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8 December 2015

Committee Secretary  
Parliamentary Joint Committee on Intelligence and Security  
PO Box 6021  
Parliament House  
Canberra ACT 2600

Dear Committee Secretary

## Submission on Inquiry into the Counter-Terrorism Legislation Amendment Bill (No.1) 2015 ('the Bill')

Australian Lawyers for Human Rights ("ALHR") thanks the Parliamentary Joint Committee on Intelligence and Security for the opportunity to make this submission in relation to the Bill. As requested, we previously sent an email to confirm that we would be making a submission.

ALHR was established in 1993 and is a network of over 2,600 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne.

### 1. Background

ALHR's primary concern is that the Bill should adhere to international human rights law and standards. We acknowledge, with the Law Council of Australia, the need to safeguard Australia's national security, but at the same time stress with them how important it is that those measures are a proportionate response and do not:

- detract from established principles of the Australian criminal justice system,
- fail to comply with international human rights standards, nor
- abrogate rule of law principles.<sup>1</sup>

We endorse the principles articulated in the Law Council's *"Anti-Terrorism Reform Project"* October

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<sup>1</sup> See generally Law Council of Australia, *"Anti-Terrorism Reform Project"* October 2013, <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf>> accessed 5 December 2015.

2013, which are relevant also to this review of the Bill.

As noted by the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism in their 2010 Report:

*Compliance with human rights while countering terrorism represents a best practice because not only is this a legal obligation of States, but it is also an indispensable part of a successful medium and long-term strategy to combat terrorism.<sup>2</sup>*

It is recognised in the Explanatory Memorandum (EM) that the Bill ‘engages’ - in other words, ‘impacts upon’ - over 17 separate human rights listed in the *International Covenant On Civil And Political Rights* (ICCPR), the *Convention on the Rights of the Child (CRC)* and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*.

## 2. Summary

We have general concerns about the imposition of control orders on children, as well as in relation to the nature of control and preventative detention orders generally. While the EM states that the policy is to use the admittedly extraordinary measures ‘sparingly’ the Bill does not enshrine that policy and the amendments it effects to various pieces of legislation could potentially be used so as to breach many basic human rights in an intensive and extreme fashion.

We are particularly concerned about those amendments which could restrict a fair hearing and which remove the Family Court from involvement in orders relating to children.

## 3. Restrictions on Civil liberties and common law rights

Ironically, the Bill severely limits a number of common law rights which the Attorney General has promoted elsewhere including:

- the presumption of innocence
- the prosecution carrying the burden of proof
- the presumption against construing laws so as to allow for arbitrary or unrestricted power
- the tradition of independent judicial review of law and executive action.

Indeed the Attorney General has asked the Australian Law Reform Commission to examine how such common law rights could be preserved, including through identifying statutes that unreasonably impact on common law rights. The Bill, if enacted in its present form, is such a statute.

## 4. General Concerns about impact on human rights

4.1 **Not all relevant provisions of ICCPR considered in the EM:** In particular, a number of provisions in the Bill are inconsistent with the undertakings in Article 2(3) of the ICCPR:

3. *Each State Party to the present Covenant undertakes:*

- To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*

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<sup>2</sup> Quoted in Australian Lawyers for Human Rights, *Submission to the Independent National Security Legislation Monitor*, 25 September 2012, par 8.

(c) *To ensure that the competent authorities shall enforce such remedies when granted.*

4.2 The Bill effectively **enshrines extreme measures** - which should be temporary in nature - into the status of a **new norm**.<sup>3</sup> We are generally concerned that although the Explanatory Memorandum states that the Bill's provisions in relation to control orders and the monitoring of control orders, including control orders against children, are unlikely to be used much and are not all likely to be invoked at the same time (see par 117), (the policy intention being that these are "extraordinary measures which are to be used sparingly", particularly with children), the legislation itself imposes no such restraints. The legislation permits any combination of the obligations, prohibitions and restrictions listed in subsection 104.5(3) of the Crimes Act 1914 to be imposed as part of a control order. Even if only some of these possible limitations were imposed at the same time, the person subject to the order would have their human rights such as the rights to privacy, to liberty, to freedom of speech, of assembly, of movement and of security, significantly infringed.

## 5 General concerns re preventative and control orders, delayed notification search warrants

5.1 ALHR is concerned that both **preventative detention** and **control orders** were recently expanded in terms of scope and lower thresholds<sup>4</sup>:

- despite a number of bodies including the Council of Australian Governments, the Independent National Security Legislation Monitor<sup>5</sup> and the Law Council of Australia recommending the abolition of control orders and preventative detention orders and/or a significant reduction in the scope of such orders, if retained; and
- without inclusion of the most important safeguards previously recommended by such bodies.

5.2 The orders should be subject to the same safeguards as for a person charged with a criminal offence. The criminal standard of proof should apply, not the balance of probabilities.

5.3 We are concerned that the burden of proof is effectively reversed under such orders: the onus is on the person to prove that the order against them should be revoked<sup>6</sup> despite the person affected being allowed to receive only minimal information as to the basis for the decision being made.

5.4 These issues give further weight to the arguments that the controls enable detention that is potentially arbitrary and that the required procedures fall short of the standards outlined by the Human Rights Committee. To adequately protect human rights, control orders (and in particular any preventative detention regime) should comply with Article 9 of the ICCPR. The regime:

*"... must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9(2) and (3), as well as article 14, must also be granted."*<sup>7</sup>

5.5 Retrospectivity is also a concern. Such orders may be imposed on persons for actions that may not have been illegal at the time they occurred, such that the person is effectively being

<sup>3</sup> See for example paragraph 13 below and Australian Lawyers for Human Rights (2012), *op cit*, par 9.

<sup>4</sup> See for example section 104.2(2)(a).

<sup>5</sup> As established by the *Independent National Security Legislation Monitor Act 2010*.

<sup>6</sup> ss104.18 and 140.20 *Criminal Code 1995*.

<sup>7</sup> Human Rights Committee, *CCPR General Comment No. 8*, 16<sup>th</sup> sess, [4], (1982).

punished retrospectively contrary to Article 15(1) ICCPR (freedom from retrospective guilt).

- 5.6 We have previously expressed our concerns about the very nature of delayed notification search warrants, and the recent **lowering of thresholds applicable to police officers when initiating an arrest** of someone for terrorism offences without a warrant or seeking a control or preventative detention order.<sup>8</sup>

## 6. Specific concerns

We support the provisions in the Bill which create the new offence of ‘advocating genocide’ under the *Criminal Code Act 1995* and which support the *Convention on the Prevention and Punishment of the Crime of Genocide*. However there are a number of other provisions of particular concern:

### 6.1 *Crimes Act 1914 - Delayed notification search warrants*

While there is no doubt that the proposed amendments will facilitate the process of obtaining such warrants, the proposed amendments at the same time clearly **remove some of the levels of protection and oversight** that were previously contained in the legislation.

### 6.2 *Crimes Act 1914 , Telecommunications (Interception and Access) Act 1979, Surveillance Devices Act 2004 - Monitoring warrants for control orders*

We are concerned that the **degree of monitoring** of a person who is subject to a control order is, under the proposed amendments, **virtually unlimited** and capable of stripping that person of all privacy and such basic rights as the rights to privacy, to liberty, to freedom of speech, of assembly, of movement and of security. Even if only some of these possible means of monitoring were imposed, the person subject to the order would have their human rights significantly infringed. While at par 50 the EM states that “The potentially intrusive nature of the powers *is balanced by their use solely in respect of terrorism offences*” (emphasis added) the fact is that **control orders and monitoring warrants are by definition going to be used before there is any evidence that the person in question is actually involved in a terrorism offence**. The presumption of innocence is not followed. The amendments to the SDA also permit electronic surveillance, including listening and tracking devices, without a warrant for the purpose of monitoring a control order so long as there is no covert entry onto premises or interference with a vehicle (EM par 141, 156ff).

### 6.3 *Criminal Code Act 1995 - Deletion of Family Court of Australia from definitions of “issuing court” and “superior court”*

We are concerned that in the case of control and preventative detention orders relating to children the **Family Court would be the more appropriate issuing court**, members of which have more experience than do other courts with considering the best interests of children, including their human rights, and therefore this change should not be made.

### 6.4 *Criminal Code Act 1995 – Reduction in minimum age for control orders*

Under the proposed amendments, the whole gamut of restrictions and limitations under control orders can be imposed on a child of 14 or over, including a requirement that the child remain at specified premises between specified times each day or on specified days for up to a total of 12 hours in any 24 hour period. The right of the child to have their best interests as a

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<sup>8</sup> Note that Article 9(2) of the ICCR requires ‘anyone who is arrested [to] be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.’ If persons can be arrested only on suspicion, then they cannot promptly be informed of proposed charges against them - which by definition would appear to be unformed when there is only a basis of ‘suspicion’. Nor can they be informed of the ‘reason’ for their arrest in the sense of being told what grounds have given rise to a belief that particular charges should be brought against them – because that belief has not been formed.

primary consideration by courts of law, administrative authorities or legislative bodies in accordance with Article 3 of the CRC, and the right of the child under the Family Law Act to have their best interests treated as a paramount consideration, are effectively overruled. As paragraph 85 of the EM states,

“The Family Law Act requires the best interests of the child to be treated as “the paramount” consideration, when considering whether to make certain orders. **In contrast, the paramount consideration with respect to control orders is the safety and security of the community.**”

Even though the best interests of the child are required under the legislation to be taken into account (see new subsection 104.4(2)(b)) **they are not given any primacy**, in breach of Article 3 of the CRC. Section 104.4(2) as revised reads as follows:

- 104.4(2) In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted the court must take into account:
- (a) the impact of the obligation, prohibition or restriction on the person’s circumstances (including the person’s financial and personal circumstances); and
  - (b) if the person is 14 to 17 years of age—the best interests of the person.
- (2A) In determining what is in the best interests of a person for the purposes of paragraph (2)(b), the court must take into account the following:
- (a) the age, maturity, sex and background (including lifestyle, culture and traditions) of the person;
  - (b) the physical and mental health of the person;
  - (c) the benefit to the person of having a meaningful relationship with his or her family and friends;
  - (d) the right of the person to receive an education;
  - (e) the right of the person to practise his or her religion;
  - (f) any other matter the court considers relevant.

We cautiously support the requirement that the issuing court appoints a lawyer as independent advocate to represent the child’s best interests (separately from the child’s legal representation). It remains to be seen whether such an advocate will be able to carry out that role effectively.

#### 6.5 ***Telecommunications (Interception and Access) Act 1979*– Control orders can be effective even if not served on person**

We do not agree that new section 6T, which treats a control order as effective even if it has not been able to be served on the person in question, is appropriate. This provision enables monitoring of a person on the basis of a control order, before they are even aware that they are the subject of a control order. According to EM par 158, referring to the *Surveillance Device Act*, this appears to be **intended ‘to ensure that officers have an opportunity to install surveillance devices covertly**, as there are often limited opportunities to do so.”

#### 6.6 ***Surveillance Devices Act 2004* – Deferred reporting**

The argument that reporting may need to be deferred so that the subjects of control orders are not aware that they are being surveyed (EM pars 159 to 160) is not convincing, given that it is quite clear from the legislation and the EM that any person who is the subject of a control order will be subject to intensive electronic and other surveillance, in breach of their rights to privacy, in contravention of the presumption of innocence, and so as to chill their freedom of expression. **We do not support this deferral, which reduces the transparency of the reporting requirements.**

Nor are we convinced that the right to an effective remedy under Article 2(3) of the ICCPR is addressed by those provisions which provide immunity to police officers acting under the SDA (pars 166ff of the EM). The **effective remedy should be a remedy for the person the subject or proposed subject of the control order**, not only a protection for the officers monitoring the control order.

Although the *Criminal Code* acknowledges the right of the detainee to apply to the Federal Court for a remedy in relation to a preventative detention order<sup>9</sup>, and although paragraph 104.12(1)(b) of the *Criminal Code* requires the accused person to be given some minimal information about their rights, effectively the lack of information required to be provided makes any challenge difficult or impossible.

6.7 **National Security Information (Criminal and Civil Proceedings) Act 2004 – national security information kept secret in control order proceedings**

We do not agree that persons should be able to be the subject of control proceedings on the basis of information which is not made available to them or their legal representatives (revised section 38J).

We also strongly disagree with the proposed amendments that would permit closed hearings at which neither the proposed subject nor their legal representatives may appear. **This is an extreme breach of the person's right to a fair hearing.**

The requirement that the court must under par 38J(5)(a)) have regard to the potential prejudice to national security in not making one of the orders places unreasonable pressure upon the court and is **likely to 'chill' the court's discretion**, contrary to the claims in par 135 of the EM.

6.8 **National Security Information (Criminal and Civil Proceedings) Act 2004 –orders contrary to regulations**

Nor do we believe that courts should be given the power to make an order that is inconsistent with regulations made under the NSI Act if the Attorney-General has applied for the order. It is **bad practice** to allow enacted legislation, even regulations, to be set aside at the request of the Attorney General.

## Conclusion

ALHR acknowledges that it is vital to achieve a proportionate and effective balance between the government's domestic and international obligations to protect its citizens from terrorism and its international obligations to preserve and promote its citizens' fundamental human rights.

However it is also essential that anti-terrorism laws adhere to the Australian government's international legal obligations under various binding instruments and accord with agreed norms of human rights, civil liberties and fundamental democratic freedoms. If legislative provisions do not accord with these standards they should not be adopted.

ALHR believes that a human rights framework will strengthen counter-terrorism and national security laws in Australia by appropriately balancing the various obligations. The provisions of the Bill to which we draw attention in this submission do not sufficiently reflect an appropriate balance.

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<sup>9</sup> s105.28(2)(g) *Criminal Code Act 1995*.

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If you would like to discuss any aspect of this submission, please contact Nathan Kennedy, President  
Australian Lawyers for Human Rights, by email at \_\_\_\_\_ or the LaTrobe Secretariat

Yours faithfully,

Nathan Kennedy  
President  
Australian Lawyers for Human Rights