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

Dear Committee Secretary

**Submission on *Counter-Terrorism Legislation Amendment Bill 2014***

Australian Lawyers for Human Rights (ALHR) thanks the Parliamentary Joint Committee on Intelligence and Security (the 'Committee') for the opportunity to comment on the provisions of the *Counter-Terrorism Legislation Amendment Bill 2014* (the 'Amendment Bill').

As requested, we sent an email on 1 November 2014 to confirm that ALHR would be making a submission.

ALHR was established in 1993. ALHR is a network of Australian law students and lawyers active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2,600 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

As you know, ALHR made a previous submission dated 3 October 2014 (our 'original submission') in relation to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (the 'original Bill' which is now enacted with some variations, 'the Act') and we re-iterate the concerns expressed in that original submission.

**Summary**

1. The Amendment Bill:
   - addresses only one of the 37 recommendations made by the Committee in relation to the original Bill; and
   - introduces a number of further changes to the *Criminal Code Act 1995* ('Criminal Code') and the *Intelligence Services Act 2001* ('ISA'), including to expand the control order regime (which was objected to by us and many others in submissions regarding the original Bill).

2. ALHR generally supports the Committee's recommendations and submits that as a minimum those recommendations should all be addressed in the Amendment Bill.

3. ALHR is concerned that the provisions introduced into other legislation by the Act – even as amended by the Amendment Bill – still display the following problems:
   a) the provisions are disproportionate in effect;
   b) the provisions reduce the oversight of the courts (which oversight is essential to the balance of powers in a democracy);
   c) the provisions are inconsistent with accepted international human rights standards;
   d) the provisions contain insufficient mechanisms for independent and comprehensive review;
   e) the key terms in the provisions are not clearly or are not appropriately defined (and are thus potentially subject to arbitrary or inconsistent application - in particular in the absence of normal judicial review);
   f) the provisions contain insufficient safeguards in relation to accepted standards of legal support and oversight in the light of international human rights standards.

4. ALHR has some specific concerns in relation to the new legislative provisions in the Bill, as described further in section B below, as well as more general concerns as described in the following section A.

## A Continuing defects in Act provisions not remedied by Amendment Bill, including potential abuse of disproportionate legislative provisions

While it is stated in the explanatory memorandum to the original Bill, and again in the explanatory memorandum to the Amendment Bill, that the provisions being introduced are a reasonable, necessary and proportionate to achieving the legitimate objective of protecting the public from a terrorist act, no examination is made of legislative alternatives which are not so far-reaching. This is contrary to Article 4(1) of the *International Covenant On Civil And Political Rights* ('ICCPR') which contemplates that a State will take measures derogating from its obligations under the ICCPR only 'in time of public emergency which threatens the life of the nation,' only 'to the extent strictly required by the exigencies of the situation' and only for so long as that emergency lasts.

ALHR believes that reasonable, necessary and proportionate legislation will 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;[1]

and that the government has not established that either the original Bill or the Amendment Bill meets these tests.

In the context of both the Act and the Amendment Bill, ALHR is particularly concerned at the emerging trend whereby the Federal Government:

(1) legislates to impose disproportionately severe penalties (described as 'horrific over-reach'[2]), without allowing any 'public benefit,' public domain or 'whistleblower' defences, for a wide range of matters;

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[1] 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 2 October 2014.

[2] Michael Bradley, 'What Brandis won't tell us about S35P', *ABC* at <http://www.abc.net.au/news/2014-11-06/bradley-what-brandis-wont-tell-us-about-s35p/5871684> accessed 9 November 2014 and see Simon Breheny, 'George Brandis's Solution A Cure Worse than the Disease', *Institute of Public Affairs Website* at <http://ipa.org.au/news/3198/george-

but then

(2) states publicly that the government is unlikely to encourage prosecutions under the legislation against certain classes of person - as it has done in the context of disclosure by journalists of security operations.[3]

ALHR endorses the comments of Bret Walker SC to the Committee that enacting disproportionately severe legislation as a purported disincentive can, ironically, give rise to a situation where any legal safeguards included in the legislation will effectively be useless. This is because the legislation can be used to intimidate those people who could conceivably be prosecuted under it - in which circumstances the legislative safeguards will not be available to those persons.

Thus in responding to the Committee question as to whether there is 'basically no harm in having [particular crimes] on the statute books because they might come in handy at some stage', Mr Walker said (emphasis added):

> *"I am revolted by that approach to lawmaking, particularly when one is talking about infringements of what would otherwise be civil liberties. I like being in a society where we have something called criminal justice, which involves a trial in which the state bears the onus of proof beyond reasonable doubt. I think all departures from that, however necessary, should be only so great as circumstances require.* ***It cannot be the requirement of circumstances that it would be nice to have something on the shelf though you cannot think of what to use it for at the moment.***
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> *… We should never countenance the idea of having things on the books so that they can be the subject of threats by officers,* ***bearing in mind that all our safeguards, of course, are absolutely useless in the face of such informal and, in my view, dishonest use of such powers."***[4]

ALHR is particularly concerned that the draconian provisions of the Act relating to 'declared areas' are far in excess of any appropriate response to the presence of Australian civilians in an area of fighting, and endorses the recommendation of the Australian Human Rights Commission to the Committee that at the very least the exception contained in s 119.2(3) of the Criminal Code be amended so that s 119.2(1) does not apply to a person if that person enters, or remains in, an area for a purpose or purposes not connected with engaging in hostile activities.[5]

ALHR also endorses Mr Walker's comments that:

- section 3ZZHA of the Crimes Act should be amended to allow for whistleblowing;[6]
- the concept of 'international relations of Australia' should be deleted or amended in the definition of 'prescribed organisation' contained in clause 117.1(2) of the Criminal Code;[7]

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brandis%27s-solution-a-cure-worse-than-the-disease> accessed 9 November 2014, being a reproduction of an article originally published in *The Australian* on 7th November 2014.

3 Bradley, op cit;

4 Commonwealth of Australia, Hansard, *Parliamentary Joint Committee on Intelligence and Security*, 8 October 2014, p 45, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=priority,doc_date-rev;page=6;query=Dataset%3AcomJoint;rec=8;resCount=Default> Accessed 9 November 2014.

5 Australian Human Rights Commission, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Submission to the Parliamentary Joint Committee on Intelligence and Security*, 2 October 2014, page 11, par 50.

6 op cit, p 38.

7 op cit, p 38.

and

- the concept of 'subverting society' should be removed from the Criminal Code.[8]

**B Concerns relating to further amendments to Criminal Code and ISA**

1. As mentioned in ALHR's original submission, ALHR believes the whole concept of **control orders** is problematic in terms of civil liberties and potentially imposes a disproportionate restriction upon a number of human rights (freedom of movement, freedom of association, freedom of speech, right to privacy, freedom from arbitrary detention, right to work, right to a fair trial, right to an effective remedy). Although no doubt some of the amendments will allow for greater ease in implementing and carrying out control orders, generally ALHR does not agree with the expansion of that regime in the Amendment Bill. ALHR notes in this regard the comments of Human Rights Watch in relation to the original Bill:

> *So long as control orders are in effect, the Australian Parliament should introduce the following minimum safeguards:*
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> - *Do not over-broaden the scope of use of control orders to those who have 'participated in terrorist training' or 'engaged in hostile activity in a foreign country.'* [which is exactly what the Amendment Bill does]. *Use should be limited to those who have been convicted of crimes in Australia or countries that have laws which meet international standards, as a number of other countries have overly broad definitions of terrorism.*[9]
> - *Restrictions should be imposed through a process in which credible evidence of their necessity is provided to the court and the person subject to the order;*
> - *The criminal standard of proof ("beyond a reasonable doubt") should be applied;*
> - *Persons affected by control orders and their lawyers should have access to sufficient evidence to ensure the right to an effective defense.*

2. ALHR has concerns as to the ambit of the proposed section 8 (1)(a)(ia) and (ib), section 9(1AA) and new subsections 9(1AA), (1AB) and (1AC) of the ISA, which provide that the Minister may **'specify classes of Australian persons who are, or are likely to be, involved in an activity or activities that are, or are likely to be, a threat to security'**. We find it hard to imagine how the Minister could describe such a class in a useful way without indulging in discriminatory stereotyping. The explanatory memorandum sheds no light on the intended use of this provision which strongly bears the marks of a 'fishing expedition'. ALHR notes that the Explanatory Memorandum says at paragraph 149 (emphasis added) that:

> *The Minister must also be satisfied that the class relates to support to the Defence Force in military operations as requested by the Defence Minister* ***and that all persons in the class of Australian persons will or are likely to be involved in one or more of the activities set out in paragraph 9(1A)(a).***

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8 op cit, p 42.

9 ALHR notes that the concept of being convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence (within the meaning of subsection 3(1) of the *Crimes Act 1914*) has been introduced to address this issue, but the over-broadness of the grounds of providing/receiving/participating in training and engaging in hostile activity have also been added.

However the wording of the legislation does not appear to bear this out, as section 9(1A) of ISA, as amended, would only require the Minister to be satisfied that:

> *the Australian person or the class of Australian persons mentioned in that subparagraph is, or is likely to be, involved in one or more of the following activities:*
> *(i) activities that present a significant risk to a person's safety;*
> *(ii) acting for, or on behalf of, a foreign power;*
> *(iii) activities that are, or are likely to be, a threat to security;*
> *(iv) activities related to the proliferation of weapons of mass destruction or the movement of goods listed from time to time in the Defence and Strategic Goods List (within the meaning of regulation 13E of the Customs (Prohibited Exports) Regulations 1958 );*
> *(iva) activities related to a contravention, or an alleged contravention, by a person of a UN sanction enforcement law;*
> *(v) committing a serious crime by moving money, goods or people;*
> *(vi) committing a serious crime by using or transferring intellectual property;*
> *(vii) committing a serious crime by transmitting data or signals by means of guided and/or unguided electromagnetic energy…*

That is, there is no requirement that every person in the class must be believed to be likely to be involved in the activities.

3. ALHR queries whether the **contingency arrangements** to be included in sections 9A and 9B are based on experience or on any reasonably likely scenario. That is, has it ever been the case that none of: the Minister responsible for the relevant agency, the Prime Minister, the Defence Minister, the Foreign Affairs Minister or the Attorney General has been readily contactable by Australia's intelligence agencies? This set of circumstances is particularly unlikely in the light of the other provisions being added to permit emergency authorisations to be given orally. As the Explanatory Memorandum says in paragraph 174, not only are Ministers contactable by close to instantaneous forms of written communication by electronic means (such as via email or SMS) but they will now also be able to give authorisations by telephone or videoconference if this is appropriate either by reason of their remote location; 'or if the circumstances are of such urgency that the time required for an authorisation to be drafted may mean that the opportunity to conduct the relevant activity is lost or compromised.' Given the extent of these protections, ALHR queries whether it is necessary to give emergency powers to agency heads as well, even if those powers are limited to a period of 48 hours.

**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 existing legislation as amended by this Amendment Bill does not reflect an appropriate balance.

If you would like to discuss any aspect of this submission, please email me
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Yours faithfully

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