Professor Clive Walker
School of Law
University of Leeds

Submission to Hon Roger Gyles Independent National Security Legislation Monitor Inquiry into additional safeguards to the control order regime

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Introduction

1 This paper responds to the proposed change in the (Australia) Counter Terrorism Legislation Amendment Bill (no.1) 2015, Schedule 2 — 'Control orders for young people'. Thus, subsection 104.2(3) of the Criminal Code authorises an issuing court to impose a control order on persons who are aged 14 years and older. There is a concession to these 'under-age' candidates for control orders. By subsection 104.4(2) of the Criminal Code:

> 'the court must take into account:
> (a) the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances); and
> (b) if the person is 14 to 17 years of age—the best interests of the person.'

2 This submission arises from my extensive research into equivalent executive orders in the United Kingdom. Control orders under the Prevention of Terrorism Act 2005 were replaced by the Terrorism Prevention and Investigation Measures (TPIMs) under the TPIM Act 2011, and both have involved a much fuller range of invocation than control orders in Australia. Full details of these measures are related in my books, *Terrorism and the Law* (Oxford University Press, Oxford, 2011) and *The Anti-Terrorism Legislation* (Third edition, Oxford University Press, Oxford, 2014). Further detailed exposition of the legislative history, case law, and practices is contained in 'Keeping control of terrorists without losing control of constitutionalism' (2007) 59 *Stanford Law Review* 1395-1463.

3 There is no lower age-limit set in the UK, whether in the 2005 or 2011 Acts. However, my main purpose in this submission is to draw to the attention of the INSLM to the alternative non-criminal law modes of dealing with juveniles and children who are at risk of involvement in terrorism or may already have committed terrorist offences.

4 More serious offences will still result in arrests and prosecutions even of under-age suspects. Thus, one noticeable trend in recent arrest statistics under section 41 of the Terrorism Act

2000[1] is that in the year ending September 2015, the number of under-age suspects arrested for terrorism-related offences almost doubled from 8 to 15.[2] This trend has related to the phenomenon of foreign terrorist fighters (FTFs), as associated with the growth of Islamic State in Iraq and Syria. In addition, there have been three relevant convictions for terrorism-related offices. First, Hammaad Munshi, aged 16 on arrest, was sentenced in 2008 to two years' youth detention for the possession of a guide to explosives and notes on martyrdom hidden in his bedroom, contrary to section 58 of the Terrorism Act 2000.[3] Second, and of direct relevance to Australia, a boy who had sent messages to an alleged Australian jihadist, Sevdet Besim, aged 18, in which he instructed him to carry out an Islamic State terror group inspired attacks to behead police officers at an Anzac Day parade in Melbourne, Australia, was sentenced to life imprisonment, with a minimum of five years, for inciting terrorism overseas.[4] The unnamed boy was aged 14 at the time of arrest. Third, and linked to this Anzac Day plot, also at Manchester Youth Court, a girl aged 16, who was a friend, pleaded guilty to two section 58 offences (possessing bomb making recipes and also the Islamic State online magazine, *Dabiq*).[5] She was sentenced to a 12 month referral order.[6]

5 The greatly increased police attention and action directed towards under-age actual or potential FTFs has not been matched by a large increase in arrests and prosecutions. Nor has any control order or TPIM ever been issued against a person under 18.[7] Instead, two new tactics have grown. It is these which should be considered in the Australian context, for they considerably mitigate the potential impact of anti-terrorism laws on under-age suspects and allow for alternative resolutions which are more welfare-based and aim for longer term rehabilitation, which seems more appropriate in the case of under-age suspects, rather than potentially endless security management.

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[1] Section 41(1): 'A constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist.'

[2] Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, quarterly update to September 2015 Statistical Bulletin 08/15* (London, 2015) p.1. In oral evidence from Mark Rowley, Assistant Commissioner for Specialist Operations in the Metropolitan Police Service, commented that many more arrestees are under 20 and that about a quarter of suspects are vulnerable through age or mental health (House of Commons Home Affairs Committee, *Counter Radicalisation* (2015-16 HC 311) pp.7, 10).

[3] *R v Sultan Muhammed and Aabid Hassain Khan* [2009] EWCA Crim 2653.

[4] See http://www.bbc.co.uk/news/uk-34423984, 2 October 2015.

[5] *The Times* 27 August 2015 p.18.

[6] *The Times* 16 October 2015 p.4.

[7] See for control orders (of which 52 were issued), Anderson, D., *Control Orders in 2011* (Home Office, London, 2012) para.3.13 et seq.

It is these which are the prime subject of this submission. Two such measures should be considered:

- the Channel Programme
- the intervention of family courts

In the background is the reinforced application of the 'Prevent' duty under CONTEST[8] (regarding counter-extremism education and information) which has become a statutory obligation for the likes of schools and other educational establishments under the terms of the Counter Terrorism and Security Act 2015 (CTS 2015).[9]

Channel Programme

6 The Channel Programme has been running since 2010.[10] It provides a multi-agency response to those deemed to be 'at risk' of extremism. The full ground-rules for this important programme have never been published. Therefore, it remains uncertain who is referred, by which agency, on what precise grounds, to what they are referred in terms of 'treatment', what is the impact of any treatment, and what is the relationship of this Programme with other disposals and actions (including control orders/TPIMs, prosecution, and entry on security-related databases).

7 As mentioned above, the core mission of Part V of the CTS 2015 is to put 'Prevent' (including the flagship Channel Programme) on a statutory footing, but the legislation does so selectively by way of a bare framework approach. Several objectives underline the move towards the implementation of a statutory basis. One is enforcement – that 'Prevent' activity demands the

[8] See Home Office, *Countering International Terrorism*, (Cm.6888, London, 2006), as revised by: Cm.7547, London, 2009; Cm.7833, London, 2010; Cm.8123, London, 2011; Cm.8583, London, 2013; Cm.8848, London, 2014; Cm.9048, London, 2015.

[9] See Blackbourn, J., and Walker, C., 'Interdiction and indoctrination: The Counter-Terrorism and Security Act 2015' *Modern Law Review*, pending; House of Commons Select Committee on Education, *Extremism in Schools* (2014-15) HC 473 and the *Government Response* (Cm.9094, London, 2015); Long, R., *Counter Extremism Policy in English School* (House of Commons Library 07345, London, 2015).

[10] See Home Office, *Channel: Protecting vulnerable people from being drawn into terrorism. A guide for local partnerships* (London, 2012).

co-operation of local organisations, but some have been deficient, reluctant, or even hostile.[11] In addition, legal intervention permits greater standardisation and transparency through the checking of outputs and their quality.

8 Chapter 2 of Part V deals with 'Support etc for people vulnerable to being drawn into terrorism', which essentially is a reference to the 'Channel Programme'. In her speech to RUSI on 24 November 2014, the Home Secretary stated, 'we will legislate to put Channel – the existing successful programme for people at risk of radicalisation – on a statutory basis to improve the consistency of its delivery and ensure the participation of all the appropriate organisations.'[12] Whilst no further evidence of effectiveness was provided during the legislative passage or since,[13] the CTS Act 2015 begins to address the legitimacy deficit by furnishing a statutory framework.[14]

9 Under section 36, the Programme becomes a statutory obligation for local authorities to maintain. Local authorities must ensure that a panel is in place to assess whether individuals referred by the police are vulnerable to being drawn into terrorism and then to implement required 'treatment' functions. Referrals may only be made by the police and only if they have reasonable grounds to believe that an individual is vulnerable to being drawn into terrorism.[15] The panel must prepare a support plan for each 'identified individual', but the individual (or their parent or guardian) must consent to the arrangements.[16] Support might be declined, but the panel must then consider referral to health or social care services.[17] The support plan should address the nature of the support, who is to provide it, and how and when.[18] Section 37 deals further with the membership and proceedings of panels; core membership will consist of local authority and the police. In addition, section 38 requires relevant organisations (such as health, education, and probation authorities) to be cooperative.[19] But the duty must be undertaken consistently with the

[11] O'Toole et al, T., 'Governing through Prevent? Regulation and Contested Practice in State–Muslim Engagement' (2015) *Sociology* doi: 10.1177/0038038514564437.
[12] https://www.gov.uk/government/speeches/home-secretary-theresa-may-on-counter-terrorism, 24 November 2014.
[13] See House of Commons Home Affairs Committee, *Counter-Terrorism: Foreign Fighters* (2014-15 HC 933) para.9.
[14] See CTS Act 2015, s 36(7)-(8).
[15] *ibid.*, s 36(3).
[16] *ibid.*, s 36(4).
[17] *ibid.*, s 36(6).
[18] *ibid.*, s 36(5).
[19] *ibid.*, Schedule 7. See Counter-Terrorism and Security Act 2015 (Risk of Being Drawn into Terrorism) (Amendment and Guidance) Regulations 2015, SI 2015/928, para.8.

Data Protection Act 1998 and must not affect sensitive information (such as held by intelligence agencies).[20] In addition, section 40 allows for the indemnification of support providers.[21]

10 Chapter 2 is a welcome step towards legality, but is the Channel enterprise worthwhile? Official assertions that the Channel programme has been successful[22] are not sustained by published evidence.[23] Performance measures in terms of referral rates, costs, and outcomes are not specified. Furthermore, the accompanying definitions of 'extremism', 'radicalisation', and 'Britishness' fall short of normal standards of legal certainty.

11 The assumption being made here is that under-age persons suspected of being at risk of terrorism are prime candidates for this Channel Programme, which is being used in preference to control orders/TPIMs. The data is scanty, and there are certainly likely to be more adults than children subjected to the Channel Programme.[24] However, this form of disposal is significant for under-age suspects and may be proportionately more significant than for adult suspects. Thus, it has been revealed that in the year to October 2015, there were 1355 referrals of under-age suspects compared to 466 in the equivalent period in 2014.[25]

12 Based on this admittedly tentative evidence, it is recommended that the INSLM considers the alternatives to control orders, especially the notion of a formal 'de-indoctrination' programme equivalent to the UK's Channel Programme. However, any such Australian equivalent should be better researched and more transparent from the outset than the UK precedent.

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[20] CTS Act 2015, s 38(5).
[21] The Explanatory Memorandum to the Act, para.236, mentions potential difficulty in obtaining appropriate insurance and therefore a disincentive to being a support provider.
[22] Not only by the Home Secretary but also by the National Policing Lead for Counter Terrorism, Assistant Commissioner Mark Rowley: House of Commons Home Affairs Committee, *Counter-Terrorism: Foreign Fighters* (2014-15 HC 933) 11.
[23] The Home Office's *Factsheet – Part 5 Chapter 2 – Channel* (London, 2014) reveals only that: 'Since its national rollout in April 2012, over 2000 people have been referred to Channel and hundreds have been offered support. Between April 2012 and end-March 2014 National Counter Terrorism Policing reported a 58% increase in Channel referrals.'
[24] See for example Intelligence and Security Committee, *Report on the intelligence relating to the murder of Fusilier Lee Rigby* (2014-15 HC 795).
[25] *The Times* 26 December 2015, pp.1, 6.

Intervention of Family Courts

13 The family courts have inventively resorted to two legal powers to provide for the appropriate treatment of under-age terrorism suspects. One set of powers arise from the common law jurisdiction of the Family Division of the High Court relating to wardship under what is termed that Court's 'inherent jurisdiction'. The second set of powers arises principally under the Children Act 1989.[26] The Children Act 1989 sets out in detail what care authorities and the courts should do to protect the welfare of children. It imposes on local authorities the 'duty to investigate … if they have reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm' (section 47). The Children Act 1989 defines 'harm' as ill-treatment (including sexual abuse and non-physical forms of ill-treatment) or the impairment of health (physical or mental) or development (physical, intellectual, emotional, social or behavioural) (section 31). The relevance to terrorism risk relates to what are called public law cases are which are brought by local authorities or an authorised person (currently only the NSPCC has authorised person status under section 31). Public law matters include measures such as: care orders, which transfer parental responsibility for a child concerned to the local authority; supervision orders, which place a child under the supervision of their local authority; and emergency protection orders, which seek to ensure the immediate safety of a child by taking them to a place of safety or by preventing removal from a place of safety. These public law cases commence in the Family Proceedings Courts, which are a form of specialist Magistrates' Courts. Proceedings may be transferred to the County Courts in order to minimise delay or to enable the case to be consolidated with other family proceedings, or to handle exceptionally grave, complex or important disputes. In contrast to the position under control orders/TPIMs whereby the court must treat security as the paramount consideration at least in regard to disclosure,[27] the paramountcy principle in family proceedings means that a child's welfare is paramount when making any decisions about a child's upbringing; thus, the court shall not make an Order unless this is 'better for the child than making no Order at all' (section 1).

[26] See further Department for Education, *Working together to safeguard children* (London, 2015).
[27] See TPIM Act 2011, Sch.4; Civil Procedure Rules, r.80.2.

14 The application of these two jurisdictions to terrorism cases is best plotted through case-law, since there can be an overlap between authorities and jurisdictions.[28]

15 In *Tower Hamlets v M*, the Family Division intervened with a potential application of wardship orders to stop the departure of would-be FTFs aged under 18.[29] The intervention did not culminate in a final order because other resolutions were agreed.

16 Wardship was actually applied in a case from Bristol,[30] when the Family Division dealt with a 17-year-old girl thought to be at risk of travelling to an IS-controlled area. Mr Justice Hayden made the girl a ward of court and banned her from travelling abroad without the permission of a judge. Her passport was also seized. However, wardship will expire when she turns 18.

17 A third case, *In re X and Y*[31] involved young children who were to be taken out of the country by suspected FTFs. The resulting conditions imposed on the adult parents, included: passport removal and an all-ports alert; injunctions against removing the children from the jurisdiction and requiring them to live at a specified address; the monitoring of the parents and the children by a combination of unannounced visits by the local authority, regular reporting to the police or local authority and, in the case of the parents, electronic tagging; and swearing on the Quran that they will abide by the order.[32]

18 A fourth case, *Tower Hamlets v B,*[33] resulted in removal of a 16 year old girl from her family who were said to be grooming her for departure to Syria. A previous order was varied because the parents had been deceitful, so she was removed from home.

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[28] See Edwards, S., 'Protecting schoolgirls from terrorism grooming' (2015) 3 *International Family Law* 236; Downs, M., and Edwards, S., 'Brides and martyrs' (2015) 45 *Family Law* 1073; Rozenberg, J., 'Violations of the mind' (2015) *Law Society's Gazette* 23 November p.23.
[29] [2015] EWHC 869 (Fam). See further *Re M* [2015] EWHC 1433 (Fam).
[30] 'Try teens who flee to join IS in special courts' *Bristol Post*, 12 June 2015 2, 3.
[31] [2015] EWHC 2265 (Fam). See further *Re X and Y (No 2)* [2015] EWHC 2358.
[32] *ibid.*, para.50.
[33] [2015] EWHC 2491 (Fam).

19 In *Re Z,*[34] an application was granted without notice for wardship of a 17 year old Somali girl. Her two friends went through with their plan to travel to Syria. She was stopped at an airport under Schedule 7 of the Terrorism Act 2000 with a one-way ticket.

20 In oral evidence given on 21 July 2015 to the House of Commons Home Affairs Committee's inquiry into *Counter Radicalisation*, Mark Rowley, Assistant Commissioner for Specialist Operations in the Metropolitan Police Service, revealed that the police have initiated cases in the family courts affecting 12 families and 30 children.[35]

21 Following this run of cases, general guidance was issued in the form of *Radicalisation cases in the Family Courts: Guidance issued by Sir James Munby President of the Family Division* on 8 October 2015 and covering both wardship and child protection proceedings.[36] The emphasis is upon administrative arrangements rather than legal finer points. In particular, advice is given to assign senior judges; to ensure coordination between agencies; and to encourage the disclosure of sensitive information by the police.

22 This intervention by family law into the realms of counter-terrorism remains in its infancy, and several uncertainties remain to be resolved, as indicated by the foregoing *Guidance*. A major issue is coordination between agencies, especially who should take the lead. The affected agencies feel unease for different reasons – some social workers feel drawn uncomfortably into policing, the police feel they lack control and may be reluctant to share sensitive information, while the Home Office worries about the costs of enforcement (which can include electronic tagging). Another apprehension is that the family law versions of counter-terrorism can turn out to be more draconian both in outcome and process than the express version in counter-terrorism legislation as authorised by Parliament, including the nature of the impositions allowed under a TPIM and the opportunities for challenge and review. The final problem concerns the demarcation between family law and counter terrorism legislation – on what basis should one or another jurisdiction be invoked? It may appear to be happenstance as to whether the authorities (or perhaps different authorities) depict behaviour either as evidence of vulnerability (and so call in family law) or evidence of immaturity

[34] [2015] EWHC 2350 (Fam).
[35] (2015-16 HC 311) p.7.
[36] https://www.judiciary.gov.uk/publications/radicalisation-cases-in-the-family-courts/.

or gullibility (which is where Project Channel might help) or evidence of wickedness (and so worthy of prosecution). The *Guidance* does not go anywhere near far enough to deal with all of these tensions.

23 These family law initiatives should be considered by the INSLM as potential alternatives to control orders. Equivalent family law exists in Australian state and territory legislation.[37] The initiative is to be welcomed as offering a more finely graded and welfare-based intervention than control orders for dealing with under-age suspects. However, any such Australian initiative should be based on clearer grounds than the UK precedent.

Contact details

Professor Emeritus Clive Walker
Centre for Criminal Justice Studies
School of Law
University of Leeds
Leeds LS2 9JT
UK
☎0044 113 2335033
🖫law6cw@leeds.ac.uk

[37] See https://aifs.gov.au/cfca/publications/australian-child-protection-legislation. Family courts do not have a wide inherent wardship jurisdiction: *Minister for Immigration and Multicultural and Indigenous Affairs v B and Another* [2004] HCA 20, paras.6, 20.