



## AUSTRALIAN SENATE

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### Submission to the Parliamentary Joint Committee on Intelligence and Security

#### On the

#### ***Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014***

#### Principal concern

I have a number of concerns with the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*. However, my principal concern is that at no point has the passage of this Bill into law been justified evidentially.

Throughout the Explanatory Memorandum, phrases describing measures as ‘reasonable, necessary and proportionate’ are used. Similarly, there is the repeated assertion that ‘terrorist acts constitute one of the most significant threats to Australia and its national security interests’.

The first seems intended to operate as a (not very effective) prophylactic against Australia breaching its international obligations under the ICCPR, without any evidence as to ‘reasonableness’, ‘necessity’ or ‘proportionality’. The second is simply asserted without any basis at all; Australia’s existing anti-terror laws, beefed up in the wake of 9/11, have only been used three times. Two control orders have been issued, while Preventative Detention Orders (PDOs) were first used during last month’s terrorism raids in Sydney and Brisbane.

Despite this, the Government is seeking an increase in these – and other – powers.

In my view, the Government ought to provide credible examples of harmful activities that only the passage of this Bill will discourage or prevent, even if identifying details are redacted for security reasons.

#### Specific concerns

I recognise that I am but a single voice and a single vote, so in an attempt to improve what will inevitably be enacted into law in some form or another, I shall also outline my specific concerns with sections of the proposed legislation.

In order, my main concerns relate to the following:

1. The enactment of provisions governing 'delayed notification search warrants'.
2. The lack of a public interest defence for unauthorised disclosure of the issuance of a delayed notification warrant.
3. The new offence of 'advocating terrorism'.
4. The loosening of the definition of 'engaging in a hostile activity' in the foreign incursions regime in the new Part 5.5 of the Criminal Code.
5. The new offence for entering or remaining in a 'declared area'.
6. The repeated extension of sunset periods, typically by 10 years.

I should note that items 3, 5, and 6 have been covered in detail by Professor George Williams and his team at the Gilbert + Tobin Centre of Public Law, UNSW, and I share their concerns. I will therefore only make brief comments on those issues.

#### Delayed notification search warrants for terrorism offences

The proposed Part 1AAA of the *Crimes Act 1914* removes the requirement (on the Australian Federal Police) to provide a copy of any warrant with respect to terrorism offences to the occupier of the premises subject to the warrant and then allow them to observe the search.

Instead, the search is undertaken without the occupier's knowledge and provides a mechanism for delayed notification to the occupier. The delay is 'generally' meant to be no longer than six months, but can be extended by application to the court in six monthly increments and, at an extreme, the legislation seems to allow indefinite extension.

In addition, the warrant's executing officer is able to enter the premises via adjoining premises, and is granted the power to impersonate another person 'where reasonably necessary to execute the warrant'.

Despite reassurances in the Explanatory Memorandum, it is difficult to see how this provision is not in breach of Article 17 of the ICCPR, which provides people with rights to protection against arbitrary or unlawful interference with their privacy, family, home, or correspondence. Quite apart from the convention, the warrants regime is so draconian as to invite a re-run of *Entick v Carrington*<sup>1</sup> and is contrary to our most basic protections at common law.

Of course, noises are made, once again, about the grave threat terrorism poses to Australia, and once again, no evidence on point is provided.

#### No public interest defence for unauthorised disclosure of a delayed notification search warrant

Division 8 of the Proposed Part 1AAA provides a penalty of two years imprisonment for the unauthorised disclosure of either an application for, the execution of, or a report on, a delayed

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<sup>1</sup> [1765] EWHC KB J98; 19 Howell's State Trials 1029 (1765)

notification search warrant. Even more absurdly, the same penalty is imposed for unauthorised disclosure of a notice to the owner of adjoining premises to those subject to the search.

There is no public interest defence, and although two years imprisonment is not as draconian as the 10 years enacted into law in other recently passed national security legislation, we are not here talking about a major security operation. It is merely the issuance of a *warrant*. The provision seems calculated to remove the AFP from any and all journalistic scrutiny, and is in any case excessively broad.

#### The new offence of 'advocating terrorism'

This issue is covered in detail by Professor Williams, but I endorse his core point: the offence (punishable by a term of 5 years) goes far beyond 'incitement of violence' at common law. Not only does it take in the 'promotion' of violence, which is broad enough to capture a general statement endorsing revolutionary violence in a third country, but requires only that the speaker is 'reckless' as to whether what is said causes terrorism.

Incitement at common law has always required intent, while 'promotion' goes beyond the requirement, also present in incitement, that words ought to operate directly on the intended audience, and do so quickly ('proximity in time').

Also worthy of note is that organisations can be 'proscribed' (listed as terrorist organisations) on the basis of 'advocating terrorism', and once again the definition of 'advocacy' employed is considerably broader than that typically captured by 'incitement' at common law. The consequences of listing are severe, and there is a real danger that community associations run by amateurs unused to keeping office-bearers 'singing from the same song-sheet' may finish up listed based on the views of only a few members. And, as Professor Williams points out, there is the potential to criminalise much entirely legitimate speech.

#### Loosening the definition of 'engaging in a hostile activity' in the foreign incursions regime in Part 5.5 of the Criminal Code.

The new Part 5.5 of the Criminal Code is meant to replace the existing foreign incursions law [*Crimes (Foreign Incursions and Recruitment) Act 1978*], which will be repealed. The definition of 'engaging in a hostile activity' under the 1978 Act was narrow, and covered such things as 'causing fear of suffering death or personal injury'. The new law will greatly broaden this in scope by including 'intimidating the public or a section of the public' in the definition.

This is the standard definition of 'breach of the peace' in Scots law, and evidence from that jurisdiction indicates it is so broad as to be capable of application to almost any form of behaviour. Until *Smith v Donnelly*<sup>2</sup> was decided, convictions for breach of the peace took in behaviour as varied as protesters

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<sup>2</sup> 2002 J.C. 65

blocking military vehicles at Faslane, selling copies of a BNP newspaper outside Celtic Park, and cross-dressing in Aberdeen.

This definition criminalises behaviour that is so broadly defined that it could take in almost anything – anything that irritates a member of the Australian Federal Police, at least.

If acts are to be criminalised and stiff sentences imposed, they should be for behaviours that are widely regarded as criminal, and should not admit of so much discretion on the part of police officers.

#### Declared areas

Professor Williams and his team cover this issue in considerable detail, so I will keep my observations brief.

Schedule 1, item 110, clause 119.3 of the Bill allows the Minister for Foreign Affairs to designate an area in a foreign country a 'declared area'. This declaration depends on the Minister satisfying himself that a listed terrorist organisation is present there and engaging in hostilities. A person who enters such an area and who cannot show that they remained in the declared area *solely* for a legitimate purpose is liable to imprisonment for 10 years. 'Legitimate purpose' is defined narrowly in the Bill, covering things like the provision of humanitarian aid and visiting family, but not things like religious pilgrimage or freelance journalism.

Crucially, the offence is made out by entering the 'declared area', not by engaging in terrorist related activity. Yes, the prosecution must prove entry into the declared area beyond reasonable doubt, which means that the onus is not reversed. However, asking the accused to discharge the evidential burden by demonstrating a reasonable possibility that his travel to the 'declared area' was *solely* for a legitimate purpose comes dangerously close to demanding proof of a negative ('I did not travel to x for any other reason').

Quite apart from the fact that the word *solely* places too much of an evidential load on the accused, it is not the business of governments to go about declaring certain areas *ipso facto* hostile; indeed, as Professor Williams observes, it is contrary to the most basic principle of freedom of movement in liberal democracies.

#### Extension of sunset periods

Much has been made of the urgency attaching to this Bill, however, when one considers that the existing sunset clauses do not expire until either December 2015<sup>3</sup> or July 2016<sup>4</sup>, this urgency seems unwarranted. There is plenty of time for the most draconian measures – preventative detention orders (PDOs), control orders, and ASIO's questioning and detention powers – to be used in light of current events in the Middle East. They do not need to be extended until either 2025 or 2026. Indeed, this is a

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<sup>3</sup> *Crimes Act 1914* (Cth), s 3UK.

<sup>4</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34ZZ.

classic case of laws that will remain on the books far longer than the current Government will remain in office, inviting abuse and ‘mission creep’ by future governments, of whatever stripe.

In addition, the existing sunset clause regime has worked, providing police with the opportunity to establish which of the measures are actually useful in the prosecution of crime. Both the AFP and state police forces have made submissions to the Independent National Security Legislation Monitor pointing out that the PDO regime, in particular, is not fit for purpose.<sup>5</sup>

#### Other concerns

I also find the repeated lowering of arrest thresholds (from ‘reasonable belief in the commission of a terrorism offence’ to ‘reasonable suspicion of a terrorism offence’) throughout the proposed Bill worrying, as they make it ever easier for police to engage in overreach. Similarly, the desire to criminalise speech present throughout will serve only to ensure that it becomes even more difficult to learn if we are in actual danger: the parallel that comes to mind is the hare-brained 1950s attempt to ban the Communist Party.

Finally, the imposition of sentences of life imprisonment (up from 10 years) for hostile activity in a foreign state – and ‘hostile activity’ has now been expanded to include a very loose definition of ‘subverting society’ – is excessive. First, it is well known that maximum sentences do not deter; it is the likelihood of detection that achieves that objective. Second, the extra-territorial overreach evinced in the offence is extraordinary: the Bill foreshadows behaviour by Australian authorities in controlling behaviour by nationals abroad that is routinely criticised when engaged in by authorities from the United States.

#### Ongoing concerns with respect to speech issues

I should note that I am still troubled by the restrictions on freedom of speech and of the press in both this Bill and in the recently enacted National Security legislation. Much of the Foreign Fighters Bill concerns amendments to the ASIO Act 1979, as did the previous legislation, and I wish to foreshadow at this point that I will be looking to make amendments to both the Act and the Bill.

I also maintain it is not good enough to tell journalists that they have recourse to the Inspector-General of Intelligence and Security (IGIS) rather than reporting their findings to the public in the usual way. It places enormous power in the hands of ‘a small agency’<sup>6</sup>, and deprives the Australian people of access to the truly independent scrutiny offered by a free press.

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<sup>5</sup> *INSLM 2012 Report*, 56.

<sup>6</sup> <http://www.igis.gov.au/about/recruitment.cfm>: ‘As a small agency, employment opportunities arise infrequently in the Office of the Inspector-General of Intelligence and Security. When opportunities arise, the position is advertised on the [APSjobs](#) website’

Concluding comments

My comments are, of necessity, brief. I and my staff were given little time to review this Bill, and much of that review time coincided with a sitting week. However, it is clear that this Bill is bad law and the necessity for it has not been made out even if it were good law.