Submission: **from Civil Liberties Australia** CLA

Issues for Consideration numbers 7-21 and 41-45 in Appendix 3 of the INSLM's Annual Report 16th December 2011, or generally.

Civil Liberties Australia (CLA) thanks the Independent National Security Legislation Monitor (INSLM) for the invitation to make a submission on the powers relating to questioning warrants and questioning and detention warrants under the *Australian Security Intelligence Organisation Act 1979* (Cth) and control orders and preventative detention orders under the *Criminal Code Act 1995* (Cth). CLA is committed to engaging constructively with the INSLM in this review.

Questioning Warrants under the *Australian Security Intelligence Organisation Act 1979* (Cth)
CLA recognises that the Australian Government has an obligation to deter and prevent terrorism. However, we advocate for legislation that contains appropriate safeguards for protecting the rights of individuals and is consistent with Australia's international obligations. We recognise that intelligence agencies such as ASIO must be able to collect information, and that it may be appropriate to question persons. CLA considers the powers granted to ASIO under the questioning warrants provisions to be incongruent with civil liberties and Australia's international human rights obligations. We advocate for reform to the *ASIO Act* to bring these powers into harmony with the powers that the state and territory Police forces and the AFP operate under.

7. Is the last resort requirement for a questioning warrant under the ASIO Act too demanding?
CLA does not evaluate the last resort requirement for a questioning warrant under the *ASIO Act* to be too demanding.

8. Are the time limits (eg 7 days detention for 24 hours questioning) applicable to questioning warrants too long, too short or about right?
CLA concurs with the view of the INSLM that a questioning period of 24 hours is an extraordinary power quite remote form the experience of ordinary Australians. [1] We submit that the time limits applicable to questioning warrants are too long. We believe that the standards applicable to the Australian Federal Police (AFP) and other state and territory Police forces represent the appropriate community standard. CLA advocates for the *ASIO Act* to be reformed to bring the time limits applicable to questioning warrants to be harmonised with the time limits applicable to the AFP when questioning suspects.

9. Are the time limits for questioning warrants where interpreters have been used commensurate with the limits applying otherwise?
CLA supports the provision of interpreters; however, we are concerned that automatically doubling the time limits is not commensurate with the time limits applying otherwise. We advocate for the time taken to translate to be measured and aggregated. The ordinary time limits should apply plus that time *actually* taken to translate. The principle should be that time taken to translate is separate. Judgments should be made on a case by case basis, and the utilisation of translation services should be neutral.

[1] Walker, Bret (2012) ANNUAL REPORT 16 DECEMBER 2011, http://www.dpmc.gov.au/annual_reports/index.cfm

10. Are there sufficient safeguards including judicial review in relation to the surrender or cancellation of passports, in connexion with questioning warrants?
CLA does not regard the safeguards to be sufficient in relation to questioning warrants.

11. Is the 5 years imprisonment for failing to answer questions truthfully etc under a questioning warrant appropriate and comparable to penalties for similar offences?
CLA does not support a penalty of 5 years imprisonment for failing to answer questions truthfully in any curial proceedings. We believe that whilst it may at times be necessary to require a person to answer a question truthfully, or produce a document or thing, this power must be adjudicated by the Judicial branch and not the Executive branch.

12. Is the abrogation of privilege against self-incrimination under a questioning warrant sufficiently balanced by the use immunity?
CLA concurs with the view of the INSLM and the Independent Reviewer of Terrorism Legislation (IRTL) that the abrogation of the privilege against self-incrimination is inconsistent with the common law. [2] CLA further believes that the abrogation of the privilege runs counter to Australia's international human rights obligations and is injurious to Australia's international reputation. We do not believe that the abrogation is sufficiently balanced by the use of immunity. We submit that the permissibility of derivative use demonstrates the inherent flaw in this compromise. CLA advocates for the privilege against self incrimination to be reinstated.

13. Do the conditions permitting use of lethal force in enforcing a warrant sufficiently clearly require reasonable apprehension of danger to life or limb?
CLA is highly concerned that the conditions permitting the lethal use of force in enforcing a warrant deviate from community standards. We advocate for the provisions of the *ASIO Act* to be harmonised with the provisions utilised by the Police in Australian jurisdictions who confront situations where there is a reasonable apprehension of danger to life or limb every day.

Questioning and Detention Warrants under the *Australian Security Intelligence Organisation Act 1979* (Cth)
Whereas CLA recognises the need for questioning to occur, the questioning and detention warrants regime is not supported. Should the Australian Government choose to retain these divisions, we make the following comments.

14. Are the three several conditions for issuing a questioning and detention warrant stringent enough?
CLA does not regard the three several conditions for issuing a questioning and detention warrant stringent enough. We do not support Division 3 of Part III of the *ASIO Act*. We concur with the view of the INSLM that the powers authorising questioning and detention are not at all necessary in order to permit a person to be detained after attendance for questioning and until the statutory limits have been reached. [3] Secondly, we argue that the apparent safeguard is not appropriate as the issuing authority is not a judicial officer and the procedure

[2] Anderson, D (2012) CONTROL ORDERS IN 2011: Final Report of the Independent Reviewer on the *Prevention of Terrorism Act 2005*, http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/

[3] Walker, Bret (2012) ANNUAL REPORT 16 DECEMBER 2011, http://www.dpmc.gov.au/annual_reports/index.cfm

is incongruent with the doctrine of the separation of powers. CLA advocates for the repealing of the questioning and detention provisions.

15. Should the risk of non-appearance as a condition for issuing a questioning and detention warrant require assessment by a judicial officer?
CLA submits that a judicial officer should assess the risk of non-appearance as a condition for issuing a questioning and detention warrant. We do not support Division 3 of Part III of the *ASIO Act*, and we advocate for the repealing of the questioning and detention provisions.

16. Does the possible resort either to a questioning and detention warrant or to arrest for the same person for the same circumstances give an inappropriate discretion to officers of the executive?
CLA believes that the possible resort to either a questioning and detention warrant or to arrest for the same person for the same circumstances gives an inappropriate discretion to officers of the Executive. We do not support Division 3 of Part III of the *ASIO Act*. We submit that this provision gives rise to the possible situation where the Executive branch inappropriately exercises draconian powers that directly violate the civil liberties of individuals. Absent the checks and balances that operate on the Police, or judicial review, this provision permits sloppy work. CLA advocates for the repealing of the questioning and detention provisions.

17. Should the issuing authority, being a judicial officer, rather than the Attorney-General, or as well as the Attorney-General, determine the existence of a condition for the issue of a questioning and detention warrant?
CLA submits that the issuing authority should be a judicial officer. We concur with the view expressed by the INSLM that the attention of a judicial officer to a matter of such moment to an individual's personal liberty is highly desirable, [4] and we submit that it is a necessity. We do not support Division 3 of Part III of the *ASIO Act*, and we advocate for the repealing of the questioning and detention provisions.

18. Should the offence of failing to produce records or things under a warrant explicitly extend to deliberate destruction?
CLA takes the principled position that the offence of failing to produce records or things should explicitly extend to deliberate destruction.

19. Is the disparity between length of imprisonment for offences against security obligations in relation to questioning warrants and for offences of deliberate contravention of safeguards in relation to questioning warrants appropriate?
CLA does not regard the disparity between the length of imprisonment for offences against security obligations in relation to questioning and detention warrants and for offences of deliberate contravention of safeguards in relation to questioning warrants to be appropriate. We believe that the nominal disparity is evidence of the jaundiced bias in favour of exceptional Executive authority more appropriate in situations of an actual emergency. We do not support Division 3 of Part III of the *ASIO Act*, and we advocate for the repealing of the questioning and detention provisions.

20. Is the degree and nature of permitted contact by a person being questioned under a warrant sufficient?

[4] Walker, Bret (2012) ANNUAL REPORT 16 DECEMBER 2011, http://www.dpmc.gov.au/annual_reports/index.cfm

CLA submits that the degree and nature of permitted contact by a person being questioned under a warrant are not sufficient. We take the position that the degree and nature of permitted contact by a person being questioned under a warrant should be harmonised with the degree and nature of permitted contact by a person being questioned by a state or territory Police force or the AFP. We do not support Division 3 of Part III of the *ASIO Act*, and we advocate for the repealing of the questioning and detention provisions.

21. Should questioning and detention warrants remain available at all?
CLA submits that questioning and detention warrants should not remain available at all. We do not support Division 3 of Part III of the *ASIO Act*, and we advocate for the repealing of the questioning and detention provisions.

Control Orders and Preventative Detention Orders under the *Criminal Code Act 1995* (Cth)
CLA does not support Division 104 and Division 105 of the *Criminal Code Act*. We advocate for the repealing of the regime of control orders and preventative detention orders. Should the Australian Government choose to retain these divisions, we make the following comments.

41. Should anything be done about doubtful aspects of the constitutional validity of control orders and preventative detention orders under the Criminal Code?
CLA agrees with the INSLM that the ambit of control orders and preventative detention orders that restrict or abrogate the personal liberty of individuals, otherwise than for the legitimate purposes of punishment or investigation, is extraordinary. [5] We do not believe that either division is appropriate or necessary when considered against Australia's international human rights obligations. We ask, how can a court make an order in favor of a fair trial when, in exercising its discretion, it must give the issue of fair trail less weight than the Attorney-General's certificate? CLA advocates for the repealing of the regime of control orders and preventative detention orders.

42. Do international comparators support or oppose the effectiveness and appropriateness of control orders and preventative detention orders?
CLA believes that international comparators oppose the effectiveness and appropriateness of control orders and preventative detention orders. The control orders regime in the United Kingdom has been replaced with the Terrorism Prevention and Investigation measures. The regime was acknowledged to be a second best option and subsequently, the IRTL stated in his report on control orders that:

> "It was unproductive in terms of evidence usable in the criminal process, since controlled persons were aware of being watched in a way that subjects of covert surveillance may not be. It was also expensive, particularly once legal costs were factored in."[6]

CLA agrees with the IRTL that the imprisonment of a dangerous terrorist is more effective at protecting the public and is a more efficient utilisation of resources. More importantly, by following the rule of law, the State imposes an extraordinary intrusion and restriction on the liberty of an individual on the basis of proof, utilising the mechanism of a fair criminal trial. We submit that the fact that the control order regime in the United Kingdom has been dismantled is evidence that control orders are not effective, nor appropriate.

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5 Walker, Bret (2012) ANNUAL REPORT 16 DECEMBER 2011, http://www.dpmc.gov.au/annual_reports/index.cfm
[6] Anderson, D (2012) CONTROL ORDERS IN 2011: Final Report of the Independent Reviewer on the *Prevention of Terrorism Act 2005*, http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/

New Zealand has not introduced a control order regime, yet is engaged in the War in Afghanistan and has suffered injury from terrorist attacks. CLA submits that the fact that New Zealand has not introduced a control order regime is evidence that control orders are not effective or appropriate. CLA advocates for the repealing of the regime of control orders and preventative detention orders.

43. Does non-use of control orders and preventative detention orders suggest they are not necessary?
CLA believes that the absence of a state of emergency justifiably giving rise to the reasonably adapted abrogation of civil liberties suggests that control orders and preventative detention orders are not necessary. The fact that control orders have not been utilised in the recent past, and the non-use of preventative detention, suggests that they are not necessary. We are however particularly concerned by the 'chilling effect' the retention of these divisions have. CLA concurs with the INSLM that the threat of use of these powers having a real effect is realistic. [7] Furthermore, there is no evidence that threatened use of control or preventative detention orders has become subject to judicial scrutiny, nor would the safeguards be effective in protecting the public interest or individuals when these orders are not used. CLA advocates for the repealing of the regime of control orders and preventative detention orders.

44. Should control orders and preventative detention orders be more readily available?
CLA does not believe that control orders or preventative detention orders should be more readily available. We do not support Division 104 and Division 105 of the *Criminal Code Act*. CLA advocates for the repealing of control orders and preventative detention orders.

45. Should control orders and preventative detention orders require a relevant prior conviction and unsatisfactory rehabilitation?
CLA advocates for the repealing of control orders and preventative detention orders. Alternatively, if the regime persists, we submit that control orders and preventative detention orders should require a relevant prior conviction and unsatisfactory rehabilitation. Further reforms should aim to make the orders less intrusive, more tightly and clearly defined, and more comparable with restrictions that already exist in the Australian justice system.

CLA thanks the INSLM for the invitation to make this submission. We reiterate our willingness to constructively engage with the INSLM in the future and can be contacted on:

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[7] Walker, Bret (2012) ANNUAL REPORT 16 DECEMBER 2011, http://www.dpmc.gov.au/annual_reports/index.cfm