>7</sup>
4. Since that time there has hardly been any experience of control orders to demonstrate their effectiveness.<sup>8</sup> This is particularly concerning in light of UK evidence that control orders act as an impediment to prosecution.<sup>9</sup>
5. If control orders are to be maintained, the Law Council agrees with the former INSLM's suggestion of replacing the control orders regime with narrower 'Fardon type provisions'.
6. However, if Australia's control order regime is to be retained prior to conviction, it needs revising and updating to ensure that it is a necessary and proportionate response to the threat of terrorism.

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<sup>1</sup> See, for example, Law Council of Australia, [Anti-Terrorism Reform Project](#), October 2013, 104.

<sup>2</sup> Ibid.

<sup>3</sup> UK Secretary of State for the Home Department, [Review of Counter-Terrorism and Security Powers: Findings and Recommendations](#), January 2011, 37.

<sup>4</sup> Independent National Security Legislation Monitor, [Declassified Annual Report](#), 20 December 2012, 4.

<sup>5</sup> The INSLM referred to orders under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD), which the High Court upheld in 2004 as constitutional in *Fardon v Attorney-General* (QLD) (2004) 223 CLR 575. The Act allows a court, if satisfied a prisoner released from custody would otherwise be a serious danger to the community, to order that the prisoner be detained in custody indefinitely for control, care or treatment or that the prisoner be released subject to requirements set out in the order.

<sup>6</sup> Independent National Security Legislation Monitor, [Declassified Annual Report](#), 20 December 2012, 44, Recommendation II/4.

<sup>7</sup> Independent National Security Legislation Monitor, [Annual Report](#), 28 March 2014, 67-70.

<sup>8</sup> At least two control orders have been issued since March 2014. See The Guardian, [Control order on Melbourne teenager despite terrorism charges being dropped](#) (17 September 2015)

<sup>9</sup> UK Secretary of State for the Home Department, [Review of Counter-Terrorism and Security Powers: A report by Lord Macdonald of River Glaven QC](#) (26 January 2011) 9.

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7. This submission has focused only on consideration of the INSLM's terms of reference regarding the additional safeguards recommended in the [2013 COAG review of Counter-Terrorism Legislation \(COAG Review\)](#) in relation to the control order regime. It does not consider broader amendments to control orders that might be required.
  8. The Law Council supports a number, but not all, of the COAG recommendations which are intended to clarify or strengthen procedural safeguards in the issuing processes of control orders.
  9. Key recommendations of this submission include:
    - a) 'Suspects' on reasonable grounds, rather than 'considers' on reasonable grounds, is appropriate when a senior member of the Australian Federal Police (**AFP**) seeks the Attorney-General's written consent to request an interim control order.
    - b) The definition of 'issuing court' in section 100.1 of the Criminal Code be amended to read 'the Federal Court of Australia or the Federal Circuit Court of Australia'.
    - c) Recommendation 29 of the COAG review be implemented in legislation to ensure appropriate consultation between the AFP and Commonwealth Director of Public Prosecutions (**CDPP**) prior to a control order being sought.
    - d) There should be a statutory requirement requiring the prospects for prosecution to be reviewed throughout the life of a control order.
    - e) A special advocate system should be introduced into the control order regime provided the fundamental safeguards set out in this submission are met.
    - f) Division 104 of the Criminal Code should provide for a minimum standard concerning the extent of the information to be given to a person the subject of an application for the confirmation of a control order, or an application for a variation or revocation of a control order. The minimum standard should be: 'the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations'.
    - g) Section 104.12 of the Criminal Code should be amended to provide that the information to be given to a person the subject of an interim control order include notification of the person's right to legal representation.
    - h) In determining whether a relocation power is necessary and proportionate the factors set out in this submission should be considered, including the intrusiveness of such an order, the threat level, the effectiveness of current obligations, prohibitions or restrictions and the likelihood of such a measure being of real practical assistance to authorities. If a relocation power is introduced, appropriate statutory limitations must also be implemented. Strategies should also be developed to mitigate alienation and resentment likely to be caused in some communities.
    - i) The curfew period should be no longer in any case than the minimum period required for protecting the public from a terrorist act or one of the other prescribed purposes of the control order regime under section 104.1.
    - j) The curfew period should be required to be considered cumulatively by the court, such that the period combined with other stringent measures, do not amount to a disproportionate deprivation of liberty. This may alternatively be achieved by implementation of the COAG Review's Recommendation 37.

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- k) An overnight residence requirement should be required where the curfew imposed is considerable.
  - l) The Criminal Code should impose a presumption that a person should not be deprived of basic mobile phone or landline access and access to at least one internet computer. This presumption could be rebutted on the basis of necessity for achieving one of the prescribed purposes of the control order regime in section 104.1.
  - m) There should be no change to the maximum duration of a control order, namely a period of 12 months.
  - n) Section 104.5 should be amended to ensure that, whenever a control order is imposed, any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person's liberty, privacy or freedom of movement that is necessary in all the circumstances.
  - o) The INSLM seek clarity as to why Division 105 of the Criminal Code clearly indicates that the Commonwealth Ombudsman is empowered specifically to provide general oversight of preventative detention orders, whereas Division 104 does not include such an express requirement.

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## Introduction

10. The Australian control order regime is loosely based on the former control order regime in the UK. In the UK control orders were introduced in 2005 as emergency legislation to impose rigid restrictions on terror suspects who could not be prosecuted or deported.<sup>10</sup> The objective of these orders was to:

*...prevent these individuals from engaging in terrorism-related activity by placing a range of restrictions on their activities, including curfews, restrictions on access to associates and communications and, in some cases, relocation.*<sup>11</sup>

11. The House of Lords criticised aspects of the UK control order regime as being in breach of human rights and the right to a fair trial.<sup>12</sup> A subsequent review in 2010-2011 by the UK Home Department found that some areas of the UK's counter-terrorism and security powers were *neither proportionate nor necessary*.<sup>13</sup> It made recommendations that were 'in keeping with [UK] traditions and [UK] commitment to the rule of law'.<sup>14</sup> A key element included:

*The end of control orders and their replacement with a less intrusive and more focused regime. Additional resources will be provided to the police and security agencies to ensure the new measures are effective not only in protecting the public but in facilitating prosecution.*<sup>15</sup>

12. The control order regime in the UK was subsequently repealed and replaced by the Terrorist Prevention and Investigation Measures (TPIM) orders, introduced by the *Terrorism Prevention and Investigation Measures Act 2011* (UK).

13. The COAG Review's consideration of the Australian control order regime was set against the backdrop of the UK reforms. A critical assessment of the COAG Review and the UK reforms is timely to ensure that the Australian control order regime, if it is to be retained, is necessary and proportionate. This is critical given recent amendments<sup>16</sup> and proposals<sup>17</sup> for the expansion of regime.

14. As noted by Parliamentary Joint Committee on Human Rights, the control orders regime involves 'very significant limitations on human rights', including the right to a fair trial.<sup>18</sup> The Committee considered that the 'control orders regime may not satisfy

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<sup>10</sup> UK Secretary of State for the Home Department, [Review of Counter-Terrorism and Security Powers: Findings and Recommendations](#), January 2011, 36.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Secretary of State for the Home Department v AF and another* [2009] UKHL, 28.

<sup>13</sup> *Ibid.*, 5.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, 6.

<sup>16</sup> In 2014 the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (Foreign Fighters Act) extended the control order regime in Division 104 until 7 September 2018. The Foreign Fighters Act also expanded the regime to apply to persons who have: engaged in armed hostilities in a foreign State; been convicted of a terrorism related offence in Australia or overseas (but only where conduct relevant to the foreign conviction would be a terrorism offence if engaged in in Australia); and trained with or received training from a terrorist organisation, including participating in training provided to or from a terrorist organisation.

<sup>17</sup> The proposed Counter-Terrorism Bill 2015 may include measures that expand the control order regime to apply to children younger than 16 years of age – see The Daily Telegraph, [Jihadist teens could be forced to wear tracking devices under new anti-terror laws](#) (September 13, 2015)

<sup>18</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fourteenth Report of the 44th Parliament* (2014) 17.

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the requirement of being reasonable, necessary and proportionate in pursuit of their legitimate objective'.<sup>19</sup>

15. The Law Council therefore welcomes the current INSLM's inquiry as an important step in refining the control order regime to more accurately reflect fundamental rule of law principles.

## Threshold for seeking Attorney-General's consent

16. Recommendation 27 of the COAG Review provides:

*The Committee recommends the amendment of subsection 104.2(2)(b) to require that the second basis on which a senior member of the Australian Federal Police seeks the Attorney-General's written consent to request an interim control order be that he or she 'considers on reasonable grounds that the person has provided training, or received training from, a listed terrorist organisation'.<sup>20</sup>*

17. This recommendation was not supported by COAG on the basis that:

- There is merit in ensuring consistency across the bases on which a senior member of the AFP seeks the Attorney-General's written consent to request an interim control order. However, both bases for seeking the Attorney-General's consent should require the AFP member to 'suspect' rather than 'consider' on reasonable grounds that the order in the terms requested would substantially assist in preventing a terrorist act.<sup>21</sup>

18. The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (**Foreign Fighters Act**) amended the threshold for an AFP applicant to request a control order by amending the threshold in subparagraph 104.2(2)(a) to 'suspects on reasonable grounds'.

### Law Council position

19. In its submission to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) on the Foreign Fighters Bill, the Law Council noted that in the absence of further reasons to justify the departure from the COAG Review's recommendation, the threshold for seeking a control order should remain as 'considers on reasonable grounds'.

20. At a public hearing on the Bill on 8 October 2014, the PJCIS asked the former INSLM, Mr Bret Walker SC, of his views on the lowering of the threshold. Mr Walker SC responded:

*The first thing is that I think the principle of there being consistency, not for its own sake but because the subject matters are so closely allied, is a useful one—one way or the other, whichever way you go. Second, as a practitioner occasionally in criminal and allied areas I am bound to tell you that there is an element of hairsplitting in the difference between 'considers' and 'suspects', bearing in mind they both have a requirement for 'reasonable grounds'. Rarely in law enforcement*

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<sup>19</sup> Ibid.

<sup>20</sup> Council of Australian Governments, [Council of Australian Governments Review of Counter-Terrorism Legislation](#), Australian Government, (2013), Recommendation 27.

<sup>21</sup> Council of Australian Governments, [COAG Response to COAG Review of Counter-Terrorism Legislation](#), (October 2014).

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do we require, as it were, a policeman to decide that somebody is the person who did it. Rather, a suspicion is appropriate, on reasonable grounds, to then put in train further steps, which ultimately, as I say, come to fruition in a trial and conviction. For those reasons, I am not quite sure that there is any true, appreciable lowering if things go as the bill presently proposes, any more than I think that there is any appreciable tightening if things went as COAG described. But I do think it happens in this area because of the similarity and overlap of concerns; that consistency is a virtue in itself.<sup>22</sup>

21. The Law Council respectfully agrees with the former INSLM's reasoning on this issue.

**Recommendation:**

- **'Suspects' on reasonable grounds, rather than 'considers' on reasonable grounds, is appropriate when a senior member of the AFP seeks the Attorney-General's written consent to request an interim control order.**

## Appropriate 'issuing court'

22. Recommendation 28 of the COAG Review provides:

*The Committee recommends that the definition of 'issuing court' in section 100.1 be amended to read 'the Federal Court of Australia'.<sup>23</sup>*

23. This recommendation was supported in part by COAG on the basis that:

- The Federal Court is currently an 'issuing court' for the purpose of Division 104 of the Criminal Code, in addition to the Family Court and the Federal Circuit Court (per section 100.1).
- It is appropriate to amend the definition of 'issuing court' to read 'the Federal Court of Australia and the Federal Circuit Court'.
- A role for the Family Court in the administration of the terrorism control order regime under the Criminal Code is anomalous compared with its areas of jurisdiction. While the Family Court is a superior court of record, it is a specialist family law court and does not exercise powers which are similar to those relevant under the control order regime. In contrast, as the Federal Court of Australia and the Federal Circuit Court of Australia have broad general federal law jurisdictions, these courts are more familiar with the type of processes and powers required to administer the regime. As there have been only a very small number of control orders ever issued, the operation of the scheme would not be expected to be impacted if the scope of 'issuing courts'

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<sup>22</sup> Mr Bret Walker SC, Official Committee Hansard, Parliamentary Joint Committee on Intelligence and Security, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Wednesday, 8 October 2014, Canberra, 45.

<sup>23</sup> Council of Australian Governments, [Council of Australian Governments Review of Counter-Terrorism Legislation](#), Australian Government, (2013), Recommendation 28.

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was more confined, nor would there be expected to be significant workload implications for the remaining courts.<sup>24</sup>

#### Law Council position

24. The Law Council agrees with the reasoning of the COAG Review and COAG response as to the removal of the Family Court as an issuing court. However, it is in favour of the maintenance of the status quo, at least insofar as the continuance of the Federal Circuit Court and the Federal Court as issuing Courts is concerned.
25. The Law Council understands that in the ordinary course of events, the majority (if not all) of the applications for control orders are made to (or end up before) a judge of the Federal Circuit Court. The Court is, the Law Council understands, seen to be conscious of this and to be attempting to allocate such matters to particular judges with a view to some consistency of approach and the corresponding development of expertise in such matters. The judges of the Federal Circuit Court have a range of other personal powers relating to matters such as interception warrants<sup>25</sup> and the like and the power to issue control orders is not out of step with those other powers.
26. There is also a right of appeal to the Federal Court from the Federal Circuit Court.<sup>26</sup>
27. The Law Council understands that the majority of applications for control orders are made on an *ex parte* basis with minimal notice and some urgency. That gives rise to an issue as to available judicial resources. This may be one reason why the majority of matters go to the Federal Circuit Court: it has the largest judicial resource base and is seen as more accessible.
28. The Law Council is not aware of any evidence that the process of applications to the Federal Circuit Court has not been working effectively to date. It is consistent with the ordinary approach to general federal matters in which the Federal Circuit Court and the Federal Court share jurisdiction, that is, that where possible an application be made in the first instance to the Federal Circuit Court and the Federal Court deal with appeals.

#### **Recommendation:**

- **The definition of ‘issuing court’ in section 100.1 of the Criminal Code be amended to read ‘the Federal Court of Australia or the Federal Circuit Court of Australia’.**

## Appropriate consultation with CDPP

29. Recommendation 29 of the COAG Review provides:

*The Committee recommends that investigating agencies, prior to the Australian Federal Police requesting consent from the Attorney-General to seek an interim control order, should provide the Commonwealth Director of Public Prosecutions with the material in their possession so that the Director may, in light of the*

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<sup>24</sup> Council of Australian Governments, [COAG Response to COAG Review of Counter-Terrorism Legislation](#), (October 2014), 12.

<sup>25</sup> *Telecommunications (Interception and Access) Act 1979* (Cth), ss 6 and 6DB.

<sup>26</sup> *Federal Court of Australia Act 1976* (Cth), s 24(1)(d).

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*Prosecution Policy of the Commonwealth, consider or reconsider the question of prosecution in the criminal courts. This recommendation does not necessarily require that it be incorporated in the legislation at this stage. It does, however, emphasise that criminal prosecution is the preferable approach. Control orders should always be sought as a last resort.*<sup>27</sup>

30. This recommendation was supported in principle by COAG on the basis that:
- in practice, there is appropriate consultation and cooperation between the AFP and the CDPP when control orders are under consideration. Retaining this approach as a matter of practice, rather than as a statutory obligation, ensures appropriate flexibility and discretion in individual cases.<sup>28</sup>

#### Law Council position

31. The Law Council supports implementation of recommendation 29 of the COAG review.
32. As noted in the COAG review, the UK's *Terrorism Prevention and Investigation Measures Act 2011* (UK) has a statutory safeguard, which requires consultation between the Secretary of State and the Chief Officer of the appropriate police force to determine whether there is evidence available that could realistically be used for the purposes of prosecuting an individual for a terrorism-related offence.
33. Every effort should be made to ensure that terrorists are tried in the criminal courts and that the use of extraordinary executive measures such as control orders is kept to a minimum. Control orders should only be made where, among other prescribed minimum standards being met, an individual cannot realistically be prosecuted for a terrorism-related offence.
34. These principles accord more directly with the rule of law which provides that all people are entitled to the presumption of innocence and to a fair and public trial.<sup>29</sup> It is more appropriate for a person's liberty to generally be restricted on the basis of an actual finding of guilt rather than suspicion.
35. Prosecution should also be the preferred course because the public is protected more effectively where a terrorist has been convicted and incapacitated through a term of imprisonment. The same point was made by the former Independent Reviewer in the UK, Lord Carlile, that it is 'in the public interest for the conventional charge and trial process to be used whenever possible, rather than control orders'.<sup>30</sup>
36. In the context of the UK's TPIMs, the current UK Independent Reviewer, Mr David Anderson QC, has made similar recommendations noting that 'no control order should be requested where prosecution would be a feasible alternative'.<sup>31</sup>
37. The importance of the current process in Australia whereby consultation and cooperation between the AFP and CDPP exists as a matter of practice should not be

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<sup>27</sup> Council of Australian Governments, [Council of Australian Governments Review of Counter-Terrorism Legislation](#), Australian Government, (2013), Recommendation 29.

<sup>28</sup> Council of Australian Governments, [COAG Response to COAG Review of Counter-Terrorism Legislation](#), (October 2014), 13.

<sup>29</sup> Law Council of Australia, [Policy Statement: Rule of Law Principles](#), (March 2011), Principle 3.

<sup>30</sup> Lord Carlile of Berriew QC, *Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, (18 February 2009), 2.

<sup>31</sup> David Anderson QC, Independent Reviewer of Terrorism Legislation, *Control Orders in 2011*, (March 2012), Recommendation 2.

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underestimated. Consultation between the AFP and CDPP is critical as the CDPP is in the best position to know, on the basis of information provided by the AFP, whether a prosecution may be a realistic option.

38. While consultation may occur as a matter of practice, an express statutory requirement would ensure that this matter is brought to the attention of the CDPP. A statutory obligation would ensure that the feasibility of prosecution is appropriately considered in all cases where a control order may be contemplated. The ruling out of a feasible prosecution as a statutory precondition to the AFP requesting consent from the Attorney-General to seek an interim control order would be an important safeguard. A statutory obligation would also demonstrate a commitment to the prosecution of terrorists where there is sufficient admissible evidence to do so.
39. A requirement for consultation regarding realistic prospects of prosecution would also more readily accord with the terms of the *United Nations Security Council Resolution 1566* (2004). This resolution requires Member States, including Australia, to cooperate fully in the fight against terrorism and to deny safe haven and bring to justice through prosecution or extradition, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.<sup>32</sup>
40. Investigation with a view to prosecution should also remain under police review throughout the life of a control order, as is the case in the UK.<sup>33</sup>

**Recommendation:**

- **Recommendation 29 of the COAG review be implemented in legislation to ensure appropriate consultation between the AFP and CDPP prior to a control order being sought.**
- **There should be a statutory requirement requiring the prospects for prosecution to be reviewed throughout the life of a control order.**

## Special advocates

41. Recommendation 30 of the COAG Review provides:

*The Committee recommends that the Government give consideration to amending the legislation to provide for the introduction of a nationwide system of 'Special Advocates' to participate in control order proceedings. The system could allow each State and Territory to have a panel of security-cleared barristers and solicitors who may participate in closed material procedures whenever necessary including, but not limited to, any proposed confirmation of a control order, any*

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<sup>32</sup> UN Security Council, *Security Council Resolution 1566 (2004), Concerning Threats to International Peace and Security Caused by Terrorism*, (8 October 2004), S/RES/1566 . In addition, it would also arguably be more consistent with the right to a fair trial as contained in Article 14 of the *International Covenant on Civil and Political Rights*. The Convention entered into force for Australia on 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993.

<sup>33</sup> Section 10(5) of the *Terrorism Prevention and Investigation Measures Act 2011* (UK).

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*revocation or variation application, or in any appeal or review application to a superior court relating to or concerning a control order.*<sup>34</sup>

42. This recommendation was not supported by COAG on the basis that:

- Jurisdictions note that the Commonwealth has significant reservations about introducing a regime of special advocates in respect of national security litigation, including a scheme of the kind in recommendation 30 which would apply specifically to control order proceedings.
- In addition, the majority of jurisdictions consider the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) is the preferable means of protecting national security information in federal judicial proceedings, including those in relation to control orders.
- It is also noted that a court may, under either the NSI Act or inherent jurisdiction, appoint a special counsel if considered necessary to ensure the proper administration of justice in proceedings involving sensitive evidence such as national security information.<sup>35</sup>

43. The former INSLM did not recommend the introduction of special advocates to the NSI Act regime given the fundamental problems associated with using special advocates to overcome fair trial deficiencies in criminal proceedings.<sup>36</sup>

#### Law Council position<sup>37</sup>

44. The Law Council queries COAG's response that a court may, under inherent jurisdiction, appoint a special counsel. Presumably this view is drawn from the concept of *amicus curiae*. However, in *Al-Rawi v the Secret Service*,<sup>38</sup> the UK Supreme Court ruled that government attempts to create closed trials for Guantanamo Bay detainees which included provision for special advocates would be contrary to the common law. Lord Kerr noted that 'this would not be a development of the common law... It would be, at a stroke, the deliberate forfeiture of a fundamental right which... has been established for more than three centuries.'<sup>39</sup> However, the ability to appoint special counsel may still arise under the NSI Act.<sup>40</sup>

45. Nonetheless, a special advocate regime,<sup>41</sup> combined with the minimum disclosure requirement, would improve – although not remedy – the fairness to the controlee. In *Assistant Commissioner Condon and Pompano Pty Ltd*<sup>42</sup>, Justices Hayne, Crennan,

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<sup>34</sup> Council of Australian Governments, [Council of Australian Governments Review of Counter-Terrorism Legislation](#), Australian Government, (2013), Recommendation 30.

<sup>35</sup> Council of Australian Governments, [COAG Response to COAG Review of Counter-Terrorism Legislation](#), (October 2014), 13.

<sup>36</sup> Independent National Security Legislation Monitor, Australian Government, [Annual Report](#), (7 November 2013), 113.

<sup>37</sup> Further information regarding the Law Council's position on special advocates and concerns with the NSI Act is available at: Law Council of Australia, [Anti-Terrorism Reform Project](#), (October 2013); Law Council of Australia, [Submission to the Independent National Security Legislation Monitor Inquiry into the operation of the National Security Information \(Criminal and Civil Proceedings\) Act 2004](#), (19 July 2013).

<sup>38</sup> *Al Rawi and Others v Security Service and Others* [2011] UKSC, 34.

<sup>39</sup> *Ibid* per Lord Kerr JSC at [617].

<sup>40</sup> *R v Lodhi* [2006] NSWSC 586 per Whealy J at [45].

<sup>41</sup> Special advocates are lawyers with high security clearances given access to secret evidence that cannot be disclosed to those for whom the advocates act. These special advocates act in closed material proceedings. In such proceedings, the individual who is subject to state action and his or her legal representatives are excluded, but the special advocate acts on the subject's behalf.

<sup>42</sup> [2013] HCA 7.

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Kiefel & Bell JJ<sup>43</sup> expressed doubts about the significance of a special advocate from the point of view of procedural fairness. Justice Gageler noted that a special advocate may assist from a fairness point of view, although 'it cannot cure a want of procedural fairness'.<sup>44</sup>

46. David Anderson QC, the UK Independent Reviewer of Terrorism Legislation, has concluded in relation to the control order and TPIM regimes, while 'gisting'<sup>45</sup> and the appointment of special advocates has provided 'a substantial degree of fairness to the controlled person...no procedure can be wholly fair in which a participant is enabled neither to hear nor to rebut the detailed evidence against him.'<sup>46</sup>

47. The former INSLM also noted that:

*It is a fallacy to suggest a special advocate could represent the accused... the INSLM does not believe that a special advocate can provide the court with assistance to an extent that would remedy the fair trial issues that would arise where a defendant's lawyer was excluded from the court during argument over whether potentially critical and exculpatory evidence should be adduced in a criminal proceeding.*<sup>47</sup>

48. The introduction of a special advocate procedure should not therefore detract from the momentum to effect meaningful reform of those provisions of the NSI Act that the Law Council and others have consistently identified as raising fair trial concerns.<sup>48</sup>

49. The special advocate system in the UK has also been criticised as not affording sufficient fairness to the controlee. UK special advocates have identified a number of serious difficulties with the present system, including:<sup>49</sup>

- prohibition on any direct communication with open representatives;
- the inability effectively to challenge non-disclosure;
- the lack of any practical ability to call evidence;
- the allowance of 'second or third hand hearsay to be admitted, or even more remote evidence; frequently with the primary source unattributed and unidentifiable, and invariably unavailable for their evidence to be tested, even in closed proceedings';<sup>50</sup>
- a systemic problem with prejudicially late disclosure by the Government;

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<sup>43</sup> Ibid, [110]-[112].

<sup>44</sup> Ibid, [208].

<sup>45</sup> Gisting in the UK requires that a person be given at least the gist or essence of the case against him or her so as to enable him or her to give effective instructions to his or her lawyers.

<sup>46</sup> David Anderson QC, Independent Reviewer of Terrorism Legislation, *Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (March 2012) p6.

<sup>47</sup> Independent National Security Legislation Monitor, Australian Government, [Annual Report](#), (7 November 2013), 152.

<sup>48</sup> Further information regarding the Law Council's position on special advocates and concerns with the National Security Information (Criminal and Civil Proceedings) Act 2004 is available at: Law Council of Australia, [Anti-Terrorism Reform Project](#), October 2013; Law Council of Australia, [Submission to the Independent National Security Legislation Monitor Inquiry into the operation of the National Security Information \(Criminal and Civil Proceedings\) Act 2004](#), 19 July 2013.

<sup>49</sup> Special Advocates, *Justice and Security Green Paper: Response to Consultation from Special Advocates*, Justice and Security Consultation, (December 2011), [17].

<sup>50</sup> Ibid.

- where *AF (No.3)* applies, the Government's approach of refusing to make such disclosure as is recognised would require to be given until being put to its election, and the practice of 'iterative disclosure';
- the increasing practice of serving redacted closed documents on the special advocates, and
- the lack of a searchable database of closed judgments.

50. Accordingly, while the Law Council supports the introduction of a special advocate scheme for control orders, it is essential for fundamental minimum safeguards to be met. These safeguards include:

- (a) There must be a legislated requirement of a minimum standard of information to be disclosed to an affected individual. The minimum standard should be that the person is given sufficient information about the allegations against him or her, or the reasons for the relevant decision under consideration, to enable effective instructions to be given in relation to those allegations or reasons.<sup>51</sup>
- (b) Special advocates must be appointed under a process that is subject to the full and free discretion of the court. In making a decision that a special advocate is necessary, the court must be able to give unfettered weight to the principles of open justice, natural justice and the right to a fair trial, as well as to the likelihood of damage to the interests of national security if relevant material were disclosed. It should be acknowledged that there will be cases in which it would not be fair and justifiable to rely on special advocates;<sup>52</sup>
- (c) The appointment of the special advocate should be a last resort, where the trial judge is satisfied that no other alternative will adequately meet the interests of fairness to the affected individual.<sup>53</sup> The available alternatives could include restricting disclosure to the legal advisers of the parties, in camera proceedings, or orders restricting reporting of the proceedings;
- (d) Special advocates are provided with access to the affected individual, his or her counsel, the case against him or her as well as access to the information subject to the closed hearing;
- (e) Practical support must be available which assists special advocates to fulfil their role to the maximum extent possible. For example:
  - i. they must be provided with adequate administrative and research support and resources. This must include practical access to resources and expertise which would enable them to challenge expert security evidence, to which courts are almost bound to defer given the absence of any evidence or expert opinion to the contrary; and
  - ii. they must be able to search closed judgments to identify precedents;

<sup>51</sup> This is similar to Recommendation 31 of the COAG Review Report, which calls for a minimum standard of disclosure to be legislated in the anti-terrorism control order context: Council of Australian Governments, [Council of Australian Governments Review of Counter-Terrorism Legislation](#), Australian Government, (15 May 2013).

<sup>52</sup> *R (Roberts) v Parole Board*, per Lord Carswell at [144], as discussed in Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Report to the United Nations General Assembly, A/63/223, (6 August 2008), 19.

<sup>53</sup> *R v Lodhi* [2006] NSWSC 586, per Whealy J at [45].

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- (f) Special advocates should be fully funded by Government without burdening existing legal aid funding;
- (g) In light of their different role, special advocates should be exempt from liability in relation to the conduct obligations which ordinarily attach to legal representatives;<sup>54</sup> and
- (h) Care must be taken to ensure that a wide range of suitably qualified special advocates is available, including on a geographic basis, in order to ensure that an affected individual has an effective right of choice regarding the person to act as his or her special advocate.
51. In addition, particular consideration must be given to the issue of communication between the special advocate and the affected individual or his or her ordinary legal representatives, following disclosure of classified information to the special advocate.
52. UK special advocates have consistently raised the bar on further communication as a fundamental difficulty. The Law Council considers that the parameters of communication must be considered carefully, in light of the need to ensure that information remains secure *and* the need to assist special advocates to perform their roles effectively. It is concerned that a special advocate may be placed 'in the position of having to challenge the state's case without the ability to freely consult with the person who is often best placed to refute the state's allegation and who may have a ready explanation for them'.<sup>55</sup>
53. Consideration should also be given to the less restrictive approach taken under Canada's *Immigration and Refugee Protection Act 2001*, under which the special advocate must gain the permission of the Court to further communicate with the affected individual, but is not required to notify the Government.
54. If a special advocates model is to be adopted, the Law Council considers that it should be trialled on a limited basis only, within narrow parameters (for example, in relation to a single area of the law such as the control order regime) and a finite timeframe. A comprehensive independent review should then take place before it is adopted on a permanent basis.

**Recommendation:**

- **A special advocate system should be introduced into the control order regime provided the fundamental safeguards set out in this submission are met.**

## Minimum standard of disclosure to a controlee

55. Recommendation 31 of the COAG Review provides:

*The Committee recommends that the legislation provide for a minimum standard concerning the extent of the information to be given to a person the subject of an application for the confirmation of a control order, or an*

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<sup>54</sup> See, for example, section 268 of the New Zealand *Immigration Act 2009*.

<sup>55</sup> Dr John Ip, 'The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill ' (2009) *New Zealand Law Review* 207, 219.

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*application for a variation or revocation of a control order. This requirement is quite separate from the Special Advocates system. It is intended to enable the person and his or her ordinary legal representatives of choice to insist on a minimum level of disclosure to them. The minimum standard should be: 'the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations.'* This protection should be enshrined in Division 104 wherever necessary.<sup>56</sup>

56. This recommendation was not supported by COAG on the basis that:

- The existing disclosure requirements in Division 104 are considered by a majority of jurisdictions to be sufficient and appropriate. The AFP is required to personally serve and explain the effect of an interim order on the person, ensuring that he or she understands the substance of the order (s 104.12).
- The proposed new minimum requirement of providing 'sufficient information... to enable effective instructions' imports an inappropriately broad and subjective standard in relation to the sufficiency of information disclosed, the application of which may delay the hearing of confirmation applications and prejudice security interests. Caution is also necessary in relation to any proposed wholesale incorporation of the European Court of Human Rights (**European Court**) jurisprudence into Australian laws, recognising that such jurisprudence can embody different legal and constitutional standards and practices to those of Australia.<sup>57</sup>

#### Law Council position

57. Currently, when seeking a confirmed control order, a senior AFP member must personally notify the controlee of the order, provide them with a statement of facts justifying the order any facts against the order (if known by the AFP), as well as an explanation of the obligation, prohibitions or restrictions, and 'any other details required to enable the person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order'.<sup>58</sup>

58. However, the AFP is not obliged to provide any document that would prejudice national security (within the meaning of the NSI Act) or be protected from public interest immunity, or that would put at risk either the safety or operations of law enforcement or intelligence officers.<sup>59</sup> The term 'national security' is broadly defined under the section 8 of the NSI Act as follows:

*In this Act, national security means Australia's defence, security, international relations or law enforcement interests.*

59. 'Law enforcement interests' are also broadly defined under section 12 of the NSI Act and include, for example, 'ensuring that intelligence and law enforcement agencies are not discouraged from giving information'.

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<sup>56</sup> Council of Australian Governments, [Council of Australian Governments Review of Counter-Terrorism Legislation](#), Australian Government, (2013), Recommendation 31.

<sup>57</sup> Council of Australian Governments, [COAG Response to COAG Review of Counter-Terrorism Legislation](#), (October 2014), 13.

<sup>58</sup> Criminal Code s104.12A(2).

<sup>59</sup> Criminal Code s104.12A(3).

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60. Therefore, in practice, the person may only be given very limited information about why a control order was made. The information may only consist of general information without specific factual references. This may mean that the controlee may not have sufficient information to challenge the case against them, making it difficult to comply with the requirement to give written notice to the AFP Commissioner of the grounds upon which the revocation or any variation of the order is sought.<sup>60</sup>
61. Implementation of COAG Recommendation 31 would enable a minimum level of information to be provided to the controlee to enable them to identify the grounds on which the order was made, which in turn would enable them to contest the case against them.
62. COAG review recommendation 31 was based on decisions in the European Court and the House of Lords relating to the issue of the compatibility of the UK control order proceedings with Article 6 of the European Convention on Human Rights (**ECHR**) which protects the right to a fair trial.
63. In *Secretary of State for the Home Department v AF and another* [2009] UKHL 28 (**AF No. 3**), Lord Phillips considered the government's argument that 'a less stringent standard of fairness was applicable in respect of control orders' than that required for criminal proceedings under Article 6 ECHR.<sup>61</sup> His Lordship held that while this might be true as a general proposition, it was not the case that this meant minimum disclosure requirements would differ.<sup>62</sup> Taking into account the judgment in the *European Court of Human Rights in A & Others v United Kingdom* [2009] ECHR 301 (**A v UK**), the House of Lords in *AF No. 3* held that Article 6 of the ECHR requires a 'core irreducible minimum' of procedural fairness such that:

*... the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations<sup>63</sup>...*

*If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him<sup>64</sup>.*

64. Lord Brown stated:

*In short, Strasbourg has decided that the suspect must always be told sufficient of the case against him to enable him to give 'effective instructions' to the special advocate, notwithstanding that sometimes this will be impossible and national security will thereby be put at risk<sup>65</sup>...*

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<sup>60</sup> Criminal Code s104.18(3).

<sup>61</sup> *Secretary of State for the Home Department v AF and another* [2009] UKHL 28 per Lord Phillips at [57].

<sup>62</sup> *Ibid.*

<sup>63</sup> *Secretary of State for the Home Department v AF and another* [2009] UKHL 28. [3], [59].

<sup>64</sup> *Ibid.*, [84].

<sup>65</sup> *Ibid.*, [116].

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...Strasbourg has... [stipulated] the need in all cases to disclose to the suspect enough about the allegations forming the sole or decisive grounds of suspicion against him to enable him to give effective instructions.<sup>66</sup>

65. Lord Phillips held the Grand Chamber in *A v UK* recognised an important qualification where controlees have a right to know the allegations against them but not necessarily, where the interests of national security are concerned, the source of the evidence that gives rise to suspicions regarding the engagement in terrorism-related activities.<sup>67</sup>
66. The House of Lords acknowledged that in some cases the allegations and the underlying evidence cannot be separated. In these cases, if the Secretary of State is not willing to disclose the material the control order will be quashed.<sup>68</sup> In a subsequent case, Collins J expressed concern that the 'distinction may in given cases not be easy to apply since, as what must be obvious, what amounts to an allegation and what amounts to evidence to support an allegation may depend on the width of the allegation'.<sup>69</sup>
67. It is for the UK courts to assess how much disclosure is necessary in each case for the controlee to effectively challenge it.<sup>70</sup> The courts have appeared to interpret this as requiring the bare minimum of information required for a controlee to refute the case against him/her to meet the minimum disclosure threshold.<sup>71</sup>
68. One of the concerns raised by the COAG response to Recommendation 31 of the COAG Review related to the inappropriately broad and subjective standard in relation to the sufficiency of information disclosed, the application of which may delay the hearing of confirmation applications and prejudice security interests. However, the issue of the proposed standard being inappropriately broad and subjective would not appear to be supported by the UK jurisprudence referred to above. Nor does it take into account the subjective elements that pertain to the current requirements under Division 104 which already depend in part upon the view formed by the senior AFP member about the 'details' to be provided to that person.
69. Australia is not a party to the *European Convention on Human Rights* 1950 (**ECHR**). Consequently, it is not bound by the jurisprudence of the European Court which has influenced the jurisprudence of the House of Lords. However, the ECHR protects the right to a fair trial in a number of analogous respects to the *International Covenant on Civil and Political Rights* (**ICCPR**) – the latter treaty of which Australia is a State party.<sup>72</sup> Consequently, the case law from the House of Lords, may be instructive in considering how the United Nations Human Rights Committee may interpret similar provisions in Article 14 of the ICCPR.<sup>73</sup> This is particularly pertinent given that the

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<sup>66</sup> Ibid, 119.

<sup>67</sup> *SSHD v AF (No 3)* [2009] 3 WLR 74, 100–1 [66].

<sup>68</sup> Ibid, [87].

<sup>69</sup> *Secretary of State for the Home Department v AS* [2009] EWHC 2564, [8].

<sup>70</sup> *SSHD v AF (No 3)* [2009] 3 WLR 74, [102]-[103] and [106]. See also, for example, *Secretary of State for the Home Department v AS* [2009] EWHC 2564 (Admin); *Secretary of State for the Home Department v CE* [2011] EWHC 3159 (Admin); *AH v Secretary of State for the Home Department* [2011] EWCA Civ 787; and *AN, AE & AF v Secretary of State for the Home Department* [2010] EWCA Civ 869.

<sup>71</sup> Ibid.

<sup>72</sup> The ICCPR entered into force in Australia on the 13<sup>th</sup> of November 1980.

<sup>73</sup> See, for example, *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 89-92 [140]-[152]. Article 14 of the ICCPR protects the right to a fair trial and fair hearing.

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INSLM is required to have regard to Australia's obligations under international agreements, including human rights obligations.<sup>74</sup>

70. In any event, international instruments, such as the ICCPR, cannot be used to override clear and valid provisions of Australian national law.<sup>75</sup> Only where a statute is ambiguous will courts generally favour a construction that accords with Australia's international obligations.<sup>76</sup> The explicit wording in subsection 104.12A(2) is arguably not ambiguous and therefore implicitly overrides Article 14 of the ICCPR. It is therefore unlikely that a court would consider that subsection 104.12A should be interpreted, as far as the language permits, in a manner consistent with Article 14.
71. Nonetheless, the Law Council commends the minimum standard of disclosure model of the House of Lords to the INSLM as providing an additional safeguard to the control order regime. Such a minimum disclosure standard would more readily serve, as suggested by the House of Lords, as a procedural means to safeguard the rule of law and the right to a fair trial.

**Recommendation:**

- **Division 104 of the Criminal Code provide for a minimum standard concerning the extent of the information to be given to a person the subject of an application for the confirmation of a control order, or an application for a variation or revocation of a control order. The minimum standard should be: 'the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations'.**

## Appeal and review rights

72. Recommendation 32 of the COAG Review provides:

*The Committee recommends that section 104.12 should be amended to provide that the information to be given to a person the subject of an interim control order include information as to all appeal and review rights available to that person or to the applicant in the event that an interim order is confirmed, varied or revoked.*<sup>77</sup>

73. This recommendation was supported by COAG on the basis that:

- While the existence of general rights of appeal could reasonably be expected to be within the knowledge of a person's legal representative, an express requirement would ensure that this matter is brought to the attention of the subject of an interim order.<sup>78</sup>

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<sup>74</sup> *Independent National Security Legislation Monitor Act 2010* (Cth), s 8.

<sup>75</sup> *Minister for Immigration v B* (2004) 219 CLR 365, per Kirby J at [171].

<sup>76</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR per Mascon CJ and Deane J at [273], [287].

<sup>77</sup> Council of Australian Governments, [Council of Australian Governments Review of Counter-Terrorism Legislation](#), Australian Government, (2013), Recommendation 32.

<sup>78</sup> Council of Australian Governments, [COAG Response to COAG Review of Counter-Terrorism Legislation](#), (October 2014), 14.

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74. Paragraph 104.12(1)(b) of the Criminal Code was subsequently amended by the Foreign Fighters Act to require that the AFP member inform the person that s/he has the following legal rights in relation to the interim control order: the right to appeal and review rights in relation to the decision of the issuing court, the right to attend court to confirm or declare or revoke the interim control order, the right of the person (or their representatives) to adduce evidence if the interim order is confirmed, the right to apply for a variation or revocation if the interim order is confirmed and the right of the person (or their representative) to adduce evidence in relation to an application to revoke or vary the control order if it is confirmed.<sup>79</sup>
75. Subsection 104.17(2) of the Criminal Code provides that the obligations on the AFP member to inform the person of their appeal and review rights do not apply if the actions of the person make compliance impracticable.

Law Council position

76. The Law Council believes that the Foreign Fighters Act amendment supported Recommendation 32 of the COAG Review and is an important initial step in improving the safeguards in the control order regime.<sup>80</sup>
77. The Law Council's submission to the PJCIS on the Foreign Fighters Bill sought further information on the kind of conduct a person would need to engage in to make it impractical for the AFP member to comply with the requirements to inform a person of their appeal and review rights. In response, the Attorney-General's Department stated:

*This provision is designed to protect the integrity of an interim control order served on a person who, for example, is behaving violently towards the AFP member seeking to explain the terms of the order. In contrast, it would not apply in circumstances where the person's limited English skills meant the person did not understand the terms. In such a case it would be reasonably practicable – and expected – that the AFP member would make arrangements for an interpreter to assist in explaining the person's appeal and review rights.<sup>81</sup>*

78. The Law Council considers that a court should be empowered to review the circumstances where it would be impractical for the AFP member to comply with the appeal and review requirements, and where those circumstances are suggesting that it was not in fact impractical for the AFP member to comply, that the control order should be ineffective.
79. In addition, the Law Council suggests that there should also be a requirement to inform a person of his/her rights to legal representation. This would provide greater clarity and certainty to the subject of an order about his or her access to justice rights.

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<sup>79</sup> Explanatory Memorandum to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 39.

<sup>80</sup> See also: Law Council of Australia, [Submission to the Parliamentary Joint Committee on Intelligence and Security's Inquiry into the Counter-Terrorism Legislation Amendment \(Foreign Fighters\) Bill 2014](#), (3 October 2014) 22.

<sup>81</sup> Attorney-General's Department, *Supplementary Submission to the Parliamentary Joint Committee on Intelligence and Security's Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 24.

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80. The steps taken to alert a person to his/her review and appeal rights would be more meaningful if the COAG Review Recommendation relating to a minimum standard of disclosure of information is implemented.

**Recommendation:**

- **Section 104.12 of the Criminal Code should be amended to provide that the information to be given to a person the subject of an interim control order include notification of the person's right to legal representation.**

## Restrictions imposed on controlee

### Relocation condition

81. Recommendation 33 of the COAG Review provides:

*The Committee recommends that subsection 104.5(3)(a) be amended to ensure that a prohibition or restriction not constitute – in any circumstances – a relocation order.*<sup>82</sup>

82. This recommendation was supported by COAG on the basis that:

- Section 104.5(3)(a) is not intended to cover mandatory relocation. Recommendation 33 would ensure that this intention is recorded expressly in Part 5.3 of the Criminal Code.<sup>83</sup>

83. In the UK the removal of involuntary relocation, whereby a control order subject could be required, with his/her family if s/he wished, to live away from his/her home was reversed in 2015 on the basis of the UK Independent Reviewer's recommendation.<sup>84</sup>

#### Law Council position

84. The Law Council does not feel sufficiently informed about the current threat level to be able to conclude whether a relocation power would be a necessary and proportionate response. We therefore will be guided by the INSLM's judgment on whether the nature of the threat justifies ensuring that a prohibition or restriction not constitute in any circumstances a relocation order.

85. Notwithstanding the above, the Law Council suggests the INSLM consider the following issues in determining the appropriateness of Recommendation 33 of the COAG Review:

- The power to relocate an individual away from their family and community by way of a civil order, entirely outside the criminal justice system, is very intrusive and potentially damaging to family and public life, which may indicate that a relocation power would not be justifiable. The UK Joint Committee on Human

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<sup>82</sup> Council of Australian Governments, [Council of Australian Governments Review of Counter-Terrorism Legislation](#), Australian Government, (2013) Recommendation 33.

<sup>83</sup> Council of Australian Governments, [COAG Response to COAG Review of Counter-Terrorism Legislation](#), (October 2014) 14.

<sup>84</sup> *Counter-Terrorism and Security Act 2015* (UK), ss 16 and 17. Government Response to the report by David Anderson Q.C. on Terrorism Prevention and Investigation Measures in 2013, December 2014, 3.

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Rights has noted that it has been particularly influenced in such a view by ‘the harshness of the impact on family life, on women and children in particular, and the extent to which the use of the power in control orders led to extreme resentment in certain minority communities who felt victimised by its use against members of those communities’.<sup>85</sup>

- The particular threat level faced by Australia and clear articulation of the link between any proposal to introduce a specific power of relocation and this threat. The new threat level alert system arising from the COAG Review commences in coming weeks, and this may affect the understanding of this issue.
- The effectiveness of other obligations, restrictions or prohibitions in deterring a controlee from travelling to prohibited areas or places, including for the purpose of harmful association.
- Whether, in the absence of a relocation power, current obligations, restrictions or prohibitions are effective in preventing a subject from meeting harmful associates in his/her home area for the purposes of terrorist plotting, facilitating an abscond or simply maintaining links and networks.<sup>86</sup> In this context, it is noted that paragraph 104.5(3)(e) of the Criminal Code allows a court to prohibit or restrict a subject from communicating or associating with specified individuals. Paragraph 104.5(3)(d) of the Criminal Code also allows a court to order that the person wear a tracking device.
- Whether the power to relocate subjects away from their home would be of real practical assistance to law enforcement and security agencies in distancing subjects from their associates and reducing the risk of abscond.<sup>87</sup>
- Appropriate statutory limitations if any relocation power is recommended. For example, a limited radius of the relocation power and that the power is used only when the individual circumstances of the particular subject render it necessary and proportionate to do so.<sup>88</sup>
- Appropriate strategies about how to mitigate the alienation and resentment likely to be caused in some minority communities.<sup>89</sup>

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<sup>85</sup> UK Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Security Bill Fifth Report of Session 2014-15*, (7 January 2015) 19.

<sup>86</sup> Mr David Anderson QC, *Independent Reviewer of Terrorism Legislation, Terrorism Prevention and Investigation Measures in 2014*, (March 2015) 16.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> UK Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Security Bill Fifth Report of Session 2014-15*, (7 January 2015) 20.

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**Recommendation:**

- **In determining whether a relocation power is necessary and proportionate the factors set out in this submission should be considered, including the intrusiveness of such an order, the threat level, the effectiveness of current obligations, prohibitions or restrictions and the likelihood of such a measure being of real practical assistance to authorities. If a relocation power is introduced, appropriate statutory limitations must also be implemented. Strategies should also be developed to mitigate alienation and resentment likely to be caused in some communities.**

## **Curfew condition**

86. Recommendation 34 of the COAG Review provides:

*The Committee recommends that a prohibition or restriction under subsection 104.5(3)(c) – a curfew order – be generally no greater in any case than 10 hours in one day.<sup>90</sup>*

87. This recommendation was supported in part by COAG on the basis that:

- Section 104.5(3)(c) is intended to place restrictions on a person's movement for part of a day, rather than authorising a form of home detention. This reflects the ordinary meaning of the term 'curfew'.
- Specifying an indicative maximum curfew period would provide an additional safeguard by making clear the above intention, while retaining appropriate flexibility to tailor the conditions of orders to the circumstances of individual cases. An indicative curfew of 12 hours within a 24-hour period is supported. This is based on a maximum curfew duration prescribed in the bail, sentencing and dangerous sexual offenders legislation in some States.<sup>91</sup>

88. For example, subsection 19B(4) of the *Dangerous Sexual Offenders Act 2006* (WA) provides for a maximum curfew of 12 hours in any one day.

89. The Foreign Fighters Act amended paragraph 104.5(3)(c) to limit the time a person subject to a control order can be required to remain at a specified premises to a maximum of 12 hours in any 24 hour period.

90. Curfews in the UK for controlees were initially for a period of 18 hours, reduced to a maximum of 16 after intervention by the courts, and came down to 10 hours under TPIMs and were limited to an overnight residence.<sup>92</sup>

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<sup>90</sup> Council of Australian Governments, [Council of Australian Governments Review of Counter-Terrorism Legislation](#), Australian Government, (2013) Recommendation 34.

<sup>91</sup> Council of Australian Governments, [COAG Response to COAG Review of Counter-Terrorism Legislation](#), (October 2014) 14.

<sup>92</sup> The overnight residence requirements in Schedule 1 of the TPIM Act replaced the 18 and 16 hour curfews provided for under the PTA. The TPIM Act does not prescribe any set number of hours for the overnight residence. The Explanatory Notes accompanying the Bill state that: [T]he term 'overnight' is not defined in the Bill, but as a matter of public law the period would need to fall between hours which a reasonable person would consider 'overnight' – see Explanatory Notes to the Terrorism Prevention and Investigation Measures

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### Law Council position

91. Control orders which impose a curfew on individuals suspected of being involved in terrorism but who have not been charged with a criminal offence restrict an individual's liberty and engage Article 9 of the ICCPR (freedom from arbitrary detention and arrest).<sup>93</sup> There is clearly scope for differing views about what the maximum curfew limit should be, but in our view, given the seriousness of other restrictions imposed on individual in the most onerous control orders, it should be no longer in any case than the minimum period required for protecting the public from a terrorist act or one of the other prescribed purposes of the control order regime under section 104.1.
92. It is noted that the issuing court has to be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary and reasonably appropriate and adapted for one of the enumerated purposes.<sup>94</sup>
93. However, consideration should be given to amendments to the Criminal Code to:
- ensure that the curfew period is considered cumulatively by the court, such that the period combined with other stringent measures, does not amount to a disproportionate deprivation of liberty. This may alternatively be achieved by implementation of the COAG Review's Recommendation 37 (discussed below); and
  - require an overnight residence requirement where the curfew imposed is considerable.
94. In the UK, courts have found that curfews of 18 hours per day amount to disproportionate deprivations of liberty, whereas curfews of 12 to 14 hours or even in some extreme cases 16 hours do not.<sup>95</sup> The European Court and the House of Lords have held that control order conditions must be considered cumulatively, such that a nine hour curfew combined with other stringent measures may effectively amount to a deprivation of liberty in breach of Article 5 of the ECHR.<sup>96</sup> In assessing what constitutes a deprivation of liberty, the issue is the length of the period for which the individual is confined to their residence. Other restrictions imposed under a control order, which contribute to the controlee's social isolation may also be taken into account along with the period of the curfew.<sup>97</sup> While Australia is not bound by the jurisprudence of the European Court which has influenced the jurisprudence of the House of Lords, it may nonetheless be instructive on what amounts to a reasonable and proportionate curfew limit.

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Bill 2011, 7 [40]. This was defined in *Secretary of State for the Home Department v BM* [2012] 1 WLR 2734, 2751 [52] (*Collins J*) as meaning the hours between which most people would regard it as reasonable to think that others might be at home (which meant not beyond the hours of 21:00 to 07:00).

<sup>93</sup> Article 9 of the ICCPR provides that no-one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedure as are established by law. It may be contended that the duration of time for which a subject of a control order may be subjected to could result in a form of detention (by requiring an individual to be in one place for twelve hours).

<sup>94</sup> Criminal Code s 104.4.

<sup>95</sup> *Secretary of State for the Home Department v JJ & Others* [2007] UKHL 45; *Secretary of State for the Home Department v E & Another* [2007] UKHL 47; *Secretary of State for the Department v MB & AF* [2007] UKHL 46; *Guzzardi v Italy*, Application 7367/76, Decision of 11 June 1980.

<sup>96</sup> *AP v Secretary of State for the Home Department* [2010] UKSC 24. See also *Guzzardi v Italy*, Application 7367/76, Decision of 11 June 1980.

<sup>97</sup> *AP v Secretary of State for the Home Department* [2010] UKSC 24.

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95. Consideration should be given to introducing an overnight residence requirement (as is currently the case in the UK) where there is a considerable curfew period imposed to make it less likely that control orders will be found to be in breach of Article 9 of the ICCPR. The UK Home Office, for example, noted that the overnight residence requirement for TPIMs, that the maximum period of confinement must be ‘overnight’ only, ‘is such that is unlikely to engage article 5 of the ECHR in view of the case law in relation to control order curfews’.<sup>98</sup> The importance of the overnight requirement is to ensure as far as practicable that the controlee, who has not been charged with a criminal offence, is able to lead a ‘normal life’.<sup>99</sup>

**Recommendations:**

- **The curfew period should be no longer in any case than the minimum period required for protecting the public from a terrorist act or one of the other prescribed purposes of the control order regime under section 104.1.**
- **The curfew period should be required to be considered cumulatively by the court, such that the period combined with other stringent measures, do not amount to a disproportionate deprivation of liberty. This may alternatively be achieved by implementation of the COAG Review’s Recommendation 37.**
- **An overnight residence requirement should be required where the curfew imposed is considerable.**

## Communication restrictions

96. Recommendation 35 of the COAG Review provides:

*The Committee recommends that, other than in any exceptional case, the prohibitions or restrictions under subsection 104.5(3)(f) permit the controlled person to have access to one mobile phone, one landline, and one computer with access to the internet.*<sup>100</sup>

97. This recommendation was not supported by COAG on the basis that:

- This proposal would substantially remove the necessary flexibility to tailor conditions of control orders to the particular terrorist threat presented by the subject of a proposed order.<sup>101</sup>

98. Under the UK TPIMs scheme, all controlees have a right to use at least one mobile phone without internet access, one landline and one computer which connects to the internet. Use of equipment is subject to necessary controls, for example, regular inspection and notification of passwords.<sup>102</sup>

### Law Council position

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<sup>98</sup> UK Home Office, *ECHR Memorandum: Terrorism Prevention and Investigation Measures Bill*, (2011), [20].

<sup>99</sup> *Secretary of State for the Home Department v JJ & Others* [2007] UKHL 45 [63].

<sup>100</sup> Council of Australian Governments, [Council of Australian Governments Review of Counter-Terrorism Legislation](#), Australian Government, (2013) Recommendation 35.

<sup>101</sup> Council of Australian Governments, [COAG Response to COAG Review of Counter-Terrorism Legislation](#), (October 2014) 15.

<sup>102</sup> *Terrorism Prevention and Investigation Measures Act 2011* (UK), Schedule 1.

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99. The control order regime should require that an issuing court have specific regard to the ordinary entitlement to use of a phone and internet and to require the court to be satisfied that a proposed restriction on such access is necessary in any given case. The Criminal Code should impose a presumption that a person should not be deprived of basic mobile phone or landline access and access to at least one internet computer without being satisfied of necessity. This would ensure that an individual who has not been charged with a terrorism offence is able to live a normal life as far as is consistent with public protection. It would also ensure that the controlee is only subject to the minimum restrictions necessary for that purpose<sup>103</sup> and in a manner that does not impinge excessively on the person's right to liberty under Article 9 of the ICCPR.

**Recommendation:**

- **the Criminal Code should impose a presumption that a person should not be deprived of basic mobile phone or landline access and access to at least one internet computer. This presumption could be rebutted on the basis of necessity for achieving one of the prescribed purposes of the control order regime in section 104.1**

## Duration of a control order

100. Recommendation 36 of the COAG Review provides:

*The Committee recommends that, for the present time, there be no change to the maximum duration of a control order, namely a period of 12 months.*<sup>104</sup>

101. This recommendation was supported by COAG on the basis that:

- As the Review Committee identified, there is no evidence to suggest that a 12-month maximum duration is excessive.<sup>105</sup>

### Law Council position

102. The maximum 12 month duration period of a control order is already lengthy in light of such measures being issued on the basis of reasonable suspicion and on a lower standard of proof than that required for a criminal conviction. In the absence of evidence to suggest a longer duration is necessary, reasonable and proportionate, the Law Council does not support an extension of the 12 month period to 2 years, which would bring Australian legislation into line with the UK position. There is already a power under the Criminal Code for the control order to be renewed.<sup>106</sup> Further, the Law Council is not aware of any control orders where successive orders have been sought.

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<sup>103</sup> United Kingdom, *Parliamentary Debates*, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill (28 June 2011) 6th sitting, col 186–7 (James Brokenshire, Parliamentary Under-Secretary of State for the Home Department).

<sup>104</sup> Council of Australian Governments, [Council of Australian Governments Review of Counter-Terrorism Legislation](#), Australian Government, (2013) Recommendation 36.

<sup>105</sup> Council of Australian Governments, [COAG Response to COAG Review of Counter-Terrorism Legislation](#), (October 2014), 15.

<sup>106</sup> Criminal Code s 104.16(2).

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**Recommendation:**

- **There should be no change to the maximum duration of a control order, namely a period of 12 months.**

## 'Least Interference' test

103. Recommendation 37 of the COAG Review provides:

*The Committee recommends that section 104.5 should be amended to ensure that, whenever a control order is imposed, any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person's liberty, privacy or freedom of movement that is necessary in all the circumstances.*<sup>107</sup>

104. This recommendation was not supported by COAG on the basis that:

- The issuing criteria in section 104.4 require that each proposed condition of a control order must be reasonably necessary, and reasonably appropriate and adapted, to the purpose of protecting the public from the threat of a terrorist act. In making this assessment, the issuing court is required to have regard to the personal circumstances of the subject of the proposed order.
- Consistent with the preventative and non-punitive function of these orders, it is appropriate that the issuing criteria focus primarily on public protection. This ensures that orders contain conditions which are directed only to this purpose, and are not issued with conditions that are least restrictive on the personal liberty of an individual, but may be less than what is reasonable necessary for public protection.<sup>108</sup>

### Law Council position

105. The Law Council supports implementation of COAG Review Recommendation 37.

106. Article 9 of the ICCPR<sup>109</sup> recognises and protects both liberty of person and security of person. In the Universal Declaration of Human Rights, Article 3 proclaims that everyone has the right to life, liberty and security of person. This is the first substantive right protected by the Universal Declaration, which indicates the significance of Article 9 of the ICCPR both for individuals and for society as a whole.<sup>110</sup> As the Human Rights Committee has noted:

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<sup>107</sup> Council of Australian Governments, [Council of Australian Governments Review of Counter-Terrorism Legislation](#), Australian Government, (2013), Recommendation 37.

<sup>108</sup> Council of Australian Governments, [COAG Response to COAG Review of Counter-Terrorism Legislation](#), (October 2014) 15.

<sup>109</sup> Article 9(1) of the ICCPR provides: Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

<sup>110</sup> United Nations Human Rights Committee, *International Covenant on Civil and Political Rights: General Comment No. 35 Article 9 (Liberty and Security of person)*, CCPR/C/GC/35, (16 December 2014) 1.

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*Liberty and security of person are precious for their own sake, and also because the deprivation of liberty and security of person have historically been principal means for impairing the enjoyment of other rights.*<sup>111</sup>

107. Restrictions on Article 9 of the ICCPR should be necessary, reasonable and proportionate to achieve a legitimate objective and in light of the circumstances, based on a determination of whether there are less severe means of achieving the same ends.<sup>112</sup>

108. This would not mean that public protection would become a secondary consideration in the issuance of a control order – only that such issuance would take into account any possible less invasive means of achieving that protection.

**Recommendation:**

- **Section 104.5 should be amended to ensure that, whenever a control order is imposed, any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person’s liberty, privacy or freedom of movement that is necessary in all the circumstances.**

## Oversight by the Commonwealth Ombudsman

109. Recommendation 38 of the COAG Review provides:

*The Committee recommends that the Commonwealth Ombudsman be empowered specifically to provide general oversight of interim and confirmed control orders.*<sup>113</sup>

110. This recommendation was not supported by COAG on the basis that:

- The Ombudsman’s general powers of oversight and inquiry already extend to the AFP’s actions in the implementation and enforcement of control orders.<sup>114</sup>

### Law Council position

111. The Law Council agrees with COAG’s assessment. Under the Ombudsman Act 1976, the Commonwealth Ombudsman is also the Law Enforcement Ombudsman and can investigate complaints about the actions of AFP members and about the policies, practices and procedures of the AFP. Nonetheless, there might be some value in the INSLM inquiring as to why there is an apparent inconsistency in the current express entitlement in Division 105 relating to preventative detention orders, which is absent from Division 104.

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<sup>111</sup> Ibid.

<sup>112</sup> Ibid, 5.

<sup>113</sup> Council of Australian Governments, [Council of Australian Governments Review of Counter-Terrorism Legislation](#), Australian Government, (2013), Recommendation 38.

<sup>114</sup> Council of Australian Governments, [COAG Response to COAG Review of Counter-Terrorism Legislation](#), (October 2014), 16.

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**Recommendation:**

- **The INSLM seek clarity as to why Division 105 of the Criminal Code clearly indicates that the Commonwealth Ombudsman is empowered specifically to provide general oversight of preventative detention orders, whereas Division 104 does not include such an express requirement.**

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive as at 1 July 2015 are:

- Mr Duncan McConnel, President
- Mr Stuart Clark AM, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Mr Morry Bailes, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.