



17 September 2015

The Hon Roger Gyles AO QC  
Acting National Security Legislation Monitor  
PO Box 6500, Canberra ACT 2600

By email: [INSLMSubmissions@pmc.gov.au](mailto:INSLMSubmissions@pmc.gov.au)

Dear Mr Gyles,

### Control orders

Thank you for the opportunity to make a submission concerning the adequacy of control order safeguards recommended by the 2013 COAG review of Counter-Terrorism Legislation.

The Australian Human Rights Commission has made several submissions raising its concerns with the current control order regime in Division 104 of the *Criminal Code Act 1995* (Cth). I refer you to the following relevant submissions of the Commission:

- Submission to the Senate Legal and Constitutional Legislation Committee, Inquiry into the Anti-Terrorism Bill (No 2) 2005 (11 November 2005). At [http://humanrights.gov.au/legal/submissions/terrorism\\_sub\\_12-11-2005.html](http://humanrights.gov.au/legal/submissions/terrorism_sub_12-11-2005.html)
- A Human Rights Guide to Australia's Counter-Terrorism Laws (2008). At [http://humanrights.gov.au/legal/publications/counter\\_terrorism\\_laws.html](http://humanrights.gov.au/legal/publications/counter_terrorism_laws.html).
- Submission to the Independent National Security Legislation Monitor, 14 September 2012. At <https://www.humanrights.gov.au/review-counter-terrorism-and-national-security-legislation>.
- Submission to the COAG Review Committee, 28 September 2012. At <https://www.humanrights.gov.au/coag-review-counter-terrorism-legislation#fnB8>
- Submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, 11 November 2014. At <https://www.humanrights.gov.au/submissions/inquiry-counter-terrorism-legislation-amendment-bill-no1-2014>

In these submissions, the Commission raised its concerns that the control order regime

- may allow for the arbitrary detention of individuals, contrary to article 9(1) of the *International Convention on Civil and Political Rights* (ICCPR);
- may result in arbitrary interference with a number of other rights of those subjected to such orders, such as the right to privacy, and the rights to freedom of movement, expression and association (articles 17, 12, 19 and 22 of the ICCPR respectively)
- does not provide effective review procedures.

The Commission has previously recommended that:

1. A court issuing a control order should be required to be satisfied that a control order (with the conditions sought) is also the least restrictive means of achieving the purpose of protecting the public from a terrorist act, in all the circumstances.
2. Division 104 of the *Criminal Code Act 1995* (Cth) should be amended to set out the minimum content to be included in the summary of the grounds to be provided to the subject. It should specifically require that the person be given sufficient material to alert him or her to the factual basis upon which the order was made, to enable him or her to identify whether there are grounds for revocation or variation.
3. Consideration should be given to the use of the Special Advocate procedure and/or a Public Interest Monitor in the case of security sensitive material.

The Commission notes that the following 2013 COAG Review recommendations reflect these recommendations of the Commission:

- **Recommendation 37** - The Committee recommends that section 104.5 should be amended to ensure that, whenever a control order is imposed, any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person's liberty, privacy or freedom of movement that is necessary in all the circumstances.
- **Recommendation 31** – the Committee recommends that the legislation provide for a minimum standard concerning the extent of the information to be given to a person the subject of an application for the confirmation of a control order, or an application for a variation or revocation of a control order. This requirement is quite separate from the Special Advocates system. It is intended to enable the person and his or her ordinary legal representatives of choice to insist on a minimum level of disclosure to them. The minimum standard should be: "*the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in*

*relation to those allegations.”* This protection should be enshrined in Division 104 wherever necessary.

- **Recommendation 30** – 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.

The Commission endorses these recommendations as well as the other safeguards proposed by COAG in its 2013 Review.

If you require any further details, please contact Bronwyn Byrnes on ph: 02 9284 9647 or by email: [bronwyn.byrnes@humanrights.gov.au](mailto:bronwyn.byrnes@humanrights.gov.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Gillian Triggs', with a stylized flourish at the end.

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