



Australian Government

Independent National Security Legislation Monitor

# CONTROL ORDER SAFEGUARDS PART 2

*The Hon Roger Gyles AO QC*

*April 2016*



# Control Order Safeguards Part 2

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978-1-925238-54-9 - Control Order Safeguards and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (INSLM Report) Part 2 (Hardcopy)

978-1-925238-55-6 - Control Order Safeguards and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (INSLM Report) Part 2 (PDF)

978-1-925238-56-3 Control Order Safeguards and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (INSLM Report) Part 2 (DOXC)

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**Independent National Security Legislation Monitor**

THE HON ROGER GYLES AO QC

ONE NATIONAL CIRCUIT  
BARTON ACT

13 April 2016

The Hon Malcolm Turnbull MP  
Prime Minister  
Parliament House  
CANBERRA ACT 2600

Dear Prime Minister

**Independent National Security Legislation Monitor Inquiry into Control Order Safeguards**

Pursuant to section 30 of the *Independent National Security Monitor Act 2010* I give you herewith the second and final part of my report on the section 7 reference as to control order safeguards. This Report does not include information of the kind referred to in subsection 29(3) of the *Independent National Security Legislation Monitor Act 2010*.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Roger Gyles', enclosed in a thin black rectangular border.

Roger Gyles AO QC  
Independent National Security Legislation Monitor



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## 1 Introduction

- 1.1 The then Prime Minister referred the following matter to me pursuant to s 7 of the *Independent National Security Legislation Monitor Act 2010* (INSLM Act):

*... 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 advisory report on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) - tabled on 20 November 2014.*

- 1.2 The Council of Australian Governments (COAG) established a Review Committee to review and evaluate the amendments that had been made to counter-terrorism laws including the control order provisions of the schedule to the *Criminal Code Act 1995* (Cth) (*Criminal Code*).<sup>1</sup> The principle to be taken into account was that anti-terrorism laws must be necessary, effective against terrorism, contain appropriate safeguards against abuse, and be exercised in a way that is evidence-based, intelligence-led and proportionate.
- 1.3 The COAG Review commenced in August 2012 and reported in March 2013.<sup>2</sup> The Report contained a number of recommendations about safeguards in relation to control orders. Some of the recommendations were adopted in whole or in part in legislative amendments in 2014. This report deals with those that were not. The members of the Review Committee, chaired by the Hon Anthony Whealy QC, a retired judge from the New South Wales Court of Appeal who had experience of conducting terrorism trials, had an impressive range of relevant experience.<sup>3</sup>
- 1.4 On 29 January 2016, I provided the first part of this Report to the Prime Minister. It dealt with the advisability of introducing a system of special advocates into the control order regime in the context of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 (the 2015 Bill). This part deals with all relevant recommendations.
- 1.5 As I said in the first part of this Report, the Reference from the former Prime Minister assumes the continued availability of control orders following the amendments to div 104 of the *Criminal Code* in 2014. Control orders have been a controversial remedy. The previous INSLM, Bret Walker SC, recommended that they be abolished.<sup>4</sup> That was not accepted. Some submissions to this Inquiry contain or reference calls for abolition and highlight alleged flaws

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<sup>1</sup> See *Criminal Code* div 104.

<sup>2</sup> *Council of Australian Governments Review of Counter-Terrorism Legislation Report 2013* (COAG Report), p 2 [9].

<sup>3</sup> The Committee members included: Mr Richard Bingham, South Australian Ombudsman; Assistant Commissioner Mike Condon, State Crime Operations Command, Queensland Police; Mr Graeme Davidson, Deputy Director, Commonwealth Director of Public Prosecutions; Judge David Jones AM, retired Victorian County Court judge and current Victorian Law Reform Commissioner; and Assistant Commissioner Justine Sanders APM, Manager Counter-Terrorism Domestic, Australian Federal Police.

<sup>4</sup> Independent National Security Legislation Monitor, *Declassified Annual Report 20th December 2012*, Recommendation II/4.

in the control order regime.<sup>5</sup> There is a duty to review the control order legislation pursuant to the INSLM Act apart from this Reference. The issue of abolition will be considered in that context rather than in this Reference. In the meantime, the issue of safeguards is important as the government remains committed to the availability of control orders.

1.6 The modus operandi of this Review is described in Appendix C.

## 2 What is a Control Order?

2.1 Control orders are court orders pursuant to div 104 of pt 5.3 of the *Criminal Code* that impose restrictions, prohibitions and obligations upon a person for one or more of the following purposes:

- (a) protecting the public from a terrorist act;
- (b) preventing the provision of support for or the facilitation of a terrorist act;
- (c) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.<sup>6</sup>

2.2 The orders that can be made are set out in s 104.5(3) of the *Criminal Code*. The orders that have been made in recent cases are set out in Appendix A3 of this Report.

2.3 Control orders are civil orders, yet, if breached, a criminal sanction of up to five years imprisonment is attracted.<sup>7</sup>

## 3 Short History of Control Orders

### a. Derivation of Control Orders

3.1 In response to the 11 September 2001 terrorist attacks the United Kingdom (UK) introduced the *Anti-terrorism Crime and Security Act 2001* (UK) (ATCSA).<sup>8</sup> The Act, under pt IV, enabled non-nationals suspected of international terrorism to be detained. In 2004, the House of Lords acting in its judicial capacity in the matter of *A v Secretary of State for the Home Department*,<sup>9</sup> declared that pt IV of the ATCSA was incompatible with arts 5 and 14 of the *European*

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<sup>5</sup> The Gilbert and Tobin Centre of Public Law has recommended the abolition of control orders: Gilbert and Tobin Centre of Public Law, Submission No 5 to *INSLM Inquiry into Control Order Safeguards*, 18 September 2015, Annexure 2, p 4, Recommendation 19. The Law Council of Australia has also recommended repeal of the control order regime: the Law Council of Australia, Submission No 8 to *INSLM Inquiry into Control Order Safeguards*, 30 September 2015, p 3. The Australian Human Rights Commission (AHRC) raised concerns that the control order regime may be a breach of the human rights relating to arbitrary detention, privacy, freedom of movement, expression, and association, found in arts 9, 17, 12, 19 and 22 of the *International Convention on Civil and Political Rights*, respectively. The AHRC is also concerned that control orders do not provide effective review procedures: Australian Human Rights Commission, Submission No 2 to *INSLM Inquiry into Control Order Safeguards*, 17 September 2015, p 2. See also, Marque Lawyers, Submission No 4 to the *INSLM Inquiry into Control Order Safeguards*, 18 September 2015, p 1, and Lisa Burton and George Williams, 'What Future for Australia's Control Order Regime?' (2013) 24 *Public Law Review* 182.

<sup>6</sup> *Criminal Code* s 104.1.

<sup>7</sup> *Criminal Code* s 104.27.

<sup>8</sup> Explanatory Notes, ATCSA s 3 (Summary and Background).

<sup>9</sup> [2004] UKHL 56.

*Convention on Human Rights*, as the provision was discriminatory against non-nationals and disproportionate. In response to this, the UK Government replaced pt IV of the ATSCA with the *Prevention of Terrorism Act 2005* (UK) (PTA UK) which, inter alia, established control orders.<sup>10</sup> Control orders applied to both citizens and foreigners. The purpose of control orders was preventative, not punitive.<sup>11</sup>

- 3.2 In Australia, div 104 of the *Criminal Code*, which governs control orders, was enacted in the aftermath of the London terrorist attacks in July 2005.<sup>12</sup> It is loosely based on similar provisions enacted at that time in the UK. Because the control order (and preventative detention) regimes involved amendments to pt 5.3 of the *Criminal Code*, the then Government engaged in the consultation process set out in s 100.8 of the Code and pursuant to the Intergovernmental Agreement on Counter-Terrorism Laws made in 2004. The various jurisdictions reached a broad agreement to establish the control order regime at the Special COAG Meeting on Counter-Terrorism on 27 September 2005. It was agreed that the National Counter-Terrorism Committee would settle the details of the amendments within the broad parameters agreed by COAG. The then Government introduced the proposed reforms in the House of Representatives on 3 November 2005 in the Anti-Terrorism Bill (No. 2) 2005 (Cth). The House passed the Bill on 29 November 2005, and it was introduced in the Senate on 30 November 2005. The Bill was referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report.
- 3.3 The Senate Committee Inquiry into the Bill attracted significant public interest, and involved a detailed examination of its provisions. The Committee recommended that the Senate pass the Bill, subject to a series of recommendations, which were intended to clarify or strengthen procedural safeguards in the issuing processes. The then Government supported a number (but not all) of the Committee's recommendations and introduced Parliamentary amendments. The Bill passed the Senate (with the amendments referred to above) on 6 December 2005. The House of Representatives agreed to the Senate amendments on 7 December 2005, and the *Anti-Terrorism Act (No. 2) 2005* (Cth) received Royal Assent on 14 December 2005.

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<sup>10</sup> In the UK control orders were made against 52 people over the lifetime of the *Prevention of Terrorism Act 2005* (UK): David Anderson QC (Independent Reviewer of Terrorism Legislation) *Terrorism Prevention and Investigation Measures in 2012* (March 2013).

<sup>11</sup> Explanatory Notes, Prevention of Terrorism Bill 2004–2005 (UK) s 3 (Summary); *SSHD v MB* [2008] 1 AC 440 [15]–[24] (Lord Bingham). Following a review of counter-terrorism and security powers in 2010, control orders were replaced by Terrorism Prevention and Investigation Measures (TPIMs), by way of the *Terrorism Prevention and Investigation Measures Act 2011* (UK). TPIMs are similar in purpose to control orders but are less onerous in some respects.

<sup>12</sup> This paragraph and the following paragraph is based on the COAG Report, p 45 [178]–[179].<sup>13</sup> *Criminal Code* s 104.4(1)(c)(iii)–(v) and s 104.23(1)(b)(ii)–(iv). Prior to the amendment, the court was empowered under s 104.4(1)(c)(ii) to consider controlee provision and receipt of training to/from listed terrorist organisations, and so the Foreign Fighters Act simply extended this power to also include controlee engagement in 'hostile activity in a foreign country' (s 104.4(1)(c)(iii)). However, prior to the amendment, s 104.23(1) did not provide the AFP Commissioner with any explicit power to seek variations to confirmed control orders on the basis of controlee activities related to training with listed terrorist organisations. The amendments to s 104.23(1) made by the Foreign Fighters Act provided the AFP Commissioner with an explicit power to seek variations on the basis of controlee provision and receipt of, and participation in, training with listed terrorist organisations.

3.4 Division 104 was amended by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Foreign Fighters Act). Of particular note:

- the bases upon which a court can issue an interim control order under s 104.4(1)(c), and upon which the AFP Commissioner can seek to vary a confirmed control order under s 104.23(1), were expanded to include instances of controlee participation in hostile activities overseas, convictions related to terrorist activities, and participation in training with a listed terrorist organisation;<sup>13</sup>
- the rights that the AFP needed to explicitly inform controlees of when serving control orders were expanded through amendments to ss 104.12(1)(b) (interim control order), 104.17 (confirmed control order), and 104.26(1)(c) (varied control order), to include rights to either personally, or by representation, seek review or appeal of the order, or variation of the order; and
- the operative date of the sunset clause for div 104 in s 104.32 was brought forward from 2024 to 2018.

3.5 Division 104 was further amended in 2014 by the *Counter-Terrorism Legislation Amendment Act (No 1) 2014*. Noteworthy changes include:

- the objects of the division (stated in s 104.1) were expanded from allowing obligations, prohibitions, and restrictions to be imposed on a person under a control order only for the purpose of protecting the public from terrorist acts, to also allowing obligations, prohibitions, and restrictions, to be imposed to prevent the provision of support for, or the facilitation of, a terrorist act or hostile activity in a foreign country (with other minor consequential amendments made in subsequent sections of the division to reflect this expansion);
- the grounds upon which the AFP can seek the Attorney-General's written consent to an interim control order under s 104.2 were expanded to include situations where it is reasonably *suspected* that the order would substantially assist in preventing the provision of support for, or the facilitation of, either a terrorist act or hostile activity in a foreign country;
- the range of information that needs to be provided by the AFP to obtain the Attorney-General's consent to an interim control order under s 104.2 was reduced; and
- the bases upon which a court can issue an interim control order under s 104.4(1)(c), and the AFP Commissioner can seek to vary a confirmed control order under s 104.23(1), were expanded to include instances where the variation would assist in preventing support for, or facilitation of, terrorist acts, or hostile activity in a foreign country.

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<sup>13</sup> *Criminal Code* s 104.4(1)(c)(iii)–(v) and s 104.23(1)(b)(ii)–(iv). Prior to the amendment, the court was empowered under s 104.4(1)(c)(ii) to consider controlee provision and receipt of training to/from listed terrorist organisations, and so the Foreign Fighters Act simply extended this power to also include controlee engagement in 'hostile activity in a foreign country' (s 104.4(1)(c)(iii)). However, prior to the amendment, s 104.23(1) did not provide the AFP Commissioner with any explicit power to seek variations to confirmed control orders on the basis of controlee activities related to training with listed terrorist organisations. The amendments to s 104.23(1) made by the Foreign Fighters Act provided the AFP Commissioner with an explicit power to seek variations on the basis of controlee provision and receipt of, and participation in, training with listed terrorist organisations.

**b. Control Orders to Date in Australia**

Since the introduction of the control order regime the Australian Federal Police (AFP) has obtained six control orders. Details concerning these control orders are included at Appendix A3.

## 4 Security Landscape

- 4.1 The security landscape has deteriorated since the COAG Review was completed in 2013.
- 4.2 The National Terrorism Public Alert Level was raised from Medium to High (the equivalent to Probable under the new National Terrorism Threat Advisory System)<sup>14</sup> on 12 September 2014.<sup>15</sup>
- 4.3 The context in which the 2015 Bill was introduced can be adequately appreciated by referring to the INSLM 2014 - 2015 Annual Report at pages 2–4 and 9.
- 4.4 Domestically since 1 December 2015, 15 people have been charged as a result of offences identified through the course of counter-terrorism investigations (current as of 29 March 2016).<sup>16</sup>
- 4.5 Internationally, major terrorist attacks since 1 December 2015 include:
- 14 January 2016, Jakarta: seven people (including five suspected terrorists) were killed;<sup>17</sup>
  - 13 March 2016, Ankara: 37 people were killed in a bombing for which the Kurdish group TAK claimed responsibility;<sup>18</sup>
  - 22 March 2016, Brussels: three attacks for which Islamic State claimed responsibility killed 32 people;<sup>19</sup> and
  - 28 March 2016, Lahore: 70 people (including many children) were killed, with a Taliban faction claiming responsibility.<sup>20</sup>

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<sup>14</sup> The new National Terrorism Threat Advisory System introduced on 26 November 2015, is a scale of five levels (Certain, Expected, **Probable**, Possible, Not Expected). It tells the public about the likelihood of an act of terrorism occurring in Australia. The Hon Michael Keenan, Minister Assisting the Prime Minister on Counter Terrorism, and Sen the Hon George Brandis QC, Attorney-General, Joint Media Release, *New National Terrorism Threat Advisory System*, 26 November 2015.

<sup>15</sup> The Hon Tony Abbott (former) Prime Minister and Sen the Hon George Brandis QC, Attorney General, Joint Media Release, *National Terrorism Public Alert Level Raised to High*, 12 September 2014.

<sup>16</sup> AFP advice to INSLM, 1 April 2016.

<sup>17</sup> 'Jakarta attacks: Bombs and Gunfire Rock Indonesian Capital' *BBC Online*, 14 January 2016 <<http://www.bbc.com/news/world-asia-35309195>>.

<sup>18</sup> 'Ankara Blast: Kurdish group TAK Claims Bombing', *BBC Online*, 17 March 2016 <<http://www.bbc.com/news/world-europe-35829231>>.

<sup>19</sup> 'Brussels Attacks: Belgium Releases Terror Murder Suspect', *BBC Online*, 29 March 2016 <<http://www.bbc.com/news/world-europe-35911401>>; 'Brussels Attacks Tolls Revised Down to 32', AAP, 30 March 2016 <<http://www.sbs.com.au/news/article/2016/03/30/brussels-attacks-toll-revised-down-32>>.

<sup>20</sup> 'Pakistan Taliban faction claims park attack on Lahore Christians', *BBC Online*, 28 March 2016 <<http://www.bbc.com/news/world-asia-35909677>>.

# INSLM Conclusions on COAG Recommendations

## 5 RECOMMENDATION 27: Criminal Code – Control orders – Basis for seeking Attorney-General’s consent

*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>21</sup>*

The reasoning in support was as follows:

*An important aspect of the control order scheme is the necessity to obtain the Attorney-General’s consent. As has been noted, the senior AFP member need only suspect on reasonable grounds that the person to be controlled has, for example, received training from a listed terrorist organisation. The Committee considers that the Attorney-General should be asked to consent in a situation where the AFP consider on reasonable grounds that a control order application should be made. Mere suspicion should not suffice. The Committee considers that there should be uniformity between the statutory pre-conditions for a senior AFP member’s approach to the Attorney-General for written consent. It is appropriate that the second basis should require that the AFP member “considers on reasonable grounds” that the person has provided training to, or received training from, a listed terrorist organisation.*

*When the issuing court is asked by the AFP to make an interim control order, the court must be satisfied on the balance of probabilities, for example, that the person has provided training to, or received training from, a listed terrorist organisation. Given this reasonably high threshold for the making of the order, there seems no warrant for allowing consent to be sought on the basis of mere suspicion. To do so would be inconsistent with the legislation.<sup>22</sup>*

- 5.1 The Government resolved the difference in standard within s 101.2 by making suspicion on reasonable grounds the test for each limb rather than consideration on reasonable grounds as recommended.
- 5.2 As pointed out by the Law Council of Australia in its submission to this Inquiry, the former INSLM did not oppose the change in a hearing before the Parliamentary Joint Committee on Intelligence and Security (PJCIS).<sup>23</sup>
- 5.3 The COAG Review position is reasonable but the matter need not be pursued in the face of a considered response to the contrary. The threshold for seeking consent does not limit the Attorney-General’s discretion and has no relevance to the test of ‘satisfaction on the balance of probabilities’ to be applied by the court.

**In those particular circumstances, recommendation 27 is not pressed.**

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<sup>21</sup> COAG Report, pp xiii, and 57, recommendation 27.

<sup>22</sup> COAG Report, pp 57–58 [229]–[230].

<sup>23</sup> Law Council of Australia, Submission No 8 to the *INSLM Inquiry into Control Order Safeguards*, 30 September 2015, p 7 [20].



## 6 RECOMMENDATION 28: Criminal Code – Control orders – Definition of ‘issuing court’

*The Committee recommends that the definition of ‘issuing court’ in section 100.1 be amended to read ‘the Federal Court of Australia’.*<sup>24</sup>

The reasoning was as follows:

*The Committee considers that the power to make control orders should be the sole province of the Federal Court. We mean no disrespect to the Federal Magistrates or the Judges of the Family Court, but we think the gravity of the making of a control order requires that this jurisdiction be reposed in the Federal Court itself. The Committee also gave consideration to substituting the Supreme Court of each State or Territory for the Federal Court. However, on balance, we think that judicial comity, fairness and consistency of outcome would best be served by the orders being made in the Federal Court.*<sup>25</sup>

- 6.1 This recommendation would be partially effected by the 2015 Bill — sch 4 amends the definition of ‘issuing court’ in s 101(1) by removing the Family Court of Australia. The Explanatory Memorandum to the 2015 Bill does not address the recommendation that ‘court’ be limited to the Federal Court of Australia.
- 6.2 The Federal Court favours the recommendation, primarily based upon the serious nature of an order.<sup>26</sup> The Federal Circuit Court agrees with the Federal Court and points out that the premises that it uses are not all suitable for security cases.<sup>27</sup>
- 6.3 A number of submissions favour the recommendation,<sup>28</sup> although these do not include the submission of the Law Council of Australia.<sup>29</sup>
- 6.4 The Attorney-General’s Department (AGD) submitted that both the Federal Court and the Federal Circuit Court exercise relevant functions and that retaining both provides flexibility to ensure ready access to an issuing authority at short notice in a range of locations. Removing the Federal Circuit Court could delay consideration of a control order.<sup>30</sup>
- 6.5 All control orders to date have been issued by the Federal Circuit Court (formerly the Federal Magistrates Court). None of the recent orders have been subject to a confirmation hearing on the merits.

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<sup>24</sup> COAG Report, pp xiii and 58, recommendation 28.

<sup>25</sup> COAG Report, p 58 [231].

<sup>26</sup> Federal Court, Submission No 9 to the *INSLM Inquiry into Control Order Safeguards*, 8 October 2015.

<sup>27</sup> Federal Circuit Court, Submission No 10 to the *INSLM Inquiry into Control Order Safeguards*, 12 October 2015.

<sup>28</sup> See for example, Tamara Tulich, The University of Western Australia, Submission No 6 to the *INSLM Inquiry into Control Order Safeguards*, 18 September 2015, p 2; Gilbert and Tobin Centre for Public Law, Submission No 2 to the PJCIS, *Inquiry into Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, 8 December 2015, p 6, sch 4.

<sup>29</sup> Law Council of Australia, Submission No 8 to the *INSLM Inquiry into Control Order Safeguards*, p 9 [24]–[28].

<sup>30</sup> AGD, Supplementary Submission to the PJCIS, *Inquiry into Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, January 2016, pp 14–15, sch 4.

- 6.6 The serious effect that a control order has upon the liberty and life of the controlee will become even more drastic if, as is likely, sch 2 (dealing with people as young as 14) and schs 3, 8, 9 and 10 (dealing with monitoring of orders and related matters) of the 2015 Bill are passed.
- 6.7 The application of the control order legislation is important for controlees, the authorities and the public. The first contested cases will establish principles and set the pattern. It is best that this be done by one superior court. The Federal Court has a presence in all capitals. If there is no resident judge, an interstate judge can be provided at short notice and a video hearing can take place if necessary. Control order applications have not been a high volume jurisdiction and that is not likely to change.

**The best solution is to accept recommendation 28 but to give the Federal Court the power to remit an application to the Federal Circuit Court.**

## **7 RECOMMENDATION 29: Criminal Code – Control orders as a last resort – Cooperation and information sharing between the Australian Federal Police and the Commonwealth Director of Public Prosecutions**

*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 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>31</sup>

- 7.1 The possibility of legislating accordingly was not taken up by the COAG Review. Legislation is still not appropriate. Arrangements for co-ordination between the AFP and the Commonwealth Director of Public Prosecutions (CDPP) in relation to anti-terrorism, including control orders, are operating in a satisfactory fashion.
- 7.2 Furthermore, a general principle that control orders should be a last resort compared to prosecution is not self-evidently correct in all circumstances. The purpose of a control order is protection of the community by prevention of an act of terrorism. The primary purpose of prosecution is punishment for an act that has been committed. Sentencing involves consideration of many factors, including subjective issues that have little to do with protection of the public. The two should not be conflated. This distinction is recognised by the discussion of the COAG Review of recommendation 26 for the retention of control orders which includes the following:

<sup>31</sup> COAG Report, pp xiv and 58, recommendation 29.



*The Committee considers that control orders presently have three possible areas of operation. These are:*

*(a) where a person has been convicted of a terrorist offence, has served his or her sentence, but where upon release his or her renunciation of extremist views has not been demonstrated;*

*(b) where a prosecution for a terrorist offence is not a feasible or possible alternative; or*

*(c) where a person has been acquitted of a terrorist offence on a purely technical ground, or where the intelligence/evidence pointing to terrorist activity has been rejected otherwise than on the merits.<sup>32</sup>*

- 7.3 The UK situation has been influential. There, a control order or TPIM is obtained by an executive order. That comparison is not valid for the *Criminal Code* where a control order is an order of a court, after a hearing, according to the rules of evidence.
- 7.4 Recommendation 29 should presumably be understood as applying only to cases that might fall into category (b) extracted in paragraph 7.2 above. The consequence of adoption of a mandatory policy in favour of prosecution would be that a charge of a minor preparatory act would preclude seeking a control order based in part on that act in that class of case. The control order provisions should not be so limited in operation, although a general preference for prosecution is acceptable.
- 7.5 The mandatory involvement of the CDPP in all these decisions is another issue. With the best will in the world, that will involve delay, and can blur lines of responsibility and increase bureaucracy. The AFP and its officers have, and should, exercise the responsibility for arrest and charge, and for applying for control orders in a timely fashion, which may well be immediate. There will always be the opportunity for CDPP consultation. The best time for that is debateable. This relationship is best sorted out by those involved.

**No further action is required as to recommendation 29.**

## **8 RECOMMENDATION 30: Criminal Code – Control orders – Special Advocates**

*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 revocation or variation application, or in any appeal or review application to a superior court relating to or concerning a control order.<sup>33</sup>*

- 8.1 The first part of this Report dealt with this recommendation in the context of the 2015 Bill. Proposed amendments (see proposed ss 38J(2)(e) and (3)(d) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) in particular) explicitly provide

<sup>32</sup> COAG Report, p 55 [216].

<sup>33</sup> COAG Report, pp xiv and 59, recommendation 30.

that an order might be made that a court may consider information in the control order proceeding even if the information is withheld from a controlee and the controlee's legal representative on national security grounds. The recommendations of the Report were as follows:

*That the recommendation of the COAG Review as to the introduction of a system of special advocates into the control order regime be accepted and implemented, if proposed s 38J of the NSI Act in Schedule 15 of the 2015 Bill is to become law; and*

*That proposed s 38J of the NSI Act in Schedule 15 of the 2015 Bill should not come into force until Recommendation 1 has been implemented.*

- 8.2 The first part of this Report did not consider whether the amendment to s 38J should proceed. The subsequent PJCIS report on the Bill did not oppose that amendment (and related amendments). It seems inevitable that it will pass. That outcome will be assumed in this Report. As a result, little more needs to be said about a system of special advocates in control order proceedings so far as proposed s 38J of the NSI Act is concerned. The recommendations of the first part of this Report and the explanation of them stand. They are supported in principle by the recent reports by the PJCIS<sup>34</sup> and the Parliamentary Joint Committee on Human Rights (PJCHR).<sup>35</sup> As noted in the first part of this Report they are consistent with the review of national security information in proceedings by the New Zealand Law Commission.<sup>36</sup>
- 8.3 The amendment to s 38J referred to above is part of a wider set of amendments relating to control order proceedings. All of the proposed amendments are to the NSI Act rather than div 4 of pt 5 of the *Criminal Code* where the substantive provisions as to control order proceedings are to be found. The amendments (and some existing NSI Act provisions) nonetheless apply to the substantive proceeding.
- 8.4 An order pursuant to proposed s 38J(2)(e) or (3)(d) of the NSI Act in practical terms will only be sought by the AFP. Such an order will not necessarily be sought in every proceeding. Is there a role for a special advocate absent an application for such an order?
- 8.5 One potential area for a special advocate is where the controlee seeks access to sensitive information in order to find and use exculpatory material. If opposed, that could be dealt with pursuant to a claim for public interest immunity or pursuant to a closed hearing under the NSI Act. There is little chance of the disputed information being seen by the controlee or non-security cleared counsel. A special advocate could see the information and put an argument for access and use on behalf of the controlee.
- 8.6 I do not favour that course. It would place controlees in a privileged position as compared with other litigants. It would inevitably lead to fishing applications for access by controlees becoming routine in control order proceedings, with the consequent delay, complication and

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<sup>34</sup> Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015*, 2016, p xiv, recommendation 5.

<sup>35</sup> Parliament of Australia, *Thirty-sixth Report to the 44<sup>th</sup> Parliament: Human Rights Scrutiny Report*, 2016, p 87 [2.522].

<sup>36</sup> Law Commission (New Zealand), *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings*, Report 135 (2015) [5.65]–[5.67].

cost to the taxpayer, whether or not the control order applicant seeks to withhold the information relied upon for the order from the controlee.

- 8.7 Another potential area for a special advocate is at an ex parte hearing for an interim control order where the interests of the controlee could be represented. I do not see a sufficient case for this unless the applicant seeks to rely upon information that will be withheld from the controlee.
- 8.8 The view put forward by the AGD is that information that is to be withheld from a party cannot be used against that party. Whilst that may be correct in general, it is debatable in relation to control orders and should be put beyond doubt as discussed below. That position will not change after the amendments to the NSI Act, as, if invoked, a hearing would be required to obtain the necessary orders. In any event, service of the documents and return to court on notice occurs promptly after an interim order has been made. Ex parte orders and injunctions are routinely made in many jurisdictions. An application for an interim order need not be made ex parte. The introduction of a special advocate would unnecessarily delay and complicate interim applications.
- 8.9 Special advocates are justified where a control order is sought on the basis of information withheld or to be withheld from the controlee and should be limited to that situation. A special advocate should participate in any closed hearing relating to the information that is or is sought to be withheld, including on a confirmation or variation hearing.
- 8.10 As was explained in the first part of this Report, the special advocate should have no contact with the controlee or the lawyer for the controlee after the advocate has access to the information to be withheld except by leave of the court and on notice to the applicant and the Attorney-General. The risk of inadvertent disclosure of information is too great.
- 8.11 The proposition that div 104 does not permit the applicant for a control order to rely on information withheld or to be withheld from the controlee is debatable because of the effect of ss 104.2(3A), 104.5(2A), 104.12A(3) and 104.23(3A). Indeed, contrary to earlier advice noted in the first part of this Report, the AFP has relied upon s 104.12A(3) to withhold information in one case. These sections were not part of the original Bill. They were agreed to by the Government after debate in the Senate, as per the Schedule of Amendments to the Anti-Terrorism Bill (No 2) 2005 made by the Senate highlighted in the Supplementary Explanatory Memorandum at items 5, 8, 13 and 22. Division 104 should be amended to ensure that the withholding of national security information from a controlee is dealt with only by the NSI Act as it is to be amended.

**Recommendation 30 is supported in principle. Division 4 of pt 5.3 of the *Criminal Code* should be amended as proposed.**

## 9 RECOMMENDATION 31: Criminal Code – Control orders – Minimum standard of disclosure of information to controlee

*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 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>37</sup>*

The reasoning in support was as follows:

*In this regard, the legislation, for example, presently requires that a person whose order is to be confirmed must be given “any other details required to enable a 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”. This formulation is perhaps not far removed from the terminology we prefer. But it is not identical. It is our intention that the formula we have chosen – stemming as it does from the decisions in the ECHR and the House of Lords – should be added to the terminology presently appearing in the relevant sections.’<sup>38</sup>*

- 9.1 The outline of disclosure to a controlee and national security information in Appendix B is the backdrop to the discussion that follows.
- 9.2 A number of submissions supported this recommendation.<sup>39</sup> The recent PJCS report recommended:

### **Recommendation 4**

*The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 be amended such that the minimum standard of information disclosure outlined in proposed paragraph 38J(1)(c) of the National Security Information (Criminal and Civil Proceedings Act) 2004 reflects the intent of Recommendation 31 of the Council of Australian Governments Review of Counter-Terrorism Legislation, namely that the subject of the control order proceeding be provided ‘sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations’.<sup>40</sup>*

The PJCHR took a similar view in its recent report.<sup>41</sup>

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<sup>37</sup> COAG Report, pp xiv and 59, recommendation 31.

<sup>38</sup> COAG Report, p 60 [235].

<sup>39</sup> See, for example: Law Council of Australia, Submission No 8 to the *INSLM Inquiry into Control Order Safeguards*, 30 September 2016, p 19 [71]; Gilbert and Tobin Centre of Public Law, Submission No 2 to the *PJCS Inquiry into the CTLAB (No 1) 2015*, 8 December 2015, p 16.

<sup>40</sup> PJCS, *Advisory Report on the Counter-terrorism Legislation Amendment Bill (No. 1) 2015*, February 2016, pp xiv and 75, recommendation 4.

<sup>41</sup> Parliament of Australia, *Thirty-sixth Report to the 44<sup>th</sup> Parliament: Human Rights Scrutiny Report*, 2016, p 87 [2.522].

9.3 The COAG Review contrasted the standard in s 104.12A(2)(iii) of the *Criminal Code* with the formula adopted by the UK courts drawing on European jurisprudence and preferred the latter. If that were the issue, I would respectfully disagree. The *Criminal Code* text is well expressed in terms familiar to Australian courts. Importing foreign jurisprudence in a different setting would lead to uncertainty. It would be a mistake. The problem with the *Criminal Code* is not s 104.12A and cognate sections but the carve out from disclosure effected by s 104.12A(3) and cognate sections. I have recommended (in relation to recommendation 30) that the protection of national security information should be governed by the (to be amended) NSI Act rather than the *Criminal Code*. The carve outs should be removed. That would have the full material served on the controlee plus any necessary further particulars unless the NSI Act is invoked. There is no need to change the *Criminal Code* formula for particulars.

9.4 On the basis that the amendments to the NSI Act in sch 15 to the 2015 Bill proceed, and that they govern the way in which national security information is dealt with in control order proceedings if the NSI Act is invoked, an order that information may be withheld from and used against a controlee may not be made unless

*the court is satisfied that the relevant person has been given notice of the allegations on which the control order request was based (even if the relevant person has not been given notice of the information supporting those allegations).*<sup>42</sup>

9.5 On the face of it, this requirement satisfies recommendation 31 and the PJCIS recommendation in terms. It reflects the distinction between particulars of the case that a party has to meet and the evidence or information that proves it. That distinction is well understood in litigation and administrative law — between *what* case a party seeks to make and *how* that party seeks to make it.<sup>43</sup>

9.6 However, there is a question as to whether the COAG Review intended to go further and require the provision of the gist of the evidence or information (the *how*) to be withheld from a controlee. This arises because the reasoning adopts the English jurisprudence. It is at least arguable that this would require that the gist of the withheld information should be provided to the controlee.<sup>44</sup> If so, this would be a significant departure from the structure of the proposed amendments to the NSI Act in sch 15 to the 2015 Bill.<sup>45</sup> Section 38J provides for a graduated response from full disclosure to partial disclosure to no disclosure to the controlee and s 38J permits the use of information that has not been disclosed to the controlee by the court in certain circumstances.<sup>46</sup> Hence, the recommendation for the system of special advocates who can participate in the closed hearings on behalf of the controlee.

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<sup>42</sup> Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, proposed s 38J(1)(c).

<sup>43</sup> See the decision of the High Court in *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 per Hayne, Crennan, Kiefel and Bell JJ at [156]–[157] (citing *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 and *RCB (as litigation guardian of EKV, CEV, CIV and LRV) v The Honourable Justice Forrest* (2012) 292 ALR 617), and per French CJ at [69]–[70] (citing *Russell v Russell* (1976) 134 CLR 495 per Gibbs J citing the plurality in *Hogan v Hinch* (2011) 243 CLR 506 and *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 per Gummow, Hayne, Heydon and Kiefel JJ).

<sup>44</sup> *Home Office v Tariq* [2011] UKSC 35.

<sup>45</sup> Discussed in the first part of this Report, [2.5]–[2.9].

<sup>46</sup> See Appendix B.

- 9.7 There will be circumstances where the gist of information cannot be given without directly or indirectly disclosing information that ought not be disclosed. For example, the identity of an informant may be disclosed by the gist of information that could only have come directly from that person. Should the AFP necessarily be prevented from using that information where it may be crucial in preventing a terrorist act? Neither the COAG Review, the PJCIS, or the PCJHR directly address that difficult question.
- 9.8 On balance, bearing in mind the protective purpose of control orders, sch 15 provides a reasonable response to the issue if the system of special advocates is introduced. The court, assisted by the special advocate, has the task of determining what is to be disclosed. Courts are accustomed to making that judgment in deciding claims for public interest immunity. It can be assumed that a court, assisted by a special advocate, would normally order full or partial disclosure, reserving the use of undisclosed information for the exceptional case. The New Zealand Law Commission accepted that evidence could be withheld from a party in civil proceedings but used by a court against that party where necessary.<sup>47</sup> The use of vital admissible evidence in an exceptional case to assist in preventing a terrorist act should be accepted.
- 9.9 The making of an order authorising the use of undisclosed information is not mandatory. In making the decision as to disclosure, the court must consider: whether there would be a risk of prejudice to national security in the event of disclosure (having regard to the Attorney-General's certificate); whether the order would have a substantial adverse effect on the substantive hearing in the proceeding; and any other matter the court considers relevant.<sup>48</sup> On the substantive hearing the court retains power to control proceedings,<sup>49</sup> including the grant of a stay by reason of abuse of process.<sup>50</sup>
- 9.10 The foregoing analysis, and the discussion of a somewhat similar regime by the High Court in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd*,<sup>51</sup> should demonstrate satisfaction of the requirements of the *Constitution* and of the *International Covenant on Civil and Political Rights* that have been raised in some submissions.<sup>52</sup>

**The substance of recommendation 31 is adequately reflected in sch 15 to the 2015 Bill if a system of special advocates is introduced and the withholding of national security information in control order proceedings is governed by the NSI Act and not the *Criminal Code*.**

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<sup>47</sup> Law Commission (New Zealand), *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings*, Report 135 (2015), pp 65–66, [5.44]–[5.45] and [5.51].

<sup>48</sup> The 2015 Bill, proposed s 38J(5).

<sup>49</sup> *Criminal Code* s 104.14(2).

<sup>50</sup> NSI Act s 19(3)–(5).

<sup>51</sup> (2013) 252 CLR 38.

<sup>52</sup> See for example, Law Council of Australia, Submission No 8 to the *INSLM Inquiry into Control Order Safeguards*, 30 September 2015, pp 18–19 [69]–[70]; and Australian Human Rights Commission, Submission No 5 to the *PJCIS Inquiry into the CTLAB (No 1) 2015*, 9 December 2015, pp 18–19.

## **10 RECOMMENDATION 33: Criminal Code – Control orders – Relocation condition**

*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>53</sup>

- 10.1 Section 104.5(3)(a) of the *Criminal Code* provides that a court may impose by order:
- (a) a prohibition or restriction on the person being at specified areas or places[.]*
- 10.2 The Government accepts the substance of the recommendation but does not regard amendment as necessary as it contends that the section does not authorise a mandatory order for relocation.
- 10.3 Neither the COAG Review nor the Government response define or explain relocation. In this context it can be taken to mean relocating the residence of the controlee and his or her family. There has been considerable controversy in the UK about that power. It was abandoned when control orders were converted to TPIMs in 2011 but has been re-introduced in 2015 as a result of a recommendation by the Independent Reviewer of Terrorism Legislation. As this power is not now sought by the authorities on the basis of local experience, there is no need to comment further on it at this stage.
- 10.4 Relocation is distinguished from exclusion (ie, restricting an individual from entering a specified area or place) in the UK legislation.<sup>54</sup> A knowledge of this background supports the Government contention as to the proper construction of s 104.5(3)(a).
- 10.5 However, the Australian legislation has no relocation power to contrast with the exclusion power. The wording of the section would literally permit de facto relocation by excluding the place of residence of the controlee. It is preferable to spell out the position as recommended in the COAG Review.

**Recommendation 33 is supported.**

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<sup>53</sup> COAG Report 2013, pp xiv and 61, recommendation 33.

<sup>54</sup> David Anderson QC (Independent Reviewer of Terrorism Legislation) *Terrorism Prevention and Investigation Measures in 2014*, March 2015, see in particular, pp 13–17, [3.15]–[3.25].



## 11 RECOMMENDATION 34: Criminal Code – Control orders – Curfew condition

*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>55</sup>*

- 11.1 In 2014, s 104.5(3)(c) of the *Criminal Code* was amended to provide for a maximum ‘curfew’ of 12 hours within any 24 hours.<sup>56</sup>
- 11.2 Curfews of 12 hours (and more) were found valid and proportionate in the UK<sup>57</sup> (although now limited to 10 hours) and are found in certain bail, sentencing, and dangerous sexual offenders’ legislation in Australia.<sup>58</sup> In those circumstances, a considered government choice of 12 hours as a maximum should be accepted.
- 11.3 The Law Council suggests that an overnight residence requirement should be introduced where the period of curfew is considerable, as in the UK. This appears to be reasonable. Otherwise, a 12 hour daytime curfew plus residence at home overnight would be close to home detention.

**Recommendation 34 need not be pursued but early consideration should be given to including an overnight residence requirement.**

## 12 RECOMMENDATION 35: Criminal Code – Control orders – Communication restrictions

*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>59</sup>*

- 12.1 Section 104.5(3)(f) is as follows:

*The obligations, prohibitions and restrictions that the court may impose on the person by the order are the following...*

*(f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet)[.]*

- 12.2 This recommendation broadly mirrors the UK position. The recommendation was not supported by the Government because it would remove the necessary flexibility to tailor conditions to the particular threat posed by the subject of the order.

<sup>55</sup> COAG Report, pp xiv and 61, recommendation 34.

<sup>56</sup> Foreign Fighters Act s 75.

<sup>57</sup> See for example, *Secretary of State for the Home Department v E & Another* [2007] UKHL 47 [6]–[12] per Lord Bingham and [25] per Baroness Hale of Richmond; *Secretary of State for the Home Department v MB & AF* [2007] UKHL 46 [5]–[11] per Lord Bingham.

<sup>58</sup> See for example, s 19B(4) of the *Dangerous Sexual Offenders Act 2006* (WA), which provides for a maximum curfew of 12 hours in one day.

<sup>59</sup> COAG Report, pp xv and 61, recommendation 35.



- 12.3 The recommendation would not entirely remove flexibility, as an exceptional case is recognised. It is not clear what case would be regarded as exceptional. As the legislation stands, the court must be satisfied that each prohibition or restriction is reasonably necessary and reasonably appropriate and adapted for the purpose, taking into account the impact upon the circumstances of the controlee pursuant to ss 104.4(1) and 104.4(2).
- 12.4 This issue involves a dilemma. Experience in anti-terrorism investigations has increased since the COAG Review. Reviewing terrorism cases to date, including control order cases, the use of telecommunications and technology including the internet for questionable purposes, is far from exceptional. An absence of some form of control of communication in most cases would leave a substantial hole in guarding against planning of terrorist acts. However, a blackout on telecommunications and technology would make normal life difficult, if not impossible, in this day and age. An order limited to prohibition of certain types of communication by subject matter would be of little utility without ubiquitous surveillance. This has no doubt contributed to the increased monitoring provisions in the 2015 Bill.
- 12.5 In truth, all of the orders that can be made pursuant to s 104.5(3) have the capacity to drastically interfere with the civil liberties of the controlee. In each case reliance must be placed on the court properly carrying out the obligation imposed by ss 104.4(1)(d) and 104.4(2), buttressed by what is said later in relation to recommendation 37.

**Recommendation 35 is not supported.**

### **13 RECOMMENDATION 37: Criminal Code – Control orders – (Least Interference)**

*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>60</sup>*

- 13.1 The reasoning in support was as follows:

*The Committee considers that this recommendation is one of considerable importance and fundamental to the protection of the rights of a person made the subject of a control order. The legislation presently provides that the court imposing the order must be “satisfied 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 the purpose of protecting the public from a terrorist act. This recommendation addresses a different subject altogether. It should be an additional requirement throughout the legislation designed to ensure that the court which imposes a control order is satisfied that the specific obligations and restrictions to be imposed constitute the least interference with the person’s liberty, privacy and freedom of movement that is necessary in all the circumstances. It will require a court to consider alternatives to those that are initially proposed. It will be a matter for the Parliamentary Counsel and the legislature, if this*

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<sup>60</sup> COAG Report, pp xv and 63, recommendation 37.

*recommendation is accepted, to craft the precise terminology and adapt Division 104 to accommodate this important requirement wherever it is necessary throughout the legislation.*<sup>61</sup>

- 13.2 The Government's position to date has been that the current test is adequate as it ensures that the court considers the reasonable necessity, appropriateness and adaptation of each obligation, prohibition or restriction to be imposed. Section 104.5(2) and (3) needs to be taken into account as well as s 104.5(1)(d).
- 13.3 The current provision has hardly been seriously tested in contested proceedings.
- 13.4 It seems to me that the two formulae are different ways of achieving the same result. By way of example, there is hardly a difference of significance between necessity in the circumstances and reasonable necessity in this context.
- 13.5 There is substantial support for recommendation 37 in submissions and by commentators.<sup>62</sup> This support seems to be based upon the view that the proposed wording is more favourable to the contolee than the existing provision, and by implication at least, less favourable to the applicant for the control order.
- 13.6 If a choice had to be made between the two versions, the proposed version is not obviously preferable to the current version from any point of view. Each would oblige the court to take the orders one by one and consider less severe restrictions than those proposed by the applicant in the same way that a court would do in considering the terms of an injunction or bail conditions. On what basis should a measure that is reasonably necessary and reasonably appropriate and adapted to achieving the purpose not be imposed? If there is a less intrusive way of achieving the same result then it would hardly satisfy the existing test. The wording of this recommendation would encourage endless debates at first instance and on appeal.
- 13.7 However there is a case for having the court consider whether the combined effect of all of the proposed restrictions is proportionate to the risk being guarded against in addition to looking at each restriction as now required. It may be that this idea was behind this recommendation. The case becomes even stronger if (as appears likely) the changes to the control order regime proposed in the 2015 Bill are passed, particularly the intrusive monitoring and related provisions.
- 13.8 I have reservations as to whether a least disadvantage test is the best formula for achieving this purpose, compared with a positive finding of proportionality. It would have the potential to hijack the process because of the tendency to debate as noted above, and convert a final reality check into a major battlefield.

**A variation of recommendation 37 is supported in principle.**

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<sup>61</sup> COAG Report, p 63 [246].

<sup>62</sup> See for example, Australian Human Rights Commission, Submission No 2 to the *INSLM Inquiry into Control Order Safeguards*, 17 September 2015, pp 2–3; Law Council of Australia, Submission No 8 to the *INSLM Inquiry into Control Order Safeguards*, 30 September 2015, p 28 [108]; and Tamara Tulich, Submission No 6 to the *INSLM Inquiry into Control Order Safeguards*, 18 September 2015, p 7.

## **14 RECOMMENDATION 38 - Criminal Code – Control orders – Oversight by the Commonwealth Ombudsman**

*The Committee recommends that the Commonwealth Ombudsman be empowered specifically to provide general oversight of interim and confirmed control orders.*<sup>63</sup>

- 14.1 This was based upon the contrast between s 105.36 of the *Criminal Code* as to preventative detention orders and control orders.
- 14.2 The recommendation has not been accepted as the Ombudsman already has jurisdiction over police actions in relation to control orders.
- 14.3 Preventative detention orders are issued administratively. Control orders are issued judicially and are subject to appeal. Control orders are made on the record in open court. Breaches of control orders are prosecuted in court. Hence the distinction between the two.

**Recommendation 38 is not necessary.**

## **15 Other Recommendations**

**Recommendations 26 and 36 have been accepted and no action is required.**

**Recommendation 32 has been implemented.**

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<sup>63</sup> COAG Report, pp xv and 63, recommendation 38.



# Appendices

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## Appendix A1 – Process of Obtaining a Control Order

The following is an edited version of the AFP Submission No 3 to the *INSLM Inquiry into Control Order Safeguards*, October 2015, pages 5–9, paragraphs 18–48. It is a reasonable summary of the process but subject to the caveat that the AFP have the power to withhold information from the controllee at each stage if disclosure of the information would inter alia prejudice national security (ss 104.5(2A); 104.12A(3); and 104.23(3A) of the *Criminal Code*). Disclosure of information to the controllee is discussed at Appendix B.

### **Applying for an interim control order**

18. A senior AFP member may request an interim control order after obtaining written consent from the Attorney-General.<sup>1</sup>

19. An applicant for an interim control order (a senior AFP member) must suspect on reasonable grounds that:

- the order would substantially assist in preventing a terrorist attack;
- the person has provided training to, received training from or participated in training with a listed terrorist organisation;
- the person has engaged in a hostile activity in a foreign country;
- the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act;
- the person has been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence;
- the order would substantially assist in preventing the provision of support for, or facilitation of, a terrorist act; or
- the person has provided support for, or otherwise facilitated the engagement in, a hostile activity in a foreign country.<sup>2</sup>

20. The Attorney-General must give written consent before a senior AFP member may apply for an interim control order,<sup>3</sup> and in seeking the Attorney-General's consent the applicant must give the Attorney-General relevant documentation including a draft order, statement of facts (including any facts relating to why the order should not be made) and summary of grounds on which the order should be granted.<sup>4</sup>

21. The Attorney-General's consent may be made contingent on changes required by the Attorney-General being made to the draft order.<sup>5</sup>

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<sup>1</sup> *Criminal Code* s 104.2.

<sup>2</sup> *Criminal Code* s 104.2(a)–(d).

<sup>3</sup> *Criminal Code* s 104.2(1); an urgent interim control order can be made without first obtaining the Attorney-General's consent in limited circumstances (see *Criminal Code* ss 104.6 and 104.8). In these circumstances, such consent must be obtained within eight hours of the request being made or the order ceases to be in force: *Criminal Code* s 104.10.

<sup>4</sup> *Criminal Code* s 104.2(3).

<sup>5</sup> *Criminal Code* s 104.2(4).

22. It is open to the Attorney-General to refuse to give consent for the making of an application for a control order if s/he considers that the grounds to apply for a control order have not been made out. The Attorney-General can also require that the proposed obligations, prohibitions or restrictions to be imposed by an order be amended, to ensure that the conditions sought by the AFP are reasonably necessary, and reasonably appropriate and adapted, to the circumstances.

### **Making of an Interim Control Order**

24. The making of an interim control order and the imposition of individual conditions contained in a control order are subject to the court's discretion, and entirely based on the adequacy of the information put before the court.<sup>6</sup>

25. The court must be given:

- a sworn/affirmed request to make an interim control order;
- all the information that was given to the Attorney-General (incorporating any changes to the draft order);
- an explanation as to why each of the proposed obligations, prohibitions or restrictions should be imposed and any available information as to why they should not be imposed;
- the outcomes and particulars of any previous applications in relation to control orders or preventative detention orders relating to the person;
- any available information regarding detention of the person under a State preventative detention order; and
- a copy of the Attorney-General's consent.<sup>7</sup>

26. These specific requirements mean that substantive justification must be provided to the court as to why each condition (obligation, prohibition or restriction) should be imposed. The court may fully scrutinise any relevant history relating to any similar applications made in respect of the person.

27. The court is also able to require further information to be provided before agreeing to a request to make an order.<sup>8</sup>

28. The court may only make an interim control order if the court is satisfied on the balance of probabilities that:

- the order would substantially assist in preventing a terrorist attack;
- the person has provided training to, received training from or participated in training with a listed terrorist organisation;
- the person has engaged in a hostile activity in a foreign country;
- the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act;
- the person has been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence;

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<sup>6</sup> *Criminal Code* s 104.4.

<sup>7</sup> *Criminal Code* s 104.3(a)–(f).

<sup>8</sup> *Criminal Code* s 104.4(1).

- the order would substantially assist in preventing the provision of support for, or facilitation of, a terrorist act; or
- the person has provided support for, or otherwise facilitated the engagement in, a hostile activity in a foreign country.<sup>9</sup>

29. The court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act; preventing the provision or support for or the facilitation of a terrorist act; or preventing the provision or support for or the facilitation of the engagement in a hostile activity in a foreign country.<sup>10</sup>

30. In satisfying itself of the above, the court must take into account the impact of each condition on the person's individual, personal and financial circumstances.<sup>11</sup> The court has the express power to not include a condition if it is not satisfied that it is reasonably necessary, and reasonably appropriate and adapted.<sup>12</sup> The balance of probabilities standard requires the court to take into account the nature and gravity of the application and the subject matter.<sup>13</sup>

32. In making an interim order, the court must specify a date for a confirmation hearing, which must be a day as soon as practicable (but at least 72 hours) after the interim order is made.<sup>14</sup> This legislative requirement ensures continuing judicial oversight over the control order from the time the interim order is made.

33. As soon as practicable after an interim control order is made, an AFP member must serve the order on the subject and explain the order (so the subject can understand the effect of the order). The subject must be informed of their right to a legal representative, right to apply for variation or revocation of the order, and all appeal and review rights.<sup>15</sup>

### **Confirmation of a control order**

35. Through the confirmation process, the court has the power to:

- declare the control order void, if it is satisfied that there were no grounds on which to make the order at the time the order was made;
- revoke the control order, if it is not satisfied that the grounds for the control order still exist;
- vary the control order, if it is not satisfied that any of the conditions continue to remain reasonably necessary, and reasonably appropriate and adapted; or
- confirm the control order without variation.<sup>16</sup>

36. The subject of the control order is required to be provided with relevant information prior to the confirmation hearing. This includes the statement of facts (including any facts relating to why the order should not be made) and summary of grounds on which the order should be granted.<sup>17</sup>

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<sup>9</sup> *Criminal Code* s 104.4(1)(c).

<sup>10</sup> *Criminal Code* s 104.4(1)(d).

<sup>11</sup> *Criminal Code* s 104.4(2).

<sup>12</sup> *Criminal Code* s 104.4(3).

<sup>13</sup> *Evidence Act 1995* (Cth) s 140(2).

<sup>14</sup> *Criminal Code* s 104.5(1)(e) and (1A).

<sup>15</sup> *Criminal Code* s 104.12.

<sup>16</sup> *Criminal Code* s 104.14(6) and (7).



37. In addition, the AFP must provide 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>18</sup>

38. The subject's legal representative is able to access this information.<sup>19</sup>

39. During proceedings, the subject and their representatives have a right to make submissions, and call and cross-examine witnesses, as with ordinary litigation proceedings and the rules of evidence.<sup>20</sup>

40. Access to sensitive national security information is dealt with under the NSI Act or under public interest immunity. Should the NSI Act be invoked, or a PII claim be made, the subject's legal representatives may be able to retain their role in proceedings and may access information as determined by the court, subject to an appropriate security clearance in the case of the NSI Act.<sup>21</sup>

41. As soon as practicable after an interim control order is declared to be void, revoked or confirmed (with or without variation), an AFP member must serve the order on the subject and explain the order (so the subject can understand the effect of the order), and the subject informed of their right to a legal representative, right to apply for variation or revocation of the order, and all appeal and review rights.<sup>22</sup>

42. The maximum duration of a confirmed control order is 12 months, which is calculated from the time the interim control order is made.<sup>23</sup>

#### **Requirement to Notify Court if Grounds Cease to Exist**

44. The AFP Commissioner is under a legislative obligation to apply for a revocation of a control order if satisfied that the grounds on which the order was confirmed have ceased to exist.<sup>24</sup> The Commissioner is also required to apply to vary a control order to remove one or more obligations, prohibitions or restrictions if satisfied that those conditions should no longer be imposed on the person.<sup>25</sup>

45. The Commissioner must notify the person of an application to revoke or vary the control order, and the grounds on which the revocation or variation is sought.<sup>26</sup>

46. The decision to revoke or vary the control order remains at the court's discretion, and the subject of the control order and their representatives are able to make submissions to the court or call witnesses in relation to a variation or revocation application.<sup>27</sup>

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<sup>17</sup> *Criminal Code* s 104.12A(2)(a)(i)-(ii).

<sup>18</sup> *Criminal Code* s 104.12A(2)(a)(iii).

<sup>19</sup> *Criminal Code* ss 104.5(5), 104.13 and 104.21.

<sup>20</sup> *Criminal Code* ss 104.14(1), 104.18(4), 104.19(3) and 104.23(4).

<sup>21</sup> NSI Act, s 38I(3). <sup>22</sup> *Criminal Code* s 104.17.

<sup>22</sup> *Criminal Code* s 104.17.

<sup>23</sup> *Criminal Code* s 104.5(1)(f).

<sup>24</sup> *Criminal Code* s 104.19(1)(a).

<sup>25</sup> *Criminal Code* s 104.19(1)(b).

<sup>26</sup> *Criminal Code* s 104.19(2).

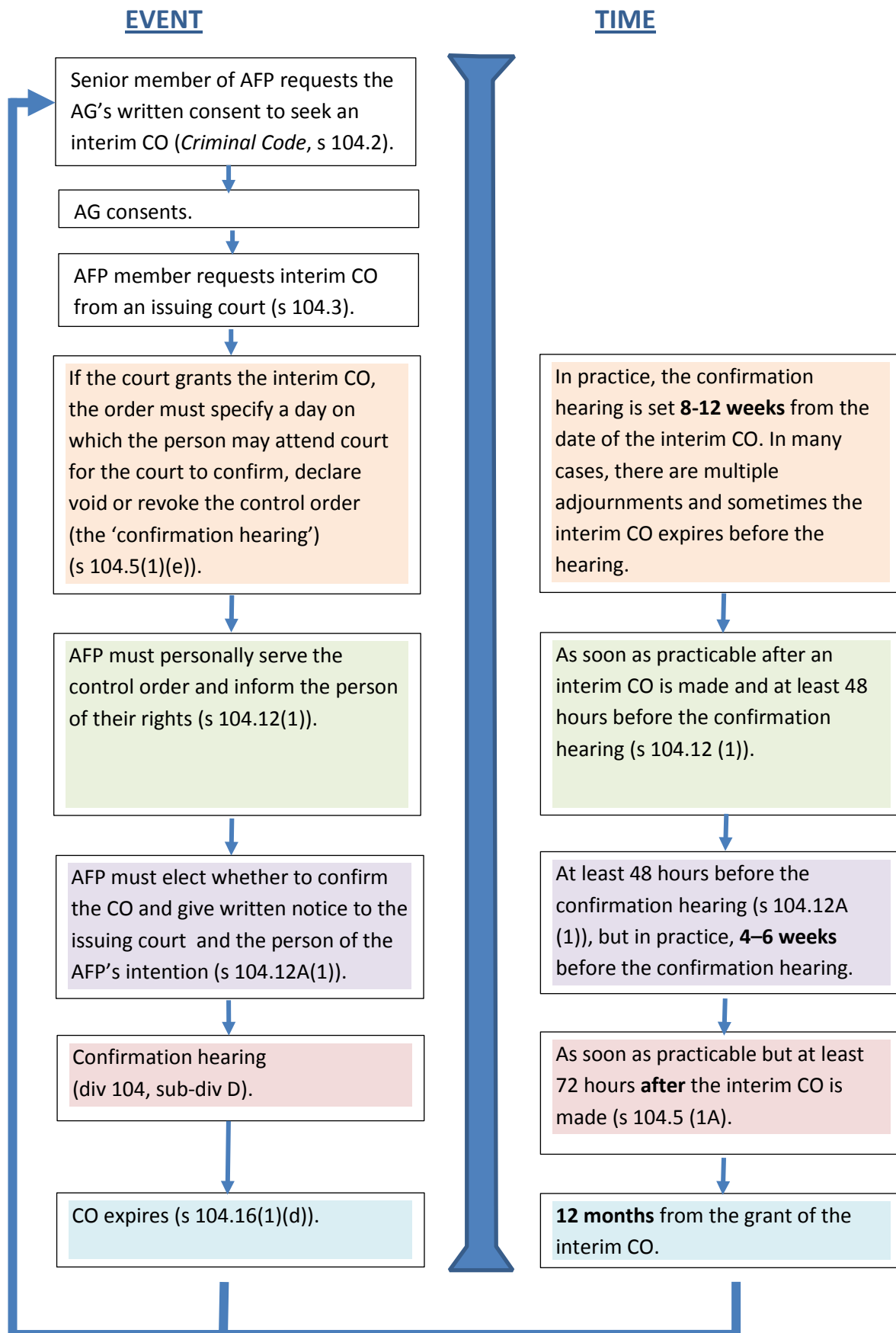
<sup>27</sup> *Criminal Code* s 104.19(3).

## Role of the Court and Rules of Evidence

47. One of the most important features of the Australian control order regime is that both the interim and confirmation hearings are court processes. The role of the court in control order proceedings is the same as for all federal civil proceedings. The court retains its express and inherent powers and discretions.

48. As control order proceedings are conducted under the ordinary rules of evidence applicable to federal civil proceedings, the evidence that may be relied upon by the AFP to support applications for and confirmation of control orders is constrained by the *Evidence Act 1995* (Cth).

## Appendix A2 – Timeline for Obtaining a Control Order (CO)



## Appendix A3 – Control Orders Granted in 2014/2015

### Timeline - Four Recent control orders

SUBJECT	DATE	EVENT	DETAILS	STATUS
CO3	17 Dec 2014	<b>Interim control order obtained</b>	<ul style="list-style-type: none"> <li>○ Confirmation hearing listed for 4 May 2015.</li> <li>○ Matter listed for directions on 10 February 2015.</li> <li>○ Documents lodged in the proceeding not be published until further order of the Court (except annexures IA and IC to Affidavit (sworn 17 December 2014) in respect of which non publication orders cease upon service of any control order on respondents.</li> <li>○ Information about evidence in the case not be published under further order of the Court.</li> </ul>	
	23 Dec 2014	<b>Alleged breach of control order</b>	Controlee arrested and charged with three counts of contravening a control order, contrary to s 104.27 of the <i>Criminal Code</i> . The charge related to a contravention of control 9 of the interim control order.	
	10 April 2015	<b>AFP elected to confirm</b>		
	21 April 2015	Directions hearing	Court advised unable to find a court room to hear matter on 4 May 2015. Respondents had advised needed additional time to comply with earlier orders and hearing date would need to be adjourned.	
	4 May 2015	Date confirmation hearing initially listed	<b>Vacated</b> — to be listed for further directions.  All parties, three days leave to apply.	
	29 May 2015	Directions hearing	Court heard submissions on whether it was necessary to relist the confirmation hearing for a particular date or whether the court had power to control own process and stand over for further directions. Respondents agreed Court had power to vacate. Confirmation hearing date vacated and matter listed for further directions on a date to be fixed and parties advised administratively. All parties given leave to apply on three days' notice.  The matter listed for further directions on a date to be fixed after 19 June 2015 and the parties will be advised administratively.	

	18 Sept 2015	Directions hearing	<p>Until further order of the Court, information tending to reveal the identity of the First Respondent and Second Respondent or either of them as parties to these proceedings not be published.</p> <p>On or before 25 September 2015, the Second Respondent advised the Applicant which conditions of the interim control order he opposes and the bases of such objections.</p> <p>The second respondent (CO4) file and serve an outline of submissions regarding s 116 of the Constitution on or before 12 October 2015.</p> <p>Applicant and First Respondent (CO3) have leave to apply to list First Respondent’s matter for confirmation hearing on 21 October 2015.</p> <p>Matter listed for further directions on 21 October 2015.</p>	
	18 Dec 2015			<b>Term of Interim Control Order expired</b>
	23 Dec 2015	Consent Orders	<p>The interim control order made in relation to the Respondent on 17 December 2014 is vacated.</p> <p>The Court notes the period during which the control orders, if confirmed, would have been in force has lapsed. Accordingly, no further proceedings will be taken by the Applicant with respect to the Application.</p>	
	29 Jan 2016	<b>Sentencing - breach of control order</b>	<p>Controlee pleaded guilty to contravention of control order, and was sentenced to 2.5 years imprisonment with a non-parole period of 18 months.</p>	

Appendix A3 – Control Orders Granted in 2014/2015

SUBJECT	DATE	EVENT	DETAILS	STATUS
CO4	17 Dec 2014	<b>Interim order obtained</b>	<ul style="list-style-type: none"> <li>○ Confirmation hearing listed for 4 May 2015.</li> <li>○ Matter listed for directions on 10 February 2015.</li> <li>○ Documents lodged in the proceeding not be published until further order of the Court (except documents annexures IA and IC to Affidavit (sworn 17 December 2014) in respect of which non publication orders cease upon service of any control order on respondents.</li> <li>○ Information about evidence in the case not be published under further order of the Court.</li> </ul>	
	10 April 2015	<b>AFP elected to confirm</b>		
	21 April 2015	Directions hearing	Court advised unable to find a court room to hear matter on 4 May 2015. Respondents had advised needed additional time to comply with earlier orders and hearing date would need to be adjourned.	
	4 May 2015	Date confirmation hearing initially listed	<p><b>Vacated</b> — to be listed for further directions.</p> <p>All parties, three days leave to apply.</p>	
	29 May 2015	Directions hearing	<p>Court heard submissions on whether it was necessary to relist the confirmation hearing for a particular date or whether the court had power to control own process and stand over for further directions. Respondents agreed Court had power to vacate. Confirmation hearing date vacated and matter listed for further directions on a date to be fixed and parties advised. All parties given leave to apply on three days’ notice.</p> <p>The matter listed for further directions on a date to be fixed after 19 June 2015 and the parties will be advised.</p>	

Appendix A3 – Control Orders Granted in 2014/2015

	18 Sept 2015	Directions hearing	<p>Until further order of the Court, information tending to reveal the identity of the First Respondent and Second Respondent or either of them as parties to these proceedings not be published.</p> <p>On or before 25 September 2015, the Second Respondent advise the Applicant which conditions of the interim control order he opposes and the bases of such objections.</p> <p>The Second Respondent (CO4) file and serve an outline of submissions regarding s 116 of the Constitution on or before 12 October.</p> <p>Applicant and First Respondent (CO3) have leave to apply to list First Respondent’s matter for confirmation hearing on 21 October 2015.</p> <p>Matter listed for further directions on 21 October 2015.</p>	
	18 Dec 2015			<b>Term of Interim Control order expired</b>
	23 Dec 2015	Consent Orders	<p>The interim control order made in relation to the Respondent (CO4) on 17 December 2014 is vacated.</p> <p>The Court notes the period during which the control orders, if confirmed, would have been in force has lapsed. Accordingly, no further proceedings will be taken by the Applicant with respect to the Application.</p>	

SUBJECT	DATE	EVENT	DETAILS	STATUS
CO5	5 March 2015	<b>Interim order obtained</b>		
	15 April 2015	Directions	<p>Court Ordered:</p> <ul style="list-style-type: none"> <li>• Respondent to file address for service</li> <li>• Applicant to serve the Applicant’s affidavit (sworn 4 March) including exhibits by 20 April 2015</li> <li>• Documents filed and information about evidence not be published – but service on Respondent not breach of order</li> <li>• Any election to confirm interim control order to be lodged with the Court and served on Respondent by 5 May 2015</li> <li>• By 5 May 2015 Respondent to advise Applicant in writing by 29 May 2015                             <ul style="list-style-type: none"> <li>○ if he intends to attend court on specified day for confirmation, and</li> <li>○ if so any fact or matter alleged in Applicant’s affidavit (sworn 4 March) which he (the Respondent) will dispute at the confirmation hearing.</li> </ul> </li> </ul> <p>Adjourned pre hearing</p>	
	5 May 2015	<b>AFP elected to confirm</b>		
	12 May 2015	Directions	<p>Order 6 made on 15 April be amended to read:</p> <ul style="list-style-type: none"> <li>• Respondent to advise applicant in writing by 29 May 2015:                             <ul style="list-style-type: none"> <li>○ if he intends to attend court on specified day for confirmation, and</li> <li>○ If so any fact or matter alleged in Applicant’s affidavit (sworn 4 March) which he (the Respondent) will dispute at the confirmation hearing.</li> </ul> </li> </ul> <p>Adjourned pre hearing</p>	
	2 June 2015	Directions hearing	<p>Order 6 made on 15 April be amended to read:</p> <ul style="list-style-type: none"> <li>• Respondent to advise applicant in writing by 27 July 2015:                             <ul style="list-style-type: none"> <li>○ if he intends to attend court on specified day for confirmation, and</li> <li>○ If so any fact or matter alleged in Applicant’s affidavit (sworn 4 March) which he (the Respondent) will dispute at the confirmation hearing.</li> </ul> </li> </ul> <p>The Court ordered confirmation hearing date adjourned to 14 September 2015.</p>	
	9 June 2015	Date confirmation hearing was originally listed		



Appendix A3 – Control Orders Granted in 2014/2015

	11 Sept 2015	Directions hearing	Vacated – not to be listed before 9 November 2015 – date to be fixed administratively. The Respondent provide notices, in accordance with s 78B of the Judiciary Act 1903 (Cth) (s 78B notices) by 14 September. Various orders relating to date for submissions in relation to the constitutional issue raised in the s 78B notices.	
	30 Nov 2015	<b>Orders confirming the control order, made by consent in chambers by Judge Driver.</b>	By consent, the Court ordered the hearing date of 14 September 2015, be adjourned and listed not before 9 November 2015, to be fixed.	<b>Control Order confirmed by consent</b>
	29 Feb 2016	<b>Alleged breach of control order.</b>	Controlee arrested and charged with five counts of contravention of a control order, contrary to s 104.27 of the <i>Criminal Code</i> . The charge related to a contravention of control 6 of the interim control order.	
	5 March 2016			<b>Control order expires</b>
	7 March 2016	Bail refused	Controlee refused bail, remains in remand in relation to alleged breach of control order.	

SUBJECT	DATE	EVENT	DETAILS	STATUS
CO6	10 Sept 2015	<b>Interim control order obtained</b>	<p>Until 5pm on 11 September 2015 no publication of the existence or content of the Interim control order.</p> <p>Until further order of the court the following documents be confidential:</p> <ul style="list-style-type: none"> <li>○ Exhibit NG-1 Annexure B, pages 1–81 of the Affidavit of Neil Gaughan (sworn 9 September 2015) — the statement of facts).</li> <li>○ Exhibit NG-1 Annexure B, pages B1–B2011 to the Affidavit of Neil Gaughan sworn on 9 September 2015 (the ‘Supporting Documents’).</li> </ul> <p>Until further order there be no publication of:</p> <ul style="list-style-type: none"> <li>○ The statement of facts; and</li> <li>○ The supporting documents.</li> </ul> <p>Except to the parties, their legal representatives or Victoria police.</p> <p>Confirmation hearing listed for 2 December 2015.</p>	
	28 Oct 2015	<b>AFP elected to confirm control order</b>		
	23 Nov 2015	By consent, the parties agreed to adjourn, advised administratively	<p>The Applicant and Respondent agreed the hearing would take more than the one day listed on 2 December 2015. The Court advised no capacity for 3 day hearing at this time. Hearing date listed for 2 December 2015 vacated and Court and re-listed for February 2016. Court to advise of new confirmation date.</p> <p>Initial confirmation hearing vacated.</p>	
	26 Nov 2015		Confirmation date relisted for 5 day hearing to commence Monday 22 February 2016.	
	2 Dec 2015	Initial confirmation hearing (1)		

*Appendix A3 – Control Orders Granted in 2014/2015*

	22 Feb 2016	New confirmation hearing (2)	<p>Respondent made submissions for matter to be transferred to Federal Court. Judge Hartnett ruled would not grant such an application.</p> <p>Respondent applied for adjournment – noting expected contested hearing to now run for four weeks. Applicant did not object to adjournment.</p> <p>Hearing adjourned and relisted for 10 day hearing commencing 20 June 2016.</p>	
	20 June 2016	New confirmation hearing (3)		
	15 Sept 2016			<b>Control order will expire</b>

## Appendix A4 – Control Order Obligations in 2014/2015

SUBJECT	INTERIM CONTROL ORDER ISSUED ON	CONDITION	SUMMARY
CO3	17 DECEMBER 2014		
		1	Remain at specified premises between 10:00pm and 5:00am each day
		2	Report to state police force at specified station 3 times per week between 6:00am and 8:00pm
		3	Allow an impression of fingerprints at first report
		4	Prohibition from being in specified areas including: airports / ports with international departure; prison or correctional facility; mosques or masjid other than one(s)specified; any residence of person named in control 8; and outside state
		5	Prohibition on leaving Australia
		6	Prohibition on specified activities including: (i)acquiring, possessing, accessing, producing or supplying documentation relating to explosives, weapons and counter-surveillance; and, (ii) acquiring, possessing, accessing, accumulating, storing or producing electronic media depicting or describing any execution, beheading, suicide attack, bombing, terrorist attack, propaganda for terrorist organisation, activities of Islamic state, unless material is broadcast on free to air television, pay television, commercial cinema, or has a classification from Office of Film and Literature
		7	Prohibition on possessing certain articles and substances including: any firearm or ammunition, and any quantity of chemical not consistent with reasonable domestic use
		8	Prohibition on associating or communicating with specified individuals
		9	Prohibition on use of public phones except in an emergency Prohibition on use of satellite telephone service Limited to the use of one nominated: mobile phone; SIM card; fixed landline; VOIP service; internet service provider account; email address; and, computer, unless given written approval by JCTT for additional nominated items / services
		10	Consider in good faith, participating in counselling or education related to spiritual, emotional and physical wellbeing with a suitably qualified counsellor or recognised religious leader, as nominated by the subject.

SUBJECT	INTERIM CONTROL ORDER ISSUED ON	CONDITION	SUMMARY
C04	17 DECEMBER 2014		
		1	Remain at specified premises between 10:00pm and 5:00am each day
		2	Report to state police force at specified station 3 times per week between 6.00am and 8.00pm
		3	Allow an impression of fingerprints at first report
		4	Prohibition from being in specified areas including: airports / ports with international departure; prison or correctional facility; mosques or masjid other than one(s)specified; any residence of person named in control 8; and, outside state
		5	Prohibition on leaving Australia
		6	Prohibition on specified activities including: (i)acquiring, possessing, accessing, producing or supplying documentation relating to explosives, weapons and counter-surveillance; and, (ii) acquiring, possessing, accessing, accumulating, storing or producing electronic media depicting or describing any execution, beheading, suicide attack, bombing, terrorist attack, propaganda for terrorist organisation, activities of Islamic state, unless material is broadcast on free to air television, pay television, commercial cinema, or has a classification from Office of Film and Literature
		7	Prohibition on possessing certain articles and substances including: any firearm or ammunition, and any quantity of chemical not consistent with reasonable domestic use
		8	Prohibition on associating or communicating with specified individuals
		9	Prohibition on use of public phones except in an emergency Prohibition on use of satellite telephone service Limited to the use of one nominated: mobile phone; SIM card; fixed landline; VOIP service; internet service provider account; email address; and, computer, unless given written approval by JCTT for additional nominated items / services
		10	Consider in good faith, participating in counselling or education related to spiritual, emotional and physical wellbeing with a suitably qualified counsellor or recognised religious leader, as nominated by the subject

SUBJECT	INTERIM CONTROL ORDER ISSUED ON	CONDITION	SUMMARY
CO5	5 MARCH 2015		
		1	Remain at specified premises between 10:00pm and 5:00am each day
		2	Report to state police force at specified station 3 times per week between 6.00am and 8.00pm
		3	Allow an impression of fingerprints at first report
		4	Prohibition from being in specified areas including: airports / ports with international departure; prison or correctional facility; mosques or masjid other than one(s)specified; any residence of person named in control 8; and, outside state
		5	Prohibition on leaving Australia
		6	Prohibition on specified activities including: (i)acquiring, possessing, accessing, producing or supplying documentation relating to explosives, weapons and counter-surveillance; and, (ii) acquiring, possessing, accessing, accumulating, storing or producing electronic media depicting or describing any execution, beheading, suicide attack, bombing, terrorist attack, propaganda for terrorist organisation, activities of Islamic state, unless material is broadcast on free to air television, pay television, commercial cinema, or has a classification from Office of Film and Literature
		7	Prohibition on possessing certain articles and substances including: any firearm or ammunition, and any quantity of chemical not consistent with reasonable domestic use
		8	Prohibition on associating or communicating with specified individuals
		9	Prohibition on use of public phones except in an emergency Prohibition on use of satellite telephone service Limited to the use of one nominated: mobile phone; SIM card; fixed landline; VOIP service; internet service provider account; email address; and, computer, unless given written approval by JCTT for additional nominated items / services
		10	Consider in good faith, participating in counselling or education related to spiritual, emotional and physical wellbeing with a suitably qualified counsellor or recognised religious leader, as nominated by the subject
	CONFIMED ON 30 NOVEMBER 2015		Controls numbered 1, 2, 8, 9, and 10 of the orders were amended during the term of interim control order, by consent of the JCTT Coordinator, and confirmed as amended. Control 10 was removed, and details of controls 1, 2 ,8, 9 were amended to account for change in circumstances and add additional communication services.

SUBJECT	INTERIM CONTROL ORDER ISSUED ON	CONDITION	SUMMARY
CO6	10 SEPTEMBER 2015		
		1	Remain at specified premises between 12.00am and 5:00am each day
		2	Allow tracking device to be fitted – and checked
		3	Wear — and keep in good working order — a tracking device Prohibition on removing or tampering with tracking device
		4	Prohibition from being in specified areas including: airports / ports with international departure; prison or correctional facility; a number of specific identified addresses; mosques or masjid other than one(s)specified; any residence of person named in control 8; and, outside the state.
		5	Prohibition on leaving Australia
		6	Prohibition on specified activities including: (i)acquiring, possessing, accessing, producing or supplying documentation relating to explosives, weapons and counter-surveillance; and, (ii) acquiring, possessing, accessing, accumulating, storing or producing electronic media depicting or describing any execution, beheading, suicide attack, bombing, terrorist attack, propaganda for terrorist organisation, activities of Islamic state, unless material is broadcast on free to air television, pay television, commercial cinema, or has a classification from Office of Film and Literature or is published online by Australian or foreign media outlet recognised by ACMA or Australian Press Council
		7	Prohibition on possessing certain articles and substances including: any firearm or ammunition, and any quantity of chemical not consistent with reasonable domestic use
		8	Prohibition on associating or communicating with specified individuals
		9	Prohibition on use of public phones except in an emergency Prohibition on use of satellite telephone service Limited to the use of one nominated: mobile phone; SIM card; fixed landline; VOIP service; internet service provider account; email address; and, computer, unless given written approval by JCTT for additional nominated items / services
		10	Consider in good faith, participating in counselling or education related to spiritual, emotional and physical wellbeing with a suitably qualified counsellor or recognised religious leader, as nominated by the subject

## Appendix B – Disclosure to Controlee and National Security Information

### Introduction

1. Appendix A1 summarises the process for obtaining control orders as a whole. This Appendix focuses on the main information disclosure obligations as part of the process of seeking or making a control order. The word ‘controlee’ is used to describe both a would-be and an actual controlee, according to the context.

### Disclosure Obligations Under the *Criminal Code*

2. Division 104 of the *Criminal Code* governs all control order proceedings and contains several significant information disclosure obligations (the following summary is a slightly simplified version of the provisions).
3. First, under s 104.2(3), the AFP must give the Attorney-General (when seeking the consent of the Attorney-General to request an interim control order):
  - a draft of the interim control order to be requested;
  - a statement of the facts relating to why the order should be made (and any known facts as to why the order should not be made);
  - any information at hand regarding the person’s age; and
  - a summary of the grounds on which the order should be made.
4. Section 104.2(3A) provides that the summary of the grounds on which the order should be made does not require information to be included if disclosure of that information is likely to prejudice national security within the meaning of the NSI Act.
5. Under s 104.5(1), an interim control order made by an issuing court must contain a range of terms, including a summary of the grounds on which the order is made.
6. Section 104.5(2A) provides that the summary of the grounds on which the order is made contained within the order does not require information to be included if disclosure of that information is likely to prejudice national security within the meaning of the NSI Act.
7. Under s 104.12A(2)(a), if the AFP elects to confirm an interim control order, the AFP must serve personally on the controlee:
  - a copy of the prior notification of an interim control order (already required to have been served personally on the controlee);
  - a copy of:
    - the statement of the facts relating to why the order should be made (and any known facts as to why the order should not be made) given by the AFP to the Attorney-General; and
    - the explanation as to why each of the proposed obligations, prohibitions or restrictions should be imposed on the controlee (and any known explanation as to why the proposed obligations, prohibitions or restrictions should not be imposed) given by the AFP to the issuing court in connection with the interim control order; and
  - any other details required to enable the controlee to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the order.



8. Under s 104.12A(2)(b), if the controlee is a resident of Queensland, or the issuing court is in Queensland, the AFP must give a copy of the documents to be provided to the controlee under s 104.12(2)(a) to the Queensland public interest monitor.
9. Section 104.12A(3) provides that s 104.12A(2) does not require any information to be served or given if disclosure of that information is likely to:
  - prejudice national security within the meaning of the NSI Act;
  - be protected by public interest immunity;
  - put ongoing operations by law enforcement agencies or intelligence agencies at risk; or
  - put at risk the safety of the community, law enforcement officers or intelligence officers.
10. As can be seen from the summary above, each of the significant information disclosure obligations described above is subject to an exception for information, the disclosure of which is likely to prejudice national security within the meaning of the NSI Act. As such, there is presently no legislated, guaranteed minimum disclosure requirement.
11. Having said that, the ordinary rules of evidence apply in relation to control order proceedings before issuing courts. Thus, according to the Government, including through the Explanatory Memorandum to the 2015 Bill, an issuing court cannot presently make a control order based on material which a controlee has not seen. This is a debatable proposition as discussed in the body of the Report in relation to recommendations 30 and 31.

#### **Current Impact if the NSI Act is Invoked**

12. The NSI Act applies to relevant civil proceedings (including control order proceedings) where the Act is invoked by the Attorney-General, giving notice by way of a certificate to a ‘potential discloser’.
13. The NSI Act originally applied only to criminal proceedings. The Explanatory Memorandum explained the aim of the Bill as follows:

*The National Security Information (Criminal Proceedings) Bill 2004 (the Bill) seeks to protect information from disclosure during a proceeding for a Commonwealth offence where the disclosure is likely to prejudice Australia’s national security...*

*The existing rules of evidence and procedure do not provide adequate protection for information that relates to, or the disclosure of which may affect, national security, where that information may be adduced or otherwise disclosed during the course of a federal criminal proceeding.*

*Prosecutions for espionage, treason, terrorism and other security-related crimes may require the disclosure of such information to persons who are not security cleared, including members of a jury. As a consequence, the Commonwealth may be faced with a choice between accepting the damage resulting from the disclosure of information or protecting the information by abandoning the prosecution.*

*The Bill is designed to provide a procedure in cases where information relating to, or the disclosure of which may affect, national security could be introduced during a federal criminal proceeding. The aim of the Bill is to allow this information to be introduced in an edited or summarised form so as to*

*facilitate the prosecution of an offence without prejudicing national security and the rights of the defendant to a fair trial.*<sup>1</sup>

14. That principle was extended to civil proceedings with the introduction of pt 3A to the NSI Act in 2005.
  15. The NSI Act provides broadly for the protection of, and dealings with, national security information and operates in outline as follows:
    - The Attorney-General has a general right to be heard in relation to issues arising in relevant criminal or civil proceedings which relate to national security information.<sup>2</sup>
    - A party to such proceedings is obliged, as soon as practicable, to notify the Attorney-General where the party believes that national security information will be disclosed during the proceedings (unless the Attorney-General has notified the party already).<sup>3</sup>
    - The Attorney-General may certify that national security information, whether to be provided in documentary form or by a witness, requires protection and that the information may not be provided, or may be provided ‘in an edited or summarised form’ (to use the language of the explanatory memorandum, extracted above).<sup>4</sup>
    - In response to the certificate, the court must hold a closed hearing (while the substantive proceedings are on hold, and with tight controls over who may be present) to determine what is to be done in relation to the national security information.<sup>5</sup>
    - The court may order that national security information not be provided, or be provided in an edited or summarised form. Sections 31(2) (criminal proceedings) and 38L(2) (civil proceedings) of the NSI Act provide that a court may order that the information be disclosed in the following form:
      - (d) a copy of the document with the information deleted; or*
      - (e) a copy of the document with the information deleted and a summary of the information, as set out in the order, attached to the document; or*
      - (f) a copy of the document with the information deleted and a statement of facts, as set out in the order, that the information would, or would be likely to, prove, attached to the document.*
- Information provided in an edited or summarised form is admissible provided the fuller version of what is edited or summarised would itself be admissible in the proceedings.<sup>6</sup>
- The NSI Act enables the Attorney-General and parties to proceedings to agree on arrangements (which the relevant court may sanction) for the protection of national security information.<sup>7</sup>
  - In some circumstances, access to national security information by a party to the proceedings, or by the party’s legal representative, may turn on the relevant person holding a security clearance.<sup>8</sup>

<sup>1</sup> Explanatory Memorandum, National Security Information (Criminal Proceedings) Bill 2004, p 1.

<sup>2</sup> NSI Act ss 20A (criminal proceedings) and 38AA (civil proceedings).

<sup>3</sup> NSI Act ss 24 (criminal proceedings) and 38D (civil proceedings).

<sup>4</sup> NSI Act ss 26, 28 (criminal proceedings), 38F and 38H (civil proceedings).

<sup>5</sup> NSI Act ss 27, 29–36 (criminal proceedings) and 38G, 38J–38P (civil proceedings).

<sup>6</sup> NSI Act ss 31(3)–(5) and 38L(3)–(5).

<sup>7</sup> NSI Act ss 22 (criminal proceedings) and 38B (civil proceedings).

<sup>8</sup> NSI Act ss 29(3), 29(5) (criminal proceedings) and 38I(3), 38I(9) (civil proceedings).

- The Act does not facilitate the tender of information that is withheld from a party on national security grounds otherwise than in an edited or summarised form. Under pt 3A, if the national security information cannot be disclosed in an edited or summarised form then it cannot be disclosed or tendered in evidence.

### Impact if the NSI Act is Amended as Proposed and Invoked in Control Order Proceedings

16. The 2015 Bill would amend the operation of the NSI Act when that Act is invoked in control order proceedings, in the manner set out in sch 15 to that Bill.
17. The principal difference from the existing regime is that the court is empowered to make three types of orders in control order proceedings under div 104 of the *Criminal Code*,<sup>9</sup> having the following effect:
  - the controlee may be provided with an edited or summarised form of the national security information, although the court may consider all of the information in the original source document;<sup>10</sup>
  - the controlee may not be provided with any information, however the court may still consider all of the information;<sup>11</sup> and
  - the information provided by a witness need not be disclosed to the controlee however the court may consider all of the information provided by the witness.<sup>12</sup>
18. Leaving aside the power of the court to control its own processes and to stay proceedings, the main substantive safeguard proposed in relation to disclosure of information to a controlee is that the court must be satisfied, before making such an order, that the controlee has been given  
*... notice of the allegations on which the control order request was based (even if the relevant person has not been given notice of the information supporting those allegations).*<sup>13</sup>
19. Further under proposed s 38J(5), in determining whether to make any of the orders under proposed s 38J, the court must consider:
  - the risk of prejudice to national security, having regard to the Attorney-General's certificate;
  - whether the order will have a substantial adverse effect on the substantive control order hearing; and
  - any other matter the court considers relevant.
20. Under the proposed changes, a court will not be compelled to make one of the new orders under the NSI Act, in which case, the court must make an order under the existing regime which applies to all civil proceedings.<sup>14</sup>
21. The principal substantive provisions of Schedule 15 are contained in proposed s 38J and are as follows:

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<sup>9</sup> Proposed s 38J of the NSI Act would apply only in relation to control order proceedings, which are otherwise dealt with in div 104 of the *Criminal Code*.

<sup>10</sup> Proposed s 38J(2) of the NSI Act.

<sup>11</sup> Proposed s 38J(3) of the NSI Act.

<sup>12</sup> Proposed s 38J(4) of the NSI Act.

<sup>13</sup> See, proposed s 38J(1)(c) of the NSI Act.

<sup>14</sup> Proposed s 38J(7) of the NSI Act.

### **38J Special court orders in control order proceedings**

When this section applies

(1) This section applies if:

- (a) the court has held a hearing required by subsection 38G(1) or 38H(6) about the disclosure of information in a proceeding under Division 104 of the Criminal Code relating to a request (the **control order request**) to the court to make, confirm or vary a control order in relation to a person (the **relevant person**); and
- (b) the Attorney-General or the Attorney-General's legal representative has requested the court to make an order under subsection (2), (3) or (4) of this section about the disclosure and consideration of the information in the proceeding; and
- (c) the court is satisfied that the relevant person has been given notice of the allegations on which the control order request was based (even if the relevant person has not been given notice of the information supporting those allegations).

Non-disclosure certificate hearings

(2) If the hearing was required by subsection 38G(1) and the information is in the form of a document, the court may order under this subsection that:

- (a) the following persons must not, except in permitted circumstances or in accordance with this subsection, disclose the information (whether in the proceeding or otherwise):
  - (i) any person to whom the certificate mentioned in subsection 38F(2) or (3) was given in accordance with that subsection;
  - (ii) any person to whom the contents of the certificate have been disclosed for the purposes of the hearing;
  - (iii) any other specified person; and
- (b) those persons may disclose in the proceeding:
  - (i) a copy of the document with the information deleted; or
  - (ii) a copy of the document with the information deleted and a summary of the information, as set out in the order, attached to the document; or
  - (iii) a copy of the document with the information deleted and a statement of facts, as set out in the order, that the information would, or would be likely to, prove attached to the document; (which disclosure may or may not be the same as was permitted in the certificate); and
- (c) the information may be disclosed to the court in the proceeding; and
- (d) the closed hearing requirements in section 38I are to apply when the information is disclosed to the court at a hearing in the proceeding; and
- (e) if the information is disclosed to the court in the proceeding and, apart from the order, the information is admissible in evidence in the proceeding—the court may consider the information in the proceeding, even if the information has not been disclosed to the relevant person or the relevant person's legal representative.

(3) If the hearing was required by subsection 38G(1), the court may, regardless of the form of the information, order under this subsection that:

- (a) any of the following persons must not, except in permitted circumstances or in accordance with this subsection, disclose the information (whether in the proceeding or otherwise):
  - (i) any person to whom the certificate mentioned in subsection 38F(2) or (3) was given in accordance with that subsection;

(ii) any person to whom the contents of the certificate have been disclosed for the purposes of the hearing;

(iii) any other specified person; and

(b) the information may be disclosed to the court in the proceeding; and

(c) the closed hearing requirements in section 38I are to apply when the information is disclosed to the court at a hearing in the proceeding; and

(d) if the information is disclosed to the court in the proceeding and, apart from the order, the information is admissible in evidence in the proceeding—the court may consider the information in the proceeding, even if the information has not been disclosed to the relevant person or the relevant person’s legal representative.

#### *Witness exclusion certificate hearings*

(4) If the hearing was required by subsection 38H(6) in relation to the calling of a witness in the proceeding, the court may order under this subsection that:

(a) the relevant person and the relevant person’s legal representative must not call the witness at a hearing in the proceeding; and

(b) the closed hearing requirements in section 38I are to apply if the witness is called at a hearing in the proceeding.

#### *Factors to be considered by court*

(5) The court must, in deciding whether to make an order under subsection (2), (3) or (4), consider the following matters:

(a) whether, having regard to the Attorney-General’s certificate, there would be a risk of prejudice to national security if:

(i) where the certificate was given under subsection 38F(2) or (3)—the information were disclosed in contravention of the certificate; or

(ii) where the certificate was given under subsection 38H(2)—the witness were called;

(b) whether any such order would have a substantial adverse effect on the substantive hearing in the proceeding;

(c) any other matter the court considers relevant.

#### *Proceedings relating to making and confirming control order*

(6) If the court makes an order under subsection (2), (3) or (4) in relation to a proceeding for the making of a control order in relation to the relevant person, then the order under that subsection also applies in relation to a proceeding for the confirmation of the control order in relation to the person.

#### *If order is not made*

(7) If the court decides not to make an order under subsection (2), (3) or (4), then the court must make an order under section 38L.

## Appendix C – Conduct of Review

An advertisement calling for submissions was placed in the *Financial Review* on 21 August 2015, and the *Australian* on 22 August 2015.

Public submissions were received from (in order of receipt):

- The Attorney General’s Department;
- Australian Human Rights Commission;
- Australian Federal Police;
- Marque Lawyers;
- Gilbert and Tobin Centre of Public Law;
- Dr Tamara Tulich (University of Western Australia);
- Professor Clive Walker;
- Law Council of Australia;
- Federal Court of Australia;
- Federal Circuit Court of Australia; and
- Professor Clive Walker (Supplementary Submission).

The INSLM held a public hearing on 16 December 2015. A transcript of the proceedings is available from the INSLM’s website: <https://www.dpmc.gov.au/pmc/about-pmc/core-priorities/independent-national-security-legislation-monitor/inslm-current-inquiries>

The INSLM also held private consultations with:

- the Hon James Allsop, Chief Justice of the Federal Court of Australia;
- the Parliamentary Joint Committee on Intelligence and Security;
- the Law Council of Australia
- the Australian Federal Police; and
- the Commonwealth Department of Public Prosecutions

The first part of the Report focusing on Special Advocates and the Counter Terrorism Legislation Amendment Bill (No 1) 2015 was delivered on 29 January 2016.

The co-operation of the Australian Federal Police is acknowledged as is the excellent support from staff, particularly from Senior Adviser, Mr Mark Mooney.