# Joint Submissions into the Counter-Terrorism Legislation Amendment Bill (No.1) 2014.

## Prepared by the New South Wales Council for Civil Liberties & the Muslim Legal Network (NSW).

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**Joint Submissions from the NSW Council for Civil Liberties and the Muslim Legal Network (NSW).**

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

The Muslim Legal Network is an Australian-based legal practitioner and law student association. We provide community legal education and participate in law reform and legal advocacy, as well as offering a Muslim perspective on civil liberties issues.

The NSW Council for Civil Liberties and the Muslim Legal Network of New South Wales have joined in this submission to highlight the fact that the **Counter-Terrorism Legislation Amendment Bill (No.1) 2014**, like the government's other counter-terrorism laws, are simultaneously an attack on the civil liberties of all Australians and are, rightly or wrongly, perceived as a targeted attack on the Muslim community in Australia.

We are concerned that this Bill will perpetuate and exacerbate the feelings of the Australian Muslim community that they are "targeted" by law enforcement, intelligence agencies and the Australian Government.

**Time for review of the Counter-Terrorism Legislation Amendment Bill (No.1) 2014**

We are deeply concerned over the speed in which the suites of Counter-Terrorism laws have been introduced into Australia. Australia, even prior to the new suite of anti-terrorism legislation, had arguably one of the most extensive counter terrorism laws compared to any other western democracy. We received a **mere ten days to review the proposed Bill**, to analyze the potential impact on the civil liberties and human rights of Australian citizens and upon Australia's legal obligations under International Law and then to detail these potential consequences in written submissions.

The short time frame given to consider the consequences of the Bill adversely affects the opportunity for public debate and ultimately, the ability for members of the Australian parliament to properly represent the Australian

people. The short time frame limits the ability of members of parliament to make informed decisions regarding national security.

As such, we believe that the short time frame is an abuse of process and lays the foundation for reckless lawmaking. There has been no demonstrated need by the Australian Government that the proposed provisions in the Bill are indeed required and not superfluous, proportionate to any "threat" facing Australia or that there are sufficient safeguards in the Bill. We are concerned that there is a belief that by referring to "Islamic State" or "Foreign Fighters" in an Explanatory Memorandum, that the Australian Government is somehow absolved from their duty to explain why the proposed Bill is required and proportionate. The Explanatory Memorandum has merely asserted that the proposed provisions in the Bill are proportionate, but has failed to demonstrate the proportionality.

We are seeing Orwellian "double speak" enter our legislation; where "enhancements" means "more power for the AFP" and "streamline" meaning "less safeguards for Australian citizens who have not been charged or convicted of a criminal offence".

**Summary of Recommendations**

We strongly oppose the provisions regarding Part 5.3 of the Criminal Code Act 1995 ("the Control Order Regime").

We strongly oppose the provisions regarding the amendments to the Intelligence Service Act ("the Intelligence Act").

## 1. The Control Order Regime (COR)

Control Orders were first introduced by the Anti-Terrorism Act [No 2] 2005 (Cth) after the London Bombings to wide criticism and opposition. It is defined in Schedule 5 of the Code as being *"…an interim control order or a confirmed control order".*

Control Orders arbitrarily detain a person who has not been convicted nor charged with any criminal offence by an Executive order i.e an order by the Australian Government and illustrates *"…the inability of judges to protect the community from the erosion of civil rights"*[1].

Control Orders involve *"…the loss of liberty, potentially extending to virtual house arrest, not by reference to past conduct or even by reference to what that person himself might or might not do in the future. It is based entirely in a prediction of what is "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act, a vague, obscure and indeterminate criterion if there was one….On its face, it is capable of arbitrary and capricious interpretation"*[2].

The process of "requesting" a control order commences *"with a written request by a senior member of the AFP, including a draft of the interim control order and various statements, information and explanations, seeking the Attorney-General's written consent to request an interim control order on either two alternative grounds"*[3]. The proposed inclusion of a new subsection (c) and subsection (d) to section 104.2 of the Code seeks to expand the grounds in which an AFP member can request an interim control order to include four possible alternative grounds. The Bill also seeks to substantially reduce the information the AFP member is required to disclose to the Attorney general when requesting an interim control order under the proposed repeal of section 104.2(3) and (4) and introduction of a new section 104.2(3) of the Code.

Currently, upon the Attorney General consenting within 4 hours to the AFP request for an interim order, the AFP then proceeds to request an issuing court to determine the application on an ex parte basis. The proposed amendments sought to section 104.6(2) seek to increase the time period from four hours to twelve hours.

### 1.2 No Demonstrated Need for the Control Order Amendments.

[1] Fairall, P and Lacey, W. "Preventative Detention and Control Orders under Federal Law: the Case for a Bill of Rights". *Melbourne University Law Review*. Volume 31 1076.
[2] Thomas v Mowbray (2007) 237 ALR 194 per Kirby J at 291-2.
[3] Council of Australian Governments Review of Counter Terrorism Legislation (2013) Page 43.

The Explanatory Memorandum states that the "need" for the amendments to the Control Order Regime is a result of the *"…serious and ongoing terrorist threat which has recently raised by the return of Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas"*[4]. There has not been any evidence to support the requirement of the sought amendments and we reiterate that the Explanatory Memorandum has merely asserted that the proposed provisions in the Bill are proportionate, but has failed to demonstrate the proportionality.

The Explanatory Memorandum states that *"…the Control Order Regime have been used judiciously to date…this reflects the policy intent that these order do not act as a substitute for criminal proceedings"*[5]. This Bill, along with the Australian Federal Police (AFP) lobbying the Government for additional powers, signals that Control Orders will be used far more frequently than what was traditionally envisaged when they were introduced in 2005.

**1.3 Expanding the grounds in which an AFP member can request an interim control order.**

Pursuant to section 104(2) of the Code, a senior AFP may only seek the Attorney General's written consent to request an interim control order if the AFP member:

> (a) considers on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act; or
> (b) suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation.

The proposed inclusion of a new part (c) would provide an AFP member far wider grounds for seeking an interim control order as it would include if the AFP member:

> "…suspects on reasonable grounds that the order in the terms be requested would substantially assist in ***preventing the provision of support for or the facilitation of a terrorist act***".

The proposed new part (d) will also expand the grounds in which an AFP member could apply for an interim control order to include where the AFP member suspects on reasonable grounds that the person has:

[4] Paragraph 2 of the Explanatory Memorandum.
[5] Paragraph 29 of the Explanatory Memorandum.

> **"….*provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country*".**

The arbitrary detention of an individual who has not been charged or convicted of a criminal offence is a serious departure from the fundamental legal principles that form the bedrock of our criminal justice system. The grounds for an AFP member to apply for an interim control order should remain limited.

***Lack of clarity over expanded grounds***

There is a distinct lack of clarity regarding the terms "***provision of support for or the facilitation of a terrorist act"*** as referred to in the proposed new section 104.2(c). This could potentially apply to legitimate conduct that lacks nefarious intent or recklessness. With the introduction of declared area provisions, the argument could be made that those who seek to travel to a declared area for legitimate purposes could trigger an AFP member for applying for an interim control order. If a third party financially assists an individual to travel to overseas, such as if they purchased an airline ticket, and the individual then absconds and travels to a declared area for an illegitimate purpose, an interim control order could apply to that innocent third party. It could essentially apply to third parties who have nothing to do with the individual's conduct.

There is also a lack of clarity over the terms ***"….provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country"*** as referred to in the proposed new section 104.2(d). This could potentially apply to parents who become aware that their child has left Australia to go to a declared area for an illegitimate purpose and seek to travel overseas in order to seek their return.

**Damage to Community Relationships or "Partnerships"**

If the AFP are going to have significantly broader grounds in applying for an interim control order, it will reinforce the concept that the AFP are not reasonable, responsible or accountable i.e it will further damage the relationship between communities and law enforcement agencies.

**The grounds for an AFP member to seek an interim order should be restricted and we oppose the proposed amendment to section 104(2)(c) and (d).**

**1.4 Repeal of 104.2(3) & (4)-New section 104.2(3)-AFP not required to produce all documents when requesting interim Control Orders.**

The repeal of an AFP member's requirement under 104.2(3) and 104.2(4) to provide the Attorney General all documents that would subsequently be provided to a court is a dangerous departure from the ***limited safeguards*** that were contained in the Code under Part 5.3 of the Code. The repeal and subsequent proposed 104.2(3) substantially lowers the burden of proof required by the AFP when requesting an interim control order from the Attorney General.

There is absolutely no excuse for an executive agency taking serious action against an individual who has not been charged or convicted of a criminal offence without reviewing all of the relevant documents.

The proposed new section 104.2(3) will allow limited information to be presented to the Attorney General. All that would be required would be a draft of the interim order that is being requested, any information about the individual's name and age, and a mere summary of the grounds in which the interim control order should be made. By the AFP member not being required to produce all documents that will subsequently be provided to a court, it could give rise an AFP member essentially "cherry picking" the information put to the Attorney General, greatly impacting on the Attorney General's ability to make an informed decision and being armed with complete documentation.

The amendments seek to discharge the current obligation on the AFP member to provide an explanation as to why each obligation, restriction or prohibition should be imposed. Instead, only one explanation needs to be given for the total or cumulative obligations, restrictions or prohibitions being sought. This will substantially lower the burden on the AFP and will adversely impact upon the individual's civil liberties and human rights.

We strongly oppose the repeal of section 104.2(3) and (4) as it lowers the threshold required for the AFP to request an interim control order. Any "bypass" of a court in favour of increased powers of the AFP or any other law enforcement agency should be treated with great caution.

***1.5 Concern that the AFP will use Control Orders in lieu of prosecution***

If the *"operational issues"* encountered by the AFP post counter-terrorism raids is the basis of which the amendments are being sought, there should be

a high degree of criticism attached to the review of this Bill[6]. Brett Walker SC in the Independent National Security Legislation Monitor Annual Report stated that:

> *"It should be a matter of concern that Control Order's can be imposed in a terrorist suspect without following the normal criminal law process of arrest, charge and prosecution…. Control Orders are not an investigative tool and using a Control Order against someone pre-charge can have a negative impact on the investigation"[7].*

Walker proceeded to state that the use of Control Order's in cases where there is insufficient evidence to prosecute is not justified and further stated that:

> *"Australia is committed internationally to prosecute terrorism offences, meaning in appropriate cases. Nationally, the rule of law requires that the possibility that someone has committed a criminal offence produces consideration of prosecution and nothing else in terms of official action to restrain that person's liberty. In order for Australia to be a "free and confident society" a person must be prosecuted according to the rule of law"[8].*

Control Orders should not be used short term, such as in the event that a person's passport has been "automatically" cancelled, but that person has not been charged or convicted of a criminal offence.

**1.6 New section 104.4(2) and (3)-Limited Judicial Consideration**

The proposed amendments will impact upon the judicial consideration of the request from the AFP for a control order. Under the current section 104.4(3):

> *"The court need not include in the order an obligation, prohibition or restriction that was sought by the senior AFP member if the court is not satisfied as mentioned in paragraph (1)(d) in respect of that obligation, prohibition or restriction".*

Under the proposed section 104.4(3), the court would not need to include in the order an obligation, prohibition or restriction in the order that was being sought by the AFP:

[6] Paragraph one of the Explanatory Memorandum.
[7] Independent Security Legislation Monitor Declassified Annual Report 20th December 2012; page 26.
[8] Ibid 7 at page 31.

> "***if not including the obligation, prohibition or restriction in the order would allow the court to become satisfied*** as mentioned in section 104.4(1)(d)".

By replacing the existing obligation on the courts that they should be satisfied on the balance of probabilities that each obligation, prohibition or restriction is reasonably necessary, and reasonably appropriate and adapted with the requirement that the court only needs to be satisfied on the balance of probabilities that the control order is reasonably necessary, and reasonably appropriate and adapted" will inevitably result in the court's power to vary or revoke Control Orders to be substantially limited.

When combined with the revised amendment to section 104.4(2), being that the court will be restricted in their consideration of the individual's subjective circumstances it is inevitable that Control Orders will be made by the court on a far more frequent basis.

We further submit that it would be mischievous for the assumption that the judiciary can protect the civil liberties of individuals who may be subject to an interim control order in the *"face of extraordinary legislative measures"* to be presented as a safeguard.

**1.7 Increasing the time for Attorney General's consent to be obtained from 4 hours to 12 hours: Section 104.6(2) of the Code.**

We strongly oppose increasing the time for the consent of the Attorney General to be obtained from 4 to 12 hours.

Under the current section 104.6(2) the AFP member can apply directly to the court for an interim control order without the immediate consent of the Attorney General on the basis of urgent circumstances. If this occurs, the Attorney general's consent must be obtained within 4 hours of the AFP member making the request.

***No demonstrated need that additional time is required***

Furthermore, there has been no demonstrated need or explanation as to why the time limit needs to be increased. The words *"Islamic State"* and *"operational issues"* should not considered "magic words" that allow the AFP to have further powers without any evidence as to the mere assertion that there are deficiencies with the current time period of four hours.

Under section 105.9 of the Code, a person can be detained for up to 48 hours (not including "dead time") and there are state laws such as the which allows detention for 14 days if a police officer (including an AFP member) *"is satisfied that there are reasonable grounds for believing that there is a threat of a terrorist act occurring in the near future"*[9]. There are already sufficient powers available for law enforcement to detain individuals who may hold nefarious intent.

As we oppose the amendment to section 104.5(2), we also oppose the amendments sought to section 104.8, 104.10(1) and (2) on similar grounds.

***Increased arbitrary detention of innocent individuals***

The extension of time from four hours to twelve will ultimately increase the time in which a citizen is arbitrary detained. In 2005, the Senate Legal and Constitutional Legislation Committee heard submissions from Mr. John North, who was the President of the Law Council of Australia who had reviewed the proposed legislation that "created" Control Orders. Mr North stated that:

> *"Australia's formal criminal justice system embraces critically important guarantees and safeguards, including the right of an accused to a fair trial, rules of evidence which are fair, the presumption of innocence and the requirement that guilt be established beyond reasonable doubt…It is unheard of in Australian law to have people held or detained for long periods under very strict conditions".*

Any attempt to extend the detention period will further erode the very legal principles that are intrinsic to our justice system.

**1.8 Violation of the Separation of Powers**

Control Orders deprive innocent people of their liberty based not on their conduct, but based on what a **member of the AFP** has suggested that they **might do.**

[9] Terrorism (Police Powers) Act 2002 section 5(a).

### 1.8 The Bill is a "Lawyer's Picnic"

If this Bill affectively allows Control Orders to be used as alternatives to prosecution, it will inevitably lead to a "lawyer's picnic" and a High Court challenge based on Chapter 3 of the Constitution, which guarantees the people in Australia that they can only be detained as a result of having a criminal offence proven in a Chapter 3 court.

Due to the reckless speed in which this Bill is being introduced and debated, there has been insufficient attention as to whether they are constitutionally valid. Expressed simply, legislation that allows for unnecessary detention and conditions raised the flag that it will be challenged in the High Court.

We respectfully submit that the members of the Committee should not be considering this Bill without the benefit of reviewing a Report being issued by the **Legal and Constitutional Affairs Legislation Committee**. There has not been sufficient analysis of the constitutional issues arising from this Bill.

### 1.9 Impact upon Human Rights

We respectfully submit that the members of the Committee should not be considering this Bill without the benefit of reviewing a Report being issued by the **Parliamentary Joint Committee on Human Rights**. There has not been sufficient analysis of the ramifications upon civil liberties or human rights.

We do however; hold grave concerns that the amendments to the control order regimes significantly impact on fundamental human rights, specifically:

1. Article 9 of the ICCPR-The Right to Freedom from Arbitrary Detention;
2. Article 12 of the ICCPR- The Right to Freedom of Movement;
3. Article 14 of the ICCPR-The Right to a Fair Trial
4. Article 17 of the ICCPR- The Right to Protection against Arbitrary and Unlawful Interferences with Privacy;
5. Article 19 of the ICCPR- Right to Freedom of Expression;
6. Article 22 of the ICCPR- Right to Freedom of Association; and
7. Article 6 of the ICESCR- The Right to Work.

## 2. Amendments to the Intelligence Services Act 2001

### 2.1 Emergency Authorisations-Section 9A & 9B

The *Counter Terrorism Legislation Amendment Bill* seeks to amend Section 9A of the *Intelligence Services Act 2001* and introduce Section 9B. Currently, the section only allows the Prime Minister, Defence Minister, Foreign Minister and Attorney-General to issue emergency authorisations before undertaking intelligence activities in relation to an Australian person. The proposed Section 9A allows such authorisations to be issued orally. It seeks to expand the power to issue emergency authorisations to heads of agencies when the relevant Ministers are unavailable.

We understand that in certain situations, urgent authorisations will be needed and the current requirement that the authorisation may be an impediment to protecting national security. Consequently, we do not take issue with the amendment that one of the relevant Ministers may issue an emergency authorisation orally to be followed with a written record of that authorisation within 48 hours.

We understand that the amendments seek to balance the right to privacy with national security. However, we respectfully submit that the current Section 9A already balances this and addresses the need for emergency authorisations by appropriately reserving such power to the four Ministers specified. It is submitted, that the legislation **already caters for urgent circumstances** by providing that four relevant Ministers of an appropriately senior level can issue authorisations for matters of this kind to be dealt with expeditiously. By expanding this power to heads of agencies when the Ministers are unavailable does not take into account the appropriateness and need for reserving this power for those at the most senior level. This need was taken into account by the legislator's when first drafting this provision and included as one of the safeguards to breaches of privacy. It is submitted that to further expand this power is, with respect, unprincipled and ineffective, as it does not provide adequate safeguards.

It is submitted that the right to protection against arbitrary and unlawful interferences with privacy and reputation (Article 17 of the *ICCPR)* is breached.

The Explanatory Memoranda states that the rigorous safeguards in place for these amendments include a maximum duration of 48 hours (without the ability to renew) and reporting requirements to the responsible Minister and

IGIS. Although, 48 hours is preferable to a longer period of time, it is nevertheless still ample time to breach the privacy of an Australian person without the appropriate safeguards in place. Despite the time limit, intelligence activity would still be undertaken against the relevant Australian person. Whilst it is acknowledged that the ISA agencies are subject to the oversight of IGIS, the IGIS will only become aware of any misuse of this provisions after the intelligence activity is undertaken and does not provide any safeguards to prevent misuse at the time such emergency authorisations are made.

The Explanatory Memoranda also states that other safeguards include the requirement of the relevant head of agency submitting a report to the relevant Minister and on receipt of such a report, the Minister has the option to cancel the authorisation. However, this report is required to be completed within 48 hours of the authorisation and the maximum period of that authorisation is 48 hours. If the report is submitted towards the end of that period, there is little utility in the Minister cancelling the authorisation as by that time, intelligence activity would have already been undertaken and collected against an Australian person. Consequently, this is not an effective safeguard. Furthermore, the question arises that if these provisions are put in place to respond to extreme emergencies where relevant Ministers are not available within a 48 hour period, it will not be effective to give the power of a Minister to cancel that authorisation within 48 hours and presumably, they would be unavailable for that whole period. If they are not unavailable for that period, we respectfully submit that the need will not arise to defer such power to the heads of agencies.

Furthermore, the proposed amendments do not take into account the level of intrusion into privacy required. The Attorney-General's Guidelines state that the least of intrusive techniques should be used whenever possible (10.4(d)). A greater level is only justified where a threat is assessed to develop quickly (10.4(e)). However, the Guidelines also provide that the more intrusive the investigative technique, the higher the level of officer that should be required to approve its use (10.4(c)). We are concerned that the current amendments do not take into account an assessment of the level of intrusion required and simply allows the issuing of all emergency authorisations to be made by agency heads when a relevant Minister is unavailable, regardless of the level of intrusion. We respectfully submit that this is an unacceptable breach to both the Guidelines and breach of privacy that is not balanced by other safeguards.

**Recommendations:**

1. Section 9A of the ISA already contains adequate provisions for circumstances of extreme urgency and do not require further amendment (except for recommendation (2)) and Section 9B is not required.
2. We do not take issue with the amendment that one of the relevant Ministers may issue an emergency authorisation orally to be followed with a written record of that authorisation within 48 hours. This provides enough flexibility for interests of national security to be achieved.

## 2.2 Broadening the role of the Australian Secret Intelligence Service to providing assistance to the Australian Defence Force

The Bill proposes broadening the role of the ASIS to include providing:

> *"……assistance to the Defence Force in support of military operations and to cooperate with the Defence Force on intelligence matters".*

There has been scant explanation as to the **intention or the purpose** behind the proposed section 8(1)(a)(i):

*(ia)* *undertaking, in the course of providing assistance to the Defence Force in support of military operations under paragraph 6(1)(ba), an activity, or a series of activities, for the specific purpose, or for purposes which include the specific purpose, of producing intelligence on one or more members of a class of Australian persons; or*

*(ib)* *undertaking, in the course of providing assistance to the Defence Force in support of military operations under paragraph 6(1)(ba), an activity, or a series of activities, that will, or is likely to, have a direct effect on one or more members of a class of Australian persons; or*

The media has speculated that the true purpose of this amendment is to enable Australians who are participating in the theatre of terrorism will be targeted by military operations i.e. they will be the subject of targeted killings. We call on the Australian Government to clarify the purpose behind this provision and the "need" for the amendment.

In the Explanatory Memorandum, it stated that:

> *"The requirement for these amendments* ***arises out of the different circumstances of Iraq to Afghanistan.***
>
> *ASIS provided essential support to the ADF in Afghanistan. The support ranged from force protection reporting at the tactical level, through to strategic level reporting on the Taliban leadership. ASIS reporting was instrumental in saving the lives of Australian soldiers and civilians (including victims of kidnapping incidents), and in enabling operations conducted by Australian Special Forces. However, differences in the circumstances in Iraq mean that reliance on existing provisions of the ISA in relation to the functions of ASIS (which are not specific to the provision of assistance to the ADF) is likely to severely limit ASIS's ability to provide such assistance in a timely way.*
>
> *The amendments will remedy this by making explicit that it is a statutory function of ASIS to provide assistance to the ADF in support of military operations, and to cooperate with the ADF on intelligence matters".*

With respect, the Explanatory Memorandum does not explain or clarify the deficiencies of the current laws regarding the functions of the ASIS and why the amendments are required.

The ADF are involved in military operations, which often employ the use of weapons. Section 6(4) of the Intelligence Act explicitly states that:

> *"In performing its functions, ASIS must not plan for, or undertake, activities that involve:*
>
> *(a) paramilitary activities; or*
>
> *(b) violence against the person; or*
>
> *(c) the use of weapons".*

We are concerned that this amendment is a "back door" in allowing ASIS to directly contravene section 6(4) of the Intelligence Act or be complicit in the targeted killings of Australian citizens who have not been charged or convicted of a criminal offence. We are also concerned with the sharing of the intelligence with "friendly foreign states" and the use of the intelligence in their military operations.

If there is a legitimate use of shared intelligence between civilian intelligence agencies and military intelligence agencies, such as providing intelligence on the location of Australian citizens overseas for the purposes of detaining or capturing in order to charge them with a criminal offence, then there should be safeguards incorporated into the Bill. Full accountability for the outcomes achieved from shared intelligence, such as an Annual Report to parliament with detailed statistics as to the intelligence shared, the circumstances of the sharing of the intelligence and the fate of the Australian citizens who are the subjects of the intelligence.

An Ombudsman, or another suitably qualified independent monitor would have an explicit review function to ensure that information or intelligence is not shared without appropriate justification or safeguards. We respectfully submit that the authorisation of the Minister and IGIS is an insufficient safeguard, especially in light of the restricted ability of the courts to review these decisions.