



3 October 2014

PO Box A147  
Sydney South  
NSW 1235  
DX 585 Sydney

[alhr@alhr.asn.au](mailto:alhr@alhr.asn.au)  
[www.alhr.asn.au](http://www.alhr.asn.au)

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

Dear Secretary

Australian Lawyers for Human Rights (ALHR) is pleased to provide this submission in relation to the Committee's terms of reference, which are to consider the provisions of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (the Bill).

As requested, we previously sent an email to confirm that we would be making a submission.

#### **Summary**

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

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

We are concerned that the Bill's provisions are disproportionate in effect, reduce the oversight of the courts (which oversight is essential to the balance of powers in a democracy), and are inconsistent with accepted international human rights standards. There are insufficient mechanisms for independent and comprehensive review, the key terms are not clearly or are not appropriately defined (and are thus potentially subject to arbitrary or inconsistent application - in particular in the absence of normal judicial review) and contain insufficient safeguards in relation to accepted standards of legal support and oversight in the light of international human rights standards.

---

<sup>1</sup> See generally Law Council of Australia, "Anti-Terrorism Reform Project" October 2013, <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf>> accessed 2 October 2014.

### Limitations of submission

Please note that because:

- the legislative changes proposed are extensive (the Bill and the Explanatory Memorandum ('EM') are 164 and 227 pages respectively); and
- the time period permitted for submissions is short,

we have not been able to make this response as comprehensive as we would wish in terms of framing specific recommendations and there may be additional issues which are of concern from a civil liberties and human rights point of view which have not been mentioned here.

### Concept of Subverting Society

The justification for the new legislation, which involves the amendment of a number of existing statutes, is stated to be that Australia faces an increasing threat to the security of Australians at home and abroad because of escalating terrorism in Iraq and Syria. In particular the Bill is said to focus on Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas ('foreign fighters'). However its provisions go considerably further.

A main theme of the Bill is that persons involved in 'subverting society' should be penalised.<sup>2</sup> An organisation can be prescribed as a terrorist organisation if it is even indirectly engaged in assisting in 'subverting' Australian society.<sup>3</sup>

But our Australian society must take into account that the manner in which we respond to crimes is in itself a measure of the strength and nature of our society. It is particularly concerning that this Bill continues the existing practice of removing all terrorism-related matters from the ambit of the *Administrative Decisions (Judicial Review) Act* (AD(JR) Act). The Bill adds to the already long lists in Schedules 1 and 2 of that Act of decisions which either cannot be reviewed at all under that Act<sup>4</sup>, or for which reasons do not have to be given<sup>5</sup> – effectively making it impossible for the court to carry out any contextual review.<sup>6</sup> Thus:

- amendments made under the Bill which involve administrative or executive decisions under the majority of Acts amended by the Bill, including: the *ASIO Act 1979*, the *Intelligence Services Act 2001*, the *Telecommunications (Interception and Access) Act 1979*, cannot be reviewed under the AD(JR) Act,
- the new provisions of the *Australian Passports Act 2005* and the *Foreign Passports (Law Enforcement and Security) Act 2005* which are added by the Bill are themselves specifically excluded from review under the AD(JR) Act, and
- amendments made under the Bill which involve administrative or executive decisions under the *Social Security Act 1991*, the *A New Tax System (Family Assistance) Act 1999*, *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Paid Parental Leave Act*

---

<sup>2</sup> According to paragraph 211, 'The previously undefined phrase 'engaging in armed hostilities in a foreign State' in paragraph 6(3)(aa) of the *Foreign Incursions Act* has been substituted with the phrase 'engages in subverting society' in new subsection 117.1(1) of the *Criminal Code*.'

<sup>3</sup> The definition of 'engages in subverting society' goes beyond 'engaging in armed hostilities in a foreign State' and is aligned with the definition of 'terrorist act' so as to cover types of conduct that (generally speaking) causes serious physical harm or risk thereof to people, property, or an electronic system.

<sup>4</sup> See Schedule 1 of the Act. This includes all decisions under the *ASIO Acts 1956 and 1979*, *Intelligence Services Act 2001*, *Inspector-General of Intelligence and Security Act 1986*, *Telecommunications (Interception and Access) Act 1979*, and *Telephonic Communications (Interception) Act 1960*.

<sup>5</sup> See Schedule 2 of the Act.

<sup>6</sup> Paragraph 273.

2010 (involving payments of a social security nature to suspected terrorists being cancelled) can be reviewed but no reasons for the decisions need to be given.

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

Full judicial review is fundamental to the structure of a democratic society and it is arguably a 'subversion' of Australian society for Parliament to remove that safeguard and that balance of powers. In the words of Dr. Binoy Kampmark:

*It is no exaggeration to suggest that the current swathe of proposed laws risk placing Australia, not merely on a police state footing, but a garrisoned footing. Terrorism, for all its fearful properties, remains an idea, a tactic and a method. The consequences of responding to it are quite something else. Shredding civil liberties is the first step to admitting a failure in dealing with the very problem a society should resist.<sup>7</sup>*

#### **Restrictions on Civil liberties and common law rights**

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

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

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

#### **Impact on human rights**

It is recognised in the EM that the Bill 'engages' - in other words, 'impacts upon' - over 13 separate human rights listed in the *International Covenant On Civil And Political Rights* (ICCPR). It is therefore difficult to imagine how it can be said in the EM that:

*This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.*

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

*Compliance with human rights while countering terrorism represents a best practice because not only is this a legal obligation of States, but it is also an indispensable part of a successful medium and long-term strategy to combat terrorism.<sup>8</sup>*

---

<sup>7</sup> "Winding back the Liberties: The New Anti-Terror Laws in Australia," 25 September 2014, Rule of Law Institute website <<http://www.ruleoflaw.org.au/anti-terror-laws-in-australia/>> accessed 28 September 2014.

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

*General Problems:*

- (1) **No alternatives proposed therefore not clear that regulation is proportionate:** It is regularly stated in the EM that the legislative provisions are reasonable and necessary, but no examination is made of alternatives which are not so far-reaching (eg retain full judicial review). This is contrary to Article 4(1) of the ICCPR which contemplates that a State will take measures derogating from its obligations under the ICCPR only 'in time of public emergency which threatens the life of the nation' and only 'to the extent strictly required by the exigencies of the situation' and only for so long as that emergency lasts.
- (2) **Not all relevant International agreements considered:** While the EM refers to the need for the Parliamentary Joint Committee on Human Rights (**PJCHR**) to comply with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011*, and the international agreements to which that Act refers, the EM does not appear to take all of these matters into account, for example the terms of the *International Convention on the Elimination of All Forms of Racial Discrimination*.
- (3) **Not all relevant provisions of ICCPR considered in the EM:** In particular, a number of provisions in the Bill are inconsistent with the undertakings in Article 2(3):

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

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
  - (c) To ensure that the competent authorities shall enforce such remedies when granted.*
- (4) The Bill effectively **enshrines extreme measures** - which should be temporary in nature - into the status of a **new norm**.<sup>9</sup>

**Specific concerns**

There are a number of provisions of particular concern:

1. Amendments to the *Criminal Code* and *Crimes Act 1914* (Cth) include a **lowering of the threshold applicable to police officers when initiating an arrest** of someone for terrorism offences without a warrant or seeking a control or preventative detention order (see also paragraph 13 below). There would only be the requirement to "suspect on reasonable grounds" that a commission of a terrorism offence had taken or is taking or might take place, abandoning the "belief on reasonable grounds" requirement which has been in place since 1995.<sup>10</sup> The EM explains that the police officer "must have a 'positive feeling

---

<sup>9</sup> See for example paragraph 13 below and Australian Lawyers for Human Rights (2012), *op cit*, par 9.  
<sup>10</sup> Kampmark, *op cit*.

of actual apprehension or mistrust, amounting to a ‘slight opinion’<sup>11</sup> – and claims that this is a reasonable and proportionate change to the standard required. Indeed the EM acknowledges that the change will enable police to be more proactive<sup>12</sup> – despite the resultant infringements upon the civil liberties of any suspect. It would appear that these provisions are in breach of Article 9(2) of the ICCR which requires ‘anyone who is arrested [to] be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.’ If persons can be arrested only on suspicion, then they cannot promptly be informed of proposed charges against them – which by definition would appear to be unformed when there is only a basis of ‘suspicion’. Nor can they be informed of the ‘reason’ for their arrest in the sense of being told what grounds have given rise to a belief that particular charges should be brought against them – because that belief has not been formed.

2. **Thresholds are also lowered** under:

- the *Australian Security Intelligence Organisation Act 1979*, so that the Attorney General will no longer need to be satisfied that ‘relying on other methods of collecting that intelligence would be ineffective’ prior to issuing a questioning warrant, but need only be satisfied that it is ‘reasonable in all the circumstances’, including whether other methods of collecting that intelligence would likely be as effective.
  - the *Migration Act* to enable Department of Immigration officers to retain personal identity documents where they only ‘suspect’ that the documents are bogus.
3. Amendments to the *Australian Passports Act 2005*, *Australian Security Intelligence Organisation Act 1979*, *Foreign Passports (Law Enforcement and Security Act) 2005*, and the *Administrative Decisions (Judicial Review) Act 1977* allow for temporary cancellation of Australian passports **without notification to the passport holder, and without judicial review of the decision being possible**. Again, this is inconsistent with proper process;
4. Amendments to the *Crimes Act* will allow police to conduct searches of a ‘warrant premises’ **without the occupier’s knowledge and without notifying the occupier of the premises at the time the warrant is executed**. They also have the right to access those premises via adjacent premises. Notice of the search will be required to be given to the occupier of a searched premises – and to the occupier of the adjoining premises – at a later date, ‘generally’ within six months. Police are also given the **right to ‘impersonate a person where reasonably necessary to execute the warrant’** in order, says the EM, ‘to allay the suspicion of other residents of the area’. <sup>13</sup>
5. The introduction of **mandatory non-parole periods** for terrorism offences under the *Crimes Act 1914* (Cth) is inconsistent with proper judicial process and contrary to the comments elsewhere in the EM that ‘facilitating the exercise of judicial discretion’ is evidence that the legislation is ‘sufficiently mindful of human rights obligations.’<sup>14</sup>
6. The **ban on Australian citizens entering or remaining in a ‘declared area’ of a foreign country** (described in the EM as intended ‘to deter Australians from travelling to areas

<sup>11</sup> Paragraphs 97 and 99 – referring to Kitto J in *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303 – quoted in *George v Rockett* (1990) 170 CLR 104 – see also Paragraph 174.

<sup>12</sup> Paragraph 98.

<sup>13</sup> Paragraph 106.

<sup>14</sup> Paragraph 83.

where listed terrorist organisations are engaged in a hostile activity') is an inappropriate and unreasonable restriction on Australians' freedom of movement and civil rights:

- There is a very limited list of legitimate exceptions (not including business purposes). Paragraph 225 says that '*Those that travel to a declared area without a sole legitimate purpose or purposes might engage in a hostile activity with a listed terrorist organisation*'. This is a disproportionate response to such a possibility.
- There is no element of intent. It is perfectly possible that an Australian could be in a declared area with no knowledge that it has been made illegal for Australians to be there and no with no guilty intent.
- Of particular concern, given that intent is not an element in the offence, is the shift in the burden of proof. The EM appears to argue that there is no infringement of Article 14(2) of the ICCPR (which provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law)<sup>15</sup> because the burden 'shifts back' again to the prosecution once the defendant demonstrates that they fall within one of the exemptions, or at least that they have a 'legitimate' reason for being in the area. While paragraph 235 argues that '*The legitimate purpose defence captures common reasons for travelling*' this is not correct and the list is very limited. It is clear from paragraph 228 and the text of the amendment that the effect of the amendment is clearly to place the burden of proving their innocence upon the defendant.

As such, the amendment is antithetic to the ICCPR.

7. A related issue is the **limitation of the 'humanitarian aid exception'** in the *Criminal Code Act 1995*. The Bill now makes it much harder to claim that exception, as humanitarian aid is now to be an exception on where it is the sole reason that the conduct in question is undertaken. It is submitted that there could be many additional reasons why the particular conduct was carried out that are not related to terrorist activities and that it is quite inappropriate for the test to be so narrow.
8. It is not clear whether amendments to the *Foreign Evidence Act* may have the unintended consequence of making it **harder for a court to exclude evidence obtained by torture or duress**. See in this regard the concerns of the Law Council as expressed in 2013, which would appear to still be applicable even if the Bill is implemented<sup>16</sup>.
  - While the EM states that there is a mandatory requirement to exclude material obtained by torture or duress, it appears that this only applies where the court is 'satisfied' that the material was obtained in this way (paragraph 252 and see the terms of the proposed section 27D of the *Foreign Evidence Act 1994*). It is difficult to imagine how a court in Australia can 'satisfy' itself of such a matter in relation to events which have happened overseas.
  - There is a further difficulty in that 'torture' is defined prescriptively. Paragraphs 1017 and 1018 say that:

<sup>15</sup> Paragraph 227.

<sup>16</sup> Law Council of Australia (2013), *op cit*, 130 ff.

*The definition of 'torture' will provide that an act or omission amounting to torture must inflict severe pain or suffering, whether physical or mental. **The definition of 'torture' in subsection 27D(3) will also list the purposes for which the relevant conduct must be engaged in to constitute torture.** In summary these purposes are:*

- *obtaining from the other person or from a third person information or a confession, or*
- *punishing the other person for an act that the other person or a third person has committed or is suspected of having committed, or*
- *intimidating or coercing the other person or a third person, or*
- *discrimination that is inconsistent with the Articles of the ICCPR.*

That is, a court is not permitted to categorise the intentional infliction of pain for other reasons, or for no reason, as torture. Neither would merely 'cruel, inhuman or degrading treatment', or pain inflicted for 'medical' or 'scientific' experimentation appear to amount to the definition of torture, contrary to Article 7 of the ICCPR. This is completely inappropriate and the definition should be made inclusive, not exclusive.

9. Changes to the **requirements for the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to review** the operation, effectiveness and implications of a number of pieces of security-related legislation is of concern:

- a. Under the *Intelligence Services Act 2001* there was a requirement for the PJCIS to review a number of pieces of legislation, which has been removed. The EM justifies this on the basis of a review having been carried out in 2006.<sup>17</sup> However there is no reason why that review should not be ongoing –indeed from an accountability and transparency point of view this is highly desirable.
- b. The requirement for PJCIS to report on the operation, effectiveness and implications of Division 3 of Part III of the ASIO Act by 22 January 2016 has been extended to 22 January 2026.

10. The Bill includes a new section 80.2C to the *Criminal Code* prohibiting a person from **advocating the doing of a terrorist act**, or the commission of a terrorism offence. The penalty is imprisonment for 5 years or more. This provision is in addition to various other relevant provisions of the Criminal Code 1995 (Cth), including section 11.4 relating to incitement.

An incitement offence under section 11.4 of the *Criminal Code* already applies to a person who urges the commission of an offence. An advocacy offence under the proposed 'advocating terrorism' provision additionally includes an act by a person that counsels, promotes, encourages or urges the doing of a terrorist act or the commission of a terrorism offence where the person engaging in the conduct is reckless as to whether another person will engage in a terrorist act or commit a terrorism offence. The introduction of such an additional offence is inconsistent with previous recommendations by the Council of Australian Governments and the Law Council.<sup>18</sup>

<sup>17</sup> Paragraph 256

<sup>18</sup> Law Council of Australia (2013), *op cit*, 20.

The proposed provisions are unnecessary in the light of the existing *Criminal Code* offences and unreasonably impinge on the right to freedom of expression under Article 19 of the ICCPR.

11. The expansion of provisions relating to the **collection of biometric data** (specifically a photograph of the person's face and shoulders) not just from overseas visitors but from Australian citizens<sup>19</sup> is particularly concerning given the lack of information as to related privacy protection (eg when relevant information will be deleted) and potential for sharing of such information. *'Should the need arise, and technology improve, other personal identifiers such as a persons' [sic] fingerprints or iris scan may be prescribed in the Migration Regulations,'* says the Explanatory Memorandum (paragraph 333).
12. The Bill extends the Commonwealth search, information gathering, arrest and related powers under the *Crimes Act 1914* (Cth) from the present sunset date of 16 December 2015 until **15 December 2025**, at which point they will have been in effect for almost two decades. The Bill also extends the divisions of the *Criminal Code 1995* (Cth) relating to control orders and preventative detention orders for the same period.

The provisions in question were originally introduced many years ago on the presumption they would be removed once the perceived terrorist threat was alleviated. The government provides no indication, in extending the life of these provisions, as to what criteria it will use to establish that any perceived terrorist threat has dissipated.

ALHR submits that appropriateness of the relevant legislation should be reviewed on a regular basis. ALHR also notes the government's failure to adhere to the recommendations of the Council of Australian Governments that police powers under the *Crimes Act 1914* (Cth) should have a sunset clause of 5 years. ALHR submits that the reasoning in the Bill's explanatory memorandum for this failure (that a terrorist threat remains an ongoing and real phenomenon<sup>20</sup>) eludes the real issues and does not evidence a proportionate and appropriate response.

13. ALHR is concerned that both **preventative detention** and **control orders**<sup>21</sup> have been retained for a further 10 years (as mentioned above), and indeed have been expanded in terms of scope and lower thresholds (as mentioned above)<sup>22</sup>:
  - despite a number of bodies including the Council of Australian Governments, the Independent National Security Legislation Monitor<sup>23</sup> and the Law Council of Australia recommending the abolition of control orders and preventative detention orders and/or a significant reduction in the scope of such orders, if retained; and
  - without inclusion of the most important safeguards previously recommended by such bodies.

---

<sup>19</sup> See Schedule 5.

<sup>20</sup> Explanatory Memorandum paragraph 150.

<sup>21</sup> This section is largely drawn from Nathan Kennedy, *"Are Human Rights Adequately Protected In Australia?"* a paper prepared for the course in International Human Rights Law, University of NSW, 2009 and the Law Council of Australia (2013), *op cit*.

<sup>22</sup> See for example proposed section 104.2(2)(a).

<sup>23</sup> As established by the *Independent National Security Legislation Monitor Act 2010*.



We endorse the principles articulated in the Law Council's "*Anti-Terrorism Reform Project*" October 2013, which are relevant also to this review of the Bill.

Division 104 of the *Criminal Code* already provides for control restrictions (of a level appropriate to convicted criminals) to be placed on a person who has not been charged, tried or convicted of an offence.<sup>24</sup> Division 105 already allows for preventative detention intended to prevent an imminent terrorist attack occurring or to preserve evidence relating to a terrorist attack.<sup>25</sup> That is, the restrictions that can already be placed on a person through these orders are extremely onerous and involve a high potential for human rights violations - particularly in the light of the secrecy surrounding such orders<sup>26</sup> and consequential limits on:

- a fair trial as per Article 14 ICCPR;<sup>27</sup> and
- judicial oversight;<sup>28</sup>

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

We are concerned that the burden of proof is again reversed here: the onus is on the person to prove that the order against them should be revoked<sup>29</sup> despite the person affected being allowed to receive only minimal information as to the basis for the decision being made. The argument that the control order regime 'does not constitute a criminal penalty as [it] is neither punitive nor retributive'<sup>30</sup> is not convincing.

---

<sup>24</sup> 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.

<sup>25</sup> s105.1 *Criminal Code 1995*.

<sup>26</sup> In the case of preventative detention orders it is an offence for the detainee, his or her lawyer, an interpreter or anyone else to disclose that the detainee is in preventative detention: s105.41 *Criminal Code Act 1995*. The detainee is effectively held incommunicado, which has been the subject of adverse comment by the HRC because it is a circumstance in which torture can more readily take place. Such interference with communication is on the face of it a violation of the freedom from arbitrary interference with family (Article 17 ICCPR), Freedom of Speech (Article 19 ICCPR) and the right to work (Article 6 ICESCR). It could also give rise to circumstances of arbitrary detention given the secrecy involved.

<sup>27</sup> The *ex parte* nature of the control hearings violate the right of the person to be tried in their own presence and to be informed of the case against them contrary to Articles 14(3)(a) & (d) ICCPR.

<sup>28</sup> The judicial review grounds available under the *Administrative Decisions (Judicial Review) Act 1977* are not available in relation to decisions made under Division 105 of the Code (Schedule 1(dac) *Administrative Decisions (Judicial Review) Act 1977*). This is despite review under that Act being considered to be the Federal Court's principal judicial review jurisdiction (Administrative Review Council, *The Scope of Judicial Review Discussion Paper*, 2003, 10). This therefore limits any review to writs of mandamus, prohibition, or injunction (The High Court's power under section 75(v) of the Constitution to issue these remedies is conferred on the Federal Court by section 39B(1) of the *Judiciary Act 1903*). Application for a writ of habeas corpus to the Federal Court may be possible for the review of the legality of the detention or on narrow procedural grounds (Australian Lawyers for Human Rights, (2006) *op cit*, 5.) It has been argued that this is 'well short' of effective 'court control of the detention' and is a breach of Article 9(4) ICCPR (Letter from Professors Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon to ACT Chief Minister, 18 October 2005, 5).

<sup>29</sup> ss104.18 and 140.20 *Criminal Code 1995*.

<sup>30</sup> Explanatory Memorandum, paragraph 182. The paragraph continues: 'this amendment does not further punish those who have been convicted or acquitted in accordance with the law.' While this

Although the Code acknowledges the right of the detainee to apply to the Federal Court for a remedy in relation to a preventative detention order<sup>31</sup>, and although amendments to paragraph 104.12(1)(b) of the Criminal Code (which are welcomed by ALHR) require the accused person to be given some minimal information about their rights, effectively the lack of information required to be provided makes any challenge difficult or impossible.

These issues give further weight to the arguments that the controls enable detention that is potentially arbitrary<sup>32</sup> and that the required procedures fall short of the standards outlined by the Human Rights Committee. To adequately protect human rights, control orders (and in particular any preventative detention regime) should comply with Article 9 of the ICCPR. The regime:

*“... must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9(2) and (3), as well as article 14, must also be granted.”<sup>33</sup>*

Retrospectivity is also a concern. Such orders may be imposed on persons for actions that may not have been illegal at the time of they occurred, such that the person is effectively being punished retrospectively<sup>34</sup> contrary to Article 15(1) ICCPR (freedom from retrospective guilt).

## Conclusion

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

However it is also essential that anti-terrorism laws adhere to the Australian government’s international legal obligations under various binding instruments and accord with agreed norms of human rights, civil liberties and fundamental democratic freedoms. If legislative provisions do not accord with these standards they should not be adopted. In particular, laws which remove full judicial review are a direct affront to Australia’s international legal obligations, the separation of powers and the rule of law and have no place on the law books of a democratic nation State.<sup>35</sup>

ALHR believes that a human rights framework will strengthen counter-terrorism and national security laws in Australia by appropriately balancing the various obligations. This Bill does not reflect an appropriate balance.

## ALHR

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 2600 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights

---

may be so, it does punish those who have never been brought to a full trial and who have not been convicted of any offence.

<sup>31</sup> s105.28(2)(g) *Criminal Code Act 1995*.

<sup>32</sup> Letter from Professors Andrew Byrnes et al (2005), *op cit*, 5.

<sup>33</sup> Human Rights Committee, *CCPR General Comment No. 8*, 16<sup>th</sup> sess, [4], (1982).

<sup>34</sup> Australian Lawyers for Human Rights (2006) *op cit*, 10.

<sup>35</sup> See generally Australian Lawyers for Human Rights (2012), *op cit*, particularly paragraphs 4 and 5.

law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

If you would like to discuss any aspect of this submission, please email me at:

Yours faithfully

Nathan Kennedy  
President  
Australian Lawyers for Human Rights

*Contributors: Dr Tamsin Clarke, Nathan Kennedy, Vicky Kuek, Charles Gregory, Brendan Donohue*