



Australian
Human Rights
Commission

Inquiry into the Counter-Terrorism Legislation Amendment Bill (No.1) 2014

**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 makes this brief submission to the Parliamentary Joint Committee on Intelligence and Security (Committee) in its Inquiry into the Counter-Terrorism Legislation Amendment Bill (No.1) 2014 (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. In light of the extremely short timeframe given to the public to make submissions to this inquiry, this submission addresses only a few key concerns raised by the Bill's amendments to the Control Order regime. The Submission does not address all aspects of the Bill.
4. The Commission acknowledges the critical importance of ensuring that our law enforcement agencies have appropriate powers to protect our national security and to protect the human rights of other citizens, including protecting the Australian community from terrorism. Human rights law provides significant scope for such agencies to have expansive powers, even where they impinge 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.
5. The Commission recommends that certain provisions of the Bill not be passed.

2 The Control Order regime

6. Division 104 of Part 5.3 of the *Criminal Code Act 1995* (Cth) provides for the making of control orders. A control order is an order issued by a court (either the Federal Court, Family Court or Federal Magistrates Court), at the request of a member of the Australian Federal Police (AFP), to allow obligations, prohibitions and restrictions to be imposed on a person, for the purpose of protecting the public from a terrorist act.¹
7. Control Orders impose prohibitions or restrictions, which may prevent a person from:
 - being at specified areas or places
 - leaving Australia
 - communicating or associating with specific individuals
 - accessing or using specified types of telecommunications, including the internet
 - possessing or using specified articles or substances
 - carrying out specified activities (including in respect to their work or occupation).²

8. Control order terms may also require the person to:
 - remain at specific premises at particular times of the day
 - wear a tracking device
 - report to specified persons at specified times and places
 - allow him or herself to be photographed and have fingerprint impressions taken
 - participate in specified counselling or education (only if they agree to do so).³
9. It is evident from the types of prohibitions and restrictions which can be placed upon a person that control orders potentially infringe upon a number of human rights, including:
 - the right to liberty (article 9(1) of the *International Covenant on Civil and Political Rights*⁴ (ICCPR))
 - the right to freedom of movement (article 12 of the ICCPR)
 - the right to privacy (article 17 of the ICCPR)
 - the right to freedom of expression (article 19 of the ICCPR)
 - the right to freedom of association (article 22 of the ICCPR)
 - the right to work (article 7 of the *International Covenant on Economic, Social and Cultural Rights*⁵).
10. The right to liberty is not absolute – a person may be deprived of that right for legitimate purposes where the deprivation meets the test of proportionality in all the circumstances. The same may generally be said of the other human rights potentially infringed by the restrictions available under control orders.
11. A critical feature of control orders is that they place significant restrictions on a person's human rights without the need to charge, prosecute or convict an individual of any crime.
12. The Commission has previously raised its concerns about control orders in its submissions to the Council of Australian Governments (COAG) Review Committee,⁶ to the Independent National Security Legislation Monitor,⁷ and to the Senate Legal and Constitutional Legislation Committee inquiry into the Anti-Terrorism Bill (No 2) 2005.⁸
13. The former Independent Security Legislation Monitor has criticised the control order regime.⁹ In particular the Monitor concluded that 'control orders in their present form are not effective, not appropriate and not necessary'.¹⁰ The Monitor recommended that the provisions of Div 104 of Part 5.3 of the Criminal Code be repealed.¹¹
14. The COAG Review of Counter-Terrorism Legislation concluded that the control order regime should be retained but with additional safeguards and protections included.¹²

15. To date, two control orders have been issued.

2.1 Expanding the grounds for a control order

16. The Bill proposes to expand the objects of the control order regime, and the grounds upon which a control order can be requested, issued or varied, to include prevention of the provision of support or the facilitation of a terrorist act; or engagement in a hostile activity in a foreign country.

17. The Explanatory Memorandum states that the amendments ‘reflect the importance of being able to place appropriate controls on all individuals assessed as representing a threat to the security of Australia by not only engaging in terrorism themselves, but also engaging in facilitating or supporting conduct that could result in the commission of a terrorist act’.¹³

18. The Bill’s statement of compatibility notes that ‘the new grounds upon which a control order can be requested and issued may potentially increase the number of individuals who may be subject to a control order’.¹⁴

19. The Commission is concerned that the Bill proposes to increase the availability of control orders in light of the Monitor’s criticisms of the current regime and without introducing any of the additional safeguards recommended by the COAG Review of Counter-Terrorism Legislation.¹⁵ The Commission submits that the expansion of the availability of control orders should not proceed.

Recommendation 1: the Commission recommends that proposed s104.1, 104.2(2), 104.4(1)(d), 104.23(1), 104.24(1)(b) not be passed.

2.2 A less targeted proportionality analysis

20. Currently when requesting the court to make an interim control order under existing s 104.2(d)(i) and (ii) and 104.3(a), a senior AFP member is required to provide the court with an explanation of ‘each’ obligation, prohibition and restriction as well as information regarding why ‘any of those’ obligations, prohibitions or restrictions should not be imposed. New s104.3(d)(i) and (ii) propose to reduce the burden by only requiring the member to provide an explanation as to why ‘the’ proposed obligations, prohibitions or restrictions should be imposed and, to the extent known, a statement of facts as to why ‘the’ proposed obligations, prohibitions or restrictions – as a whole rather than individually – should not be imposed.

21. Similarly, under proposed s 104.4(1)(d), the court may make an interim control order where the court is satisfied on the balance of probabilities that ‘the order’ is reasonably necessary, and reasonably appropriate and adapted, for the purpose of one of the objects of the Division. This replaces the current requirement under existing s104.4(1)(d) for the issuing court to be satisfied on the balance of probabilities that ‘each of the obligations, prohibitions and restrictions to be imposed on the person by the order’ is reasonably necessary, and reasonably appropriate and adapted, for the purpose of one of the objects of the Division.

22. The Commission is concerned that reducing the burden in this way will result in the proportionality analysis not being targeted to the specific obligation, prohibition or restriction imposed on a person. The Explanatory Memorandum does not include any justification for changing the requirements or the standard of which the issuing court must be satisfied. The Commission submits that there is value in considering the impact of each of the obligations, prohibitions and restrictions individually rather than as a whole. Given the extreme nature of control orders, a targeted test of proportionality considering each restriction and its impact is appropriate.
23. The Commission has previously submitted that the issuing court should be required to be satisfied that imposing each of the obligations, prohibitions and restrictions is the least restrictive way of achieving the purpose for which the control order is sought.¹⁶ Recommendation 37 of the COAG Review of Counter-Terrorism Legislation also recommended that section 104.5 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'. The Commission submits that the proportionality analysis for the imposition of control orders should be strengthened (as described above) not weakened.

Recommendation 2: The Commission recommends that those parts of s104.3(d), 104.4(1)(d), 104.4(2) and (3), 104.23(2)(b)(i), 104.23(2)(b)(ii), 104.24(1)(b), 104.24(2) and (3) that weaken the proportionality analysis not be passed.

2.3 Attorney-General's consent

- 2.4 The Bill proposes to extend the time for seeking the Attorney-General's consent after obtaining an urgent interim control order from an issuing court from 4 hours to 12 hours.
- 2.5 The Explanatory Memorandum states that this reflects the fact that it may not always be practical or even possible to seek the Attorney-General's consent within 4 hours of making a request for an urgent interim control order. For example, the Attorney-General may be in transit between the east and west coasts of Australia and unable to be contacted for a period of more than 4 hours.¹⁷
- 2.6 The Commission considers it reasonable to extend the period for obtaining the Attorney-General's consent. However, it submits that a period of 8 hours would be more appropriate. Obtaining the Attorney-General's consent to an urgent interim control order is an important safeguard and it should be carried out as quickly as possible.

Recommendation 3: The Commission recommends that the period for seeking the Attorney-General's consent after obtaining an urgent interim control order be 8 hours.

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¹ Criminal Code Act 1995 (Cth) s 104.1

² See *Criminal Code Act 1995* (Cth) ss 104.5(3) and 104.16(1)(c).

³ *Criminal Code Act 1995* (Cth) ss 104.5(3) and 104.16(1)(c).

⁴ Opened for signature, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁵ Opened for signature, 16 December 1966, 993 United Nations Treaty Series 3; entered into force 3 January 1976; ratified by Australia 10 December 1975.

⁶ Australian Human Rights Commission, Submission to the COAG Review Committee, September 2012 (available at <https://www.humanrights.gov.au/coag-review-counter-terrorism-legislation#fnB8>)

⁷ Australian Human Rights Commission, Submission to the Independent National Security Legislation Monitor, 14 September 2012, (available at <https://www.humanrights.gov.au/review-counter-terrorism-and-national-security-legislation>).

⁸ Australian Human Rights Commission, Submission to the Senate Legal and Constitutional Legislation Committee, 11 November 2005 (available at <https://www.humanrights.gov.au/submission-anti-terrorism-bill-no-2-2005>)

⁹ Independent National Security Legislation Monitor, *Declassified Annual Report* (2012), Chapter II (available at <http://www.dpmc.gov.au/INSLM/index.cfm>).

¹⁰ Independent National Security Legislation Monitor, *Declassified Annual Report* (2012), 8-9 (available at <http://www.dpmc.gov.au/INSLM/index.cfm>)

¹¹ Independent National Security Legislation Monitor, *Declassified Annual Report* (2012), 40 (available at <http://www.dpmc.gov.au/INSLM/index.cfm>).

¹² *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013), 54 [215] (available at <http://www.coagctreview.gov.au/Report/Pages/default.aspx>).

¹³ Explanatory Memorandum, 18 [88].

¹⁴ Statement of Compatibility, 7 [31].

¹⁵ *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013), 54 [215] (available at <http://www.coagctreview.gov.au/Report/Pages/default.aspx>).

¹⁶ Australian Human Rights Commission, Submission to the Independent National Security Legislation Monitor, 14 September 2012, [73] (available at <https://www.humanrights.gov.au/review-counter-terrorism-and-national-security-legislation>).

¹⁷ Explanatory Memorandum, 24 [122].