Parliamentary Joint Committee on Intelligence and Security

Review of the operation, effectiveness and implications of Division 3A of Part IAA of the *Crimes Act 1914*, Divisions 104 and 105 of the *Criminal Code*, and sections 119.2 and 119.3 of the *Criminal Code* – police stop, search and seizure powers, the control order regime and the preventative detention order regime, and the 'declared area' provisions

Joint AFP and AGD supplementary submission and responses to questions on notice

Stop, search and seizure powers – Division 3A of Part IAA of the Crimes Act 1914

Your response to a previous written question from the Committee (question 4) noted that the 28-day duration of a prescribed security zone is 'subject to an important safeguard' in that the Minister must revoke a declaration 'if he or she is satisfied that there is no longer a terrorism threat justifying the declaration being continued, or where the declaration is no longer required'. The Law Council, however, has recommended that there be an obligation on the Minister to periodically review the necessity of a declaration.

(a) While the Act provides that a Minister must revoke a declaration *if satisfied* that it is no longer necessary, what mechanisms are in place to ensure that the Minister would make such a determination?

In making a prescribed security zone declaration, it is likely that the Minister would rely on the advice of law enforcement and intelligence agencies, including the police application under section 3UI. Throughout the course of a declaration, the Minister would continue to have access to regular briefings from these agencies. These briefings would provide a strong indication of whether a declaration continues to remain necessary.

For example, the AFP has a number of effective communication channels in place that ensure the Minister is kept updated on the progress of counter-terrorism operations at appropriate times. Under existing reporting arrangements, the Minister's Office is given status updates at key points during an operation through the AFP's Law Enforcement Liaison Officer (LELO). In addition, where a prescribed security zone declaration is in force and the AFP has information to support its revocation on the grounds set out in paragraphs 3UJ(4)(a) or (b), the AFP would provide a brief outlining that information to the Minister.

(b) Would you have any operational concerns if the Minister was required in the Act to periodically review the declaration of a prescribed security zone (for example weekly)?

A requirement to periodically consider a declaration may undermine the purpose of the prescribed security zone declaration which is intended to last 28 days. If the Minister had to formally review the declaration regularly, this may require agencies to provide the same detailed briefing and assessments that initially prompted the making of a prescribed security zone declaration. This may cause delays that prevent law enforcement agencies from acting swiftly to prevent terrorist acts, and divert resources from law enforcement and intelligence agencies whose principal focus during this period will be the prevention of a terrorist act.

As above, if the AFP has information that would support revocation of a declaration, a brief outlining that information would be provided to the Minister. The AFP would consider amending relevant internal governance to make clear the AFP's obligation in this regard. Compliance with internal governance is part of the AFP's professional standards integrity framework.

Please provide an explanation of the relationship between Commonwealth and State and Territory stop, search and seize powers at airports.

Division 3A was inserted by the *Anti-Terrorism Act (No. 2) 2005* following the 2005 COAG decision to strengthen Australia's counter-terrorism laws. Division 3A expanded the powers of the AFP and State and Territory police forces in relation to terrorist acts. To ensure the AFP had the ability to prevent and respond effectively to a terrorist act, Division 3A extended within Commonwealth jurisdictional limitations the AFP's powers to stop, question and search people.

While States and Territories have their own special counter-terrorism powers to stop, question and search people, these powers differ from jurisdiction to jurisdiction. Noting the significance of Commonwealth places, and their enduring attraction as targets for terrorist activity, the Government noted, at the time of introducing Division 3A, that there is benefit in having a common approach for policing in Commonwealth places throughout Australia.[1] This ensures that AFP officers, located at Commonwealth places, have access to familiar, well understood and nationally consistent powers when safeguarding Commonwealth places, such as airports.

[1] Explanatory memorandum, *Anti-Terrorism Bill (No. 2) 2005*, p. 74.

Preventative detention orders – Division 105 of the Criminal Code

Your response to a previous written question from the Committee (question 25) provides a brief hypothetical scenario in which a PDO could be used against a non-suspect for the purpose of preserving evidence. The scenario involves a terrorist suspect giving a bag containing an explosive device to a second person who is unaware of the bag's contents and refuses to cooperate with police.

(a) Under this scenario, what alternative powers could be considered in order to deal with the situation? Would a PDO be the most appropriate response? Why?

In order to apply for a Commonwealth preventative detention order (PDO) to detain a person to preserve evidence of, or relating to, a terrorist attack, the applicant (an AFP member) must be satisfied that detaining the subject for the specified period is 'reasonably necessary' for that purpose. Part of this assessment involves the AFP member considering what other powers are available and appropriate for dealing with the situation. While this assessment is made on a case by case basis, other options may include voluntary cooperation with police, or arrest.

The AFP considers that a PDO (whether under Commonwealth or State/Territory legislation) may be an appropriate response for dealing with a non-suspect for the purpose of preserving evidence in limited circumstances. Such circumstances may arise, for example, where it is clear that a terrorist attack has occurred but police do not yet have any other information available to them to support the use of other powers. In this scenario, it may not be clear whether the person is a suspect or not. If the person fails to cooperate with police, there may not be any alternative powers for police to rely on to contain the threat presented by the person or to preserve vital evidence.

(b) Could you provide any more detailed scenarios in which a PDO would be the only viable option to intervene? Please include an explanation of the other powers that could be considered for such a scenario, and why they would not be appropriate in the circumstances.

Hypothetical example – Mass casualty attack

Consider there has been an explosion in a crowded place in the Melbourne central business district. There are significant casualties. Police arrest a person suspected of causing the explosion and establish that the terrorist suspect had called an unknown associate around the time of the attacks. The associate is previously unknown to police, and at this stage, there is insufficient information to reach the threshold for arrest, and further investigation is required. A Commonwealth PDO is issued by a senior AFP member in relation to the associate.

Please provide an explanation of the different circumstances in which ASIO questioning and detention powers and preventative detention orders might be used for the purpose of preserving evidence.

ASIO's questioning and detention powers

ASIO's primary role is to collect and analyse intelligence that will enable it to anticipate activities or situations that might endanger Australia's national security and to warn government accordingly.

Questioning and detention warrants (QDWs) reflect ASIO's function as an intelligence, rather than a law enforcement, agency. These powers assist ASIO to collect security intelligence, rather than evidence, and are used at all stages of an investigation, rather than in connection with a criminal offence.

A QDW is first and foremost an intelligence-gathering power, coupled with additional safeguards (the detention power) to mitigate risks that may arise if and when ASIO alerts the person to the investigation by notifying them of the questioning warrant. For example, there may be circumstances where the subject of a questioning warrant (QW) (as opposed to a QDW) is likely to tip-off others about the investigation, or destroy records of things of intelligence value, because the person feels obliged to alert or assist the subject of the investigation, or to protect their interests. In these cases, a QDW can assist ASIO to ensure this conduct does not occur.

However, a QDW may not be sought solely for the purpose of preventing a person from 'tipping-off' another person, or to prevent a person from absconding or destroying records or things.

ASIO may seek a QW or QDW where there are reasonable grounds to believe that questioning the person will substantially assist in the collection of intelligence that is important in relation to a terrorism offence. A QW or QDW may be issued in respect of the person who is the subject of ASIO's investigation, or another person, such as a family member or associate, provided it meets this threshold.

The QDW enables ASIO to collect intelligence by questioning a person, in circumstances where there are reasonable grounds for believing that, if the person was not immediately taken into custody and detained after notifying them of the warrant, the person:

- may alert a person involved in a terrorism offence that the offence is being investigated
- may not appear before the prescribed authority, or
- may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

However, the existing use immunity (*ASIO Act 1979* (Cth) s 34L(9)) provides a safeguard to ensure that anything said, or any record or thing produced, by a person in response to a request made under a QDW is not admissible in evidence against that person in criminal proceedings.

AFP's preventative detention orders

Comparatively, the PDO framework is first and foremost a preventative framework. A PDO may be issued for the purpose of either:

- preventing a terrorist act that is capable of being carried out, and could occur, within the next 14 days from occurring, or
- preserving evidence of, or relating to, a recent terrorist act.

Reflecting the preventative nature of the PDO framework, subsection 105.42(1) of the Criminal Code limits the purposes for which the AFP may question a person held under a PDO, essentially to procedural matters, such as verifying their identity and ensuring their safety and wellbeing. Subsection 105.42(2) prohibits ASIO from questioning the person held under a PDO entirely.

Where a person is being held under a PDO and ASIO has separately obtained a QW or QDW under the ASIO Act, section 105.25 of the Criminal Code provides that the person may be released from detention under the PDO so that the person may be questioned in accordance with the QW or QDW.

Interaction between powers

ASIO requires a questioning function for its own intelligence gathering purposes. While agencies work together where it is appropriate and necessary to ensure the effective performance of their functions, it is important to effective discharge of their respective and distinct functions that each agency to have the powers necessary for the purposes relevant to the function of that agency.

The PDO framework allows the AFP to take a person into preventative detention to prevent a terrorist act, or to preserve evidence of, or relating to, a recent terrorist act, consistent with the AFP's functions as a law enforcement agency.

The QW and QDW framework enables ASIO to gather intelligence to protect Australia, and the people of Australia, from threats including terrorism, consistent with ASIO's functions as a security intelligence agency.

The powers may interact, in limited circumstances, where ASIO seeks a QW or QDW to question a person who has been detained by the AFP under a PDO. This situation may arise where, for example, ASIO reasonably believes that the person who has been detained is part of a larger terrorist group that remains at large, and that questioning the person will therefore substantially assist in the ongoing terrorism investigation.

Further comments

If it would further assist the Committee, the department included additional information on the interaction between ASIO's questioning powers and various counter terrorism powers, including PDOs, in its submission to the Committee's inquiry into ASIO's questioning and detention powers (at paragraphs 2.12-15), as well as in its supplementary submission 7.2 (p 8), and in response to questions from the Committee (supplementary submission 7.3, pp 2-3). The department and ASIO also provided evidence to the Committee on this issue at its public hearing on 16 June 2017 (Hansard, pp 25-26).

Control order regime – Division 104 of the Criminal Code

Could the Department provide a short written response on the issue raised by the Law Council of Australia relating to inferences?

In its submissions to the Independent National Security Legislation Monitor (INSLM), the Law Council of Australia (LCA) raised concerns with the application of the rule in *Jones v Dunkel*[2] in control order proceedings. This rule is summarised below:

> In civil proceedings, under the common law (the "rule in *Jones v Dunkel"*), adverse inferences may be drawn from the failure of a party to adduce particular evidence, where such evidence would reasonably have been expected.[3]

The LCA argued that adducing evidence to avoid an adverse inference may, for example, re-enliven criminal charges against the person subject to the control order proceedings.[4] The LCA recommended that the criminal rules of evidence should apply to inferences.[5] In its written submissions to the Committee, the LCA recommended that an inference 'should only be drawn if it is the only rational inference'.[6]

The INSLM noted that the proceedings were civil in character, and that the civil standard of proof and the rules of evidence in civil proceedings applied to their resolution. The INSLM specifically examined the application of the rule in *Jones v Dunkel* to control order proceedings. He outlined that while the rule may be a practical problem for a controlee who does not wish to give evidence, this problem is not unique and does not justify the change recommended by the LCA. The INSLM specifically did not recommend any changes to the standard of proof that applies to control order proceedings[7].

Generally, where the Commonwealth is able to meet a higher standard of proof the preferred option will be to arrest, charge and prosecute the person rather than apply for a control order. Requiring the Commonwealth to meet a higher standard than that which currently applies to the control order proceedings reduces the effectiveness of the control order regime and defeats its purpose.

What is the status of the recommendations made by the second INSLM in his reports into Control Order Safeguards?

The Government response to the second INSLM's reports into Control Order Safeguards, and an Addendum to the Government response, is at **Attachment A**.

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[2] *Jones v Dunkel* (1959) 101 CLR 298.
[3] Stephen Odgers, *Uniform Evidence Law* (11th ed, 2014), [1.3.110].
[4] LCA, submission to INSLM, para 80.
[5] Odgers notes that the common law position in criminal proceedings is different to civil proceedings, and only in the most unusual circumstances would the reasoning described in *Jones v Dunkel* be available: see Stephen Odgers, *Uniform Evidence Law* (11th ed, 2014), [1.3.110].
[6] LCA, submission to PJCIS, para 26.
[7] INSLM, Review of Division 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders, 2017, paras 8.46-8.49.

Application of rules and procedures – Supplementary comments

The AFP notes that the INSLM's statutory review addressed the key issues associated with the rules of evidence that apply to control order proceedings. The INSLM made a number of important observations, including:

- clarifying that control order proceedings are civil proceedings to which the ordinary rules of civil procedure should apply
- noting that there is no reason for limiting the application of the *Jones v Dunkel* principle in control order proceedings, and
- recommending that section 104.14 of the Criminal Code should be amended to clarify that:
    - the interim control order application need not be tendered as evidence of the proof of its contents, and
    - the court may take judicial notice of the fact that the interim control order application was made, but is only to act on evidence received in accordance with the rules of evidence.

Control order proceedings can be complex, being civil proceedings in relation to which the conduct is governed by provisions in the Criminal Code. The INSLM's report noted that civil rules of evidence apply to control order proceedings. However, the novelty of the regime as compared with traditional civil proceedings, means that in practice, there may be differing expectations as to how matters should be conducted.

Some of the practical considerations that have arisen include differing expectations by parties around:

- The obligation to seek documents through the usual discovery process in civil proceedings. Uncertainty around the correct process for obtaining documents, including where a party considers that pre-trial disclosure obligations from criminal procedure apply, can cause delays to proceedings.

- Processes for narrowing the facts in contention, including through pleadings, an agreement as to facts in dispute, or a notice to admit facts or documents. Certainty around the scope of issues in dispute could significantly reduce the length and complexity of proceedings.

- The form of evidence for a confirmation hearing, including whether written material should be in affidavit form and the requirement for expert witness reports to appropriately qualify the expert witness. Such uncertainty can also cause delays in proceedings.

In addition to any amendments required to implement the INSLM's recommendations, there may be benefit in considering whether any further improvements could be made to ensure there is clarity around how civil procedure rules apply in a control order proceeding. The views of the Federal Circuit Court and Federal Court would be important in informing these considerations.

Declared areas provisions – Division 119 of the Criminal Code

Are you aware of people who have come forward to seek further advice on travel to those areas [declared areas]?

The AFP has not received any requests for further advice from individuals in relation to travel to a declared area.

Attachment A

Government response to the Independent National Security Legislation Monitor's Report into Control Order Safeguards

Control Order Safeguards – Part 1 – Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015

COAG review recommendation	*INSLM recommendation*	*Government response to INSLM recommendation*
RECOMMENDATION 30: Criminal Code – Control orders – Special Advocates The Committee recommends that the Government give consideration to amending the legislation to provide for the introduction of a nationwide system of 'Special Advocates' to participate in control order proceedings. The system could allow each State and Territory to have a panel of security-cleared barristers and solicitors who may participate in closed material procedures whenever necessary including, but not limited to, any proposed confirmation of a control order, any revocation or variation application, or in any appeal or review application to a superior court relating to or concerning a control order.	**Recommendation 1** That the recommendation of the COAG Review as to the introduction of a system of special advocates into the control order regime be accepted and implemented, if proposed s 38J of the NSI Act in Schedule 15 of the 2015 Bill is to become law.	**Supported** The Government supports the INSLM's recommendation and will incorporate provisions in the CTLA Bill 2016 to create a special advocate role when sensitive national security information is withheld in control order proceedings.
	Recommendation 2 That proposed s 38J of the NSI Act in Schedule 15 of the 2015 Bill should not come into force until Recommendation 1 has been implemented.	**Support in principle** The Government supports the intent of the INSLM's recommendation. The Government will incorporate provisions in the CTLA Bill 2016 to create a special advocates role. These provisions will have a delayed commencement to enable administrative arrangements to be put in place so the regime can be practically implemented. The Government will work swiftly to ensure these arrangements are completed as soon as possible. Recognising that the court can continue to exercise its

COAG review recommendation	*INSLM recommendation*	*Government response to INSLM recommendation*
		inherent powers to appoint a special advocate if appropriate, the Government considers (in line with PJCIS Recommendation 5) that it is important not to delay the commencement of proposed section 38J of the NSI Act in Schedule 15 of the CTLA Bill.

Control Order Safeguards – Part 2

COAG review recommendation	*INSLM recommendation*	*Government response to INSLM recommendation*
RECOMMENDATION 26: Criminal Code – Retention of control orders The Committee considers that the control order regime should be retained with additional safeguards and protections included.	**Accepted and no further action required**	**Supported** The Government supports the INSLM's recommendation. As noted by the INSLM, this recommendation has been accepted by the Government and no further action is required.
RECOMMENDATION 27: Criminal Code – Control orders – Basis for seeking Attorney-General's consent The Committee recommends the amendment of subsection 104.2(2) (b) to require that the second basis on which a senior member of the Australian Federal	**In those particular circumstances, recommendation 27 is not pressed.**	**Supported** The Government supports the INSLM's recommendation. In 2014, the Government amended the threshold in paragraph 104.2(2)(a) to 'suspects' on reasonable grounds to make it consistent with the threshold in paragraph

COAG review recommendation	*INSLM recommendation*	*Government response to INSLM recommendation*
Police seeks the Attorney-General's written consent to request an interim control order be that he or she "considers on reasonable grounds that the person has provided training, or received training from, a listed terrorist organisation".		104.2(2)(b). That threshold is commonly used for the exercise of police powers. As noted by the INSLM, the threshold for obtaining the consent of the Attorney-General does not limit the Attorney-General's discretion and has no impact upon the test of 'satisfaction on the balance of probabilities' to be applied by the issuing court.
RECOMMENDATION 28: Criminal Code – Control orders – Definition of 'issuing court' The Committee recommends that the definition of 'issuing court' in section 100.1 be amended to read 'the Federal Court of Australia'.	**The best solution is to accept recommendation 28 but to give the Federal Court the power to remit an application to the Federal Circuit Court.**	**Not supported** The Government favours an approach that provides clarity about whether or not the Federal Circuit Court is an 'issuing court' for control order purposes. The INSLM's recommendation makes the jurisdiction of the Federal Circuit Court unclear and dependent on the decision of the Federal Court. The Government notes that all control orders to date have been issued by the Federal Circuit Court (and the Federal Magistrates Court, as it was formerly known). The Government will work collaboratively with the Federal Circuit Court to resolve any concerns they may have in hearing control order applications.

COAG review recommendation	*INSLM recommendation*	*Government response to INSLM recommendation*
RECOMMENDATION 29: Criminal Code – Control orders as a last resort – Cooperation and information sharing between the Australian Federal Police and the Commonwealth Director of Public Prosecutions The Committee recommends that investigating agencies, prior to the Australian Federal Police requesting consent from the Attorney-General to seek an interim control order, should provide the Commonwealth Director of Public Prosecutions with the material in their possession so that the Director may, in light of the Prosecution Policy of the Commonwealth, consider or reconsider the question of prosecution in the criminal courts. This recommendation does not necessarily require that it be incorporated in the legislation at this stage. It does, however, emphasise that criminal prosecution is the preferable approach. Control orders should always be sought as a last resort.	**No further action is required as to recommendation 29.**	**Supported** The Government supports the INSLM's recommendation. In practice, there is appropriate consultation and cooperation between the Australian Federal Police and the Commonwealth Director of Public Prosecutions when control orders are under consideration.
RECOMMENDATION 30: Criminal Code – Control orders – Special Advocates	**Recommendation 30 is supported in principle. Division 4 of pt 5.3 of the *Criminal Code* should be**	**Supported in principle** The Government supports the INSLM's

COAG review recommendation	*INSLM recommendation*	*Government response to INSLM recommendation*
The Committee recommends that the Government give consideration to amending the legislation to provide for the introduction of a nationwide system of 'Special Advocates' to participate in control order proceedings. The system could allow each State and Territory to have a panel of security-cleared barristers and solicitors who may participate in closed material procedures whenever necessary including, but not limited to, any proposed confirmation of a control order, any revocation or variation application, or in any appeal or review application to a superior court relating to or concerning a control order.	**amended as proposed.** The INSLM recommended that: *Division 104 should be amended to ensure that the withholding of national security information from a controlee is dealt with only by the National Security Information (Criminal and Civil Proceedings) Act 2004 (NSI Act) as it is to be amended.*	recommendation in principle. The Government will incorporate provisions in the CTLA Bill 2016 to create a special advocate role when sensitive national security information is withheld in control order proceedings. The Government does not support the proposed amendment to Division 104. The statutory provisions contained in the control order regime for the disclosure of information operate in addition to any other applicable procedural rights in federal civil proceedings, such as normal processes of discovery, in which a party to a proceeding is entitled to obtain much of the material relied upon by the other party.
RECOMMENDATION 31: Criminal Code – Control orders – Minimum standard of disclosure of information to controlee The Committee recommends that the legislation provide for a minimum standard concerning the extent of the information to be given to a person the subject of an application for the confirmation of a control order, or an application for a variation or revocation of a control order.	**The substance of recommendation 31 is adequately reflected in Schedule 15 to the 2015 Bill if a system of special advocates is introduced and the withholding of national security information in control order proceedings is governed by the NSI Act and not the *Criminal Code*.**	**Supported** The Government considers that, in addition to creating a system of special advocates, there is merit in clearly expressing the extent of the Commonwealth's disclosure obligations under the proposed amendments contained in Schedule 15 of the CTLA Bill 2016. Accordingly, the Government will amend Schedule 15 of the CTLA Bill 2016 to reflect

COAG review recommendation	*INSLM recommendation*	*Government response to INSLM recommendation*
This requirement is quite separate from the Special Advocates system. It is intended to enable the person and his or her ordinary legal representatives of choice to insist on a minimum level of disclosure to them. The minimum standard should be: "the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations." This protection should be enshrined in Division 104 wherever necessary.		the intent of the COAG recommendation and give effect to Recommendation 4 of the PJCIS Advisory Report into the CTLA Bill 2015.
RECOMMENDATION 32: Criminal Code – Control orders – Information concerning appeal rights The Committee recommends that section 104.12 should be amended to provide that the information to be given to a person the subject of an interim control order include information as to all appeal and review rights available to that person or to the applicant in the event that an interim order is confirmed, varied or revoked.	**Recommendation 32 has been implemented.**	**Supported** The Government implemented this recommendation in the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*, which added subparagraphs 104.12(1)(b)(iv) to (ix) (in relation to interim control orders) and 104.17(1)(b)(i) to (iii) (in relation to confirmed control orders) to the *Criminal Code*. Those provisions set out the various rights the person must be informed of when the AFP serves an interim or confirmed control order on the person.

COAG review recommendation	*INSLM recommendation*	*Government response to INSLM recommendation*
RECOMMENDATION 33: Criminal Code – Control orders – Relocation condition The Committee recommends that subsection 104.5(3)(a) be amended to ensure that a prohibition or restriction not constitute – in any circumstances – a relocation order.	**Recommendation 33 is supported**	**Not supported** Subsection 104.5(3)(a) is not sufficiently broad to allow for a relocation order. At present, there is no express power that would allow for the relocation of a control order subject. The proposed amendment is therefore not necessary.
RECOMMENDATION 34: Criminal Code – Control orders – Curfew condition The Committee recommends that a prohibition or restriction under subsection 104.5(3)(c) – a curfew order – be generally no greater in any case than 10 hours in one day.	**Recommendation 34 need not be pursued but early consideration should be given to including an overnight residence requirement.**	**Not supported** The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* amended paragraph 104.5(3)(c) to provide that the maximum period a curfew may last is 12 hours within any 24 hours. At present, the Government does not see the need to pursue an 'overnight residence' requirement. The current provisions allow sufficient flexibility to tailor control order conditions to the circumstances of the control order subject. The Government does not consider that, under some circumstances, control order conditions may be 'close to home detention'. Such an outcome would not satisfy the test in subsection 104.4(2) that the issuing court,

COAG review recommendation	*INSLM recommendation*	*Government response to INSLM recommendation*
		when determining whether each obligation, prohibition and restriction is 'reasonably necessary, and reasonably appropriate and adapted', must also consider the person's circumstances (including their financial and personal circumstances).
RECOMMENDATION 35: *Criminal Code* – Control orders – Communication restrictions The Committee recommends that, other than in any exceptional case, the prohibitions or restrictions under subsection 104.5(3)(f) permit the controlled person to have access to one mobile phone, one landline, and one computer with access to the internet.	**Recommendation 35 is not supported**	**Supported** The Government supports the INSLM's recommendation to not amend subsection 104.5(3)(f) as the COAG Review recommendation would substantially remove the necessary flexibility to tailor conditions of control orders to the particular terrorist threat presented by the subject of a proposed control order.
RECOMMENDATION 36: *Criminal Code* – Control orders – Limit on duration The Committee recommends that, for the present time, there be no change to the maximum duration of a control order, namely a period of 12 months	**Recommendation 36 has been accepted and no action is required.**	**Supported** The Government has previously agreed to the COAG Review recommendation and there is no evidence to suggest that a 12-month maximum duration is excessive.
RECOMMENDATION 37: *Criminal Code* – Control orders – Terms of an interim	**A variation of recommendation 37 is supported in principle**	**Not supported** The issuing court, when deciding what

COAG review recommendation	*INSLM recommendation*	*Government response to INSLM recommendation*
control order The Committee recommends that section 104.5 should be amended to ensure that, whenever a control order is imposed, any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person's liberty, privacy or freedom of movement that is necessary in all the circumstances.		controls to place on the subject of a control order, must determine whether each of the obligations, prohibitions and restrictions imposed on the subject of a control order is 'reasonably appropriate and adapted' for the purpose of protecting the public from a terrorist act. In making this decision, the court must also consider the impact of each obligation, prohibition and restriction on the person's circumstances. That is, the court has to have a positive finding of proportionality. The INSLM noted that the proposed formula in the COAG Review recommendation is not obviously preferable to the existing requirements and that the two formulae are different ways of achieving the same result. The INSLM noted there is a case for having the court consider whether the combined effect of all of the proposed restrictions is proportionate to the risk being guarded against in addition to looking at each restriction as now required. However, this would add complexity to the control order provisions.
RECOMMENDATION 38: *Criminal Code* – Control orders – Oversight by the Commonwealth Ombudsman	**Recommendation 38 is not necessary**	**Supported** The Government supports the INSLM's recommendation on the basis that the

COAG review recommendation	*INSLM recommendation*	*Government response to INSLM recommendation*
The Committee recommends that the Commonwealth Ombudsman be empowered specifically to provide general oversight of interim and confirmed control orders.		Ombudsman's general powers of oversight and inquiry already extend to the AFP's actions in the implementation and enforcement of control orders.

Addendum to the Government response

Since the finalisation of the Government response to the reports of the Independent National Security Legislation Monitor (INSLM) into Control Order Safeguards, the *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* implemented the Government's position on the following:

- Recommendations 1 and 2 of Part 1 of the INSLM's Control Order Safeguards report, and
- Part 2 of the INSLM's Control Order Safeguards report dealing with Recommendations 30 and 31 of the COAG Review.

The *National Security Information (Criminal and Civil Proceedings) Amendment Regulations 2017*, which contains the administrative arrangements relating to special advocates, came into force on 20 December 2017.