Secretary of State for the Home Department v AF: *a lesson for Australia*

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Abstract

This article examines the control order schemes in the United Kingdom ('the UK') and Australia. It analyses *Secretary of State for the Home Department v AF (No 3)* ('*SSHD v AF (No 3)*'),[1] in which the House of Lords considered whether the control orders made against certain persons had been issued in ways consistent with their rights to fair hearings as provided by art 6(1) of the *European Convention on Human Rights* ('*ECHR*').[2] The article then outlines Australia's control order scheme and assesses it against Australia's obligations under art 14 of the *International Covenant on Civil and Political Rights* ('*ICCPR*').[3] The article argues that there is the potential for a person's right to a fair hearing under art 14 of the *ICCPR* to be contravened when a control order is made against him or her. It concludes that a person who believes his or her right has been so contravened can do little domestically to enforce it, in contrast to a person who is the subject of a UK control order.

I Introduction

The question of how to appropriately address the threat of terrorism has long vexed the governments of many countries. In the wake of September 11 and the London bombings in 2005, several countries, including the UK and Australia, enacted a raft of measures (including control order schemes), in an effort to address the perceived increase in the threat of terrorism. Much has been written in Australia on the nature of these measures, particularly the terrorism offences,[4] but little has been written on the procedure prescribed for issuing control orders. This possibly reflects the few control orders that have been issued in Australia.[5]

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1 *Secretary of State for the Home Department v AF (No 3)* [2009] 3 WLR 74.

2 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

3 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). It entered into force for Australia on 13 November 1980: see *ICCPR* [1980] ATS 23.

4 See, eg, Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (University of New South Wales Press, 2006).

5 See *Jabbour v Thomas* (2006) 165 A Crim R 32; *Jabbour v Hicks* (2007) 183 A Crim R 297; *Jabbour v Hicks* [2008] FMCA 178 (19 February 2008).

In contrast, at the time of writing this article, more than 38 control orders have been made under the UK control order scheme[6], and the procedure by which control orders are made has been the subject of a large volume of litigation.[7] One of the most important decisions on control orders is the House of Lords' decision in *SSHD v AF (No 3)*. At issue in *SSHD v AF (No 3)* was whether the procedure that led to the making of control orders against certain persons satisfied their rights to fair hearings as provided by art 6(1) of the *ECHR*.[8] It is timely to consider this case, and what it might tell us about Australia's control order system, given that the Council of Australian Governments is scheduled to review Australia's control order system in the near future.[9]

Part I of this article outlines the UK control order scheme and Part II discusses the background to *SSHD v AF (No 3)*. Part III analyses the judgment of Lord Phillips in *SSHD v AF (No 3)* with whom all members of the House of Lords agreed. Part IV outlines Australia's control order scheme and assesses the procedure for confirming an interim control order against Australia's obligations under art 14 of the *ICCPR*.[10] The article argues that the procedure for confirming an interim control order has the potential to breach a person's right to a fair hearing under art 14 of the *ICCPR*. It concludes that there is little the subject of an Australian control order can do domestically to enforce his or her right to a fair hearing, which differs significantly from the position of a person who is the subject of a control order in the UK.

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6 *SSHD v AF (No 3)* [2009] 3 WLR 74, 81 [6] (Lord Phillips). One reason for the difference between the numbers of control orders issued in the UK compared to Australia is that the UK, unlike Australia, does not have effective legislation for prosecuting those who take actions in preparation of a terrorist act: see, eg, Lynch and Williams, above n 4, 57.

7 See, eg, *Secretary of State for the Home Department v JJ* [2008] AC 385; *Secretary of State for the Home Department v E* [2008] AC 499.

8 Article 6(1) is as follows:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

9 Bronwen Jaggers, 'Anti-Terrorism Control Orders in Australia and the United Kingdom: A Comparison' (Research Paper No 28, Parliamentary Library, Parliament of Australia, 2008) 6.

10 Article 14(1) provides:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

II Control orders in the UK

In the UK, control orders are made pursuant to the *Prevention of Terrorism Act 2005* (UK) ('*PT Act*').[11] In the ordinary course, the Secretary of State for the Home Department ('the Secretary') will apply to the High Court of England and Wales for permission to make a control order against an individual ('the controlee') in circumstances where he or she has reasonable grounds for suspecting the controlee is or has been involved in terrorism-related activity, and considers the control order necessary for protecting the public.[12] The court must consider whether the Secretary's decision that there are reasonable grounds to make the order is 'obviously flawed'.[13] If the court finds that the Secretary's decision is not 'obviously flawed', it may permit the Secretary to make the order.[14]

The court may make its determination in the absence of the controlee.[15] If the court permits the Secretary to make the control order, it must then give directions for a hearing in relation to the order ('a s 3(10) hearing') as soon as reasonably practicable.[16] The directions must include arrangements that enable the controlee to make representations in relation to the directions already made and any directions that might be made in the future.[17]

At the s 3(10) hearing, the court must consider whether the Secretary's decision that there were grounds to make the control order was 'obviously flawed'.[18] A court may exclude the controlee and his or her legal representative from the hearing or part of the hearing in order to ensure that no information is disclosed contrary to the public interest.[19] The Secretary must apply to the court for permission to withhold closed material from the controlee or his or her legal representatives, and may not rely on closed material unless a special advocate has been appointed to represent the interests of the controlee.[20] The closed material must be filed with the court and served on the special advocate[21] together with a statement of reasons for withholding that material from the controlee.[22] If possible, the Secretary should also serve the controlee with a summary of the closed material in a form that does not disclose information contrary to the public interest.[23] The special advocate may communicate with the controlee before he or she receives the

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11 This article will only consider non-derogating control orders. At the time of writing, no derogating control orders had been made in the UK.

12 *PT Act* ss 2(1), 3(1)(a), 15(1)(c).

13 Ibid s 3(2)(a).

14 Ibid s 3(2)(b).

15 Ibid s 3(5).

16 Ibid s 3(2)(c).

17 Ibid s 3(7).

18 Ibid s 3(10).

19 *Civil Procedure Rules* (UK) ('*CP Rules*') r 76.22(1). Rule 76.1(4) adopts a broad approach of what 'disclosure contrary to the public interest' means. It states: 'disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.'

20 Ibid rr 76.23, 76.28(1).

21 Ibid r 76.28(2)(a).

22 Ibid r 76.28(2)(b).

23 Ibid r 76.28(2)(c).

closed material,[24] but may not communicate with the controlee about any matter connected with the s 3(10) hearing after viewing the closed material[25] unless he or she receives the court's permission to do so.[26]

If the court considers that any of the Secretary's decisions relating to the order were 'flawed', it may quash the control order,[27] quash one or more of the obligations imposed by the control order,[28] or direct the Secretary to revoke the control order or modify its obligations.[29] If, however, the court does not find that any of the Secretary's decisions were 'flawed', it must order that the control order remain in force.[30]

III Background to *SSHD v AF (No 3)*

A *The appellants' cases at first instance*

The appellants, AN, AF and AE, were each subject to control orders and were each suspected of having links with Islamist extremists.[31] The appellants' relevant hearings were each presided over by different judges.

In AN's case, Mitting J was satisfied, on the basis of the closed material, that there were reasonable grounds for suspecting that AN had been involved in terrorism-related activity.[32] Nevertheless, his Lordship held that AN had not been informed of the gist of the allegations against him and had therefore been unable to instruct his special advocates with respect to those allegations.[33] He ordered the Secretary to disclose the material he had identified in his closed judgment as necessary to disclose to the controlee or cease to rely upon it.[34] His Lordship felt compelled to reach this conclusion following the House of Lords' decision in *Secretary of State for the Home Department v MB* ('*SSHD v MB*').[35] His Lordship understood *SSHD v MB* to have established both a minimum standard of disclosure necessary to ensure a controlee receives a fair s 3(10) hearing and a 'makes no difference' principle. He summarised the principles established in *SSHD v MB* in the following way:

> unless at a minimum, the special advocates are able to challenge the [Secretary's] grounds for suspicion on the basis of instructions from the

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24 Ibid r 76.25(1).
25 Ibid rr 76.25(2), (3)(d).
26 Ibid r 76.25(4),(5).
27 *PT Act* s 3(12)(a).
28 Ibid s 3(12)(b).
29 Ibid s 3(12)(c).
30 Ibid s 3(13).
31 *Secretary of State for the Home Department v AF* [2008] EWHC 453 (Admin) (10 March 2008); *Secretary of State for Home Department v AE* [2008] EWHC 132 (Admin) (1 February 2008); *Secretary of State for the Home Department v AN* [2008] EWHC 372 (Admin) (29 February 2008).
32 *Secretary of State for the Home Department v AN* [2008] EWHC 372 (Admin) (29 February 2008) [10].
33 Ibid.
34 Ibid.
35 [2008] 1 AC 440.

> [controlee] which directly address their essential features, the [controlee] will not receive the fair hearing to which [he or she] is entitled [under art 6 of the *ECHR*] except, perhaps, in those cases in which [he or she] has no conceivable answer to them.[36]

In AF's case, Stanley Burnton J held that the limited information the Secretary had provided AF meant that he had been unable to instruct his special advocates so as to enable them to challenge the allegations made against him.[37] His Lordship found, however, that there was one aspect of the case against AF on which he was 'quite sure that in any event no possible challenge could conceivably have succeeded'.[38] In a separate hearing, his Lordship accepted Mitting J's interpretation of *SSHD v MB* in AN's case, but respectfully disagreed with Mitting J as to whether the House of Lords had recognised a 'makes no difference principle'.[39] Accordingly, his Honour held that even though the cogency of the evidence withheld from AF was such that AF would be unable to challenge it effectively, AF's right to a fair hearing had been contravened and the control order against him could not stand.[40]

Justice Silber heard AE's case and ordered that AE's control order should continue in force.[41] His Lordship held that even though AE had only been made aware of the allegations against him in very general terms, the role played by AE's special advocate in the closed hearings had ensured that AE had not suffered any serious injustice.[42]

B *The appeals to the Court of Appeal*

AE appealed Silber J's order and the Secretary appealed the orders made in the cases of AN and AE. The Court of Appeal heard the appeals together.[43] A majority (Sir Anthony Clarke MR and Waller LJ, Sedley LJ dissenting) dismissed AE's appeal but allowed the Secretary's appeals.[44] In a joint judgment, Sir Anthony Clarke MR and Waller LJ held that Mitting and Stanley Burnton JJ had misunderstood the approach endorsed by the majority in *SSHD v MB*.[45] Their

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36 *Secretary of State for the Home Department v AN* [2008] EWHC 372 (Admin) (29 February 2008) [9].

37 *Secretary of State for the Home Department v AF* [2008] EWHC 453 (Admin) (10 March 2008) [42]. Stanley Burnton J heard AF's case upon remitter following AF's successful appeal as one of the parties in *SSHD v MB* [2008] 1 AC 440.

38 *Secretary of State for the Home Department v AF* [2008] EWHC 453 (Admin) (10 March 2008) [48].

39 *Secretary of State for the Home Department v AF* [2008] 4 All ER 340, 349 [32].

40 Ibid 349-350, [32]–[34].

41 *Secretary of State for Home Department v AE* [2008] EWHC 132 (Admin) (1 February 2008) [40].

42 Ibid.

43 There was a fourth appellant in the case heard by the Court of Appeal. The Secretary appealed against a decision of Sullivan J quashing a control order made against AM. It is not possible to discuss AM's case in this article because the Court delivered a closed judgment in relation to AM.

44 *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269.The majority also dismissed the Secretary's appeal against the orders in AM's case. Sedley LJ dissented on the ground that the majority in *SSHD v MB* had not in fact determined the question of whether a controlee should have the case against him or her disclosed to him or her and given the opportunity to answer it: 468 [111]–[112].

45 *Secretary of State for the Home Department v AF (No 3)* [2009] 2 WLR 423, 460-64 [81]-[94] (Sir Anthony Clarke MR and Waller LJ).

Lordships stated that *SSHD v MB* had established that the correct approach to determining whether a controlee's rights under art 6 of the *ECHR* had been infringed was whether, taken as a whole, his or her s 3(10) hearing had been 'fundamentally unfair' in that he or she had not been 'accorded a substantial measure of procedural fairness'.[46] They also rejected Mitting J's understanding that *SSHD v MB* had established a 'makes no difference principle'.[47]

Their Lordships allowed AN, AF and AE to appeal to the House of Lords. They accepted that there was room for debate as to whether they had correctly understood *SSHD v MB* and considered that the question as to the material that a controlee must receive was one of public importance.[48]

IV The decision of the House of Lords

The issue before the House of Lords was whether the control order proceedings in relation to AN, AF and AE, had satisfied their rights to fair hearings as provided by art 6(1) of the *ECHR*.[49] Lord Phillips, who delivered the lead judgment, acknowledged that in the time since the appellants had been granted leave to appeal, the debate regarding the correct interpretation of *SSHD v MB* had become one of academic interest only.[50] His Lordship considered that the decision of the Grand Chamber of the European Court of Human Rights ('Grand Chamber') in *A v United Kingdom* (*'A v UK'*),[51] delivered a little over a week before the hearing in *SSHD v AF (No 3)*, provided a 'definite resolution' to the critical questions on appeal.[52]

A A v UK *and its application to control orders*

In line with the requirement laid down in s 2(1)(a) of the *Human Rights Act 1998* (UK) ('*HR Act*') that 'a court … determining a question which has arisen in connection with a Convention right must take into account any judgment … of the European Court of Human Rights', Lord Phillips analysed *A v UK* in some detail. The issue before the Grand Chamber in *A v UK* was whether the relevant hearings of the 11 detainees, who were non-citizen terrorist suspects detained under the *Anti-Terrorism, Crime and Security Act 2001* (UK), had complied with the standard of fairness set out in art 5 of the *ECHR*.[53] The relevant hearings under the *Anti-*

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46 Ibid 455 [64].
47 Ibid 449 [48], 452 [55].
48 Ibid 466–7 [105].
49 *SSHD v AF (No 3)* [2009] 3 WLR 74, 80 [1].
50 Ibid 92 [38].
51 (2009) 49 EHRR 29.
52 *SSHD v AF (No 3)* [2009] 3 WLR 74, 95 [50].
53 See especially *A v UK* (2009) 49 EHRR 29, 704–12 [162]–[190]. Article 5 is as follows:

> (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a

Terrorism, Crime and Security Act 2001 (UK) shared a number of features with the hearing procedures prescribed under the *PT Act*, including the withholding of information from a detainee on the grounds of national security and the provision of a special advocate to the detainee.[54] In view of the 'dramatic impact' that the lengthy detention had had on the detainees, the Grand Chamber reasoned that art 5(4) of the *ECHR* imported 'the same fair trial guarantees as art 6(1) of the *ECHR* in its criminal aspect'.[55] It made a number of statements as to what must be disclosed to a detainee to satisfy the requirements of art 5(4).[56] Perhaps most importantly, it held that the procedural requirements of art 5(4) will be contravened where the material disclosed to a detainee consists 'purely of general assertions' and the relevant court's decision to maintain the detainee's detention is 'based solely or to a decisive degree on closed material'.[57]

Lord Phillips applied the Grand Chamber's jurisprudence to the *PT Act*. His Lordship rejected the Secretary's submission that a less stringent standard of fairness than the one established in *A v UK* was applicable to control orders where the relevant proceedings were subject to art 6 in its civil aspect.[58] His Lordship considered that the Grand Chamber would not endorse such a distinction and that the potentially severe restrictions a control order might impose upon a controlee's liberty demanded that the same standard of fairness that applies to criminal proceedings apply to control order proceedings.[59]

> court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him. (3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

[54] This is because the *PT Act* essentially replaced the *Anti-Terrorism, Crime and Security Act 2001* (UK) after the Grand Chamber in *A v K* (2009) 49 EHRR 29 found that a number of the procedures in the Act were incompatible with art 5 of the *ECHR*. See also Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, House of Lords Paper No 64, House of Commons Paper No 394, Session 2009-10 (2010) 8 [16].

[55] *A v UK* (2009) 49 EHRR 29, 719–20 [217], cited in *SSHD v AF (No 3)* [2009] 3 WLR 74, 95 [51].

[56] *A v UK* (2009) 49 EHRR 29, 720–1 [220], cited in *SSHD v AF (No 3)* [2009] 3 WLR 74, 96 [51].

[57] *A v UK* (2009) 49 EHRR 29, 720–1 [220], cited in *SSHD v AF (No 3)* [2009] 3 WLR 74, 96 [51].

[58] *SSHD v AF (No 3)* [2009] 3 WLR 74, 98 [57].

[59] Ibid.

Applying *A v UK*, Lord Phillips concluded that a controlee must receive sufficient information about the allegations against him or her to allow him or her to provide effective instructions to his or her special advocate in relation to those allegations.[60] The controlee, however, will not have received a fair hearing where the open material is comprised of general assertions only and the case against the controlee is found 'solely or to a decisive degree in the closed materials'.[61] His Lordship emphasised that this will be the case regardless of the cogency of the case against the controlee in the closed materials.[62] In so emphasising, his Lordship effectively put to rest the debate about the existence (or otherwise) of a 'makes no difference principle'.[63]

B Qualification

The only qualification Lord Phillips held the Grand Chamber in *A v UK* recognised is that where the interests of national security are concerned, it may be acceptable not to disclose to the controlee the source of the evidence that gives rise to suspicions that he or she has engaged in terrorism-related activities.[64] Accordingly, provided that the controlee is able to give effective instructions to his or her legal representatives and/or special advocates, the controlee will have received a fair hearing notwithstanding that he or she was 'not provided with the details or the sources of evidence forming the basis of the allegations.'[65]

His Lordship did not, however, consider whether a distinction between the allegations and the evidence relied on to support those allegations was capable of being made in practice. In a case decided shortly after *SSHD v AF (No 3)*, Collins J expressed concern that the distinction may not always be easy to apply because what amounts to an allegation and what amounts to evidence to support an allegation may depend upon the nature and width of the allegation.[66]

C *Conclusion: reading down the* PT Act

Lord Phillips allowed the appeals. His Lordship concluded that there was 'good reason' to hold that the *PT Act* should be read down and given effect 'except where to do so would be incompatible with the right of the [controlee] to a fair trial'.[67] His Lordship explained that as a result, a judge presiding over a s 3(10) hearing will have to consider the allegations that need to be disclosed in order to meet the

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60 Ibid 98–9 [59].
61 Ibid.
62 Ibid.
63 This author submits that Lord Phillips would have endorsed the 'makes no difference' principle had he not been bound by *A v UK*: see *SSHD v AF (No 3)* [2009] 3 WLR 74, 99 [62]. But see Martin Chamberlain, 'Update on Procedural Fairness in Closed Proceedings' (2009) 28 *Civil Justice Quarterly* 448, 450.
64 *SSHD v AF (No 3)* [2009] 3 WLR 74, 100–1 [66].
65 Ibid 98–9 [59].
66 *SSHD v AS* [2009] EWHC 2564 (Admin) (21 October 2009) [8].
67 *SSHD v AF (No 3)* [2009] 3 WLR 74, 101 [67]–[69]. See s 3(1) of the *HR Act*, which provides that, so far as possible, legislation 'must be read and given effect in a way which is compatible with the [*ECHR*] rights'.

requirements established in *A v UK,* together with any other matter the disclosure of which is indispensable to the fairness of the hearing.[68] In this author's view, this formulation of a 'fair hearing' is more prescriptive than the formulations in *SSHD v MB*, particularly as it does not allow a court to look at the proceedings overall and conclude that they were still fair despite key allegations being withheld from the controlee.

V Australia's control order regime

A *Overview of Australia's control order regime*

Australia's control order scheme is set out in div 104 of the schedule to the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') and is modelled on the control order scheme in the UK.[69] It broadly consists of two stages: the making of an interim order and the confirmation of that order.

1 *Interim control orders*

Division 104 provides that a senior Australian Federal Police ('AFP') member can, with the Attorney-General's consent, apply to the Federal Court, the Federal Magistrates Court or the Family Court for an interim control order against a person ('the controlee').[70] The court can hear the application ('the interim hearing') in the controlee's absence.[71] Section 104.4(1) provides that the court may issue the interim control order if it is satisfied on the balance of probabilities '(i) that making the order would substantially assist in preventing a terrorist act, or (ii) that the [controlee] has provided training to, or received training from, a listed terrorist organisation'.[72]

The order may impose obligations, prohibitions and restrictions on the controlee, such as a prohibition from being in specified areas[73] and/or a restriction on communicating with specified individuals.[74] Whatever obligations, prohibitions and restrictions the senior AFP member seeks to impose, the court must be satisfied on the balance of probabilities that each of them is 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.'[75]

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68 *SSHD v AF (No 3)* [2009] 3 WLR 74, 101 [68].

69 See, eg, Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) 10–11 [2.31].

70 *Criminal Code* ss 100.1(1), 104.2, 104.3, 104.4.

71 The interim control order hearing was heard in the absence of the controlee in *Jabbour v Thomas* (2006) 165 A Crim R 32. Division 104, however, does not mandate that the hearing must be in the controlee's absence: see *Jabbour v Hicks* (2007) 183 A Crim R 297, 298 [3], in which the controlee's legal representatives attended the interim control order hearing having received notice of the hearing from the senior AFP member.

72 *Criminal Code* s 104.4(1)(c).

73 Ibid s 104.5(3)(a).

74 Ibid s 104.5(3)(e).

75 Ibid s 104.4(1)(d).

The interim control order must specify a date on which the controlee may attend court for the court to confirm the order.[76] The date must be as soon as practicable but at least 72 hours after the order is made.[77] The controlee must receive the order at least 48 hours before the date specified in the order.[78]

2 *Information the controlee will receive before the confirmation hearing*

After an interim order has been made, the senior AFP member must decide whether to seek confirmation of the order or allow it to expire.[79] If the senior AFP member elects to confirm the interim order he or she must serve a number of documents on the controlee.[80] These include the 'statement of the facts relating to why the order should be made'[81] and the 'explanation as to why each of the obligations, prohibitions and restrictions should be imposed' which the senior AFP member gave the court at the interim hearing.[82] The senior AFP member must also serve the controlee with 'any other details required to enable the [controlee] to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order'.[83] However, s 104.12A(3) provides that the senior AFP member is not required to disclose information if its disclosure 'is likely to prejudice national security, be protected by public interest immunity, put at risk ongoing operations by law enforcement agencies or intelligence agencies, or put at risk the safety of the community, law enforcement officers or intelligence officers'.

3 *The confirmation hearing*

At the confirmation hearing, the court must consider whether it is, once again, satisfied of the grounds set out in s 104.4(1). Evidence may be adduced by the senior AFP member who requested the interim control order, other AFP members, the controlee and representatives of the controlee.[84] If the court holds that at the time of making the interim order there were not any grounds on which to make the order, then it may declare the order void.[85] Otherwise, the court may confirm the order,[86] confirm the order but vary one or more of its terms[87] or revoke the order.[88]

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76 Ibid s 104.5(1)(e).

77 Ibid s 104.5(1A). See *Jabbour v Hicks* [2008] FMCA 178 (19 February 2008) [4], in which the confirmation hearing was held two months after the interim control order hearing to enable the controlee sufficient time to provide his representatives with proper instructions.

78 *Criminal Code* s 104.12(1).

79 Ibid s 104.12A(1).

80 Ibid s 104.12A(2)(a).

81 Ibid s 104.2(3)(b)(i).

82 Ibid s 104.2(3)(c)(i).

83 Ibid s 101.12A(2)(a)(iii).

84 Ibid s 104.14(1).

85 Ibid s 104.14(6).

86 Ibid s 104.14(7)(c).

87 Ibid s 104.14(7)(b). Subdivision F of div 104 sets out procedures for how an obligation, prohibition or restriction may be added or varied.

88 Ibid s 104.14(7)(a).

B *The possibility of non-disclosure*

Depending upon the circumstances of the case, div 104 may allow a senior AFP member to withhold a substantial amount of information from the controlee. Division 104 does this in a number of ways.

First, s 104.12A(3) establishes broad grounds within which information may be withheld from the controlee before the confirmation hearing. For example, s 104.12A(3) permits the senior AFP member to withhold information if its disclosure is 'likely to prejudice national security'. The term 'likely to prejudice national security' is defined with reference to s 17 of the *National Security and Information (Criminal and Civil Proceedings) Act 2004* (Cth) ('*NSI Act*'). Section 17 provides that 'a disclosure of national security information is likely to prejudice national security if there is a real, and not a remote, possibility that the disclosure will prejudice national security.' In this author's view, the requirement that there need only be a 'real … *possibility* that the disclosure will prejudice national security' sets a low threshold for withholding information from the controlee.[89]

Secondly, div 104 effectively provides a senior AFP member with an unfettered discretion as to whether information comes within one of the grounds in s 104.12A(3). The discretion is unfettered because div 104 does not provide a procedure for appealing against a decision that information should be withheld.[90] Further, the senior AFP member's discretion will be exercised in a context in which he or she is likely to err on the side of non-disclosure.[91] A court may have little choice other than to accept the senior AFP member's classification of particular information,[92] especially in the absence of a real contest to that classification.[93] Accordingly, a senior AFP member may withhold a substantial amount of information from the controlee. Although a senior AFP member may nonetheless be willing to provide the controlee with a sufficient amount of information,[94] he or she cannot be forced to do so.

Thirdly, when a court is deciding whether to confirm an interim order, div 104 may operate to allow the court to rely upon a large amount of information to which the controlee does not have access. This is because a court must consider the original request for the interim order before making an order to confirm, vary or revoke that order.[95] The original request may include a great deal of information, especially since

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89 See also Jaggers, above n 9.

90 It does not appear that div 104 allows the controlee to challenge a decision of a senior AFP member. Even if a controlee can bring such a challenge, he or she is likely to face a number of difficulties, including finding an expert to challenge the senior AFP member's assessment of the evidence as likely to prejudice national security if disclosed. See also the Senate Legal and Constitutional Legislation Committee, above n 69, 68 [4.43].

91 See, eg, *SSHD v MB* [2008] AC 440, 488–9 [66] (Baroness Hale); Australian Law Reform Commission, *Keeping Secrets*, Report No 98 (2004) 379.

92 See, eg, *Thomas v Mowbray* (2007) 233 CLR 307, 476–8 [511]–[512] (Hayne J).

93 See, eg, Martin Chamberlain, 'Special Advocates and procedural fairness in closed hearings' (2009) 28 *Civil Justice Quarterly* 314, 320.

94 As occurred in *Jabbour v Hicks* [2008] FMCA 178 (19 February 2008). See also the concern of the Special Rapporteur that there was limited evidence upon which the interim control order was made against the controlee in *Jabbour v Thomas* (2006) 165 A Crim R 32: Martin Scheinin, Special Rapporteur, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (14 December 2006) 15 [38].

95 *Criminal Code* s 104.14(3)(a).

a court that considers a request has the power to seek any information it may require.[96] There is, however, no provision in div 104 to enable the controlee to gain access to the original request. Under s 104.12A, the senior AFP member only has to provide the controlee with some of the documents that were included in the original request,[97] and even those documents may potentially be withheld because they come within the grounds in s 104.12A(3). Further, div 104 allows the original request to be made ex parte and does not require the court to give reasons for making the interim order (other than setting out a summary of the grounds on which the order is made).[98] It is therefore possible that a controlee will not have access to some of the information which the senior AFP member will use when persuading the court to confirm his or her control order.[99]

Fourthly, div 104 does not set out what, if anything, a controlee is entitled to when information is withheld from him or her pursuant to div 104. It does not, for example, provide that the senior AFP member must give the controlee a redacted summary of the allegations and evidence against him or her. Nor does it make provision for a scheme similar to the special advocate scheme in the UK as outlined in Part II of this article.

C *The* NSI Act

It is possible that the Attorney-General may give notice that pt 3A of the *NSI Act* applies to an interim hearing or confirmation hearing.[100] Part 3A requires the court to follow a number of complex procedures to determine whether particular information should or should not be disclosed. It suffices for present purposes to note that the court has the discretion under the *NSI Act* to make a range of orders relating to the disclosure of information that might appear in a document or might be made during the testimony of a witness that may affect national security.[101]

It is beyond the scope of this article to consider how the *NSI Act* might interact with div 104 of the *Criminal Code* and whether it may result in an increase or decrease in the amount of information that the senior AFP member must disclose to the controlee.[102] The remainder of this article will focus on div 104 of the

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96 Ibid s 104.4(1)(c).

97 These are: a statement of the facts relating to why the order should be made (s 104.2(3)(b)); and an explanation as to why each of the obligations, prohibitions and restrictions should be imposed on the person (s 104.2(3)(c)): s 104.12A(2)(a)(ii). See also s 104.12A(2)(a)(iii).

98 Ibid s 104.5(1)(h). See also s 104.5(2A), which provides that s 104.5(1)(h) does not require any information to be included in the summary if its disclosure is likely to prejudice national security (within the meaning of the *NSI Act*). See also Senate Legal and Constitutional Legislation Committee, above n 69, 68 [4.43], noting the concerns in some submissions that div 104 does not provide guidance on what must be included in this summary.

99 This concern was raised in submissions to the Senate Legal and Constitutional Legislation Committee, above n 69, 61–2 [4.18], 65 [4.31], but does not appear to have been addressed by the Federal Government in its amendments to the Anti-Terrorism Bill (No 2) 2005 (Cth) following the release of the Committee's report.

100 *NSI Act* s 6A.

101 Ibid ss 38D(1)(b), 38L.

102 There is nothing in the Explanatory Memorandum to the National Security Information Legislation Amendment Bill 2005 (Cth) or in the Hon Robert McClelland, *National Security Information (Criminal and Civil Proceedings) Act 2004: Practitioners' Guide* (2008) to provide guidance on

Criminal Code, although this author anticipates that many of the issues raised in regards to div 104 would apply to a similar analysis of the *NSI Act*. This limited focus is justified given that the application of the *NSI Act* to particular proceedings is not mandated but within the Attorney-General's discretion.[103] At the time of writing this article, the Attorney-General had not given notice to a court that the *NSI Act* regulated an interim control order hearing or a confirmation hearing.[104]

D *Inconsistency between Australia's control order regime and international law*

In the circumstances of a particular case, a controlee's right to a fair hearing under art 14 of the *ICCPR* may be contravened. Due to the limited scope of this article, what follows is an outline of what this author views as the strongest grounds for arguing that art 14 may be contravened during a confirmation hearing.

Article 14(1) is engaged 'whenever domestic law entrusts a judicial body with a judicial task'.[105] The majority's finding in *Thomas v Mowbray* that a court exercises judicial power when it issues a control order[106]means that the guarantees in art 14(1) apply to control order proceedings. A controlee's right to a fair hearing might not be contravened if the controlee is provided with a summary of the information withheld from him or her for security reasons and the court takes steps to ensure that the controlee is aware of, and able to respond to, the case against him or her.[107]

Where, however, the controlee does not receive such a summary and is instead presented with mere assertions of facts, the controlee's right to a fair hearing might, depending upon the circumstances, be breached. The limited provision of information would offend the principle of 'equality of arms between the parties' encompassed within the meaning of a 'fair hearing' in art 14[108] because

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this issue. Nor are there any cases or commentaries on this issue. The commentaries on pt 3 of the *NSI* Act, which applies to federal criminal proceedings, do not assist in this regard: see, eg, Phillip Boulten, 'Preserving National Security in the Courtroom: a New Battleground' in Andrew Lynch, George Williams and Edwina MacDonald (eds) *Law and Liberty in the War on Terror* (Federation Press, 2007) 96; Stephen Donaghue, 'Reconciling Security and the Right to a Fair Trial: the National Security Information Act in Practice' in Andrew Lynch, George Williams and Edwina MacDonald (eds) *Law and Liberty in the War on Terror* (Federation Press, 2007) 87.

103 *NSI Act* s 6A.

104 Further, this author's attempt to explore the possible interaction between the *NSI Act* and div 104 produced a lengthy analysis that is well beyond the scope of this article.

105 Human Rights Committee, *General Comment No 32: Article 14 Right to Equality Before Courts and Tribunals and to a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) 1 [7].

106 *Thomas v Mowbray* (2007) 233 CLR 307, 335 [30] (Gleeson CJ), 351–3 [94]–[103] (Gummow and Crennan JJ), 508–9 [599] (Callinan J), 526 [651] (Heydon J). An alternative argument is that art 14(1) is engaged because the obligations, prohibitions and restrictions that may be imposed on an individual by a control order may infringe the rights of individuals protected by international law ratified by and binding on Australia: see Kirby J at 440 [379].

107 Human Rights Committee, *Views: Communication No 1051/2002*, 80th sess, UN Doc CCPR/C/80/D/1051/2002 (29 March 2004), in *Selected Decisions of the Human Rights Committee under the Optional Protocol: Volume 8*, UN Doc CCPR/C/OP/8 [10.5]; General Assembly, *Report of the Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, 63rd sess, UN Doc A/63/223 (6 August 2008) 22 [45].

108 See Human Rights Committee, *Views: Communication No 207/1986,* 36th sess, UN Doc A/44/40 (28 July 1989), in *Selected Decisions of the Human Rights Committee under the Optional Protocol:*

it would not give the controlee 'the opportunity to contest all the arguments and evidence adduced by the other party'.[109] The fact that the senior AFP member or the court might form the opinion that the controlee would not have been able to challenge the allegations even if informed of them is irrelevant. This is because a country will be in breach of art 14(1) even if its court forms the opinion that it is 'manifestly unnecessary to invite a response from the [non-government] party'.[110]

Further, it is strongly arguable that a confirmation hearing should be regarded as criminal proceedings within the meaning of art 14(3) of the *ICCPR*.[111] Whether control order hearings, specifically s 3(10) hearings, should be categorised as criminal proceedings has received some consideration in the UK where controlees and commentators have argued that they should.[112] In *SSHD v AF (No 3)*, for example, Lord Phillips stated that '[the] requirements of a fair trial depend, to some extent, on what is at stake in the trial', and held that control order proceedings in the UK should apply the same stringent standard of fairness that criminal proceedings apply.[113] This author submits that the House of Lords' jurisprudence with respect to a fair trial can inform the meaning of a fair hearing under art 14 of the *ICCPR*.[114] Accordingly, the severe consequences that may follow from the imposition of an Australian control order, such as a restriction on

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Volume 3, UN Doc CCPR/C/OP/3 [9.3]; Human Rights Committee, *Views: Communication No 514/1992*, 53rd sess, UN Doc CCPR/C/53/D/514/1992 (4 April 1995) [8.4].

109 Human Rights Committee, *Views: Communication No 779/1997*, 73rd sess, UN Doc CCPR/C/73/D/779/1997 (24 October 2001), in *Selected Decisions of the Human Rights Committee under the Optional Protocol: Volume 7*, UN Doc CCPR/C/OP/7 [7.4].

110 Ibid. This interpretation is supported by the Grand Chamber's interpretation of art 6 of the *ECHR*, the *ECHR*'s equivalent of art 14 of the *ICCPR*: see General Assembly, above n 107, 6 [9]. The Grand Chamber has similarly held that a person's rights under art 6 of the *ECHR* will be breached where it is not possible for a person to adequately respond to the case against him or her because she or he has only been provided with highly generalised allegations and the only evidence against him or her is in the sole possession of the national authorities: see *CG v Bulgaria* (2008) 47 EHRR 51; *A v UK* (2009) 49 EHRR 29, 720–1 [220].

111 Article 14(3) is as follows:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.

112 See Ed Bates, 'Anti-Terrorism Control Orders: Liberty and Security Still in the Balance' (2009) 29 *Legal Studies* 99, 109; Senate Legal and Constitutional Legislation Committee, above n 69, 69–70 [4.49]–[4.51].

113 *SSHD v AF (No 3)* [2009] 3 WLR 74, 98 [57]. See also Senate Legal and Constitutional Legislation Committee, above n 69, 64–5 [4.26]–[4.31], 70 [4.51].

114 See, eg, *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 89–92 [140]–[152].

the controlee's freedom of movement,[115] demand that the guarantees in art 14(3) apply to Australian confirmation hearings.[116] Admittedly, this analysis is somewhat at odds with statements made in *Thomas v Mowbray* that control orders are not punitive in the criminal sense.[117] The statements in *Thomas v Mowbray*, however, do not provide a definitive answer to question of whether confirmation hearings should be categorised as criminal proceedings. This is because some of the judges in *Thomas v Mowbray* emphasised that their analysis was concerned with interim control orders only, and Kirby J wrote a strong dissent on the issue[118] that the other judges did not engage with.

Accepting that the protections in art 14(3) do apply, the protections could be contravened during a confirmation hearing. For example, a controlee's right to a fair hearing may be breached where he or she does not have adequate time to familiarise himself or herself with the documentary evidence against him or her.[119] Importantly, what is 'adequate time' will depend upon the circumstances of the individual case.[120] The requirement that a controlee must receive the interim order at least 48 hours before the date specified in the order[121] may mean that a controlee will receive little more than two days in which to prepare his or her case, which is unlikely to be enough time to prepare a response.[122]

As the above discussion illustrates, the procedures for confirming a control order may, in a particular case, breach Australia's obligations under art 14 of the *ICCPR*. Australia does not, however, have a Bill of Rights or a federal Human Rights Act to protect a person's art 14 rights. Moreover, in this author's view, s 104.12A is not ambiguous and implicitly overrides art 14. It is therefore unlikely that a court would accept a submission that s 104.12A should be interpreted, as far as its language allows, in a way compatible with art 14.[123] As a result, subject to what is discussed below, a controlee would appear to have no domestic remedy available to enforce his or her right to a fair hearing.

E *Possible protection afforded by the* Constitution

In the absence of a Bill of Rights or federal Human Rights Act, a controlee may turn to the *Constitution* in an effort to protect his or her right to a fair hearing. However, previous attempts to use the *Constitution* to protect human rights in

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115 See *Criminal Code* s 104.5(3).

116 See also Senate Legal and Constitutional Legislation Committee, above n 69, 64–5 [4.26]–[4.31], 70 [4.51].

117 *Thomas v Mowbray* (2007) 233 CLR 307, 330 [18] (Gleeson CJ), 356–7 [114]–[121] (Gummow and Crennan JJ), 526 [651] (Heydon J, expressing agreement with Gleeson CJ and Gummow and Crennan JJ).

118 Ibid 428–33 [345]–[361].

119 Article 14(3)(b). See, eg Human Rights Committee, *Views Communication No 451/1991*, 51st sess, UN Doc CCPR/C/51/D/451/1991 (15 July 1994) [9.5].

120 Human Rights Committee, above n 105, 10 [32].

121 *Criminal Code* s 104.12(1).

122 See Senate Legal and Constitutional Legislation Committee, above n 69, 66 [4.36], in which the Committee noted concerns in the submissions that the potential for a controlee to receive little prior notice of a confirmation hearing could mean that a controlee might not receive a fair hearing.

123 See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562, 577–8 [19]–[21] (Gleeson CJ). See, however, *Thomas v Mowbray* (2007) 233 CLR 307, 441 [381] (Kirby J).

Australia, including in the context of control orders, have met with limited success.[124]

In *Thomas v Mowbray*, the plaintiff unsuccessfully sought a declaration that div 104 was unconstitutional. One argument the plaintiff advanced was that div 104 was repugnant to the exercise of federal jurisdiction, in particular the 'due process' requirement (arguably) implied in ch III of the *Constitution*, because it authorised a court to disregard the requirements of procedural fairness. A majority of the High Court rejected this argument, although importantly, it also refused (or otherwise found it unnecessary) to consider the plaintiff's submission that s 104.12A(3) was constitutionally invalid.[125]

There are some judicial statements indicating that the question of whether non-disclosure of the allegations and evidence against a controlee is unconstitutional remains open and may be resolved in favour of a controlee. In their joint judgment, Gummow and Crennan JJ accepted that 'legislation which requires a court exercising federal jurisdiction to depart to a significant degree from the methods and standards which have characterised judicial activities in the past may be repugnant to ch III.'[126] Nonetheless, their Honours rejected the plaintiff's submission that div 104 was contrary to ch III by pointing to 'matters of legal history' that supported 'a notion of protection of public peace by preventative measures imposed by court order, but falling short of detention'.[127] Their Honours declined to make any conclusions as to the validity of s 104.12A(3) on the grounds that it had yet to be engaged in respect of the plaintiff. Their Honours also noted that s 104.12A(3) picked up definitions in the *NSI Act* and were reluctant to rule upon the validity of s 104.12A(3) and potentially embarrass the operation of the *NSI Act* without the benefit of submissions on the *NSI Act*.[128]

Moreover, Gleeson CJ held that the procedure for issuing interim control orders did not offend the exercise of judicial power since an interim control order would ordinarily be followed by a confirmation hearing, which would apply the ordinary rules of evidence and be held in open court.[129] His Honour did not, however, consider the effect that s 104.12A(3) might have on a particular case and emphasised that the Court was only concerned with 'a *general* challenge to the

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124 See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1; *Leeth v Commonwealth* (1992) 174 CLR 455; *Thomas v Mowbray* (2007) 233 CLR 307. But see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

125 *Thomas v Mowbray* (2007) 233 CLR 307, 335 [31] (Gleeson CJ), 355–8 [111]–[126] (Gummow and Crennan JJ). Callinan J (ibid 509 [600]) agreed with Gummow and Crennan JJ that the plaintiff's argument should be rejected and made additional comments similar to those Gleeson CJ made. Heydon J (526 [621]) agreed with the reasons given by Gleeson CJ (326-335 [10]-[31]), Gummow and Crennan JJ (344-348 [71]-[79], 351-358 [94]-[126]) and Callinan J (507-509 [595]-[600]) for rejecting the plaintiff's argument. Hayne J (473-4 [493]-[500]) did not consider the plaintiff's arguments, presumably because he found div 104 to be invalid on the grounds that the jurisdiction it purports to give federal courts 'is not jurisdiction in a matter'.

126 Ibid 355 [111].

127 Ibid 357 [121].

128 Ibid 358 [125].

129 Ibid 335 [30]. See also comments by Callinan J: 508–9 [598]–[599].

validity of div 104'.[130] His Honour conceded that 'particular issues as to procedural fairness [might] arise where, for example, particular information is not made available to the [controlee]', and that 'issues of that kind, if they arise, will be decided in the light of the facts and circumstances of [the] individual.'[131]

The above discussion indicates that there may be some scope for a controlee to argue that s 104.12A(3) is constitutionally invalid or that the effect of s 104.12A(3) in his or her individual case required a court exercising federal jurisdiction to exercise its powers in ways contrary to ch III.[132] Both arguments are likely to raise complex issues, particularly the former argument, which is likely to require submissions on the nature of the *NSI Act* and the defence power in the *Constitution*.[133] The above discussion also illustrates the difficulties and uncertainties that arise when persons attempt to use the *Constitution*, which was not designed to protect human rights, to do just that.

VI Conclusion

This article has demonstrated that a person in the UK has an enforceable right under his or her domestic law to a fair hearing in control order proceedings whereas a person in Australia does not.[134] The result may appear surprising at first given that Australia's control order scheme is modelled on the UK's scheme.[135] It is less surprising, however, when it is borne in mind that Australia neglected to import many of the procedural safeguards in the UK's control order scheme, including the special advocate regime, which has arguably played an important role in observing controlees' rights to fair hearings.[136] Australia also imported the UK's scheme, which is read subject to the *HR Act*, without legislating that its own control order scheme should similarly be read compatibly with a person's human rights.[137]

If Australia is to comply with its obligations under art 14 of the *ICCPR* then, at the very least, div 104 of the *Criminal Code* should be amended to make clear

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130 Ibid 335 [31] (emphasis added).

131 Ibid.

132 See also Kirby J in *Thomas v Mowbray*, where his Honour accepted the plaintiff's argument that div 104 involved a court exercising its power in ways inconsistent with 'the features of "independence, impartiality and integrity" that are implied or assumed characteristics of the federal courts for which ch III of the *Constitution* provides': (2007) 233 CLR 307, 436 [366].

133 Ibid 358 [125] (Gummow and Crennan JJ).

134 *Contra* Joo-Cheong Tham and KD Ewing, 'Limitations of a Charter of Rights in the Age of Counter-Terrorism' (2007) 31 *Melbourne University Law Review* 462, 487–8, for a discussion of the ways in which the Australian control order scheme may be more protective of individual liberty than the UK scheme.

135 See, eg, Senate Legal and Constitutional Legislation Committee, above n 69, 10–11 [2.31].

136 See, eg *SSHD v MB* [2008] AC 440, 485 [54] (Lord Hoffman); *SSHD v AF (No 3)* [2009] 3 WLR 74, 99 [62] (Lord Phillips). See also *A v UK* (2009) 49 EHRR 29, 717 [209], in which the Grand Chamber noted that it had referred on previous occasions to the possibility that special advocates might counterbalance the procedural unfairness caused by lack of full disclosure in national security cases. *Contra SSHD v MB* [2008] AC 440, 479–80 [35] (Lord Bingham); Chamberlain, above n 93.

137 See Senate Legal and Constitutional Legislation Committee, above n 69. See also Andrew Lynch, 'Don't Lie Back and Think of England: Comparison on the Process and Substance of Counter-Terrorism Laws' (2005, Special Issue) *Human Rights Defender* 9, 9–10; Clive Walker, 'The United Kingdom's Anti-Terrorism Laws: Lessons for Australia' in Andrew Lynch, George Williams and Edwina MacDonald (eds) *Law and Liberty in the War on Terror* (Federation Press, 2007) 181, 189; Jaggers, above n 9.

that where national security is at issue, a controlee is entitled (at a minimum) to a redacted summary of the facts and evidence which is capable of reasonably informing him or her of the allegations against him or her, and which would enable him or her to respond effectively to those allegations and challenge the evidence.[138] Australia should also respond to calls for it to enact federal legislation implementing the *ICCPR* if it is to provide adequate protection of human rights at all stages during which a control order is made.[139] As this article has demonstrated, without such protection, an individual's right to a fair hearing is vulnerable in control order proceedings. This is most troubling given the devastating effect control orders may have upon the individual and his or her family.[140]

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[138] See also Senate Legal and Constitutional Legislation Committee, above n 69, 61 [4.6].

[139] See, eg, George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (University of New South Wales Press, 2004); Scheinin, above n 94, 5–6 [10], 22 [65].

[140] See Joint Committee on Human Rights, above n 54, 14–16 [39]–[46].