

**Australian Government response:**

- **Parliamentary Joint Committee on Intelligence and Security:** Review of the police stop, search and seizure powers, the control order regime and the preventative detention order regime; Review of the ‘declared areas provisions’ (March 2018)
- **Independent National Security Legislation Monitor:** Review of Division 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders; Sections 119.2 and 119.3 of the Criminal Code: Declared Areas; Review of Division 3A of Part IAA of the *Crimes Act 1914*: Stop, Search and Seize Powers (September 2017)

Recommendation	Government Response
<b>PJCIS review of the police stop, search and seizure powers, the control order regime and the preventative detention order regime</b>	
<p><b>Recommendation 1:</b> The Committee recommends that the stop, search and seizure powers provided for under Division 3A of Part IAA of the <i>Crimes Act 1914</i> be continued.</p>	<p><b>The Government supports this recommendation.</b></p>
<p><b>Recommendation 2:</b> The Committee recommends that the Australian Federal Police (AFP) be required to provide a report to the AFP Commissioner as soon as practicable after any powers under Division 3A of Part IAA of the <i>Crimes Act 1914</i> are exercised. A copy of the report should be provided to the responsible minister, the Independent National Security Legislation Monitor and the Committee as soon as practicable. The AFP should brief the Committee when requested.</p> <p>The Committee further recommends that the Australian Federal Police be required to report annually to the Parliament on the exercise of any powers under Division 3A.</p>	<p><b>The Government supports this recommendation.</b></p>
<p><b>Recommendation 3:</b> The Committee recommends that the <i>Intelligence Services Act 2001</i> be amended to enable the Parliamentary Joint Committee on Intelligence and Security to monitor and review the performance by the Australian Federal Police of its functions under Division 3A of Part IAA of the <i>Crimes Act 1914</i> (the stop, search and seizure powers), including the basis of the Minister’s declaration of a prescribed security zone under section 3UJ. The</p>	<p><b>The Government supports this recommendation. The AFP will continue to provide operational information to the PJCIS on a voluntary basis to assist the PJCIS in the performance of its functions.</b></p>

Recommendation	Government Response
Committee should be provided with sufficient operational information to enable it to perform this new function.	
<b>Recommendation 4:</b> The Committee recommends that the <i>Intelligence Services Act 2001</i> be amended to require the Committee to conduct a further review prior to the sunset date into the operation, effectiveness and implications of the stop, search and seizure powers under Division 3A of Part IAA of the <i>Crimes Act 1914</i> , with the provisions sun setting after three years.	<b>The Government supports this recommendation.</b>
<b>Recommendation 5:</b> The Committee recommends that the control order regime provided for under Division 104 of the <i>Criminal Code</i> be continued, with the provisions sun setting after three years.	<b>The Government supports this recommendation.</b>
<b>Recommendation 6:</b> The Committee recommends that the <i>Intelligence Services Act 2001</i> be amended to require the Committee to conduct a further review into the operation, effectiveness and implications of the control order regime in Division 104 of the <i>Criminal Code</i> prior to the sunset date.	<b>The Government supports this recommendation.</b>
<p><b>Recommendation 7:</b> The Committee recommends that section 104.14 of the <i>Criminal Code</i> be amended to clarify the status of the original request for an interim control order during confirmation proceedings. This is in line with the Independent National Security Legislation Monitor’s recommendation at paragraph 8.61 of his 2017 review.</p> <p>The Committee further recommends that the Attorney-General consider, in consultation with the Federal Circuit Court, the Federal Court, and appropriate legal stakeholders, what further improvements could be made to provide greater clarity around how civil procedure rules apply in control order proceedings, noting operational sensitivities.</p>	<b>The Government supports this recommendation.</b>
<b>Recommendation 8:</b> The Committee recommends that Division 104 of the <i>Criminal Code</i> be amended to allow for either the controlee, or the Australian	<b>The Government supports this recommendation.</b>

Recommendation	Government Response
<p>Federal Police, to apply to the issuing court to vary the terms of an interim control order under section 104.5. In making this recommendation, the Committee notes that restrictions will be required to ensure that the court is not burdened with an unreasonable number of applications for variation by the contolee.</p>	
<p><b>Recommendation 9:</b> The Committee recommends that the Government extend the minimum time period between an interim and a confirmation hearing for a control order under subsection 104.5(1A) of the <i>Criminal Code</i> to seven days, subject to legal advice regarding any constitutional concerns arising from this extension.</p>	<p><b>The Government supports this recommendation.</b></p>
<p><b>Recommendation 10:</b> The Committee recommends that the <i>Criminal Code</i> be amended as required to implement an Extended Supervision Order (ESO) regime which would include any of the controls that can be imposed under a control order, similar review mechanisms, and other associated changes consistent with the model recommended by the Independent National Security Legislation Monitor at paragraphs 9.40 to 9.47 of his 2017 review. This will address interoperability issues between Division 104 and Division 105A.</p>	<p><b>The Government supports this recommendation.</b></p>
<p><b>Recommendation 11:</b> The Committee recommends that the preventative detention order regime in Division 105 of the <i>Criminal Code</i> be continued, with the provisions sun setting after 3 years.</p>	<p><b>The Government supports this recommendation.</b></p>
<p><b>Recommendation 12:</b> The Committee recommends that the <i>Intelligence Services Act 2001</i> be amended to require the Committee to conduct a further review into the operation, effectiveness and implications of the preventative detention order regime in Division 105 of the <i>Criminal Code</i> prior to the sunset date.</p>	<p><b>The Government supports this recommendation.</b></p>

Recommendation	Government Response
<p><b>Recommendation 13:</b> The Committee recommends that the Australian Federal Police be required to notify the Committee as soon as practicable after a preventative detention order is made under Division 105 of the <i>Criminal Code</i>, and to brief the Committee if requested.</p>	<p><b>The Government supports this recommendation.</b></p>
<p><b>PJCIS review of the ‘declared areas provisions’</b></p>	
<p><b>Recommendation 1:</b> The Committee recommends that sections 119.2 and 119.3 of the <i>Criminal Code</i>, which establish the ‘declared area’ provisions, be continued for a further period of three years.</p> <p>The Committee also recommends that the <i>Intelligence Services Act 2001</i> be amended to require the Committee to commence a further review into the operation, effectiveness and implications of the provisions prior to the sunset date.</p>	<p><b>The Government supports this recommendation.</b></p>
<p><b>Recommendation 2:</b> The Committee recommends that section 119.2(3) of the <i>Criminal Code</i> be amended to make clear that humanitarian work beyond direct aid, including compliance training on the laws of armed conflict, is considered to be a ‘legitimate purpose’ for entering, or remaining in, a declared area.</p>	<p><b>The Government supports this recommendation in principle.</b></p> <p>The purpose of the declared area offence is to discourage individuals from entering or remaining in areas, without a legitimate purpose, where listed terrorist organisations are known to be engaging in hostile activities. The legitimate purposes are intentionally narrowly framed to ensure they do not undermine the effectiveness of the offence.</p> <p>The Government considers that the performance of official duties of the International Committee of the Red Cross (ICRC) should be recognised as a ‘legitimate purpose’ for entering, or remaining in, a</p>

Recommendation	Government Response
	declared area. The ICRC has specific standing in international law and its role includes the provision of training on the laws of armed conflict.
<p><b>Recommendation 3:</b> The Committee recommends that the key non-legislative factors that are considered by ASIO to guide and prioritise the selection of areas in foreign countries for consideration be specifically addressed in the unclassified Statement of Reasons that is provided to the Minister and made publicly available in relation to each declared area. These factors include:</p> <ul style="list-style-type: none"> <li>• links to Australia and Australians</li> <li>• threats to Australian interests including the role of a particular area in the radicalisation of Australians and likely repercussions in Australia</li> <li>• the enduring nature of the listed terrorist organisation’s hostile activity in the area</li> <li>• the operational benefit of declaring the area</li> <li>• factors relevant to Australia’s international relations, including bilateral relations with countries including those in which an area may be declared, and engagement with international organisations such as the United Nations</li> <li>• the listed terrorist organisation’s ideology</li> <li>• links to other terrorist groups, and</li> <li>• engagement in peace or mediation processes.</li> </ul>	<p><b>The Government supports this recommendation in principle.</b></p> <p>The Government supports the provision of comprehensive, publicly available information about the factors considered by the Government when determining whether to declare an area in a foreign country.</p> <p>However, some of the factors listed in <b>Recommendation 3</b> would not be appropriate for inclusion in a publicly available, unclassified statement of reasons due to their potential impact on Australia’s foreign relations and reference to sensitive national security considerations.</p> <p>The Government will review the unclassified Statement of Reasons and the Protocol to determine what additional information could be included in it without compromising national security interests or foreign relations.</p>
<p><b>Recommendation 4:</b> The Committee recommends that section 119.3 of the <i>Criminal Code</i> be amended to provide that the Minister for Foreign Affairs may revoke a declaration at any time. This should include circumstances where the legislative test for the declaration continues to be met, but where changes in non-legislative factors suggest that the declaration is no longer necessary or desirable, taking into account security advice from relevant agencies.</p>	<p><b>The Government supports this recommendation.</b></p>
<p><b>Recommendation 5:</b> The Committee recommends that the Government</p>	<p><b>The Government supports this recommendation.</b></p>

Recommendation	Government Response
<p>implement the Independent National Security Legislation Monitor's recommendation to empower the Committee to review and report back to the Parliament on any declaration made under section 119.3 of the <i>Criminal Code</i> at its discretion 'at any time prior to the declaration ceasing to have effect or being revoked by the Minister'.</p>	<p>Australian intelligence agencies continuously monitor the necessity for a declaration. The Government welcomes ongoing engagement with the Committee to ensure any review it undertakes would be timed to maximise its value and complement parallel review processes.</p>
<p><b>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</b></p>	
<p>If the INLSM's other recommendations in respect of Division 104 are accepted, Division 104 should be continued for a further period of five years.</p>	<p><b>The Government supports the continuation of the provisions for a further three years, in accordance with the PJCIS recommendation.</b></p>
<p>Section 104.14 should be amended to clarify that:</p> <ul style="list-style-type: none"> <li>• the original request for an interim control order need not be tendered as evidence of the proof of its contents, and</li> <li>• the issuing court may take judicial notice of the fact that an original request in particular terms was made, but it is only to act on evidence received in accordance with the <i>Evidence Act 1995</i> (Cth).</li> </ul>	<p><b>The Government supports this recommendation.</b></p>
<p>Division 104 should be amended so that:</p> <ul style="list-style-type: none"> <li>• the controlee may apply to vary an interim control order prior to confirmation of the control order</li> <li>• the court has power to amend an interim control order if the AFP Commissioner and controlee agree.</li> </ul>	<p><b>The Government supports this recommendation.</b></p>
<p>Division 104 should provide that there is to be no order as to costs made by the issuing court in confirmation proceedings.</p>	<p><b>The Government supports this recommendation in principle.</b></p> <p>The Government considers it appropriate that a respondent should not be put to expense for exercising their right to contest a control</p>

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	order. However, where a respondent has acted unreasonably, then it may be reasonable for the Commonwealth to seek costs, only to the extent of the unreasonableness.
The Attorney-General should give consideration to the adequacy of legal aid for controlees in control order proceedings.	<p><b>The Government supports this recommendation.</b></p> <p>The Attorney-General will further consider this recommendation.</p>
<p>The second INSLM made a number of observations and recommendations about the control order regime that are relevant to the present review. For the purposes of this review, I [INSLM] have not reconsidered the issues to which the observations and recommendations relate. Insofar as the government has not yet responded to them, these observations and <b>recommendations stand</b> as the views of my office. Specifically:</p> <ul style="list-style-type: none"> <li>• accepted recommendation 28 of the COAG Review Committee that only the Federal Court have jurisdiction to make control orders, but recommended in turn that it be given the power to remit a request for a control order to the Federal Circuit Court</li> <li>• supported recommendation 33 of the COAG Review Committee that s 104.5(3)(a) be amended to ensure that a control imposed by a control order not constitute a relocation order, noting that the current wording ‘would literally permit de facto relocation by excluding the place of residence of the controlee’</li> <li>• recommended early consideration to including an overnight residence requirement, similar to that provided for in the United Kingdom (see sch 1 pt 1 to the <i>Terrorism Prevention and Investigation Measures Act 2011</i> (UK))</li> <li>• supported a variation of recommendation 37 of the COAG Review Committee (advocating a least interference test) to the effect that the issuing court be required to consider ‘whether the combined effect of all of the proposed restrictions is proportionate to the risk being guarded against’ in addition to the existing requirement to assess each restriction</li> </ul>	<p><b>There are no legislative amendments required to give effect to the Government response to the former INSLM’s reports into Control Order Safeguards (attached)</b></p>

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<p>individually and</p> <ul style="list-style-type: none"> <li>recommended that withholding national security information from the controllee be dealt with only by the <i>National Security Information (Criminal and Civil Proceedings) Act 2004</i> (NSI Act), and that Division 104 be amended accordingly.</li> </ul>	
<p>State and territory supreme courts should be authorised to make an ESO which would include any of the controls that can be imposed by a control order under Division 104.</p>	<p><b>The Government supports this recommendation.</b></p>
<p>If an ESO regime were incorporated into Division 105A, the conditions to which such an order may be subject should be the same as the terms of subsection 104.5(3).</p>	<p><b>The Government supports this recommendation.</b></p>
<p>Division 105A should be amended to allow the state and territory supreme courts, on the application of the Commonwealth Attorney-General, to make either a Continuing Detention Order (CDO) or an ESO for a period of up to three years (at a time) if satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community without either of those orders being made. The court should only make a CDO if satisfied that an ESO would not be effective in preventing the identified risk.</p>	<p><b>The Government supports this recommendation.</b></p>
<p>It is recommended that:</p> <ul style="list-style-type: none"> <li>the Commonwealth Attorney-General also be the applicant for an ESO</li> <li>there be no new pre-conditions before the Attorney-General commences div 105A proceedings for an ESO</li> <li>an application may be made for an ESO in relation to a person who is already the subject of a CDO or ESO</li> <li>the same controls and monitoring regime be available for an ESO made under div 105A as a control order made under div 104, and</li> <li>the government consider making the special advocates regime available</li> </ul>	<p><b>The Government supports the features of the ESO scheme recommended by the INSLM and will consider whether to make the special advocate regime available for applications under Division 105A.</b></p>



Recommendation	Government Response
for applications under div 105A.	
<p>It is recommended that:</p> <ul style="list-style-type: none"> <li>the Attorney-General be unable to give consent under s 104.2 while div 105A proceedings are pending</li> <li>in requesting an interim control order in relation to a person, the senior AFP member be required to give the issuing court a copy of any div 105A application made in relation to that person, and any order (including reasons) of the relevant court in respect of that application, and</li> <li>no control order may be in force in relation to a person while a CDO or ESO is in force in relation to that person.</li> </ul>	<p><b>The Government supports these recommendations.</b></p>
<p>Division 105 should be continued for a further period of five years, subject to the implementation of a national investigative detention regime.</p>	<p><b>The Government supports the continuation of the provisions for a further three years, in accordance with the PJCIS recommendation.</b></p> <p>At the Special Meeting of the Council of Australian Governments on Counter-Terrorism, held on 5 October 2017, the Government agreed to enhancement the existing pre-charge detention regime under Part IC of the <i>Crimes Act 1914</i>. These enhancements will support the continued use of Part IC nationally in the investigation of Commonwealth terrorism offences.</p>
<p><b>INSLM Review of Sections 119.2 and 119.3 of the Criminal Code: Declared Areas</b></p>	
<p>Provided the review provision is amended as recommended, the laws should be continued for a further period of five years.</p>	<p><b>The Government supports the continuation of the provisions for a further three years, in accordance with the PJCIS recommendation.</b></p>

Recommendation	Government Response
<p>The provisions should be continued, subject to any declaration being reviewable by the PJCIS at their discretion at any time prior to the declaration ceasing to have effect or being revoked by the Minister.</p> <p>Increasing the role of the PJCIS will assist in ensuring that the process for declaring areas under s 119.3 is judiciously applied and the situation in declared areas is monitored closely by the government with a view to the possible cessation of a declaration.</p>	<p><b>The Government supports this recommendation.</b></p> <p>Australian intelligence agencies continuously monitor the necessity for a declaration. The Government welcomes ongoing engagement with the Committee to ensure any review it undertakes would be timed to maximise its value and complement parallel review processes.</p>
<p>Consideration should be given to making a regulation under, or an amendment to, these provisions to allow an individual to seek permission from the Foreign Affairs Minister (following advice from the Attorney-General) to enter into and remain in a declared area for such period and on such conditions as the Minister may choose to impose.</p>	<p><b>The Government does not support this recommendation.</b></p> <p>The Government considers that an authorisation scheme could not be effectively implemented and monitored. There may be little information at the Government's disposal to assist it to assess whether an applicant would be travelling for a bona fide reason, and to gather such information would require diversion of significant security and intelligence resources from other priorities to support such assessments.</p> <p>Declared areas are also 'do not travel' destinations. Permitting travel to a 'do not travel' destination would be contrary to the Australian Government's own travel advice and there would be significant practical difficulty in monitoring compliance with any conditions imposed on an authorisation for travel to conflict zones.</p>

**INSLM Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers**

The laws ought to be continued, subject to the addition of new safeguards in the form of reporting requirements (akin to the existing requirements for delayed notification search warrants) to the relevant minister, the Ombudsman, the PJCIS and my Office so that each such body can review, in accordance with their own powers and procedures, any exercise of div 3A powers, including the making of a ministerial declaration.

Provided those safeguards are implemented, the laws should be continued for a further period of **five years**. This is because, as to matters in paragraph 6(1)(a) of the INSLM Act, the laws have the capacity to be effective (noting that the laws have not operated in that they have not been used) and are laws that are truly 'emergency' powers.

**The Government supports the continuation of the provisions for a further three years, in accordance with the PJCIS recommendation.**

**The Government supports the introduction of reporting requirements in accordance with the PJCIS recommendation.**

The Government supports the introduction of reporting requirements but considers that the existing reporting requirements for delayed notification search warrants in section 3ZZFA of the *Crimes Act 1914* are not the most suitable to use as a model as they relate to the covert use of police powers.

The Government supports the PJCIS's recommendation that the AFP report to the responsible minister, the Independent National Security Legislation Monitor and the PJCIS as soon as practicable after the AFP exercises any powers under Division 3A of Part IAA of the *Crimes Act 1914*.

The Government further supports the PJCIS's recommendation that the AFP be required to report annually to the Parliament on the exercise of any powers under Division 3A.

**ATTACHMENT**

**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**

<i>COAG review recommendation</i>	<i>INSLM recommendation</i>	<i>Government response to INSLM recommendation</i>
<p><b>RECOMMENDATION 30: Criminal Code – Control orders – Special Advocates</b></p> <p>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.</p>	<p><b>Recommendation 1</b></p> <p>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.</p>	<p><b>Supported</b></p> <p>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.</p>
	<p><b>Recommendation 2</b></p> <p>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.</p>	<p><b>Support in principle</b></p> <p>The Government supports the intent of the INSLM’s recommendation.</p> <p>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 inherent powers to appoint a special advocate if appropriate, the Government considers (in line with PJCS Recommendation 5) that it is important not to delay the commencement of proposed section 38J of the</p>

<i>COAG review recommendation</i>	<i>INSLM recommendation</i>	<i>Government response to INSLM recommendation</i>
		NSI Act in Schedule 15 of the CTLA Bill.

**Control Order Safeguards – Part 2**

<i>COAG review recommendation</i>	<i>INSLM recommendation</i>	<i>Government response to INSLM recommendation</i>
<p><b>RECOMMENDATION 26: Criminal Code – Retention of control orders</b></p> <p>The Committee considers that the control order regime should be retained with additional safeguards and protections included.</p>	<p><b>Accepted and no further action required</b></p>	<p><b>Supported</b></p> <p>The Government supports the INSLM’s recommendation.</p> <p>As noted by the INSLM, this recommendation has been accepted by the Government and no further action is required.</p>
<p><b>RECOMMENDATION 27: Criminal Code – Control orders – Basis for seeking Attorney-General’s consent</b></p> <p>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 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”.</p>	<p><b>In those particular circumstances, recommendation 27 is not pressed.</b></p>	<p><b>Supported</b></p> <p>The Government supports the INSLM’s recommendation.</p> <p>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 104.2(2)(b). That threshold is commonly used for the exercise of police powers.</p> <p>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.</p>

<b><i>COAG review recommendation</i></b>	<b><i>INSLM recommendation</i></b>	<b><i>Government response to INSLM recommendation</i></b>
<p><b>RECOMMENDATION 28: Criminal Code – Control orders – Definition of ‘issuing court’</b></p> <p>The Committee recommends that the definition of ‘issuing court’ in section 100.1 be amended to read ‘the Federal Court of Australia’.</p>	<p><b>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.</b></p>	<p><b>Not supported</b></p> <p>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).</p> <p>The Government will work collaboratively with the Federal Circuit Court to resolve any concerns they may have in hearing control order applications.</p>
<p><b>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</b></p> <p>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</p>	<p><b>No further action is required as to recommendation 29.</b></p>	<p><b>Supported</b></p> <p>The Government supports the INSLM’s recommendation.</p> <p>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.</p>

<b>COAG review recommendation</b>	<b>INSLM recommendation</b>	<b>Government response to INSLM recommendation</b>
<p>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.</p>		
<p><b>RECOMMENDATION 30: Criminal Code – Control orders – Special Advocates</b></p> <p>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.</p>	<p><b>Recommendation 30 is supported in principle. Division 4 of pt 5.3 of the <i>Criminal Code</i> should be amended as proposed.</b></p> <p>The INSLM recommended that:</p> <p><i>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.</i></p>	<p><b>Supported in principle</b></p> <p>The Government supports the INSLM’s recommendation in principle.</p> <p>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.</p> <p>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.</p>
<p><b>RECOMMENDATION 31: Criminal Code – Control orders – Minimum standard of</b></p>	<p><b>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</b></p>	<p><b>Supported</b></p> <p>The Government considers that, in addition to</p>

<b>COAG review recommendation</b>	<b>INSLM recommendation</b>	<b>Government response to INSLM recommendation</b>
<p><b>disclosure of information to controlee</b></p> <p>The Committee recommends that the legislation provide for a minimum standard concerning the extent of the information to be given to a person the subject of an application for the confirmation of a control order, or an application for a variation or revocation of a control order. This requirement is quite separate from the Special Advocates system. It is intended to enable the person and his or her ordinary legal representatives of choice to insist on a minimum level of disclosure to them. The minimum standard should be: “the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations.” This protection should be enshrined in Division 104 wherever necessary.</p>	<p><b>national security information in control order proceedings is governed by the NSI Act and not the <i>Criminal Code</i>.</b></p>	<p>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.</p> <p>Accordingly, the Government will amend Schedule 15 of the CTLA Bill 2016 to reflect the intent of the COAG recommendation and give effect to Recommendation 4 of the PJCIS Advisory Report into the CTLA Bill 2015.</p>
<p><b>RECOMMENDATION 32: Criminal Code – Control orders – Information concerning appeal rights</b></p> <p>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.</p>	<p><b>Recommendation 32 has been implemented.</b></p>	<p><b>Supported</b></p> <p>The Government implemented this recommendation in the <i>Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014</i>, 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 <i>Criminal Code</i>. Those provisions set out the various rights the person must be informed of when the AFP serves an interim or confirmed</p>



<b>COAG review recommendation</b>	<b>INSLM recommendation</b>	<b>Government response to INSLM recommendation</b>
		control order on the person.
<p><b>RECOMMENDATION 33: Criminal Code – Control orders – Relocation condition</b></p> <p>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.</p>	<p><b>Recommendation 33 is supported</b></p>	<p><b>Not supported</b></p> <p>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.</p>
<p><b>RECOMMENDATION 34: Criminal Code – Control orders – Curfew condition</b></p> <p>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.</p>	<p><b>Recommendation 34 need not be pursued but early consideration should be given to including an overnight residence requirement.</b></p>	<p><b>Not supported</b></p> <p>The <i>Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014</i> amended paragraph 104.5(3)(c) to provide that the maximum period a curfew may last is 12 hours within any 24 hours.</p> <p>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.</p> <p>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, when determining whether each obligation, prohibition and</p>

<b>COAG review recommendation</b>	<b>INSLM recommendation</b>	<b>Government response to INSLM recommendation</b>
		restriction is ‘reasonably necessary, and reasonably appropriate and adapted’, must also consider the person’s circumstances (including their financial and personal circumstances).
<p><b>RECOMMENDATION 35: <i>Criminal Code</i> – Control orders – Communication restrictions</b></p> <p>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.</p>	<p><b>Recommendation 35 is not supported</b></p>	<p><b>Supported</b></p> <p>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.</p>
<p><b>RECOMMENDATION 36: <i>Criminal Code</i> – Control orders – Limit on duration</b></p> <p>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</p>	<p><b>Recommendation 36 has been accepted and no action is required.</b></p>	<p><b>Supported</b></p> <p>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.</p>
<p><b>RECOMMENDATION 37: <i>Criminal Code</i> – Control orders – Terms of an interim control order</b></p> <p>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</p>	<p><b>A variation of recommendation 37 is supported in principle</b></p>	<p><b>Not supported</b></p> <p>The issuing court, when deciding what 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</p>

<b>COAG review recommendation</b>	<b>INSLM recommendation</b>	<b>Government response to INSLM recommendation</b>
<p>movement that is necessary in all the circumstances.</p>		<p>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.</p>
<p><b>RECOMMENDATION 38: Criminal Code – Control orders – Oversight by the Commonwealth Ombudsman</b></p> <p>The Committee recommends that the Commonwealth Ombudsman be empowered specifically to provide general oversight of interim and confirmed control orders.</p>	<p><b>Recommendation 38 is not necessary</b></p>	<p><b>Supported</b></p> <p>The Government supports the INSLM’s recommendation on the basis that the Ombudsman’s general powers of oversight and inquiry already extend to the AFP’s actions in the implementation and enforcement of control orders.</p>

### **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.