



Australian Government
Attorney-General's Department

**National Security Law
& Policy Division**

15/526-01

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The Hon Roger Gyles AO QC
Acting Independent National Security Legislation Monitor
Department of the Prime Minister and Cabinet
PO Box 6500
CANBERRA ACT 2600

Dear Mr Gyles

Inquiry into additional safeguards in relation to the control order regime

Thank you for your letter to the Secretary of the Attorney-General's Department, Chris Moraitis. I am pleased to reply on behalf of the Department.

The Department is happy to assist you in your inquiry in relation to safeguards in the control order regime established by Division 104 of the *Criminal Code Act 1995* (Criminal Code).

The Council of Australian Governments' Review of Counter-Terrorism Legislation (COAG Review) was tabled in Parliament in May 2013 and COAG's Response to the Review was issued on 10 October 2014. A copy of the COAG Response is **attached**. As you may be aware, some of the recommendations of the COAG Review were implemented by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Foreign Fighters Act), which received royal assent on 3 November 2014.

In relation to each of the safeguards recommended by the COAG Review listed in your letter, I can provide the following information:

- Recommendation 27: Amend the threshold for seeking the Attorney-General's consent to apply for a control order
 - COAG recommended changing the threshold in paragraph 104.2(2)(b) of the Criminal Code from "suspects" to "considers" on reasonable grounds. The Government does not support this recommendation.
 - When the control order regime was enacted, a senior member of the Australian Federal Police (AFP) could seek the Attorney-General's consent to apply for an interim control order if the member "suspected" on reasonable grounds that the person had engaged in training with a terrorist organisation (paragraph 104.2(2)(b)). That threshold differed from paragraph 104.2(2)(a) which permitted a senior AFP member to seek the Attorney-General's consent where the member "considered" on reasonable grounds that the order would

substantially assist in the prevention of a terrorist act. COAG recommended changing the threshold in paragraph 104.2(2)(b) to make the threshold for both limbs “consider” on reasonable grounds.

- In 2014, the Government amended the threshold in paragraph 104.2(2)(a) to “suspects” on reasonable grounds. In addition, a number of new criteria for seeking consent to apply for a control order were inserted into Division 104. The “suspects” threshold was also applied to those limbs. That threshold is commonly used for the exercise of police powers. Regardless of the change in threshold for seeking the Attorney-General’s consent, the test for an issuing court was not changed. Accordingly, an issuing court will still need to be “satisfied on the balance of probabilities” that at least one of the reasons for issuing a control order listed in paragraph 104.4(1)(c) exists.
- Recommendation 28: Remove the Federal Circuit Court and the Family Court from the definition of “issuing court” for the purposes of control orders
 - COAG recommended removing the authority of the Federal Circuit Court and the Family Court to make control orders. The Government supports this recommendation in part, but has not made any legislative amendments to implement this recommendation.
 - The Criminal Code currently provides that the Federal Court, the Federal Circuit Court and the Family Court are all issuing bodies for the purposes of obtaining a control order.
- Recommendation 29: Mandatory consultation with the Commonwealth Director of Public Prosecutions (CDPP)
 - COAG recommended the Criminal Code be amended to require the AFP and other relevant agencies to consult with the CDPP before seeking the Attorney-General’s consent to apply for a control order. The Government supports this recommendation in principle, but has not made any legislative amendments to implement it.
 - In practice, the AFP liaises closely with the CDPP when collating the information to support a request for a control order. While consultation is standard practice, the Government has not amended the legislation to make consultation a statutory obligation. To do so could impede flexibility and discretion in appropriate cases.
- Recommendation 31: Minimum standard of disclosure of information to a “controlee”
 - COAG recommended amending Division 104 of the Criminal Code to require a minimum standard of information be provided to a person subject to a control order. The Government does not support this recommendation.
 - Division 104 contains a number of provisions regarding the provision of information to a person who is the subject of a control order (and to other persons). This includes a requirement that the AFP personally serve the interim control order on the person and explain the effect of the order and must inform them of all the factors listed in paragraph 104.12(1)(b), including their appeal and review rights, their right to attend court for the hearing to determine whether to confirm the interim order, their right to have legal representation, their right to adduce evidence, and their right to apply to have the control order varied or revoked. The Government considers the existing requirements are sufficient.

- Recommendation 32: Provision of information concerning appeal and review rights
 - COAG recommended the Criminal Code be amended to require the AFP to advise a person subject to a control order of their appeal and review rights. This recommendation has been implemented.
 - The Foreign Fighters Act added subparagraphs 104.12(1)(b)(iv) to (ix) (in relation to interim control orders) and 104.17(1)(b)(i) to (iii) (in relation to confirmed control orders) to the Criminal Code. Those provisions set out the various rights the person must be informed of when the AFP serves an interim or confirmed control order on the person.
- Recommendation 33: Obligations, prohibitions and restrictions that can be imposed by a control order: *relocation*
 - COAG recommended amending paragraph 104.5(3)(a) of the Criminal Code to clarify that the prohibition or restriction on the person's being at particular places is not intended to result in mandatory relocation. The Government supports this recommendation, but has not made any legislative amendments to implement it. The Government does not consider existing paragraph 104.5(3)(a) would support a mandatory relocation order.
- Recommendation 34: Obligations, prohibitions and restrictions that can be imposed by a control order: *curfew*
 - COAG recommended amending paragraph 104.5(3)(c) to impose a maximum "curfew" of 10 hours in one day . The Government supports this recommendation in part.
 - The Foreign Fighters Act amended paragraph 104.5(3)(c) to specifically provide a maximum curfew of no more than 12 hours within a 24-hour period. An issuing court has discretion to impose a shorter period.
- Recommendation 35: Obligations, prohibitions and restrictions that can be imposed by a control order: *communications*
 - COAG recommended amending paragraph 104.5(3)(f) to authorise a person under a control order to have access to a mobile phone, one landline and one computer with an internet connection. The Government does not support this recommendation. Implementing the recommendation would reduce flexibility to tailor conditions to the particular threat posed by the subject of a proposed order.
- Recommendation 36: Maximum duration of a control order
 - COAG recommended maintaining the existing maximum durations for control orders. The Government supports this recommendation, but no legislative changes have been made or are necessary.
 - The current maximum durations are 12 months from the day the interim control order was made for an adult (paragraphs 104.5(1)(f) and 104.16(1)(d) of the Criminal Code) and three months from the day the interim order is made for a person aged 16 or 17 years (subsection 104.28(2)).

- Recommendation 37: Include a “least interference” test in relation to obligations, prohibitions and restrictions imposed by a control order
 - COAG recommended amending Division 104 of the Criminal Code to require the issuing court to be satisfied that the obligations, prohibitions and restrictions imposed by the order constituted the “least interference with the person’s liberty, privacy or freedom of movement that is necessary in the circumstances”. The Government does not support this recommendation.
 - An issuing court can only impose obligations, prohibitions and restrictions in a control order that are reasonably necessary, and reasonably appropriate and adapted, for the purposes of protecting the public from a terrorist act, preventing support for or facilitation of a terrorist act, or preventing support for or facilitation of hostile activity in a foreign country. Further, subsection 104.4(2) requires the court to take into account the impact each obligation, prohibition or restriction would have on the person’s financial and personal circumstances.
 - Consistent with the preventative and non-punitive function of control orders, it is appropriate that the issuing criteria focus primarily on public protection. This ensures that orders contain conditions directed only to this purpose, and are not issued with conditions that are least restrictive on the personal liberty of an individual, but may be less than what is reasonably necessary for public protection.

I note that your inquiry into Special Advocates (Recommendation 30) will include consideration of whether the COAG Review’s recommended system of “special advocates” should be introduced for in control order proceedings.

For your information, the Government is preparing a further package of legislative amendments for introduction later this year. Those amendments will respond to lessons from recent counter-terrorism operations and implement outstanding recommendations from independent reviews, including the COAG Review, as appropriate.

The action officer for this matter is [REDACTED]

Yours sincerely



Jamie Lowe
First Assistant Secretary