Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime

Submission to the Parliamentary Joint Committee on Intelligence and Security

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Protecting and promoting justice, freedom and the rights of the individual

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the issues raised by the terms of reference of Parliamentary Joint Committee on Intelligence and Security's review of the operation, effectiveness and implications of the police stop search and seizure powers, the control order regime and the preventative detention order (PDO) regime (collectively, the powers under review).

2. The ALA agrees that national security and counter-terrorism measures are of utmost concern to us all. There is no more important obligation of a government than to keep people under its jurisdiction safe. We believe that this is best achieved by ensuring law reform is evidence-based and complies with Australia's obligations under the Constitution and international human rights law. We oppose, however, the introduction of laws that are just as likely to increase risks to the population as they are to increase safety, while sacrificing fundamental rights and freedoms for no reason.

3. The powers currently under review seek to reduce the risk of terrorist acts occurring in Australia, or abroad with the support or assistance of people in Australia, by expanding the ability of law enforcement agencies to interfere with peoples' privacy, liberty and other rights. This submission considers the extent to which these powers infringe on civil liberties and human rights, whether they have been effective in their stated aims and whether it is worthwhile pursuing such powers. It is ultimately recommended that these powers should be repealed or allowed to expire with the sunset clauses.

Powers under review

4. All of the powers currently being reviewed by the Joint Committee were introduced by the *Anti-Terrorism Act (No. 2) 2005* (Cth). This Act was passed in the wake of the 2005 London terror attacks, which killed 52 people and injured over 700. This legislation was highly controversial at the time, with the Senate Standing Committee on Legal and Constitutional Affairs receiving nearly 300 submissions when it reviewed the enacting Bill.

5. Many of the provisions were modelled on similar legislation that was passed in the UK following the London attacks. The legal systems in Australia and the UK differ significantly, however, due to the absence of any effective human rights protections at the federal level in Australia. Thus, while some of the more serious elements of the UK's anti-terrorism regime have developed in the context of its existing human rights protections, Australia has mirrored those developments in the absence of any such protections.[2]

Stop, search and seizure powers

6. These powers were introduced into Part IAA of the *Crimes Act 1914* (Cth) in 2005. They allow for the Australian Federal Police (AFP) or other police officers to stop and search people in Commonwealth places on the basis of a reasonable suspicion that the person has just committed, or is about to commit, a terrorist act. In such 'prescribed security zones', officers can search people without any suspicion of wrongdoing: ss3UB, 3UD. The Minister may declare a Commonwealth place to be a prescribed security zone if he or she considers that such a declaration would assist in preventing or responding to a terrorist act: s3UJ.

7. The legislation also allows the search of a premises and seizure of items on the premises without a warrant, regardless of where the premises is (whether or not it is in a Commonwealth place or a declared area): s3UEA. Warrantless searches can be conducted where officers suspect on reasonable grounds that they are necessary to prevent something on the premises from being used in connection with a terrorism offence, or to prevent a serious threat to a person's life, health or safety.

8. These powers gave rise to significant levels of community concern when they were introduced. Commentators noted that the government had not adequately clarified the need for these powers, that they granted unreasonable levels of discretion to

[2] For example, control orders developed in the UK in response to the decision by UK authorities not to rely on intercept evidence, for fear it would reveal "operational techniques of the intelligence agencies and alter criminal behaviour so as to avoid detection": Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Ant-Terrorism Laws and Trials: A timely examination of the impact of Australia's anti-terror laws after September 11 and the new 2014 terror laws* (2015), 191. In contrast, intercept evidence is readily used in court in Australia.

Ministers and the police; and that they were open to abuse.[3] Police officers already have substantial powers to search people and premises, and emergency warrants are also available. In the 2005 Senate Committee review of these reforms, the Australian Privacy Foundation recommended that, rather than remove the need for warrants, the preferable course was to provide adequate funding to ensure that judges were available to approve warrants when they are urgently required.[4] This recommendation is equally applicable today.

9. These powers have the potential to infringe the rights to privacy, freedom of assembly and freedom of association.[5] Under international law that Australia has agreed to be bound by (as discussed below), interferences with these rights are permitted only to the extent that they comply with the law, which itself must comply with international human rights law standards.[6]

10. There are no safeguards included in the existing legislation to ensure that these powers are not exercised discriminatorily or in bad faith, other than the requirement for suspicion on reasonable grounds. Given findings in Victoria that police profiling has led to the unfair targeting of minority groups,[7] such safeguards are essential. Their absence is a cause for concern.

[3] See Senate Legal and Constitutional Affairs Legislation Committee, *Provisions of the Anti-Terrorism Bill (No. 2) 2005*, Chapter 6, especially from [6.16].

[4] Australian Privacy Foundation, submission 165 to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into *Provisions of the Anti-Terrorism Bill (No. 2) 2005*, [32].

[5] *International Covenant on Civil and Political Rights* (1966) (ICCPR), articles 17, 21, 22.

[6] Human Rights Committee, *General Comment 16 on Article 17 (the right to respect of privacy, family home and correspondence, and protection of honour and reputation)*, (1988), [3].

[7] In 2013 a Federal Court case alleging racial profiling by Victorian Police was settled: *Haile-Michael v Konstantinidis*: http://www.smartjustice.org.au/cb_pages/files/Media%20Release%20-%20FKCLC%20%26%20ABL%20Feb%202013.pdf. The Police Stop Data Working Group subsequently wrote a report, *Monitoring Racial Profiling: Introducing a scheme to prevent unlawful stops and searches by Victorian Police* (2017) http://www.policeaccountability.org.au/wp-content/uploads/2017/08/monitoringRP_report_softcopy_FINAL_22082017.pdf, which examined the problem of racial profiling and how it might be combatted.

11. As far as the ALA is aware, these powers have never been used.[8] They have been available for use for 12 years and during that period numerous raids have been conducted as a part of Australia's counter-terrorism efforts. As such, we question the need to maintain these extraordinary powers.

12. Their lack of use also means that there has been no opportunity to test the implementation of these powers, and whether it has been limited to those circumstances where the powers are necessary and proportionate to the threat to which they are responding.

13. The Gilbert+Tobin Centre of Public Law has advocated that any search conducted without a warrant should be required to be legitimised following the search with an *ex post facto* warrant. If the warrant were not granted following the search, as a result of the court not being satisfied of the urgency of the matter or some other requirement, any evidence discovered during the search would be rendered inadmissible.[9] COAG did not support this recommendation, preferring instead to recommend that annual reporting of the use of the power be required.[10]

14. The ALA believes that warrants must be required before any search takes place. *Ex post facto* validation is inadequate. While we support increased reporting requirements in line with the COAG recommendation, we also believe that this is inadequate to properly protect the rights that warrants protect. If there is any reform required to facilitate urgent searches, the appropriate reform should ensure that safeguards can also be implemented in a timely fashion, should an urgent need arise. Such reforms might include providing funding for judges to be able to authorise urgent warrants, rather than doing away with essential rights.

[8] Meaning that there has been no opportunity to test whether they comply with international law at the Human Rights Committee. COAG made the same observation in its 2013 *Council of Australian Governments Review of Counter-Terrorism Legislation* report, at [322].

[9] Glibert+Tobin Centre of Public Law, *Submission to COAG Review of Counter-Terrorism Legislation* (2012), https://www.ag.gov.au/Consultations/Documents/COAGCTReview/GilbertTobinCentreofPublicLaw.pdf, 34.

[10] COAG, recommendation 43.

Control orders

15. These orders are available to (a) protect the public from a terrorist act; (b) prevent the provision of support for, or the facilitation of, a terrorist act; or (c) prevent the provision of support for, or the facilitation of, hostile activity in a foreign country: s104.1.

16. Control orders can be granted if, on the balance of probabilities (s104(1)(c)), the court believes that making the order would substantially assist in preventing a terrorist act, or if the subject of the order has been involved with a terrorist organisation or terrorism in the past, in Australia or abroad. The court must also be satisfied on the balance of probabilities that the conditions imposed are reasonably necessary, appropriate and adapted to protecting the public from a terrorist act, preventing provision of support for or facilitation of a terrorist attack, or preventing provision of support for or facilitation of engagement in hostile activities abroad: s104.4(1)(d). 'Terrorist act' is broadly defined, including interference with information systems or systems used for or by a transport system with particular motivations: s100.1. The controlee does not have a right to be heard before the court makes an interim control order: s104.4. They do have a right to make submissions if confirmation of the control order is sought, but their failure to attend the hearing will not disrupt the confirmation: s104.14.

17. The fact that the civil, rather than the criminal, standard of proof is used for control orders is a matter of concern, as the ALA has previously argued.[11] The repercussions of being placed under a control order can be severe. They can include having to wear a tracking device; being subjected to a curfew of up to 12 hours a day; prohibitions from accessing the internet or other telecommunications devices; prohibitions on carrying out certain activities or using specific articles or substances and/or mandatory counselling or education: ss104.5(3), 104.16(1)(c). They can last for up to 12 months (s104.5(1)(f)) and infringing their terms is a criminal offence, punishable by up to five years in prison: s104.27. While the High Court has found, in the 5:2 decision of *Thomas v Mowbray*,[12] that control orders were not a criminal punishment that would infringe the separation of powers, it also acknowledged that

[11] ALA, *Submission to the Senate Standing Legal and Constitutional Affairs Legislation Committee*, (No. 87).

[12] (2007) 233 CLR 307.

these restrictions "involve substantial deprivation of liberty".[13] While agreeing that the *Briginshaw v Briginshaw* standard should apply,[14] control orders continue to be granted when only circumstantial evidence exists.[15]

18. It is possible that the evidence relied on in securing a control order could include evidence procured from sources abroad. Where evidence adduced abroad is concerned, there is a risk that this evidence could have been obtained as a result of torture or cruel, inhuman or degrading treatment or punishment, in contravention of Australia's international obligations.[16] This risk was proved real with the very first control order granted in Australia, against Joseph Thomas. This order relied on, among other things, evidence of an admission made during an interrogation in Pakistan. That evidence had previously been the reason that Thomas' appeal against his criminal conviction was successful, as the Victorian Court of Criminal Appeal found that it had not been given freely.[17] A control order was made following the Victorian Court's decision. Thomas unsuccessfully challenged the control order in the High Court.[18] Commentators labelled this as "jurisprudential context shopping…

[13] *Thomas v Mowbray* (2007) 233 CLR 307, at 330 [18], per Gleeson CJ (in the majority). The Chief Justice went on to distinguish the depravation of liberty that control orders allow from the depravation of liberty that requires a determination of criminal guilt by a court.

[14] *Ibid*, at 355 [113], per Gummow and Crennan JJ.

[15] *Gaughan v Causevic (No. 2)* [2016] FCCA 1693. See discussion below on this point.

[16] Under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), articles 15, 16; ICCPR (1966), article 6.

[17] *R v Thomas* [2006] VSCA 165. Thomas had initially been convicted of receiving funds from a terrorist organisation and possessing a falsified passport, and was acquitted of two counts of intentionally providing resources to a terrorist organisation. Thomas admitted to having altered his passport to make it look like he had spent less time in Pakistan, due to a fear that the amount of time he had spent there would be a cause for concern for Australian officials. He also admitted that his flight home had been paid for by an associate of Osama bin Laden. However, the appeal court judge found that these admissions should not have been accepted into evidence as they had been made following many weeks of incommunicado detention, during which time he had been threatened with torture, his wife had been threatened with rape, he had been kept in horrific conditions and moved between locations. The appeal court found that in these circumstances, the admission was not freely given, and should not have been admitted into evidence by the first instance judge.

[18] *Thomas v Mowbray* (2007) 233 CLR 307.

[so as to avoid] the procedural requirements of the criminal law", as evidence rejected in one trial was used as a basis of an order in another.[19]

19. While the *Foreign Evidence Act 1994* (Cth), s27D, prohibits the use of foreign material that has been obtained directly as a result of torture or duress, that provision does not prohibit the use of evidence obtained indirectly as a result of torture, or as a result of cruel, inhuman or degrading treatment or punishment. In the case of Thomas, where a confession was given in the context of prolonged incommunicado detention during which he had been threatened with torture and his wife had been threatened with rape, the *Foreign Evidence Act* provided no protection. Applying a civil standard of proof reduces protections further still, as Thomas's control order demonstrates.

20. There is also a question as to the effectiveness of approaching these matters firstly as a law enforcement concern. In confirming a control order on an 18 year old but varying its terms in *Gaughan v Causevic*,[20] the Federal Circuit Court found that there was no direct evidence of an intention or plan to carry out a terrorist act and that the applicant's case was entirely circumstantial. In such circumstances, the imposition of numerous conditions, including restrictions on accessing the internet, telephones, email and computers appears unreasonable.[21] There were a lot of resources devoted to this law enforcement approach which might have been more constructively and efficiently used to build community cohesion.

21. Between 2008-09 and 2015-16, only four interim control orders were made, one of which was confirmed.[22] It is of little comfort that these laws are used so rarely. Their lack of popularity suggests that they are not, in fact, necessary to combat terrorism in Australia. A number of terrorist plots have been uncovered in the years since

[19] Lucia Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (2007) 257, 265, quoted in Andrew Lynch, 'Case Note: Thomas v Mowbray – Australia's 'War on Terror' Reaches the High Court', (2008) 32 *Melbourne University Law Review* 1182, 1188.

[20] *Gaughan v Causevic (No.2)* [2016] FCCA 1693.

[21] *Ibid*, Schedule 1.

[22] See the Attorney-General's annual reports, available at https://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/ControlOrders.aspx. Prior to this, control orders were granted in relation to David Hicks and Joseph Thomas, the latter of which was examined by the High Court as discussed above.

these measures were introduced. Despite the rhetoric employed at the time that they were passed, that these measures were essential to ensuring that terrorism did not take hold in Australia,[23] the fact that they have not been regularly used demonstrates this argument to be false.

22. While the High Court has found that control orders do not amount to criminal punishment, as discussed above, the ALA believes that there is a strong argument that they infringe the rights to liberty and privacy, thus having the potential to conflict with Australia's international human rights obligations. This risk is heightened by the broad circumstances in which these orders can be made, meaning that they may be far more readily available than is necessary and proportionate for national security purposes.

23. The ALA believes that the provisions for control orders should be repealed or allowed to expire with the sunset clauses in line with recommendations of the former Independent National Security Legislation Monitor (INSLM), Bret Walker SC.[24] Where individuals are suspected of wrongdoing or of planning wrongdoing, standard law enforcement means of investigation and surveillance are adequate and should be relied on.

24. If this recommendation is not accepted, we believe that the *Criminal Code Act* should be amended to significantly limit the circumstances in which control orders are available, and the conditions that they can impose. Controlees should be afforded the opportunity to rebut allegations prior to the order being made, and it should not be possible to obtain a control order merely on circumstantial evidence. Control orders should never be, or be seen to be, a convenient means of avoiding more rigorous criminal standards of proof.

Preventative detention orders

25. A PDO can be made if an AFP member or other issuing authority suspects, on reasonable grounds, that the subject of the order will engage in a terrorist act,

[23] Mr Philip Ruddock, Attorney-General, *House of Representatives Official Hansard*, 3 November 2005, 102.

[24] Bret Walker SC, 'Declassified Annual Report' (Annual Report, Independent National Security Legislation Monitor, 20 December 2012) ('INSLM Report'), recommendation 11/4, 44.

possesses a thing that is connected with the preparation for, or the engagement of a person in a terrorist act, or has done an act in preparation for or planning a terrorist act: s105.4(4). They are also available if a terrorist act has occurred within the last 28 days and it is reasonably necessary to detain the subject of the order to preserve evidence of or relating to the terrorist act, and detention is reasonably necessary for those purposes: s105.4(6). PDOs can last for a maximum of 48 hours under the federal legislation (s105.14), although state and territory regimes allow for longer detention periods. Individuals detained pursuant to PDOs cannot be questioned, except in limited circumstances: s105.42.

26. While they are subjected to the order, it is illegal for a detainee to reveal that they are the subject of a PDO, are being detained or the length of the detention, with penalties of five years imprisonment available if such a disclosure is made: s105.41(1). Detainees, lawyers, parents/guardians, interpreters, people who have received outlawed disclosures and police and interpreters who monitor contact between a detainee and another person can all be subjected to these penalties if they reveal the existence of the PDO, the fact of the detention or the period of detention while the detainee is being detained, or any information revealed to them by the detainee in the course of contact, unless certain exceptions apply: s105.41(2), (5)-(7). A parent/guardian can even be subjected to a criminal penalty of five years imprisonment for revealing prohibited information to another parent/guardian without permission: s105.41(4A).

27. These orders are available for people as young as 16: s105.5. For those who are 16 or 17 years of age, additional protections are afforded. They are to have access to all of their parents or guardians, and may have contact with other persons (such as parents or guardians) for at least two hours per day (or longer if the order permits it): s105.39(5). Any communications during that time may be monitored, however, which means an interpreter (who may be a police officer) may be required if the detainee and their visitor speak in a language other than English: s105.39(7)-(9).

28. There have been no PDOs made under the federal legislation since 2008-09.[25] It is therefore difficult to argue that they are necessary to prevent terrorism, or indeed

[25] Although at the time of drafting the report for 2010-11 was not available: https://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/ControlOrders.aspx. Additional PDOs have been granted under state-based legislation. See submission 2 to this inquiry: Gilbert+Tobin Centre of Public Law and UNSW Law, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime*, 5.

whether their imposition would comply with constitutional or international law requirements.

29. According to eminent scholars, PDOs are extraordinary:

> "Australia's PDO regime can be characterised as extraordinary in its nature, in particular with respect to its potential impact upon fundamental human rights. Significant periods of detention without charge lie beyond the bounds of what would normally be considered reasonable in a liberal democracy. It is a power more commonly found in undemocratic regimes lacking basic rights. This is exemplified by the fact that a person subject to a PDO may contact one family member only to say that they are safe and unable to be contacted for the time being. Receiving such a call would no doubt confuse, and perhaps terrify, a spouse or parent."[26]

30. The former INSLM, Bret Walker SC, similarly described the PDO regime as being "at odds with our normal approach to even the most reprehensible crimes".[27] He pointed to the failure of preventative detention regimes employed in the United States (US) during World War II, and in the United Kingdom (UK) in the 1970s in response to IRA threats. In the US, thousands of Japanese were interned during the War. However, not one of these individuals was convicted of sabotage, and the US government ultimately issued an apology to them. In the UK, following the internment of hundreds of suspected IRA members without trial, it was acknowledged that this action "resulted in increased sympathy for the IRA and aided its recruitment efforts".[28]

31. The ALA agrees with the dissenting report presented by the Australian Democrats following the Senate Standing Committee review, that PDOs effectively constitute incommunicado detention, without charge or trial.[29]

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[26] Dr Svetlana Tyulkina and Professor George Williams, "Preventative detention orders in Australia", 38(2) *UNSW Law Journal* 738, 746.

[27] Bret Walker SC, 'Declassified Annual Report' (Annual Report, Independent National Security Legislation Monitor, 20 December 2012) ('INSLM Report'), 47.

[28] *Ibid*.

[29] See Senate Standing Legal and Constitutional Affairs Legislation Committee, *Provisions of the Anti-Terrorism Bill (No. 2) 2005*, Additional comments and points of dissent by Senator Natasha Stott Despoja on behalf of the Australian Democrats, from 203.

32. While Australia has not used PDOs to the extent they were used in the US or the UK, these lessons should be heeded. Detention without trial can potentially pose increased risks to the community, as the UK 1970s experience demonstrates. In this sense the criminal process (adjudging guilt beyond a reasonable doubt before criminal penalties such as detention can be imposed), protects both those suspected of posing a risk or being involved in wrongdoing, as well as the broader community.

33. It is noted that there currently exist various tools which allow the detention and questioning of suspects. Under the *Australian Security Intelligence Organisation Act 1979* (Cth), individuals can be detained for questioning by ASIO pursuant to warrants being available under Pt III Div. 3. Compulsory questioning can also be conducted by the Australian Criminal Intelligence Commission pursuant to the *Australian Crime Commission Act 2002* (Cth).

34. The *Criminal Code Act 1995* (Cth) also contains numerous preparatory offences, which carry substantial penalties, including the catch-all s101.6, which prohibits doing "any act in preparation for, or planning, a terrorist act", contravention of which can attract a penalty of life imprisonment.

35. While the ALA has previously argued that these powers go beyond what is necessary and proportionate,[30] we question the need for all three mechanisms. The existence of these powers mean that PDOs only add to powers that law enforcement officials already have in limited circumstances, including for individuals not suspected of any wrongdoing. We submit that there should be no place for such powers in a liberal democracy such as Australia.

Obligations under international law

36. In implementing many of these powers, Australia has relied on international requirements to reduce the threat of terrorism. Since September 2001, there has been an increase in resolutions requiring governments to take certain actions, including supressing the financing of terrorists and prohibiting incitement to commit

[30] ALA, *Submission to the Parliamentary Joint Committee on Intelligence and Security: Review of ASIO's questioning and detention powers* (2017), https://www.lawyersalliance.com.au/documents/item/842; ALA, *Submission to the Parliamentary Joint Committee on Intelligence and Security: Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (2016), https://www.lawyersalliance.com.au/documents/item/695.

terrorist acts.[31] There are also obligations under international human rights law that are important to adhere to in devising an appropriate counter-terrorism strategy.

Global counter-terrorism strategy

37. The United Nations (UN) has developed a four pillar global counter-terrorism strategy to assist in implementing these obligations. The four pillars are: addressing the conditions conducive to the spread of terrorism; preventing and combatting terrorism; building states' capacity and strengthening the role of the UN; and upholding human rights and the rule of law in counter-terrorism efforts.

38. This strategy makes it clear that counter-terrorism efforts and human rights protections are in fact co-dependent, not mutually exclusive as has been argued by some Australian politicians.[32] As the UN Secretary General has noted, disregard for international law and human rights law has in fact contributed to resentment, which has exacerbated the difficulties in addressing the conditions that are conducive to the spread of terrorism.[33]

39. The Secretary General specifically noted that human rights are "central to counter-terrorism efforts", regretting their de-prioritisation over law enforcement and security measures.[34] He highlighted the "need to focus on young people [including]

[31] See, for example, UN Security Council resolutions S/RES/1624 (2005) and S/RES/1373 (2001).

[32] For example, during recent reporting of the latest national security proposals discussed at the Council of Australian Governments meeting, Victorian Premier Daniel Andrews described debating civil liberties as a luxury that people in positions of leadership cannot indulge in: see Kathryn Murphy, "Turnbull denies new facial recognition measures amount to 'mass surveillance'", 5 October 2017, *The Guardian*, https://www.theguardian.com/australia-news/2017/oct/05/turnbull-denies-new-facial-recognition-measures-amount-to-mass-surveillance. Similarly, NSW Premier Gladys Berejiklian appeared to see civil liberties and community safety as in opposition, when she said that she understood that "public safety must come first" when considering individual rights and liberties: Gareth Hutchens, "Daniel Andrews defends claims that civil liberties a 'luxury' in fight against terrorism", 8 October 2017, *The Guardian*, https://www.theguardian.com/australia-news/2017/oct/08/daniel-andrews-defends-claims-that-civil-liberties-a-luxury-in-fight-against-terrorism.

[33] UN Secretary General, *Activities of the United Nations system in implementing the United Nations Global Counter-Terrorism Strategy*, Report to the General Assembly (2016), A/70/826, [5].

[34] UN Secretary General, *Activities of the United Nations system in implementing the United Nations Global Counter-Terrorism Strategy*, Report to the General Assembly (2016), A/70/826, [30].

fostering dialogue, understanding and social inclusion" and promoting the positive role that "young people can play in society". He further states that the "importance of pillar IV of the strategy, which stresses upholding human rights and the rule of law while countering terrorism, cannot be overstated".[35]

40. As noted by Professor Martin Scheinin, then Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, "[t]here is no need in this process for a balancing between human rights and security, as the proper balance can and must be found within human rights law itself. Law is the balance, not a weight to be measured."[36]

Human rights implications of the powers under review

41. Australia remains the only liberal democracy without a bill of rights or enforceable federal human rights act. While modern-day human rights law largely codifies and clarifies centuries of common law protections (such as *habeas corpus*), Australian courts have found that legislative abrogation of these protections is permissible so long as it is sufficiently clear.[37] As such, the laws that are passed in Australia are of a different nature to those in other comparable countries: the balance that legislative or constitutional human rights protections provides in other countries does not exist here. We must therefore be even more vigilant in ensuring that the laws that currently exist do not undermine the fundamental freedoms that underpin our democracy.

42. Despite our lack of domestic protections, Australia has agreed to be bound by a comprehensive collection of human rights standards in international law. Having ratified the *International Covenant on Civil and Political Rights* (1966), among other treaties, Australia has committed to respect the rights of people subjected to its jurisdiction. The specific rights that Australia has agreed are important include the

[35] UN Secretary General, *Activities of the United Nations system in implementing the United Nations Global Counter-Terrorism Strategy*, Report to the General Assembly (2016), A/70/826, [32].

[36] Professor Martin Sheinin, then-Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering-terrorism, *Report to the UN Human Rights Council* (2010), A/HRC/16/51, [12].

[37] This is the principle of legality. See, for example, *Coco v The Queen* (1994) 179 CLR 427; *R v Secretary of State for the Home Department; Ex parte Simms* [2002] 2 AC 115.

rights to privacy and family life,[38] liberty of movement,[39] freedom from arbitrary detention,[40] freedom of expression,[41] the right to freedom from cruel, inhuman or degrading treatment or punishment,[42] and the right to freedom from discrimination.[43] As a party to the *International Covenant on Economic, Social and Cultural Rights* (1966), Australia has also agreed to progressively afford people the rights to work and education. [44]

43. Stop, search and seizure powers undermine individuals' right to privacy by allowing police officers to examine their person or property without a warrant, or indeed any suspicion of wrongdoing.

44. Control orders can have broad ramifications, including in relation to the rights to privacy and freedom of expression (for example, communications might be monitored and controlees might feel unable to express themselves freely as a result); the rights to liberty and freedom of movement (if the controlee has a tracking device affixed, is subjected to a curfew or is otherwise inhibited in their freedom of movement); and the right to freedom of association (if they are prohibited from having contact with specified individuals or groups). They can also impact on controlees' right to work and education. To this end, we note *Gaughan v Causevic*, where evidence was presented that Causevic, who was the subject of a control order, had not been able to find work as a result of the tracking device affixed to his ankle.[45]

45. PDOs likewise impact on the right to liberty, and can have broader ramifications in relation to a person's ability to work, maintain a family life or engage in education. They also impact on the right to freedom of expression of the detainee, or anyone

[38] ICCPR, article 17.

[39] *Ibid*, article 12.

[40] *Ibid*, article 9.

[41] *Ibid*, article 19.

[42] *Ibid*, article 7.

[43] *Ibid*, article 4.

[44] *International Covenant on Economic, Social and Cultural Rights* (1966), articles 6, 13.

[45] *Gaughan v Causevic (No. 2)* [2016] FCCA 169 (8 July 2016), [140].

who knows about the order, imposing criminal sanctions for disclosing the existence of the order or other details.

46. It is possible that any one of these three powers could also infringe on people's right to be free from cruel, inhuman or degrading treatment or punishment, especially given that they can be imposed on people who are not suspected of any wrongdoing,[46] but may have serious negative ramifications and give rise to suspicions about them in the community. The powers also have the potential to have a discriminatory impact, which is not adequately guarded against in the law, as discussed above.

47. Perhaps most concerning about the powers under review is the potential for them to be used against children as young as 14 years of age.[47] Under international law, children are entitled to additional protections, in view of their acknowledged heightened vulnerability. As such, Australia's obligations under the *Convention on the Rights of the Child* include a commitment to ensure that all decisions that affect children should have their interests as a primary consideration.[48] Detention of children should also be avoided, except as a measure of last resort and then only for the shortest possible period of time.[49]

Application to powers under review: necessity and proportionality

48. The ALA is concerned that many of the measures discussed above frame national security as being in conflict with human rights, contrary to the UN Secretary General's advice. This framing means that many opportunities to engage positively

[46] Note that the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) excludes "pain or suffering arising only from, inherent in or incidental to lawful sanctions" from its definition of torture: article 1. Given the powers under review are of questionable legality under international law, however, this exception may not apply in these circumstances.

[47] Control orders are available in relation to children as young as 14: s104.28. PDOs are available for children as young as 16: *Criminal Code Act* 1995 (Cth), s105.5. Recent announcements have suggested there are plans to expand their availability to children as young as 10. While additional protections exist for all such orders made against children, it is unlikely that these protections will in all cases meet the obligations that exist under the CRC.

[48] CRC, article 3.

[49] *Convention on the Rights of the Child* (1989) (CRC), article 37.

with at-risk individuals can be missed, with the only engagements potentially being punitive and security-focused.

49. Of course, human rights law and counter-terrorism laws designed to protect the community and national security can exist in harmony, allowing limitation of some rights to the extent that such encroachment is a necessary and proportionate response to the threat faced. It is not clear that the powers under review, however, are in fact necessary or proportionate. It is difficult to see how the extreme criminal penalties of up to five years imprisonment which can apply to prohibited disclosures (including the fact of detention under a PDO for example) without there being any intention or recklessness that such disclosure could put public safety at risk, could ever be necessary or proportionate to even the most serious terrorism threat. The fact that terrorism laws themselves are so broad supports the contention that the penalties are disproportionate.[50]

50. While the laws currently being reviewed have rarely been used, that does not mean that the infringements of international human rights law that they would allow are in any way less serious. While these laws remain untested, they remain an unknown force. Without any counterbalancing enforceable federal human rights framework, there is even less certainty regarding how these laws might ultimately be used.[51]

51. Further, there has been no evidence presented that the powers that exist in these laws are effective in minimising the terrorist threat that exists, as required by the global counter-terrorism strategy. The fact that they have rarely been used after numerous raids on, and charges being brought against, terrorism suspects, also suggests that they are not sufficiently effective to justify the potential infringements that they effectively sanction.

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[50] For example, under the *Criminal Code Act* 1995 (Cth), it is illegal to recklessly advocate doing a terrorist act or committing a terrorist offence (s80.2C), associating with members of terrorist organisations (s102.8) or generally does any act in preparation or planning for a terrorist act, even if such an act does not occur (s101.6).

[51] Note that the High Court of Australia has tended to affirm the right of the Legislature to abrogate the rights that Australia is bound to respect under international law. Control orders and administrative detention have been found not to conflict with constitutional protections: *Thomas v Mowbray* 233 CLR 307; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Fardon v Attorney-General (Qld)* (2004) 233 CLR 575. Note that Fardon appealed this decision to the UN Human Rights Committee, which found that his detention infringed obligations relating to arbitrary detention: *Fardon v Australia* (2010) CCPR/C/98/D/1629/2007.

52. This gives rise to an increased concern that the Australian government is sacrificing Australia's civil liberties without any evidence that security is being genuinely enhanced as a result. Australia's Attorney-General, George Brandis SC recently quoted former Israeli Prime Minister Aharon Barak, in recalling that:

> "Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day they strengthen its spirit."[52]

53. The ALA believes that it is ultimately unsafe to presume that doing away with civil liberties will make our community safer. It is just as likely to make us less safe, as people who feel that they have been mistreated feel alienated and rejected by their community. It will also increase the discontent of society at large, as our civil liberties and freedoms are continuously eroded for no good discernible reason. It is for this reason that we must remain committed to the rule of law, international human rights law and liberty.

Recommendations

54. The ALA makes the following recommendations:

    a. The powers under review should be repealed or allowed to expire with their sunset clauses;

    b. If these powers are not repealed or allowed to expire, they should be significantly curtailed as follows:

        i. Stop, search and seizure powers should not allow the searching of premises without a warrant in any circumstances. Funding should be made available to ensure that judges are available to grant urgent warrants if the need arises;

        ii. Searches of people should be permitted only when there is a reasonable suspicion of wrong doing;

[52] https://www.attorneygeneral.gov.au/Speeches/Pages/2017/FourthQuarter/Address-at-the-Opening-of-the-International-Bar-Association-annual-Conference-Sydney-Australia.aspx.

iii. Any use of powers under Part IAA of the *Crimes Act 1914* should be reported annually to federal parliament;

iv. The availability of control orders should be limited to circumstances in which there is more than circumstantial evidence against the controlee;

v. Persons potentially subjected to a control order should have the opportunity to present evidence against the granting of the order prior to an interim control order being granted;

vi. PDOs should be repealed. Any detention prior to charge should be strictly limited to that permitted by international human rights law. Individuals detained should always be permitted to inform someone where they are, why they are there, and how long they expect the detention to last. There should be no penalties that infringe on the freedom of speech of people who become aware of the detention;

c. All law reform designed to combat terrorism should be evidence-based and comply with constitutional requirements and international human rights law;

d. Adequate protections should be introduced, and implementation monitored, to ensure that any counter-terrorism measures do not rely on racial or religious profiling; and

e. Australia should introduce a federal human rights act as a matter of priority, with a clause of precedence over other legislation.[53]

[53] In line with the recommendation made by the UN Special Rapporteur on the human rights of migrants, François Crépeau, in his end of mission to Australia statement of 18 November 2016: http://un.org.au/files/2016/11/16.11-SRM-Australia-End-of-mission-Statement.pdf.