Law Council
OF AUSTRALIA

Stop, search and seizure powers, declared areas, control orders, preventive detention orders and continuing detention orders

Independent National Security Legislation Monitor

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About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee in the preparation of this submission.

Executive Summary

1. The Law Council is pleased to participate in the Independent National Security Legislation Monitor's (**INSLM**) review of the following areas of counter-terrorism and national security legislation:

    - Division 3A of Part IAA of the *Crimes Act 1914* (Cth) (**Crimes Act**) (stop, search and seize powers);
    - Offences relating to entering and remaining in 'declared areas' under division 119 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**); and
    - Divisions 104 and 105 of the Criminal Code (control orders and preventive detention orders) including the interoperability of the control order regime and the *High Risk Terrorist Offenders Act 2016* (Cth) (**HRTO Act**).

2. The Law Council supports counter-terrorism legislative measures, provided any such legislation is justified as necessary, proportionate and is consistent with rule of law principles.

3. The Law Council considers that the following principles should be used for evaluating the above laws:

    - consistency with the rule of law;
    - consistency with the requirements of international law concerning terrorism; and
    - consistency with Australia's international human rights obligations.

4. Applying these principles, this submission sets out the following key issues and recommendations relating to the laws currently under consideration by the INSLM.

Stop, search and seize powers

5. The Law Council is not aware of any evidence to suggest that ordinary entry, search and seizure powers requiring a judicial warrant have caused an operational problem for law enforcement so as to justify the potential invasion of privacy for the exercise of powers in Part 1AA, Division 3A of the Crimes Act. The Law Council thus considers that:

    - In the absence of evidence to suggest the necessity of the powers, Division 3A of Part 1AA of the Crimes Act should be repealed or cease when the sunset date (7 September 2018) is reached; and
    - If police, stop, search and seizure powers are retained in Part 1AA, Division 3A of the Crimes Act, the Law Council recommends that the reporting and oversight provisions should be strengthened to require annual reporting to the Minister and oversight by the Commonwealth Ombudsman in the same manner as for delayed notification search warrants.

Declared areas

6. Issues which arise in relation to section 119.2 of the Criminal Code are that it:

    - has the potential to significantly affect Australians' freedom of movement;
    - may have a disproportionate effect on individuals travelling;
    - may present undue difficulties for accused persons accessing relevant evidence from the declared area to present to a court in their own defence;
    - is contrary to the rule of law principle that offences should not be so broadly framed that they inadvertently capture a wide range of benign conduct; and
    - is overly reliant on law enforcement and prosecutorial discretion.

7. A preferable approach would be to rely on the offences of entering a foreign country with the intention of engaging in hostile activity, or preparing to do so. These offences are sufficiently broad to prevent a person from travelling to a certain region to engage in terrorist activities.

8. On this basis the Law Council does not support the declared area offence, but if it is maintained, it should be amended to require:

    - intention of travelling to a declared area for an illegitimate purpose or purposes as a fault element of the offence (an illegitimate purpose could be defined as a purpose that was not statutorily listed or accepted by the court as legitimate);
    - that a court be provided with the discretion to determine on a case by case basis whether a person travelled to a declared area for a legitimate purpose. In such a case the power to make regulations under this provision would be removed from the declared area provisions; and
    - the following conduct to also be classed as a legitimate purpose for the purposes of the offence: providing legal advice to a client; making a bona fide visit to a friend, partner or business associate; and performing bona fide business, teaching and/or research activities.

Control orders

9. The Law Council has previously raised concerns in relation to the control order (**CO**) regime and indeed has previously recommended its repeal. However, if the CO regime is to be retained, it requires revising and updating to ensure that it is (as much as possible) a necessary and proportionate response to the threat of terrorism. The Law Council's recommendations in relation to COs include:

    - Paragraph 104.5(3)(a) of the Criminal Code should be amended to ensure that a prohibition or restriction not constitute, in any circumstances, a relocation order;
    - An overnight residence requirement should be introduced where the curfew period is considerable;

- The court should be required to consider whether the combined effect of all the proposed restrictions is proportionate to the risk being guarded against;
- Special advocates should be given proper administrative support;
- The INSLM should appoint special advocates;
- Special advocates should be properly remunerated;
- The special advocate regime should be established after a comprehensive consultation process with the INSLM and relevant stakeholders such as the Law Council;
- Sections 3ZZOA and 3ZZOB of the Crimes Act should be amended to require that there must be at least a 'reasonable suspicion' that the CO is not being complied with or that the individual is engaged in terrorist related activity;
- Subsection 3ZZNA(1) of the Crimes Act should be amended to include the words 'or express consent subject to limitations';
- Paragraph 3ZZKF(2)(b) and subsection 3ZZLC(2) of the Crimes Act are unnecessary and should be repealed;
- Subsection 3ZZNF(4) (compensation for damage to electronic equipment) of the Crimes Act should be amended to insert 'were given the opportunity to provide any known appropriate warning or guidance on the operation of the equipment and if so' before the words 'provided any appropriate warning or guidance';
- Unless the INSLM receives evidence which suggests that B-Party warrants are a necessary and proportionate measure to monitor compliance with a CO, the relevant provisions should be repealed;
- The provisions of the *Surveillance Devices Act 2004* (Cth) that enable informers to use a surveillance device without a warrant for the purpose of monitoring CO compliance should be repealed;
- The *Evidence Act 1995* (Cth) should continue to apply to CO confirmation hearings;
- The Federal Court of Australia in addition to State and Territory Supreme Courts be granted the power to issue a CO or, in relevant post-sentence cases, a continuing detention order (**CDO**) under the Criminal Code;
- If Supreme Courts are to be given the power to make COs in order to better harmonise the CO regime with the CDO regime, it may be appropriate to make provision for agreed statements of fact in the Criminal Code;
- The INSLM give consideration to the adequacy of the Notice to Admit procedures in both the Federal Court and the Federal Circuit Court in CO proceedings (if the latter court is to be retained as an issuing authority);

- The criminal law evidentiary rules for the drawing inferences and the application of the rule in *Jones v Dunkel*[1] should be applied in CO cases;

- A CO should also be confirmed on the basis of the criminal standard as opposed to the current civil standard. As a minimum, it appears that some version of the *Briginshaw* rule[2] applies to the burden of proof in CO confirmation proceedings;[3] but this should be clarified;

- Division 104 of Part 5.3 of the Criminal Code should be amended to allow variations of an interim CO to be made; and

- Special Commonwealth funding should be allocated to ensure legal aid is available in CDO and CO proceedings akin to the arrangements for complex criminal cases.

Preventive detention orders

10. In relation to the preventative detention order (**PDO**) regime, the Law Council's recommendations include:

    - Section 105.4(5) of the Criminal Code should to be amended to provide that 'a terrorist act is one that…is likely to occur within the next 14 days' rather than is '…capable of being carried out in the next 14 days'; and

    - The exercise of executive powers under Division 105 of the Criminal Code should be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1997* (Cth).

Interoperability between control orders, preventative detention orders and continuing detention orders under high risk terrorist offenders' legislation

11. Harmonisation difficulties arise because the CDO scheme under the HRTO Act is largely based on State and Territory schemes which are not set in the context of the Commonwealth counter-terrorism framework.

12. The Law Council sees a benefit in an approach whereby it is open to the Court to make a CO as an alternative to a CDO. A single court process, where an application for a CDO is sought to be made, would assist efficiencies in the judicial process for all parties concerned. To ensure flexibility in applications, both the Federal Court of Australia and State and Territory Supreme Courts should have the power to issue CDOs. Further, the Law Council considers that the unacceptable risk test in relation to making a CDO should be amended in a manner more consistent with the PDO test.

13. In addition, the Law Council recommends:

    - The applicant for a CDO should continue to be the Attorney-General;

    - The Attorney-General should be required to be satisfied in an application for a CDO that there is no other less restrictive measure (for example, a control order)

[1] (1959) 101 CLR 298.
[2] *Briginshaw v Briginshaw* (1938) 60 CLR 226.
[3] See *Gaughan v Causevic (No 2)* [2016] FCCA 1693 (8 July 2016), [10].

that would be effective in preventing the unacceptable risk of a serious Part 5.3 offence if the offender is released into the community;

- The Attorney-General's decision to make an application for a CDO should be required to be made on the basis of information which is sworn or affirmed by a senior AFP member with an explanation as to why each of the possible obligations, prohibitions or restrictions or a combination of such for a CO would not be effective; and

- The Attorney-General should also be required to have regard to matters as outlined in section 105A.8.

Stop, search and seizure powers

14. Part 1AA, Division 3A of the Crimes Act was justified as necessary to prevent or disrupt a terrorist act.[4] It allows police to stop, question, search, enter and seize in Commonwealth places or a prescribed zone without a warrant in emergency circumstances where an officer suspects on reasonable grounds that material relevant to a terrorism offence is on the premises or there is a risk to a person's life, health or safety. The Minister may declare a Commonwealth place a 'prescribed security zone' where the Minister 'considers' that doing so would assist in preventing a terrorist act occurring or assist in responding to a terrorist act that has occurred.[5] The declaration remains in force for 28 days.

15. Thus, everyone in a prescribed security zone is subject to police stop, search, questioning and seizure powers irrespective of whether or not the police officer has reasonable grounds to believe a person may be involved in the commission, or attempted commission, or a terrorist act. The broad power of the Minister to declare an area to be a 'prescribed security zone' and thus engage the special search and seizure powers has the potential to impact upon the liberty and security of individuals. Moreover, there is no ongoing obligation on the Minister to review the necessity of a declaration within the 28 day period the declaration is in force; this may lead to situations where the liberty of an individual is unnecessarily compromised. In the absence of mechanism requiring the Minister to consciously decide whether to revoke or extend a declaration, the period imposes a potentially unnecessary or disproportionate intervention upon liberty and security.[6]

16. Further, this regime stands in contrast to the ordinary requirement that law enforcement obtain a warrant issued by a judge or magistrate to exercise such powers. The issuance of such a warrant by an independent office is a central safeguard as to what would otherwise constitute trespass. The rule of law also generally requires that the use of executive powers should be subject to meaningful parliamentary and judicial oversight, including regarding powers to enter private premises, to seize property and to copy and seize information.[7]

17. The Law Council is not aware of any empirical evidence to suggest that ordinary entry, search and seizure powers requiring a judicial warrant have caused an operational problem for law enforcement so as to justify the potential invasion of privacy for the exercise of powers in Part 1AA, Division 3A of the Crimes Act. In the absence of such evidence, the Law Council retains its view that Division 3A of Part 1AA, including section 3UEA, of the Crimes Act should be repealed.[8]

18. In particular, the Law Council retains the following concerns regarding section 3UAE (emergency entry to premises without warrant) of the Crimes Act:

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[4] Anti-Terrorism Bill (No 2) 2005, *Explanatory Memorandum*, 2.
[5] *Crimes Act 1914* (Cth), s 3UJ(1).
[6] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Australia: Study on Human Rights Compliance while Countering Terrorism*, A/HRC/4/26/Add.3 (14 December 2006), at [10]-[16], note 108.
[7] Law Council of Australia, *Policy Statement on Rule of Law Principles* (March 2011), Principle 6(b).
[8] See Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security on the Counter-Terrorism Amendment (Foreign Fighters) Bill 2014* (3 October 2014), 51.

- The power to enter and search premises and seize property without the occupier's consent is a breach of privacy. Accordingly, the Law Council previously submitted that this power should be carefully confined and subject to strictly enforced conditions.[9] The warrant system ensures that police search and seizure powers are subject to independent and external supervision and may only be exercised where prescribed statutory criteria are satisfied. Allowing police to enter and search premises without a warrant and under their own authority increases the risk that such powers may be misused or mistakenly used. Moreover, it increases the risk that an individual's privacy will be breached in circumstances not justified by the necessary pursuit of a legitimate law enforcement imperative; and

- The necessity for this power, particularly given the ability to obtain a warrant by telephone or fax in exigent circumstances. If these existing measures do not operate effectively in emergency situations, consideration should first be given to improving the logistics of how and to whom a warrant application can be made in an emergency before introducing a warrantless entry power.

19. The Law Council is also not aware of instances where the Part 1AA, Division 3A of the Crimes Act have been used. This raises questions about the necessity and utility of the powers.

20. In the absence of evidence to suggest the necessity of the powers, Division 3A of Part 1AA of the Crimes Act should be repealed or cease when the sunset date (7 September 2018) is reached.

21. Notwithstanding the above concerns, the Law Council acknowledges that if the need for a narrowly drafted emergency entry power for the AFP can be demonstrated, it would not oppose this per se, provided appropriate safeguards were put in place. In this context, the Law Council provides the following observations.

22. Given the concerns with the powers (as noted above), the Law Council recommends that the oversight and reporting safeguards of Part 1AA, Division 3A of the Crimes Act be improved in recognition of the breadth of the powers. The Law Council notes that the COAG Review shared a number of its concerns about section 3UEA and recommended that police authorities exercising power under this section should report annually to Parliament on the use of the power.[10]

23. Increased reporting and oversight of extraordinary powers is an important safeguard to mitigate against the risk that the powers can be misused inadvertently or deliberately. The Parliament has regularly recognised this fact. For example, the delayed notification search warrant provisions require an annual report by the agency to the Minister and a six-monthly report by the agency to the Commonwealth Ombudsman.[11] Further, the Ombudsman must, at least once in each six month period, inspect the records of each eligible agency in order to determine the extent of compliance with the delayed notification search warrant provisions.[12] The Ombudsman must then present a report to the Minister on the results.[13] The Law Council considers that applying similar reporting

[9] Ibid.
[10] Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013), 85.
[11] *Crimes Act 1914* (Cth), ss 3ZZFB and 3ZZFC.
[12] Ibid., s 3ZZGB.
[13] Ibid., s 3ZZGH.

obligations would improve the adequacy of the safeguards contained in Part 1AA, Division 3A of the Crimes Act.

Recommendations:

- **In the absence of evidence to suggest the necessity of the powers, Division 3A of Part 1AA of the Crimes Act should be repealed or cease when the sunset date (7 September 2018) is reached.**
- **If police, stop, search and seizure powers are retained in Part 1AA, Division 3A of the Crimes Act, the Law Council recommends that the reporting and oversight provisions should be strengthened to require annual reporting to the Minister and oversight by the Commonwealth Ombudsman in the same manner as for delayed notification search warrants.**

Declared areas[14]

24. Section 119.2(1) of the Criminal Code makes it an offence for a person to enter or remain in a declared area. A 'declared area' is one declared as such by the Minister for Foreign Affairs and Trade.[15] A number of exceptions to subsection 119.2(1) are provided for in subsection 119.2(3). These are where a person enters or remains in a declared area solely for one or more of the following purposes:

    (a) providing aid of a humanitarian nature;

    (b) satisfying an obligation to appear before a court or other body exercising judicial power;

    (c) performing an official duty for the Commonwealth, a State or a Territory;

    (d) performing an official duty for the government of a foreign country or the government of part of a foreign country (including service in the armed forces of the government of a foreign country), where that performance would not be a violation of the law of the Commonwealth, a State or a Territory;

    (e) performing an official duty for the United Nations or an agency of the United Nations;

    (f) making a news report of events in the area, where the person is working in a professional capacity as a journalist or is assisting another person working in a professional capacity as a journalist;

    (g) making a bona fide visit to a family member; and

    (h) any other purpose prescribed by the regulations.

[14] The Law Council previously raised concerns in relation to 'declared areas': see Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (3 October 2014).

[15] *Criminal Code Act 1995* (Cth), s 119.2 (1)(b).

25. The person charged bears an evidentiary burden in relation to these exceptions.[16] The offence is punishable by 10 years imprisonment and was subject to parliamentary scrutiny by the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**).[17]

26. The Law Council is not aware of any prosecutions under this offence since its enactment in 2014.[18] Further, the Law Council notes that the PJCIS report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, which introduced the offence, noted 'declared area' offences of the kind in the Criminal Code do not exist in any comparable jurisdictions overseas.[19] This raises questions as to the necessity and utility of the offence.

27. The Law Council considers that section 119.2 has the potential to disproportionately impact on Australians' freedom of movement, the right to a fair trial and the presumption of innocence. People with valid reasons for being in a declared area could well have difficulties in accessing or presenting relevant evidence in their own defence at a trial in Australia.

28. There is much in the argument that the declared area offence is incompatible with the right to a fair trial, the presumption of innocence, arbitrary detention and freedom of movement.[20] While it is accepted that restrictions on individual rights are necessary in certain circumstances to protect national security, such restrictions must be proportionate and must be the least intrusive means of achieving the desired result.[21]

29. The Explanatory Memorandum to the Bill which introduced the offence in 2014 provided that:

> *The legitimate objective of the new offence is to deter Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity unless they have a legitimate purpose to do so. People who enter, or remain in, a declared area will put their own personal safety at risk. Those that travel to a declared area without a sole legitimate purpose or purposes might engage in a hostile activity with a listed terrorist organisation. These people may return from a declared area with enhanced capabilities which may be employed to facilitate terrorist or other acts in Australia.*[22]

30. If a person enters or remains in a declared area, criminal liability will be *prima facie* established. It will be incumbent upon the defendant to produce evidence that suggests

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[16] *Criminal Code Act 1995* (Cth) s 13.3(3).
[17] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014).
[18] Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014.
[19] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014), 108.
[20] See Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Bills introduced 30 September – 2 October 2014 Legislative Instruments received 13 – 19 September 2014*, [1.182]. See also Australian Law Reform Commission, *Traditional Rights and Freedoms – Enroachments by Commonwealth Laws (Report 129)* (2 May 2016), 218.
[21] See *International Covenant on Civil and Political Right*s, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 12(3); United Nations Human Rights Committee, *General Comment No 27 (1999) on Article 12 of the Convention - Freedom of Movement*, [13]-[14].
[22] Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, *Explanatory Memorandum*, 47.

a reasonable possibility that he or she was in the declared area solely for a legitimate purpose.[23]

31. The offence as drafted does not require the prosecution to prove that the person's intent was illegitimate. This is a *de facto* reversal of the burden of proving the central reason for the offence, namely engaging in terrorist activity. The list of exceptions ameliorates this to a very limited extent. The broad drafting of the provision and the limited list of exceptions means that a wide range of individuals with no intent to be involved in terrorist activities may be caught within the ambit of the proposed offence. For example, there is an exception for journalists but not for people who want to do other business, who may have close friends or assets in the area, or who have other legitimate reasons for travelling there. Even within the limited list of exceptions, the defendant may be unable to show that there is a reasonable possibility that travel was solely for a legitimate reason because of a lack of capacity to explain their reasons due to age, cultural and linguistic background or physical or mental capacity, inability to call as witnesses people in the declared area to corroborate the exception, or a lack of record keeping.

32. As such, the offence may also have the unintended effect of preventing and deterring innocent Australians from travelling abroad for legitimate purposes (such as assisting friends who may have a disability or otherwise require assistance) out of fear that they may be prosecuted for an offence, subjected to a trial and not be able to adequately discharge the evidential burden.

33. The offence is likely to impact on certain segments within the community who may for example have family connections or trading engagements in declared areas. This impact (when combined with the breadth of the offence and the evidential burden on the accused) risks marginalising precisely those segments of the Australian community whose cooperation and goodwill is most essential to curbing the terrorist threat.

34. Research suggests that marginalisation such as this may be a key vulnerability factor that makes an individual more receptive to extremist ideology.[24] Viewed in this light, the offence has the potential to be counterproductive.

35. Further consideration is required as to the operation of the offence with the ancillary offences under Chapter Two of the Criminal Code, and any unintended consequences which may result. For example, it is an offence for a person to aid, abet, counsel or procure the commission of an offence by another person.[25] A person who acts as a travel agent, or a body corporate which operates aircraft carriers, may be concerned at their potential exposure to these ancillary offences – with the result that even people with legitimate travel reasons will be unable to do so.

36. For the above reasons, the Law Council considers that a preferable approach would be to rely on the proposed offences of entering a foreign country with the intention of engaging in hostile activity (subsection 119.1(1)), or preparing to do so (section 119.4). It is submitted that these offences are sufficiently broad to prevent a person from travelling to a certain region to engage in terrorist activities.

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[23] *Criminal Code Act 1995* (Cth), s 13.3.

[24] See for example Dr Hussein Tahiri and Professor Michele Grossman, *Community and Radicalisation: An examination of perceptions, ideas, beliefs and solutions*, (September 2013), 39. Marginalisation and radicalisation were also linked in the Australian Government's Counter-Terrorism White Paper (2010), iv.

[25] *Criminal Code Act 1995* (Cth), s 11.2.

37. If the Law Council's preferred approach is not accepted by the INSLM, the Law Council suggests that the offence could be improved as noted below.

38. There are a number of complexities with the offence as it is currently drafted. The offence does not identify a fault element but as the physical element involves a 'circumstance in which conduct occurs' (i.e. being in an area that has been declared for the purpose of the offence), the fault element is recklessness.[26] It is acknowledged that this requires that a person a) must be aware of a substantial risk that the area was declared; and b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. However, it nevertheless means that a person can be caught within the ambit of the offence *without knowing* that the area is declared and *without any intention* of engaging in terrorist activity. This may particularly be the case where a person is uncertain as to the boundaries of the declared area, for example. Further, a mistake as to whether a particular location falls within a declared area, or a misapprehension as to the borders of a declared area, likely amount to a mistake of law - which cannot be pleaded as a defence - and not a mistake of fact; this may be the case even where the misapprehension is based upon incorrect advice.[27] A mistake of fact may arise where, for example, a person honestly and reasonably believes that he or she is in Place A (outside a declared area) when he or she is in fact in Place B (inside a declared area), but the person would not be entitled to plead that he or she did not know that Place B was a declared area. The Law Council considers that it would be preferable if the offence specified 'intention of travelling to a declared area for an illegitimate purpose or purposes' as a fault element of the offence.[28]

39. The 'legitimate purposes' specified (such as bona fide visits to family members, providing aid of humanitarian nature) are too narrowly defined. They do not permit a range of other legitimate purposes for travel such as:

    - a bona fide visit to a friend or partner. The Law Society of New South Wales has noted for example that the proposed provision would not permit a person visiting a dying friend who is not a family member;

    - bona fide business, teaching or research purposes – for example, it would seem highly unfair to deprive for three years a person of his or her livelihood through an export or import business purely because a listed terrorist organisation had commenced operating in an area;

    - providing legal advice to an Australian citizen. For example, if parts of Egypt had been a declared area, Peter Greste's lawyer would not be able to visit him for the purposes of providing legal advice under this offence; or

    - missionary work.

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[26] Ibid., s 5.4.

[27] See *Ostrowski v Palmer* (2004) 214 CLR 493. Mr Palmer was charged with fishing for rock lobster in the waters surrounding Quobba Point. The areas in which fishing was prohibited were prescribed in a Table in the Regulations. Prior to fishing, Mr Palmer had sought advice as to the boundaries of the prohibited zones from Fisheries WA; the advice did not include the relevant regulation. He thus set lobster pots in prohibited area. The Court held that Mr Palmer's mistaken belief as to his entitlement to fish where he did was a mistake of law and not a mistake of fact.

[28] An illegitimate purpose could be defined as a purpose that was not listed or accepted by the court as legitimate (see further discussion below regarding the Law Council's recommendation that a court be granted discretion to determine a legitimate purpose).

40. The requirement for a defendant to establish that there was a reasonable possibility that he or she was in a declared area *solely* for one or more of the listed legitimate purposes also creates difficulties. A person may travel to an area for multiple legitimate purposes although these may not all be covered in the proposed section 119.2 of the Criminal Code. In the example above, a legal representative may travel to Egypt for the dominant reason of providing legal advice to a client (not covered by the defences in proposed section 119.2) with a secondary purpose of a bona fide visit to a family member (currently covered by the defences). However, in such a case the lawyer would be held guilty of an offence liable of 10 years' imprisonment because he or she did not travel to the area *solely* for one or more of the defined legitimate purposes specified in section 119.2.

41. In this respect, the Law Council notes the evidence given by the former INSLM, Bret Walker SC, to the PJCIS:

> *I do think that there is a problem in the exceptions provided in subsection 3, by the use of the word 'solely' because it contemplates the evidentiary burden, if it has been successfully discharged by the defendant so that the prosecution then has to prove beyond reasonable doubt that the trip was not solely for one of these permitted purposes. The difficulty that then arises is, if the Crown succeeds in that it will not have proved, of course, positively, any particularly bad conduct on the part of the defendant; simply that the remaining and entering was not solely for one of the permitted purposes. That I think means that there will be most invidious decisions to be made concerning how to sentence such a person. There are other offences, which include life sentences, for carrying out hostile activities. It does seem to me that the utility of 119.2, which has understandably attracted a lot of attention, is greatly to be doubted.*[29]

42. The ability to prescribe further legitimate purposes in regulations will be of no use to a defendant who travelled to an area for a purpose that the community would ordinarily consider to be legitimate but happened not to be covered under proposed section 119.2 (as in the example provided above). A far more flexible approach would be to permit the court to exercise its discretion as to determine whether travel was for a legitimate purpose. This could be achieved by inserting a general terms clause at the beginning of subsection 119.2(3) to provide 'without limiting this subsection'. In such a case the administrative burden of producing regulations would also be removed.

Recommendations:

- **In the absence of evidence to suggest the necessity of section 119.2, it should be repealed or cease when the sunset date (7 September 2018) is reached.**
- **If this primary recommendation is not accepted by the INSLM, section 119.2 should be amended to require:**
  - **intention of travelling to a declared area for an illegitimate purpose or purposes' as a fault element of the offence;**
  - **an illegitimate purpose could be defined as a purpose that was not**

[29] Mr Bret Walker SC, *Parliamentary Joint Committee on Intelligence and Security Hansard*, Canberra, 8 October 2014, 39.

listed or accepted by the court as legitimate;

- **subsection 119.2(3) to provide 'without limiting this subsection' to allow a court the discretion to determine on a case by case basis whether a person travelled to a declared area for a legitimate purpose. In such a case the power to make regulations under this provision would be removed; and**
- **the following conduct to also be classed as a legitimate purpose for the purposes of the offence:**
  - **providing legal advice to a client;**
  - **making a bona fide visit to a friend, partner or business associate; and**
  - **performing bona fide business, teaching and/or research obligations.**

Control orders

43. The CO regime is set out in Division 104 of part 5.3 of the Criminal Code. Broadly speaking, a CO is a court order that imposes restrictions, prohibitions or obligations on a person for the purposes of protecting the public from a terrorist act, preventing the provision of support for or the facilitation of a terrorist act or preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.[30] An application for a CO requires the consent of the Attorney-General[31] and the Federal Court or Federal Circuit Court can impose a control order only if it is satisfied of the matters set out in subsection 104.4(1). A CO cannot be made in relation to a person who is under the age of 14[32] and, where a person between the ages of 14 and 17 does not have a lawyer, the Court is required to appoint one.[33]

44. The Law Council has previously raised concerns in relation to the CO regime and indeed has previously recommended its repeal.[34] This recommendation accords with the view of the former INSLM, Bret Walker SC.[35] The Law Council also understands that only six control orders have been issued. In contrast, there appears to have been a growth in the prosecutions relating to preparatory terrorism offences. This may also indicate that, in practice, COs are not needed or have little operational utility.

45. However, if the CO regime is to be retained, it requires revising and updating to ensure that it is a necessary and proportionate response to the threat of terrorism. This is particularly so in light of the interoperability of COs and CDOs following the HRTO Act 2016.

46. The Law Council made a number of recommendations for improvement to the CO regime in the context of the former INSLM's review of the adequacy of safeguards

[30] *Criminal Code Act 1995* (Cth), ss 104.1, 104.5(3).
[31] Ibid., ss 104.2, 104.10.
[32] Ibid., 104.28(1).
[33] Ibid., 104.28(4).
[34] Law Council of Australia, *Anti-Terrorism Reform Project* (October 2013), 104.
[35] Independent National Security Legislation Monitor, *Annual Report* (28 March 2014), 67-70.

relating to the control order regime.[36] Some of the Law Council's recommendations were subsequently adopted and implemented in legislation.[37] However, there are still a number of unaddressed recommendations that the previous INSLM made in his *Control Order Safeguards (Part 2)*[38] report which the Law Council considers ought to be implemented. These are:

- Paragraph 104.5(3)(a) should be amended to ensure that a prohibition or restriction not constitute, in any circumstances, a relocation order;[39]
- An overnight residence requirement should be introduced where the curfew period is considerable;[40] and
- The Court should be required to consider whether the combined effect of all the proposed restrictions is proportionate to the risk being guarded against.[41]

47. The Law Council welcomes the addition of a special advocate regime to the control order process as previously recommended by the Law Council.[42] On 24 November 2016 the Law Council provided a submission to the Minister for Justice in relation to the special advocate regulations. The Law Council's key recommendations included:

- Special advocates should have adequate administrative support;
- It is critical that special advocates are appointed by a body independent of government. As such, the Law Council recommends that the INSLM appoint special advocates; and
- Special advocates should be adequately remunerated.

48. A copy of this submission is attached. The Law Council considers that the special advocate regime should be established after a comprehensive consultation process with the INSLM and relevant stakeholders such as the Law Council.

Monitoring of persons subject to control orders

49. If the CO regime is to be retained, the Law Council makes the following comments in relation to the monitoring of persons subject to control orders.

50. The *Counter-Terrorism Legislation Amendment Act (No 1) Bill 2015* (Cth) introduced a number of measures by which a person who is the subject of a CO may be extensively monitored. The amendments allow law enforcement agencies broad powers to search premises and persons the subject of a control order, intercept telecommunications and

[36] See Law Council of Australia, *Adequacy of safeguards relating to the control order regime* (30 September 2015).
[37] For example, amending the definition of 'issuing court' in section 100.1 of the Criminal Code to read 'the Federal Court or the Federal Circuit Court of Australia' and the introduction of a special advocate regime.
[38] Independent National Security Legislation Monitor, *Control Order Safeguards: Part 2* (April 2016).
[39] Ibid., 15.
[40] Ibid., 16.
[41] Ibid., 18.
[42] See, e.g. Law Council of Australia, *Counter-Terrorism Amendment Bill 2015* (10 December 2015), 35; Independent National Security Legislation Monitor, *Control Order Safeguards (INSLM Report) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (January 2016); Counter-Terrorism Legislation Amendment Act (No 1) 2016, Pt 2 of Sch 15.

install surveillance devices in the absence of any suspicion or evidence that the order is not being complied with and/or any intelligence to suggest terrorist activity.

51. The broad range of monitoring measures to determine whether a breach of a CO condition has occurred rather than that a serious criminal offence has taken place is likely to be a disproportionate response under human rights law.[43] This is particularly so given the extensive powers of monitoring already in place prior to the monitoring warrant regime, including tracking, listening and surveillance devices that can be used to monitor controlees. For example, prior to the introduction of the CO monitoring warrant regime, a tracking device was placed on a controlee in *Gaughan v Causevic (No 2)*[44] (**Causevic**). The controlee believed that the tracking device included a listening device. The psychologist in that case gave evidence that this was inhibiting counselling she was conducting. The controlee was also afraid it would show if he may have inadvertently strayed into one of the proscribed zones and it marked him socially and in applying for work.

52. Generally, the CO conditions authorised by the court give the AFP a broad range of powers and the terrorism offences contained in the Criminal Code are already very broad. In *Causevic,* the effects on the controlee were serious and police monitoring powers were already very extensive. While a CO is aimed at ensuring community safety, it is arguable that the community's best interests would appear to have been in ensuring that he received effective counselling, employment and a normal social life. The tracking device, according to the treating psychologist in the case, was inhibiting that process.

53. A monitoring warrant can now be obtained in relation to premises to which a controlee has a 'prescribed connection'.[45] This may allow for monitoring of places where the controlee attends such as schools, the workplace or a friend's house.

54. The monitoring measures include:

    - Monitoring powers under the Crimes Act that allow a police officer to enter a premises or search a person in order to monitor the compliance of a person who is subject to a CO with the conditions of the control order;

    - Allowing agencies to apply for a telecommunications interceptions warrant under the *Telecommunications (Interception and Access) Act 1979* (Cth) to monitor compliance with a CO; and

    - Allowing law enforcement officers to apply for a surveillance device warrant under the *Surveillance Devices Act 2004* (Cth) to monitor compliance with a CO.

55. The PJCIS made a number of recommendations to address concerns of the Law Council and other stakeholders in relation to the proposed monitoring warrant regime. For example, the PJCIS recommended that for a monitoring warrant in relation to a premises or person, the issuing officer should be required to have regard to whether the exercise of monitoring powers under the warrant constitutes the least interference with the liberty or privacy of any person that is necessary in all the circumstances. These

[43] Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament*, [1.145]
[44] *Gaughan v Causevic (No 2)* [2016] FCCA 1693 (8 July 2016).
[45] *Crimes Act 1914* (Cth), s 3ZZOA(2)(b).

recommendations were subsequently accepted by Government[46] and reflected in the legislation prior to enactment.

Monitoring warrants

56. While the PJCIS recommendations were welcome, the Law Council retains some of its previously expressed concerns in relation to the monitoring powers.[47] While an issuing officer is to have regard to the least interference with the liberty or privacy of any person,[48] this is to be balanced with a range of other factors such as the nature of the person's prescribed connection with the premises,[49] and whether it is reasonably necessary that one or more constables should have access to the premises for the purpose of determining whether the control order has been, or is being, complied with.[50]

57. In the Law Council's view, the powers afforded to a police officer under subsection 3ZZKE(3) of the Crimes Act are wide and overly intrusive. The 'prescribed connection with premises' definition, in combination with the broadly drafted purpose of 'determining whether the control order has been or is being complied with' and 'general monitoring powers' give extraordinary search powers to, for example, inspect any document on the premises (such as a workplace or educational institution), question occupiers and require any person present on the premises to answer any questions and produce any document 'likely to assist' in, the four specified purposes. This is an infringement on the rights of other innocent persons who may have nothing to do with the CO. It purports to conscript other persons' present to assist with the investigation, under pain of punishment.

58. Further, the Law Council considers that sections 3ZZOA and 3ZZOB of the Crimes Act should be amended to require that there must be at least a 'reasonable suspicion' that the CO is not being complied with or that the individual is engaged in terrorist related activity. Subsection 3ZZNA(1) should also be amended to include the words 'or express consent subject to limitations' to ensure that the occupier is properly informed of his or her rights in this respect.

59. Furthermore, the answers given under compulsion may be used to further an investigation or prosecution. There is no limitation or definition as to 'prosecuting an offence' in section 3ZZRD. It appears to be contemplated also that if while searching, there is evidential material within the meaning of the *Proceeds of Crime* Act 2002 (Cth) (**POCA**), there can be search and seizures and use of such evidence both derivatively and directly in future civil proceedings. These incidental powers are also broad reaching and intrusive.

60. The Law Council considers that paragraph 3ZZKF(2)(b) and subsection 3ZZLC(2) are unnecessary in light of the existing power to seize information in relation to preventing the support for or the facilitation of a terrorist act. This power is sufficient to enable the purposes of the legislation to be realised. It also avoids unintended consequences of

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[46] Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment Bill (No.1) 2015* (15 February 2016); Attorney-General of Australia, *Government Response – Strengthening counter-terrorism legislation* (25 July 2016), available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/CT_Amendment_Bill_2015/Government_Response

[47] Law Council of Australia, *Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (10 December 2015).

[48] *Crimes Act 1914* (Cth) ss 3ZZOA(2)(c)(ii), (4)(g).

[49] Ibid., s 3ZZOA(2)(c)(i).

[50] Ibid., s 3ZZOA(2)(c)(vii).

future dissemination of the information through the broad ranging disclosure provisions within the POCA (which has quite different objects to the legislation currently under consideration).

61. The Law Council also recommends that section 3ZZNF(4) (compensation for damage to electronic equipment) be amended to insert 'were given the opportunity to provide any known appropriate warning or guidance on the operation of the equipment and if so' before the words 'provided any appropriate warning or guidance'.

Telecommunications warrants

62. The Law Council previously raised concerns in relation to issuing telecommunications service warrants (**B-Party warrant**) relating to persons subject to a control order.[51] B-Party warrants are particularly invasive tools for detection of criminal activity.[52] They permit law enforcement agencies to intercept telecommunications made or received by people who are not suspects or who may have no knowledge or involvement in a crime but who may be in contact with someone who does.

63. The Law Council previously recommended that the B-Party warrant regime should be repealed on the basis that the regime is a disproportionate response to the need to investigate threats to national security and serious criminal offences and is contrary to Article 17 of the International Covenant on Civil and Political Rights.[53]

64. The Law Council also notes that the Australian Law Reform Commission expressed concern that there is potential to collect a large amount of information about non-suspect persons under a B-Party warrant.[54]

65. The amendments to the Counter-Terrorism Bill (No 1) 2015 that were proposed by the PJCIS and accepted by the Government go some way to addressing the Law Council's concerns. For example, the requirement that the issuing officer have regard to whether the interception of telecommunications under a warrant would be the method that is likely to have the least interference with any person's privacy is supported.[55] However, given the scope of information that may be collected under a B-Party warrant, and given the implications for a person's right to privacy, the Law Council recommends that the B-party warrant regime be subject to close scrutiny by the INSLM with a view to determining its utility, necessity and appropriateness.

Surveillance Device Warrants

66. Subsection 38(6) of the *Surveillance Devices Act 2004* (Cth) allows a 'person assisting' (presumably including an 'informer') to use a surveillance device (such as a listening device) without a warrant where a control order is in force.

67. The Law Council opposes the extension of these extraordinary powers to a 'person assisting' for the purpose of monitoring control order compliance. This extension is a cause of concern, and demands particularly robust external, independent authorisation

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[51] Law Council of Australia, *Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (10 December 2015).
[52] Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the provisions of the Telecommunications (Interception) Amendment Bill 2006*, 37.
[53] See Law Council of Australia, *Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (10 December 2015), 19.
[54] Australian Law Reform Commission, *Discussion Paper 72: Review of Australian Privacy Law* (2007), 1056.
[55] *Telecommunications (Interception and Access) Act 1979* (Cth), s 46(5)(f).

processes. The Law Council submits that, if evidence is obtained from informants without judicial oversight, then such evidence comes at too high a price and is unlikely to be in the interests of justice in the long-term. If such investigative steps are to be used, they should only be taken following the lawful approval of a warrant.

Procedural matters

68. In the event the CO regime is retained, the Law Council makes the following comments in relation to procedural and evidentiary matters in the context of CO applications. These comments are informed, in part, by *Causevic* and the experience of Dr David Neal SC, who acted for Mr Causevic in the CO confirmation hearing. A memorandum prepared by Dr Neal SC outlining his views on procedural and evidentiary issues identified is attached to this submission.

Issuing authority

69. Currently, under section 100.1 of the Criminal Code an 'issuing authority' for a control order is defined to include the Federal Court of Australia and the Federal Circuit Court. Prior to the enactment of the CDO regime, the former INSLM, the Hon Roger Gyles QC AO, recommended that only the Federal Court should be an issuing authority but that it should have power to remit an application to the Federal Circuit Court.[56]

70. The Attorney-General's Department submitted that both the Federal Court and the Federal Circuit Court exercise relevant functions and that retaining both provides flexibility to ensure ready access to an issuing authority at short notice in a range of locations.[57] Removing the Federal Circuit Court, in the Attorney-General's Department's view, could delay consideration of a CO.

71. Superior courts are best suited to determine CO applications. The COAG Review previously recommended that only the Federal Court should determine CO applications on the grounds of the gravity of such an order.[58] The complexities that arose in *Causevic* (as per the **attached** memorandum) also suggest the need for a superior court to be the issuing authority. Further, the Federal Circuit Court in its submission to the former INSLM's 2016 review of COs noted that '…the Court operates from a number of localities, including commercial premises, which do not have the necessary security infrastructure to accommodate these applications'.[59] The Federal Court also pointed to the difficulty and complexity of CO proceedings in support of its view that only the Federal Court should have jurisdiction with respect to such proceedings.[60]

72. The Law Council thus supports the former INSLM's recommendation but suggests that it needs to be revised and updated in light of the CDO regime. The Law Council recommends that the Federal Court of Australia in addition to State and Territory Supreme Courts be granted the power to issue a CO or, in relevant post-sentence cases, a CDO under the Criminal Code (discussed further below). Allowing state and territory Supreme Courts to hear CO proceedings may also ameliorate the Attorney-General's

[56] Independent National Security Legislation Monitor, *Control Order Safeguards: Part 2* (April 2016), 7.
[57] Ibid.
[58] Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013), 58.
[59] Federal Circuit Court, *Submission to the inquiry concerning the adequacy of safeguards relating to the control order regime* (12 October 2015).
[60] Federal Court of Australia, *Submission to the inquiry concerning the adequacy of safeguards relating to the control order regime,* (8 October 2015).

Department's concern that, if the Federal Circuit Court were no longer an issuing authority, CO applications may be delayed.

Time periods and defending a control order application

73. The Law Council notes that there have been occasions where a not insubstantial amount of time passes between the making of an interim control order and the confirmation hearing.[61] The Law Council accepts as a general proposition that matters should proceed as expeditiously as possible. However, to the extent that any reforms are proposed in this respect (whether procedural or otherwise), the Law Council considers that such reforms ought not to come at the expense of impairing procedural safeguards or the ability of the controlee to mount a proper defence and to properly test the evidence put forward in support of a control order application during a confirmation hearing.

74. Further, the Law Council is not aware of any case where the period of time between the making of an interim CO and a confirmation hearing, or the length of a confirmation hearing itself, was inordinate in the circumstances. Confirmation hearings can involve a very substantial amount of documentary material which the respondent's lawyers must digest before they take instructions that material. In *Causevic,* for example, the respondent's Record of Interview with police ran for some 202 pages and, it is noted, could be found at pages 8137 to 8339 of an annexure to the Applicant's affidavit.[62] The Applicant also relied upon some further 13 affidavits in the confirmation hearing.[63] Properly giving advice on or contesting a confirmation hearing will necessarily require an amount of time that is commensurate with the amount of material to be led in support of a confirmation application and the resources of the respondent's lawyers.

75. Further, in the Law Council's view, *Causevic* demonstrates the importance of the respondent to a CO application being given the opportunity to thoroughly test the case at a confirmation hearing. In *Causevic*, the AFP relied upon a number of allegations from which, it was argued, the conclusion could be drawn that the conditions of the CO were necessary in order to substantially assist in preventing a terrorist act. These allegations included:

    - Conducting surveillance at the Shrine of Remembrance and the Dandenong RSL shortly before ANZAC Day in April 2015;
    - Purchasing knives;
    - Talking about being 'mentally prepared' and using 'arm wrestle' as code words for engaging in an act of violence; and
    - Applying for a passport in March 2015, which it was alleged should be interpreted as Mr Causevic intending to travel overseas to joint ISIS.

[61] See, e.g. *Gaughan v Causevic (No 2)* [2016] FCCA 1693 (8 July 2016).
[62] Ibid., at [23].
[63] Ibid., at [17].

76. In the absence of challenge by way of cross-examination these allegations may well have been accepted. However, these allegations were subject to challenge and, ultimately, the Court did not accept them.[64]

Notice to Admit procedures

77. The Law Council suggests that the INSLM give consideration to the adequacy of the Notice to Admit procedures in both the Federal Court and the Federal Circuit Court in CO proceedings (if the latter court is to be retained as an issuing authority). In the Federal Circuit Court, for example, a CO applicant may serve a notice asking the respondent to admit the facts or documents specified in the notice.[65] Further, if the respondent does not, within 14 days, dispute a fact or the authenticity of a document, then the respondent will be taken to admit the fact or authenticity of the document.[66]

78. While the Notice to Admit procedure can, in appropriate cases, serve to expedite hearing of a matter, it must be recognised that large amounts of material can be involved and that failure to comply with the 14 day time period can have grave consequences for a respondent to a CO.

Evidentiary matters

79. The *Evidence Act 1995* (Cth) (**Evidence Act**) should continue to apply to confirmation hearings and no exceptions to these provisions should be carved out for CO proceedings. An interim control order should only be confirmed on the basis of relevant and admissible evidence; this is appropriate given the consequences a control order has upon a person's liberty. However, the Law Council notes that, for example, section 191 of the Evidence Act allows for the provision of a statement of agreed facts and that section 50 allows a party to adduce the contents to two or more documents in the form of a summary if the court is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question. The use of both of these provisions in the appropriate cases could perhaps reduce the length of time of a confirmation hearing. In this respect, the Law Council notes that, if Supreme Courts are to be given the power to make COs in order to better harmonise the CO regime with the CDO regime, it may be appropriate to make provision for agreed statements of fact in the Criminal Code, noting that not all jurisdictions have adopted the uniform Evidence Act.

80. A CO should also be confirmed on the basis of the criminal standard as opposed to the current civil standard. As a minimum, it appears that some version of the *Briginshaw* rule[67] applies to the burden of proof in CO confirmation proceedings;[68] but there may

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[64] Ibid., 'the inference that the Respondent was conducting a reconnaissance of the Shrine cannot be drawn', at [87]; ;'there is no basis on the evidence for inferring that the Respondent conducted a reconnaissance of the Dandenong RSL', at [98]; 'The Applicant then gave evidence that…the term "arm wrestling" equated to mental preparation for an act of violence…This evidence can be given little or no weight', at [104]-[105]; 'the Applicant seeks the Court to infer that the Respondent sought to travel to Syria or Iraq to fight. The Respondent's mother's evidence is that the passport was being obtained for future travel to Bosnia. The Respondent in his Record of Interview said he wished to obtain his passport for travel to Bosnia…The totality of the circumstantial evidence does not make the Applicant's hypothesis more probable, at [109]; 'in the circumstances of the facts of this case it is not possible to draw an inference that one of the knives was to be used in the commission of a terrorist act', at [128].

[65] *Federal Circuit Court Rules 2011*, r 15.31(1).

[66] Ibid., r 15.31(2).

[67] *Briginshaw v Briginshaw* (1938) 60 CLR 226.

[68] See *Gaughan v Causevic (No 2)* [2016] FCCA 1693 (8 July 2016), [10].

be benefit in clarifying this point. The Law Council further notes that, since CO proceedings are civil proceedings, adverse inferences may be drawn against a respondent where there is an unexplained failure to lead evidence, pursuant to the rule in *Jones v Dunkel*.[69] This may place respondents in a difficult position, particularly where, for example, giving evidence may re-enliven charges: either the respondent gives evidence and risks re-enlivening charges or the respondent does not give evidence and risks adverse inferences being drawn in the CO proceedings. The criminal rules of evidence should apply to inferences and the rule in *Jones v Dunkel*.[70] The Law Council encourages the INSLM to have regard to Dr Neal SC's memorandum in considering these issues.

Ability to vary interim control orders

81. Further, the Law Council considers that provision should be made for allowing amendments to interim COs. Accepting that there may be some time between the making of an interim CO and the confirmation hearing, an appropriate time period must be afforded to a controlee's lawyer to prepare for the confirmation hearing. The Law Council suggests that allowing for variations of the conditions of an interim CO would better allow the CO conditions to reflect a change in circumstances during that time. This specifically arose in Causevic regarding the tracking device. This appears to be a gap in the current legislation. Variations are confined to confirmed orders (section 104.18 of the Criminal Code).

Access to justice

82. Funding arrangements for the defence of CO proceedings are seriously inadequate and apparently *ad* hoc due to the unusual nature of CO cases. The *Causevic* case involved thousands of pages of complex material and a 10 day contested hearing. Both defence counsel accepted the case on the basis that legal aid at some level would be provided. However, legal aid was not available under the Expensive Criminal Cases Fund and the Attorney-General's Department refused aid on the basis the no novel point of law arose. Victoria Legal Aid had agreed to provide some assistance. Despite the case being concluded in July 2016, the basis of aid as of late March 2017, had not been resolved, and no allowance has been made for significant portions of the work. The amounts allowed are minimal and the only payment as of 27 April 2017, when the Law Council's initial written submission to the INSLM was provided, was $2500. On 10 May 2017 the Law Council was advised by Dr David Neal SC, senior counsel in the case, that he had received payment of $38 000 for the 25 days' work in that case. This equates to approximately $1500 per day as compared to the Australian Federal Police rates for a silk of $3700 per day and juniors counsel $2200 per day. The AFP was represented by senior and junior counsel and the Australian Government Solicitor. On the assumption that they were paid on the usual government rates, the inequality of arms is very great. Special funding arrangements analogous to the Commonwealth funding for complex criminal cases should be put in place.

83. The inequality of representation in these types of matters may invariably lead to an approach being taken by those bodies seeking such orders because they are not subject to proper scrutiny. This will occur not through any intention on the part of those bodies seeking COs but rather the fact that they are not being questioned or challenged by a

[69] (1959) 101 CLR 298.
[70] Ibid.

properly resourced and experienced lawyer. There is also the danger that the Court will not receive the assistance it requires when considering whether such orders will be made.

Recommendations:

- **Unless evidence is produced to the INSLM which suggests that control orders are a necessary counter-terrorism mechanism, the control order regime should be repealed;**
- **If the control order regime is to be maintained, then:**
    - **Paragraph 104.5(3)(a) should be amended to ensure that a prohibition or restriction not constitute, in any circumstances, a relocation order;**
    - **An overnight residence requirement should be introduced where the curfew period is considerable; and**
    - **The Court should be required to consider whether the combined effect of all the proposed restrictions is proportionate to the risk being guarded against.**

<u>In relation to the special advocate regime:</u>

- **Special advocates should be given proper administrative support;**
- **The INSLM should appoint special advocates;**
- **Special advocates should be properly remunerated; and**
- **The special advocate regime should be established after a comprehensive consultation process with the INSLM and relevant stakeholders such as the Law Council.**

<u>In relation to the monitoring regimes:</u>

- **Sections 3ZZOA and 3ZZOB of the Crimes Act should be amended to require that there must be at least a 'reasonable suspicion' that the CO is not being complied with or that the individual is engaged in terrorist related activity;**
- **Subsection 3ZZNA(1) of the Crimes Act should be amended to include the words 'or express consent subject to limitations';**
- **Paragraph 3ZZKF(2)(b) and subsection 3ZZLC(2) of the Crimes Act are unnecessary and should be repealed**
- **Section 3ZZNF(4) (compensation for damage to electronic equipment) of the Crimes Act should be amended to insert 'were given the opportunity to provide any known appropriate warning or guidance on the operation of the equipment and if so' before the words 'provided any appropriate warning or guidance';**

- **Unless the INSLM receives evidence which suggests that B-Party warrants are a necessary and proportionate measure to monitor compliance with a control order, the relevant provisions should be repealed; and**

- **The provisions of the *Surveillance Devices Act 2004* (Cth) that enable informers to use a surveillance device without a warrant for the purpose of monitoring control order compliance should be repealed.**

In relation to procedural matters:

- **The *Evidence Act 1995* (Cth) should continue to apply to confirmation hearings;**

- **The Federal Court of Australia in addition to State and Territory Supreme Courts be granted the power to issue a CO or, in relevant post-sentence cases, a CDO under the Criminal Code;**

- **If Supreme Courts are to be given the power to make COs in order to better harmonise the CO regime with the CDO regime, it may be appropriate to make provision for agreed statements of fact in the Criminal Code;**

- **The INSLM give consideration to the adequacy of the Notice to Admit procedures in both the Federal Court and the Federal Circuit Court in CO proceedings (if the latter court is to be retained as an issuing authority);**

- **The criminal law evidentiary rules for the drawing inferences and the application of the rule in *Jones v Dunkel*[71] should be applied in CO cases;**

- **A CO should also be confirmed on the basis of the criminal standard as opposed to the current civil standard. As a minimum, it appears that some version of the *Briginshaw* rule[72] applies to the burden of proof in CO confirmation proceedings;[73] but this should be clarified; and**

- **Division 104 of Part 5.3 of the Criminal Code should be amended to allow variations of an interim CO to be made; and**

- **Special Commonwealth funding should be allocated to ensure legal aid is available in CDO and CO proceedings akin to the arrangements for complex criminal cases.**

Preventative Detention Orders

84. The PDO regime is found in Division 105 of part 5.3 of the Criminal Code. A PDO is an order authorising that a person be taken into custody and detained for a period of time in order to:

[71] (1959) 101 CLR 298.
[72] *Briginshaw v Briginshaw* (1938) 60 CLR 226.
[73] See *Gaughan v Causevic (No 2)* [2016] FCCA 1693 (8 July 2016), [10].

- prevent a terrorist act that is capable of being carried out and could occur within the next 14 days from occurring; or

- preserve evidence of, or relating to, a recent terrorist act.[74]

85. There are two types of PDOs: initial preventative detention orders issued by a senior member of the AFP and continued preventative detention orders and extensions of those orders issued by an 'issuing authority' on application of a member of the AFP.[75]

86. The PDO regime is not based on the fact that a person is suspected, alleged or has been proven to have committed a particular offence but rather on the basis that the person might commit or facilitate the commission of an offence. The broad scope of the PDO regime can effectively target any person suspected of involvement (even peripheral involvement) in terrorist activity.

Necessity

87. Under the Criminal Code, it is an offence to attempt, procure, incite or conspire to commit any offence, including terrorist related offences.[76] Each of these offences allows police to take pre-emptive action to prevent the commission of a terrorist act. However, unlike the PDO regime, they require police to establish a connection between a suspect and the planned commission of a particular offence before action can be taken to arrest and charge a person. These extensions of liability, along with the preparatory terrorism offences in the Criminal Code, may call into question the necessity of the PDO regime.

Proportionality

88. The Law Council maintains its previously expressed concerns with respect to the PDO regime.[77] In particular, the Law Council considers that subsection 105.4(5) of the Criminal Code is too broad and may not ensure that only situations where there is a real risk of a terrorist act occurring are captured. Accordingly, subsection 104.4(5) of the Criminal Code ought to be amended such that instead of reading 'a terrorist act is one that…is capable of being carried out, and could occur, within the next 14 days' it instead provides that 'a terrorist act is one that…is likely to occur within the next 14 days'.

89. PDOs also restrict detainee's rights to legal representation by only allowing detainees access to legal representation for the limited purpose of obtaining advice or giving instructions regarding the issuing of the order or treatment while in detention;[78] contact with a lawyer for any other purpose is not permitted. In addition, both the content and the meaning of communication between a lawyer and a detained person can be monitored.[79]

90. While the Administrative Appeals Tribunal may review a decision of an issuing authority to make or extend a PDO,[80] it is noted that decisions made under Division 105 of the

[74] *Criminal Code Act 1995* (Cth)., s 105.1.
[75] Ibid., ss 105.8, 105.11.
[76] Ibid., pt 2.4
[77] See, e.g. Law Council of Australia, *COAG Review of Counter-Terrorism Legislation* (27 September 2012).
[78] *Criminal Code Act 1995* (Cth), s 105.37.
[79] Ibid., s 105.38.
[80] Ibid., s 105.51(5).

Criminal Code are not amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**).[81] This, coupled with inadequate access to information and limited access to legal representation, may make it difficult for a detainee to ascertain the true basis for the order being made, challenge the legality of the order, or challenge the conditions of their detention. Accordingly, the Law Council recommends that the exercise of executive powers under Division 105 of the Criminal Code be subject to judicial review under the ADJR Act.

Uniformity of Preventative Detention Order Schemes

91. All the States and Territories have their own preventative detention regimes.[82] The various State and Territory regimes are broadly similar, although there are some differences between them, and the State and Territory regimes differ from the Federal PDO regime in some important respects. For example, the New South Wales scheme now allows for questioning of a person who is subject to a PDO and all the State and Territory regimes allow for a longer period of detention (14 days) compared to the Federal scheme (48 hours). Moreover, the PDO regime in New South Wales, for example, is entirely 'judicial' in that both initial and final PDOs are made by a judge of the Supreme Court; in contrast, the Federal CDO scheme allows a senior member of the AFP to make an initial PDO.

92. It appears that, while the state and territory schemes were intended to broadly mirror the federal regime, the differences between them were intentional. The Minister in his Second Reading Speech in relation to the Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005 (NSW), for example, said that:

> *The New South Wales scheme replicates the Commonwealth provisions in that it provides for the detention of a person, thus incapacitating them; restrictions on communications, which is true of all arrested and detained persons; and the monitoring of the detains person's communications to ensure that there is no exchange of information between suspects or plans made to evade capture or destroy evidence. However, this bill differs in a number of important respects, namely, due to constitutional reasons the Commonwealth scheme can operate only for 48 hours. The New South Wales scheme operates for up to 14 days. The Commonwealth scheme is administrative. The New South Wales scheme is judicial.*[83]

93. Similar comments were made in the Second Reading Speech with respect to the Victorian Bill that introduced PDOs.[84]

94. The Law Council notes and adopts the criticisms that the Law Society of New South Wales has made of the New South Wales PDO regime. In particular:

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[81] Ibid., s 105.51(4); *Administrative Decisions (Judicial Review) Act 1977* (Cth), Sch 1 para (dac).
[82] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Police Powers) Act 2002* (NSW); *Terrorism (Emergency Powers) Act 2006* (NT); *Terrorism (Preventative Detention) Act 2006* (WA); *Terrorism (Community Protection) Act 2003* (Vic); *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas).
[83] Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005 (NSW), *Second Reading Speech, NSW Legislative Assembly Hansard* (17 November 2005).
[84] Terrorism (Community Protection) (Amendment) Bill 2005 (Vic), *Second Reading Speech, Parliament of Victoria Hansard* (28 February 2006).

- The 14 day period of detention is too long and should be 48 hours in line with the federal scheme;
- Only persons over 18 years of age should be subject to a PDO;
- While the scheme in NSW is judicial (as compared to the federal scheme):
    - The rules of evidence do not apply to a PDO application in the Supreme Court; and
    - A detainee's lawyer is entitled to see nothing more than a copy of the PDO and a summary of the grounds upon which the PDO was made.[85]

95. The Law Council further notes that there are constitutional limitations on the extent to which the federal PDO regime can be amended.

96. Additional complexity is found in that no two pieces of PDO legislation, whether Commonwealth, State or Territory are the same. Given that counter terrorism investigations have proven to be transnational in nature, the variance between legislation renders them operationally impractical to use.[86]

97. Further, the COAG Review received submissions from the Victorian, South Australian, and Western Australian police, all of which 'unequivocally suggested that, from an operational perspective, they would be unlikely to use the preventative detention regime.'[87]

98. Irrespective of concerns relating to operational expediency, the Law Council sees merit in a harmonised and uniform PDO regime. However, a uniform regime should not entail replicating objectionable provisions in State, Territory or Federal regimes.

Recommendations:

- **Section 105.4(5) of the Criminal Code should to be amended to provide that 'a terrorist act is one that…is likely to occur within the next 14 days'; and**
- **The exercise of executive powers under Division 105 of the Criminal Code be subject to judicial review under the ADJR Act.**

Continuing detention orders

99. In 2016, a scheme for the continuing detention of high-risk terrorist offenders who pose an unacceptable risk to the community at the conclusion of their custodial sentence was introduced.[88] The scheme is due to take effect on 7 June 2017.[89] Under it, a person

[85] Law Society of New South Wales, *Statutory Review of the Terrorism (Police Powers) Act 2002*, (22 July 2015).
[86] NSW Ombudsman, *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002, (*August 2011), 29.
[87] Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation*, Canberra, 2013, 70.
[88] *Criminal Code Act 1995* (Cth), Div 105A.

is eligible to have a CDO imposed where the person has been convicted of a relevant offence, the person is either serving a sentence of imprisonment for that offence or is subject to a CDO and the person it at least 18 years of age at the conclusion of the sentence.[90] The Attorney-General may make an application for a CDO[91] and, upon the application being made, the Court must hold a preliminary hearing to determine whether to appoint one or more relevant experts[92] to conduct a risk assessment of the person and provide a report.[93]

100. The Supreme Court of a State or Territory may make a CDO where, having regard to the matters in section 105.8, the Court is satisfied to a high degree of probability, on the basis of admissible evidence, that the person poses an unacceptable risk of committing a serious Part 5.3 offence if the person is released into the community and the Court is satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.[94]

101. The Court must review a CDO every 12 months[95] and a person subject to a CDO may apply to the Court for a review.[96] The Attorney-General must prepare a report each year in relation to the operation of the scheme.[97]

102. In its submission to the PJCIS in relation to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, the Law Council raised a number of concerns in relation to the regime; some of these concerns were addressed prior to enactment.[98] However, the Law Council still holds a number of concerns in relation to the CDO regime.

103. Post-sentence preventative detention runs counter to fundamental common law principles by virtue of:

- The application of the rules of evidence and procedure for civil matters to detention, without ordinary means of testing contested evidence;
- Detention being based on prevented expected future behaviour, rather than as punishment for past offending proven in court;
- Being contrary to the principle of finality;
- The reality that detainees will serve their continued detention in high risk security conditions;
- The reality of what can be seen as double punishment for the same conduct;
- Retrospectivity of criminal laws applicable to offenders sentenced before the regime was put in place; and

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[89] By virtue of the *Criminal Code Amendment (High Risk Terrorist Offenders) Act* 2016 (Cth), cl 2(1).
[90] *Criminal Code Act 1995* (Cth), s 105A.3.
[91] Ibid., s 105A.5.
[92] Ibid., s 105A.6(1)
[93] Ibid., s 105A.6(4).
[94] Ibid., s 105A.7.
[95] Ibid., s 105A.10.
[96] Ibid., s 105A.11.
[97] Ibid., s 105A.22.
[98] For example, removing the offence of treason from the list of offences that can trigger eligibility for a continuing detention order.

- The question of whether the regime may be inconsistent with freedom from arbitrary detention and the right to liberty of the person in Article 9, and the right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the person in Article 10 of the *International Covenant on Civil and Political Rights*.

104. The Law Council also raised a number of practical difficulties with the regime, including:

    - Who are the psychiatrists/psychologists or 'other experts' with the demonstrated expertise to predict future terrorist actions?
    - How will the experts make meaningful predictions based on one or more interviews with people who have already served lengthy sentences?
    - How will the prison system provide appropriate conditions which facilitate the de-radicalisation and rehabilitation prospects for detainees?
    - How will the scheme work in relation to the broader counter-terrorism framework relating to COs and PDOs (the interoperability question)?

Accurate risk prediction

105. Given the central place of the expert report in the regime, it is essential that the Court has a sound evidentiary basis for determining an application for a CDO. However, predicting future behaviour can be a notoriously difficult task. In *Fardon v Attorney General for the State of Queensland*, Justice Kirby observed that predictions of dangerousness are "based largely on the opinions of psychiatrists which can only be, at best, an informed 'guess'".[99] Further, in *DPP (WA) v Comeagain*, Justice McKeniche stated:

> *There remains an issue with all the predictive tools in that they have not yet been validated. They were developed, in part, to overcome the perceived and actual weaknesses of an unguided clinical assessment and have been embraced by professionals, psychiatrists and psychologists, as an improvement on an unguided assessment. Nevertheless, it would be an error to attribute a degree of scientific certainty to the tools simply because they deliver an arithmetical outcome. They remain unvalidated. Years will have to pass before a retrospective survey can determine whether, and to what extent, the predictive tools are reliable.*[100]

106. Moreover, Justice Callaway in *TSL v Secretary to the Department of Justice* cited an issues paper prepared by Professor Bernadette McSherry concerning the dangers of evidence provided by mental health professionals, especially in light of the "...potential for judges and juries to misunderstand and misuse risk assessments, assigning greater accuracy and inevitability to predicted behaviours than is warranted."[101]

107. While the Law Council understands that work is being done on the development of indicative tests for radicalisation, the fact that such instruments have yet to be developed, let alone validated, does not provide a proper basis for a regime based upon

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[99] *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 275, at [125].
[100] *DPP (WA) v Comeagain* [2008] WASC 235, [20].
[101] *TSL v Secretary to the Department of Justice* (2006) 14 VR 109, 122.

predictions of future terrorist acts. Further, cases involving terrorists, such as Man Haron Monis, indicate a criminal history including violent behaviour; it is unclear whether there are any special warning signs from a psychological perspective which would clearly indicate whether an individual continues to be radicalised or has genuinely become de-radicalised.

108. The PJCIS recommended that the Attorney-General provide the Committee with an implementation plan for the HRTO Bill, which should include information about the development and validation of risk assessment tools.[102] The Government accepted this recommendation and has provided an implementation plan.[103] The implementation plan provides that the development of risk assessment tools is anticipated to be finalised in December 2017.

109. In the Law Council's view, it is critical that the accuracy of risk assessments be demonstrated. The legitimacy and effectiveness of the post-sentence detention regime is dependent upon the accuracy of the risk assessment methodology employed.

Unacceptable risk test

110. The Law Council considers that the unacceptable risk test in paragraph 105A.7(1)(b) is not appropriate in the case of terrorist offences for a number of reasons:

- The lack of any established body of specialised knowledge on which to base predictions stands in marked contrast to the extensive body of learning which underpins sexual offences, for example, and even then there are serious criticisms of the prediction methods used in those areas;

- The concept of 'risk' is too fluid and may be quite subjective. The qualifier of 'unacceptable' does little or nothing to change that high level of subjectivity; and

- It is inconsistent with the test for PDOs. That test focuses on the probability that a person will commit a terrorist act and requires reasonable grounds to suspect that the person will engage in a terrorist act. It is suggested that this is a more certain standard and that the test for a CDO should be at least as strict as that for a PDO. However, the test should require belief, not suspicion.

111. The PJCIS considered that the test was appropriate in the circumstances.[104] The PJCIS noted that the unacceptable risk test would allow the court to engage in a 'balancing exercise' and that it was appropriate to have a different test in the PDO regime because CDOs involve a contested application.[105] The PJCIS further noted that the test is modelled off State and Territory regimes. However, the Law Council notes the decision of Justice Hulme in *New South Wales v Thomas*, where His Honour stated in the context of the 'unacceptable risk' test in the NSW sex offender post-sentence preventative detention regime that:

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[102] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (4 November 2016), xvi.
[103] Attorney-General's Department, *Post-Sentence Preventative Detention of High Risk Terrorist Offenders Implementation Plan* (November 2016).
[104] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (4 November 2016), 57.
[105] Ibid.

> *That provision, to my mind, is an indication by the legislature that the risk of the person committing a serious sex offence does not need to be more likely than not before it can be regarded as an unacceptable risk. Put another way, the risk may be less likely than not but still be an unacceptable risk.*[106]

112. Thus, it may be that a Court is satisfied that there is an 'unacceptable risk' of a person committing a terrorist act even though it is less likely than not that the risk may eventuate. The Law Council accordingly maintains its view that the 'unacceptable risk' standard is a problematic one.

Conditions of detention

113. The Law Council suggests that it is highly likely that detainees held on CDOs would be held in levels of high security that inevitably impose significant restraints and constraints; this distinguishes the regime from similar regimes for different types of offenders. This is despite section 105A.4 of the Criminal Code, which makes provision for the appropriate treatment of a person in light of their status as a person who is not serving a sentence of imprisonment.

114. In New South Wales, for example, detainees will be assessed and assigned a security classification by Corrective Services pursuant to the *Crimes (Administration of Sentences) Act 1999* (NSW) and the *Crimes (Administration of Sentences) Regulation 2014* (NSW), as are prisoners on remand and those serving sentences of imprisonment. The exceptions to both subsections 105A.4(1) and (2) of the Criminal Code include exceptions for the security and good order of a prison and the safety and protection of the community. These exceptions mean that detainees under a continuing detention order could be given a Category AA classification (in the case of male inmates) or a Category 5 classification (in the case of female inmates) under clauses 12 and 13 respectively of the *Crimes (Administration of Sentences) Regulation 2014* (NSW). These clauses relevantly permit those classifications for an inmate if, in the opinion of the Commissioner of Corrective Services, they represent a special risk to national security (for example, because of a perceived risk that they may engage in terrorist activities) and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment.

115. Where a CDO has been made, a Category AA or Category 5 classification by Corrective Services for a detainee would be almost inevitably given because the order would have been made on the basis of a finding that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community. The conditions of custody for any Category AA or Category 5 prisoner in relation to the terrorism offences, whatever the basis for their detention – that is, whether on remand, serving a sentence or under a continuing detention order – are harsh. In *R v Naizmand*, Justice Harrison noted:

> *The applicant's security classification has resulted in him being housed in a maximum security facility. His association with other inmates is limited to four other prisoners. His exercise time is restricted. When he is outside his cell he is escorted by no less than four prison officers or corrective services personnel. In these situations, he is routinely handcuffed and his feet are always shackled. That*

[106] *New South Wales v Thomas* [2011] NSWSC 118, [16].

procedure is universally adopted, even in circumstances as apparently benign as walking along the corridor to use the phone.[107]

116. Justice Harrison also commented that the evidence on the release application:

> *…has reinforced the notorious fact that prisoners on remand awaiting terrorism charges are treated differently…[All] such prisoners receive the same treatment. It is therefore expected that a person facing prosecution for alleged breaches of a control order will be subject to custodial conditions that include limited association, shackling and constant surveillance, and all of the other onerous and intrusive conditions and constraints of the type outlined by the present applicant.*[108]

117. It is suggested that this highlights the importance of appropriate detention facilities that encourage a rehabilitative environment. Relevant offenders should be given repeated opportunities to participate in rehabilitation programs as soon as possible after their sentence commences. A delay in the provision of rehabilitation programs until shortly before an offender is eligible for parole is not sufficient. Further, an early assessment of an at risk offender should be required so that an appropriate rehabilitation program can be put in place as soon as possible after an offender has been sentenced.

118. While the Law Council understands that work is being undertaken with respect to risk assessment tools, developing an appropriately qualified list of experts and ensuring appropriate rehabilitation programs,[109] the importance of these measures cannot be overstated.

Recommendations:

- **The test for a continuing detention order should be that the court is satisfied beyond reasonable doubt that there are reasonable grounds to believe that the person will engage in a Part 5.3 offence; and**
- **Detainees should be afforded targeted and appropriate rehabilitative programs as soon as possible after their sentence of imprisonment commences**.

Interoperability of continuing detention order regime with broader counter-terrorism framework

119. Harmonisation difficulties arise because the CDO scheme is largely based on State and Territory schemes which are not set in the context of the Commonwealth counter-terrorism framework. The Commonwealth framework includes COs and PDOS. The tests for COs, PDOs and CDOs are different as are the procedures and courts which can administer them.

[107] *R v Naizmand* [2016] NSWSC 836, [20].
[108] Ibid, [39].
[109] See Attorney-General's Department, *Post-Sentence Preventative Detention of High Risk Terrorist Offenders Implementation Plan* (November 2016).

120. A number of questions arise in this context, including (but not limited to):

- Given that at present the CO regime uses different tests, how can the CO regime and CDO scheme operate in an efficient, fair and consistent manner?
- Are the procedural steps for and time limits applicable to a CO compatible with those applicable to a CDO?
- Should the CDO regime adopt a test similar to the preventive detention test – namely a test based on whether the person will engage in a terrorist act – rather than the 'unacceptable risk' test?
- How is the 'unacceptable risk' to be reconciled with the test for a PDO?
- How can the stricter test applied to preventive detention - an essentially short term measure – be reconciled with the looser unacceptable risk test for the long-term CDOs?
- Would a test which required the Court to be satisfied beyond reasonable that there are reasonable grounds to believe that the person will engage in a terrorist act strike a better balance between protection of the community and over-prediction of future terrorist acts and compliance with Australia's human rights obligations?

121. In its initial submission to the PJCIS on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, the Law Council noted that the unacceptable risk test in relation to making a CDO should be amended in a manner more consistent with the PDO test.[110] The Law Council remains of this view.

Interaction between control orders and continuing detention orders

122. The PJCIS, in their report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, recommended that:

> The Government consider whether the existing control order regime could be further improved to most effectively operate alongside the proposed continuing detention order regime.[111]

123. The Government accepted this recommendation in its response to the PJCIS's report.[112]

124. The Law Council sees a benefit in an approach whereby it is open to the Court to make a CO or extended supervision order as an alternative to a CDO. A single court process, where an application for a CDO is sought to be made, would assist efficiencies in the judicial process for all parties concerned. The Law Council's view is that the CO option (rather than an extended supervision order) is preferable on the basis that it would

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[110] Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (12 October 2016), 19.
[111] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (4 November 2016), 101.
[112] Attorney-General, *Media Release: Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (30 November 2016), available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/HRTOBill/Government_Response

ensure consistency within Australia's counter-terrorism framework. This approach would also require that the Federal Court of Australia in addition to State and Territory Supreme Courts be granted the power to issue a CO or, in relevant post-sentence cases, a CDO under the Criminal Code.

125. The Law Council also notes that CDO applications are made by the Attorney-General. In contrast, a senior AFP member can make an interim or confirmed CO application. While the Law Council supports greater harmonisation between the CO and CDO regimes, it would not support a process whereby it would be open to a senior AFP member to make an application for a CDO given the gravity of such an order.

126. Under the HRTO Act, the Court may make a CDO if it is satisfied that there is no other, less-restrictive measure (such as a CO) that would be effective in preventing the unacceptable risk to the safety of the community.[113] The Attorney-General must ensure that reasonable inquiries are made to ascertain any facts that would reasonably be regarded as supporting a finding that the order should not be made (subsection 105A.5(2A) of the Criminal Code). However, the Law Council considers that the Attorney-General's decision in this regard should be required to be made on the basis of information which is sworn or affirmed by a senior AFP member with an explanation as to why each of the possible obligations, prohibitions or restrictions or a combination of such under a CO would not be effective. The AFP member should also be required to present:

- a statement outlining any facts relating to why any of those obligations, prohibitions or restrictions may not be effective;
- outcomes and particulars of all previous requests for interim control orders/CDOs, interim CDOs/CDOs/preventative detention orders, applications for variations or revocations of control orders/CDOs;
- relevant expert reports, including from corrective services;
- information about the offender's conviction and period for which the offender has been sentenced and detained; and
- any information that the member has about any periods for which the person has been detained under a corresponding State preventative detention law or State CDO law.

127. In addition, the Attorney-General must have regard to matters outlined in section 105A.8 (Matters a Court must have regard to in making a continuing detention order).[114]

[113] *Criminal Code Act 1995* (Cth), new section 105A.7(1)(c).

[114] Briefly stated, these are the safety and protection of the community; any reports from relevant experts or reports in relation to the extent to which the offender might be managed in the community; any treatment or rehabilitation programs the offender has participated in and the offender's level of participation; the level of compliance with parole or CDO obligations; any prior convictions for relevant offences; and the views of the sentencing court.

Recommendations:

- **The applicant for a CDO should continue to be the Attorney-General.**
- **The Attorney-General should be required to be satisfied in an application for a CDO that there is no other less restrictive measure (for example, a control order) that would be effective in preventing the unacceptable risk of a serious Part 5.3 offence if the offender is released into the community.**
- **The Attorney-General's decision to make an application for a CDO should be required to be made on the basis of information which is sworn or affirmed by a senior AFP member with an explanation as to why each of the possible obligations, prohibitions or restrictions or a combination of such for a CO would not be effective**.
- **The Attorney-General should also be required to have regard to matters as outlined in section 105A.8**.

Annexure A – Memorandum from David Neal SC, Defence Counsel in *Gaughan v Causevic* [2016] FCCA 1693

26 April 2017

Causevic – Control Order Case

Introduction

1. In 2016, I ran a contested Control Order case on behalf of Harun Causevic for 10 days in the Federal Circuit Court.[115] I understand that it was the first case to be contested on the facts. We contested the basis for the Order but the principal focus was removal of the requirement that he wear an ankle bracelet to track his movements. The bracelet was socially embarrassing and a severe impediment for him finding work, especially in construction industry where concealing it was impossible.

Background

2. Mr Causevic was one of two 18 year old Muslim men from Dandenong who had been arrested and charged with conspiring to carry out a terrorist act on Anzac Day 2015. His friend Sevdet Besim had been communicating with an English teenager who was convicted in England. Besim pleaded guilty in mid-2016 to conspiring with the English teenager to carry out a terrorist act.

3. In September 2015, the CDPP dropped the conspiracy charge against Mr Causevic. He was released pleaded guilty to possession of a prohibited knife in the Magistrates' court. By this time, Mr Causevic had served some five months in a maximum security adult prison prior to release. Almost simultaneously, the AFP took out an Interim Control Order against him in the Federal Circuit Court (**FCC**) on the basis that in the absence of the control order he was likely to carry out a terrorist act. The AFP relied on the same evidence as the criminal case. (He had previously been subjected to a Preventative Detention Order in April 2015 from the Victorian Supreme Court under Victorian legislation).

[115] *Gaughan v Causevic* (No. 2) [2016] FCCA 1693.

4. Under the federal legislation, Control Order cases can go to the Federal Court, the Family Court or the FCC. The AFP chose to issue in the FCC. I do not know the basis for this choice, or why it should be their choice. They successfully resisted our attempt to transfer the case to the Federal Court. I understand that a recommendation to limit these cases to the Federal Court has not been accepted on the basis of court availability. I think these cases are sufficiently important to go to the Federal Court and some of the difficult points that arose in the case confirmed my view about this. I see no reason why the State Supreme Courts could not also exercise this jurisdiction (particularly now that we have Commonwealth Preventative Detention Orders). Further, the majority of the FCC judges do family law which does not fit this subject matter and I understand that the FCC operates under a very heavy case load. That said, the FCC accommodated our requests for hearing dates.

5. I was briefed to lead Gideon Boas by Stary and George in November 2015. By then, the criminal proceedings had exhausted the family's funds and borrowing capacity. No grant of legal aid was in place. They applied to AGD for special grant of legal aid from AGD (which, as I understand, was one of the conditions for passage of this unprecedented legislation. This was refused on the basis that no novel point of law arose. Notwithstanding that, the AFP briefed Stephen Donaghue QC and a junior instructed by a senior AGS solicitor and it seemed one other solicitor. I estimate that their cost which included voluminous affidavits and exhibits – based on my preparation (15 days in my case), running of our case transfer application, and a 10 day contest – cost them something in the order of $400,000. VLA granted aid in about April 2016 on an extremely limited basis. As of 12 May 2017 my fees have been allowed at $38,000 for 25 days work which comes to some $1500 per day; claims for very significant portions of the work were disallowed. The AFP rate for senior counsel is $3700 per day (i.e. $92,500 for same work) for senior counsel and $2200 for junior counsel. Gideon Boas has been allowed $20,000. I do not know what amount was paid to Stary's office. The inequality of arms is stark.

6. The notion that these cases – particularly when they are unfunded – can be run quickly is misconceived. Even the Response to the Notice to Admit proceeded on a very selective sample of the affidavit material. More than that, two further affidavits with extensive exhibits were filed in the following February. The idea

that one could contest an application like this – given the volume of material and the lack of resources – within a short period of time seems unrealistic.

Civil Procedure and Rules of Evidence

7. The Court relied on *Thomas v Mowbray*[116] and held that the *Briginshaw* rule applies to the burden of proof in these cases.[117] This could be clarified.

8. In late November 2015, we were served with a 50 page Notice to Admit; failure to answer within a limited prescribed time (we completed the process just before Christmas 2015) is deemed to be an admission. The Notice alleged each of the facts asserted by the AFP in the affidavits and their exhibits. The exhibits ran to thousands of pages including TI transcripts, SMS messages, videos and websites visited, surveillance records, etc, etc. Responding to the Notice was a major task within a limited time, required days beginning to familiarise ourselves with the documents and then days of conferences with Mr Causevic and his family going through allegations, the inferences drawn in the principal affidavit and supporting the supporting documents.

9. The decision to respond to the Notice arose against number of background risks.

10. The principal risk that something said in the Response could re-enliven the charges which carry a life sentence. We were convinced that he had no part in the conspiracy but very concerned about the risk of subjecting him to cross-examination where he might say something that was liable to be misinterpreted and re-enliven the conspiracy charge. The same consideration meant that relying on the privilege against self-incrimination was impractical and dangerous.

11. The same consideration had led us to decide not to call Mr Causevic at the hearing. However, being a civil case, the *Jones v Dunkel*[118] rule applied and he risked an adverse inference on matters where he had a good explanation.

12. On a related issue, because this was a civil case and the law on drawing inferences (which is crucial in these cases and was in this case) is balance probabilities. Given control order proceedings necessarily rely on inferences about future events and involve volatile issues, this low standard for drawing inferences is

[116] (2007) 233 CLR 307.
[117] *Gaughan v Causevic (No 2)* [2016] FCCA 1693, [9] – [13] dealt with the authorities on the burden of proof, *Jones v Dunkel* and circumstantial evidence.
[118] (1959) 101 CLR 298.

dangerous. The particular circumstances of this case and the use of the Response avoided some of this. That may not be so in other cases.

13. To avoid the *Jones v Dunkel* inference and to contest inferences relied on by the AFP, we advised that the Notice to Admit provided a mechanism for putting Mr Causevic's case in evidence (an evidentiary dispute which we won at the hearing) while avoiding the risks associated with subjecting him to cross-examination.

14. Ultimately, the Response did lead to the AFP dropping a lot of material in the principal affidavit. (Large portions were also excluded on evidentiary grounds: hearsay, lack of expertise, etc. I note there is some suggestion that the AFP may wish the rules of evidence be relaxed for control order proceedings. I think this case demonstrates why that should be opposed.)

The Ankle Bracelet

15. The Control Order in this case would have expired on 10 September 2016. The condition that drove the contest was the requirement to wear a tracking bracelet. Aside from a number of minor conditions, the control order also required Mr Causevic to attend sessions with an AFP approved counsellor fortnightly and an AFP approved Imam on every other week. He was also required to stay away from the Shrine of Remembrance, the RSL in Dandenong, and not to associate with his previous circle. The conditions requiring him to meet with an Imam and a Psychologist on alternate weeks were something he valued. Avoiding certain people and places did not bother him.

16. In February 2016, we applied to the court to have the matter transferred from the FCC to the Federal Court.[119] That application was rejected. The judge made a particular intervention at that stage about the settlement of the matter. At the heart of it was the requirement of the control order that Mr Causevic wore an ankle bracelet. The judge said that she had been reluctant to impose that condition at the time of the interim control order and that she was not prepared to remove it at the time of the application to transfer, but that she had serious reservations about its justification.

17. The defence offered to agree to substitute reporting conditions for the ankle bracelet. The AFP refused and strongly asserted the need for the tracking device. The client was suspicious that the device also was bugged and he found it acutely

[119] *Gaughan v Causevic* [2016] FCCA 397.

embarrassing both socially and in his attempts to find employment. He wished to work in the construction industry and it was inevitable that even if he wore long pants, someone would notice the ankle bracelet. He associated it with people facing terrorism charges and sex offenders. He was very reluctant to apply for jobs under these conditions and spent many months with little or nothing to do

18. The contested hearing proceeded in June 2016. It proceeded largely by way of the affidavits and oral evidence of the head of counter terrorism for the AFP plus a supplementary affidavit and from other AFP personnel involved in surveillance of various sorts.

The AFP Evidence

19. The main affidavit made a number of serious factual allegations which were rejected in the judgment.

20. The first of these alleged that he had conducted surveillance shortly before Anzac Day in April 2015 of the Shrine of Remembrance in St Kilda Road Melbourne and the Dandenong RSL.

21. The AFP relied on physical surveillance of his driving along St Kilda Road Melbourne on the relevant date. The surveillance cars lost contact with him at the critical times on St Kilda Road in the vicinity of the Shrine. There was a gap of some three minutes in which he was out of sight but they said he could have conducted surveillance of the Shrine as he was in that vicinity. He had said in his record of interview that he had been going to take the freeway to Dandenong (his home) but then he stopped near the floral clock on St Kilda Rd and went back along St Kilda Rd to take the Dandenong Road route to avoid the tolls. Mr Gaughan of the AFP conceded that they had found no notes, photographs, plans or any other evidence of any surveillance at the Shrine by Mr Causevic.

22. The court found that there was no basis for inferring that Mr Causevic conducted reconnaissance at the Shrine.[120]

23. Later on the same afternoon, the AFP alleged that he conducted reconnaissance at the Dandenong RSL. They relied on a tracking device on his car which took him along a main road – Stud Road - past the Dandenong RSL. The Dandenong RSL in fact faces into a shopping centre in the main Dandenong shopping plaza. In order

[120] Ibid., at [98].

to conduct surveillance, it would have been necessary to enter the appropriate parking area within the shopping plaza.

24. As a resident of Dandenong, Mr Causevic was well familiar with that shopping centre. Indeed, on the same day and at the same time, he had been on the other side of the shopping plaza area buying a bottle of water. This was done under the observation of two AFP cars which were in the car park. They lost him as he exited the car park along Clow Street, Dandenong. This was logged at exactly the same time when – according to the tracking device - his car was on Stud Road on the opposite side of the shopping centre. Mr Gaughan was asked in cross examination how this could be explained and was unable to give an answer. After an adjournment, the AFP had to concede that there had been an error and that the tracking device had in fact been in a police car, and not in Mr Causevic's car.

25. Another allegation was that he had bought an 'AK 47o knife' in order to carry out the planned attack. In his record of interview, Mr Causevic said that he had bought the knife for fishing. He invited the police to smell it because it had a fishy smell on it. It was put to Mr Gaughan in cross examination that a bug placed in Mr Besim's car on the day or two prior to their arrest, recorded three or four men in Mr Besim's car including Mr Causevic and Mr Besim at the beach, cutting up bait and preparing to go fishing. One of the voices on the tape commented on the AK 47 knife they were using to cut the bait.

26. The Court did not accept the inference that the knife was to be used to commit a terrorist attack.[121]

27. A further allegation was a taped phone conversation between Mr Besim and Mr Causevic about arm wrestling. Both of them did body building at the gym and computer records showed protein drink purchases. Mr Besim had beaten Mr Causevic in an arm wrestling contest a day or so previously. Mr Causevic challenged Mr Besim to a rematch. Mr Besim was incredulous. Mr Causevic said that he had been drinking protein drinks and that he was now mentally prepared. Mr Gaughan opined that this meant that Mr Causevic was now mentally prepared to carry out a terrorist act. Despite the fact that the AFP did not then set up close surveillance, Mr Gaughan did not resile from that proposition under cross examination.

[121] Ibid., at [128].

28. The Court held that this evidence could be given little or no weight.[122]

29. Mr Gaughan accepted in evidence that the AFP had no evidence of communication of any sort which connected Mr Causevic with the plan made by Mr Besim and the English teenager. This included calls between Mr Besim and Mr Causevic at times when Mr Besim had been recently speaking to the English teenager. There was no direct evidence that Mr Causevic even knew of the plan. The AFP case against Mr Causevic depended on the circumstantial evidence: his association with Mr Besim, with Numan Haider who had been shot after stabbing two police some 12 months earlier, frequenting of the Al Furqan mosque, video material which included footage of ISIS, possession of a Shahada flag which he carried in his car and allegedly waved at a nearby police car, a passport application, a note with telephone numbers of people connected to foreign fighters, and what was said to be an escalating pattern of radicalised behaviour.

30. One further example about competing inferences. The AFP interpreted Mr Casuevic's application for a passport in early 2015 as an attempt to join ISIS and fight in the Middle East. Mrs Causevic gave evidence that she and her husband had been urging Mr Causevic to return to Bosnia - where his uncle lived, and whom he had previously visited - so that he could be separated from what they regarded as his then current associates in Melbourne and in the hope that they could find him a suitable wife by way of an arranged marriage.

31. The Court held that the totality of the circumstantial evidence did not make the AFP inference more probable.[123]

32. The judgment summarises the other inferences relied on by the AFP. In many ways, the credibility of the AFP case was damaged because of the conduct of the investigation. The errors with respect to the tracking device on the police car, losing the defendant at the critical time near the Shrine of Remembrance, and reliance on terms like 'mentally prepared', to say nothing of the fishing knife, would have appeared very sinister in the absence of the contrary explanations in the response to the Notice to Admit and the cross-examination flowing from them.

[122] Ibid., at [105].
[123] Ibid., at [109]. See too the failure by AFP to draw inferences from watching videos and a photograph of a pledge of allegiance to ISIS. In his record of interview, Mr Causevic had said he did not think ISIS was doing the right thing and that he wouldn't swear allegiance to ISIS.

33. The rules with respect to drawing inferences in civil cases only require the inference to be available on the balance of probabilities. As will be seen from the examples cited above, this case depended upon inferences. Even on the civil standard, the court was not prepared to draw those inferences on the critical factual disputes of the case. However, given what is at stake and the highly charged atmosphere surrounding such allegations, the criminal rule for drawing inferences should be applied.

Predicting Future Dangerousness

34. The other major defect in the prosecution case was the failure by the AFP to provide expert evidence or to have updated its assessment of Mr Causevic's 'dangerousness' by reference to the time of his arrest or the nine months which had elapsed between his release from prison and the date of the hearing. The AFP relied on Mr Gaughan's affidavit and his oral evidence.

35. Mr Gaughan himself had no qualifications in psychology or the prediction of future dangerousness. He accepted that he had had only two and a half years in the counter terrorism area and that he had no direct personal knowledge of Mr Causevic.

36. Mr Gaughan admitted in evidence that he had not sought to inform himself by way of reports from either the psychologist or the Imam or from any other source about Mr Causevic's current intentions or state of mind.

37. The prosecution did not call either the Imam or the psychologist, despite the fact that the conditions of the control order required week about counselling from an AFP approved psychologist and an AFP approved Imam. Both the psychologist and the Imam were called to give evidence by the defence. The psychologist, in particular, was subjected to hostile cross-examination by senior counsel for the AFP.

38. The psychologist reported on Mr Causevic's enthusiastic adoption of the counselling process and the fact that he had not missed a single appointment and wished to continue with the appointments because he felt that it was significantly helping him. The Imam reported a similar preparedness to actively participate in the sessions with him. The Imam said that he thought it was important that Mr Causevic learned about Islam through him rather than through the internet. At the time of writing, Mr Causevic continues to engage voluntarily in counselling through the Islamic Council of Victoria.

The Raid

39. At numerous points during the surveillance of Mr Causevic immediately before his arrest, police had the opportunity to arrest him in circumstances where he was alone and clearly unarmed. One of those included surveillance outside the Dandenong mosque shortly after the time when he was alleged to have conducted surveillance at the Dandenong RSL.

40. Similarly, the AFP had Mr Causevic under surveillance in a shopping centre at the Dandenong RSL, and at a later time when he bought the AK 47 knife from an acquaintance.

41. Ultimately, a day or so later, Mr Causevic was arrested in the course of a dawn raid at his home where the police threw a stun grenade through the front window of the parent's bedroom. Mr Causevic senior and his wife woke up with a masked officers holding a gun at Mr Causevic's head, and bursting into the bedroom of his twenty-two year old sister and thirteen year old brother as well as into Mr Causevic's bedroom itself. It is hard to understand the justification for the risks associated with this sort of a raid – both to the Causevic family and the police themselves - given that they had him under such direct surveillance over an extended period.

Conclusion

42. By the date of the decision, the control order had about two months to run. The judge ordered that the ankle bracelet be removed immediately and deleted the conditions relating to the Shrine of Remembrance and the Dandenong mosque. The other conditions and the Control order itself left in place but Mr Causevic had already indicated that he wished to continue with the counselling sessions. In truth, there did not appear to be a basis for continuing with the control order, but the client had no appetite to appeal.

43. We had instructions not to apply for costs. Given it was a civil proceeding, costs were an issue. The judge indicated that she thought that costs were not appropriate in this jurisdiction. VLA did not support an application for costs. There was no application for costs on either side.

44. There was no application to renew the control order when it expired on 10 September 2016.

Dr David Neal, SC, 26 April 2017