



**AFP**

AUSTRALIAN FEDERAL POLICE



## Independent National Security Legislation Monitor

Inquiry into additional safeguards recommended in the 2013 Council of Australian Governments (COAG) Review of Counter-Terrorism Legislation report for the control order regime

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Submission by the  
Australian Federal Police

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## Introduction

The Australian Federal Police (AFP) welcomes the opportunity to respond to the acting Independent National Security Legislation Monitor (the acting Monitor)'s letter of 3 July 2015 regarding the inquiry into additional safeguards recommended in the 2013 Council of Australian Governments (COAG) Review of Counter-Terrorism Legislation in relation to the control order regime established by Division 104 of the Criminal Code, in particular, introducing a system of 'Special Advocates', and also including:

- the appropriate threshold in the context of seeking the Attorney-General's consent to seek a control order
- the appropriate 'issuing court' in respect of control orders
- the need for appropriate consultation with the Commonwealth Director of Public Prosecutions before requesting the Attorney-General's consent to seek a control order
- legislating a minimum standard of disclosure of information to a 'controlee'
- the provision of information concerning appeal and review rights to a person the subject of an interim control order
- the restrictions imposed on a controlee under a control order (specifically, as to place of residence, curfews and communications)
- the duration of a control order, and
- a 'least interference' test in relation to obligations and restrictions imposed by a control order.

2. The AFP made submissions and participated in briefings to the COAG Review of Counter-Terrorism Legislation, and also contributed to the whole-of-Government response to the COAG recommendations. The AFP continues to support the Government's response to the COAG Review.

## Background: Use and purpose of control orders

3. The terrorism threat environment is fluid and evolving. The domestic threat environment has changed in recent years due to several factors, culminating in the raising of the terror alert level to high on 12 September 2014.

4. The frequency and speed of radicalisation is increasing, both online and face-to-face. In addition, terrorist acts are increasingly perpetrated by smaller groups or individuals who may radicalise rapidly and then engage in relatively short term planning for opportunistic attacks of a smaller scale. These changes increase the challenge for law enforcement to detect and prevent terrorist threats, as the number of individuals under investigation and the severity of the threat are also increased. It is important, in this evolving environment, to review the ongoing efficacy of the tools available to address terrorist threats to the Australian community, including the control order regime.

5. In the current threat environment, police are increasingly required to act early to disrupt terrorist attacks to prevent harm to the Australian community. Control orders provide a vehicle to manage the threat in the medium term where other law enforcement responses are not available.

6. A control order is a preventative measure, and is not intended to be punitive in nature nor a substitute for prosecution. Control orders are always considered in conjunction with criminal prosecution options, and may be used as a risk mitigation tool while criminal investigations are ongoing.
7. Control orders allow police to more effectively monitor a person's movements and associations, thereby reducing the risk of future terrorist activity. Specifically, control orders can be used to:
  - prohibit a person from possessing certain articles that might be used in preparation for, or during, a terrorist attack;
  - separate a person from associates involved in terrorist activity; and
  - remove the ability and impetus of a person to perpetrate an offence.
8. To date, control orders have been infrequently used.
9. At the time of the COAG Review, control orders had been sought in relation to two individuals, Jack Thomas and David Hicks. At the time of these applications the AFP was operating in a lower threat environment. The two cases involved individuals who had been closely linked to offshore terrorism persons of interest and were determined to be high risk individuals.
10. As at September 2015, control orders have now been sought an additional four times in operations arising in the context of the recently, rapidly increasing terrorist threat. These additional control order applications have been made in an environment of heightened national threat level. All the applications for current control orders were made after the threat level increased on 12 September 2014. This is reflective of the increased operational tempo.
11. It is currently believed that approximately 120 Australians are fighting in Syria and Iraq. In addition to these, approximately thirty Australians have already returned. As the number of Australians with hands-on experience in Syria and Iraq is now several times what it was at the period of heightened conflict in Afghanistan, the security challenge posed by Australians participating in the conflict is much greater. Thirty Australians travelled to Afghanistan or Pakistan between 1990 and 2010 to train at extremist camps and/or fight with extremists. Twenty-five of these individuals returned to Australia and nineteen of those were engaged in activities of security concern following their return. Eight were subsequently convicted of terrorism-related offences, with five still serving prison sentences.
12. The AFP welcomes the acting Monitor's request to inspect the AFP records and continues to work with the acting Monitor's Office to facilitate the inspection.

## Safeguards

13. As a control order may impose significant restrictions on an individual, it is appropriate that there are stringent safeguards to ensure they are used appropriately. The AFP recognises that it is essential that the control order regime maintain an appropriate balance between the need to protect the community from harm, and the preservation of the civil liberties of persons who are considered to pose a risk to the community.

14. Accordingly, the legislation provides for a number of safeguards. These safeguards apply at each stage of the control order process, and involve a significant degree of independent, external checks and balances on the AFP's actions.

15. It is important to note that control order proceedings are subject to the inherent characteristics of openness and equality of the arms of government. In contrast to approaches in other jurisdictions, the Australian legislative regime ensures that a court maintains full control over the making of a control order and applies judicial oversight to every step of the process. Control orders are made subject to the court's inherent discretion, and the conduct of proceedings are also subject to the court's powers. The normal rules of evidence apply to control order proceedings.

16. In making applications for control orders, the AFP applies the same high standard of documentation and evidence as it does for other prosecutions and litigation, as well as meeting the specific requirements of the control order legislation.

### **Specific legislative safeguards**

17. The application process for a control order is rigorous and the applicant (a senior AFP member), the Attorney-General and the court play distinct roles, as enshrined by the legislation, in ensuring any control order imposed on the individual appropriately balances the need to protect community safety and protect the civil liberties of individuals.

### ***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; or
- the person has provided training to, received training from or participated in training with a listed terrorist organisation; or
- the person has engaged in a hostile activity in a foreign country; or
- the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act; or
- 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; or
- 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.

20. The Attorney-General must give written consent for a senior AFP member to apply for an interim control order,<sup>2</sup> and in seeking the Attorney-General's consent the applicant must

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<sup>1</sup> In the case of an urgent application, consent must be given within eight hours; if not given, the order ceases to be in force.

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.

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

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.

23. The practical effect of these requirements is that substantial documentation and evidence must be provided by the AFP for independent review and agreement by the Attorney-General even before an application for an interim order is made to a court.

***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.

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.

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 is also able to 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.

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<sup>2</sup> For an urgent application, consent must be given within eight hours and if not given, the order ceases to be in force.

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; or
- the person has provided training to, received training from or participated in training with a listed terrorist organisation; or
- the person has engaged in a hostile activity in a foreign country; or
- the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act; or
- 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; or
- 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.

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.

30. In satisfying itself of the necessity, appropriateness and proportionality of each obligation, prohibition and restriction, the court must take into account the impact of each condition on the person's individual, personal and financial circumstances. 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. The balance of probabilities standard requires the court to take into account the nature and gravity of the application and the subject matter.<sup>3</sup>

31. Once an interim control order is made, the legislation provides further safeguards, including mechanisms for judicial oversight and obligations on the AFP to ensure the control order process is as fair and transparent to the subject of the order as possible.

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. 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, and all appeal and review rights.

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<sup>3</sup> Subsection 140(2), *Evidence Act 1995*.

**Confirmation of a control order**

34. The confirmation of a control order provides a mechanism to allow a court to consider the appropriateness and continuation of an interim control order.
35. Through the confirmation process, the court has the ability 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; or
  - revoke the control order, if it is not satisfied that the grounds for the control order still exist; or
  - 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.
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.
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.
38. The subject's legal representative is able to access this information.
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.
40. Access to sensitive national security information is dealt with under the *National Security (Criminal and Civil Proceedings) Act 2004* (NSI Act) or under public interest immunity (PII). Should the NSI Act be invoked, or a PII claim be made, the subject's legal representatives are able to retain their role in proceedings and may access information as determined by the court.
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.
42. The maximum duration of a confirmed control order is 12 months, which is calculated from the time the interim control order is made. This ensures that a control order can only continue if a court is satisfied that the risks remain extant, by ensuring the court is engaged and has oversight of control orders that continue beyond 12 months.

**Requirement to notify court if grounds cease to exist**

43. Further safeguards exist in relation to confirmed control orders, which ensure that a control order and the conditions attached to an order only continue while the circumstances justifying the order and the conditions 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. Similarly, 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.

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.

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.

**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. This provides certain fundamental procedural rights for the subject of the application, such as the essential common law concepts of burdens of proof, fairness, judicial impartiality, equality of the arms of government, and rights of appeal.<sup>4</sup> The role of the court in control order proceedings is the same as for all federal civil proceedings and is not altered by the control order regime. The court retains its inherent powers and the court's discretion is not limited.

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).

49. As a matter of practice, control order applications prepared by the AFP are drafted on the best available admissible evidence, notwithstanding that hearings for interim control order applications are interlocutory proceedings, consistent with the provisional nature of the interim control orders.

**External oversight**

50. The AFP's use of the control order regime is subject to a number of external oversight mechanisms. These oversight mechanisms are both general and specific to the counter-terrorism and national security context. Aside from the acting Monitor, other key oversight mechanisms are summarised below.

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<sup>4</sup> *Thomas v Mowbray* HCA 33 (2 August 2007) at [30].

***Parliamentary oversight***

51. The Parliamentary Joint Committee on Intelligence and Security (PJCIS) is empowered to monitor and review the performance by the AFP of its functions under Part 5.3 of the Criminal Code (including control orders). Increased PJCIS oversight is a result of recent (post-COAG review) legislative amendments.

52. The AFP is also subject to general oversight by the Parliamentary Joint Committee on Law Enforcement (PJCLE), which oversees the AFP, monitors performance and reports to parliament.

***Statutory oversight***

53. The Commonwealth Ombudsman (who is also the Law Enforcement Ombudsman) performs annual reviews, ad hoc reviews, has access to AFP information and documents, and provides annual reports. The Ombudsman can investigate complaints about the actions of AFP members and about the policies, practices and procedures of the AFP as an agency.

54. The Australian Commission for Law Enforcement Integrity (ACLEI) provides independent assurance to government about the integrity of prescribed law enforcement agencies, including the AFP, and their staff members. ACLEI's primary role is to investigate law enforcement-related corruption issues. Both members of the public and AFP members may report alleged corruption to ACLEI, and the AFP Commissioner must notify the Integrity Commissioner of any corruption issues. Any information that indicates corrupt conduct has occurred, is occurring, or may be likely to occur, can be investigated by the Integrity Commissioner.

**Additional COAG recommendations**

55. The COAG Review made recommendations for the following additional safeguards in relation to the control order regime:

- introduction of special advocates
- the appropriate threshold in the context of seeking the Attorney-General's consent to seek a control order
- the appropriate 'issuing court' in respect of control orders
- the need for appropriate consultation with the Commonwealth Director of Public Prosecutions before requesting the Attorney-General's consent to seek a control order
- legislating a minimum standard of disclosure of information to a 'controlee'
- the provision of information concerning appeal and review rights to a person the subject of an interim control order
- the restrictions imposed on a controlee under a control order (specifically, as to place of residence, curfews and communications)
- the duration of a control order
- a 'least interference' test in relation to obligations and restrictions imposed by a control order.

56. The AFP notes that some recommendations have been implemented through recent law reforms. The AFP has amended its processes where required to meet these new provisions. For example, AFP guidelines have been amended clarifying the information regarding appeal and review rights which must be provided to the subject of an interim control order.

57. The AFP continues to support the Government's response to the COAG Review, and the AFP's position regarding the additional safeguards remains consistent with the Government position. Notwithstanding this position, the AFP provides the following general comments on those additional safeguards recommended by the COAG Review which have not been enacted at this time.

#### ***Special advocates***

58. The AFP understands that special advocates have been introduced in some overseas jurisdictions as a measure to afford fairness to the subject of a control order, where the subject is either not afforded legal representation during hearings, or where legal representatives are not able to hear or challenge certain sensitive information. That is, those overseas regimes contain features which are markedly different from the Australian control order process, and which therefore need to be incorporated in any comparisons.

59. As highlighted in this submission, under the current Australian control order regime, individuals the subject of control order applications are afforded the same protections as individuals in criminal and civil proceedings. The court retains judicial discretion and independent oversight, and the subject is entitled to legal representatives who have the same role, and the same right of access to the applicant's information, as in other criminal or civil proceedings.

60. Given these factors, particularly the rights afforded to the subject's legal representatives, the utility of introducing special advocates in the existing regime appears to be very limited.

#### ***Attorney-General's consent***

61. The AFP notes that this recommendation was addressed by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* which amended the wording of section 104.2(2)(a) from "considers" to "suspects".

#### ***Appropriate issuing court***

62. The AFP considers that the Federal Court and Federal Circuit Court are appropriate issuing courts for the making of control orders.

#### ***Control orders as a last resort***

63. As a matter of established practice, the AFP always consults with the Commonwealth Director of Public Prosecutions before requesting the Attorney-General's consent to seek a control order. Control orders are considered as part of the suite of tools necessary to address terrorist threats to the Australian community. They are applied for in circumstances where control orders are identified as the most appropriate method to mitigate such a threat, which is invariably where other law enforcement options are not available. In addition, the AFP engages independent counsel and solicitors for advice on any control order application.

**Minimum standard of disclosure of information**

64. In accordance with current legislative requirements, rules of court, and common law obligations, the AFP provides significant and detailed information to the subject of a control order.

65. As highlighted above, the AFP provides the subject of the control order with all 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, 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, and all the information referred to in section 104.12 regarding service and explanation (including appeal and review rights).

66. Should any further requirement be introduced, it will be important to ensure it is clearly defined and does not conflict with existing requirements.

**Appeal and review rights**

67. The AFP notes that this recommendation was implemented by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*.

**Restrictions imposed on subject of control order**

68. The AFP supports the recommendation to ensure that a prohibition or restriction imposed on the subject of a control order does not constitute a relocation order.

69. The AFP notes that the curfew recommendation was implemented in part by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*, which amended the requirement to be no more than 12 hours within any 24 hours. This is an appropriate limit allowing sufficient flexibility whilst balancing individual rights; it is also consistent with state and territory bail conditions.

70. The AFP does not support the recommendation that, other than in any exceptional case, the prohibitions or restrictions under section 104.5(3)(f) permit the subject of a control order to have access to one mobile phone, one landline, and one computer with access to the internet. Conditions placed on communications must always be tailored to the individual circumstances and ultimately determined by the court when assessing whether any limitations are reasonably necessary, and reasonably appropriate and adapted.

**Duration**

71. The AFP will fully review the effectiveness of current control orders with a view to assessing the current 12 month maximum duration.

**Least interference test**

72. Under the current legislation, the court considers whether the control order and the individual conditions of the control order are reasonably necessary, and reasonably appropriate and adapted. This test requires the court to consider the impact of each condition on the person's personal and financial circumstances, and the court has full discretion to refuse to include any of the proposed conditions, or to vary any of the conditions at confirmation.

73. In this context, a 'least interference' test would substantially overlap with existing safeguards, which are appropriate and effective in ensuring that any conditions imposed are

proportionate in limiting the person's liberty and privacy to address the risks to public safety for which the control order is sought. As the existing safeguards have already been applied where control orders have been sought, it would seem desirable to retain these safeguards to ensure continuity of judicial consideration and existing case law.

## Conclusion

74. Control orders are an important preventative tool in the current terrorism threat environment. Existing safeguards which apply at each and all stages of the control order process include legislative requirements, the independent role of the courts and the rules of evidence, and external oversight measures. The AFP believes that these safeguards are effective and proportionate in the context of the current control order regime.