

CONTROL ORDER SAFEGUARDS –
(INSLM REPORT) SPECIAL
ADVOCATES AND THE COUNTER-
TERRORISM LEGISLATION
AMENDMENT BILL (NO 1) 2015

The Hon Roger Gyles AO QC

January 2016

Control Order Safeguards (INSLM) Report
Special Advocates and the Counter-Terrorism
Legislation Amendment Bill (No 1) 2015

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Australian Government

Independent National Security Legislation Monitor

THE HON ROGER GYLES AO QC

ONE NATIONAL CIRCUIT
BARTON ACT

29 January 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

For the reasons explained in my letter of 16 December 2015, pursuant to section 30 of the *Independent National Security Monitor Act 2010* I give you herewith the first 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 2013 Council of Australian Governments Review of Counter-Terrorism Legislation (the COAG Review) recommendation in relation to special advocates is as follows:

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.¹

- 1.3 The Parliamentary Joint Committee on Intelligence and Security (PJCIS) recommended that the INSLM ‘consider whether the additional safeguards recommended in the 2013 Council of Australian Governments Review of Counter-Terrorism Legislation should be introduced. Particular consideration should be given to the advisability of introducing a system of ‘Special Advocates’ into the Regime.’²

- 1.4 Other relevant safeguards are not considered in this part of the Report.

- 1.5 The Reference from the former Prime Minister assumes the continued availability of control orders following the amendments to Division 104 of the Schedule to the *Criminal Code Act 1995* (*Criminal Code*) in 2014. Control orders have been a controversial remedy. The previous INSLM, Bret Walker SC, recommended that they be abolished.³ That was not accepted. Some submissions to this inquiry contain prior calls for abolition and highlight alleged flaws in the control order regime.⁴ There is a duty to review the control order legislation pursuant to the INSLM Act apart

¹ *Council of Australian Governments Review of Counter-Terrorism Legislation 2013*, p 97.

² Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014*, November 2014, Recommendation 1.

³ Independent National Security Legislation Monitor, *Declassified Annual Report 20th December 2012*, Recommendation II/4.

⁴ Gilbert and Tobin Centre of Public Law has recommended the abolition of control orders (18 September 2015, Annexure 2, page 4, Recommendation 19). The Law Council of Australia also has recommended repeal of the

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 PJCIS is currently considering the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (the 2015 Bill), which includes amendments to the control order regime, and is due to report in February 2016.
- 1.7 The PJCIS has asked for my views in relation to special advocates in that context to be provided by 1 February 2016.
- 1.8 Hearings and consultations on the Reference concluded in December 2015. Preparation of the Report on the Reference is in train but will not be completed by 1 February. In these circumstances it is appropriate to deliver the first part of the Report relating to special advocates, in the context of the 2015 Bill, to the Prime Minister, in accordance with section 30 of the INSLM Act.
- 1.9 Because of the purpose and timing of this part of the Report, a knowledge of the current legislation governing control orders, the history and operation of that legislation and the commentary about it, as well as the contents of the 2015 Bill and the Explanatory Memorandum (EM), will be assumed. I have taken into account the report of the Parliamentary Joint Committee on Human Rights on this Bill.⁵ This Report will be more succinct than may otherwise have been the case.

2 The 2015 Bill

- 2.1 This is not a report on the 2015 Bill. However, three aspects of the 2015 Bill bear upon the case for special advocates.
- 2.2 The first aspect is Schedule 2 dealing with control orders for young people. These amendments are controversial and, if passed, will require careful monitoring. For present purposes, the point of interest is the obligation for the court to make an order appointing a lawyer to be the court appointed advocate of the young person.⁶ At first sight this might be thought to provide some guidance in relation to special advocates generally. That possibility can be dismissed once the role

control order regime (30 September 2015, page 3). The Australian Human Rights Commission (AHRC) raise concerns that the control order regime may be in breach of the right to: arbitrary detention, privacy, rights to freedom of movement, expression and association, found in articles 9, 17, 12, 19 and 22 of the International Convention on Civil and Political Rights (ICCPR), respectively. The AHRC is also concerned that control orders do not provide effective review procedures (17 September 2015, p 2). See also Michael Bradley, *Marque Lawyers* (18 September 2015, p 1) and Lisa Burton and George Williams, 'What future for Australia's Control Order Regime' (2013) *Public Law Review* Vol 24, pp 182-208.

⁵ Parliamentary Joint Committee on Human Rights, *Thirty-second report of the 44th Parliament*, 2015, pp 3-38.

⁶ Proposed section 104.28AA of the *Criminal Code* (see Schedule 2 of the 2015 Bill).

of the advocate is considered. The EM neatly describes the position – the advocate is not the young person’s representative and is not obliged to act on the instructions of the young person – rather the advocate is an independent party who is responsible for representing the best interests of the young person rather than the expressed wishes of the young person. The advocate may even disclose information communicated by the young person to the court against the wishes of the young person. The advocate must form an independent view of what is in the best interests of the young person and suggest to the court the adoption of a course of action that the advocate believes to be in the best interests of the young person (EM paras 89-97). It is contemplated that the lawyer might argue for a control order to be made and that evidence obtained from the child could be used to support that outcome. It is not unreasonable to see that procedure as potentially being an aid to investigation by the authorities.

- 2.3 That procedure is adapted from sections 68L and 68LA of the *Family Law Act 1975* which principally apply in custody cases. In those cases there will be a choice as to the best arrangements for custody and access involving an assessment of the suitability of the potential custodians – usually parents or close relatives. A child may well have emotional attachments that cloud his or her attitude or may be too young to be able to form a sensible view. Furthermore, a child is not a party to family law proceedings. It is a large step to move from that context to one where the proceeding is against the child and the choice is whether or not to impose an intrusive control order with criminal liability for breach. It is also odd, to say the least, that the parents who ordinarily would have the custody and control of the young person have no responsibilities in relation to control orders.
- 2.4 The second aspect is monitoring compliance with control orders pursuant to Schedules 3, 8, 9 and 10 of the 2015 Bill. Monitoring compliance seems a reasonable concept, but reading these schedules brings home forcibly the extent of intrusion into life and liberty by the making of a control order. The mere existence of the order is a trigger for monitoring.⁷ The details of the potential monitoring blur, if not eliminate, the line between monitoring and investigation. The case for control orders is weakened if control orders are of little utility without such far reaching surveillance. It is difficult to imagine such provisions being applied to an accused on bail. The significance for present purposes is to emphasise the seriousness of the impact upon a person of the grant of a control order if these changes come into force and the consequent necessity for proper safeguards of the interests of a potential controlee.
- 2.5 The third aspect is the amendment to the way in which national security information is dealt with in control order proceedings by the proposed amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) by Schedule 15 of the 2015 Bill, particularly proposed s 38J. This aspect has the most direct impact upon the potential role of a special

⁷ See, for example, proposed ss 3ZZKA (1)(f); 3ZZKE (2)(d), 3ZZLA, 3ZZOA, and 3ZZOB of the Crimes Act which concern police search powers in relation to control orders (see Schedule 8 of the 2015 Bill). There are related proposed legislative amendments in the 2015 Bill concerning the use of tracking devices, telecommunications interception and surveillance devices.

advocate. Firstly, the court is expressly authorised to consider information that has not been disclosed to the target of a control order request or that person's legal representative (proposed ss 38J(2)(e) and 38J(3)(d)). Secondly, the target may be either precluded from calling a witness who may be able to give exculpatory evidence or be excluded from a hearing if the witness gives evidence.⁸ Thirdly, redactions, summaries and particulars of information may not be fair to the target.

2.6 It is accepted for the purposes of this Report that these consequences are new. Whether that is so will be addressed in the next part of this Report. Further, this Report does not address the reason for making this change now. The justification in the EM (paras 748-749) existed in 2005 if it exists now. The EM does not explain why control order proceedings are singled out for special treatment or what happens if the NSI Act is not invoked by the Attorney-General. It is worth remarking that no information was withheld by the applicant for a control order from the respondent in any of the four recent control order cases and that no proposal for an application for a control order has been abandoned by the Australian Federal Police because of the prospect of the need to deal with sensitive information.⁹ Indeed, it appears that over recent years there have been no contested NSI Act hearings in any context, as agreements pursuant to s 22 of the Act have been entered into.¹⁰

2.7 There is some amelioration of the impact of this amendment upon the respondent/target. The court needs to be satisfied that the target has been given notice of the allegations on which the control order request was based, even if that person has not been given notice of the information supporting those allegations (proposed s 38J(1)(c)). 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 (proposed s 38J(5)). There are different closed hearing requirements if the party or the legal representative of the party has a sufficient security clearance (proposed s 38I). On the substantive hearing the court retains power to control proceedings (*Criminal Code* s 104.14(2)) including the grant of a stay by reason of abuse of process (NSI Act ss 19(3)-(5)). It is contended in the EM that the provisions of the *Criminal Code* such as s 104.12A ensure that the target knows the case to be made, but each is subject to a carve out of national security (and other) information.

⁸ Proposed s 38J(4) of the NSI Act (see Schedule 15 of the 2015 Bill).

⁹ Oral submission to the INSLM Inquiry into Additional Safeguards into the Control Order Regime, Australian National University, Canberra, 16 December 2015, pp 4 – 5, Assistant Commissioner Gaughan, AFP.

¹⁰ Oral submission to the INSLM Inquiry into Additional Safeguards into the Control Order Regime, Australian National University, Canberra, 16 December 2015, p 12, Attorney General's Department Official, Attorney General's Department.

- 2.8 The serious impact of the restrictions that can be imposed pursuant to proposed s 38J remain. The amelioration of them might arguably save the provision from constitutional invalidity¹¹ and non-compliance with Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR)¹² but honouring the principles of open justice, a fair trial, a fair hearing and the equality of arms may not be achieved. Any reasonable means of improving the imbalance should be taken. That is the reasonable price to be paid for the maintenance of secrecy.
- 2.9 Would the provision of a special advocate along the lines recommended by the COAG committee, who can have access to the information that is contended should be withheld, be such a means? The answer is in the affirmative. The objection in principle to special advocates is that they give a veneer of fairness to an inherently unfair and unnecessary process. That objection may be passed over in considering this Reference as it is in substance an attack on control orders. It is also suggested that there are practical limitations on the utility of the role.

3 UK experience

- 3.1 In this context the United Kingdom (UK) experience comes into focus. It does not appear to have been appreciated in some of the commentary that, by contrast with the UK, control orders in Australia are an exercise of federal judicial power governed by the ordinary rules of procedure including the laws of evidence. There is no admission of pure intelligence information. The normal rights of appeal also apply.
- 3.2 The detail of the UK legislation has changed from time to time and differs from our legislation. Control orders were first introduced in the UK with the advent of the *Prevention of Terrorism Act 2005* (UK) (PTA Act). Following this, a review of counter-terrorism and security powers in 2010, led to the passage of the *Terrorism Prevention and Investigation Measures Act 2011* (UK) (TPIM Act). TPIMs are similar to control orders in purpose. Experience there provides the only

¹¹ The use of 'secret' evidence in control order proceedings did not arise in *Thomas v Mowbray* (2007) 233 CLR 307 (see Gleeson CJ at [31] and Gummow & Crennan JJ at [125]. Kirby J (in dissent) discusses the issues including special advocates at [364]-[365] and [377]. The issue has since arisen in a series of cases in the High Court dealing with criminal organisations culminating in *Assistant Commissioner Condon v Pompano Pty Limited* (2013) 252 CLR 38, where it was decided that there is no universal rule that a court cannot take into account evidence that is withheld from a party. For a discussion of this line of authority see Greg Martin 'Outlaw of Motorcycle Gangs and Secret Evidence: Reflections on the Use of Criminal Intelligence in the Control of Serious Organised Crime in Australia' (2014) 36 (3) *Sydney Law Review* 501. See also Andrew Lynch, Tamara Tulich and Rebecca Welsh, 'Secrecy and Control Orders: the Role and Vulnerability of Constitutional Values in the United Kingdom and Australia' in David Cole, Federico Fabbrini and Arianna Vedeschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (2013, Edward Elgar) 154.

¹² See EM for 2015 Bill paragraphs [125]-[138] and Parliamentary Joint Committee on Human Rights, *Thirty-second report of the 44th Parliament*, 2015, pp 3-38.

substantial body of empirical evidence as to how special advocates might act as a safeguard in NSI Act proceedings affecting control order applications.

- 3.3 Under the TPIM Act, the Secretary of State cannot apply to the court to withhold closed material from the relevant party unless a special advocate has been appointed. The special advocate may challenge the application in which case the court conducts a preliminary hearing to determine the application. If permission is granted and the relevant party is excluded, the special advocate represents the interests of the party at the substantive hearing by making submissions adducing evidence and cross examining witnesses. The special advocate may not communicate with the relevant party or their legal representative after being served any closed material. The special advocate may request directions from the court authorising him/her to communicate with the relevant party, in which case the court must notify the Secretary of State who can object to the proposed communication.¹³
- 3.4 There has been controversy as to the efficacy of the special advocates system,¹⁴ some of the criticism emanating from the special advocates.¹⁵ A working group was established, to be chaired by a High Court Judge (Mitting J), to discuss procedural and timing concerns in the closed material aspect of TPIM litigation and to seek solutions and/or make recommendations for improvements. No output has emerged yet. The UK Independent Reviewer of Terrorism Legislation, David Anderson QC, generally supports the role of the special advocate.¹⁶

4 Decision in principle

- 4.1 I do not doubt the utility of the role of special advocate in control order proceedings, even if access to the respondent party is limited. My experience as defence counsel is that it is possible to play a useful role in testing the prosecution case where no positive defence can be put forward on behalf of an accused. My experience as counsel, Royal Commissioner and judge is that a contradictor plays a vital role in any decision making, particularly judicial or quasi-judicial decision making. A special advocate can make submissions, for example as to: the extent to which the

¹³ Part 80 of the *Civil Procedure Rules*, Proceedings under the TPIM Act.

¹⁴ See for example the following: Trent Glover 'Public Interest Immunity Claims in National Security Trials and the Role of Special Counsel' (2009) 33 (6) *Criminal Law Journal* 309; Adam Tomkins, 'Justice and Security in the United Kingdom' (2014) 47 (3) *Israel Law Review* 305; Tamara Tulich, 'Adversarial Intelligence? Control Orders, TPIMS and Secret Evidence in Australia and the United Kingdom' (2012) 12 (2) *Oxford University Commonwealth Law Journal* 341; John Ip 'The Rise and Spread of the Special Advocate' (2008) Winter *Public Law Journal* 717; Aileen Kavanagh 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73 (5) *The Modern Law Review* 824; Nicholas Phillip 'Closed Material' *London Review of Books* 17 April 2014.

¹⁵ Special Advocates Memorandum on the Justice and Security Bill submitted to the Joint Committee on Human Rights, 14 June 2012; United Kingdom Special Advocates, Response to Consultation From Special Advocates, *Justice and Security Green Paper*, 16 December 2011.

¹⁶ David Anderson QC (Independent Reviewer of Terrorism Legislation), *Terrorism Prevention and Investigation Measures in 2012* (2013), 9.31; Mr Anderson has not recommended abolition of special advocates.

information needs to be protected if at all; the most helpful way of redacting the information and providing summaries or particulars of it; and the admissibility of the information and the lack of, or limited, probative value the information might have to support the case for the orders. The special advocate will have access to all of the evidence and can put the withheld evidence into context. A special advocate should be available without charge to the party wherever evidence is proposed to be withheld from a party on national security grounds. That facility would assist in satisfying the constitutional requirement for procedural fairness and in complying with international obligations. The involvement of a special advocate in the NSI Act proceedings should not introduce any undue delay in control order proceedings as special advocates will only be involved in those cases where proposed s 38J of the NSI Act is invoked and should not require any additional steps to be taken.

5 Australian Precedents

- 5.1 The broad concept is not novel in Australia. The courts may appoint counsel ad hoc as amicus curiae to ensure that a point of view is put, although amicus curiae does not normally advocate for a party. In *R v Lodhi* Whealy J (as he then was) contemplated the ad hoc appointment of a special advocate in relation to national security information.¹⁷
- 5.2 The Public Monitors of Victoria and Queensland play a role in relation to various law enforcement mechanisms but generally do not advocate for a party.¹⁸ Other similar roles include the Queensland Criminal Organisation Public Interest Monitor¹⁹ and the New South Wales Criminal Intelligence Monitor.²⁰ The Queensland Monitor has a role in the control order legislation. If the controlee is a resident of Queensland, or if the control order was made in Queensland, the Queensland Public Interest Monitor must be given a copy of the interim control order²¹ and notice to elect to confirm or not confirm the order along with any supporting documents.²² If the controlee or the AFP apply for a revocation or variation of a control order the controlee or the AFP must notify the Queensland Public Interest Monitor if the subject is a resident of Queensland

¹⁷ *Regina v Faheem Khalid Lodhi* [2006] NSWSC 586; *State of New South Wales v Public Transport Ticketing Corporation (No 3)* [2011] NSWCA 200. See also *Regina v Khazaal* [2006] NSWSC 1061; *P Dawson Nominees Pty Limited v ASIC (No 2)* [2009] FCA 413 at [26]; *AVS Group of Companies Pty Ltd v Commissioner of Police* [2010] NSWSC 109.

¹⁸ The QLD Public Interest Monitor is governed by the *Police Powers and Responsibilities Act 2000* (Qld), *Crime and Corruption Act 2001* (Qld) and *Telecommunications Interception Act 2009* (Qld). The Victorian Public Interest Monitor is governed by the *Public Interest Monitor Act 2011* (Vic). An ACT Public Interest Monitor is provided for by the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) but no appointment has been made. An explanation of the various monitors can be found in the Attorney General's Department (AGD) supplementary submission to the PJCIS (January 2016).

¹⁹ Under the *Criminal Organisation Act 2009* (Qld).

²⁰ Under the *Crimes (Criminal Organisations Control) Act 2012* (NSW).

²¹ *Criminal Code* s 104.12.

²² *Criminal Code* s 104.12A.

or if the court will hear the application in Queensland.²³ The Queensland Public Interest Monitor also has a right to make submissions and adduce evidence in relation to the confirmation of an interim control order or revocation or variation of a confirmed control order.²⁴

- 5.3 The *Telecommunications (Interception and Access) Act 1979* (TIA Act) provides a recent example of that kind of role. It creates the role of ‘Public Interest Advocate’ in connection with access under the TIA Act to certain information relating to a journalist. Section 180X of the TIA Act requires the Prime Minister to declare one or more persons to be a Public Interest Advocate. The role is to make submissions to the Minister or an issuing authority, respectively, relevant to a decision whether to issue a ‘journalist information warrant’ applied for by ASIO or an issuing authority, respectively, and the conditions or restrictions (if any) that are to be specified in any such warrant. In broad terms, a journalist information warrant is required to authorise access to telecommunications data associated with a journalist where a purpose of the authorisation would be to identify a person known or reasonably believed to be the source of the journalist.
- 5.4 The *Telecommunications (Interception and Access) Regulations 1987* (the TIA Regulations) provide further detail about Public Interest Advocates. Public Interest Advocates are appointed for a term and will be either a security cleared Queens or Senior Counsel or a retired judge of certain courts (Regs 13, 14). Appointments to date have been retired judges.²⁵ An applicant for a journalist information warrant is required to seek submissions from a Public Interest Advocate and any submissions made by him or her (written or at a hearing) are relevant to the decision whether to issue the warrant. For example, in relation to a warrant sought by ASIO, the Minister must not issue the warrant unless satisfied, among other things, that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source – having regard, among other things, to any submissions made by a Public Interest Advocate. Regulation 9(2) of the TIA Regulations provides:

The Public Interest Advocate must include in the submission the facts and considerations he or she considers:

(a) are relevant to one or both of the following:

(i) the decision whether to issue a journalist information warrant (including any facts and considerations which support the conclusion that a journalist information warrant should not be issued);

(ii) the decision about the conditions or restrictions (if any) that are to be specified in the warrant; and

(b) have not been satisfactorily addressed in the proposed request by the Director-General of Security or application by the enforcement agency.

²³ Criminal Code s 104.18 and 104.19.

²⁴ *Criminal Code* s 104.14, 104.19 and 104.23.

²⁵ Attorney General’s Department Supplementary Submission to the PJCS, *Inquiry into the Counter-Terrorism Legislation Amendment Bill (No 1) 2015*, January 2016, p 36, Schedule 15.

(3) Subregulation (2) does not limit the facts or considerations that the Public Interest Advocate may include in his or her submission.

Similar provisions apply to oral submissions at a hearing see (reg. 10 (3)).

6 Support for Special Advocates

- 6.1 The recommendation of the COAG Review in favour of special advocates is entitled to be given weight as such, particularly as it was chaired by the Hon. Anthony Whealy QC, a former judge with considerable experience in terrorism trials. The former INSLM, Bret Walker SC, did not recommend special advocates either in relation to control orders or the NSI Act. He recommended the abolition of control orders. He did not suggest that the appointment of special advocates should not remain of active interest.²⁶
- 6.2 The Law Council of Australia and the Australian Human Rights Commission submissions are each in favour of special advocates on the assumption that control orders are retained. The New Zealand Law Commission has recently comprehensively reported on the general topic of the handling of security information and reviewed the UK experience including a visit to the UK. It recommends a system of special advocates.²⁷ The support of the UK Reviewer of Terrorism has been noted.

7 What kind of advocate?

- 7.1 There is a choice as to the method of providing the advocate. The UK system is to have a pool of security cleared counsel with the party having a choice of counsel. That has the advantage that the experience and ability of the counsel would be known and counsel would be accustomed to acting for a party. The alternative approach would take the various Public Interest Monitors and Advocates as a guide. As noted, the Queensland Monitor is involved now. The Monitor would acquire national security expertise and could be given a wider law enforcement remit. However the Monitor's role is not to advocate for a party and risks being seen by the affected parties as a part of the government bureaucracy, not to be trusted.²⁸ The COAG Review and the New Zealand Law Commission favour the UK model and I agree. It is important that the advocate should unequivocally argue for the result most favourable to the potential controlee without consideration of either the public interest or the 'best interests' of the party.

²⁶ Independent National Security Legislation Monitor, *Annual Report 7th November 2013*, Ch VII.13, p 152.

²⁷ New Zealand Law Commission, *Report 135 The Crown in Court*, December 2015, pp 111 – 112, Recommendations 30-39.

²⁸ In *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 the role of the of the Criminal Organisation Public Interest Monitor was noted and contrasted with the role of the special advocate of representing the controlee in the United Kingdom cases (Hayne, Crennan, Kiefel and Bell JJ at [112], French CJ at 655[54], 662[77] and Gageler J at 693[208]).

- 7.2 Contact between the advocate and the party is a contentious issue. Contact between the advocate and the party effectively does not occur in practice in the UK after the advocate has access to the sensitive information. Proposed communications have to be disclosed to the Crown party and the advocates will not make such disclosure.²⁹ The New Zealand Law Commission has taken a slightly more liberal view than currently applies in the UK in favouring the court overseeing the communications without disclosure to the authorities. The UK model is appropriate in the context of schedule 15 of the 2015 Bill as the NSI Act does not govern the substantive control order application. The issues in relation to the substantive application will be considered in the next part of the Report on the Reference.
- 7.3 Attention would need to be given as to means of preventing either side from using the special advocate as a reason for not arriving at sensible arrangements pursuant to s 22 of the NSI Act as has been the case to date. Use of a special advocate should be a last resort rather than becoming a routine part of the landscape.
- 7.4 The New Zealand Law Commission report is a useful introduction to other practical issues that arise.³⁰

RECOMMENDATIONS

1. 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
2. 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.

²⁹ *Civil Procedure Rules*, r 80.21.

³⁰ New Zealand Law Commission, *The Crown in Court*, 2015, pp 111-112, Recommendation 37.