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COAG Counter Terrorism Review Secretariat
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Dear Secretary,

COAG Review of Counter Terrorism Legislation

INTRODUCTION

1. Australian Lawyers for Human Rights (**ALHR**) thanks the Council of Australian Governments (**COAG**) for the opportunity to comment on multi-jurisdictional counter-terrorism legislation in Australia.
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 welcomes COAG's timely review of Australia's national security and counter-

terrorism legislation (**CT Laws**)¹ and notes the recent flurry of activity in this area including:

- the Parliamentary Joint Committee for Intelligence and Security's (JCIS) Inquiry into, and call for submissions on Potential Reforms of National Security Legislation proposed by the Australian Government;² and
 - the Independent National Security Legislation Monitor's (INSLM) recent call for submissions 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**)³.
4. Ultimately, ALHR 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. For example, to the extent that the laws for questioning warrants and questioning and detention warrants under the ASIO Act empower officers of the executive to order that certain individuals be arbitrarily detained, and where other CT laws have similar effect, 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.
5. 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 and urges COAG to adopt a similar criterion.

1. Including: *Criminal Code Act 1995* (Cth) (Divisions 104 and 105 and sections 100.1 101.2, 101.4, 101.5, 101.6, 102.1, 102.5, 102.6, 102.8, 103.1, 103.2, 103.3, 106.2, 106.3); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Police Powers) Act 2002* (NSW) (Part 2A); *Terrorism (Emergency Powers) Act 2003* (NT); *Terrorism (Preventative Detention) Act 2005* (QLD); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (TAS); *Terrorism (Community Protection) Act 2003* (VIC) (Part 2A); *Terrorism (Preventative Detention) Act 2006* (WA); *Crimes Act 1914* (Cth) (sections 3C and 3D and Division 3A); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Major Events Security Act 2000* (ACT) (Division 3.2); *Terrorism (Police Powers) Act 2002* (NSW) (Parts 2 and 2A (and Parts 1, 4 and Schedule 1 insofar as they apply to Parts 2 and 2A)); *Terrorism (Emergency Powers) Act 2003* (NT); *Police Powers and Responsibilities Act 2000* (Special Events) (QLD) (Chapter 19, Part 2); *Public Safety Preservation Act 1986* (terrorist emergency powers) (QLD) (Part 2A); *Terrorism (Police Powers) Act 2005* (SA); *Police Powers (Public Safety) Act 2002* (TAS); *Terrorism (Community Protection) Act 2003* (VIC) (Part 3A); *Terrorism (Extraordinary Powers) Act 2005* (WA); *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (section 6); *Financial Transaction Reports Act 1988* (Cth) (section 16); *Administrative Decisions (Judicial Review) Act 1977* (Cth) (Schedule 1 (dab) and (dac)).

² 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, attached as annexure 1.

³ Australian Lawyers for Human Rights, Submission to the Independent National Security Legislation Monitor, Bret Walker SC, Inquiry into powers relating to questioning warrants, questioning and detention warrants, control orders and preventative detention, 25 September 2012, attached as annexure 2.

6. Ultimately, ALHR urges and insists that all of the CT laws under review by COAG 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.
7. ALHR considers 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.
8. ALHR recently made submissions to the JCIS and the INSLM which are relevant to COAG's current review and therefore have been attached to this submission as Annexure 1 and Annexure 2. You will note that parts of this submission are directly copied from those submissions where relevant.

OVERVIEW

9. Australia's CT laws provide significant power to the State, both the Federal Government and State and Territory Governments, to immediately abrogate the fundamental right to liberty of the person on grounds of reasonable suspicion.
10. While such powers are sought to be justified on the basis that it is reasonable to utilise such powers to nullify the commission of a terrorist offence which would otherwise kill many innocent people, the need for such powers must be subject to ongoing review. The concern about the necessity of such powers grows when the powers are under-utilised or unreasonably utilised. Such review should pay heed to changes in the global geo-political climate. Such review must place much weight on the need to comply with Australia's 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 indispensable part of a successful medium and long-term strategy to combat terrorism.*⁴ (References omitted).

11. Measures to combat terrorism have the potential to prejudice the enjoyment of – and violate – human rights principles and the rule of law.⁵ ALHR acknowledges that, in performing the delicate balancing between two different objectives, there may from time to time be some justified incursions upon fundamental freedoms, however, only in extreme circumstances and for a temporary and limited time, such as national security in

⁴ 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.

⁵ 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].

times of war.⁶ 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 to the status of a new norm.

12. The United Nations General Assembly has strongly and repeatedly expressed similar 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.”⁷ 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.⁸

13. On a similar note, in the UN Human Rights Council, governments unanimously recently reaffirmed the cautions necessary in the use of detention, urging that States:

- respect and promote the right of anyone detained, by bringing proceedings before court without delay.

⁶ 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.

⁷ United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, above n 4, para. [8].

⁸ 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.

- ensure that this situation is equally respected in cases of administrative detention in relation to public security legislation.⁹
14. 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 an already excessively policed and heavily legislated environment¹⁰. The proposals are currently the subject of the existing inquiry by the JCIS 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.
 15. As expressed in ALHR's submission to the JCIS, 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.
 16. Any laws that have the potential to prejudice the rights of those accused of crimes and to substantially intrude on the rights of ordinary, private citizens demands serious scrutiny. ALHR considers 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.

THE INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR

17. ALHR welcomed the appointment of the INSLM, Bret Walker SC, by the Federal Government in April 2011. ALHR 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 CT laws.
18. ALHR looks forward to the INSLM's 2012 Report and hopes the Federal Government and COAG pay due attention to its recommendations and put them into effect promptly.
19. In the context of COAG's current review, it is relevant to note observations and issues highlighted by Mr. Walker SC, in his 2011 Annual Report to Parliament. Despite all the hyper counter terrorism legislating by successive Australian governments since 9/11, "*the most serious cases of terrorism could not be treated any more seriously under the CT Laws [Australia's counter-terrorism and national security legislation] than under pre-existing law.*"¹¹ The main tasks that the INSM is charged with is to ensure that:

⁹ Human Rights Council, *Arbitrary detention* (17 Jul 2012) UN doc A/HRC/RES/20/16, Geneva (CHE), United Nations.

¹⁰ 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=pcjis%2Fnsi2012%2Fsubs.htm (submission no. 194).

¹¹ Independent National Security Monitor (INSLM), Bret Walker SC, *Annual Report 2011*, (16 December 2011) Commonwealth of Australia, 2012, 4.

“Australia’s CT [Australia’s counter-terrorism and national security legislation] Laws are effective in deterring and preventing terrorism, are effective in responding to terrorism, **are consistent with Australia’s international obligations and contain appropriate safeguards for protecting the rights of individuals.**”

(Emphasis added)

20. In the Report, Mr Walker SC quotes Lord Hoffman dissenting in *A v Secretary of State for the Home Department* [2005] 2 AC 68 (at 131-132 [95]-[97]), a case about the consistency of United Kingdom’s counter terrorism laws with its international human rights treaty obligations concerning equality and the protection of individual rights:

“Of course the Government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms.

... Terrorist violence, serious as it is, does not threaten our institutions of government or existence as a civil community. ... The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.¹²

21. In any assessment of Australia’s counter terrorism and national security laws, it is vital to achieve an effective balance between the government’s responsibility (including international obligations) to protect its citizens from terrorism and its responsibilities and international obligations to preserve and promote its citizens’ fundamental human rights. It is erroneous to cast the two events as opposed or mutually exclusive.
22. COAG and the Federal, State and Territory Governments of Australia (**the governments of Australia**) must ensure that the country’s CT laws comply with our international obligations to respect and protect the rights of individuals.

ISSUES FOR CONSIDERATION

Australia’s International Legal Obligations

23. In the context of the broad range of laws under review, including a variety of powers of officers of the executive government to detain persons without charge, the fundamental right to liberty occupies a key place in ALHR’s concerns about such laws.
24. 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)*¹³ 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:

¹² INSLM, *Annual Report 2011*, above n 11, 6.

¹³ Signed by Australia on 18 December 1972 and ratified on 13 August 1980.

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.

25. In this context, ALHR strongly supports the inclusion of appropriate, strong and proportionate procedural safeguards in the administration and enforcement of Australia's CT laws.
26. 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 democratic country like Australia.
27. ALHR strongly advocates for a vigilant and precautionary approach by the governments of Australia 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.¹⁴ In fact, between 2003 and 2011 an ASIO questioning and detention warrant has never been issued.
28. Whilst rare use of course does not mean such provisions might not one day save many 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.
29. What is necessary is oversight by multiple authorities and enforced compliance with pre-existing procedures on pain of criminal sanction.¹⁵ At least theoretically, this displays 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 makes the submission that the right balance must be struck.
30. ALHR advises COAG to recommend a provisional safeguard in all CT Legislation that provides for the humane treatment of persons and ensures and preserves the dignity of the person. Section 34T(2) of the *Australian Security and Intelligence Organisation Act 1979 (Cth) (ASIO Act)* is exemplary in this respect. That section provides for the humane treatment of the person specified in a questioning and or questioning and detention 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
31. Finally, ALHR supports periodic review of these procedures and if future practical

¹⁴ INSLM, *Annual Report 2011*, above n 11, Appendix 18, 115.

¹⁵ For example, section 34ZF of the ASIO Act.

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.

32. ALHR strongly recommends:

- a. The inclusion of appropriate and proportionate procedural safeguards in the administration and enforcement of Australia's CT laws to properly balance the principles of individual liberty and public order. This includes:
 - i. Comprehensive oversight by multiple authorities and enforced compliance with pre-existing procedures on pain of criminal sanction for the execution and administration of Australia's CT laws, as exemplified by the procedural safeguards in force under the section 34 ZF of the ASIO Act.
 - ii. a provisional safeguard in all CT Legislation that provides for the humane treatment of persons and ensures and preserves the dignity of the person in similar terms to s 34T of the ASIO Act.
- b. That police powers in Australia accord with international human rights norms including the guidelines for police powers published by the Office of the United Nations High Commissioner for Human Rights (OHCHR) entitled "Human Rights Standards and Practice for the Police" (2004).¹⁶

Discrimination: Targeting Particular Ethnic Minorities

33. ALHR is also concerned that Australia's CT laws may directly or indirectly discriminate against particular ethnic minorities given the racialised context of the "war on terror".
34. The Australian Government's 2010 Counter Terrorism White Paper identifies "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.
35. 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.
36. 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

¹⁶ 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 28 Sep 2012.

circumstance may need to be implemented.

37. 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.

38. 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).

39. Further Article 5(a) of the *Convention for the Elimination of All Forms of Racial Discrimination 1966* (CERD)¹⁷ 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;

40. ALHR recommends:

- i. COAG ensure that provisional procedural safeguards are enacted in each of the CT laws under review to protect against discrimination in the enforcement and administration of those laws.
- ii. COAG ensure that Australia’s CT laws properly accord with Australia’s international obligations to uphold equality and non-discrimination including on the bases of gender, sex, sexual preference, race, culture and ethnicity.

¹⁷ Ratified by Australia on 30 September 1975.

Detention Regimes

41. ALHR expresses significant concern about any of Australia's CT laws which allow for the detention of persons to be executed and/or authorised by officers of the executive in an arbitrary manner.

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

Paragraph 3 of article 9¹⁸ 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 days¹⁹ ...[and]...pre-trial detention should be an exception and as short as possible.²⁰

28. More recently, in February 2009, the UN's Working Group on Arbitrary Detention, when considering detentions in the framework of countering terrorism stated that: 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:²¹

(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 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

¹⁸ 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.

¹⁹ 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.

²⁰ Ibid, para. [3].

²¹ Working Group on Arbitrary Detention, Report, 2009 Human Rights Council (UN doc A/HRC/10/21, 16 February 2009), paras. [53] – [55].

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:²²

- 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.

30. This issue is explored in more detail below in relation to control orders and preventative detention orders.

31. ALHR strongly recommends:

- a. The repeal of any CT laws which allow for the arbitrary detention of persons by officers of the executive government.

Control Orders

32. It was argued in *Thomas v Mowbray*, ('*Thomas*')²³ 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.

33. 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

²² Human Rights Council, Tenth Session, Resolution 10/9. Arbitrary detention (UN doc A/HRC/RES/10/9, 26 March 2009), paras. [2]-[4].

²³ *Thomas v Mowbray* (2007) 237 ALR 194.

creating new rights and obligations restrictive of a person's liberty.²⁴ The remaining justices of the majority held similar views.²⁵ Kirby J dissented holding that the judiciary can only deprive individuals of their liberty on the basis of evidence of past conduct.²⁶

34. Gleeson CJ,²⁷ 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 the executive is responsible for such decisions with little if any judicial oversight. This leads to a weakening of judicial independence as the executive abuses this independence to give their actions a "cloak of legitimacy".²⁸
35. 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 protections to a person subject to a control order. In *Thomas* Kirby J referred to international human rights standards²⁹ 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.
36. 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;³⁰ the right to liberty;³¹ the right to privacy and family life;³² freedom of association;³³ freedom of speech;³⁴ the right to work;³⁵ the freedom to practise religion³⁶; and freedom from arbitrary detention.³⁷
37. 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.³⁸ 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

²⁴ Ibid 205 (Gleeson CJ).

²⁵ Ibid (Callinan, Heydon, Gummow and Crennan JJ).

²⁶ Ibid 293 (Kirby J).

²⁷ Ibid, 205 (Gleeson CJ).

²⁸ 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.

²⁹ Above n1, 440-441.

³⁰ Article 12 ICCPR.

³¹ Article 9 ICCPR.

³² Article 17 ICCPR.

³³ Article 21 ICCPR.

³⁴ Article 19 ICCPR.

³⁵ Article 6 ICESCR.

³⁶ Article 18 ICCPR.

³⁷ Article 9 ICCPR.

³⁸ 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.

fair trial as per Article 14 ICCPR.

38. 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.³⁹ The *inter partes* proceedings to confirm the order also violates 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.⁴⁰
39. Inherent to 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'.⁴¹ 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.
40. 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'.⁴²
 - (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.⁴³
 - (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.⁴⁴

Preventative Detention Orders

41. Preventative detention orders expose a person who has not been charged, tried or convicted of an offence to effectively incommunicado executive detention.⁴⁵
42. 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

³⁹ Articles 14(3)(a) & (d) ICCPR.

⁴⁰ ss104.18 and 140.20 *Criminal Code 1995*.

⁴¹ Article 14(1) ICCPR.

⁴² Division 104 Subdivision C *Criminal Code 1995*.

⁴³ See for example: Schedule [7] *Prevention of Terrorism Act 2005* (UK).

⁴⁴ Letter from Professors Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon to ACT Chief Minister, 18 October 2005, 9.

⁴⁵ s105.35 *Criminal Code Act 1995*.

bias, procedural unfairness and an 'inequality of arms'. There are no adequate safeguards provided and the detention is arguably arbitrary.⁴⁶ An issuing authority for a continuing order includes, amongst others, a judge or a retired judge,⁴⁷ however, they do not exercise judicial power but act in their personal capacity⁴⁸ 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."⁴⁹

43. 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.⁵⁰ The High Court has accepted indefinite detention by the executive in the context of migration law⁵¹ and is unlikely to be concerned with detention for 48 hours even in relation to persons entitled to be 'at large' in the community.⁵² The majority of the High Court has also endorsed the practice of granting non-judicial functions to judicial officers acting in a personal capacity.⁵³

44. 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.*⁵⁴

45. The HRC has commented⁵⁵ that a decision as to continued preventative detention must be considered a determination attracting the right to a fair trial under Article 14 ICCPR.
46. 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.
47. ALHR recommends:
 - (i) Division 105 of the Criminal Code and the State and Territory preventative detention regimes should be repealed.

⁴⁶ Letter from Professors Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon to ACT Chief Minister, 18 October 2005, 4.

⁴⁷ s105.2 *Criminal Code Act 1995*.

⁴⁸ s105.18(2)(c) *Criminal Code Act 1995*.

⁴⁹ s105.35 *Criminal Code Act 1995*.

⁵⁰ 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.

⁵¹ *Al-Kateb v Godwin* (2004) 219 CLR 562.

⁵² Paul Fairall and Wendy Lacey, 'Preventative Detention And Control Orders Under Federal Law: The Case For A Bill Of Rights', above n 50, 48.

⁵³ *Grollo v Palmer* (1995) 184 CLR 348.

⁵⁴ Human Rights Committee, *CCPR General Comment No. 8*, 16th sess, [4], (1982).

⁵⁵ Human Rights Committee, UN Doc CCPR/C/79/Add.81, [27] (1997) (concluding observations on India).

- (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?

48. In relation to a comparative law analysis of the appropriateness of control orders from a human 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*⁵⁶ including concerns about the infringement of the right to liberty and a fair trial.⁵⁷ These amendments were debated and some were voted on but ultimately defeated.⁵⁸
49. 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.⁵⁹ 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?

50. 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.

51. 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.

52. 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 as the INSLM points out in his 2011 annual

⁵⁶ 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].

⁵⁷ Ninth Report of Session 2004-05, *Prevention of Terrorism Bill: Preliminary Report*; Tenth Report of Session 2004-05, *Prevention of Terrorism Bill*.

⁵⁸ Fifth Report of Session 2008-09, *Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009* [7].

⁵⁹ Tenth Report of Session 2004-05, *Prevention of Terrorism Bill*, 6.

report a person in Australia is more likely to be killed in an accident or some other criminal act than by a terrorist.⁶⁰ 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.

53. ALHR recommends:

- (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?

54. 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.
55. 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.
56. 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.⁶¹
57. 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.⁶²
58. 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

⁶⁰ INSLM, *Annual Report 2011*, above n 11, 48.

⁶¹ ss104.4 and 104.14(7) *Criminal Code* 1995.

⁶² S105.4(4) *Criminal Code* 1995.

period for which the person is to be detained is reasonably necessary to preserve evidence.⁶³

59. 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.

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

60. 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.⁶⁴ 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.
61. 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

Search and seizure (*Crimes Act* part IAA div 3A)

62. The underlying rationale for search and seizure warrants is for an authorised ability for 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. 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 lobbying unrestrained powers, "just in case..." ALHR strongly cautions against such incremental chipping away at the stone tablets of our free society, as such incursions ultimately alter the very way of life they seek to protect.
63. 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 1914* (Cth) ('*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".

64. Section 3UEA, introduced via the *National Security Legislation Amendment Act 2010*

⁶³ S105.4(6) *Criminal Code 1995*.

⁶⁴ ICCPR Art 14(7).

(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 or safety.

65. ALHR are very concerned that measures of this kind overstep the line and undermine the fundamental rights and freedoms on which our way of life depends.
66. As noted above, the right to liberty of the person is guaranteed by Article 9 of the ICCPR
67. 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, ALHR reminds COAG that the right to privacy is guaranteed by Article 12 of the *Universal Declaration of Human Rights 1948* (UDHR) and Article 17 of the International Covenant on Civil and Political Rights (ICCPR).
68. 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. In this regard, ALHR recommends the democratic balance is restored through amending any offending provisions of the CT laws.

The Universal Declaration of Human Rights 1948

69. Article 12 of the UDHR provides:

"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."

70. Article 19 of the UDHR provides:

"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."

71. It is important to remember Australia's leadership in founding the United Nations and playing a prominent role in both the negotiation of the UN Charter in 1945 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

72. Article 17 of the ICCPR provides:

"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.”

73. 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 Privacy⁶⁵ the UN Human Rights Committee importantly stated:

“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...

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.” (Emphasis added)

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

74. ALHR recommends:

- a. 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 democratic balance be restored to search and seizure powers in Australia's CVT laws through amending any offending provisions of the CT laws such that enforcement of public order is appropriately and proportionately balanced against the fundamental individual rights to liberty and privacy.

Lethal Force in Executing Warrants

⁶⁵ ICCPR General Comment 16 (Thirty-second session, 1988): Article 17: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, A/43/40 (1988) 181 at paras. 1-11.

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

75. Subsection 34V(3) provides that 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.
76. 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.

77. ALHR accepts that the reference to doing something likely to cause the death of a person an officer believes on reasonable grounds that it is necessary to protect life or to prevent serious injury to another person (including the officer) is "unexceptionable".⁶⁶ 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."⁶⁷
78. 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.*⁶⁸

⁶⁶ INSLM, *Annual Report 2011*, above n 11, 33.

⁶⁷ 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 28 Sep 2012.

⁶⁸ Ibid, 24-25.

79. 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).
80. 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 be amended to instead allowing disabling force (such as a gunshot to the leg) in circumstances prescribed which currently allow the use of lethal force.
81. ALHR recommends:
- a. Subsection 34V(3) of the ASIO Act and any other similar CT laws be amended to insert similar provision as the “Procedures for Use of Firearms” in the OHCHR “Human Rights Standards and Practice for the Police”.
 - b. In the extreme circumstances currently provided in section 34V(3) of the ASIO Act, subsection 34V(3)(b) of the ASIO Act and any other similar CT laws be amended to focus on and encourage the use of disabling force, rather than lethal force.

CONCLUSIONS

82. 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.
83. 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.

84. 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.⁶⁹ 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 urges COAG to maintain such balance and protect our way of life in “the lucky country”.

⁶⁹ 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.

85. If you would like to discuss any aspect of this submission, please contact Stephen Keim,
President on _____ or email: _____

Yours faithfully,



Stephen Keim SC

President

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