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30 October 2017

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

By email: pjcis@aph.gov.au

Dear Committee Secretary

Submission in relation to various 'national security' legislation

Australian Lawyers for Human Rights (ALHR) is grateful for the opportunity to comment on those areas of counter-terrorism and national security legislation which you are considering, being:

1. Division 3A of Part IAA of the *Crimes Act* (Stop, Search and Seize Powers)
2. Divisions 104 and 105 of the *Criminal Code* (Control Orders and Preventive Detention Orders) including the interoperability of the control order regime and the *High Risk Terrorist Offenders Act 2016* (Continuing Detention Orders).

This submission draws upon our previous submission of 12 May 2017 to the Independent National Security Legislation Monitor (INSLM) and upon the previous submission to the INSLM by the Law Council of Australia (LCA), with which we generally agree. This submission also refers to the recently released reports by the INSLM concerning the legislation referred to above.[1]

ALHR

ALHR was established in 1993 and is a national association of 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 specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

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1 Commonwealth of Australia, Independent National Security Legislation Monitor, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers*, Australian Government, Sept 2017, Report No. 1 ('Report No. 1'), and *Review of Divisions 104 and 105 of the Criminal Code*, Australian Government, Sept 2017, Report No. 3 ('Report No. 3').

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Summary

ALHR is concerned that the legislation under consideration displays the following problems:

a) the provisions are disproportionate in effect;

b) some of 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.

1. ALHR's Concerns

1.1 ALHR's primary concern is that Australian legislation and judicial decisions should adhere to international human rights law and standards and preserve the rule of law.

1.2 We endorse the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014[2] as to the nature of Australia's obligations in relation to human rights, including in particular as to civil and political rights , and agree that the inclusion of human rights 'safeguards' in Commonwealth legislation is directly relevant to Australia's compliance with those obligations.

1.3 Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights. There is no hierarchy of human rights – they are all

[2] Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1*: *Drafting Statements of Compatability*, December 2014, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources> accessed 16 January 2015, see also previous *Practice Note* 1 which was replaced by the Guidance Note, available at< https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>, accessed 16 January 2015.

interrelated, interdependent and indivisible. Where legislative protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others. Conversely, where legislation penalises behaviour it is relevant to what extent the offender's behaviour impacts upon the human rights of others.

1.4 Human rights entail both rights and obligations. In so far as we are ourselves entitled to the protection of human rights, we must also respect the human rights of others.[3]

1.5 Thus all rights must be **balanced** where they conflict, and as part of that balancing process must provide **reasonable accommodation** to other rights. This is commonly understood in international law and in jurisdictions where human rights are enshrined in national constitutions, such as Canada and European Community countries. In Australia, being alone amongst first world countries in not having constitutionally protected human rights, there is not a common understanding of this issue.

1.6 ALHR submits that the legislation in question does not meet the appropriate balance between competing rights and does not make reasonable accommodation for the rights and freedoms that are infringed. In our submission, these measures threaten important principles that form the fundamental structure of our justice system.

2. No alternatives proposed therefore not clear that regulation is proportionate

2.1 While it was generally stated in the explanatory memoranda to the pieces of legislation under present consideration that the provisions introduced were a reasonable, necessary and proportionate response to achieving the legitimate objective of protecting the public from a terrorist act, no examination appears to have been made of legislative alternatives which were not so far-reaching. This is also an issue not addressed in Reports No. 1 and No. 3 of the INSLM.

2.2 This omission 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,' and
- 'to the extent strictly required by the exigencies of the situation,' and
- for so long as that emergency lasts.

2.3 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;[4]

and is concerned that generally the Federal Government has not established that the legislation in question meets these tests.

2.4 In the words of Dr. Binoy Kampmark:

> *It is no exaggeration to suggest that the current swathe of proposed laws risk placing Australia, not merely on a police state footing, but a garrisoned footing. Terrorism, for all its fearful properties, remains an idea, a tactic and a method. The consequences of responding to it are quite something*

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[3] See generally, United Nations Human Rights Office of the High Commissioner, "What are Human Rights?" available at <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>, accessed 9 February 2017.

[4] See generally Law Council of Australia, *"Anti-Terrorism Reform Project"* October 2013, https://www.lawcouncil.asn.au/docs/7247484f-0639-e711-93fb-005056be13b5/Anti-Terrorism%20Reform%20Project%20-%20Oct%202013%20Update.pdf accessed 28 October 2017.

> *else. Shredding civil liberties is the first step to admitting a failure in dealing with the very problem a society should resist.*[5]

2.5 In any assessment of Australia's counter terrorism laws, it is vital to achieve an effective balance between the government's responsibilities (including international obligations) to protect its citizens from terrorism, and its responsibilities and international obligations to preserve and promote its citizens' fundamental human rights.

2.6 Statements made by former United Nations Secretary-General Kofi Annan in a 2005 address to the International Summit on Democracy Terrorism and Security highlight the importance of considering human rights when making laws for national security:

> *Compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective by ceding to him the moral high ground, and providing tension, hatred and mistrust of government among precisely those parts of the population where he is more likely to find recruits.*

2.7 As the UN General Assembly stated in its Resolution on 64/297, the States Members of the United Nations recognise that terrorist acts are aimed at the destruction of human rights, fundamental freedoms and democracy. For a democratic society to significantly curtail human rights and fundamental freedoms in the "fight against terrorism" offends the very essence of those democratic privileges and allows terrorism to prevail. Ultimately, a delicate balance must be struck.

3. Disproportionate legislation justified on the basis that it is little used or carefully used

3.1 ALHR is extremely concerned at the emerging trend (evidenced further in the first week of October 2017 in comments that under changes to Commonwealth legislation children as young as ten years of age could be held for up to 14 days without charge), whereby the Federal Government:

(1) legislates to impose disproportionately severe penalties (described as 'horrific over-reach'[6]), without allowing any 'public benefit,' public domain or 'whistleblower' defences, for a wide range of matters;

but then

(2) states publicly that the government is unlikely to encourage prosecutions under the legislation against certain classes of person.

The government has used this method in the context of disclosure by journalists of security operations.[7]

3.2 ALHR endorses the comments of Bret Walker SC 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

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5 "Winding back the Liberties: The New Anti-Terror Laws in Australia,"25 September 2014, Rule of Law Institute website, accessed 28 September 2014, http://www.ruleoflaw.org.au/anti-terror-laws-in-australia/

6 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-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.

7 Bradley, op cit;

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.

3.3 Thus in responding to a 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."***[8]

3.4 ALHR is concerned that an increasing number of pieces of legislation are being passed which overturn the crucial presumption of innocence, and potentially our civil liberties and our human rights as Australians purely on the basis that they *might* be useful. We are concerned that Reports No. 1 and No. 3 of the INSLM[9] approve the trend for legislation which increasingly overrules civil and human rights on this basis.

3.5 The Reports approve the legislation under consideration on the bases that:

(1) the police have said that they will only use the legislation in extreme or 'emergency' cases;[10] and
(2) in addition to the legislation one can rely on protection from police procedures, police Code of Conduct and police professional standards.[11]

In relation to the first point, much of the legislation under consideration is stated to relate only to emergency situations. However, what is an emergency situation depends very much on the definition of 'terrorist act' in s 100.1(1) of the Criminal Code. Many criticisms have been made of the overly broad nature of that definition which arguably chills free political speech. Those criticisms should have been addressed by the INSLM. While both points may very well be true, they are not a good basis for legislation. The criteria for a restrictive use of extreme legislation should be built into the legislation so that the legislation is specific and focused rather than being wide open to discretionary application.

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8 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.

9 Commonwealth of Australia, Independent National Security Legislation Monitor, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers*, Australian Government, Sept 2017, Report No. 1, *Review of Divisions 104 and 105 of the Criminal Code***,** Australian Government, Sept 2017, Report No. 3.

10 The INSLM states, for example in Report No. 1 par 9.3 that the 'Stop Search and Seize' laws are "truly 'emergency' powers", apparently on the basis that the laws have not yet been used, rather than on the basis that they are narrowly tailored.

11 See for example Report No. 1 par 8.32 f and h, par 8.33.

4. Disproportionate legislation justified on the basis that it is little used in comparison to even more excessive State legislation

Similarly, the argument of the INSLM that in practice State police are more likely to be the persons carrying out similar actions under relevant State legislation[12] (which is often broader) is implicitly used to justify the broadness of the Commonwealth legislation. In this way both States and Commonwealth piggyback on each other in enacting more and more extreme legislation in the name of 'national security.'

5. Disproportionate legislation justified on the basis of short lead time

5.1 The INSLM notes, quoting ASIO, that "the changing nature of terrorism provides challenges to the early identification and detection of threats."[13] "Vulnerable individuals" can be "swiftly radicalised"[14] and there is a "very short flash to bang, so to speak, time from radicalisation to violent action" meaning that "police have very little lead time or none at all to prevent spontaneous attack." [15] These background comments are relied on by the INSLM to justify his finding that the legislation under consideration provides a necessary and proportionate response to the problems identified such that its impact on human rights and civil rights is not in his view disproportionate.

5.2 But what if the lead time is not necessarily so short? Recently there has been increased focus on the overlap that often appears to exist between domestic violence and public 'terrorist' attacks, whether or not having a radical religious or political element. It is now being suggested that a useful practice for police would be to focus on perpetrators of domestic violence.[16]

6. Not all relevant International agreements or common law rights considered

6.1 While the explanatory memoranda for the legislation under consideration refers to the need for the Parliamentary Joint Committee on Human Rights **(PJCHR)** to comply with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011,* and the international agreements to which that Act refers, the memoranda do not appear to take all of these matters into account, for example the terms of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

The Universal Declaration of Human Rights 1948

6.2 Article 12 of the UDHR provides that:

> *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

6.3 Article 19 of the UDHR provides that:

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12 Report No. 1, pars 3.14, 5.33, 6.3 and following.

13 Report No. 1, par 2.1.

14 Report No. 1, par 2.3.

15 Report No. 1, par 2.4, quoting AFP Deputy Commissioner, Mr Michael Phelan APM.

16 See for example: Martin McKenzie-Murray, "Terrorism and Domestic violence", *The Saturday Paper,* 24 June 2017, *https://www.thesaturdaypaper.com.au/news/law-crime/2017/06/24/terrorism-and-domestic-violence/14982264004831,* Joan Smith, "The seeds of terrorism are often sown in the home – with domestic violence", *Guardian online,* 11 July 2017*,* *https://www.theguardian.com/commentisfree/2017/jul/10/seeds-terrorism-sown-home-domestic-violence-islamic-state,* Jane Mayer, "The Link between Domestic Violence and Mass Shootings", *The New Yorker*, 16 June 2017, https://www.newyorker.com/news/news-desk/the-link-between-domestic-violence-and-mass-shootings-james-hodgkinson-steve-scalise, Helen Lewis, "Many terrorists' first victims are their wives - but we're not allowed to talk about that", *New Statesman online*, 7 October 2017, https://www.newstatesman.com/print/node/308638

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

6.4 It is important to remember Australia's leadership in founding the United Nations and playing a prominent role in both the negotiation of the *1945 Charter of the United Nations* and in being one of the eight nations involved in drafting the UDHR. ALHR submits that Australia should continue its leadership in the field of international human rights by striking the appropriate balance between protecting civil liberties and implementing national security safeguards.

The International Covenant on Civil and Political Rights

6.5 The right to liberty of the person is guaranteed by Article 9 of the International Covenant on Civil and Political Rights (**ICCPR**)[17] which provides as follows:

1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
2. *Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*
3. *Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*
4. *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*
5. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

6.6 Australia signed the ICCPR on 18 December 1972, and ratified the ICCPR on 13 August 1980. Pursuant to the principle of *Pacta Sunt Servanda* enshrined in Article 26 of the *1969 Vienna Convention of the Law of Treaties,* every country who ratifies an international treaty, must do so in good faith that it will uphold the principles and laws held therein.

6.7 A number of provisions in the legislation under consideration are inconsistent with the undertaking in Article 2(3) of the ICCPR:

3. Each State Party to the present Covenant undertakes:

(a) 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;

(b) 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

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17 *International Covenant on Civil and Political Rights* (Adopted by UNGA Resolution 2200A (XXI) 16 December 1966, Entry into Force 23 March 1976) UN Doc. A/6316 (1966) 999 UNTS 171. Australia Signed: 18 December 1972, ratified: 13 August 1980 (**ICCPR**).

system of the State, and to develop the possibilities of judicial remedy;

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

6.8 In Report No. 1 the INSLM considered the rights under the ICCPR in detail, noting that few of the rights are absolute,[18] concluded that "limitations designed to address national security or public order concerns are capable of being consistent with a range of rights under the ICCPR if the limitations are prescribed by law, are not arbitrary, and conform to the principle of proportionality."[19]

6.9 Australian society must take into account that the manner in which we respond to crimes is in itself a measure of the strength and nature of our society. It is particularly concerning that the legislation under consideration continues the existing practice of removing all terrorism-related matters from the ambit of the *Administrative Decisions (Judicial Review) Act* (AD (JR) Act). The legislation adds to the already long lists in Schedules 1 and 2 of that Act of decisions which either cannot be reviewed at all under that Act[20], or for which reasons do not have to be given[21]– effectively making it impossible for the court to carry out any contextual review.[22]

6.10 Whether or not one believes that the legislation under consideration is either (1) morally correct and/or (2) desirable in practical terms, there can be no justification for restricting full judicial review of decisions made under that legislation. Without full judicial review there is no accountability and no transparency. A government that places its administrative officials above the courts is not properly or fully democratic.

6.11 Full judicial review is fundamental to the structure of a democratic society and maintenance of the rule of law. It is arguably a 'subversion' of Australian society for Parliament to remove that safeguard. It is also entirely inconsistent with the doctrine of the separation of powers.

Restrictions on Civil liberties and common law rights

6.12 Ironically, the legislation under consideration 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, and
- the tradition of independent judicial review of law and executive action.

6.13 The INSLM notes in the recent Reports that "it is better to have a carefully thought-out counter-terrorism legal structure in place before an attack"[23] rather than to make legislation on the run. However, we do not believe that the proposed legislation referred meets the stated aim of providing a carefully thought out counter-terrorism legal structure either in terms of efficacy nor in terms of protecting civil rights. It is neither necessary nor proportionate.

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18 Report No. 1 par 5.14 and following and par 5.29 and following.

19 Report No. 1 par 5.15.

20 See Schedule 1 of the Act. This includes all decisions under the *ASIO Acts* 1956 and 1979, *Intelligence Services Act* 2001, *Inspector-General of Intelligence and Security Act* 1986, *Telecommunications (Interception and Access) Act 1*979, and *Telephonic Communications (Interception) Act* 1960

21 See Schedule 2 of the Act.

22 Paragraph 273.

23 Report No. 1, p 2.10

7. Division 3A of Part IAA of the *Crimes Act* (Stop, Search and Seize Powers)

Introduction

7.1 ALHR has previously made submissions regarding, *inter alia*, the implementation and operation of Division 3A of Part IAA of the *Crimes Act 1914* (Cth) (**Crimes Act**) (police stop and search powers and prescribed zones) in submissions to the Council of Australian Governments (**COAG**) in about October 2012.

7.2 ALHR maintains its position as stated in those submissions with regards to these Counter-Terrorism laws (**CT Laws**) and the submissions below reiterate and elaborate upon that position.

Police Stop and Search Powers and Prescribed Zones

7.3 The underlying rationale for search and seizure warrants is to authorise officers of the executive to invade a person's privacy and property on the grounds of reasonable suspicion that the person may commit a crime. The law has kept the exercise of such powers subject to grave vigilance such that fundamental, and indeed defining, democratic institutions including fundamental rights to liberty and privacy are not unnecessarily or arbitrarily abrogated, or placed in a vulnerable position. This is why the separation of powers safeguard enshrined in judicial oversight of the issue of warrants has remained a mostly unmovable rule of law in law enforcement in western democracies throughout history.

7.4 However, in the seemingly eternal "war on terror", the government and law enforcement authorities appear to be taking the death-by-a-thousand-cuts approach to revoke this principle by constantly calling for unrestrained powers, "just in case ... ". ALHR strongly cautions against such incremental chipping away at the fundamental freedoms and basic rights of our democratic free society, as such incursions ultimately undermine the very way of life they seek to protect.

7.5 In 2005, the Federal Government introduced new search and seizure powers through the introduction of the *Anti-Terrorism Act (No 2) 2005* (Cth). This Act introduced Part IAA Division 3A of the Crimes Act entitled "Powers in relation to terrorist acts and terrorism offences". Section 3UD empowers police officers to stop and conduct a warrantless search of people. Section 3UC obligates the person to provide personal information and evidence of it and a "reason for being in that particular Commonwealth place" (section 3UC(1)(c)).

7.6 Section 3UEA, introduced via the *National Security Legislation Amendment Act 2010* (Cth), even further expanded the breadth of police powers under Division 3A and allows a member of the Australian Federal Police (**AFP**) to enter premises without a warrant where they reasonably suspect that: it is necessary to exercise this power in order to prevent a thing that is on the premises from being used in connection with a terrorism offence; and it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health of safety. This stand-alone power of emergency entry to premises without warrant can be exercised in any place and is not limited only to Commonwealth places (as are the other provisions in Division 3A).

7.7 ALHR is very concerned that measures of this kind overstep the line and undermine the fundamental rights and freedoms on which our way of life depends. We note that the Law Council of Australia has commented in its own submission to INSLM in relation to this legislation that there is no "evidence to suggest that ordinary entry, search and seizure powers requiring a judicial warrant have caused an operational problem for law enforcement so as to justify the potential invasion of privacy for the exercise of powers

in Part 1AA, Division 3A of the Crimes Act."[24] The LCA queried the necessity for such a power given the ability to obtain a warrant by telephone or fax in urgent circumstances. It suggested that, if such existing processes do not operate effectively in emergency situations, consideration should first be given to improving the logistics of how and to whom a warrant application can be made in an emergency before turning to a warrantless entry power. We also note that in the recent case of *R v Ghazzaway*, a group collectively referred to as the "Khalid Group" was prevented from committing a serious terrorist attack, with the main offender Mr Ghazzaway later being charged with conspiracy to commit a terrorist act.[25] The offender was sentenced to 8 years and 6 months jail. In this case, law enforcement relied upon procedures used prior to the enactment of the new counter-terrorism laws, executing search warrants despite the seriousness of the offence and the involvement of a terrorist group. This is an example of a situation where previously existing legislation was sufficient to prevent the threat of terrorism, and calls into question the need for the overreaching powers contained within Part 1AA Division 3A of the Crimes Act.

7.8 In relation to the compulsion to provide personal identification and evidence of it and the ability to enter private premises without a judicially authorized warrant under the CT laws, the right to privacy is guaranteed by Article 12 of the *Universal Declaration of Human Rights 1948* (**UDHR**) and Article 17 of the ICCPR which provides as follows:

> *1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
>
> *2. Everyone has the right to the protection of the law against such interference or attacks.*

7.9 Article 17 provides for positive obligations on States parties to address the activities of private persons or entities. In ICCPR General Comment 16 on the Right to Privacy the UN Human Rights Committee importantly stated (emphasis added):

> *2. …In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right…*
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> *3. …Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.*
>
> *4. The expression "arbitrary interference" is also relevant to the protection of the right provided for in article 17.* ***In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law.*** *The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.*

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[24] Law Council of Australia, Stop, search and seizure powers, declared areas, control orders, preventive detention orders and continuing detention orders, 12 May 2017, accessed at https://www.inslm.gov.au/sites/default/files/submissions/2-law-council-of-australia.pdf, 7 October 2017.

[25] R v Ghazzaway [2017] NSWSC 474.

7.10 Many of the police powers provided by the CT laws under review encroach unjustifiably on Australian citizens' rights to privacy and thereby contravene Australia's international obligations under various international human rights treaties to which it is a party.

7.11 In this regard, ALHR recommends the democratic balance can only be restored by urgently amending any provisions of the CT laws which offend and violate Australia's international legal obligations as described.

7.12 ALHR is concerned about the broad scope of detention and questioning powers vested in officers of the executive and not subject to judicial oversight.

Recommendations

7.13 ALHR recommends that Australia continue its leadership in the field of international human rights by striking the appropriate balance between protecting civil liberties and implementing national security safeguards. We support the Law Council's recommendations that:

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

(ii) if police, stop, search and seizure powers are retained in Part 1AA, Division 3A of the Crimes Act, we endorse the recommendation of the INSLM that the reporting and oversight provisions should be strengthened to require annual reporting to the Minister, the Commonwealth Ombudsman, the PJCIS and the INSLM in the same manner as for delayed notification search warrants as well as oversight by the Commonwealth Ombudsman.

8. Division 104 of the *Criminal Code* (Control Orders)

8.1 It was argued in *Thomas v Mowbray, (`Thomas')*[26] that the control order provisions of the *Criminal Code* (Division 104) conferred non-judicial power on a federal court as the power to determine what legal rights and obligations *should* be created lacked the essential criterion for the exercise of judicial power, namely the application of *existing* rights and obligations to particular factual circumstances.

8.2 The High Court, by majority, upheld the constitutional validity of Division 104, stating that it did not breach Chapter III of the Constitution.

8.3 Gleeson CJ noted that to have decided *Thomas* differently would have been to consign the determination of control orders to the executive — which is unlikely to provide stronger human rights protection. ALHR submits that the decision in *Thomas* therefore seems to lead to a conclusion that either judicial power is expanded to encompass some non-judicial power, in order to guarantee that the judiciary has some role to play in the making of the control orders, or that the executive is responsible for such decisions with little if any judicial oversight. This first alternative leads to a weakening of judicial independence as the executive abuses this apparent independence to give executive actions a "cloak of legitimacy".[27]

8.4 ALHR submits, however, that whether the executive makes the order or whether the order is made by a judge, without a bill of rights or an express reference to human rights considerations in the control order legislation, the separation of powers

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26 *Thomas v Mowbray* (2007) 237 ALR 194

27 Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105, 138.

entrenched in the Constitution does not provide sufficient protections to a person subject to a control order.

8.5 Control orders (as do preventative and continuing detention orders) have the potential to violate a number of human rights as provided for in the ICCPR and *International Covenant on Economic Social and Cultural Rights* (ICESCR) such as: freedom of movement; the right to liberty; the right to privacy and family life; freedom of association; freedom of speech; the right to work; the freedom to practise religion; and freedom from arbitrary detention.

8.6 Control orders provide for restrictions to be placed on a person who has not been charged, tried or convicted of an offence. Those restrictions are of a magnitude only previously seen in relation to a convicted criminal. ALHR submits that to adequately protect human rights, the imposition of the orders should be subject to the same safeguards as exist in relation to a person charged with a criminal offence. The legislation should provide for the right to a fair trial as per Article 14 ICCPR.

8.7 ALHR submits that the control order regime violates the right to a fair trial on a number of bases. The *ex parte* nature of the interim control order proceedings violates the right of the person to be tried in his or her presence and to be informed of the case against him or her. The *inter partes* proceedings to confirm the order also violate the right to a fair trial as there is a lack of complete disclosure of the case against the person. The onus of proof is also reversed and the onus is on the person to prove that the order should be revoked.

8.8 The court only has to be satisfied on the *balance of probabilities* in relation to any of the items listed in s 104.4(c); and that each of the restrictions to be imposed on the person *is reasonably necessary,* appropriate and adapted, for the purpose of protecting the public from a terrorist act, or preventing the provision of support for, or the facilitation of, a terrorist act or the engagement in a hostile activity in a foreign country.[28]

8.9 ALHR submits that 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.

8.10 ALHR also supports the Law Council's recommendations that if the CO regime is to be retained, it requires revising and updating to ensure that it is (as much as possible) a necessary and proportionate response to the threat of terrorism. In particular:

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

In relation to the special advocate regime:

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

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[28] ss104.4 and 104.14(7) *Criminal Code 1995.*

In relation to the monitoring regime:

- Sections 3ZZOA and 3ZZOB of the Crimes Act should be amended to require that there must be at least a 'reasonable suspicion' that the CO is not being complied with or that the individual is engaged in terrorist related activity;
- Subsection 3ZZNA(1) of the Crimes Act should be amended to include the words 'or express consent subject to limitations';
- Paragraph 3ZZKF(2)(b) and subsection 3ZZLC(2) of the Crimes Act are unnecessary and should be repealed;
- Subsection 3ZZNF(4) (compensation for damage to electronic equipment) of the Crimes Act should be amended to insert 'were given the opportunity to provide any known appropriate warning or guidance on the operation of the equipment and if so' before the words 'provided any appropriate warning or guidance';
- Unless the INSLM receives evidence which suggests that B-Party warrants are a necessary and proportionate measure to monitor compliance with a CO, the relevant provisions should be repealed; and
- The provisions of the Surveillance Devices Act 2004 (Cth) that enable informers to use a surveillance device without a warrant for the purpose of monitoring CO compliance should be repealed;

In relation to procedural matters:

- The Evidence Act 1995 (Cth) should continue to apply to CO confirmation hearings;
- The Federal Court of Australia in addition to State and Territory Supreme Courts be granted the power to issue a CO or, in relevant post-sentence cases, a continuing detention order (**CDO**) under the Criminal Code;
- If Supreme Courts are to be given the power to make COs in order to better harmonise the CO regime with the CDO regime, it may be appropriate to make provision for agreed statements of fact in the Criminal Code;
- The INSLM give consideration to the adequacy of the Notice to Admit procedures in both the Federal Court and the Federal Circuit Court in CO proceedings (if the latter court is to be retained as an issuing authority);
- The criminal law evidentiary rules for the drawing inferences and the application of the rule in Junes v Dunkel should be applied in CO cases;
- A CO should also be confirmed on the basis of the criminal standard as opposed to the current civil standard. As a minimum, it appears that some version of the *Briginshaw* rule applies to the burden of proof in CO confirmation proceedings, but this should be clarified;
- Division 104 of Part 5.3 of the Criminal Code should be amended to allow variations of an interim CO to be made; and
- Special Commonwealth funding should be allocated to ensure legal aid is available in CDO and CO proceedings akin to the arrangements for complex criminal cases.

8.11 ALHR also supports the INSLM's recommendations[29]:

(1) that s 104.14 be amended to clarify that:

- The original request for an interim control order need not be tendered as evidence of the proof of its contents.

[29] Report No 2 par 11.6 and following.

- The issuing court may take judicial notice of the fact that an original request in particular terms was made, but it is only to act on evidence received in accordance with the *Evidence Act 1995* (Cth).

(2) that div 104 be amended so that:

- The controlee may apply to vary an interim control order prior to confirmation of the control order.
- The court has power to amend an interim control order if the AFP Commissioner and controlee agree.

(3) that div 104 provide that there is to be no order as to costs made by the issuing court in confirmation proceedings

8.12 We also recommend, following from the INSLM's recommendations, that fully funded legal aid be available for controlees in control order proceedings

9. Division 105 of the *Criminal Code* (Preventive Detention Orders)

9.1 Preventative detention orders effectively expose a person who has not been charged, tried or convicted of an offence to incommunicado executive detention for up to 48 hours under Federal law.[30] States have legislated for preventive detention for as long as 14 days[31] and it seems that the Federal government is currently moving to follow suit.[32]

9.2 An AFP member or issuing authority only needs *reasonable grounds to suspect* that the subject of the order will engage in a terrorist act; or possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or has done an act in preparation for, or planning, a terrorist act; and making the order would substantially assist in preventing a terrorist act occurring; and only needs *reasonable grounds* to believe that detaining the subject for the period for which the person is to be detained is *reasonably necessary* to prevent a terrorist act occurring.[33]

9.3 The preventative detention regime requires the same agency (AFP) to request and issue the initial order. ALHR submits it is a system where there is a clear apprehension of bias, procedural unfairness and an `inequality of arms'. There are no adequate safeguards provided and the detention is arguably arbitrary.

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30 It is an offence for the detainee, his or her lawyer, an interpreter or anyone else to disclose that the detainee is in preventative detention: s105.41 *Criminal Code Act 1995.* The detainee is effectively held incommunicado, which has been the subject of adverse comment by the HRC because it is a circumstance in which torture can more readily take place. Such interference with communication is on the face of it a violation of the freedom from arbitrary interference with family (Article 17 ICCPR), Freedom of Speech (Article 19 ICCPR) and the right to work (Article 6 ICESCR). It could also give rise to circumstances of arbitrary detention given the secrecy involved.

31 See New South Wales: Part 2A of Terrorism (Police Powers) Act 2002; Queensland: Terrorism (Preventative Detention) Act 2005; South Australia: Terrorism (Preventative Detention) Act 2005; Tasmania: Terrorism (Preventative Detention) Act 2005; Victoria: Part 2A of Terrorism (Community Protection) Act 2003; Western Australia: Terrorism (Preventative Detention) Act 2006; Australian Capital Territory: Terrorism (Extraordinary Temporary Powers) Act 2006; and Northern Territory: Part 2B of Terrorism (Emergency Powers) Act 2003.

32 James Massola, "Malcolm Turnbull pushes for law to detain terror suspects for up to 14 days before charges", *Sydney Morning Herald*, 3 October 2017, accessed at http://www.smh.com.au/federal-politics/political-news/malcolm-turnbull-pushes-for-law-to-detain-terror-suspects-for-up-to-14-days-before-charges-20171003-gytill.html.

33 S105.4(4) *Criminal Code 1995.*

9.4 An issuing authority for a continuing order includes, amongst others, a judge or a retired judge, however, they do not exercise judicial power but act in their personal capacity and at no time is the detainee brought before a court. There is no provision for an *inter partes* hearing at any stage. There is no provision for the information provided to the issuing authority to be provided to the detainee or for the detainee to be provided with details of the reasons why the order was made. The Code prevents communication by adult detainees with family, housemates or work colleagues to the extent of advising them that he or she is "safe but is not able to be contacted for the time being."[34]

9.5 The Human Rights Committee (`HRC') has made the following comment in relation to preventative detention and Article 9 of the ICCPR:

> *...it 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.*[35]

9.6 The HRC has commented[36] that a decision as to continued preventative detention must be considered a determination attracting the right to a fair trial under Article 14 ICCPR.

9.7 9.7 ALHR submits that the current preventative detention regime in Division 105 of the Criminal Code violates a person's right to freedom from arbitrary detention and the right to a fair trial. Moving perilously close to a system which allows arbitrary detention at the discretion of the executive arm of government does not make Australia a safer place. In fact it makes us less safe by threatening the principles that form the fundamental structure of our criminal justice system. The judicial review grounds available under the *Administrative Decisions (Judicial Review) Act 1977* are not available in relation to decisions made under Division 105 of the Code[37]. This therefore limits any review to writs of *mandamus*, prohibition, or injunction[38]. Application for a writ of *habeas corpus* to the Federal Court may be possible for the review of the legality of the detention or on narrow procedural grounds but it has been argued that this is 'well short' of effective 'court control of the detention' and is a breach of Article 9(4) ICCPR[39].

9.8 Retrospectivity is also a concern. Control orders and preventative detention 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 punished retrospectively contrary to Article 15(1) of the ICCPR (freedom from retrospective guilt).

10. Continuing Detention Orders

10.1 The *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* amended the *Criminal Code* to allow the Attorney-General to apply for a continuing detention order in relation to a person convicted of terrorist offences listed in s 105A.3(1) and who is serving a sentence of imprisonment for the offence or is already subject to a continuing or interim detention order.

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34 s105.35 *Criminal Code Act 1995.*

35 Human Rights Committee, *CCPR General Comment No. 8,* 16th sess, [4], (1982).

36 Human Rights Committee, UN Doc CCPR/C/79/Add.81, [27] (1997) (concluding observations on India).

37 Schedule 1(dac) *Administrative Decisions (Judicial Review) Act 1977.*

38 The High Court's power under section 75(v) of the Constitution to issue these remedies is conferred on the Federal Court by section 39B(1) of the *Judiciary Act 1903.*

39 Letter from Professors Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon to ACT Chief Minister, 18 October 2005, 5.

10.2 A continuing detention order could result in imprisonment for an indefinite period as the court can make successive continuing detention orders.[40] A court may also instead order a 'less restrictive measure' than imprisonment and such a measure could be a control order.[41]

10.3 ALHR submits that a person should not be tried or punished again for an offence for which he or she has already been finally convicted.[42] If a person has already been tried, convicted and punished for a terrorist related offence ALHR submits that person should not then be exposed to the possibility of indefinite detention under a control order. This would be to effectively punish the person further for the same offence.

10.4 A continuing detention order is made applying only the rules of evidence and procedure for **civil matters**[43] despite the punishment being the practical equivalent of punitive imprisonment, potentially for an indefinite period.

10.5 In *Fardon v Australia*[44] the United Nations Human Rights Committee (HRC) considered the imprisonment of Mr Fardon under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) (DPSOA). Mr Fardon had already served his original prison sentence but Section 13 of the DPSOA provided that a prisoner who is proven to be a serious danger to the community may be detained in custody for an indefinite term for control, care or treatment.

10.6 ALHR submits there are similarities between the DPSOA and the regime created by the *High Risk Terrorist Offenders Act*. The HRC provided a View that the DPSOA breached Mr Fardon's rights under Article 9(1) of the ICCPR, amounting to double jeopardy and arbitrary detention. We submit the reasoning is also applicable to the *High Risk Terrorist Offenders Act:*

"7.4…..

(1) The author *[of the complaint; the offender]* had already served his 14 year term of imprisonment and yet he continued, in actual fact, to be subjected to imprisonment in pursuance of a law which characterises his continued incarceration under the same prison regime as detention. This purported detention amounted, in substance, to a fresh term of imprisonment which, unlike detention proper, is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law.

(2) Imprisonment is penal in character. It can only be imposed on conviction for an offence in the same proceedings in which the offence is tried. The author's further term of imprisonment was the result of Court orders made, some 14 years after his conviction and sentence, in respect of predicted future criminal conduct which had its basis in the very offence for which he had already served his sentence. This new sentence was the result of fresh proceedings, though nominally characterised as "civil proceedings", and fall within the prohibition of Article 15 paragraph 1 of the Covenant. In this regard, the Committee further observes that, since the DPSOA was enacted in 2003 shortly before the expiry of the author's sentence for an offence for which he had been convicted in 1989 and which became an essential element in the Court orders for his continued incarceration, the DPSOA was being retroactively applied to the author. This also falls within the prohibition of Article 15 paragraph 1 of the Covenant, in that

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40 s 105A.7(6).

41 s 105A.7(1) Note 1.

42 ICCPR Art 14(7).

43 s 105A.7(1) Note 2.

44 *Fardon v. Australia*, CCPR/C/98/D/1629/2007, UN Human Rights Committee (HRC), 10 May 2010, pp 8 to 9, available at: http://www.refworld.org/cases,HRC,4c19e97b2.html [accessed 10 May 2017]

he has been subjected to a heavier penalty "than was applicable at the time when the criminal offence was committed". The Committee therefore considers that detention pursuant to proceedings incompatible with article 15 is necessarily arbitrary within the meaning of article 9, paragraph 1, of the Covenant.

(3) The DPSOA prescribed a particular procedure to obtain the relevant Court orders. This particular procedure, as the State Party conceded, was designed to be civil in character. It did not, therefore, meet the due process guarantees required under Article 14 of the Covenant for a fair trial in which a penal sentence is imposed.

(4) The "detention" of the author as a "prisoner" under the DPSOA was ordered because it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation. The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. The DPSOA, on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise. To avoid arbitrariness, in these circumstances, the State Party should have demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State Party had a continuing obligation under Article 10 paragraph 3 of the Covenant to adopt meaningful measures for the reformation, if indeed it was needed, of the author throughout the 14 years during which he was in prison."

11. Interrelationship between different orders

11.1 The mere non-use of the laws relating to these various orders cannot of itself provide a definitive basis to say that they are not necessary or that their provisions are excessive. What can be said is that these particular provisions provide authorities with extraordinary powers that are antithetical to our traditional notions of criminal justice and to the role traditionally played by the judiciary and the executive in protecting our fundamental human rights. These are laws that violate a significant number of human rights. ALHR submits that our Australian government should not violate human rights to such an extent, and at the very least, to the extent that it does so, the requirements of Article 4 ICCPR must be complied with.

11.2 Article 4(1) ICCPR provides that:

> *In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*

11.3 Terrorism is a live threat but it is questionable as to whether it is a threat of such a significant degree that it threatens the 'life of the nation'. Certainly a public emergency of such magnitude has not been officially proclaimed by the government. If the threat

can be judged by the likely threat to life then it is worth remembering that a person in Australia is more likely to be killed in an accident or some other criminal act than by a terrorist. ALHR submits that these laws are not 'required by the exigencies of the situation'.

11.4 The Attorney General has produced reports since 2009[45] on the use of control orders and preventative detention. The information can be summarised as follows:

Years	Control Orders	Preventative Detention Orders
2008-2009	0	0
2009-2010	0	0
2011-2012	0	0
2012-2013	0	0
2013-2014	0	0
2014-2015	3 (interim)	0
2015-2016	1 (confirmed)	0
2016-2017	Report not yet issued	Report not yet issued

11.5 The reports provide no further details on the Orders issued, making it impossible to assess whether the (rare) use of control orders in the past 8 years have been necessary to prevent a terrorist attack. There would appear to have been no cause to use Federal preventative detention orders to date, with orders being made on only two occasions under State legislation. [46]

11.6 Preventative detention powers were first used in New South Wales in 2014. An order for preventative detention was made on 17 September 2014 following a closed court application for the detention of three men in Sydney as part of counter-terrorism raids in Brisbane and Sydney over an alleged plot to abduct and behead a random member of the public. The three men were detained on 18 September 2014 and were reportedly not notified of the grounds on which they had been detained other than being advised it was 'terrorism related'. The three men were subsequently released after 36 hours in detention without charge. Non-publication orders prevent the disclosure of their identities.[47]

11.7 The second use of preventative detention powers occurred in Victoria. Police officers of the Joint Counter Terrorism Team in Victoria applied on 17 April 2015 for an interim preventative detention order to detain Harun Causevic, then aged 18.[48] The application was made due to the police fearing that Causevic would carry out an imminent terrorist attack. Causevic was taken into custody in accordance with the interim preventative detention order on 18 April 2015. He was found to have two Cold Steel "AK-47" foldable knives, a Cold Steel "Trench" knife, a camouflage-print tactical vest, black Shahada flag and telephone numbers that were known to counter terrorism authorities

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45 https://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/ControlOrders.aspx, accessed 10 May 2017.

46 See the annual reports at https://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/ControlOrders.aspx

47 http://www.theaustralian.com.au/national-affairs/three-held-under-preventive-detention-orders/news-story/f693e0ed6e12718774357f65d304dd74

48 IMO an Application for a Preventative Detention Order in respect of Causevic [2015] VSC 248

as being used in the recruitment of Australians as foreign fighters and the facilitation of their travel into Syria and Iraq.[49]

11.8 Causevic was subsequently removed from detention under the interim PDO on 20 April 2015 and charged with conspiracy to do an act in preparation for, or planning, a terrorist act contrary to ss. 11.5(1) and 101.6(1) of the *Criminal Code* relating to a plan to carry out a terrorist attack in Melbourne on or around 25 April 2015. This charge was later withdrawn by the Commonwealth Director of Public Prosecutions on 25 August 2015 and he pleaded guilty to three counts of possessing a prohibited weapon contrary to s.5AA of the *Control of Weapons Act 1990* (Vic).[50]

11.9 Causevic was subsequently placed under an interim control order on 10 September 2015 which was subsequently confirmed on 8 July 2016.[51] The court found that there was no direct evidence of any knowledge by Causevic of Besim's planned attacks and there was no direct evidence of Causevic making unambiguous and extreme threats of violence toward police. However, the Court was satisfied on the balance of probabilities that confirming the Interim Control Order would substantially assist in preventing a terrorist act.[52]

11.10 ALHR endorses the comments of Bret Walker SC quoted in paragraph 2.7 as to the undesirability of excessive legislation which goes far beyond the specific requirements of current circumstances and so greatly undermines our traditional balance of powers and the rule of law.

11.11 We also endorse the Law Council's recommendations that:

- Section 105.4(5) of the Criminal Code should to be amended to provide that 'a terrorist act is one that...is likely to occur within the next 14 days' rather than is '...capable of being carried out in the next 14 days'; and
- The exercise of executive powers under Division 105 of the Criminal Code should be subject to judicial review under the Administrative Decisions (Judicial Review) Act 1997 (Cth);
- The legislation be amended so that it is open to the Court to make a CO as an alternative to a CDO.
- both the Federal Court of Australia and State and Territory Supreme Courts have the power to issue CDOs.
- the unacceptable risk test in relation to making a CDO should be amended in a manner more consistent with the PDO test.
- The applicant for a CDO should continue to be the Attorney-General;
- The Attorney-General should be required to be satisfied in an application for a CDO that there is no other less restrictive measure (for example, a control order) that would be effective in preventing the unacceptable risk of a serious Part 5.3 offence if the offender is released into the community;
- The Attorney-General's decision to make an application for a CDO should be required to be made on the basis of information which is sworn or affirmed by a senior AFP member with an explanation as to why each of the possible obligations, prohibitions or restrictions or a combination of such for a CO would not be effective; and
- The Attorney-General should also be required to have regard to matters as outlined in section 105A.8.

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49 Gaughan v Causevic (No. 2) [2016] FCCA 1693, 49 - 60.

50 Gaughan v Causevic (No. 2) [2016] FCCA 1693, 49 - 60.

51 Gaughan v Causevic (No.2) [2016] FCCA 1693, 1.

52 Gaughan v Causevic (No.2) [2016] FCCA 1693, 3-4, 62-64.

12. Other

12.1 ALHR also endorses the comments of Bret Walker SC that:

- section 3ZZHA of the Crimes Act should be amended to allow for whistleblowing;[53]
- 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;[54] and
- the concept of 'subverting society' should be removed from the Criminal Code.[55]

13. 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.

Australia was at the forefront of the development of the modern international legal system post-World War Two, which included designing and implementing the architecture of international human rights law. We have signed and ratified the core international human rights law instruments.

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 under consideration does not reflect an appropriate balance.

The danger in overly hasty, populist and crude responses to the terrorism threat is a loss of fundamental rights for all Australians. Any such loss changes our society and the nature of our democracy and in fact represents a victory for terrorism.

If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au.

Yours faithfully

Benedict Coyne
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53 op cit, p 38.
54 op cit, p 38.
55 op cit, p 42.