



Australian
Human Rights
Commission

Inquiry into the Counter- Terrorism Legislation Amendment Bill (No. 1) 2015

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE
PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY**

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1 Introduction

1. The Australian Human Rights Commission welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security (the Committee) in its Inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 (the Bill).
2. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth). It is Australia's national human rights institution.
3. This submission addresses a number of human rights concerns raised by the Bill. It does not, however, purport to be a comprehensive analysis of all the human rights implications of the proposed legislation.
4. The Commission recommends that certain provisions of the Bill not be passed. In addition, the Commission makes a number of recommendations about ways the impact of the Bill on human rights could be ameliorated.

2 Terrorism and Human Rights

5. The Commission recognises the vital importance of ensuring that intelligence and law enforcement agencies have appropriate powers to protect Australia's national security and to protect the community from terrorism. Indeed, such steps are consistent with Australia's international obligations in international law, both under Security Council Resolutions,¹ and to protect the right to life of persons under its jurisdiction. This right is itself a human right, enshrined in article 6 of the International Covenant on Civil and Political Rights (ICCPR).
6. Human rights law provides significant scope for these agencies to have extensive powers, even where they impinge to some extent on individual rights and freedoms. Such limitations on rights must, however, be clearly expressed, unambiguous in their terms, and must be necessary and proportionate responses to potential harms.
7. As the Office of the High Commissioner for Human Rights has observed, *'the purpose of security measures is, fundamentally, to protect freedom and human rights.'* It is therefore essential that fundamental human rights are protected in the struggle against terrorism.²

3 Recommendations

8. The Australian Human Rights Commission makes the following recommendations:

Recommendation 1: The proposed amendments to the control order and preventative detention order regimes, including changes to the monitoring and surveillance powers in relation to those regimes (effected by schedules 2, 5, 8, 9, and 10 of the Bill), not be passed.

Any amendments on these lines should be considered either after, or together with, a comprehensive review of the control order and preventative detention order regimes on the lines recommended by the Committee in its *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*.

Recommendation 2: An issuing court should be required to appoint a court appointed advocate prior to issuing a control order in relation to a person aged under 18.

Recommendation 3: An issuing court should explicitly be required to make the best interests of the child a primary consideration at all stages in proceedings relating to the potential issue of an interim or confirmed control order.

Recommendation 4: A court appointed advocate should be entitled to participate in all proceedings related to a control order, including closed hearings, and be entitled to review all the materials put before the court, including material that is sensitive for national security reasons.

Recommendation 5: A court appointed advocate should be required to possess relevant expertise in working with children and the development of the child

Recommendation 6: in addition to the appointment of the court appointed advocate, a child should be provided with security-cleared legal representation in all control order proceedings, and their lawyer should be entitled to attend and participate in all proceedings relating to the control order.

Recommendation 7: it should be a requirement that whenever a control order is imposed in relation to a person under 18 years of age, any obligations, prohibitions and restrictions imposed should constitute the least interference with the child's liberty, privacy or freedom of movement that is necessary in all the circumstances.

Recommendation 8: The Commission recommends that the amendments to the preventative detention order regime contained in Schedule 5 of the Bill not be passed.

Recommendation 9: Schedules 8, 9 and 10 of the Bill should not be passed. In the event that this recommendation is not accepted, the Bill should be amended to ensure that:

- a. Monitoring warrants and control order warrants should only be granted where the relevant authority is satisfied that there are no less intrusive means of obtaining the information, and**
- b. Monitoring warrants and control order warrants should only be available where a relevant authority is satisfied that there are**

reasonable grounds to suspect non-compliance with a control order.

Recommendation 10: If Schedule 15 is passed, it should be amended so that:

- a. a legal representative with an appropriate security clearance may not be excluded from control order proceedings**
- b. there is a legislated minimum standard concerning the extent of the information to be given to a person the subject of an application for the confirmation of a control order, or an application for a variation or revocation of a control order, to ensure a person is made aware of the allegations against them and is in a position to challenge those allegations, and**
- c. a system of special advocates is established to represent the subjects of control orders, and that those advocates be entitled to attend at all hearings in control order proceedings and have access to all material before the court.**

4 General comments on the proposed amendments to the Control Order and Preventative Detention Order regimes

9. The control order and preventative detention order regimes were first introduced into the Criminal Code by the *Anti-Terrorism Act (No. 2) 2005* (Cth).³ The relevant provisions became operative on 15 December 2015, and were subject to 10 year ‘sunset’ clauses.⁴

4.1 Control Orders

10. Control orders are made under division 104 of the Criminal Code. They are made to allow obligations, prohibitions and restrictions to be imposed on a person to:
 - a. protect the public from a terrorist act;
 - b. prevent the provision of support for or the facilitation of a terrorist act; and/or
 - c. prevent the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.
11. Control orders can impose a number of restrictions on a person, including:
 - a. restricting them from being in certain areas, or from leaving Australia
 - b. restricting them from communicating or associating with certain people
 - c. restricting them from owning or using certain things
 - d. restricting them from carrying out certain activities, including work

- e. restricting them from accessing specified forms of telecommunications or other technology (including the internet)
- f. requiring them to remain at specified premises for up to 12 hours in any 24 hour period (ie applying a curfew)
- g. requiring them to wear a tracking device
- h. imposing reporting requirements
- i. requiring them to be photographed or fingerprinted.

4.2 Preventative Detention Orders

12. Preventative Detention Orders (PDOs) may be made under division 105 of the Criminal Code. State and Territory laws also provide for the making of preventative detention orders.
13. The stated object of the Commonwealth PDO regime is to enable police to detain a person for a 'short period of time' to prevent an imminent terrorist act occurring or to preserve evidence of, or relating to, a recent terrorist act. Commonwealth PDOs may be granted for a period of up to 48 hours. State and Territory laws allow for preventative detention orders to be granted for up to 14 days.

4.3 Criticisms and human rights implications

14. Both the control order and preventative detention order regimes have been the subject of criticism. The Commission has previously expressed the view that these regimes:
- may allow for the arbitrary detention of individuals, contrary to article 9(1) of the ICCPR
 - may result in arbitrary interference with a number of other rights of those subjected to such orders, such as the right to privacy, and the rights to freedom of movement, expression and association (articles 17, 12, 19 and 22 of the ICCPR respectively)
 - do not provide effective review procedures.⁵
15. In 2012, the Independent National Security Legislation Monitor (INSLM) questioned the need for both the control order and preventative detention order regimes, and recommended that they be repealed.⁶
16. In 2013, a review of Australia's national security legislation conducted by the Council of Australian Governments (COAG) recommended that the preventative detention order regime be repealed.⁷ The COAG review did not recommend that the control order regime be repealed, but stated:

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We consider however that the present safeguards are inadequate and that substantial change should be made to provide greater safeguards against abuse and, in particular, to ensure that a fair hearing is held.⁸

17. It made a number of recommendations for the reform of the control order regime, including:⁹

- **Recommendation 30**

The Committee recommends that the Government give consideration to amending the legislation to provide for the introduction of a nationwide system of 'Special Advocates' to participate in control order proceedings. The system could allow each State and Territory to have a panel of security-cleared barristers and solicitors who may participate in closed material procedures whenever necessary including, but not limited to, any proposed confirmation of a control order, any revocation or variation application, or in any appeal or review application to a superior court relating to or concerning a control order.

- **Recommendation 31**

The Committee recommends that the legislation provide for a minimum standard concerning the extent of the information to be given to a person the subject of an application for the confirmation of a control order, or an application for a variation or revocation of a control order. This requirement is quite separate from the Special Advocates system. It is intended to enable the person and his or her ordinary legal representatives of choice to insist on a minimum level of disclosure to them. The minimum standard should be: *"the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations."* This protection should be enshrined in Division 104 wherever necessary.

- **Recommendation 37**

The Committee recommends that section 104.5 should be amended to ensure that, whenever a control order is imposed, any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person's liberty, privacy or freedom of movement that is necessary in all the circumstances.

18. Despite these criticisms and recommendations, in 2014 the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) was introduced, containing clauses which would have extended the sunset clauses in relation to both the control order and preventative detention order regimes by 10 years, without implementing any of these recommended reforms. The Commission made a submission to the Committee with respect to that Bill, recommending that the sunset provisions for the control order and preventative detention order regimes should not be extended without a thorough review of those regimes and the criticisms and recommendations made by the COAG Review and the INSLM.¹⁰

19. The Committee accepted the need for a review of these provisions, stating:

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It is the Committee's view that, given the nature of these powers, it is important that their use and ongoing need is assessed within a reasonable time-frame.

...

The Committee also considers it is essential that the Parliament has sufficient time to consider whether these powers need to be further amended, repealed, extended or made permanent prior to the powers being due to sunset. This should be done through a thorough review of each power.¹¹

20. The Committee recommended both that the INSLM be required to complete a review of the operation of the control order and preventative detention regimes, and that the Committee be required to conduct its own review.¹²

21. These recommendations were, at least in part, accepted. The sunset clauses were extended only until 7 September 2018. The INSLM is currently conducting an inquiry into the control order regime and is required to complete both that review and a review of the PDO regime by 7 September 2017.¹³ The Committee is required to complete a review of these regimes by 7 March 2018.¹⁴

22. In light of the above, the Commission is concerned that the current Bill proposes to expand both the preventative detention order and control order regimes before the recommended reviews have been conducted. The Bill would expand both regimes in circumstances where this Committee has recommended that, at least, consideration be given to abolishing them or introducing further protections. For instance, the Bill would:

- a. allow control orders to be applied to 14 and 15 year olds,
- b. increase the possible intrusions into the privacy of the subjects of control orders by introducing new monitoring and surveillance powers
- c. potentially reduce the ability of subjects and potential subjects of control orders to participate in proceedings leading to the grant and continuation of those orders, and
- d. lower the threshold for the grant of preventative detention orders

without putting in place any of the additional protections recommended by the COAG Review and others.

23. The Commission recommends that these amendments not be passed in the absence of a full review of the control order and preventative detention order regimes.

Recommendation 1: The proposed amendments to the control order and preventative detention order regimes, including changes to the monitoring and surveillance powers in relation to those regimes (effected by schedules 2, 5, 8, 9, and 10 of the Bill), not be passed. Any amendments on these lines should be considered either after, or

together with, a comprehensive review of the control order and preventative detention order regimes on the lines recommended by the Committee in its *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*.

24. The Commission makes some additional comments about each of these proposed amendments below.

5 Lowering the minimum age for subjects of Control Orders (Schedule 2)

25. Currently, a control order cannot be made with respect to a child under 16 years of age. Where a control order is made with respect to a child aged between 16 and 18, it can be granted for no more than three months. (Control orders may be made with respect to adults for a period of up to 12 months.)¹⁵ In either case, successive control orders may be made.¹⁶ However, the shorter permissible maximum duration of control orders made with respect to children ensures that a court regularly reviews whether an order, and the conditions it imposes, remain justified.

26. Schedule 2 of the Bill would amend division 104 of the Criminal Code to allow control orders to be made with respect to children aged 14 and older.¹⁷

27. Due to the potentially very intrusive limitations on human rights which a control order may impose, and the particular vulnerability of children, compelling reasons would be required to establish that this amendment is necessary and proportionate. The Statement of Compatibility with Human Rights prepared in relation to the Bill states:

The lowering of the minimum age follows incidents, both in Australia and overseas, organised or led by children below the age of 16. With school-age students being radicalised and engaging in radicalising others and capable of participating in activity which poses a threat to national security, the threshold of 16 years is no longer sufficient for control orders to prevent terrorist activity.

Control orders are one of the tools available to law enforcement authorities to prevent a person from carrying out terrorist acts. Children younger than 16 have shown themselves to be capable of participating in activity which poses a threat to national security, including participating in a terrorist act.¹⁸

28. The Commission is not aware of what evidence there is to support these claims. However, it considers that they are, on their own, insufficient to demonstrate that allowing control orders to be granted for children between 14 and 16 would be necessary and proportionate. In particular, the Statement of Compatibility contains no discussion of:

- a. how many of the incidents referenced above ‘led by’ children under 16 occurred within Australia, and the nature of these incidents

- b. whether control orders, if available, would have been effective to significantly reduce the risk of a specific terrorist act planned or carried out by a child under 16 years of age
 - c. whether other measures were, or would have been, available to mitigate any risk of a terrorist act occurring, whether those measures were taken, and whether or how far they were successful
 - d. how great an impact a control order would have had on the rights of any child concerned, and whether that would have been proportionate to the reduction of risk that might have been achieved.
29. Without such evidence, it is not possible to conclude that the proposed amendment is necessary or proportionate to a legitimate objective. The Commission urges the Committee to consider carefully whether there is cogent evidence that supports the assertion that the proposed lowering of the age limit for control orders would significantly mitigate a real risk of terrorism.

5.1 The rights of the child

30. Children's rights, like those of adults, are protected by international human rights treaties including the ICCPR. The Commission's concerns about the impacts on human rights of the control order and preventative detention order regimes discussed above apply equally to children.
31. In addition, in recognition of the fact that *'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection'*, the international community has enshrined the rights of the child in the Convention on the Rights of the Child (CRC).¹⁹
32. One of the central rights protected in the CRC is contained in article 3(1), which provides:
- In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
33. The 'best interests of the child' is a complex concept. Ultimately, what is in the best interests of a child must be determined in all the circumstances of a particular case.²⁰
34. This right applies 'in all actions' concerning children. That includes administrative actions and judicial proceedings, and at all stages of those proceedings.
35. Finally, the best interests of the child must be made 'a primary consideration.' That means that these interests cannot be automatically trumped by another consideration.

36. This does not mean that the best interests of the child will always prevail over all other considerations. However, in all actions concerning a child, their best interests must be given high priority. The Committee on the Rights of the Child has stated:

The expression “primary consideration” means that the child’s best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.

....

However, since article 3, paragraph 1, covers a wide range of situations, the Committee recognizes the need for a degree of flexibility in its application. The best interests of the child – once assessed and determined – might conflict with other interests or rights (e.g. of other children, the public, parents, etc.). Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. The same must be done if the rights of other persons are in conflict with the child’s best interests. If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child’s interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.²¹

37. Further:

the purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the Convention and its Optional Protocols, and the holistic development of the child.²²

38. The ‘best interests’ of the child therefore must be considered by reference to the other rights of the child enshrined in the CRC.
39. Of particular relevance in the present context is the right of the child to be heard.²³ The child’s views should be taken into account in assessing what is in their best interests, and the weight given to these views should be given progressively greater weight as the child matures. The child also has a right to be heard, either directly or through a representative, in any judicial or administrative proceeding affecting him or her.²⁴

5.2 Proposed Safeguards

40. The Commission welcomes the inclusion in the Bill of measures designed to reduce, to some extent, the negative impact the control order might have on

a child between 14 and 18 years of age. However, for the reasons that follow, the Commission considers that these measures are not sufficient to protect fully the rights of children who may be affected by control orders.

(a) *Court appointed advocates*

41. The Bill would introduce provisions into the Criminal Code requiring that a ‘court appointed advocate’ be appointed whenever a court makes a control order with respect to a child. The advocate would be required to:
- a. ensure, as far as possible, that the child understands the proceedings
 - b. form an independent view about what is in the best interests of the child
 - c. act on that independent view about what is in the best interests of the child
 - d. make submissions to the court about what course of action might be in the best interests of the child
 - e. ensure that any views expressed by the person in relation to the control order are fully put before an issuing court; and
 - f. endeavour to minimise any distress to the person associated with the control order matters.²⁵

(b) *Requirement to take into account the best interests of the child*

42. The Bill would also explicitly protect the ‘best interests’ of an affected child in several ways.

43. First, in deciding what conditions should attach to a control order in relation to a child, an issuing court would be required to consider the best interests of the child. In doing so, the court would be required to take into account:

- (a) the age, maturity, sex and background (including lifestyle, culture and traditions) of the person;
- (b) the physical and mental health of the person;
- (c) the benefit to the person of having a meaningful relationship with his or her family and friends;
- (d) the right of the person to receive an education;
- (e) the right of the person to practise his or her religion;
- (f) any other matter the court considers relevant.²⁶

44. While this is an improvement on the current situation, the court would not be required to make the best interests of the child a ‘primary’ consideration. It

would simply be one factor for the court to consider. The Explanatory Memorandum states that:

the paramount consideration with respect to control orders is the safety and security of the community.²⁷

45. While the requirements of national security might outweigh the best interests of a child in the circumstances of a particular case, that must be determined on a case-by case basis. The existence of another ‘paramount’ consideration is inconsistent with treating the best interests of a child as a primary (or ‘first order’) consideration.
46. Further, a court would be required to consider the best interests of the child only when considering whether particular obligations, prohibitions and restrictions are reasonably necessary, and reasonably appropriate and adapted, to prevent relevant terrorism-related conduct. The court is not required to consider the best interests of the child when deciding whether a control order should be made.
47. As noted above, the Bill would require the court appointed advocate to ensure the child understands the proceedings, seek the views of the child, form an opinion about the best interests of the child, and communicate that opinion to the court.
48. The requirement for court-appointed advocates is an improvement on the current situation. However, it does not ensure that the best interests of the child will be a primary consideration in all relevant actions, for a number of reasons:
 - a. The court appointed advocate is not appointed until after an interim control order is granted. The advocate can therefore do nothing to protect the interests of the child at the outset of the proceedings. Article 3 requires that the best interests of the child be protected in relation to every action, which in this context necessarily includes the grant of an interim control order.
 - b. The court appointed advocate would not be the representative of the child and would not be obliged to act on the child’s instructions. The advocate could indeed make submissions contrary to the child’s wishes.
 - c. The court appointed advocate would communicate its own views of the child’s best interests to the court. There would be a real risk that the court may be led to give the advocate’s views more weight than those of the child. The child may not have the capacity to express his or her views about his or her best interests in the context of a contested court proceeding.
 - d. The court appointed advocate would be permitted to disclose matters to the court against the wishes of the child on whose behalf they are

appointed. That could discourage affected children from communicating frankly with the advocate.

- e. The advocate is not explicitly guaranteed access to all relevant information, including classified information, that might be considered by the court.
- f. The advocate would not be required to have any special expertise or training in working with children.

49. In the event that the amendments in Schedule 2 are passed, the Commission makes the following recommendations to ameliorate their impact on children:

Recommendation 2: An issuing court should be required to appoint a court appointed advocate prior to issuing a control order in relation to a person aged under 18.

Recommendation 3: An issuing court should explicitly be required to make the best interests of the child a primary consideration at all stages in proceedings relating to the potential issue of an interim or confirmed control order.

Recommendation 4: A court appointed advocate should be entitled to participate in all proceedings related to a control order, including closed hearings, and be entitled to review all the materials put before the court, including material that is sensitive for national security reasons.

Recommendation 5: A court appointed advocate should be required to possess relevant expertise in working with children and the development of the child

Recommendation 6: in addition to the appointment of the court appointed advocate, a child should be provided with security-cleared legal representation in all control order proceedings, and their lawyer should be entitled to attend and participate in all proceedings relating to the control order.

Recommendation 7: it should be a requirement that whenever a control order is imposed in relation to a person under 18 years of age, any obligations, prohibitions and restrictions imposed should constitute the least interference with the child's liberty, privacy or freedom of movement that is necessary in all the circumstances.

6 Lowering the threshold for issuing Preventative Detention Orders (Schedule 5)

50. Schedule 5 of the Bill would significantly lower the threshold for the grant of a Commonwealth preventative detention order.

51. A preventative detention order may be made either:

- a. where it would ‘substantially assist’ in preventing an ‘imminent’ terrorist act, and is reasonably necessary to achieve that end;²⁸ or
- b. where it is reasonably necessary to preserve evidence of a terrorist attack that has occurred within the preceding 28 days.²⁹

52. The word ‘imminent’ is not currently defined in the Criminal Code (although it is qualified by the further requirement that the relevant event be one that is at any event expected to occur within the next 14 days). The word ‘imminent’ therefore currently bears its ordinary meaning. The Macquarie Dictionary (3rd ed.) gives the definition ‘*likely to occur at any moment, impending*’. The first meaning given by that dictionary for ‘impending’ is ‘*about to happen*.’ The notion of imminence therefore involves both a very high level of likelihood (or even certainty) of an event occurring and a short timeframe within which it is to occur.

53. The requirement that an issuing authority be satisfied there are reasonable grounds to suspect an *imminent* terrorist attack may not be an easy one to meet. However, that is entirely consistent with the extraordinary nature of the preventative detention order regime. Preventative detention orders are administrative orders, made, in the first instance, by a senior AFP member, which authorise an individual to be detained without charge, and without a necessary intention to charge the subject with any offence. It is not appropriate that powers of this nature be exercised if there is not a high risk of a terrorist act.

54. Further, the purpose of preventative detention orders is to prevent a terrorist act that would occur within a short period of time, by taking a potential perpetrator ‘out of circulation’ in circumstances where the urgency of the case is such that other means of preventing the act are unlikely to be effective. This rationale requires that the potential act be likely to occur within a short space of time.

55. Schedule 5 of the Bill would amend the Criminal Code to insert a new definition of an ‘imminent terrorist act.’ A terrorist act would meet that definition if an issuing authority were satisfied that there were reasonable grounds to suspect that it were ‘*capable of being carried out, and could occur, within 14 days*’.³⁰

56. It is the Commission’s view that that is far too low a threshold to enliven the power to issue a preventative detention order. On its face, it could allow an order to be made in cases where no more is shown than that there is a possibility a terrorist attack might occur. While some types of terrorist act might require very significant planning, expertise and resources, others, such as ‘lone wolf’ type attacks, would be ‘capable of being carried out’ by virtually anybody at any time – and therefore it could also be said at any time that they ‘could occur within 14 days’.

57. It is true that an issuing authority would still need to be satisfied that a preventative detention order would ‘substantially assist’ in preventing an ‘imminent terrorist attack’, and that it would be ‘reasonably necessary’ to achieve that goal. However, it is unclear how those requirements would interact with the new definition of an ‘imminent terrorist attack’. The Commission considers therefore that the revised definition of imminence would substantially reduce the threshold that must be met to obtain an order. (That, indeed, is the rationale for the proposed amendment).³¹
58. The Commission has discussed the potential human rights impacts of preventative detention orders elsewhere and does not reproduce that analysis here (see, for instance, the summary above in this submission and the corresponding references). However, it is the Commission’s view that given these impacts, the proposed lowering of the threshold has not been shown to be justified. That is particularly so in circumstances where both COAG and the INSLM have recommended that the preventative detention order regime be repealed, in large part because its objectives can substantially be achieved by the use of ordinary police powers.³²

Recommendation 8: The Commission recommends that the amendments to the preventative detention order regime contained in Schedule 5 of the Bill not be passed.

7 Monitoring Compliance with Control Orders (Schedules 8, 9 and 10)

59. Schedules 8-10 of the Bill contain a range of provisions apparently designed to assist law enforcement agencies in monitoring and enforcing control orders. The proposed measures include:
- a. amending the *Crimes Act 1914* (Cth) to introduce a new class of ‘Monitoring Warrant’, which would allow police to enter premises, question and frisk search people subject to control orders, for purposes including determining whether a control order is being complied with (Schedule 8)
 - b. amending the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act), to allow warrants to be issued to authorise the covert interception of telecommunications for purposes including determining whether a control order is being complied with (Schedule 9)
 - c. amending the *Surveillance Devices Act 2004* (Cth) (SD Act), to allow for warrants to be issued to authorise the use of covert surveillance devices (including cameras, microphones, data surveillance devices and tracking devices) to determine whether a control order is being complied with (Schedule 10). These warrants could be granted, and executed, after an interim control order were granted, but before it came into effect (which occurs when the interim order is served on the subject).

60. These proposed provisions would all limit the right to privacy of persons subject to control orders. Premises searches, and the new warrants under the TIA Act and the SD Act, would also limit the privacy of third parties whose activities may be observed in the course of conducting intercepts or surveillance. The right to privacy is protected by article 17 of the ICCPR, which 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.

61. Surveillance, or the ‘menace of surveillance’, may also restrict free speech and the freedom of expression.³³

62. Human rights law recognises that covert surveillance, which may limit the right to privacy, may in some circumstances be necessary to protect democracies from the threat of terrorism.³⁴ However, the discretion of states to conduct surveillance is not unlimited. It may be permitted only so far as is strictly necessary to protect democratic institutions.³⁵ As the European Court of Human Rights has observed, surveillance powers pose a danger of *‘undermining or even destroying democracy on the ground of defending it.’*³⁶

63. The new warrant powers that the Bill would introduce are different from other warrant powers, in that an issuing authority would not need to be satisfied that there is reason to suspect a person may have breached a control order or committed any other offence. Rather:

- a. In the case of monitoring warrants under the Crimes Act, a warrant may be granted where the issuing authority is satisfied that the grant is reasonably necessary to determine whether a control order is being complied with. The issuing authority is required to consider the ‘possibility that the person has contravened, is contravening, or will contravene, the control order;’
- b. In the case of a control order warrant under the TIA Act, a warrant may be granted where the issuing authority is satisfied that information that would be likely to be obtained under a warrant would be likely to substantially assist in connection with determining whether a control order, has been, or is being, complied with;
- c. In the case of a control order warrant under the SD Act, a warrant may be granted where the issuing authority is satisfied that the use of a surveillance device would be likely to substantially assist in determining whether a control order has been, or is being, complied with.

64. While there are requirements that issuing authorities take a number of other factors into account, including the extent to which any person’s privacy would be affected and whether there are alternative means of obtaining the

information, the Commission considers these requirements are insufficient in circumstances.

65. It is necessary to bear in mind that control orders are granted following a civil hearing, determined on the civil standard of proof. The subject of the order need not have been charged with or convicted of any offence. In those circumstances, the Commission considers that it has not been demonstrated that it would be appropriate to allow for the highly intrusive monitoring or surveillance which would be authorised by these amendments, in the absence of any evidence which could found a suspicion that a control order had not been complied with. Further, the threshold that a warrant would be likely to assist in determining whether an order has been complied with is very low. Indeed, in the case of certain restrictions or prohibitions that might be imposed under a control order, it is hard to imagine circumstances where this threshold would not be met.

Recommendation 9: Schedules 8, 9 and 10 of the Bill should not be passed. In the event that this recommendation is not accepted, the Bill should be amended to ensure that:

- a. **Monitoring warrants and control order warrants should only be granted where the relevant authority is satisfied that there are no less intrusive means of obtaining the information, and**
- b. **Monitoring warrants and control order warrants should only be available where a relevant authority is satisfied that there are reasonable grounds to suspect non-compliance with a control order.**

8 Protecting National Security Information in Control Order Proceedings (Schedule 15)

66. Schedule 15 of the Bill would introduce new provisions into the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act).
67. The NSI Act currently allows a court to prevent the disclosure of information in federal criminal and civil proceedings, where that disclosure would be likely to have an adverse effect on national security. In preparing this submission, the Commission has not undertaken a human rights analysis of the NSI Act as a whole. Rather, it has confined its attention to the amendments that would be effected by Schedule 15 of the Bill.
68. Schedule 15 of the Bill would introduce new provisions in the NSI Act, relating solely to control order proceedings. As the explanatory memorandum states, those provisions would allow the court to make orders to the effect that:
- a. the subject of [a] control order and their legal representative may be provided with a redacted or summarised form of the national security information.

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However, the court may consider all of the information contained in the original source document, even where that information has not been provided in the redacted or summarised form (new subsection 38J(2))

- b. the subject of [a] control order and their legal representative may not be provided with any information contained in the original source document. However, the court may consider all of that information (new subsection 38J(3)), or
- c. a witness may be called and the information provided by the witness need not be disclosed to the subject of [a] control order or their legal representative. However, the court may consider all of the information provided by the witness (new subsection 38J(4)).³⁷

69. Further, the Bill would provide that the court could exclude a person subject to a control order, and/or their legal representative from a control order hearing, even if they have an appropriate security clearance.³⁸

70. These provisions would limit the rights of persons to a fair trial protected by article 14(1) of the ICCPR. In particular, they would limit the right of a person subject to a control order to 'equality of arms' by restricting their knowledge of the accusations made against them and the evidence adduced in support of those accusations. The amendments would also limit the right to be represented by legal counsel.

71. International Human Rights law recognises that some restrictions on fair trial rights may be necessary to protect national security. For instance, in some circumstances, it may be permissible for closed hearings to be held. It may also be acceptable for some evidence to be withheld from a person in court proceedings, where a redacted version, or a summary of the allegations against a person, is provided. However, it is necessary that sufficient detail be provided to give a person a sufficient opportunity to respond to the case against them.³⁹

72. Under the NSI Act as amended, control order proceedings might proceed in circumstances where only a very general description is given of the terrorism-related conduct of which a person is accused. That is likely to be inconsistent with the right to a fair trial.⁴⁰

73. The Explanatory Memorandum observes that a court would retain a discretion about whether to make the orders requested, and what weight to place on material not disclosed to a person subject to a control order.⁴¹ However, the Commission considers that further protections would be necessary to ensure that closed hearings did not impermissibly interfere with the right to a fair trial. Given the explicit powers to make certain orders under the NSI Act, it is unclear how readily a court would refuse to make those orders on a discretionary basis.

74. Finally, the Commission does not consider that adequate justification has been given for treating control order proceedings differently from other civil proceedings affected by the NSI Act.

75. The Commission considers that some of these concerns could be ameliorated to a degree by implementing some of the recommendations made by the COAG review (discussed above in this submission).

Recommendation 10: If Schedule 15 is passed, it should be amended so that:

- a. a legal representative with an appropriate security clearance may not be excluded from control order proceedings**
- b. there is a legislated minimum standard concerning the extent of the information to be given to a person the subject of an application for the confirmation of a control order, or an application for a variation or revocation of a control order, to ensure a person is made aware of the allegations against them and is in a position to challenge those allegations, and**
- c. a system of special advocates is established to represent the subjects of control orders, and that those advocates be entitled to attend at all hearings in control order proceedings and have access to all material before the court.**

9 New offence – Advocating Genocide (Schedule 11)

76. Genocide is a heinous crime. Under the Criminal Code, genocide is the performance of actions such as the killing, infliction of serious harm, or infliction of conditions of life calculated to bring about the physical destruction of or on persons of a particular national, ethnic, racial or religious group, with the intention of destroying that group.⁴²

77. Incitement to genocide is already, quite properly, a criminal offence under the Criminal Code. Incitement is the urging of a person to commit an offence, with the intention that the offence be committed.⁴³

78. These provisions of the Criminal Code are consistent with Australia's obligations under the Genocide Convention, which explicitly requires States Parties to criminalise both genocide and incitement to genocide.⁴⁴

79. Criminalisation of incitement to commit violent crimes is an example of a permissible limitation on the right to freedom of expression, to achieve the legitimate objective of protecting the rights of other members of the community.

80.

81. The Bill would create a new crime of 'advocating genocide'. The word 'advocate' would be defined to mean 'counsel, promote, encourage or urge'.⁴⁵ The Explanatory Memorandum states that the new offence is necessary for the following reasons:

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[Current] offences require proof that the person intended the crime or violence to be committed, and there are circumstances where there is insufficient evidence to meet that threshold. Groups or individuals publicly advocating genocide can be very deliberate about the precise language they use, even though their overall message still has the impact of encouraging others to engage in genocide.

Furthermore, in the current threat environment, the use of social media by hate preachers means the speed at which persons can become radicalised and could prepare to carry out genocide may be accelerated. It is no longer the case that explicit statements (which would provide evidence to meet the threshold of intention and could be used in a prosecution for inciting genocide) are required to inspire others to take potentially devastating action against groups of individuals. Law enforcement agencies require tools to intervene earlier in the radicalisation process to prevent and disrupt the radicalisation process and engagement in terrorist activity. This new offence, along with the offence prohibiting advocating terrorism, which came into effect on 1 December 2014, is intended to be one of those tools.⁴⁶

82. Several points may be made about this new offence.

83. First, the precise ambit of the offence is not entirely clear. This is acknowledged in the Explanatory Memorandum, which states:

Whether specific conduct, such as making or commenting on a particular post on the internet or the expression of support for committing genocide, is captured by the offence will depend on all the facts and circumstances. Whether a person has actually “advocated” the commission of a genocide offence will ultimately be a consideration for judicial authority based on all the facts and circumstances of the case.⁴⁷

84. This indicates that the provision may infringe the right, protected by article 15 of the ICCPR, that criminal offences be defined with sufficient precision to allow people to regulate their conduct.⁴⁸

85. Further, it appears that it would not be necessary to prove that a person intend that an act of genocide occur to make out the new offence.

86. In the context of terrorism offences, a number of international bodies have stated that regardless of the abhorrence of the conduct urged or ‘glorified’, advocacy of terrorism should only be criminalised in circumstances where it is proved that:

- a. The advocate has a subjective intention to incite the offence, and
- b. There is an objective danger that one or more relevant offences would be committed as a result of the advocacy.⁴⁹

87. The Commission notes that in addition to the current offence of inciting genocide, the Criminal Code also contains provisions prohibiting ‘urging violence’ and ‘advocating terrorism.’⁵⁰ These provisions would appear to capture much of the conduct at which the proposed measures are said to be targeted.

88. In light of the above, the Commission urges the Committee to scrutinise closely the claimed justifications for the creation of the proposed offence, and to consider:

- a. whether there is cogent and persuasive evidence to support the assertion that the creation of the new offence of advocating genocide is likely have a significant effect in achieving its stated goals of preventing acts of genocide and reducing radicalisation
- b. whether the provisions are a necessary and proportionate measure to achieve those goals, and
- c. if the provisions are passed, whether it is possible to define ‘advocacy’ with greater precision better to target the mischiefs at which the provisions are said to be directed.

¹ UN Doc. S/RES/1373 (2001).

² See eg the Commission’s submission to the Senate Legal and Constitutional Legislation Committee in relation to its inquiry into the Anti-Terrorism Bill (No 2) 2005 (11 November 2005), available at http://humanrights.gov.au/legal/submissions/terrorism_sub_12-11-2005.html; Australian Human Rights Commission, *A Human Rights Guide to Australia’s Counter-Terrorism Laws* (2008), available at http://humanrights.gov.au/legal/publications/counter_terrorism_laws.html.

³ No. 144, 2005.

⁴ *Anti-Terrorism Act (No. 2) 2005*, Schedule 4, Item 24 (introducing ss 104.32 and 105.53 of the Criminal Code).

⁵ See materials referenced in note 2, above.

⁶ Declassified Annual Report (2012), Recommendation II/4, p 44; Recommendation III/4, p 67.

⁷ Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013), Recommendation 39, p 68.

⁸ Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013), 54.

⁹ Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013), xiii-xiv.

¹⁰ Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, available at

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Counter-Terrorism_Legislation_Amendment_Foreign_Fighters_Bill_2014/Submissions.

¹¹ Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, [2.302], [2.305], available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Counter-Terrorism_Legislation_Amendment_Foreign_Fighters_Bill_2014/Report1.

¹² Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, Recommendation 13, p 79.

¹³ *Independent National Security Legislation Monitor Act 2010*, s 6(1B).

¹⁴ *Intelligence Services Act 2001* (Cth), s 29(bb)(iii).

¹⁵ Criminal Code, s 104.16(1)(d).

¹⁶ Criminal Code, s 104.28(3) (with respect to children aged between 16 and 18); s 104.16(2) (with respect to adults).

¹⁷ Office of the High Commission of Human Rights, *Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective On Counter-Terrorist Measures* (2002), available at http://www.un.org/en/sc/ctc/docs/rights/2002_09_23_ctcchair_note.pdf.

¹⁸ At [75]-[76].

¹⁹ CRC, preamble.

²⁰ UN Committee on the Rights of the Child, *General Comment 14*, (2013), UN Doc. CRC/C/GC/14, [32]-[34].

²¹ UN Committee on the Rights of the Child, *General Comment 14*, (2013), [37], [39].

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- ²² UN Committee on the Rights of the Child, *General Comment 14*, (2013), [82].
- ²³ CRC, art. 12.
- ²⁴ UN Committee on the Rights of the Child, *General Comment 14*, (2013), [44]-[45].
- ²⁵ Proposed s 104.28AA.
- ²⁶ Item 5, proposed ss104.4(2A)
- ²⁷ Explanatory Memorandum, [85].
- ²⁸ Criminal Code, s 105.4(4)
- ²⁹ Criminal Code, s 105.4(6)
- ³⁰ Item 2 (proposed new s 105.4(5))
- ³¹ Explanatory Memorandum, [375]-[379].
- ³² See eg INSLM, Declassified Annual Report (2012), p 67.
- ³³ *Klass v Germany*, (1979-80) 2 EHRR 214, [37].
- ³⁴ *Klass v Germany*, (1979-80) 2 EHRR 214, [48], [68];
- ³⁵ *Klass v Germany*, (1979-80) 2 EHRR 214, [42], [49].
- ³⁶ *Klass v Germany*, (1979-80) 2 EHRR 214, [49]; United Nations High Commissioner for Human Rights, *Protection of Human Rights and Fundamental Freedoms while Countering Terrorism* (2005), UN Doc E/CN.4/2005/103.
- ³⁷ Explanatory Memorandum, [761].
- ³⁸ Proposed s 38I(3A).
- ³⁹ *Mansour Ahani v Canada*, UN Human Rights Committee Communication No. 1051 of 2002, UN Doc. CCPR/C/80/D/1051/2002; *A v United Kingdom* [2009] ECHR 301. See also M Scheinen, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: *Australia: Study on Human Rights Compliance while Countering Terrorism* (2006), UN Doc A.HRC/4/26/Add.3, [39].
- ⁴⁰ *A v United Kingdom* [2009] ECHR 301; *Secretary of State for the Home Department v AF* (No. 3) [2009] 3 WLR 74.
- ⁴¹ Explanatory Memorandum, [764]; Statement of Compatibility with Human Rights, [134], [135].
- ⁴² Criminal Code, Chapter 8, Division 268, Subdivision B.
- ⁴³ Criminal Code, s 11.4.
- ⁴⁴ The Genocide Convention is reproduced in Schedule I to the *Genocide Convention Act 1949* (Cth).
- ⁴⁵ Bill, Schedule 11, Item 4, proposed s 80.2D(3).
- ⁴⁶ Explanatory Memorandum, [687]-[688].
- ⁴⁷ Explanatory Memorandum, [695].
- ⁴⁸ See M. Scheinen, *Promotion and Protection of Human Rights – Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* (2005), UN Doc. E/CN.4/2006/98, [46].
- ⁴⁹ See M. Scheinen, *Promotion and Protection of Human Rights – Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* (2005), UN Doc. E/CN.4/2006/98, [56(c)]; UN Office of the High Commission of Human Rights, *Fact Sheet 32 - Human Rights, Terrorism and Counter-terrorism*, (2008), p 44 (available at <http://www.refworld.org/docid/48733ebc2.html>); Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, of Experts, *International Mechanisms for Promoting Freedom of Expression*, (21 December 2005), p 2; Council of Europe, *Countering Terrorism, Protecting Human Rights – A Manual* (2007) p 228ff.
- ⁵⁰ Criminal Code, ss 80.2A, 80.2B, 80.2C.