Law Council
OF AUSTRALIA

Office of the President

24 November 2016

The Hon Michael Keenan MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

By email: Michael.Keenan.MP@aph.gov.au

Dear Minister

Special Advocates for control orders - regulations

Thank you for the opportunity to comment on proposed *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth) Regulations (**the proposed Regulations**) with regard to the new special advocate (**SA**) regime for control orders.

In response to the Attorney-General's Department's (**the Department**) consultation on the proposed Regulations, the Law Council has prepared this submission to further inform your and the Department's consideration of the SA regime.

The Law Council is grateful for the assistance of its National Criminal Law Committee and Professional Ethics Committee in the preparation of this submission.

Preliminary comments

The Law Council formally recommended the system of SAs to participate in control order proceedings before the former Independent National Security Legislation Monitor (**INSLM**) in 2015.[1]

The system would allow each Australian jurisdiction to have a panel of security-cleared barristers who could participate in closed material procedures where the subject of a control order has sensitive information withheld from them and their legal representative.

The SA is a welcome inclusion to the *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth) (**the Act**).

However, the unauthorised disclosure offences in the Bill may serve to reduce the pool of possible SAs. This means that in order for the SA regime to be effective and attract

[1] Law Council of Australia, Submission to the Independent National Security Legislation Monitor, *Adequacy of Safeguards Relating to the Control Order Regime*, 30 September 2015. Available at: https://www.lawcouncil.asn.au/lawcouncil/images/3057_-_Adequacy_of_safeguards_relating_to_the_control_order_regime.pdf

Telephone +61 2 6246 3788 • Fax +61 2 6248 0639 • *Email* mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

applicants, SAs must as a minimum be given adequate practical support by way of administrative and research assistance. Access to relevant experts should also be made available and SAs should be adequately remunerated.

Eligibility for appointment

The impartial and competent administration of justice is fundamental to the rule of law, which underpins Australia's democratic society.

A strong and independent SA system requires the appointment of appropriately skilled legal practitioners.

Given that SAs will be required to represent the interests of clients in adversarial proceedings against Government Departments, it is critical that SAs are appointed by a body independent of Government. An Executive appointment would have the potential to impact directly on public confidence in the SA system and the administration of justice.

The process of appointment should ensure:

- transparency;
- that all appointments are based on merit;
- that everyone who has the qualities for appointment as a SA is fairly and properly considered; and
- the diversity of SAs in relation to gender, residential location and cultural background.

The Law Council therefore recommends that SAs be appointed by the INSLM as an independent statutory office holder with extensive expertise and knowledge in national security and counter-terrorism matters.

The INSLM should be satisfied that:

(a) the person is a Queen's Counsel or Senior Counsel who has been cleared for security purposes to a level that the Prime Minister considers appropriate; or

(b) the person has served as a judge of:

(i) the High Court; or

(ii) a court that is or was created by the Parliament under Chapter III of the Constitution; or

(iii) the Supreme Court of a State or Territory; or

(iv) the District Court (or equivalent) of a State or Territory;

but no longer holds a commission as a judge of a court listed in this paragraph.

The following persons should be specifically excluded from eligibility for appointment.

(a) the Director-General of Security or a Deputy Director-General of Security;

(b) the Director of Public Prosecutions or a person performing a similar function appointed under the law of a State or Territory;

(c) the Solicitor-General of the Commonwealth, or of a State or Territory;

(d) a person who is employed by the Commonwealth, a State or Territory; and

(e) a member of the Parliament of the Commonwealth or a State or the Legislative Assembly of a Territory.

Term of appointment
A SA should hold office for a period specified in the instrument of appointment where the period does not exceed 5 years. This should be subject to renewal.

Remuneration
A SA should have an entitlement to charge remuneration for the time spent in the performance of his or her role as a SA. Such remuneration should be borne in respect of an appointment by the Court to a case where the Attorney-General seeks to protect information under section 38J of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

The rate of remuneration should be determined by reference to no less than:

(a) per day – at the daily rate payable to senior counsel without the approval of the Attorney-General, as set out in Appendix D of the *Legal Services Directions 2005* and as in force from time to time; and

(b) per hour – at one-sixth of the maximum daily rate mentioned in paragraph (a), up to a maximum of 6 hours per day.

A similar provision appears in Regulation 15 of the *Telecommunications (Interception and Access) Regulations 1987* (Cth).

The Commonwealth should bear the costs of remuneration.

Disclosure of interests
The Law Council considers that there should be should be a requirement for disclosure of relevant interests. There must be an assurance – consistent with the ethical principle underpinning rule 12 of the Australian Solicitors' Conduct Rules (**ASCR**) and Rule 101(b) of the Australian Bar Association's barristers rules – that there is no conflict between the interests of the practitioner and interests of the client.

Conflicts of interest
The Law Council does not consider it necessary for the purposes of the primary legislation or secondary legislation to make specific provision in relation to conflicts of interest for SAs. SAs will be governed by their professional code of conduct, through which they will have the familiar duties to avoid conflicts. The Law Council also understands that there are no specific express provisions relating to conflicts of interest in UK legislation. The former INSLM recommended that the Australian SA regime should be based on the United Kingdom model.[2]

However, if this is not to be accepted by the Government, the proposed Regulations should provide as follows in relation to conflicts of interest:

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[2] The Hon Roger Gyles AO QC, *Control Order Safeguards (INSLM) Report Special Advocates and the Counter-Terrorism Legislation Amendment Bill 2015 (No 1)*, (January 2016), 9.

(1) A SA must take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the proper performance of his or her functions as a SA.

(2) If the SA believes that he or she has a conflict of interest (real or apparent) in relation to the subject-matter of a proposed requested appointment by the Court, the SA must advise the Court that he or she is unable to act as an SA in the application.

The proposed Regulations should also clarify the position so as not to exclude people who have been SAs before in a manner inconsistent with the intention of the scheme. This is particularly important given subparagraph 38PA(3)(c)(i) of the Act.[3]

The Law Council also notes that, depending upon the arrangements the Government puts in place in relation to support for SAs, a potential for conflicts may arise. In the United Kingdom, for example, special advocates are supported by the Special Advocate Support Office, which was originally set up under the Treasury Solicitor's Department (now the Government Legal Department). If a similar model is taken up in Australia, both actual or potential conflicts of interest should be avoided. Noting that the Attorney-General must approve applications for control orders (s 104.2 *Criminal Code Act 1995* (Cth), the Law Council considers it would be inappropriate (for example) for those supporting the special advocate to be part of the Attorney-General's Department. The special advocate must be, both in fact and in perception, completely independent. Support could instead come from the INSLM's office.

Resignation

Resignation by a SA should be by way of written notice to the Prime Minister which takes effect on the day it is received by the Prime Minister, or, if a later day is specified in the resignation, on that later day.

Termination of appointment

Termination of appointment of a SA should be in similar terms to that identified in section 19 of the *Independent National Security Legislation Monitor Act 2010* (Cth) and in Regulation 19 of the *Telecommunications (Interception and Access) Regulations 1987* (Cth).

However, it should be based on proven misbehaviour or incapacity and be determined by the INSLM.

That is, the INSLM should have discretion to revoke the declaration of a SA:

(a) for misbehaviour by the SA; or

(b) if the SA is unable to perform his or her duties because of physical or mental incapacity.

Mandatory revocation of the declaration of a SA could be provided where the SA:

[3] That provision provides: 'If the party for whom the court is appointing a special advocate, or the party's legal representative, requests the court under paragraph (2)(b) to appoint a particular person who meets the requirements mentioned in paragraph 2(a), the court may appoint a different person only if the court is satisfied that: (a) appointing the person requested would result in the proceeding being unreasonably delayed; or (b) appointing the person requested would result in the person having an actual or potential conflict of interest; or (c) both: (i) the person requested has knowledge of national security information and the disclosure of the information would be likely to prejudice national security and (ii) in the circumstances, there is a risk of inadvertent disclosure of that information.'

(a) becomes bankrupt; or

(b) takes steps to take the benefit of any law for the relief of bankrupt or insolvent debtors; or

(c) compounds with one or more of his or her creditors; or

(d) makes an assignment of his or her remuneration for the benefit of one or more of his or her creditors; or

(e) fails, without reasonable excuse, to comply with regulations regarding disclosure of interests or conflicts of interest; or

(f) ceases to be a Queen's Counsel or Senior Counsel or ceases to hold the required security clearance to a level that the Prime Minister considers appropriate; or

(g) holds a position mentioned above regarding ineligibility to appointment (e.g. is the Director-General of Security).

Immunity from legal action

Subsection 6(4) of the *Special Immigration Appeals Commission Act 1997* (UK) (**SIAC**) makes express provision that the SA "shall not be responsible to the person whose interests he is appointed to represent." The SIAC Act is only one – although the first and probably most widely used – instrument providing for closed material procedures (CMPs) with SAs in the UK. Other statutory CMPs, including for Control Orders and then TPIMs include similar or identical provisions in this regard.

Insofar as the proposed Regulations provide immunity from legal action this immunity should provide as follows:

> *No action, suit or proceeding may be brought against a person who is, or has been, a SA in relation to anything done, or omitted to be done, in good faith by the SA:*
>
> *(a) in the performance, or purported performance, of his or her functions; or*
>
> *(b) in the exercise, or purported exercise, or his or her powers.*

A similar provision appears in Regulation 20 of the *Telecommunications (Interception and Access) Regulations 1987* (Cth).

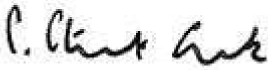
The Law Council notes that a SA is not representing a client in the traditional sense, but is representing the interests of the person who is subject to the control order proceedings. While legal practitioners are obliged to adhere to the main body of the professional conduct rules in discharging their duties to their clients, they are always subject to their paramount duty, as officers of the court, to the orders of the court and the administration of justice, which prevail to the extent of inconsistency with any other duty (see ASCR rule 3). Further, the professional conduct rules sit alongside legislation and the common law and if there is a higher standard set by legislation or the common law, it is the legislation or the common law that always prevails. Therefore, the Law Council considers it is not necessary or appropriate for there to be a specific provision conferring an "exemption" or "immunity" from the professional conduct obligations – the duty to the court and the administration of justice, and the specific provisions of statute would automatically prevail over any other duties in the conduct rules.

The Law Council would be pleased to provide its views on any other matters relating to the proposed Regulations, should it assist.

Please contact Dr Natasha Molt, Senior Legal Advisor, Policy Division (02 6246 3754 or natasha.molt@lawcouncil.asn.au) in the first instance should you require further information or clarification.

A copy of this letter has also been provided to Mr Anthony Coles, Assistant Secretary, Counter Terrorism & Intelligence Unit, Attorney-General's Department.

Yours sincerely



S Stuart Clark AM
President