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Mr Bret Walker SC
Independent National Security Legislation Monitor
PO Box 6500
CANBERRA ACT 2600

Dear Mr Bret Walker SC,

Inquiry into powers relating to questioning warrants, questioning and detention warrants, control orders and preventative detention orders.

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INTRODUCTION

1. Australian Lawyers for Human Rights (**ALHR**) thanks the Independent National Security Legislation Monitor (**INSLM**) for the opportunity to comment on powers relating to questioning warrants and questioning and detention warrants under the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) and control orders and preventative detention orders under the *Criminal Code Act 1995* (Cth)(**Criminal Code Act**).

2. 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 2000 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.

SUMMARY

3. ALHR endorses the INSLM's timely review and holds significant concern about the legislative regimes under review and the lack of adherence of those regimes to the Australian government's obligations under international law including international human rights laws. ALHR has addressed all 20 questions proposed by the INSLM in Appendix 3 of the 2011 Annual Report and provided recommendations including:

    i. The legislative regime for the request, issue and execution of questioning warrants (paras [14]-[71]) including:

        - the last resort requirement thresholds are appropriate safeguards and should be maintained (paras [14]-[25]); the time limits applicable to questioning warrants are excessive and unjustified and need to be curtailed (paras [26] – [36]); any power to arbitrarily detain minors in the execution of questioning warrants is inadmissible and must be amended out of the legislation (paras [32]-[36]);

        - the time limits applying to persons who require the use of interpreters are disproportionate and discriminatory (para [37]-[45]); there must be more sufficient and express safeguards within the legislation for the surrender and cancellation of passports in connexion with questioning warrants (paras [46]-[56]);

        - the 5 years imprisonment for failing to answer questions truthfully may be disproportionate given the abrogation of the privilege to self-incrimination (paras [57]-[59]);

        - the abrogation of privilege against self incrimination fails to accord with the Australian Government's obligations under Article 14 of the ICCPR and must be amended to do so or otherwise repealed (paras [60]-[64]);

        - some of the conditions permitting use of lethal force in enforcing a warrant require more clarity (paras [65]- [71]).

ii. The legislative regime for the request, issue and execution of questioning and detention warrants (paras [72]-[97]):

- The three severable conditions for the issue of questioning and detention warrants are problematical and clearly not stringent enough to justify such an extreme deprivation of liberty (paras [72]-[74]), would more properly be transformed into less offensive offences (paras [83]-[84] and [93]-[95]) and the requirement of a judicial officer, rather than an officer of the executive (paras [77]-[82]) should be front and centre in the issuing of such warrants (paras [75]-[76] and [80]-[82]);

- Ultimately, questioning and detention warrants impose a legislative regime empowering an officer of the executive to unreasonably and arbitrarily detain and Subdivision C should therefore be repealed (paras [76], [82] and [92]-[97]). Such repeal is further justified by the negligible use of such warrants (para [92]).

iii. The legislative regime for control orders (paras [98] – [107] and [115]-[128]):

- ALHR submits that the control order regime violates the right to a fair trial on a number of bases and Division 104 of the Criminal Code should be repealed (paras [99] – [107]) and such repeal is further justified by their under-utilisation (paras [117]- [120]).

iv. The legislative regime for preventative detention orders (paras [108]- [128]):

- Preventative detention orders expose a person who has not been charged, tried or convicted of an offence to effectively incommunicado executive detention and therefore Division 105 of the Criminal Code should be repealed (paras [108] – [114]) and such repeal is further justified by their under-utilisation (paras [117]- [120]).

4. Of course, in any assessment of these 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. The ALHR commends the INSLM for applying such a standard in his assessment of the impugned provisions.

5. Ultimately, ALHR insists that such laws must adhere with the Australian government's international legal obligations under the various binding instruments detailed below and in accordance with contemporary norms of human rights and fundamental freedoms as expressed by various UN Committees on the implementation of various articles of the binding instruments. If the impugned provisions cannot be effectively amended to accord with those standards and binding legal obligations, it is ALHR's strong recommendation that they be repealed. For example, to the extent that the laws for questioning warrants and questioning and detention warrants empower officers of the executive to order that certain individuals be arbitrarily detained, such arbitrary detention is a direct affront to Australia's international legal obligations, the separation of powers and the rule of law and therefore such laws have no place on the law books of a democratic nation State.

OVERVIEW

6. ALHR welcomed the appointment of the INSLM by the Australian Government in April 2011 and views such appointment as a very positive step in promoting accountability and prudent policy development in the rapidly changing and often controversial area of Australia's national security and counter-terrorism legislation (**CT laws**).

7. ALHR further welcomes the INSLM seeking out public comment on the current CT laws including in relation to warrants for questioning and detention by the Australian Secret Intelligence Organisation (**ASIO**) and control and preventative detention orders. Such laws provide significant power to the State to immediately abrogate the fundamental right to liberty of the person on grounds of reasonable suspicion.

8. Whilst it might not be unreasonable to utilise such powers to nullify the commission of a terrorist offence which would otherwise kill many innocent people, whether such excessive powers are necessary to have on the books, especially if under-utilised or unreasonably utilised, should be subject to ongoing review in the context of both the current global geo-political climate and of Australia compliance with its obligations under international law. As the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism stated 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 indispensible part of a successful medium and long-term strategy to combat terrorism.*[1]
> (References omitted).

9. Measures to combat terrorism have the potential to prejudice the enjoyment of – and violate – human rights and the rule of law.[2] ALHR acknowledges that, in performing the delicate balancing of two distinct objectives, there may from time to time be some justified incursions upon fundamental freedoms but only in extreme circumstances and for a temporary and limited time, such as national security in times of war.[3] Such laws become problematical in the current climate of the seemingly eternal "War on Terror" after the World Trade Tower attacks because governments have sought to justify and transmute what was once an extreme and temporary measure into the status of a new norm.

10. The United Nations General Assembly has strongly and repeatedly expressed similar

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[1] United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, "Ten areas of best practices in countering terrorism", (Human Rights Council, Sixteenth Session, 22 December 2010), para. [12], available <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf> 20 September 2012.

[2] See: United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, above n 4, para [8]: Human Rights Council (sixteenth session, 19 January 2011) *Report of the Working Group on Arbitrary Detention*, (A/HRC/16/47) para. [48].

[3] See for example: UN Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN doc E/CN.4/1985/4, 28 Sep 1984. Geneva (CHE): United Nations. Available <www.unhcr.org/refworld/docid/4672bc122.html> 19 Sep 2012.

views to the Special Rapporteur above at paragraph 5, in affirming and reaffirming Resolution 60/288: "The United Nations Global Counter-Terrorism Strategy"; and Resolution 64/168 "Protection of Human Rights while Countering Terrorism."[4] The latter Resolution relevantly "urges" States Parties, to fully comply with their international legal obligations, particularly human rights, including:

- protecting all human rights bearing in mind that certain counter-terrorism measures may impact on the enjoyment of these rights;
- respecting safeguards concerning the liberty, security and dignity of the person and taking all necessary steps to ensure that persons deprived of liberty are guaranteed their international legal rights, including review of detention and fundamental judicial guarantees;
- respecting the right of persons to equality before the law, courts and tribunals and to a fair trial,
- ensuring that laws criminalising terrorism are accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international human rights law;
- ensuring that interrogation methods used against terrorism suspects are consistent with international legal obligations and are reviewed to prevent the risk of violations of international law;
- ensuring due process guarantees, consistent with all relevant provisions of the Universal Declaration of Human Rights, and obligations under the International Covenant on Civil and Political Rights
- drafting and implementing all counter-terrorism measures in accordance with the principles of gender equality and non-discrimination.[5]

11. On a similar note, in the UN Human Rights Council, governments unanimously recently reaffirmed the caution necessary in the use of detention, urging that States:
    - respect and promote the right of anyone detained, by bringing proceedings before court without delay; and
    - ensure that this situation is equally respected in cases of administrative detention in relation to public security legislation.[6]
12. On a related note, ALHR has recently expressed significant concern and maintains a guarded vigilance regarding the Government's recent and existing proposals to further expand the powers provided to intelligence and law enforcement agencies, especially in

[4] United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, above n 4, para. [8].
[5] This includes not resorting to profiling based on stereotypes founded on grounds of discrimination prohibited by international law, including on racial, ethnic and/or religious ground.
[6] Human Rights Council, *Arbitrary detention* (17 Jul 2012) UN doc A/HRC/RES/20/16, Geneva (CHE), United Nations.

an already excessively policed and heavily legislated environment[7]. The proposals are currently the subject of an existing inquiry by the Joint Parliamentary Committee on Intelligence and Security (JPCIS) due to the potential of such proposed powers, to substantially prejudice the interests of members of the Australian public not the subject of investigation. In relation to existing powers the task seems more pressing. ALHR considers that periodic review is of the utmost importance where the right to individual liberty is at stake and ALHR submits that the maintenance of such powers must be very carefully considered.

13. As expressed in ALHR's submission to the JPCIS, and equally relevant here, Australia's counter-terrorism and national security laws can and must exist with a human rights framework. As a State signatory to numerous ratified international human rights instruments, Australia has an obligation to comply with international law. Such compliance gives international law its strength and integrity. ALHR believes that a human rights framework will strengthen counter-terrorism and national security laws in Australia by appropriately balancing the various obligations.

ISSUES FOR CONSIDERATION[8]

Questioning Warrants

Is the last resort requirement for a questioning warrant under the ASIO Act too demanding?

14. Division 3 of Part III of the ASIO Act is entitled "Special Powers relating to terrorism offences". Subdivision B and C provide the procedures for request and issue of questioning warrants and questioning and detention warrants respectively, Ultimately, the power contained in these provisions is that an individual may be detained for up to 7 days without charge, subject to continuous questioning for up to 24 hours[9] (or 48 hours when an interpreter is required[10]). Obviously, such power constitutes a significant infringement of individual liberty in a democratic country otherwise governed by the rule of law and therefore must have sufficient safeguards to balance the State's corresponding legal obligations, domestic and international, in upholding individual human rights.

15. ALHR understands that those safeguards currently constitute a complex set of pre-existing procedures in applying for and issuing a questioning warrant were summarised by the INSLM in his 2011 Annual Report as follows:[11]

    - Four different official persons are to be involved in the processes of requesting and issuing questioning warrants; the responsible Minister, the Director-General of ASIO, the Inspector-General of Intelligence and Security and the (Federal) Commissioner of Police.

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[7] Australian Lawyers for Human Rights, Submission to the Joint Committee on Intelligence and Security (JCIS) Inquiry into potential reforms of National Security Legislation, 29 August 2012, para. [35]. Available http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis%2Fnsl2012%2Fsubs.htm (submission no. 194).

[8] See Independent National Security Legislation Monitor (INSLM), Mr Bret Walker SC, *Annual Report 2011,* (16 December 2011), Commonwealth of Australia, Appendix 3, 67-70, questions 7-21 and 41-45.

[9] Subsecs 34R(6) and (7)(c) of the ASIO Act..

[10] Section 34R(11) of the ASIO Act.

[11] INSLM, *Annual Report 2011*, above n 8, 29-30.

- ASIO officers must follow their Director-General's statement of procedures. The written statement of procedures is required under s 34C and, by virtue of that provision, requires Ministerial approval following consultation with the Inspector-General of Intelligence and Security and the Commissioner of the Federal Police and on which the Director-General must further brief the Parliamentary Joint Committee on Intelligence and Security.

- The Director-General must provide to the Minister a draft of the warrant to be requested and a statement of facts upon which the issue of such warrant is said to be justified and including a statement of all previous requests for the issue of a warrant upon this person under Division 3.

- Pursuant to section 34D of the ASIO Act, the Minister may consent to the Director-General's request for the issue of a questioning warrant only if the Minister is satisfied that:

    - there are reasonable grounds for believing that its issue will substantially assist the collection of intelligence that is important in relation to a terrorism offence,

    - relying on other methods of collecting that intelligence would be ineffective.

    - There is a written statement of procedures in force for the issue of such warrants.

    - The warrant permits the person to be questioned to be provided with a lawyer

- The Minister may also request amendment to the draft request if they are not satisfied with it.

- As provided by section 34E(1)(b), the issuing authority, who pursuant to section 34AB must be a Federal Magistrate or a judge of another federal statutory court, must also be satisfied that there are reasonable grounds for believing that a questioning warrant will substantially assist in the collecting of intelligence that is important in relation to a terrorism offence before issuing such warrant.

- Questioning under a Subdivision B warrant must occur before a prescribed authority,[12] either a retired superior court judge or other persons similarly qualified[13] who must ensure the person is aware of the effect and limits of the questioning warrant, and of the important rights to contest it including by judicial review. The questioning must also be mandatorily video recorded.[14]

- Every 24 hours, the prescribed authority must inform the person of the right of judicial review relating to the warrant or treatment under it. The prescribed authority must specifically inform the person of rights to complain to the

[12] Section 34H of the ASIO Act.
[13] Section 34B of the ASIO Act.
[14] Section 34ZA of the ASIO Act.

Inspector-General of Intelligence and Security, the Ombudsman and to a police complaints agency.

16. Whilst the INSLM comments that there has been insufficient practical experience to explore whether such safeguards constitute too high a test for the effective gathering of information under these warrants and whether they are therefore impracticable,[15] ALHR is of the opinion that the Australian Government must give top priority to its international human rights obligations in countering terrorism and bolstering national security as has been recommended by various UN bodies since the attack on the twin towers and the beginning of the so-called "War on Terror".[16]

17. Australia is signatory to, and has ratified many international human rights instruments thereby imposing legal obligations on itself in the sphere of international law. Of all the instruments, perhaps Article 9 of the *International Covenant on Civil and Political Rights 1966* (**ICCPR**)[17] expresses best the sacredness with which individual liberty is held by democratic rule of law countries that form the international human rights community. Article 9(1) provides:

> *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.*

18. In this context, ALHR strongly supports the inclusion of appropriate and even perhaps "elaborate"[18] procedural safeguards in the issuing of questioning warrants under Division 3 of Part III[19] of the ASIO Act.

19. Any potential for the abrogation of the common law right to liberty of the person and Australia's international obligations to uphold such right, as expressed by, for example, Article 9 of the ICCPR and Article 3 of the *United Nations Declaration of Human Rights 1948* (**UDHR**), is of serious concern in a democratic country like Australia.

20. ALHR strongly advocates for a vigilant and precautionary approach by the Government whenever such fundamental human rights are placed in potential jeopardy. This is especially because, regardless of these provisions, Australia has a robust, existing regime of legislation to provide intelligence services and law enforcement authorities with sufficient powers of investigation and prosecution for terrorism offences and also because in the last decade since the beginning of the so called "War on Terror" they have rarely been used.[20] In fact, between 2003 and 2011 a questioning and detention warrant has never been issued.

21. Whilst rare use of course does not mean such provisions might not one day save many

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[15] INSLM, *Annual Report 2011*, above n 8, 30.
[16] See for example: K Annan, 'A Global Strategy for Fighting Terrorism' (Speech delivered at the Closing Plenary of the International Summit on Democracy, Terrorism and Security, Madrid, 10 March 2005). Available http://english.safe-democracy.org/keynotes/a-global-strategy-for-fighting-terrorism.html 20 Sep 2012; *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,* Martin Scheinin (A/HRC/16/51), paras. [8] and [12]; United Nations General Assembly resolution 60/288 - The United Nations Global Counter-Terrorism Strategy, 20 September 2006.
[17] Signed by Australia on 18 December 1972 and ratified on 13 August 1980.
[18] INSLM, *Annual Report 2011,* above n 8, 29.
[19] Sections 34A – 34ZZ of the ASIO Act.
[20] INSLM, *Annual Report 2011,* above n 8, Appendix 18, 115.

lives, what is of relevance is that so far there has been no complaint that the threshold requirements are too high to investigate and prosecute.

22. In this context, ALHR commends the stringent and perhaps elaborate safeguards embedded within Division 3 in relation to Subdivision B questioning warrants. Such oversight by multiple authorities and enforced compliance with pre-existing procedures on pain of criminal sanction display, at least theoretically, an apt compliance with the need to balance individual rights with public order. In terms of accountability, oversight and proportionate regulation of the delicate area of liberty versus law, ALHR submits that the right balance has been struck.

23. ALHR strongly commends the inclusion of s 34T(2) which provides for the humane treatment of the person specified in warrant and states that: "The person must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment, by anyone exercising authority under the warrant or implementing or enforcing the direction." Inclusion of such provision accords strongly with Australia's obligations under Article 10(1) of the ICCPR which provides that: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." However, ALHR is mindful that such grand statements need not preclude further examination of the substantive effects of the provisions in question and that the task of the INSLM must be to investigate further individual cases

24. Finally, ALHR supports periodic review of these procedures and, if future practical experience indicates the threshold requirements as they stand make the purposes of the provisions unworkable, it may be suitable to review the warrant request and issue procedures. However, as the provisions in relation to Subdivision B warrants stand, ALHR is satisfied that they are suitably tailored to the task of balancing individual liberty with public order.

25. ALHR recommends:

    i. Maintaining the stringent threshold requirements for requesting and issuing a questioning warrant under Subdivision B.

Are the time limits (e.g. 7 days detention for 24 hours questioning) applicable to questioning warrants too long, too short or about right?

26. As a human rights body, ALHR maintains a heightened vigilance upon the line demarcating arbitrariness in the prosecution of detention measures by the State especially where they arise within Australia. In relation to CT laws, the powers of the State to detain individuals without charge have been vastly expanded following the 11 September 2001 attack on the World Trade Towers in New York.

27. Warrants are only valid for a period of 28 days.[21] Time limits applicable to Subdivision B questioning warrants are provided for by the likes of section 34S which states that Division 3 "does not authorise a person to be detained for a continuous period of more than 168 hours", equivalent to seven days.

[21] Subsecs 34E(5)(b) and 34G(8)(b) of the ASIO Act.

28. ALHR strongly supports "bright line limits", as identified by the INSLM[22] on periods of detention and questioning as stipulated in the relevant provisions[23] by precise periods of hours or days. Temporal clarity is crucial when individual liberty is at stake. However, ALHR also shares the INSLM's concerns about the "problematical arbitrariness" of such timeframes.

29. ALHR expresses high concern at the INSLM's comments that there is so far "no operational justification for regarding such a long period of detention as reasonably necessary in order for useful intelligence to be gained."[24]

30. In 1982 the Human Rights Committee (CCPR) stated:

> *Paragraph 3 of article 9[25] requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days"*[26] ...[and]...*pre-trial detention should be an exception and as short as possible."*[27]

28. More recently, in February 2009, the UN's Working Group on Arbitrary Detention, when considering detention in the framework of countering terrorism stated that it considered it advisable to set up a list of principles in conformity with articles 9 and 10 of the UDHR, and articles 9 and 14 of the ICCPR, to be used in relation to deprivation of liberty of persons accused of acts of terrorism as follows: [28]

> *(a) Terrorist activities carried out by individuals shall be considered as punishable criminal offences, which shall be sanctioned by applying current and relevant penal and criminal procedure laws according to the different legal systems;*
>
> *(b)* ***Resort to administrative detention against suspects of such criminal activities is inadmissible;***
>
> ***(c) The detention of persons who are suspected of terrorist activities shall be accompanied by concrete charges;***
>
> ***(d) The persons detained under charges of terrorist acts shall be immediately informed of them, and shall be brought before a competent judicial authority, as soon as possible, and no later than within a reasonable time***

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[22] INSLM, *Annual Report 2011,* above n 8, 30.
[23] Notably s 34R(1), (2) and (6) and s 34(s) of the ASIO Act..
[24] INSLM, *Annual Report 2011,* above n 8, 31.
[25] ICCPR Article 9(3) provides:

> *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.*

[26] Office of the United Nations High Commissioner for Human Rights, CCPR General Comment No. 08: Right to liberty and security of persons (Art. 9) (sixteenth session 1982): 30/06/1982.
[27] Ibid, para. [3].
[28] Working Group on Arbitrary Detention, Report, 2009 Human Rights Council (UN doc A/HRC/10/21, 16 February 2009), paras. [53] – [55].

period;

(e) The persons detained under charges of terrorist activities shall enjoy the effective right to habeas corpus following their detention;

(f) The exercise of the right to habeas corpus does not impede on the obligation of the law enforcement authority responsible for the decision for detention or maintaining the detention, ***to present the detained person before a competent and independent judicial authority within a reasonable time period****. Such person shall be brought before a competent and independent judicial authority, which then evaluates the accusations, the basis of the deprivation of liberty, and the continuation of the judicial process.*

(Emphasis added).

29 In March 2009, the UN Human Rights Council (HRC) considered these recommendations and:[29]

- requested that States concerned to take account of the Working Group's views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty and to inform the Working Group of the steps they have taken;

- encouraged all States to

    - give due consideration to the recommendations of the Working Group and take appropriate measures to ensure that their legislation, regulations and practices remain in conformity with the relevant international standards and the applicable international legal instruments;

    - respect and promote the right of anyone who is arrested or detained on a criminal charge to be brought promptly before a judge or other officer authorized by law to exercise judicial power and to be entitled to trial within a reasonable time or to release;

29. Therefore, in the context of such international legal standards and current norms of respecting human rights in a counter-terrorism framework, it is the submission of ALHR that 168 hours as a maximum period of detention without charge is both extreme and excessive and has no place in the law books of a democratic country that respects the rule of law. Further, the under-utilisation of such powers is testament to the fact that they may not in fact be necessary.[30]

30. Before the INSLM assesses the arbitrariness or otherwise of such power, ALHR suggests that an operational justification be provided (backed by necessary evidence) for regarding such a long period of detention as reasonably necessary in order for gathering useful intelligence. In the absence of any such compelling evidence ALHR strongly suggests the laws regarding questioning warrants be repealed.

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[29] Human Rights Council, Tenth Session, Resolution 10/9. Arbitrary detention (UN doc A/HRC/RES/10/9, 26 March 2009), paras. [2]-[4].

[30] See Appendix 18 of the INSLM, *Annual Report 2011,* above n 8, 115.

31. Further, ALHR agrees with the INSLMs observations that a questioning period of 24 hours is an "extraordinary power"[31] and that where "there is little or no empirical justification for 24 hours rather than say, 12 hours",[32] ALHR makes the submission that such period is disproportionate, excessive and unnecessary, as evidence by the lack of utilisation of such power in the last decade.

Detention of Minors

32. Article 37 of the *Convention on the Rights of The Child 1989* (**CRC**)[33] provides that State Parties shall ensure that:

> *(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used* ***only as a measure of last resort*** *and for* ***the shortest appropriate period of time****;...*
>
> *(d) Every child deprived of his or her liberty shall have the right* ***to prompt access to legal and other appropriate assistance****, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.*
>
> (Emphasis added).

33. However, ALHR acknowledges that there are limited circumstances in which international human rights law allows for the detention of minors that is not unlawful or arbitrary as a last resort. The Committee on the Rights of a Child has allowed for a distinction in treatment between different types of children, contrasting those below a minimum age of criminal responsibility with those who are older but still *"younger than 18 years ... [who] can be formally charged and subject to penal law procedures"*[34] and has given specific direction on the detention of children.[35]

34. In reference to section 34ZE(6)(b)(ii) whereby minors of 16-18 years of age might be detained and subject to up to 2 hours of continuous questioning the ALHR commends the maintenance of safeguards under s 34ZE including the prompt provision of access to contact a parent or legal guardian or lawyers including under subsections 34ZE(6)(a)-(b) and 34ZE(8)(a)-(e).

35. However, ultimately under Australia's international legal obligations, particularly international human rights law obligations, it is inadmissible to subject minors to any form of arbitrary detention and therefore if it is intended they be detained, they should be charged with an offence and brought before a judicial officer within a reasonable time.

36. ALHR recommends:

    i. Subdivision B of Division 3 of Part III of the ASIO Act be repealed or

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[31] INSLM, *Annual Report 2011,* above n 8, 32.

[32] Ibid.

[33] Ratified by Australia on 17 December 1990.

[34] Committee on the Rights of a Child, General Comment No. 10: Children's rights in juvenile justice, 25 April 2007, UN doc CRC/C/GC/10, para. [31].

[35] Ibid, paras. [78]-[89].

significantly amended to reflect current international human rights norms that any form of administrative detention of terrorism suspects is inadmissible and that such detention be accompanied by concrete charges.

Are the time limits for questioning warrants where interpreters have been used commensurate with the limits applying otherwise?

37. ALHR is concerned about the discrepancy between detention and questioning timeframes between when an interpreter is not required,[36] and when an interpreter is required.[37] On its face such discrepancy appears disproportionate and arbitrary and bordering on discriminatory. As previously stated, the deprivation of liberty is perhaps one of the gravest consequences of our legal system and the power to deprive must be tempered accordingly.

38. As previously stated, Australia is bound by the terms of the ICCPR of which Article 2(1) provides:

> *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

39. .Further, in the context of the seemingly eternal "war on terror" it is arguable that Article 4(1) is also activated and thus relevant to the INSLM's concerns regarding seemingly arbitrary differences in detention times for non-English. Article 4(1) states:

> *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.***
>
> (Emphasis added).

40. Further Article 5(a) of the *Convention for the Elimination of All Forms of Racial Discrimination 1966* (CERD)[38] provides that:

> *States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice; ....*

41. As identified by the INSLM,[39] the contemporary nature of the terrorist threats under

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[36] Subsecs 34R (10, (2) and (6) of the ASIO Act.
[37] Subsecs 34R (9) and (11) of the ASIO Act.
[38] Ratified by Australia on 30 September 1975.
[39] INSLM, *Annual Report 2011,* above n 9, pp 22-23.

consideration by Australian authorities places extreme and violent Islamism squarely as the main danger,[40] although not the only danger. The Australian Government's 2010 Counter Terrorism White Paper identities "a number of Australians" subscribed "to the violent jihadist message" many of who "were born in Australia and they come from a wide range of ethnic backgrounds". In the context of these comments it is reasonable to assume that it is likely that people from ethnic backgrounds might have a higher probability of requiring an interpreter.

42. Whilst it may be commonly understood that use of an interpreter in questioning and the need to translate particular documents used in questioning is likely to take more time than without an interpreter, the unfortunate consequence is that a person from a non-English speaking background suffers up to twice the deprivation of liberty otherwise encountered by the English speaking population. This is a clear case of at least severe indirect discrimination.

43. Therefore, in abiding by Australia's other international obligations ensuring equal access to justice and non-discrimination including those mentioned above, such discrepancy needs to be kept at an absolute minimum and other methods of questioning in such circumstance may need to be implemented.

44. In the absence of any precise operational justification, backed by compelling evidence, as to why periods of questioning and detention require being almost doubled where an interpreter is involved, ALHR makes the submission that such discrepancy is heavily excessive. ALHR agrees with the INSLM that such discrepancy is a crude accommodation of linguistically diverse persons and the difference in increments of extension where an interpreter is involved seem to indicate a very rough and ready approach to what should be an extremely delicate issue, the deprivation of liberty without charge.

45. ALHR recommends:

    i. Repealing subsections 34R(9) and (11).

    ii. Amending the section with a much more reasonable and much less extreme discrepancy and provision that the prescribed authority should explicitly be required to be satisfied that any extension of time is no more than could reasonably be attributable to the use of a foreign language during questioning.

Are there sufficient safeguards including judicial review in relation to the surrender or cancellation of passports, in connexion with questioning warrants?

> *Liberty of movement is an indispensable condition for the free development of a person.*[41]

46. Perhaps the clearest provision for the fundamental human right to freedom of movement is expressed by Article 12(2) of the ICCPR which provides "Everyone shall be free to leave any country, including his own".

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[40] See Appendix 15 of the INSLM, *2011 Annual Report,* above n 8, referring to the Australian Governments Counter Terrorism White Paper (2010), 8 and 14, and the ASIO Report to Parliament 2010-2011, 5.
[41] Human Rights Committee, CCPR *General Comment 27* (Sixty-seventh session, 1999): Article 12: Freedom of Movement, A/55/40 vol. I (2000) 128, para [1].

47. Article 12(3) provides for exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted by the State including to protect national security, public order (ordre public), public health or morals and the rights and freedoms of others. However, CCPR General Comment 27 States that in order to be permissible, restrictions under Article 12(3) "must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant"[42]; "the law itself has to establish the conditions under which the rights may be limited."[43]

48. Paragraph 2 of General Comment 27 reads:

> *The permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in article 12, paragraph 3, and by the need for consistency with the other rights recognized in the Covenant.*

49. It is therefore a very serious matter to cancel or confiscate a passport of a person subject to a questioning warrant thereby abrogating that individual's fundamental right to freedom of movement.

50. Sections 34W-34Z of the ASIO Act compels that a person the subject of a Subdivision B questioning warrant or a Subdivision C questioning and detention warrant must surrender their passports to the Director-General and must obtain permission from the Director-General before leaving Australia.

51. Further, in the context of the comments at paragraph 34 above, that individuals from ethnic, and thus perhaps non-English speaking, backgrounds may be disproportionately targeted by the provisions discussed here. Article 5(d)(ii) of CERD provides that:

> *State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (d)... (ii) The right to leave any country, including one's own, and to return to one's country.*

52. Whilst judicial review is an available avenue outside of the ASIO Act to impugn the administrative decisions of government, in the especially sensitive area of national security and human rights concerns, ALHR recommends the inclusion of express safeguards including judicial review in relation to the surrender or cancellation of passports under the ASIO Act. This could be in a similar format to the stringent safeguards for how a prescribed authority is to continuously inform and check upon a person while detained for questioning under Subdivision D of Division 3 of Part II of the ASIO Act (ss 34J-34S). When a person's freedom of movement is curtailed it is a perfectly reasonable step that their right to challenge such significant decision is made known to them clearly and consistently.

53. However, ALHR is acutely aware that judicial review of such decisions remains an area of significant concern as often, in "the interests of national security", will prevail over

[42] Ibid, para. [11].
[43] Ibid, para. [12].

the release of significant information regarding the purpose and justification of the warrant. ALHR is concerned at the expression of such prevailing secrecy and obstruction to information in section 34ZT where information may be withheld from the individual to be questioned and their lawyer. [44]

54. Whilst ALHR accepts there are situations where information must be kept confidential as a matter of national security, it is worth reiterating the words of General Comment 27 of the Human Rights Committee which states that:

> *the laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution*[45]
>
> [*and*]
>
> *Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.*[46]

55. In this regard, ALHR submits that the impugned information should be provided to a judicial officer with the relevant submissions in order that an impartial tribunal can make the final determination as to the necessity for censure.

56. ALHR recommends:

    i. Implementing more stringent safeguards including express judicial review within the ASIO Act in relation to the surrender or cancellation of passports, in connexion with questioning warrants

Is the 5 years imprisonment for failing to answer questions truthfully etc under a questioning warrant appropriate and comparable to penalties for similar offences?

57. Being compelled to answer questions and to produce records authorised by subsections 34L(1) - (6). The powers of compulsory questioning come under the umbrella to the powers deemed "Special" as provided by Division 3 of Part III. As mentioned in the INSLM report, the power to force / compel persons to attend hearings and answer questions is not necessarily a unique power but neither does that mean such power accords with Australia's international legal obligations including international human rights norms. As mentioned below at paragraph [68], ICCPR Art. 14(3)(g) focus on the a person facing criminal charges not being 'compelled to testify against himself or to confess guilt'.[47]

58. Although the use-immunity covers criminal proceedings instituted on the basis of laws outside the scope of s 34L, the question still remains as to whether the threat of imprisonment for not answering a question, which *might* self-incriminate within the scope

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[44] Section 34ZT of the ASIO Act.
[45] Human Rights Committee, CCPR *General Comment 27*, above n 41, para. [13].
[46] Ibid, para. [14].
[47] ICCPR Art 14.3(g). See also CCPR *General Comment 13*: *Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, para. [14].

of s 34L, is valid? Is there any control over what sort of questions can result in such action? Whether imprisonment is appropriate here gets back to more basic questions on: the right to liberty and validity of detention;[48] and the presumption of innocence.[49]

59. Further, ALHR suggests that the INSLM's consideration of this issue will revolve around the question of whether a person can be detained 'arbitrarily' and 'whether it was reasonable (proportional) in relation to the purpose to be achieved'.[50] If there are insufficient controls on what sort of questions can result in such action, highly concerning situations might arise. For example, where someone can be asked a question and face jail for not answering, even though the subject of the question is not something that could expose the person to jail even if they did answer. The black and white acuity and academic nature of textual provisions rarely translates comfortably onto the colour spectrum of reality with all its vagaries. In that regard, troubles arise in discerning the appropriate boundaries to the abrogation of the privilege against self-incrimination, the use immunity and in discerning what penalty is appropriate for non-compliance with the impugned section in the circumstances. The ultimate question is whether the penalty of 5 years imprisonment is appropriate and proportionate in circumstances where the State appears to be breaching ICCPR Art 14?

Is the abrogation of privilege against self incrimination under a questioning warrant sufficiently balanced by the use immunity?

60. Subsection 34L(8) abolishes the privilege against self-incrimination, however there is protection against the use of such answers in criminal proceedings (other than for an offence against the same provision).

61. Article 14 of the ICCPR is concerned with equality before the law. Subparagraph14(3)(g) provides that:

> *3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
>
> ...
>
> *(g) Not to be compelled to testify against himself or to confess guilt.*

62. In considering this safeguard, the Human Rights Committee has stated in CCPR General Comment 13[51] that:

> *the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is*

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[48] ICCPR, Art 9(1)

[49] ICCPR, art 14.2; See also CCPR *General Comment 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, para. [7]; CERD *General recommendation XXXI: The Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, para. [29].

[50] Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005), 383.

[51] Office of the High Commissioner of Human Rights, *CCPR General Comment No. 13: Article 14 (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law* (twenty-first session, Human Rights Committee, 13 April 1984).

wholly unacceptable.

63. In that context, it appears that the abrogation of privilege against self-incrimination as provided by subsection 34L(8) oversteps the mark, even with the use immunity provided for in s 34L(9), and therefore offends Australia's international human rights obligations. In that respect and to the extent that the subsection offends Australia's international human rights obligations, it should be amended or otherwise repealed. Perhaps the use immunity could be broadened such that the section adheres more closely with the binding human rights norms of international law.

64. ALHR recommends:

i. Subsections 34L(8) and 34(9)of the ASIO Act be amended to accord with the Australian Government's obligations under Article 14 of the ICCPR or it be otherwise repealed.
ii. The use-immunity be broadened such that the section adheres more closely with the binding human rights norms of international law.

Lethal Force in Executing Warrants

Do the conditions permitting use of lethal force in enforcing a warrant sufficiently clearly require reasonable apprehension of danger to life or limb?

65. Subsection 34V(3) provides that lethal force may be exerted lawfully by a police officer if the person they are arresting escapes and is reasonably believed to be endangering another person's life or if the person has been called on to surrender and the officer reasonably believes there is no other way to take them into custody.

66. The right to life is of course one of the fundamental human rights. That the life of an individual will be respected and not taken arbitrarily is guaranteed by a range of binding instrumental provisions to which Australia is bound including:

Article 6(1) ICCPR

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 6(1) CRC

States Parties recognize that every child has the inherent right to life.

Article 3 of the UDHR

Everyone has the right to life, liberty and security of person.

67. ALHR accepts that the references to "doing something likely to cause the death of a person" and to "an officer believes on reasonable grounds that it is necessary to protect life or to prevent serious injury to another person (including the officer)" are

"unexceptionable".[52] Indeed, in 2004 the Office of the United Nations High Commissioner for Human Rights (OHCHR) released a publication entitled "Human Rights Standards and Practice for the Police"[53]

68. The OHCHR Human Rights Policing Standard states that:

> *Firearms are to be used only in extreme circumstances*
>
> *Firearms are to be used only in self-defence or defence of others against imminent threat of death or serious injury; or*
>
> *° To prevent a particularly serious crime that involves a grave threat to life; or*
>
> *° To arrest or prevent the escape of a person posing such a threat and who is resisting efforts to stop the threat; and*
>
> *In every case, only when less extreme measures are insufficient.*[54]

69. The Standard then proceeds to outline "Procedures for the Use of Firearms" including that the officer identify themselves correctly and give a clear warning before discharging the firearm. ALHR would strongly advise the inclusion of a version of such Procedures within the relevant subsection 34V(3).

70. However, given that a life is at stake, and that scrutinising whether a proper procedure was followed after a life has been taken bespeaks a certain futility, ALHR recommends a more precautionary approach and instead of allowing lethal force, the section should be amended to instead allow disabling force (such as a gunshot to the leg) in circumstances prescribed which currently allow the use of lethal force.

71. ALHR recommends:

    i. Subsection 34V(3) be amended to insert similar provision as the "Procedures for Use of Firearms" in the OHCHR "Human Rights Standards and Practice for the Police".

    ii. In the extreme circumstances currently provided in section 34V(3), subsection 34V(3)(b) be amended to focus on and encourage the use of disabling force, rather than lethal force.

Questioning and Detention Warrants

Are the three several conditions for issuing a questioning and detention warrant stringent enough?

72. The three several conditions for issuing a questioning and detention warrant are provided

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[52] INSLM, *Annual Report 2011*, above n 8, 33.
[53] Office of the United Nations High Commissioner for Human Rights (OHCHR), "Human Rights Standards and Practice for the Police", Professional Training Series No. 5/Add.3, 2004. Available www.ohchr.org/Documents/Publications/training5Add3en.pdf at 20 Sep 2012.
[54] Ibid, 24-25.

for in section 34(4)(d) which provides that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:

> (i) may alert a person involved in a terrorism offence that the offence is being investigated; or
>
> (ii) may not appear before the prescribed authority; or
>
> (iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

73. In the context of Australia's international obligations discussed above and the comments of the INSLM regarding the paucity of rationale behind each of these conditions, it is ALHR's submissions that they are clearly not stringent enough to justify such an extreme deprivation of liberty as authorised under a questioning and detention warrant.

74. ALHR recommends:

    i. Subdivision C ("Questioning and Detention Warrants") of Part III Division 3 of the ASIO Act, and any related provisions, be repealed.

Should the risk of non appearance as a condition for issuing a questioning and detention warrant require assessment by a judicial officer?

75. ALHR agrees that "The risk of non-appearance is also a matter traditionally and best determined by an impartial judicial officer rather than by an officer of the executive government that is seeking the person's detention." Such view accords with both the common law principle of *habeas corpus* which underpins the rule of law and the democratic fabric of Australian society and forms the crux of many of Australia's international human rights obligations as discussed above including Article 14 of the ICCPR.

76. ALHR recommends:

    i. Subdivision C ("Questioning and Detention Warrants") of Part III Division 3 of the ASIO Act, and any related provisions, be repealed.

    ii. The ASIO Act be amended so that the risk of non-appearance under section 34F(4)(d)(ii) as a condition for issuing a questioning and detention warrant instead require assessment by a judicial officer.

Does the possible resort either to a questioning and detention warrant or to arrest for the same person for the same circumstances give an inappropriate discretion to officers of the executive?

77. In terms of the international human rights norms to which the Australian government is bound, as discussed above, Subdivision C clearly gives an inappropriate discretion to officers of the executive to arbitrarily detain individuals for up to 7 days without charge. That the officer of the executive, the Minister, must be satisfied of at least one of the three several preconditions listed in section 34F(4)(d) in granting a request for a questioning and detention warrant, yet such preconditions are not within the purview of the judicial officer under section 34G, is cause for serious concern. It constitutes a direct

affront to the rule of law and the separation of powers and breaches a number of Australia's international legal obligations discussed above, most notably, Articles 9, 10 and 14 of the ICCPR.

78. In relation to this concerning issue under Subdivision C, the INSLM stated in his 2011 Annual Report that:

> *The issuing authority is not, in terms or perhaps at all, authorized to consider that question. The attention of a judicial officer to a matter of such moment to an individual's personal liberty is highly desirable, approaching the point of necessity. As a matter of policy, it is difficult to see why bail in the administration of criminal justice involves judicial decision, but not a potential 7 day detention for a possible 24 or 48 hour questioning.*

79. ALHR agrees with such observations and recommends, if Subdivision C is not going to be wholly repealed (see paras [74] and [76] above), that:

    i. Subdivision C be significantly amended to accord with Australia's legal obligations under international human rights law including that all of the considerations currently made by the Minister under section 34F be transferred to the jurisdiction of an impartial judicial officer under section 34G such that the Ministers approval of a request becomes a mere rubber stamping process and it is up to the impartial judicial officer to make the ultimate determination as to whether the warrant should be issued.

Should the issuing authority, being a judicial officer, rather than the Attorney General, or as well as the Attorney General, determine the existence of a condition for the issue of a questioning and detention warrant?

80. In adhering with the necessary separation of powers in maintaining the integrity of the rule of law and upholding Australia's obligations under Article 14(1) of the ICCPR, ALHR submits that it is inappropriate that a member of the executive determine the existence of a condition for the issue of a questioning and detention warrant, presuming that such warrants remain justified and on the legislative books.

81. It is certainly problematic that under Subdivision C of Division 3 that the issuing judicial authority is not authorised to consider whether the decision to issue was justified or reasonable. ALHR agrees that:

> *The attention of a judicial officer to a matter of such moment to an individual's personal liberty is highly desirable, approaching the point of necessity. As a matter of policy, it is difficult to see why bail in the administration of criminal justice involves judicial decision, but not a potential 7 day detention for a possible 24 or 48 hour questioning.*[55]

82. ALHR recommends:

    i. Subdivision C ("Questioning and Detention Warrants") of Part III Division 3 of the ASIO Act, and any related provisions, be repealed.

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[55] INSLM, *Annual Report 2011,* above n 8, 35.

ii. The ASIO Act be amended such that it is an impartial judicial officer, rather than a member of the executive, who determines the existence of a condition for the issue of a questioning and detention warrant.

Should the offence of failing to produce records or things under a warrant explicitly extend to deliberate destruction?

83. ALHR agrees that the third ground justification for questioning and detention warrants (the risk of tampering with evidence) could instead be specifically made, or included in, an offence in the nature of non-production. Such provision would provide a more proportionate approach to dissuading the tampering of evidence than an extreme incursion on an individual's liberty.

84. ALHR recommends:

i. The third ground justification for questioning and detention warrants (the risk of tampering with evidence) under s 34R(4)(d)(iii) instead be specifically made, or included in, an offence in the nature of non-production

Is the disparity between length of imprisonment for offences against security obligations in relation to questioning warrants and for offences of deliberate contravention of safeguards in relation to questioning warrants appropriate?

85. Section 34ZS provides that contravention of the secrecy provisions will attract a prison sentence of 5 years whereas the penalty for executive officer contravening the safeguards enshrined in the Act strangely attracts a much lesser sentence of 2 years imprisonment. On its face, the discrepancy seems to provide a clear message from the legislature that human rights concerns are inferior to those of national security. However, in keeping with the overarching and long-term counter terrorism strategy urged by the United Nations upon Member States, the balancing of human rights against national security must go forward equally hand in hand.

86. ALHR recommends:

i. The disparity between length of imprisonment for offences against security obligations in relation to questioning warrants and for offences of deliberate contravention of safeguards in relation to questioning warrants be resolved to reflect the equal balance of competing interests (human rights and public order) reflected by Australia's CT laws and international obligations.

Is the degree and nature of permitted contact by a person being questioned under a warrant sufficient?

87. ALHR agrees with the view provided in the INSLM report that the category of permitted disclosure sufficiently includes contact with lawyers and those lawyers' work on judicial reviews, and contact between the person being questioned and his or her appointed representative or family member, as to alleviate the prospect of unfair or cruel isolation.

88. However, ALHR is very concerned that Subdivision D allows ASIO to deny the right to the person's (to be questioned) lawyer of choice if they suspect such contact might result in a tip off.

89. Subparagraph (3) of Article 14 of the ICCPR provides:

> *3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
>
> *(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
>
> *(b) To have adequate time and facilities for the preparation of his defence and to communicate with* ***counsel of his own choosing;***
>
> *(c) To be tried without undue delay;*
>
> *(d) To be tried in his presence, and to defend himself in person or through* ***legal assistance of his own choosing****; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*
>
> (Emphasis added)

90. That section 34ZO empowers the prescribed authority to preclude a lawyer of the questioned persons choosing in particular circumstances is of concern and appears to contravene Australia's ICCPR obligations. As discussed above at paras [83] and [84] any concerns about tampering with evidence can be transferred into a less offensive offence in the nature of non-production rather than a ground for issuing an order to arbitrary detention. If authorities have enough evidence to be reasonably worried about the occurrence of a tip-off, ALHR suggests that they exercise their powers of arrest rather than travelling further into the shady areas of arbitrary detention and human rights abuse.

91. ALHR recommends:

    i. Section 34ZO be repealed or significantly amended to accord with Australia's international legal obligations under ICCPR Article 14(b) and (d).

Should questioning and detention warrants remain available at all?

92. As questioning and detention warrants represent such an extreme incursion on the right to liberty, their existence on the books must be justified by upholding a strong public interest. As no questioning and detention warrants were issued in the period from 2003 - 2011[56] (and possibly since)[57] and that, if they were removed, ASIO authorities would still have recourse to the "special" powers of questioning warrants, which have apparently sufficed up to this point, it seems to follow the course of common sense that at this time they are unwarranted, unnecessary and unjustified.

93. In relation to the three grounds for that justify "questioning *and* detention" as a distinct measure, ALHR agrees with the INSLM that the risk of non-appearance is best determined by an impartial judicial officer rather than by a member of the Executive that

[56] See Appendix 18 of the INSLM, *Annual Report 2011,* above n 8, 115.
[57] ALHR is not aware of the use, if any, of such warrants in the last 12 months.

is seeking the person's detention.

94. As expressed above at paragraph 56, ALHR agrees with the INSLM that the third ground (the risk of tampering with evidence) could be specifically made, or included in, an offence in the nature of non-production.

95. As to first ground (risk of tip-offs), such ground loses justification as the secrecy provisions under section 34ZS provide for punishment of an offence in such cases. In addition, there has been no empirical demonstration from the limited practical experience to date that the secrecy provisions are inadequate.

96. In that regard, ALHR finds no justification for the continuing availability of questioning and detention warrants under the ASIO Act.

97. ALHR recommends:

    i. Subdivision C ("Questioning and Detention Warrants") of Part III Division 3 of the ASIO Act, and any related provisions, be repealed.

Should anything be done about doubtful aspects of the constitutional validity of control orders and preventative detention orders under the Criminal Code?

98. ALHR submits that, whilst the constitutional validity of any legislation passed by the Commonwealth Parliament is essential, in circumstances where the High Court has already found the control order regime to be constitutional and is unlikely to strike down the preventative detention order regime, the INSLM should instead focus on how the legislation might be amended to provide greater human rights protections. ALHR submits that, to some extent, this might also have the added benefit of addressing the constitutional concerns.

Control Orders

99. It was argued in *Thomas v Mowbray*, ('*Thomas*')[58] 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.

100. The High Court, by majority, upheld the constitutional validity of Division 104, stating that it did not breach Chapter III of the Constitution. Gleeson CJ held that bail and apprehended violence orders were examples of when the judiciary exercised power creating new rights and obligations restrictive of a person's liberty.[59] The remaining Justices of the majority held similar views.[60] Kirby J dissented holding that the judiciary can only deprive individuals of their liberty on the basis of evidence of past conduct.[61]

101. Gleeson CJ[62] noted that to have decided *Thomas* differently would have been to consign

[58] *Thomas v Mowbray* (2007) 237 ALR 194.
[59] Ibid 205 (Gleeson CJ).
[60] Ibid (Callinan, Heydon, Gummow and Crennan JJ).
[61] Ibid 293 (Kirby J).
[62] Ibid, 205 (Gleeson CJ).

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 the executive is responsible for such decisions with little if any judicial oversight. This may lead to a weakening of judicial independence as the executive abuses this independence to give their actions a "cloak of legitimacy".[63]

102. 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 entrenched in the Constitution does not provide sufficient protection to a person subject to a control order. In *Thomas*, Kirby J referred to international human rights standards[64] and Gleeson CJ suggested that the judiciary could provide better human rights protections but, without a bill of rights and with the legislation as it currently stands, human rights concerns could not play a decisive role in *Thomas* and cannot be taken into account in deciding whether or not to make a control order.

103. Control orders (and preventative detention orders) have the potential to violate a number of human rights as provided for in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR) such as: freedom of movement;[65] the right to liberty;[66] the right to privacy and family life;[67] freedom of association;[68] freedom of speech;[69] the right to work;[70] the freedom to practise religion[71]; and freedom from arbitrary detention.[72]

104. Control orders provide for restrictions to be placed on a person who has not been charged, tried or convicted of an offence of a magnitude only previously seen in relation to a convicted criminal.[73] ALHR submits that, to adequately protect human rights, the imposition of the orders should be subject to the same safeguards as 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.

105. 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.[74] 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

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[63] 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.
[64] Above n1, 440-441.
[65] Article 12 ICCPR.
[66] Article 9 ICCPR.
[67] Article 17 ICCPR.
[68] Article 21 ICCPR.
[69] Article 19 ICCPR.
[70] Article 6 ICESCR.
[71] Article 18 ICCPR.
[72] Article 9 ICCPR.
[73] Australian Lawyers for Human Rights, 'Terrorism, Counter-Terrorism and Human Rights' (Submission to the International Commission of Jurists Eminent Jurists' Panel, 15 March 2006) 9.
[74] Articles 14(3)(a) & (d) ICCPR.

revoked.[75]

106. Inherent in the right to a fair trial is the right to 'a fair and public hearing by a competent, independent and impartial tribunal established by law'.[76] If the judiciary is forced to operate within a statutory regime that does not provide for a fair trial and violates human rights; and if the judiciary has no ability to take those rights into account, then the rights protection offered by the judiciary is minimal. ALHR submits in those circumstances there appears little benefit to the protection of human rights if the judiciary rather than the executive makes the order.

107. ALHR recommends:

(i) The repeal of Division 104 of the Criminal Code.

(ii) If the Division is not repealed it should be amended to remove the ability to have *ex parte* proceedings except in relation to 'urgent control orders'.[77]

(iii) The Division should be amended to allow for the full disclosure of the case against the person made by the provision of a full brief of evidence.

(iv) If full disclosure of the case against the person will not be made due to 'national security' concerns and the like, there should be provision for special advocates to represent the interests of the person in closed proceedings and they should have access to closed material not provided to the person.[78]

(v) The onus of proof should rest on the Australian Federal Police (AFP) and the court should be required to revoke the order unless satisfied by the AFP that there are grounds for continuing the order.[79]

Preventative Detention Orders

108. Preventative detention orders expose a person who has not been charged, tried or convicted of an offence to effectively incommunicado executive detention.[80]

109. 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.[81] An issuing authority for a continuing order includes, amongst others, a judge or a retired judge,[82] however, they do not exercise judicial power but act in their personal capacity[83] and at no time is the detainee brought before a court. There is no provision for an *inter partes* hearing at any

[75] ss104.18 and 140.20 *Criminal Code 1995.*
[76] Article 14(1) ICCPR.
[77] Division 104 Subdivision C *Criminal Code 1995.*
[78] See for example: Schedule [7] *Prevention of Terrorism Act 2005* (UK).
[79] Letter from Professors Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon to ACT Chief Minister, 18 October 2005, 9.
[80] s105.35 *Criminal Code Act 1995.*
[81] Letter from Professors Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon to ACT Chief Minister, 18 October 2005, 4.
[82] s105.2 *Criminal Code Act 1995.*
[83] s105.18(2)(c) *Criminal Code Act 1995.*

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."[84]

110. It has been commented that it is improbable that the preventative detention regime will be held to offend the separation of powers in the Constitution as the High Court would have to find that the power to make the orders is intrinsically an aspect of judicial power and should not be carried out by the executive.[85] The High Court has accepted indefinite detention by the executive in the context of migration law[86] and is unlikely to be concerned with detention for 48 hours even in relation to persons entitled to be 'at large' in the community.[87] The majority of the High Court has also endorsed the practice of granting non-judicial functions to judicial officers acting in a personal capacity.[88]

111. 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.*[89]

112. The HRC has commented[90] that a decision as to continued preventative detention must be considered a determination attracting the right to a fair trial under Article 14 ICCPR.

113. 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.

114. ALHR recommends:

(i) The repeal of Division 105 of the Criminal Code.
(ii) If the Division is not repealed it should be amended to provide all the protections outlined by the HRC including that reasons for the detention must be given to the detainee and court control of the detention must be available.

Do international comparators support or oppose the effectiveness and appropriateness of control orders and preventative detention orders?

115. In relation to a comparative law analysis of the appropriateness of control orders from a human

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[84] s105.35 *Criminal Code Act 1995.*
[85] Paul Fairall and Wendy Lacey, 'Preventative Detention And Control Orders Under Federal Law: The Case For A Bill Of Rights' [2007] *Melbourne University Law Review* 39, 48.
[86] *Al-Kateb v Godwin* (2004) 219 CLR 562.
[87] Paul Fairall and Wendy Lacey, 'Preventative Detention And Control Orders Under Federal Law: The Case For A Bill Of Rights', above n 82, 48.
[88] *Grollo v Palmer* (1995) 184 CLR 348.
[89] Human Rights Committee, *CCPR General Comment No. 8,* 16th sess, [4], (1982).
[90] Human Rights Committee, UN Doc CCPR/C/79/Add.81, [27] (1997) (concluding observations on India).

rights perspective, ALHR refers the INSLM to the reports of the UK Joint Committee on Human Rights which suggested amendments to the *Prevention of Terrorism Act*[91] including concerns about the infringement of the right to liberty and a fair trial.[92] These amendments were debated and some were voted on but ultimately defeated.[93]

116. ALHR notes that the JCHR rejected an argument by the UK Government that the safety net of the *Human Rights Act* provided sufficient human rights protection.[94] ALHR submits that human rights protections must be built into the control order and preventative detention order legislation.

Does non use of control orders and preventative detention orders suggest they are not necessary?

117. As the INSLM has stated in his annual report, the mere non use of the laws cannot of itself provide a definitive basis to say that they are not necessary. 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 the role played by the judiciary and the executive in restricting our fundamental human rights. As has been outlined above, these are laws that violate a significant number of human rights. ALHR submits that if a government is to violate human rights to such an extent, the requirements of Article 4 ICCPR must be complied with.

118. Article 4(1) ICCPR provides:

> 1. 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.

119. Terrorism is a live threat but it is questionable 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, as the INSLM points out in his 2011 annual report, a person in Australia is more likely to be killed in an accident or some other criminal act than by a terrorist.[95] ALHR submits that these laws are not 'required by the exigencies of the situation'. ALHR submits that they have not been used because they are not necessary to combat the current terrorist threat level.

120. ALHR recommends:

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[91] Ninth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eighth Report): The Counter Terrorism Bill* [39]-[73]; Twentieth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Tenth Report): The Counter Terrorism Bill*, [67]-[114]; Thirtieth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Thirteenth Report): The Counter Terrorism Bill*, [128]-[132].

[92] Ninth Report of Session 2004-05, *Prevention of Terrorism Bill: Preliminary Report;* Tenth Report of Session 2004-05, *Prevention of Terrorism Bill.*

[93] Fifth Report of Session 2008-09, *Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009* [7].

[94] Tenth Report of Session 2004-05, *Prevention of Terrorism Bill*, 6.

[95] INSLM, *Annual Report 2011,* above n 8, 48.

(i) The repeal of Divisions 104 and 105 of the Criminal Code.

(ii) If the Divisions are not repealed then the Criminal Code should be amended to only allow the provisions to operate if a proclamation of the sort described by Article 4(1) ICCPR has been made. ALHR refers the INSLM to ss14 to 17 of the *Human Rights Act* 1998 (UK) for an example of how such proclamations might be made and what safeguards could be used to ensure the proclamations were properly limited as to time and effect.

Should control orders and preventative detention orders be more readily available?

121. ALHR possesses no data on whether there have been opportunities lost to enhance protection of the community against terrorism that would have benefited from control orders or preventative detention orders being more readily available. A submission on that topic is outside of ALHR's area of expertise.

122. ALHR does submit, however, that the powers contained within Divisions 104 and 105 of the *Criminal Code* are extraordinary. Control orders provide for restrictions to be placed on a person who has not been charged, tried or convicted of an offence of a magnitude only previously seen in relation to a convicted criminal. Preventative detention orders provide for executive incommunicado detention with no effective court oversight and the detainee has lesser protections than a person charged with a criminal offence.

123. For control orders the court only has to be satisfied on the *balance of probabilities* that making the order would substantially assist in preventing a terrorist act; or that the person has provided or received training from a listed terrorist organisation; 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.[96]

124. For preventative detention, 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 detaining the subject for the period for which the person is to be detained is *reasonably necessary* to prevent a terrorist act occurring.[97]

125. In relation to a terrorist attack that has occurred, an AFP member or issuing authority only has to be *satisfied* that an attack has occurred and it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and detaining the subject for the period for which the person is to be detained is reasonably necessary to preserve evidence.[98]

126. ALHR submits that, given the serious violation of a person's rights when subjected to a control order or preventative detention, the thresholds required to be met for the issuing of the orders are not onerous. ALHR submits that control orders and preventative detention orders should not be more readily available.

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[96] ss104.4 and 104.14(7) *Criminal Code 1995.*
[97] S105.4(4) *Criminal Code 1995.*
[98] S105.4(6) *Criminal Code 1995.*

Should control orders and preventative detention orders require a relevant prior conviction and unsatisfactory rehabilitation?

127. 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.[99] 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 having a control order or preventative detention order made against them whilst others without prior convictions are not so exposed.

128. If the purpose of control orders and preventative detention orders are to prevent terrorist attacks, then they should not be restricted to those who have already been convicted of an offence or had unsatisfactory rehabilitation. The human rights violations apply equally to both groups of people and members of both groups have the potential to plan terrorist attacks

CONCLUSIONS

129. In any assessment of Australia's CT 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.

130. 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:

> *[C]ompromising 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 provoking tension, hatred and mistrust of government among precisely those parts of the population where he is more likely to find recruits.*

131. As the UN General Assembly stated in its Resolution 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.[100] 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. ALHR strongly commends the INSLM for contributing to maintaining such balance.

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[99] ICCPR Art 14(7).

[100] See also the statement of the President of the UN Security Council of 27 September 2010(s/PRST/2010/19), para. [2]. Available < http://daccess-ods.un.org/TMP/6939859.98630524.html> at 20 Sep 2012.

132. If you would like to discuss any aspect of this submission, please contact Stephen Keim, President on 0433 846 518 or email: s.keim@higginschambers.com.au

Yours faithfully,

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