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TRANSCRIPT OF PROCEEDINGS

INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR

BEFORE: THE HONOURABLE ROGER GYLES AO QC

AUSTRALIAN NATIONAL UNIVERSITY
CANBERRA, ACT

10.05 AM WEDNESDAY, 16 DECEMBER 2015

MR GYLES: We'll start the proceedings. As you know, this is a hearing pursuant to section 21 of the INSLM Act in relation to a reference from the Prime Minister, and I'll read it out:

> *Whether the additional safeguards recommended in the 2013 Council of Australian Governments Review of Counter-Terrorism Legislation in relation to the control order regime should be introduced, with particular consideration given to the advisability of introducing a system of special advocates into the regime, as recommended in the advisory report on the Counter-Terrorism Legislation Amendment Act (No. 1) 2014 by the Parliamentary Joint Committee on Intelligence and Security tabled on 20 November 2014.*

As you will see, that relates to the safeguards, not to the fundamental question as to whether control orders ought to be retained. However, I have a general duty to look at all of the relevant counter-terrorism provisions and, secondly, the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, recently introduced, also changes the landscape somewhat and I must take that into account in my consideration of this reference, and I have advised the interested parties that that is the position.

I understand that there were hearings on that Bill in the Intelligence and Security Committee earlier this week, so it's by way of being an inquiry-led recovery for some of you.

The hearing is in public. As a matter of convenience for people who may have other obligations, we've given some not-before markings, and the first set of people are what might be called the official platform: the Attorney-General's Department; the Australian Federal Police and the Office of the Commonwealth Director of Public Prosecutions.

I have received submissions from these parties and others and those submissions have been published on the website, and I've read them all. I don't pretend that I've assimilated every page of every reference in every submission, but I'm doing my best. In addition to these hearings and receipt of those submissions, I've conducted my own reading of some of the academic material and books and so on, and I have already had, I think, two sessions with the AFP as to the control order regime and, in particular, current control orders.

They have been conducted in private, but a great deal of that information is in the public domain, and the broad parameters I think are clear enough. A number of control orders and so on - and indeed, some of the control order hearings are in public, so there's a good deal of public information about how they are conducted.

I have also raised with the three parties appearing here some issues that occurred to me as raising matters, and I'll probably raise some others during the course of the hearing today. I welcome any opening statements that people would like to make in this public hearing, but I don't of course expect you to be repeating what's, in effect, on the public record.

ASST CMR GAUGHAN: That being the case, there's really not much more I suppose we - obviously we made some opening comments at the PJCIS hearing earlier this week. I suppose the only thing I'd like to say in - - -

MR GYLES: I wasn't there myself, and I read some of it - - -

ASST CMR GAUGHAN: I might give you a bit of a summary of that.

MR GYLES: Mr Mooney was there, but - - -

ASST CMR GAUGHAN: I think, sir, that fundamentally from my perspective, obviously the impetus in relation to this particular hearing is based on the 2013 COAG. I think it is clear from all publicly available information, both internationally and domestically, that the threat environment since that time has changed significantly, and I think that's something that we make note of.

MR GYLES: Yes, I'm just wondering, one of the problems with these inquiries is people can't hear if you're talking, if there isn't a microphone.

MR MOONEY: Yes, there's a microphone there, and I think you just press the button and - - -

ASST CMR GAUGHAN: Are we on? No?

MR MOONEY: Yes, if you talk - if the green light's on?

ASST CMR GAUGHAN: No. Now is, we're all good. Okay, sorry, I'll start that again.

COMMISSIONER: Yes, thank you.

ASST CMR GAUGHAN: I think it will be remiss of me not to make an opening comment based on the fact that this particular inquiry is based on the 2013 COAG's recommendations. Clearly, both the national and international threat environment has changed significantly through that time, and the environment that we currently see ourselves in is totally different to what we saw in 2013, in the fact that we have actually utilised control orders, almost 12 months to the day that we received our first interim control order, I think is testimony to that.

I think it's also something to note that yesterday was 12 months since the Lindt Café siege, and October this year saw the killing of a New South Wales Police employee, allegedly by a 15 year old male person. Last week we saw the joint counter-terrorism teams make more arrests in relation to Operation Appleby. The operational tempo across the country at the moment is something we've never seen before in domestic CT investigations and, unfortunately, I don't see that getting any better. The terrorism threat continues to evolve, law enforcement is stretched but coping, and we see control orders and other legislative fixes that we have as tools in our toolkit to enable us to defeat or at least stay on top of the current threat environment.

I should also say, sir, that one thing I did say during the Parliamentary Joint Committee on Intelligence Security this week, that in some circumstances control orders have actually had a positive influence on behaviour. But I say that in light of the fact that it is early days. In this new tranche, if you like, we've only issued four control orders since this time last year. Whilst that is a positive, I think, influence or positive indicator, it's unintended consequences of the regime, I get that, but I think it's something that we just need to be - forefront of our mind, that sometimes intervening through a control order is actually somewhat better than going down the path of arrest and prosecution, and I'll leave it at that.

MR GIFFORD: Mr Gyles, Cameron Gifford, Acting First Assistant Secretary, National Security Law and Policy Division of the Department.

MR GYLES: Yes.

MR GIFFORD: Just an opening thing to note: thank you very much for inviting us along today to assist with this inquiry. I think Assistant Commissioner Gaughan is quite right to note the context in which this inquiry is undertaken, that it relates to recommendations that were previously considered in 2013. It's quite a complex environment for this inquiry, if I can probably note that. In our submissions we provided to you in September we noted that the position that the Government had undertaken in relation to each of those recommendations in 2013, and you're right also to note the recent introduction of the Counter-Terrorism Legislation Amendment Bill of 2015.

To the extent that we're able to assist you with considerations of those recommendations in that context, we're more than happy to assist with any information we can provide you today, noting that there are two inquiries running alongside. But otherwise, thank you very much for inviting us along today.

MR GYLES: Thank you. I should note that the representatives of the Commonwealth Department of Public Prosecutions are here and, if you wish at any stage to contribute, please do so, and if I have questions I'll direct

them to you.

MR BRUKARD: Thank you, sir.

MR GYLES: There were some questions which I had my staff ask, and I wonder if you're in the position to answer those. May I clarify, there were three dot points, the third one has been dealt with already, but the first two have not been, and that, I think, as I recollect, that that material had been provided to a previous INSLM, and it's relevant to what, if any, problems exist in the present regime.

ASST CMR GAUGHAN: Is this in relation to the use of National Security Commission considerations?

MR GYLES: No, no. No, it's not. One was - perhaps just to identify. It's not the most important thing for today, but it's - if that can be provided in due course, that's - - -

ASST CMR GAUGHAN: We know the answers to those questions, so I think that the Attorney has never declined a request for an interim control order that's been put forward by the AFP. There's only been six, as you're aware.

MR GYLES: Yes.

ASST CMR GAUGHAN: All six have been granted, four in the last 12 months and two previously, that was Thomas and Hicks, which are well known publicly.

MR GYLES: Yes.

ASST CMR GAUGHAN: How many times has the AFP considered and not proceeded with a proposal brief to seek the AG's consent? I think to provide some operational context, this is something - - -

MR GYLES: Possibly I should clarify that a little bit more. Because of the potential need to disclose national security information.

ASST CMR GAUGHAN: National security information.

MR GYLES: Yes.

ASST CMR GAUGHAN: That's never been the case. But it's also fair enough to say, Mr Gyles, that there are times where, for operational reasons, we determine that we are not going to seek a control order full stop, based on - and I've got to be very careful what I say, obviously in an open forum here - but based on the fact that the investigation is going at such a speed or might

be such a speed that we actually determine another course of action is more appropriate than a control order.

MR GYLES: Yes.

ASST CMR GAUGHAN: That probably also applies to the third question, in relation to the four recent ones, where asked a question in relation to the NSI Act, and the answer is we haven't, we haven't invoked that.

MR GYLES: No. That leads into the question, what, from a practical point of view, is behind the - or perhaps I'll go back a stage. It seems to me that there are three significant things arising out of the current counter-terrorism bill relevant to today, there may be more, but I can identify those three. The first is that in relation to the proposal to lower the age of the child, there is a - it has the same significance, but I'll leave that aside. There is the provision for the appointment of a public interest advocate in those circumstances which touches on the COAG recommendation.

Secondly, the monitoring regime which is proposed, either exacerbates on one hand, or makes clearer on the other the very intrusive nature or effect of a control order. And it's not quite clear to me at the moment precisely how this would differ from that which applies to everybody under the normal investigatory provisions. But it seems to me it does make a significant difference, because the fact of being a controlee triggers the application of those provisions. That is simply to say that it draws attention to the quite intrusive nature of the control orders.

Thirdly, and I want to make sure that I get this right, the effect of these changes is that national security or - let's call it national security information, which is not disclosed to the potential controlee on the confirmation hearing may nonetheless be admitted into evidence and acted upon by the judge, by the Court, in granting the order. Whereas, as I understand it, although it's not spelled out precisely, under the present regime if material is excluded it is excluded, and thus, the controlee or the control order will not be made upon the basis of that information, at least on the confirmation hearing.

First of all, I'd like to make sure that people agree with my shortform analysis of the situation and, if it is correct, it does seem to me to be quite a significant move, both in itself, and that will be something that the parliamentary committee should be looking at, and I will be looking at in due course as well, but it I think has some special significance in relation to the potential role of special advocates. Because I understand the point that's made in relation to the current situation, that at the end of the day, leaving aside the interim order, on the final order, contrary to the position perhaps elsewhere, the - first of all the rules of evidence apply, secondly, material which is excluded is excluded, and I follow that that points against the need for a special advocate.

Can I just ask for some comments on what I've just said?

MR GIFFORD: That's all accurate, Mr Gyles. If I can perhaps go through those in order, so I think the first one you referred to there was the lowering of the age for control orders.

MR GYLES: Yes.

MR GIFFORD: So to sort of just expand on that a little bit further in terms of the changes that have been made, or are proposed there, at the moment a control order can be imposed on a person of 16 or 17 years of age, and this will take it down to 14 years of age. At the moment the only difference between a control order in relation to a teenager versus an adult is the duration for which a control order is held.

MR GYLES: Yes.

MR GIFFORD: So three months for the teenager, 12 months for an adult. The Bill proposes to change and introduce some safeguards in relation to the age bracket of 14 to 17, it will still be limited in time to three months duration, it will also introduce, as you say, a concept of an independent court-appointed advocate. It's not quite in the nature of a special advocate, as that term is otherwise used, so its key feature will be to make sure that the person who is the subject of the control order understands that control order, the conditions and restrictions that are being imposed upon them, and the consequences of the breach of them.

So it's the nature of the first point at which the control order is issued that is well understood by the person, should they not actually have their own legal representative. It's not to operate to the exclusion of their own appointed legal representative, they can do that as well, and we see those two roles operating conjointly.

The second one that you spoke to, the monitoring - - -

MR GYLES: Yes, but can I just stop you there. As to that, as I understand those provisions, the Court-appointed advocate is in no sense an advocate for the party. Indeed, there is an obligation to put to the Court what is in the best interests of the child, regardless of the wishes of the child. I'm presuming that will be looked at by the parliamentary committee. That's, I would have thought, at least a controversial aspect of the role of that person. You're going beyond an advocate for the person, but not subject to the instructions of the person, which is one model, to that person's advocate putting forward that advocate's view of the best interests of the child. Anyway, it's one model, that's the reason I mentioned it.

MR GIFFORD: The second feature that you referred to was the provisions which introduce enhanced monitoring for the purposes of compliance with control orders.

MR GYLES: Yes.

MR GIFFORD: It amends three different regimes: the search warrant regime in the Crimes Act; surveillance devices in the Surveillance Devices Act; and telecommunication interception powers within the Telecommunication (Interception and Access) Act. The principal change there is to say that those warranted tools will be available when you are seeking to monitor compliance with the control order itself. I think you would be familiar with the comments made by the former INSLM in terms of - I think he's pointed out that effectively control orders rely to some extent on the person adhering to the conditions and restrictions. This will actually provide a very valuable tool for law enforcement to make sure that the person is actually adhering to those conditions and restrictions. And in that way, continue to sort of mitigate the risk that the person might pose should they breach those conditions and restrictions.

At all times they are warranted tools, in terms of telecommunications interception and surveillance devices. Again though, we sought through the issuing authority, under those regimes, and indeed it's to provide that additional armoury to the control order regime to make sure that not only the conditions and restrictions imposed to mitigate the risk that a person might pose should they be planning or undertaking an act of terrorism, but to make sure that we can ensure that those conditions and restrictions are adhered to.

MR GYLES: But isn't the position that in relation to a person the subject of an order, that those warrants can be issued because that person is the subject of an order, and because the person seeking the warrant wishes to monitor? In other words, there's no threshold of suspicion.

ASST CMR GAUGHAN: Well, we need additional information to obtain the TI and the LD. The order itself at the moment isn't sufficient and that's why we're seeking the amendment.

MR GYLES: I know, that's my point.

ASST CMR GAUGHAN: Yes. Well, that's why we're - because the operational environment is at the moment that unless the person continues to be involved in activity that causes us to obtain a - a relevant threshold to obtain the warrant under the current statute, we're saying that the behaviour still needs to be monitored through that period.

MR GYLES: Yes.

MR GIFFORD: So as to that as well, there is actually some threshold tests in the application for each of these different types of warrants. So one of the preconditions is that the subject is - or the person is the subject of a control order at the moment.

MR GYLES: Yes.

MR GIFFORD: But, by the same token, under each of the three there are various formulations of the test whereby the issuing authority must be satisfied that it's reasonably necessary for one of a number of purposes, which are set out within there. So it's modified to an extent from some of the existing tests, but there is still a threshold that the AFP will need to get across in terms of applying for those warrants. They will not be issued automatically and, indeed, the part of the context in the subject being - or the person being the subject of a control order is that, to the extent that the control order establishes a degree of serious risk of - or a requirement for prevention of a terrorist act or a number of other things, that that establishes that serious sort of criminal threshold without then needing to further go and establish a particular suspicion of a particular act occurring.

MR GYLES: Yes. I'm just looking to see the - find the provision.

MR GIFFORD: If you have the bill there, page 38 has the relevant test for the search warrants.

MR GYLES: Yes. Yes, but you can have - looking at subsection (2), you can have (a), (b), (c)(vii), couldn't you, without more - - -

MR ALDERMAN: Yes, and also having regard to subsection (4).

MR GYLES: Yes, (f).

MR ALDERMAN: Yes. I suppose the point we're making is that, it's not an automatic issue there, it is still at the discretion of the issuing authority, and that those need - in terms of (f), the possibility that a person has contravened, is contravening or will contravene the control order is actually very similar in some senses to the existing thresholds that we would have for applying for a TI or a search or a surveillance device warrant, which would require the establishment of a specific suspicion being established. This allows us to actually then go and monitor the compliance, noting that in many instances we have no other mechanisms necessarily available to easily monitor compliance with non-association via telecommunications devices, et cetera.

MR GYLES: Yes. I follow that. When I read the terms of the current control orders, I can understand the monitoring issue which arises but it also brings into sharp focus the degree of control that does exist. As I saw in one of the commentaries, a civil proceeding, with the civil onus of proof,

particularly with an order, then converts it into a very dangerous state of affairs.

ASST CMR GAUGHAN: I think, Mr Gyles, we just need to be conscious of the fact that these have been used infrequently and, in my view, they've been used very judiciously. If we look at the reason why they are actually issued, and that is to substantially assist in preventing a terrorist attack, we need to weigh that up in relation to the individual rights of a human, based on the rights of the Australian community to stay safe. As I've said, they have been used very, very judiciously.

MR GYLES: There was a third point, wasn't there, that you were going to address?

MR GIFFORD: There was, indeed, sir. The third area relates to the changes in the Counter-Terrorism Bill, which introduces amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004*. It introduces a new range of orders under the NSI Act, the effect of which will be, in certain circumstances, to enable the withholding of information from the person of interest themselves or indeed their legal representative.

I might actually ask my colleague, Julia, to give you a bit of a sense about the different orders that are available to the Court under those proposals.

MR GYLES: Yes. Thank you.

MS GALLUCCIO: The new orders build on the existing orders that are already available under the NSI Act. If the Attorney issues a certificate which says that, basically, "We need to consider whether national security information should or shouldn't disclosed," the Court holds a closed hearing. Currently, under the NSI Act, the person can have a security-cleared lawyer at that hearing. The types of orders that the Court can make are - they can decide that the information shouldn't be disclosed or that it should be disclosed or that there should be some redactions that should be made, or that the person should be provided with a summary of the information but the rest of it should be withheld. So, there's quite a wide range of orders that the Court can make. Under the existing orders, the effect is that if any information is not disclosed - you were correct in saying that the Court then can't consider that information in the substantive hearing.

The primary difference with these new orders is that, if the Court orders that information shouldn't be disclosed, they can then consider it in the substantive hearing. The other difference is that, during the closed hearing, the Court can decide - and it's completely up to the discretion of the Court - that a security-cleared lawyer cannot be present during the closed hearing, to determine how to deal with the information, and then, secondly, in the substantive hearing, that a security-cleared lawyer cannot be present when the

information is disclosed and being considered by the Court. They're the key differences.

In terms of how the process will work, there's a lot of discretion that is left up to both the Attorney and the Court. First of all, in terms of the Attorney's discretion, he has discretion as to whether to invoke the NSI Act at all in the proceeding, he then has discretion as to whether to issue a certificate to trigger the closed-hearing requirements, and then he also has discretion as to whether to seek one of these new orders.

The Court isn't compelled to make one of these new orders and in fact can decline to make the order and can instead make one of the existing orders under the NSI Act. In determining whether to make one of the new orders, the Court has to be satisfied that the subject of the control order proceeding has been provided sufficient notice of the allegations on which the control order request is based. They also have to consider whether the order would have substantial adverse effect on the substantive control order proceeding.

Finally, the Court also has the residual discretion to stay the proceedings if they consider that is appropriate to do, as well.

MR GYLES: I'll come back to what has become known as "gisting" - a use of language that grammarians might criticise. It strikes me that on this point, which is probably the closest to the special-advocate area, what's really involved, and it's reflected in the way it's done, it's really changing the NSI regime. The existence of that regime, of course, is another, I think, distinction between Australia and some of the other jurisdictions. Indeed, and some of you will know, the New Zealand Law Commission last week issued a report on the topic of dealing with national security information, which I've looked at. I haven't looked at all of it but I have looked at the passages which deal with special advocates. The Commission is in favour of special advocates, as those who consult it will see.

One of the difficulties I have at the moment is in finding out how the NSI Act has been working. I have had some information from the DPP. I've asked the Law Council for some assistance on that, as well. They'll be here later - they may be here now - but I'm not sure the extent to which - I haven't got any information from them as yet. As the Assistant Commissioner said, it has not been invoked in any of the control order proceedings and, from what I hear from the DPP, it's a very infrequently used provision. Therefore, there's a paucity of material from which to draw any conclusions at the moment. My preference in what I do is to try and get some guidance from what's been happening, rather than rely upon predictions and so on. If anybody does have any information, now or later, about the NSI Act and how it's been working, I would be interested in that, even a reference to any academic articles about it.

MS GALLUCCIO: The DPP may have some more to add. The NSI Act has been used in all of our key CT prosecution to date and, in recent years, instead of needing to go through the process of the Attorney issuing certificates and having closed hearings, the parties have instead agreed to arrangements, which the NSI Act does provide for, about how to deal with the information. So, there hasn't been the need to go through that process. To date, with the recent control orders that we've obtained, it hasn't been necessary yet to invoke the NSI Act.

MR GYLES: Yes. The DPP, I think, has confirmed to me that section 22, I think it is

MS GALLUCCIO: That's right.

MR GYLES: - - - which contemplates arrangements, has been availed of in the cases where it has been necessary. There has been little experience of how the regime does pan out.

MS GALLUCCIO: I think, in the very early days of the NSI, there were certificates that were issued by the Attorney but I'd need to go back and confirm that.

MR GYLES: Yes. I'm really more interested in current experience as to how - - -

MS GALLUCCIO: Yes.

MR GYLES: The other thing that I would throw into the mix in dealing with special advocates and the linked question of what information should be given to the potential controlee is the recent telecommunication regulation dealing with journalist warrants, to use a shorthand, where there is provision for a public interest advocate. The subsidy provisions are appropriate to a warrant-type situation rather than a hearing-type situation but the regulation does provide the role for the public interest advocate and for the appointment of a public interest advocate. Thus, it provides one model, if you like, being the declaration by the Prime Minister that a person is a public interest advocate - there are certain qualifications to be held and they then are appointed for a term. It's not clear but it seems to me to be ad hoc rather than a permanent - ad hoc in the sense of only being called upon to act on request, rather than being a standing - - -

MS HARMER: That's correct. The legislation requires that the Prime Minister appoints a person or persons to perform the role of public interest advocates but both the department and the AFP gave evidence to the Parliament Joint Committee and Intelligence and Security and I believe the Attorney, also, to the Parliament on the legislation, that the circumstances in which it was likely to be required for a journalist information warrant to be

issued, which is limited to the narrow circumstance in which an agency is seeking telecommunications data for the specific purpose of identifying a journalist source, are likely to be quite limited. So, it's anticipated that the number of instances in which a warrant would be required would be limited; therefore, the number of instances in which an advocate will be required to assist an issuing authority determining whether such a warrant should be issued will be quite limited. So, while there is a requirement for appointments to be made, it is a standing role held by those appointees, when called upon, rather than a constant office and stream of work.

MR GYLES: Right. Has there been any appointment made?

MS HARMER: There have been appointments made, yes.

MR GYLES: How many?

MS HARMER: At this stage two appointments have been made.

MR GYLES: That's public, I presume.

MS HARMER: The fact that appointments have been made, yes, that is correct.

MR GYLES: The identity of the people?

MS HARMER: No. That's not.

MR GYLES: All right. That's interesting.

MS HARMER: That is a question on which I could take advice. It's simply a question that those names have not been announced and I'm mindful of sharing those in a public hearing where those people have agreed to take on that role in what is effectively a personal capacity, being retired senior officeholders. While I would not provide the names, I'm sure we could inquire of those officers whether they're happy for those to be shared.

MR GYLES: It's not of any great significance, obviously, because the qualifications speak for themselves. If it were public, I would be interested to know but it's not something that I have any particular interest in.

MS HARMER: I can certainly confirm that those persons who have been appointed meet the qualifications which have been clearly set out in the regulations.

MR GYLES: I'm sure they do. One comment on that, and I haven't studied this Act very much yet, so far as qualifications are concerned, I was interested to see that, effectively, it's an ex-officeholder.

MS HARMER: There are two types of persons who may be appointed to the role. The two categories are persons who have formerly held positions of Justices of superior Courts, both state and federal, but also persons who are Senior or Queen's Counsel and who have an appropriate security clearance. There is then a separate distinction because the regime applies to both applications by the Australian Security Intelligence Organisation and a wider range of enforcement agencies. The regulations then draw out that, in respect of any applications made by the Security Intelligence Organisation, that clearance must be at an appropriate level for particularly those applications.

MR GYLES: Yes. Thank you. That clarifies that in my own mind.

The other situation to be taken into consideration, I think, in considering the special advocate issue is, the public interest monitors in Victoria and Queensland, they have, as I understand it, at the moment - certainly the Victorian public interest advocate has a permanent appointment, with a couple of assistants, and the possibility of more ad hoc assistants, and has a role in relation to the issuing of law-enforcement warrants, as well as hearings, where relevant. I have had some early discussion with the current public interest monitor in Victoria, and I'll speak to the one in Queensland. That provides a different model; it's, in effect, a permanent - in Queensland it's a case of permanent employment, although not full-time, I think, and duties across a range of instruments.

I presume the AFP would, because of your relations with the state in law enforcement, perhaps have some knowledge about how that operates.

ASST CMR GAUGHAN: I do in Queensland, Mr Gyles, based on the fact that Queensland appointed it pretty much once they started to get their telecommunications interception powers, so therefore that was part of the agreement in the first place. Besides that, to be honest with you, I really haven't had much to do with it whatsoever. The department has probably to do with it, to be honest.

MS HARMER: The comments that you made about both the Queensland and the Victorian arrangements are correct. I certainly couldn't purport to speak on their behalf or provide advice on the detail of the operation but it is correct to say that in each of those instances they have a wider role and a standing role which reflects a role that they have under state legislation to consider a wider range of issues. In terms of the interaction with the Commonwealth, that does extend to applications for telecommunications interception rights. In particular, that was from the beginning in respect of Queensland. The department has had some engagement with those officers but it is the case that the functions conferred is under state legislation and in respect predominantly of powers under that legislation rather than in respect of the Commonwealth.

MR GYLES: It does extend to preventative detention orders, though, because they were involved in one of the Victorian matters, the *Causevic* matter where there was a reported hearing of some - - -

ASST CMR GAUGHAN: Again, that was utilisation of state-based legislation.

MR GYLES: Yes. Quite.

ASST CMR GAUGHAN: Therefore, the states basically utilised their own processes to ensure that that order was issued in accordance with the legislation.

MR GYLES: That gives rise to the question, in my mind at least, if one were to - and I should also mention that the UK reviewer, who's sort of roughly comparable with my role, comes down on the side of being in favour of a special advocate. Bearing in mind that it's not where there are points for and against, overall, he has remained in favour.

ASST CMR GAUGHAN: I think I might just say in reply to that that, obviously, these control orders are used infrequently, as I've already stated. I would anticipate that, if this Bill actually is passed into law, our use of this will actually be even less frequent, so, therefore, it will be a smaller percentage again.

MR GYLES: Smaller?

ASST CMR GAUGHAN: Most definitely. My only concern, obviously, is timeliness. If we are seeking control in relation to intervention of a terrorist attack, I don't really want other roadblocks or other impediments to speed to ensure that we get this control of it through in a timely process. I understand the balance in relation to ensuring, obviously, the individual and human rights, et cetera, et cetera, but I am concerned, Mr Gyles, around any processes put in place furtherance to what we have which again even further slows down the process of obtaining a control order.

MR GYLES: Noted. If one were to favour that approach as a matter of principle, let's say, there are a whole lot of practical questions that arise. Where would such an advocate come into the regime? Would it be at the interim end or the final end? Under the current regime, there would be, on one view, not a lot to do in the final hearing because the Court can't take account of the national security information. The most active role would be at the level of either the interim hearing or any hearing about the way in which the evidence should be dealt with. As against that, the strict rules of evidence don't apply at the interim stage, so one role that that advocate could play is removed.

Speaking for myself, having had some experience of a criminal trial where the client has given instructions to the defence counsel that precludes the counsel from putting a positive case, I don't doubt the fact that you can do quite a lot of useful things in testing what is put up by, in this case, an applicant for a control order merely by looking at the material proposed, if the rules of evidence apply, then considering that and making submissions about it; even if they don't, submissions as to the terms of the order and so on might be most usefully done without any more being involved. I'm not a sceptic about that.

That's one question: Where would you come in? Secondly, and bearing in mind what's said about roadblocks: How can it be done in a way which is not an unnecessary roadblock, bearing in mind control orders are not preventative detention? If they're walking down the street, there are other ways of dealing with it than control orders - walking down the street with a bomb, I mean.

For a limited number of occasions per annum, you can't have somebody sitting around waiting for it to happen. Therefore, you've got a problem of either having a big panel, so you've got to get somebody, or of having, in effect, a standing, more or less full-time, person, who has other duties. One can see problems with all of those alternatives. Then, digging down a bit deeper, you have the relationship between the advocate and the controlee and the controlee's would-be lawyer, and there are various gradations along that way. The New Zealand report goes some way towards having communication between the special advocate and the person the subject of the proceeding.

One solution would be to have the special advocate communicate with the controlee - I'm not talking about the interim period but the final - before the advocate sees the special material, so that he can understand where the person lives, what he does - someone, what he or she does and where they live, so you can pick up, sort of, real bonus where you've got mistaken identity or where he said, "where have you been for the last month?" and he's got his passport, he's been somewhere - he's got his tickets to go to Queensland, he lives in Queensland. There may be situations where, by communicating with that person, you can show very quickly that there's a question raised about the very identity of the person.

They're a few things that have occurred to me. Any views I would be grateful to receive, without prejudice, on the basis that, if that were the conclusion, what is the least offensive way of doing it - most effective, I'm sorry.

MR GIFFORD: I should start, as an opening comment, Mr Gyles, that effectively there's a little bit of difficulty here in terms of - the Government's

most recent stated position is effectively not to support the recommendation for special advocates. So, I won't - - -

MR GYLES: Yes. I'm not asking you to - I'm just saying, look, if this were to be done, it's best it be done in a way which is sensible.

MR GIFFORD: On that basis, there's a couple of comments that I would make. One is, effectively, at the moment, with the existing regime, too, there also remains the Court's discretion to appoint its own special advocate.

MR GYLES: Yes.

MR GIFFORD: The regime, as it applies, has no impact on that discretion whatsoever. A question would need to be asked, to what extent we need to move beyond the discretion. I think the context where effectively we're saying at the moment that there have been six control orders in the history of the regime and we've not yet invoked the NSI Act. Then, potentially, if we're saying a smaller subset of those numbers of control orders may be the subject of the orders where you would seek to withhold information - whether or not you need to build an architecture which has a standing special advocate, I think, is one question that would need to be resolved.

MR GYLES: Yes.

MR GIFFORD: If that was decided in the affirmative, that, yes, indeed, some architecture was necessary to set down a role for a special advocate, I think the considerations you've set out are exactly the same ones that we have to some extent raised and sort of troubled(?) with in the past.

I think, from an operational perspective, the AFP is quite right to highlight the need to make sure that, if a role is built into the regime, it is facilitative towards the regime. We would need to think about the impact of having the special advocate play a role any time prior to the confirmation proceeding and, to some extent, when we don't have a great body of evidence to draw from there, I don't think we've really had a substantive confirmation hearing to date - - -

MR GYLES: That's a problem.

MR GIFFORD: Which perhaps also gives a sense of why it's been the discretion that has been relied upon to date, leaving that within the hands of the Courts to decide for themselves whether or not they felt that there was something that was necessary.

In terms of a special advocate having a role at the interim stage, versus the confirmation stage, one observation would be that the confirmation stage is the point at which potentially then we would be seeking the orders to

withhold the information from a person or their lawyer. On that basis, there might be more of a role for a special advocate to play, potentially, at that stage, versus the interim stage; the interim stage obviously being ex parte and the point at which the AFP is able to leave with as much information as it possibly has at that point in time.

That's just a couple of the considerations and comments that I'd make in terms of the issues that you've raised.

ASST CMR GAUGHAN: I agree.

MR GYLES: Is there anything the DPP wishes to - - -

MR BRUKARD: Not really, sir, no, not unless you've got some questions for us in particular.

MR GYLES: I'm really just raising the things that are in my mind at the moment. There's some guidance but not a lot. Of course, there's somewhat of a chicken-and-the-egg situation here because the fate of the Counter-Terrorism Bill isn't known; so, some aspects of it may remain controversial. I don't know what the politics of it are but one presumes it will be passed largely in the form which is proposed. The most critical thing from the point of view of special advocates is, I think, the ability to withhold.

Could I turn then to the topic of gisting. I understand it was said earlier, and I understand, that the amended control provision requires:

> *the Court to be satisfied that the relevant person has been given notice of the allegations on which the control order request was based, even if the relevant person has not been given notice of the information supporting those allegations.*

That, I think, is the provision that was being referred to earlier.

UNIDENTIFIED SPEAKER: Yes.

MR GYLES: Yes. Under the present regime, that's governed by - the control order provisions themselves deal with what must be given but they contemplate, if I could put it this way, the censoring of what is given, either by way of summary or a gist being given, as I understand it, or nothing. That's the control order provisions.

What about the NSI? What's the NSI provision at the moment, just remind me, as to what must be given? What is the way it's put?

MS GALLUCIO: Just to clarify in terms of the control order provisions you're referring to, I think, section 104.12A.

MR GYLES: Yes.

MS GALLUCCIO: My understanding is that those requirements on the AFP are additional to any obligations that the AFP has to disclose material under an ordinary civil proceeding, where the rules of evidence apply. So, when the AFP hands over that material, it's them, kind of, making the decision about what gets redacted. Then, separate to that, the AFP also has its ordinary disclosure obligations. If, under the NSI Act, the Court makes an order that certain information shouldn't be disclosed, they can pick what kind of order that is, and does include gisting, once they kind of work out what information can't be provided to the person, they still have to make sure that there's enough there so that the person has notice of the allegations.

MR GYLES: That's because of what?

MS GALLUCCIO: That's to ensure a degree of procedural fairness.

MR GYLES: Yes, but there's no express provision to that effect, is there, or is there, in the control order provisions?

MS GALLUCCIO: Not in the actual control order provisions.

MR GYLES: No. I think, at all points, the - go on, you tell me what - - -

MS GALLUCCIO: Sorry. The existing orders under the NSI Act don't provide for a minimum standard of gisting but, with these new orders, it will.

MR GYLES: Because of the provision of - - -

MS GALLUCCIO: Of needing to make sure the person has sufficient notice of the allegations.

MR GYLES: Yes, but, under the present regime, the person either receives a summary or redaction, or something of that kind, and the Court has limits as to what it can take into account.

MS GALLUCCIO: That's right.

MR GYLES: Yes. Just going back to where we started, which is the COAG recommendation 31, the minimum standard of disclosure recommended was:

> *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.*

That form of words comes from the English cases, as I understand it, and

hasn't been adopted as such in the current draft Bill, or anywhere else. I must admit, I have difficulty with it because it assumes that - I think the English provision was that effective instructions are to be given to the advocate. I have difficulty because it seems to assume that there is a lawyer always acting for the party, and that's not - traditionally, here, it would be to understand the case that's made. I think there is a question about whether this form of words is chosen because it will carry with it, if you like, the understanding of it in the English cases. That might be why it was favoured by the committee.

MR ALDERMAN: Sir, in terms of the current control order proceedings, under 104.12A(2)(a)(iii), we actually need to provide any other details required to enable the person to understand and respond to the substance of the facts, matters and circumstances which form the basis of the confirmation of the order.

MR GYLES: Where is that?

MR ALDERMAN: It's 104.12A, the control order provisions.

MR GYLES: Yes. Thank you. That's on the confirmation - - -

MR ALDERMAN: Yes.

MR GYLES: Yes. I wonder why that wasn't carried through to 38J, the amended 38J. It would provide some consistency, would it not?

MS GALLUCCIO: I think the particular drafting that was chosen for the new orders was to make it absolutely clear that the person needed to be provided with information about the allegations. It was a bit unclear, I guess, under 104.12A(2)(a)(iii), what the reference to "any other details" might mean.

MR GYLES: Was 12A in force at the time of the COAG Committee recommendation?

MS GALLUCCIO: Yes.

MR GYLES: Let me just run through - are there any other comments, including from the DPP, about this whole question of gisting?

MR ALDERMAN: Sir, just to reiterate, I suppose, it's in our submission to you on the control orders themselves; we think that that actual provision in relation to our other obligations for disclosure actually does provide a fairly detailed account on that basis. That forms the basis of our position in terms of the minimum standards of disclosure.

ASST CMR GAUGHAN: I think I might also add, Mr Gyles, that, in reality, and you've seen the control order brief, so to speak, you know from personally having a look at that how much information is in that. There's no gisting.

MR GYLES: Those cases don't require gisting.

ASST CMR GAUGHAN: Even in the last - all of the applications that have been had in the last 12 to 18 months, there's definitely no gisting. They are all about the same volume.

MR GYLES: I appreciate that but - - -

ASST CMR GAUGHAN: I understand - yes.

MR GYLES: - - - there will be a case where you just don't want to - you've got a choice, "Do I get a control order or not," and you may want to get one. Then the always-interesting questions will arise.

If there's nothing more to be said about this topic, I'll just run through the other recommendations. Recommendation 27, "Amending the threshold", I think I understand what's said about that. There is now consistency, although at a slightly lower level, but the argument is that the Court still has to be satisfied, and that's what counts.

Recommendation 28, the question of the issuing Court - this will be for the AGD. The Family Court has been removed. Federal Circuit Court remains. The Chief Justice of the Federal Court has expressed the view that this is, in effect, superior Court work and it's more appropriate to be done there than in the Federal Circuit Court. The point has been made, I think, that the Federal Circuit Court includes Family Court responsibilities and has a lot of judicial officers who will have had little experience in this type of work.

I'm just putting that forward as being what's been put. Are there any further comments to be made about that, or any comments to be made about that?

MR GIFFORD: Mr Gyles, just to note that, again, this was a matter that was raised before the Parliamentary Joint Committee on Intelligence and Security on Monday. The point that was made at that particular time was effectively that the government again has had consideration of that by the extent that they're removing the Family Court, for instance.

MR GYLES: Yes. I see.

MR GIFFORD: The Parliamentary Joint Committee on Intelligence and Security has asked us to take on notice the question of whether or not that should be extended to the Federal Circuit Court. The point that was made in

evidence on Monday was to note that effectively - and I'll put - my AFP colleagues to correct me if I get this wrong but I believe now that the Federal Circuit Court has been utilised in terms of setting control orders. So, again, looking towards the limited evidentiary base that we do have, there has been a role that they have played - touch wood, hopefully, successfully I think that can be characterised, but at this stage the government has been minded only to remove the Family Court, not the Federal Circuit Court.

MR GYLES: Yes. Again, it's a bit of a chicken-and-the-egg, provided you have four a year, the Federal Court could well and truly handle it. If you have 40, it would be a very different matter. I think I may have asked this earlier but is there any MOU or anything of the sort between the AFP and any of the Courts about how these matters are to be dealt with, or the AGD, or someone?

MR GIFFORD: No, there's not, not with the AFP.

MR GYLES: The Federal Circuit Court is widely dispersed geographically and widely dispersed in finding the type of jurisdiction. Putting it delicately, I would think there's a strong case for ensuring that there is no judge-picking by the AFP or - I think it's got to be clear that there is no possibility of having warrant-friendly judicial officers known and used.

ASST CMR GAUGHAN: In the four cases recently, two were a joint application, therefore there was one Judge used, but in the other two circumstances we have used different Judges. It's really not up to the AFP to determine. We brief it out to AGS, and AGS ultimately register - - -

MR GYLES: I understand that. I'm just saying, I think there is a case for recognising that possibility within the limits of judicial Courts and depends who's dealing with it, because there should be - there may well be a process but I think there needs to be one. I mean, I'm just being realistic.

MR ALDERMAN: I've just been informed that, to date, it's always been the duty Judge.

MR GYLES: Provided there's an understanding - as a former practitioner and Judge, I know that applicants - I'm talking about police here particularly but applicants generally always keep an eye out for who they think might be a favourable judicial officer; if they can get to them, they get to them.

MR GIFFORD: I think, Mr Gyles, the point that I'd make with that is that - I think the AFP is saying the same issue - effectively they bring the matter, the Court then allocates who the matter will be heard by in any particular instance, and there is no control for the AFP as to who that would be - - -

MR GYLES: That's fine, provided that's - but I know, when going to

Magistrates, it is an entirely different matter. It may be that the current arrangements are perfectly bulletproof as far as that's concerned but it's just a point to be looked at.

Mandatory consultation with the DPP; I understand what's been said by everybody about that. Recommendation 30, control orders. Recommendation 31, minimum standard of disclosure, we've dealt with. 32, appeal rights; that seems to have been sorted out, doesn't it?

MR GIFFORD: Yes, that's in - it's in the Foreign Fighters legislation last year.

MR GYLES: Yes. Relocation; interesting topic because the pendulum has been swinging in England for and against, then back to for again. You said this is not - the government supports the recommendation, in principle. Is that right?

MR GIFFORD: That's correct. I think the view of the government expressed at the time of the COAG review was that it was supported but it did not wish to amend legislation to the extent that we do not accept the interpretation that I think 104.5, paragraph (3)(a) would support a mandatory relocation. So, while the principle was supported, it wasn't seen to be necessary to give it express legislative effect.

MR GYLES: All right. I suppose it's up to the AFP to test that one day. Certainly, it would be a very Australian construction, I think.

Curfew; 10 hours is now 12. Is that right?

MR GIFFORD: That's correct. Again, the Foreign Fighters legislation in 2014.

MR GYLES: Yes. Recommendation 35, about communications, I understand what's said about this. It's a very difficult topic, difficult in the sense of it's a very great restriction on people but, on the other hand, if you're going to have orders of this kind, non-communication is an important part of it.

ASST CMR GAUGHAN: It's not non-communication. We're allowing them access to a mobile or landline connection but it is restricted. That's for the simple purpose of ability to ascertain exactly what they're up to.

MR GYLES: Yes. Maximum duration; I understand that.

Recommendation 37, the least-interference test; I understand what you've said about that, I think. It's a matter of judgment as to whether there's a difference between the two and, if so, where the balance falls. Perhaps you

can just state what - - -

MR GIFFORD: The emphasis for us there is always coming back to the issuing Court being satisfied that the conditions, prohibitions or restrictions can only ever be imposed where, effectively, they are reasonably necessary, reasonably adapted and appropriate for the purpose of preventing a terrorist act. If we went down the least-interference route, if there was a conflict between the two, the government has chosen this particular instance to make sure that the option is that we are supporting - the conditions and restrictions have been tailored towards the prevention of a terrorist act in the least-intrusive manner - is potentially inconsistent with that.

MR GYLES: All right. Is there any matter arising from what I've been asking you about that leads you to make some final remarks, either that or generally?

ASST CMR GAUGHAN: No, sir.

MR GIFFORD: No, Mr Gyles. The only thing - if we can perhaps take it on notice for you; I think you made reference to getting some additional material in terms of where the cases have invoked the NSI Act. If we can, we'll either - do that with the DPP, in terms of where it's been invoked, and provide that to you.

MR GYLES: I have had some information from the DPP. All right. You'll take notice of what I've said at various points, to try and tease out arguments rather than indicating any point of view. I would say that it does seem to me that the amendments to the procedures in confirmation do raise a real issue about the special advocate situation. It does raise, then, real questions as to how one would, in practice, deal with something which may arise infrequently but importantly.

We'll just have a short adjournment and hear the next parties. Thank you.

ADJOURNED **[11.27 am]**

RESUMED **[11.44 am]**

MR GYLES: We'll make a start, shall we? I'll just briefly reiterate that this is a hearing under section 21 of the INSLM Act, upon a reference from the Prime Minister under section 7 of the Act, dealing with the safeguards in relation to control orders recommended by the COAG committee which were not taken up in the legislation and, in particular, the recommendation concerning special advocates.

Now, I have received – we've got representatives of the Law Council of Australia present and on the telephone we have Ms Gabrielle Bashir, a member of the Law Council, by telephone. Is that correct?

MS BASHIR: Yes, I'm here.

MR GYLES: I have had some submissions from the Law Council and I had earlier raised or I had before today raised with the Law Council the question as to how the National Security Information (Criminal and Civil Proceedings) Act 2004 has been working in practice because it's the operation of that Act which is substantially involved in the special advocate question.

Subsequent to the COAG recommendation, there was the 2014 amendments which took up some of the issues. Then there is the Bill currently before the parliament, the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 which is currently being considered by at least the Parliamentary Joint Committee on intelligence security which has provisions which have a significant impact upon the control order provisions and thus impact upon the issues or the safeguards recommended by COAG if that Bill is passed in its present form.

Now, I would welcome any opening that you would like to make. I think you were present for part or all of the previous session.

MR McCONNEL: Yes, we were.

MR GYLES: Which will have I think thrown up most of the issues that were in my mind. To the extent that you'd like to contribute to them, please do so.

MR McCONNEL: Thank you very much. I will just make a couple of brief remarks addressing our written submission. I don't want to go over what's already been supplied to you. The first and most important point to make and reinforce is that the Law Council continues to have concerns about whether a control order regime is justified. So our submissions are made in that light and subject to that very important qualification.

MR GYLES: Could I say about that the reference from the prime minister which I'm dealing with refers to safeguards and assumes the continuation of control order provisions. As I said earlier, I do have a general roving commission, if you like, and I can consider the whole question of control orders. Indeed, the changes which are mooted give rise to some important questions. So this debate is on the basis that the regime would continue. But that shouldn't be taken to assume that you agree with that or necessarily that I agree with that.

MR McCONNEL: Yes, thank you for that indication. I might add that we

also make the submissions that we have, having regard to the Counter-Terrorism Bill that's currently before the parliamentary committee. We made submissions – we've made written submissions to that committee and we appeared at its hearing on Monday of this week. Certainly the submissions we make about the safeguards are made on an assumption that what is currently contained in the Bill will become law. To some extent, that underlines and reinforces some of the concerns or issues that we've identified.

Can I just clarify – and I think this has been identified earlier this morning – that there are a couple of matters in our written submission that we would wish to modify. The first is in relation to the question of either the Family Court or the Federal Circuit Court being the issuing authority. In our written submission we have submitted that they continue to have an involvement. We've since had the benefit of reading the submissions from the Court itself and we would not wish to depart from the position adopted by the Court itself. To the extent that our submission is inconsistent with that, we withdraw it.

MR GYLES: Yes.

MR McCONNEL: The second is in relation to the question of any notice of right of legal representation or appeal or review rights, which is in paragraph 72 to 80 of our written submission. We acknowledge that those matters have been addressed in the foreign fighters legislation and so no longer apply.

MR GYLES: Yes, thanks.

MR McCONNEL: Could I just perhaps indicate then what are the key hairline points for the Law Council for the purposes of today's discussion?

MR GYLES: Yes.

MR McCONNEL: The first – and they're not in any particular order, but the first is the question of consultation between the AFP and the Commonwealth DPP. Secondly, the issue of the special advocate system. And I understand that that's probably where you may want to concentrate the discussion this morning. Very much connected to that is the question of the minimum standard for information to be provided to a respondent. Also, the issue of whether there should be a presumption in relation to basic entitlement to access communications devices such as internet and mobile phone. Those are probably the matters that we would seek to touch on and otherwise we're content with what's in our written submission.

MR GYLES: Yes, thank you.

MR McCONNEL: In relation to the consultation between the AFP and the

Commonwealth DPP, we submit that that should be reflected in the legislation as a requirement, bearing in mind and as seems to be acknowledged by both the AFP and the Commonwealth DPP, that control orders are intended to be a measure of last resort. It seems to us that, given that they are a measure of last resort, consideration must be given in every case to whether the facts and circumstances that have been gathered by the police should actually form the basis of a prosecution and whether the prosecution is capable of succeeding, and, I suppose, a third consideration, would successful prosecution actually address the risk that has been identified as a basis for the control order?

But certainly two of those three questions are questions which, it seems to us, can only be answered on a review of the material by the Commonwealth DPP. So we're not satisfied with the statement from both the AFP and the Attorney-General's Department that the – that operates in practice, in any event and that there should be sufficient flexibility to allow it to operate in practice but not be mandated. We think it should be mandated.

MR GYLES: As to that, I note you say last resort. Why should it be the last resort? I don't quite follow that. If you've got a preventative tool, why wouldn't you exercise that before somebody does something which puts them in jeopardy of criminal prosecution? You want to stop the act rather than – it's a bit blurred because there's so many preparatory offences. I appreciate it's not a clear blue line. But in principle if you've got a measure that will prevent something happening, why wouldn't you exercise it on the civil standard and therefore you might never get to an offence? You don't want to watch them and see throw a bomb before you do anything.

MR McCONNEL: That's so, but there is an acknowledgement that there is a significant incursion in personal liberties and because of that, the justification for that has been that this is sought to complement the existing measures and that the existing traditional measures, if we can call them that – I got a bit of criticism from Mr Ruddock the other day about traditional methods. But if the traditional methods can address the risk, then the traditional methods should be pursued first. That might simply be that there is enough evidence to charge someone and take them into custody, have them prosecuted and it might be - - -

MR GYLES: But then it becomes a bail – then it becomes a question of remand and bail, doesn't it?

MR McCONNEL: It may well do. But you are then in an environment where the tried and true methods, if you like, of dealing with an accused are in play as opposed to this much more intrusive regime. That is about to get a whole lot more serious because the Counter-Terrorism Bill proposes that once a control order is in place on the civil standard, then there will be an opportunity to seek a warrant to monitor that control order without suspicion

of breach. The consequence for breach of a control order is a term of imprisonment of up to five years. That's a significant and serious crime deriving from a state of affairs established on the civil test, not on the criminal burden.

MR GYLES: I put that, as you may have heard, to the authorities this morning.

MR McCONNEL: Yes. I wasn't persuaded, I must say, that there is still a further threshold that needs to be satisfied on the warrant process.

MR GYLES: No, I didn't quite follow what was said about that. I'll look at it more closely.

MR McCONNEL: Yes. It seems clear to us from the terms of the Bill that the only matter that needs to be gotten over is the existence of a control order.

MR GYLES: It says the possibility of breach, doesn't it?

MR McCONNEL: I think the possibility exists as soon as the order is in place.

MR GYLES: Looking at what I was directed to, it struck me that that was the threshold.

MR McCONNEL: Yes.

MR GYLES: I'm not sure how that will be interpreted.

MR McCONNEL: We've made a submission in relation to that proposal that that is an inadequate threshold and that the threshold should be some level of suspicion.

MR GYLES: Have you sent us the submission – we've got them through the – okay.

DR MALT: If I may, just in terms of the monitoring warrants proposed under the Crimes Act amendments, so you do have the requirement for there to be a control order in place. But the issuing officer also has to be satisfied on the balance of probabilities, for example, that the entry and search is reasonably necessary, reasonably appropriate and adapted for one of the four purposes that is listed in the legislation.

MR GYLES: One of those is monitoring.

DR MALT: So there's protecting the public from a terrorist act, preventing the provision of support for or the facilitation of a terrorist act or engagement

in hostile activity in a foreign country and determining whether a control order has been or is being complied with.

MR McCONNEL: It's that fourth one is so entirely broad that - - -

MR GYLES: As I said, when you ally that with the possibility of breach, then you may, on one view, have a very slight threshold. Yes, anyway, I follow your point.

MR McCONNEL: That's essentially the point in relation to it being a measure of last resort, because it is so intrusive and the consequences, once they're in place, are significant. Therefore, the position, it seems, of the AFP, Attorney-General's Department and DPP is that that's in practice in any event. We say that it should be entrenched.

MR GYLES: Yes.

MR McCONNEL: In relation to the special advocate system, we have listened to what was exchanged this morning in relation to that. I don't know that there's anything specifically to add to our submission in relation to it, other than that our position in support of the special advocate system is made in light of the lessons learned or the observations made in relation to the United Kingdom experience. I think it's difficult for us to deal with what a special advocate regime might look like in the abstract. But we think that particularly with the type of extensions being sought to the regime in the Counter-Terrorism Bill (No 1) of 2015 that they really underscore the need for an independent advocate at some point in the proceedings.

We had planned for Phillip Boulten SC to appear this morning. Unfortunately, he's been detained in a hearing. He has firsthand experience of these issues in some detail as a result of involvement in cases in New South Wales. If it was possible for the hearing to meet with Mr Boulten and take his views as a practitioner, a member of our criminal law committee who has firsthand experience in this area, we'd be very grateful for that opportunity being extended.

I might at this point just ask Ms Bashir if she wants to make any comment in relation to special advocates.

MR GYLES: Yes, Ms Bashir, can you - - -

MS BASHIR: Yes. Can you hear me?

MR GYLES: Yes, very well, thank you.

MS BASHIR: I do have some comments to make. I was fortunate to actually be with Mr Boulten last night and I asked him about his experience

in relation to control orders. He hasn't been involved in any control order cases but he was legal counsel for Mr Lodhi who was an accused person in a terrorist trial here. He said that in that matter in terms of the material that I'll call the otherwise secret material, that there did manage to be undertakings entered which were accepted by the federal authorities in relation to – for the legal representatives of the accused person and for the director entered into undertakings to not disclose material.

Ultimately, there was only a small amount of material the subject of a public interest immunity claim, which they were ultimately given a summary of. So in that case, the material was able to be dealt with because the legal representatives understood what it was. They had the material. They could take instructions without disclosing what the material was to their client and it operated in that way in a trial context.

The Law Council's primary position is, of course, that there should be – my understanding is that primarily proper disclosure of the information sufficient to enable, if there is to be any challenge, a challenge to be made, that that's the primary position. A system of undertakings is one which can work very well in that respect. In the event that that doesn't work or is not deemed to be the recommended option, then the special advocate system, if introduced, really does need the fundamental safeguards that we've adverted to in the submission.

In terms of news through from the field, if I could say that, in relation to current control order proceedings, of course, we're very limited in what we can say about that and it may be that you would be assisted, Mr Gyles, by having some confidential submission made by counsel from both sides that are currently involved in current control order proceedings. But some of the matters that we understand from them are that, first of all, it is a real issue that there isn't funding for this control order assistance through legal aid because it's a civil proceeding and if the person isn't likely to go into custody legal aid doesn't extend in some jurisdictions.

So that's one thing. In relation to special advocate system, if it comes in, we put in our submission that that's a system that we would submit should be fully funded by government and without burdening existing legal aid funding where, for example, in proceeds of crime legislation it has to go through legal aid, what ends up happening is that legal aid has to allocate it out of its already-substantially underfunded budget initially. Then they have to, at the end of the proceedings, go back and on a costs basis apply to the government to be reimbursed for the funding.

We would submit that there should be full funding sitting outside of legal aid funding for any special advocate system. Also, in terms of when, for example, the special advocate regime may be employed, it may be that it is required or should be available at the interim control order stage. One reason

for that is the interim control order can be in effect for months and months before the process is complete. While the interim control order is in place, of course, the civil nature of the proceedings is such that the preparation for the hearing is unfolding and there are steps in relation to preparation for the hearing.

For example, hypothetically speaking, there may be very detailed notices to admit served on a subject or prospective subject to a control order. If there is special – if there's material that is subject of nondisclosure or sought to not be disclosed it's difficult to know, firstly, whether or not there would need to be notification that there has been material omitted and some brief – if not a summary of the material, then at least some kind of identifier.

Secondly, how would the special advocate then interact with the legal representatives? So we've sought to draw out some safeguards that we think should be put in. But one thing that is very concerning is in terms of any meaningful ability to challenge or answer that material there would certainly need to be some input from the controlee. I know that in some other jurisdictions there is access allowed to a special advocate with the controlee prior to the material being served.

That in our submission would not be sufficient access because when even, for example, a summary is given to the special advocate or access in total is allowed, in order to put that material into its proper context, there must be permitted access to the controlee. Even if the special advocate can't disclose the actual subject matter, it may be that there can be a way of questioning the controlee in order to assist or inform the special advocate in how to make further inquiries or place the evidence into its proper context.

I know that in other contexts some experience that we've had where there is summary of information given, for example, in New South Wales in parole hearings in relation to allegations that are subject of some sensitivity, for example, allegations of being involved in a bikie group or the like, often when that summary has been permitted to go to the legal representative and been able to be placed into its proper context it's led to a withdrawal of the material itself or an alteration and only limited reliance placed on it.

So it is very important that there be allowed to be some meaningful – if there's a special advocate, some meaningful interaction with the controlee, because otherwise, as has been noted in the House of Lords decision, the *Secretary of State for the Home Department v AF & Anor*, there is really very – there is some work still for a special advocate to do in terms of challenging, but it is quite limited and it's questionable whether in all the circumstances it would properly allow procedural fairness.

MR GYLES: Thank you. That's very useful. I'd be happy to meet with Phillip Boulten and others who've got some current – and perhaps others who

had current control order experience. The only thing is there's some time constraints. I've promised to do my best to get my report done in time for the PJCIS to consider it in making their report. So that means I've got to get something done by early February. So it's a difficult time of year. I'm based in Sydney, as you know, and I can make myself available over the next maybe between now and Christmas in Sydney. So I'll leave that open.

MR McCONNEL: Thank you very much.

MR GYLES: I mean, there isn't much either – it's something I should have and I did speak, I think, to the Law Council some weeks ago about trying to get this sort of material, because otherwise you're limited to the official records, what's said from the official side and commentary by people really from the outside.

MS BASHIR: Sorry, I should raise that we're also aware and if you do consult with people who are currently involved in control order matters, if they're permitted and not bound by undertakings to – if they're able to speak to you – we're also aware that in one case the Victorian Public Interest Monitor played a role in a – it wasn't a control order case, it was a preventative detention order case.

MR GYLES: Yes, I'm aware of that involvement. I understand that there may be limitations on what people can say. If it were critical, I'd look and see whether my legislation might provide the answer to that. But what I would be looking for would be some – and I think there would be material which would be usefully given to me which don't descend to the sort of detail that might be prohibited. If it was important enough, I could have a look at that because I can. That was a state matter. So there may be difficulties in relation to that. I'm addressing everybody here, that is, if it can be done, so much the better.

MR McCONNEL: Thank you very much.

MS BASHIR: I might mute myself again so that - - -

MR GYLES: Thank you.

MR McCONNEL: Can I just make a couple of additional points in relation to the idea of a special advocate or what's referred to as a public interest advocate. I think as - - -

MR GYLES: That microphone doesn't seem to be operating.

MR McCONNEL: That's because I turned it off.

MR GYLES: I was awake, you see.

MR McCONNEL: A couple of comments in relation to the public interest advocate which has been identified as a role that might be created for cases involving children. In our submission to the parliamentary committee we identified some difficulties in relation to what is proposed in the Bill and, in particular, in the case of children, the possibility for confusion by the child as to what the role of that advocate is as opposed to their legal representative. So that the child might say certain things to that advocate but then the advocate is required to disclose to the hearing.

MR GYLES: Is that right? I didn't pick that up actually.

MR McCONNEL: I'm not sure if we've got the part of the Bill here.

MR GYLES: I've got the Act here.

MR McCONNEL: But one of the requirements said that they must disclose to the Court matters which are in the best interest of the child. If that advocate says it's in the best interest of this child to have certain controls put on him or her, then whether the child wants the advocate to say that or not – we've raised that really as a matter of ensuring fairness to a child who's the subject of one of these applications.

MR GYLES: I must say what I said to the previous segment that that's a very – not so much the point that you've made, although I look at that, but it's the function that's being played as having somebody there persuading the Court to make a control order. That's really what it may amount to.

MR McCONNEL: It may under that regime and that's the caution that we've raised in relation to it is that if a child doesn't properly understand - - -

MR GYLES: Forget about the child for a moment. It's not the misunderstanding about – it's the fact that the role of the advocate may be, if he or she forms the view that the child is in danger because of their associations, that they ought to be locked – not locked up, but placed under a control order, then they're bound to make that submission to the Court, which is the very antithesis of what one thinks of when one thinks of - - -

MR McCONNEL: It's not exactly a contradictor.

MR GYLES: I mean, the prosecution are there anyway.

MR McCONNEL: Yes.

MR GYLES: They're there anyway putting that point of view. I don't understand what that – I think I understand but I'm not sure I like what's

behind it.

DR MALT: And there seems to be the potential for that court-appointed advocate to make those kind of decisions even though they might not have access to the secret evidence themselves.

MR GYLES: That's not clear, is it, or not clear to me, anyway.

DR MALT: That's right.

MR GYLES: That's a point to be looked at. I'm looking at this indirectly at the moment to the extent that – now, that, to me, is quite significant because there you have a Court-appointed advocate as one model for what might happen. I'm not at the moment for this report dealing with every aspect of that Counter-Terrorism Bill. But I might have to say something about that because of its significance.

MR McCONNEL: Well, that directly relates to control order applications.

MR GYLES: It does.

MR McCONNEL: It certainly comes within what you're examining. But I was also interested that you mentioned this morning the public interest advocate in relation to generalist source warrants as well. It seems to me that if the government is proposing a form of advocate for children, that there is also a form of advocate for journalist source warrants. Then it seems to me, particularly bearing in mind the volume of matters and the significance - - -

MR GYLES: The lack of volume.

MR McCONNEL: Yes, the low volume of matters. That it really does call out for examination of whether there is a single concept of an advocate that should cover all three with clarification of that role, particularly as it relates to children. It might be that there are certain subsets of powers or obligations on that advocate. But it does look to us that when you've now got two circumstances where the government seems to acknowledge that an advocate is appropriate that we should, rather than have those sort of patchwork ad hoc approaches, simply embrace the idea and look at a concept and look at the detail of it. We'd like obviously an opportunity to examine the detail of that as it's developed.

MR GYLES: Yes. That's certainly a point of view about which requires some serious consideration.

MR McCONNEL: I think that there was one further point that we wanted to touch on today.

MR GYLES: You were going to touch on the information to be given to the party I think – the controlee.

MR McCONNEL: Yes. I think the critical point about that – and it was one that was raised earlier this morning as well – was that if these amendments to the counterterrorism legislation or in the Counter-Terrorism Bill are implemented, there will be wider scope for the withholding of information and we think that that needs therefore some safeguards about a minimum content of disclosure of the nature of the information that's held. I think it's intrinsically tied into that concept or into the requirement for a special advocate as well.

MR GYLES: Yes, but this is really – I've got to just understand the detail here. Because under the provisions the party and the advocate do have to be provided with what might be called the gist of the allegation and given notice of the allegations on which the control order in question was based. I appreciate that there will be arguments as to at what level of generality that can be done which the Court will have to decide. It is not as clear as the other subsection which was drawn to my attention in the existing legislation.

MR McCONNEL: Is this 104.12A?

MR GYLES: Yes, 12(3) – 12A(2)(a)(iii). Now, I haven't really thought through at the moment how or whether that obligation is affected by the amendments to the – proposed in the Bill.

MR McCONNEL: It is. I've got a copy of the proposed new 104.12A and it contains a subsection (3).

MR GYLES: So this is in the Bill itself?

MR McCONNEL: In the Bill there would be a - - -

MR GYLES: 12A(2)(iii).

MR McCONNEL: I beg your pardon, no, that's an existing provision. This is the subsection (3) which provides an exception to the requirement to provide that level of detail.

MR GYLES: Where's that?

MR McCONNEL: Subsection (2) does not require any information be served or given - - -

MR GYLES: Sorry, what are you reading from?

MR McCONNEL: 104.12A(3).

MR GYLES: Sorry, that's in the existing one.

MR McCONNEL: Yes. I apologise.

MR GYLES: So to carve out – the current carve-out for national security legislation applies to that.

MR McCONNEL: Yes, but it seems – and I apologise because I don't have a working involvement with this legislation, but it does appear that the carve-out goes beyond just national security to, for example, information that could put at risk the safety of the community law enforcement officers or intelligence officers.

MR GYLES: Yes.

MR McCONNEL: It seems from the way that's structured that that falls outside the NSI provisions.

MR GYLES: Yes, I see what you mean.

MR McCONNEL: Given that that exclusion exists and operates, we think that's a reason why there should be an expression of a minimum standard.

MR GYLES: Well, there is, but you say it's not – there's no carve-out from – is there, from the new 38J – looking at what's proposed, 38J(1)(c) does apply, does it not, as a precondition?

MR McCONNEL: Yes, as to the allegations.

MR GYLES: Yes, not to the evidence.

MR McCONNEL: I think there is a critical difference between - - -

MR GYLES: You criticise the generality of that carve-out, do you, or that obligation?

MR McCONNEL: It's not so much the generality of it, but if the carve-out applies, then the obligation disappears, it seems, altogether. So there might need to be some work done on where you have a carve-out, nevertheless there is an obligation to at least convey the nature of the - - -

MR GYLES: I think probably the point may be that if you accept that the worst case is where you don't get told what the information is but the Court can act on it – and it seems to me that is the worst case for the controlee.

MR McCONNEL: Yes.

MR GYLES: Then I think that provision does apply. So if that's the case and we're looking at that situation, the question is whether that is a sufficient safeguard, either alone or in combination with special advocate.

MR McCONNEL: Well, that's right, and I think the position in relation to a special advocate now – and this is going on the case Ms Bashir referred to earlier – is that there's a power of the Court to appoint special counsel or a special advocate in the exercise of their jurisdiction. If you get to that point the Court might consider that for practical reasons it can't go forward unless either a special counsel is appointed or certain undertakings are given by counsel and information can be supplied that way. But there's no mechanism within the Act itself to enable that to happen. You're really reliant on - - -

MR GYLES: I don't see how counsel appointed by the Court can have access to something where there's certificates and so on in operation. I haven't thought that through fully.

MR McCONNEL: No.

MR GYLES: All right. The last thing you were going to deal with I think was the access to telecommunications, was it?

MR McCONNEL: Yes. I think the – I might just ask Ms Bashir if she wanted to add anything to that last exchange before I move to that point.

MS BASHIR: I don't have anything to add to that. Thank you.

MR McCONNEL: This is dealt with at paragraph 96 through to 99 of our written submission. The point we wanted to underscore today was that we have not adopted the COAG recommendation. The COAG recommendation was that, other than in an exceptional case, prohibitions or restrictions should permit that level of access to communication devices. Our submission is a bit nuanced from that. We don't say that there should be an exceptional circumstances qualification. But, rather, that the Court should have specific regard to the ordinary usage of mobile phones, internet access, et cetera so that in exercising a discretion around terms of a control order or whether to issue a control order that is something that must be specifically considered by the judge with a presumption that someone should have that access as a starting point, at least a minimal amount of that access.

That is particularly, we think, important if the scheme is extended to 14 to 17 year olds, particularly because we understand that the use of personal mobile devices, handheld devices is pervasive throughout the community. If you're a parent you might have a view that a control order on your child would be sort of one of these things that mightn't be a bad thing. But it demonstrates the point that they are in constant use by teenagers. That's not to suggest that

there must necessarily flow hardship from having that use restrained. But it's something that should be considered if it is the primary means of communicating between child and parent or the child may have a requirement to use a computer for schoolwork. Indeed, I think in some schools it's mandated that work is typed. Some lessons are undertaken online, et cetera.

So the extension to children will throw up all of those issues. We say that that's something that should be mandated as a consideration, and we don't go further than that.

MS BASHIR: I would only add to that that, of course, the examples that have been given in relation to education apply to higher education also. So computers and access to the internet are really an integral part of most higher education and have been for a very long time. I would just add that it's not only when it goes back to children but in terms of control orders and the proposal that these may operate to reintegrate and rehabilitate into the community, it may be an essential aspect too that the person does remain engaged with whatever educational opportunities or work and employment opportunities that they have. That may very well necessitate the use of mobile phones or computer and internet access. We support that there's a presumption that a person shouldn't be deprived of that.

MR GYLES: All right.

MR McCONNEL: I think the final point we'd make in relation to that is that noncompliance with a control order for a teenager attracts I think a similar, if not the same, potential penalty. I think everyone would accept that the temptation for a child to continue to use a mobile phone or a handheld device without fully appreciating the consequences if they do is much greater.

MR GYLES: Yes. I must say I'm provoked to make a comment about the general issue which relates to the content of a control order and, in particular, the monitoring of it. I find it hard to come to grips with these obligations being placed on people between the ages of 14 and 17 without any corresponding obligation on the parent. It just seems to me to be quite anomalous. If there is parental responsibility and you have now the full force of law enforcement being directed to a 14-year-old child and nothing to the parent. However, that's just a comment. I'm not asking for any response.

MR McCONNEL: That's all I think we wanted to say on that. I have been reminded of a note in our written submission to just briefly raise the issue of oversight of the Commonwealth Ombudsman.

MR GYLES: Yes. As a matter of fact, I did intend to raise this with Attorney-General's Department. In fact, we may have raised it already with them prior to this. The point is made I think that in relation to preventative detention there is a general oversight express provision, whereas there's not

the same here. That's your point, is it?

MR McCONNEL: That's right. The ombudsman has jurisdiction in relation to an agency's conduct if a complaint is made, whereas it seems that in terms of preventative detention orders the ombudsman's got an enhanced ability to do an own-motion investigation or something along those lines.

MR GYLES: You've reminded me that – looking through your submission the point that I did not ask them this morning about that – we have asked them or we'll intend to ask them about what's the difference.

MR McCONNEL: It seems to us that the only basis of distinction is the fact that in the one the person is in custody and there might be therefore a restricted ability to seek access to that agency.

MR GYLES: There may be some good reason, but it doesn't appear on the face of it.

MR McCONNEL: It's not been addressed in the submission from the Attorney-General's Department either.

MR GYLES: No, it hasn't. It was ignored.

MS BASHIR: Mr Gyles, could we also draw to your attention that in section 105.15(6) there's an obligation to notify which relates to prohibited contact orders. So too in 105.16(6). So there are parallels with some of what would be envisaged with a control order and notification, which - - -

MR GYLES: Is that notification to the ombudsman?

MS BASHIR: Yes, which supports our concerns that it's not applying – doesn't appear to apply where there's a control order.

MR GYLES: Thank you, that's noted and we'll add that to our question.

MR McCONNEL: This is the problem of having people given an opportunity to have a break and look at their notes. I've found one more, if I may.

MR GYLES: Yes.

MR McCONNEL: That's in relation to the test of necessity and the recommendation as to least interference. If I could just take - - -

MR GYLES: I understand the point. I'm having difficulty seeing that one is to be preferred to the other.

MR McCONNEL: I don't know that we would say - - -

MR GYLES: I don't think that the – and I've read somewhere I think that the English provision doesn't have the obligation in ours to make sure that it's whatever it is, appropriate.

MR McCONNEL: Reasonable, necessary.

MR GYLES: Yes, adaptive.

MR McCONNEL: I think the key provision is 104.4(2) which imposes the obligation on the Court to take into account the impact. But we would say that can be supplemented by a requirement that the Court give consideration to whether the orders proposed are the least restrictive. That, at least, gives parties comfort that that question of whether it can be achieved by a less restrictive means is actually specifically addressed.

MR GYLES: Okay, thank you.

MS BASHIR: A particular example of that may be prohibiting contact with a particular person rather than prohibiting use of email generally. That's a very basic example. But if there were a requirement that there be least interference it would just mean that the Court's mind was certainly turned to the mode of expression of any orders made.

MR GYLES: Thank you. Anything else?

MR McCONNEL: I have nothing further.

MR GYLES: Thank you very much for your attendance. If we need to follow up about that other matter, you can be in touch as soon as you can.

MR McCONNEL: Thank you very much.

MR GYLES: Thank you. All right. We'll just have an adjournment till 1.30.

ADJOURNED **[12.42 pm]**

RESUMED **[1.34 pm]**

PRESIDENT: Good afternoon, it's Roger Gyles speaking.

DR TULICH: Good afternoon.

PRESIDENT: You're on speakerphone in a public room, not many people have stayed to listen, but there are some.

DR TULICH: Great, thank you.

PRESIDENT: Just to confirm that this is a hearing under section 21 of section 7 reference from the Prime Minister, which you'll be aware of.

DR TULICH: Yes.

PRESIDENT: There is a transcript being taken of your appearance, and that will appear on the website in due course.

DR TULICH: Thank you.

PRESIDENT: I have read your submission, amongst of course many others. I've also read, although not absorbed, the article that you wrote a little time ago as well.

DR TULICH: Thank you.

PRESIDENT: Having said that, however, I'll be glad to hear what you would like to say by way of statement, opening statement.

DR TULICH: Fantastic. Thank you, I have a brief opening statement. I just wanted to thank you for the opportunity to give oral evidence in support of my submission, and just to reiterate that this inquiry is timely and necessary, particularly given the proposed changes to the regime in the Counter-Terrorism Legislation Amendment Bill which is currently before Parliament.

I would like to note at the outset that, in line with previous submissions I have made with members of the Gilbert and Tobin Centre of Public Law at the University of New South Wales, I do not support the control order regime and I do draw support for this position from the previous monitor, Brett Walker QC's conclusion as to the necessity and effectiveness of control orders.

However, that said, successive governments have not adopted the recommendations of the previous monitor and the regime has indeed been significantly expanded. As such, the additional safeguards proposed by the COAG Committee are significant, in particular as they relate to the fairness of control order proceedings, and it's this aspect which I'll focus on now.

I share the concerns raised by the COAG Committee regarding the potential for unfairness to the controlee through the withholding of national security information in the control order process. I just note that the COAG review

recommended two separate safeguards to remedy or to mitigate unfairness to the controlee, and that is the introduction of a special advocate system and the statutorily guaranteed minimum standard of disclosure.

These safeguards are particularly important given that the 2015 Bill, which I understand is also part of your inquiry, proposes to amend the National Security Information Act to enable a judge to consider material a controlee, or proposed controlee, and legal representative have not seen. This proposal does not achieve an appropriate balance between preserving national security information in control order proceedings and affording the individual procedural fairness.

The introduction therefore of a special advocate system, adopted to the local context, and a minimum disclosure requirement would improve the current regime by enabling sensitive information to be subject to adversarial challenge. However, the experience in the United Kingdom illustrates that the introduction of a special advocate system will not of itself remedy unfairness and, indeed, special advocates have themselves criticised the system, as well as the system being criticised for not affording fairness, particularly due to the inequality of the resources between the parties, the practical inability of special advocates to call evidence or to effectively challenge non-disclosure, and the prohibition on discussions with the controlee once a special advocate has seen closed material.

These shortcomings need to be acknowledged, however, on balance and after much reflection, I do believe that these two safeguards recommended by the COAG Committee would improve the fairness of proceedings in those exceptional circumstances when secret evidence is relied upon by enabling the evidence presented to the Court to be subject to some form of adversarial challenge. Thank you.

PRESIDENT: Thank you very much. Yes, I confirm that I am taking into account the 2015 Counter-Terrorism Bill, which touches on control orders in several ways but I think, most importantly, in the way that you mentioned, that is that the judge can now act upon material which the controlee doesn't see, which is a significant difference from the current regime.

It's put, however, that in relation to those changes, at least there is now the obligation to give the substance of the allegations under the proposed 38J(1)(c), given notice of the allegations in which the control order request was based, even if the relevant person has not been given notice of the information supporting those allegations.

DR TULICH: And that is certainly an improvement, and the explanatory memorandum does suggest that this is to ensure that the subject of the control order has sufficient evidence - sorry, knowledge of the essential allegations to be able to challenge it, however, we've just made a submission to the

Parliamentary Joint Committee on Intelligence and Security that this requirement should be formulated in the way that the COAG review formulated it.

MR GYLES: Yes.

DR TULICH: Which is I think recommendation number - - -

MR GYLES: 31, I think.

DR TULICH: 31, that's right. So that's actually given - it's drawing on the benefit of what the UK and the European Court have developed in terms of that minimum disclosure requirement that it's sufficient notice of the allegations to enable effective instructions to be given in relation to those allegations.

MR GYLES: Yes. That's assuming of course there's a lawyer there.

DR TULICH: Yes.

MR GYLES: It's a funny way of putting it actually. But I follow the gist of it. So at least that's, I suppose, one thing to be noted, it's less explicit than the current 104.12A(2)(iii). But nonetheless, that's for the committee to assess. But I need to look at this on the basis that the bill as proposed may well pass.

DR TULICH: Yes.

MR GYLES: If the bill doesn't pass in that - let's say it doesn't pass in respect of allowing a judge to proceed on the basis of secret evidence; the case for a special advocate becomes less convincing unless one sees a role at the interim stage. What's your view about that?

DR TULICH: Our view on how the current withholding provisions work in the control order regime - and when I say "our view," I talk on behalf of Professor Andrew Lynch and Rebecca Ananian-Welsh, is that at the moment as it's currently framed, it does allow for information to be taken out of the proceedings that can still be relied upon by the judicial officer. And in that instance, the special advocate system - sorry, excuse me.

MR GYLES: But can that be done at the confirmation stage? I mean, I was reading your submission, that does seem to be your view. But I'm not clear that that's the case.

DR TULICH: My understanding is that everything that's happened up until that point, and that hasn't been disclosed for national security grounds, does not then get disclosed in the confirmation hearing. So the summary of the

grounds, which go to the controlee after the interim proceedings, when the AFP elects to confirm the control order, my understanding is that all of that information obviously excludes national security information, and what comes up in the confirming hearing doesn't again re-agitate those - what information has been excluded because the individual won't know what has been excluded.

MR GYLES: Yes, true, but the judge can only act on - - -

DR TULICH: But the Court will.

MR GYLES: But the Court can't act upon material which isn't in evidence, can it?

DR TULICH: It would have been - excuse me, sorry. My understanding, and I am happy to be - I would like to be confirmed wrong on this but, my understanding is that what happens, if the interim proceeding proceeded ex parte, then the Court may have had that national security information before it and made the decision to issue the interim control order on that basis.

MR GYLES: Yes.

DR TULICH: So it has seen that information that the individual hasn't seen, and which is then excluded from the material which is served on the individual, and then even though the control order process is adversarial, I'm not entirely - and it does accord with open justice, it's not clear whether the controlee does in any way have access to that information, because what's been given for them to respond to the allegations in the interim control order excludes national security information, and at that stage it stops that very wide test.

MR GYLES: Yes, I don't doubt that. What I am questioning, however - it's a question and not a conclusion, but the received wisdom at least seems to be that the Court on the confirmation hearing does not receive material which is excluded from the evidence. Excluded, and I must admit, I had been working on the basis that the Court could not act upon any such information, thus the importance of the proposed amendment in the current bill, which expressly says the Court - in effect, the Court can act upon material kept from the controlee.

Anyway, I'll have a closer look at that, and - - -

DR TULICH: Yes.

MR GYLES: But getting back to the question, do you see a role for a special advocate at the stage of the interim hearing, that is the ex parte interim hearing?

DR TULICH: Yes. If in the event that the Court is relying solely on the evidence presented by the AFP at that stage. The difficulty is if it's ex parte then I'm not sure how the special advocate would be able to get information on the controlee if they're not aware of the proceedings at that stage.

MR GYLES: You couldn't. No, you couldn't, you'd be put in a position of being a contradictor to the AFP, is what it amounts to.

DR TULICH: Yes. It may have some value, in that it does at least inject into that interim hearing some element of adversarial challenge and gives the judge the opportunity to see - or the magistrate, whoever is in the issuing court - to see that evidence tested.

MR GYLES: Yes.

DR TULICH: That said, the experience from the UK does tell us that special advocates aren't necessarily that effective as an adversarial challenge because of their inability to call their own evidence et cetera. But it would still inject some element of challenge, which has to be better than no challenge.

MR GYLES: Well, it would. It would on that theory certainly enable gaps to be pointed out.

DR TULICH: Absolutely. And for the evidence to be tested.

MR GYLES: Yes. It would also enable submissions to be made as to whether the material warrants the width of the control orders sought. I guess, I'm just thinking aloud.

DR TULICH: Yes.

MR GYLES: Regardless of who the controlee is, it could be said that on the basis of what's been produced, certain of the recommendations - certain of the proposed orders aren't justified.

DR TULICH: Yes, absolutely.

MR GYLES: Have you any view about how a control order - how a special advocate regime might work, that is who would be appointed, how would they be appointed, would it be - with that sort of detail?

DR TULICH: I can only talk to what they've done in the United Kingdom, in terms of having that panel that's appointed by the Attorney-General, they're all security cleared to a certain level, there were I think about 50 special advocates in the UK, and at least the controlee, when they're aware that closed material is going to come on, they don't have a choice of any

advocate in the UK, they do have a choice amongst those 50, so that adds some element.

MR GYLES: Yes.

DR TULICH: A similar system could work in Australia, again, appointed - be senior counsel, I would assume, appointed by the Attorney-General.

MR GYLES: In the UK they're basically practising counsel, are they?

DR TULICH: Yes, absolutely, they're barristers.

MR GYLES: Yes.

DR TULICH: Who have applied to the Attorney-General's panel and who've got the appropriate security clearance to be able to perform that function.

MR GYLES: Is that financed by the Government, as you understand it?

DR TULICH: It is, as I understand it.

MR GYLES: I do have some information about that system. Have you considered the sort of alternative of the public interest monitor, such as there is in Victoria and Queensland?

DR TULICH: I haven't, and that's principally because the Government wasn't going down that path in its response to the COAG - yes.

MR GYLES: No, that's true, they're not going down any path.

DR TULICH: That's the only reason why I haven't considered it.

MR GYLES: Yes. That's all right, no, it's not something I've had any real experience of either. But they do exist, and it provides another model.

DR TULICH: Yes. I'm sorry I can't assist you with that.

MR GYLES: No, that's all right. Anything more you wish you to say about either the special advocate or the agisting arrangements?

DR TULICH: I have come across an article by Adam Tomkins in the Israel Law Review which, if you would be happy, I can forward it to your office, which is very comprehensive on the changes to - or to the extension of the special advocate system to closed material proceedings - sorry, closed material proceedings to civil matters in the UK, with the Justice and Security Bill, and it's actually quite - it's actually a really good article that looks at the

safeguards that have been built into that new regime, which may be of benefit to you in thinking about how we craft a special advocate system here, if we need one at all.

MR GYLES: That sounds interesting. That would be good if you could.

DR TULICH: Yes, absolutely.

MR GYLES: By way of return gift, I'm not sure whether you've caught up with the fact that the New Zealand Law Commission has just handed down a report about - on this topic really, upon the whole topic of security information.

DR TULICH: No, I wasn't aware of that.

MR GYLES: Yes. Well, it's worth - - -

DR TULICH: I'll have a look for that straight away.

MR GYLES: It was 10 - last week - this week it came out.

DR TULICH: Did they - - -

MR GYLES: They're in favour of special advocates, I might say. It's really a review of an NIS-type situation, not limited to control orders, but having a wider operation. That gives rise to another issue, have you - I mean, you or all the others - given thought to what - any other aspect to the regime that a special advocate might be usefully engaged in? I know it may not be the preferred position.

DR TULICH: Yes. And we have - I mean, I make this submission on my own behalf, but just in terms of making that submission to the Parliamentary Joint Committee on Intelligence and Security, and there were five of us in that submission. We have had some difficulties coming to an agreed position on special advocates because they are so controversial. So I couldn't say that I've - or that we - have considered it in any other aspect of the anti-terror laws. I would hope that if they were introduced they would be used only in those very exceptional cases, where there was no other alternative but to resort to special advocates.

MR GYLES: Yes. Mark, anything that you wish to tease out?

MR MOONEY: No, I don't think so.

MR GYLES: Anything else which has sparked a comment?

DR TULICH: No, I think that covers everything, thank you.

MR GYLES: One question I touched on lightly, but is perhaps worth thinking about, you mentioned the limitations which the UK advocates have raised. I think one of those is their inability to take instructions from the controlee once the secret information is known, is that an aspect that you have given thought to?

DR TULICH: That is an aspect of the UK regime which has raised a number of issues. There is a provision that they can apply to the Court to communicate with the controlee after they have received closed material, although I'm not aware of that having been allowed.

MR GYLES: Right.

DR TULICH: It's a difficult issue because it would in some ways go against the whole reason for having special advocates, if they are able to discussed the closed material with the controlee, but I can understand why the special advocates say that they have one hand tied behind their back, because they're unable to then - to speak to the controlee about that. That said, the minimum disclosure requirement that's been formulated by the European Court and adopted by the House of Lords, requires that the controlee knows enough about the case against them to be able to instruct the special advocate. So even though they can't speak to them once they've got closed material, that minimum disclosure requirement has at least raised the standard of what the controlee may know, and the Courts have said that that means that the controlee has received a fair trial if they are able to respond to those allegations. If the case can't be put to them in such a way that they can respond, then it can't be fair.

MR GYLES: Yes.

DR TULICH: So if it's only really the general assertions, then it just won't be - it won't pass muster for article 6 and the right to a fair trial.

MR GYLES: Right.

DR TULICH: So there is some protection there, but it is a - it's a difficult area of the regime.

MR GYLES: Look, thank you very much indeed for your interest in the matter, and absent anything else, we'll say goodbye.

DR TULICH: Fabulous. Thank you very much.

MR GYLES: Thank you. Yes, it's Roger Gyles speaking.

MS BYRNES: Hi there, Mr Gyles, how are you?

MR GYLES: Very well, thank you.

MS BYRNES: My name's Bronwyn Byrnes, I'm speaking on behalf of the Australian Human Rights Commission.

MR GYLES: I think you know that this is a hearing that I'm conducting under section 21 of the INSLM Act in relation to a reference by the Prime Minister under section 7 of that Act to deal with the safeguards recommended by the COAG Committee in relation to control orders which were not taken up at the time, with particular emphasis upon special advocates and the degree of information to be afforded to a controlee. And we'll be taking a transcript of what now transpires and it will be placed on the website in due course.

MS BYRNES: I understand that, yes.

MR GYLES: Good. The submission you made was fairly general and referred to a number of prior submissions that had been made. I should also note that since then the Telecommunications Interception - sorry, I'll withdraw that - the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 has been introduced into Parliament.

MS BYRNES: yes.

MR GYLES: And consideration of that has been commenced. I'm not sure whether you have made any submission to that to the parliamentary committee in relation to that.

MS BYRNES: Yes, we have made a submission to the Senate inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1). We would be pleased to send you a copy of that submission, if it would assist.

MR GYLES: Look, I think we are in the process of receiving the various submissions to that committee, so we'll probably pick it up from that sweep, if I can put it that way.

MS BYRNES: Okay, yes.

MR GYLES: But I haven't myself had the opportunity of looking at it. And there are some important aspects of that new Bill which relate to control orders.

MS BYRNES: Yes, the Commission was particularly concerned about the control orders being applied to 14 and 15 year olds, the new monitoring and surveillance powers that were proposed, and then the potential for excluding legal representatives to participate in proceedings leading to the grants and

continuation of control orders.

I think the Commission has been increasingly concerned at the number of amendments to the control order regime that have been taking place without implementing the COAG 2013 recommendations. And I think the Commission's main intent in participating in this inquiry is really to stress that we endorse the recommendations made by the COAG Review Committee in 2013 and see no reason to delay implementing them.

MR GYLES: Are there any particular insights that you'd wish to stress or draw attention to, particularly in view of the current bill before the Parliament, or not?

MS BYRNES: I think certainly the recommendations that we highlighted in our submission to you, really, the system of national special advocates, the minimum standards of disclosure to the controlee in line with the European Court of Human Rights and House of Lords authority on the point, and the less interference test, are really the most important recommendations of the COAG review.

MR GYLES: Yes.

MS BYRNES: We certainly think those all should be prioritised.

MR GYLES: Has the Commission got any view as to how a special advocate system might work in practice?

MS BYRNES: I haven't got any instructions on that point today. I could take that question on notice and come back to you in the January.

MR GYLES: Well, I think it ought to be, because given the content of the Bill, it might be thought that the case for special advocates is stronger now than it was at the time of the COAG Committee.

MS BYRNES: Yes.

MR GYLES: But there needs to be some practical thought as to how it might work. In any event, if there are any thoughts about it, please let us know. But I have undertaken to try and complete what I'm doing on this topic by the beginning of February. So the whips are cracking in a sense.

MS BYRNES: Yes, sure. I know that - I mean, the Commission has really been looking at the system in the UK, in the same way that the COAG Committee did in 2013. I think one of the COAG recommendations was that the Federal Court alone would be the issuing Court for control orders.

MR GYLES: Yes.

MS BYRNES: So it would be just a matter of getting practitioners in all the states and territories subject to that security clearance, and we could have a look at an actual system. I know that there's been some criticisms of the UK system where in the past special advocates were not allowed to seek instructions from the controlee after they had seen the closed evidence.

MR GYLES: Yes.

MS BYRNES: So I'm aware of the criticisms of that system, and I think the authority on that point was that really the special advocate needs - really the controlee needs to have sufficient information to be able to give the special advocate instructions to respond to the case against the controlee. They need to know the gist of the case against them.

MR GYLES: Yes. Well, if there's a preferred model, I'd be very happy to receive any suggestions.

MS BYRNES: Okay, thank you.

MR GYLES: There are differences between the UK and our existing system.

MS BYRNES: Yes.

MR GYLES: Which make the case for a special advocate less compelling than it might be in the UK perhaps. But these current amendments may be thought to make the possibility a more attractive one, or more necessary, I should say.

MS BYRNES: Yes.

MR GYLES: Well, thank you very much indeed, and I'll look forward to anything which you wish to put forward on that topic.

MS BYRNES: Okay, no problem.

MR GYLES: I'll declare the hearings for today over.

ADJOURNED **[2.05 pm]**