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The Hon Roger Gyles AO QC
Independent National Security Legislation Monitor
One National Circuit
Barton ACT

Dear Mr Gyles

Inquiry into control order safeguards

I refer to your letter of invitation of 10 September 2015. I am grateful for the opportunity to make a submission to your inquiry, as below.

1. Summary of submission

1.1 The control order regime is too broad and should be restricted to circumstances where there is an imminent threat of actual death or injury to persons.

1.2 A system of special advocates is a sensible compromise to mitigate the problem caused by the information disadvantage at which subject persons are necessarily placed.

1.3 I agree with the recommendations of the COAG Review committee.

2. Control orders generally

2.1 I accept, with regret, that control orders are here to stay. There seems little point arguing against them in principle, as it has become largely accepted in most democratic societies that the threat of terrorist attacks is sufficiently real to justify extra-judicial preventative action by the arms of the executive in at least some circumstances. Underpinning this is an implicit acceptance that the criminal law process cannot be adequately adapted to provide sufficient protection to the community from terrorism.

2.2 This way of thinking ignores certain practical realities in relation to the likely sources of harm. It is a fact that Islamic terrorists have killed precisely nobody in Australia, not just since 2001 but ever, yet it is the threat of Islamic terror which is the justification for control orders along with all the rest of the national security legal structure. The community is at enormously greater risk of death or injury from domestic violence (62 women have been violently killed in Australia so far this year alone).

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2.3 Whether the actual terrorism risk is overstated, we cannot know. The COAG Review committee admitted that it was not armed with sufficient information to know either, because the intelligence information held by our security agencies is not willingly shared. We are obliged to trust the executive to some extent at least on this question, but it is an uncomfortable trust for two reasons. First, because history and overseas experience amply demonstrates the risk of what an uncontrolled executive can and is likely to do. Secondly, because the little information which we do have does not inspire confidence. In relation to control orders specifically, the two case studies of Thomas and Hicks are classic examples of executive overreach in the field of national security.

2.4 All of this can only leave us uncomfortably uncertain as to whether any of this is really necessary at all. However, as noted above, I don't think that there is any realistic chance that control orders are going to go away, so we should realistically look instead to render them as safe as possible.

2.5 I agree with all of the COAG Review committee's recommendations. They represent the least that should be done to mitigate the risks that the control order regime carries. I add specific comments on two aspects of the legislation below.

3. Grounds for control orders

3.1 If control orders are ever appropriate, then that should only be for the purpose of preventing imminent physical harm. That is consistent with the other kinds of circumstances in which physical personal freedoms may lawfully be impinged in the absence of a criminal conviction, such as by apprehended violence orders, the refusal of bail or imposition of bail conditions.

3.2 In the context of terrorism, that should mean that a control order can only be made in circumstances where there is very good reason to believe that a terrorist attack is probably imminent, so that the control order's purpose and function is to prevent it from happening.

3.3 The control order regime however allows for control orders to be made in two types of circumstance: where a terrorist act may be prevented; and where a person is suspected of having provided training to, or received training from, a listed terrorist organisation.

3.4 My first objection to this regime is that the first of these two thresholds in Division 104 refers to a "terrorist act", rather than a terrorist attack. This is a very significant distinction, because the term "terrorist act" in the *Criminal Code* has a wider definition than is generally appreciated. As defined in section 100.1(1) of the Code, it includes acts which cause death or physical harm to people or endanger lives, but also those which cause serious damage to property or seriously interfere with or disrupt electronic systems.

3.5 While a terrorist attack which is designed to damage property or disrupt electronic systems is a very serious thing and can cause a lot of harm and fear, in our view it is of a substantially lower order of risk than an attack designed to kill or injure people, and consequently should not justify the making of a control order.

3.6 My second objection is to the inclusion of training as a ground for a control order at all. While the fact that a person has trained with, or provided training to, a terrorist organisation, should be a matter of serious concern and is indicative of potential intent to engage in terrorist activity here or overseas, it cannot rise higher than the level of circumstantial evidence.

3.7 The act of providing training to or receiving training from a terrorist organisation, where it is connected with preparation for a terrorist act, is a criminal offence (*Criminal Code* section 101.2). If the evidence that a person has engaged in this training is strong enough to say beyond reasonable doubt that they've done it, then they should be convicted of the offence. If the evidence falls short of that standard, then it is difficult to see why a view that a person has probably engaged in training should be sufficient to justify curtailing their ordinary freedoms. It is at a significant remove from an actual identifiable threat of harm.

4. Special advocates

4.1 The COAG Review identified numerous points in the control order process at which a person's right to a fair trial is compromised. The following aspects of the process are relevant to the question of whether persons the subject of control order applications should be given additional protections.

(a) The initiating point for an interim control order application is that an AFP officer has formed a consideration or suspicion on reasonable grounds of certain factual conclusions (s104.2(2)).

(b) The AFP does not have to disclose to the Attorney General any information likely to prejudice national security (s104.2(3A)). This restriction flows through to the information which is required to be provided to the court.

(c) The making of an interim control order requires the court only to be satisfied on the balance of probabilities that making it would substantially assist in preventing a terrorist act, or that the person has engaged in terrorist training; and that the terms of the control order are reasonably necessary (s104.4(1)).

(d) The interim control order does not have to include any information likely to prejudice national security (s104.5(2A)).

(e) When the interim control order comes up for confirmation, the AFP is not required to provide the subject person with any information which is likely to prejudice national security, be protected by public interest immunity, put at risk ongoing law enforcement or intelligence operations or put at risk the safety of the community, law enforcement officers or intelligence officers (s104.12A(3), s104.23(3A))).

(f) A lawyer of a person subject to a control order is not entitled to obtain any information other than the control order itself (s104.13(2), s104.21(2)).

4.2 These matters constitute a substantial restriction on the ability of a subject person, or their lawyers, to obtain information which is being used to support the allegations against them.

Accepting that there are circumstances in which the disclosure of that information would be dangerous or detrimental (it is obvious that this could be the case), a major problem remains. The consequence of a control order is that an individual, who is not charged with or convicted of a crime, will have their liberties severely constrained. This will be done on the basis of a finding, on the balance of probabilities, about training they may have engaged in or terrorist acts they might engage in. There is a substantial risk that individuals may lose liberties on the basis of findings which are not actually correct, and/or perceived risks which were never going to be realised.

4.3 Those circumstances provide an unstable platform for the making of compulsory orders restricting a person's liberty. The risks are compounded by the information disadvantage in which the subject person is placed, by reason of the restrictions on disclosure referred to above. This asymmetry is the opposite of the fundamental protection which the criminal law provides to an accused person: that they will know every element of the allegations they face and be able to fully respond.

4.4 As the information disadvantage cannot be practically remedied by requiring that the subject person be provided with all of the relevant information, some other, lesser protection must be found. It is simply unfair, and leaves the system open to abuse, for this protection not to be provided.

4.5 I agree with the COAG Review committee's view that a system of special advocates is a sensible compromise. We also agree with the view that lawyers should accept that the fact that a person is an admitted lawyer is not sufficient assurance that they can and should be entrusted with sensitive national security information. It would be prudent to add an extra layer of security clearance before a lawyer should be so entrusted. This clearance procedure should not be too onerous or intrusive, or designed to discourage lawyers from seeking it. Consequently, its design and implementation should not be left to the security agencies (which have a vested interest in it being made as restrictive as possible) but overseen by a responsible independent body.

4.6 It is often argued by law enforcement and intelligence agencies, when they are advocating for ever more restrictive laws, that those who have nothing to hide should have nothing to fear. It is a misleading and bankrupt argument, but it can conveniently be turned back on them in relation to this issue. In relation to whether they should be obliged to make full disclosure of the information on the basis of which they seek and obtain a control order, to a special advocate who has been given appropriate security clearance, for the sole purpose of enabling that advocate to protect the legal rights of a person who is prevented from being able to protect themselves, it is fair to say that if the agencies have nothing to hide, they should have nothing to fear.

Yours sincerely

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