



School of Law

University of New England
Armidale NSW 2351
Australia

Associate Professor Greg Carne

The Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT 2600

2 October 2014

Re: Submission to Inquiry into *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*

Thank you for the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the *Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*.

This submission focuses on selected aspects of the Bill as indicated under the headings under “Background” in the Attorney- General’s Media Release “Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill of 23 September 2014 (Please see Appendix A to this submission for this document) and suggests various reforms to the content of the present Bill.

The abbreviated time frame for submissions as closing 12 pm Friday 3 October (as acknowledged in the Media Alert of 25 September 2014 and in the e-mail from the Inquiry Secretary of 26 September 2014) has meant that it has not been possible in this submission to comment on all aspects of the Bill.

I will now proceed to an analysis of some key aspects of the Bill.

. New Offence of entering or remaining in a declared area – Foreign incursions and recruitment

The proposed s.119.2 offence involves entry into, or remaining in an area in a foreign country and that area has been declared by legislative instrument by the Minister for Foreign Affairs under s.119.3 as satisfied that a listed terrorist organisation is engaging in hostile activity in that area of the foreign country. It is accordingly an entry or presence based offence, founded on a presumption that entry into or remaining in a declared area is for purposes of terrorism or for a terrorist act, unless a sole purpose exception can then be established on an evidential burden under s.119.2 (3).

It is apparent from the Explanatory Memorandum to the Bill that the fault elements of both knowledge and recklessness will apply in relation to the fact of declaration of an area within the terms of s.119.3¹. Accordingly, under a standard whereby the person may not have actual knowledge of the declaration of an area under s.119.3, the defendant is put to an evidential burden to satisfy at least one of the seven sole purpose legitimate purposes under s.119.2 (3) or an additional purpose prescribed by regulations under s.119.2 (3) (h).

The proposed section overreaches and is problematic in several characteristics.

First, it assumes that the s.119.2 (3) listing of exceptions (on an evidential burden on the accused) to the application of s.119.2 (1) offence is an adequate safeguard. This is not the case as an entirely innocent person may be subject to the processes of charge, arrest, remand in custody or bail, and with the consent of the Attorney General to a prosecution,² then be obliged to satisfy at trial an evidential burden in relation to the legitimate purposes of s.119.2(3).³

Second, it potentially subjects persons who have entered into, or remain in a declared area, *without actual knowledge* of that declaration under s.119.3, to a criminal charge and criminal trial process without more – that is there is no need for the prosecution to show a terrorist related intent relating to the entry or remaining in the prescribed area (this is imputed from the circumstances of the declaration under s.119.3 that a listed terrorist organisation is engaging in hostile activity in the declared area).

This imposition is potentially more onerous in the case of a person who enters an undeclared area which is then subsequently declared and remains in that area (without knowledge that the area has then been declared under s.119.3) subsequent to the declaration. In practical terms in this situation, s.119.2 works both to impute an intention of ill motives (until rebutted on an evidential burden) and to

¹ Explanatory Memorandum, 47: 'The new offence will enable the prosecution of people who intentionally enter an area in a foreign country where they know, or are aware of a substantial risk that the Australian Government has determined that terrorist organisations are engaging in a hostile activity...' The *Criminal Code* (Cth) specifies fault elements of 5.3 Knowledge: 'A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events' and 5.4 Recklessness 'A person is reckless with respect to a circumstance if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.'

² Proposed s.119.2

³ S.13.3 (6) of the *Criminal Code* Cth states that 'evidential burden' 'in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist'.

impute an awareness of the declaration by the application of the recklessness criterion as the fault element in relation to continuing presence in the now declared area.

Third, Note 2 after proposed s.119.2 (5) states that ‘Sections 10.1 and 10.3 also provide exceptions to subsection (1) of this section (relating to intervening conduct or event and sudden or extraordinary emergency respectively’. However, s.10.1 of the *Criminal Code* (Cth) “intervening conduct or event” states that ‘A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if (a) the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and (b) the person could not reasonably be expected to guard against the bringing about of that physical element.’ However, fault elements of knowledge and recklessness apply to the physical element of entry into and remaining in the declared area in the s.119.2 offence, so these are clearly not physical elements to which absolute liability or strict liability applies, and hence a person prosecuted for the s.119.2 offence could not on this point avail themselves of the intervening conduct or event defence.

Several changes could usefully be made:

Accordingly, to cover circumstances where a person is aware subsequently of a declaration of an area, but is unable to leave because of the intervening conduct of others or events over which the person has no control (eg arrest, detention, kidnap, civil war, closed borders, illness, injury etc) a further exception to this effect should be included in s.119.2 (3) capturing these circumstances. This further exception should also directly capture the circumstances of the *Criminal Code* (Cth) s.10.3 exception to criminal responsibility of carrying “out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency”.

Presently, the s.119.2 offence criminalises travel to a country or part of a country without the authorities having to show that the individual based intention for the travel was terrorism related. This appears clearly to be an attempt to afford the prosecutorial authorities an exemption from having to prove an intent to engage in terrorism, contemporaneous with, or subsequent to, the entry or remaining in the declared area.

Overall, the offence should be re-drafted to require a clear textual contemporaneity between entry to a declared area, or remaining in a declared area (i) with knowledge of the existence of that declaration and (b) with a criminal intent to commit a terrorist offence or to commit a terrorist act. (including participation in and membership of a listed terrorist organisation, the fact of its activities within the area being the basis of the declaration of the area)

Further, the proposed s.119.3 declaration arrangement specifies declaration by legislative instrument without more. The draft legislation should be modified to require in that declaration, as a matter of law, include precise geographical co-ordinates and other relevant identifying descriptive features of the declared area, being topographical features, city and town locations etc.

Similarly, the draft legislation should be modified to require, as a matter of law, that the areas so declared by legislative instrument be immediately published on the DFAT website (eg special travel advisory section) and that the declaration of such areas not legally take effect until the time of such publication on the DFAT website.

. Extension of sunset clauses: control orders, preventative detention and certain terrorism investigatory powers – the need to link to legislated review processes for Parliament to make informed choice regarding renewal

The Bill proposes the extension of sunset clauses in relation to the control order⁴ and preventative detention⁵ regimes in the *Criminal Code* (Cth) and in relation to certain terrorism investigatory powers in the *Crimes Act 1914* (Cth)⁶. The substantive provisions relating to control orders, preventative detention and investigatory powers in relation to terrorist acts and terrorism offences were introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth) following agreement of COAG⁷ in the wake of the 2005 London bombings. The COAG Communique of 27 September 2005 agreed that the new laws would be reviewed after five years, which eventually led in 2012 to the Whealy Committee report.⁸

The present Bill re-imposes a lengthy ten year sunset clause, but on this occasion without mandating an obligatory review process at any stage during the currency of the continued powers, up to and including the new expiry date.

This is most unsatisfactory from two perspectives.

First, Part 5.3 of the *Criminal Code* (Cth) relies in part for constitutional validity upon referrals of power by the states, as evidenced in the *Criminal Code Amendment (Terrorism) Act 2003* (Cth). The states and territories have an ongoing interest in this Part of the legislation and such an interest is most readily expressed in a review mechanism, in which their interests and submissions can be ventilated and considered, apart from the existing COAG consultative mechanisms on counter-terrorism⁹

Second, it needs to be emphasised that the circumstances for accessing control orders and preventative detention orders are also to be expanded in the Bill.

In the case of control orders this is by providing additional grounds for suspicion based on reasonable grounds for expanded terrorist training activities, for engaging in hostile activity in a foreign country and in having been convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or a terrorist act.

⁴ Proposed amendments to subsections 104.32 (1) and 104.32 (2) of the *Criminal Code* (Cth) omitting the words 'the end of 10 years after the day on which this Division commences' and substituting the phrase "15 December 2025"

⁵ Proposed amendments to subsections 105.53 (1) and 105.53 (2) of the *Criminal Code* omitting respectively the words "10 years after the day on which this Division commences" and "the end of 10 years after the day on which this Division commences" and substituting the phrase "15 December 2025"

⁶ Proposed amendments to subsections 3UK (1) 3UK (2) and 3UK (3) of *Criminal Code* Cth omitting the current phrase "the end of 10 years after the day on which the Division commences" and substituting "15 December 2025". Division 3A of the *Crimes Act 1914* (Cth) provides additional investigatory powers in relation to terrorist acts and terrorism offences.

⁷ COAG Communique 'Council of Australian Governments' Special meeting on Counter-Terrorism 27 September 2005 Strengthening Counter-Terrorism Laws'.

⁸ Council of Australian Governments Review of Counter Terrorism Legislation Report

⁹ Council of Australian Governments Inter-Governmental Agreement on Counter Terrorism Laws

In the case of preventative detention orders, there is in the Bill a liberalisation of the methods of making the application in urgent circumstances, and in relation to a preventative detention order for the purposes of evidence preservation, a relaxation of the test is made from being “necessary to detain” to “reasonably necessary to detain”, instituting a more objective and generalised standard.

Third, at the expiration of the proposed new sunset clauses in 2025, the Commonwealth Parliament will, in the absence of a legislatively mandated review process, will not be in a fully informed position to decide upon a further renewal of the respective sunset clauses. Proper debate and evaluation cannot be made in the absence of available information, investigation and inquiry about the operation of the legislation. At that point the existence of these provisions (twenty years in existence) will take on a permanent status, even if the relevant legislation formally preserves the sunset clauses.

The COAG Whealy Committee Report actually recommended that preventative detention orders should be repealed but that Control Orders should be retained with additional safeguards and protections. Unfortunately, this Bill fails to seriously engage with the many improvements suggested in the Whealy Committee recommendations. It is important to record that the Whealy Committee was comprised of persons with experience in and familiarity with the operation of terrorism laws - retired judges, a state ombudsman, a Deputy Director of the Commonwealth DPP and two senior police officers.

Several changes could usefully be made:

For the above three major listed reasons, the control orders and preventative detention powers in the *Criminal Code* (Cth) and the Division 3A powers in the *Crimes Act 1914* (Cth) should be subjected to a formal review process towards the latter part of the ten year cycle, and that this should be set down in concrete terms in the legislation, to avoid the unsatisfactory delays that occasioned the appointment and commencement of the COAG review process¹⁰ and appoint a Committee, chaired by a retired judge, of up to six people to represent necessary interests

The terms of reference for the review of these three items should be modelled on those of the Whealy Committee, namely:

- . to evaluate the operation, effectiveness and implications of the relevant legislation
- . to assess whether these laws the subject of the review are:
 - . necessary and proportionate
 - . are effective against terrorism by providing law enforcement, intelligence and security agencies with adequate tools to prevent, detect and respond to acts of terrorism
 - . are being exercised in a way that is evidence based, intelligence led and proportionate
 - . contain appropriate safeguards against abuse.

¹⁰ See Council of Australian Governments Review of Counter Terrorism Legislation Report, 2.

. Removal of review process for ASIO warrants questioning powers, extension of the sunset clause and relaxation of warrant threshold standard

An amendment by the Bill to paragraph 29 (1) (bb) of the *Intelligence Services Act 2001* (Cth) will remove the present legislative obligation of the Parliamentary Joint Committee on Intelligence and Security to review by 22 January 2016 the operation, effectiveness and implications of Division 3 of Part III of the *ASIO Act 1979* (Cth) – ie the special powers relating to questioning warrants and questioning and detention warrants.

Effectively, the amendment proposes that no review of Division 3 of Part III of the *ASIO Act 1979* (Cth) be conducted for a period of twenty years (the last review being conducted in November 2005).

This is an extraordinary proposition given the exceptional nature of the powers, and in particular their envisaged expansion in the present Bill by the removal of the last resort criterion – see Item 28 of the Bill, the repeal of paragraph 34D(4)(d) and its replacement constituting a lowering of the Attorney-General’s consent threshold (the existing standard being that the powers are only used where other methods of gaining that intelligence would be ineffective)

It is important to outline why the present 2016 review process was incorporated into the *Intelligence Services Act 2001* (Cth)

The initial version of the legislation imposed a three year sunset clause – then s.34Y of the *ASIO Act 1979* ‘provides that the questioning and detention powers established by Division 3 of Part III of the Act will cease to be in force from 23 July 2006. The Committee’s review is this designed to precede and inform consideration by the Government and the Parliament of the need to legislate again for these provisions or some variation of them’¹¹

The Parliamentary Committee in November 2005 recommended continuation of the legislation, with a *five year* sunset clause to come into effect on 22 November 2011, and that the Parliamentary Committee be required to review the operations, effectiveness and implications of the powers in Division 3 Part III and report to the Parliament on 22 June 2011¹², that is, within a *five year* time frame.

The recognition by the Parliamentary Committee in its 2005 report of the linkage between a sunset clause and mandated committee review as an effective and necessary accountability mechanism was emphatic:

The Committee would also note, that in something so amorphous as a war on terrorism, where the end point might be difficult, or indeed impossible to define, it is even more important that extraordinary legislation, developed to deal with these exceptional circumstances, be reviewed regularly and publicly to ensure that the extraordinary does not become ordinary by default.

¹¹ Parliamentary Joint Committee on ASIO ASIS and DSD ASIO’s Questioning and Detention Powers Review of the operation, effectiveness and implications of Division 3 of Part III in the *Australian Security Intelligence Organisation Act 1979*, vii. (November 2005)

¹² Parliamentary Joint Committee November 2005 report, xvii, Recommendation 19.

The Committee finds the arguments in favour of retaining the sunset clause the more compelling. A sunset clause, which means that the **legislation must be introduced anew, ensures that the public and parliamentary debate on the need for the powers will be regularly held and of the most focused kind.** The debate on the legislation will necessarily be more extensive if it must go through a Committee review, such as the current one, and then be debated as legislation in the chambers of the House of Representatives and the Senate. Only a sunset clause will achieve this.¹³ (emphasis added)

The existing ten year sunset clause and review cycle – reflected in s.34ZZ of the *ASIO Act 1979* (Cth) and in s.29 (1)(bb) of the *Intelligence Services Act 2001* (Cth) were the result in early 2006 of the government's rejection of a five year cycle as recommended by the Parliamentary Committee and the government preference for a ten year cycle.¹⁴

Significantly, however, the Hon P Ruddock (then Attorney General and presently a member of the Parliamentary Joint Committee on Intelligence and Security) on 29 March 2006 in a second reading speech on *ASIO Legislation Amendment Bill 2006* (Cth), accepted the necessity for Parliamentary Committee review of ASIO's terrorism related questioning and detention powers:

A key feature of the bill is to amend the current sunset clause provision, which would otherwise cause the questioning and detention powers to cease on 22 July 2006.

The government accepts the PJC's arguments about the need for ongoing review and a further sunset period, but considers that the 5 ½ year period recommended by the PJC is insufficient in the current environment.

We consider a period of 10 years to be more appropriate.

Recent experience with statutory reviews has demonstrated that they are resource intensive and do have an impact on operational priorities.

The 10 year period is consistent with state and territory government views about the time needed to properly make an assessment of the recently enacted antiterrorism package of legislation.

The longer period will also ensure that the legislation can be used over a period the government assesses there is likely to be a need for these powers.

Accordingly the bill extends the sunset clause and the PJC review period by 10 years so that the PJC will be required to review the legislation by 22 January 2016 and the legislation will cease to have effect on 22 July 2016.¹⁵

It would be unconscionable in these circumstances to proceed with Item 33 of the Bill (amending the *ASIO Act 1979* (Cth)) and Item 133 of the Bill (amending the *Intelligence Services Act 2001* (Cth))

¹³ Parliamentary Joint Committee November 2005 report, 106.

¹⁴ See Parliamentary Joint Committee on Intelligence and Security Report of the operation effectiveness and implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* Government Response March 2006

¹⁵ House of Representatives *Hansard* 29 March 2006, 5 Hon P Ruddock Second Reading Speech *ASIO Legislation Amendment Bill 2006*

removing the existing review arrangements. It would be an affront to the Committee's partially accepted recommendation as reflected in its enactment in the 2006 legislation.

Furthermore, such amendments from the Bill would (a) set a dangerous precedent whereby the legislated periodic review accountability mechanisms over exceptional powers can be peremptorily and hastily set aside due to a executive claim of present circumstances or expediency and (b) also produce a legislative elision or slippage from the exceptional or unusual nature of such powers to their legislative normalisation and permanence.

. Admission of foreign evidence – exclusionary standards

Item 125 of the Bill seeks to amend the *Foreign Evidence Act 1994* by adding a new clause s.27 D. S.27D (1) provides a list of foreign and foreign government sourced material which is admissible in a terrorism related proceeding and despite any other Australian law about such evidence.

In turn, s.27D (1) is made subject to the exception to admissibility in s.27D (2):

Foreign material or foreign government material is not admissible if the court is satisfied that the material, or information contained in the material, was obtained directly as a result of torture or duress by a person:

- (a) In the capacity of a public official; or
- (b) acting in an official capacity; or
- (c) acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity

Proposed s.27D (2) therefore draws immediately upon the language of Article 1 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, a convention to which Australia is a state party (CAT) .

Similarly, the definition of torture in proposed s.27D (3) draws directly from the language of the Article 1 definition of torture in the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ,and its closing paragraph draws from the closing sentence of Article 1 (1) of CAT, namely "It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions", by stating in the text of the proposed amendment "but does not include an act or omission arising only from, inherent in or incidental to lawful sanctions that are not inconsistent with the Articles of the Covenant" (being the *International Covenant of Civil and Political Rights*).

Presumably this allows lawful sanctions by acts and omissions that inherently or incidentally cause pain or suffering but are otherwise consistent with the civil and political rights of the ICCPR – most likely those dealing with criminal or administrative procedure and trial process - in terrorism related matters, as standing outside the definition of torture.

Several changes could usefully be made:

A useful (and more expansive) addition to proposed s.27D (3) would be to include after “the Articles of the Covenant” the words “and the Articles of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, thus broadening and reinforcing the potential procedural situations captured by the discretion to exclude.

Furthermore, Australia’s obligations as a states party to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* also include obligations under Article 16 of the CAT, which covers “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1”. General Comment 2 on Implementation of Article 2 of CAT by the UN Committee Against Torture¹⁶ states in paragraph 3:

The obligation to prevent torture in article 2 is wide ranging. The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter ill-treatment) under article 16, paragraph 1, are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture. Article 16, identifying the means of prevention of ill-treatment, emphasises “in particular” the measures outlined in articles 10 to 13, but does not limit effective prevention to these articles... In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure.

To fulfil Australia’s international treaty obligations, proposed s.27 D of *Foreign Evidence Act 1994* (Cth) should therefore be amended to *include a third exception to admissibility*, namely the imposition of cruel, inhuman or degrading treatment or punishment, when such acts are committed by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity. These are acts that are clearly different from acts of duress in proposed s.27D (3) and form a range of unacceptable infringements of human rights from an evidentiary standard that fall below the very high definitional threshold of torture.

Inclusion of this additional category will also avoid semantic and technical debate before and during proceedings about the boundaries of the definition of torture in situations where the admissibility of foreign material or foreign government material is contested.

In addition, the linkages between torture and cruel inhuman and degrading treatment or punishment identified by the Committee Against Torture in General Comment 2 are similarly reflected in the combined language of Article 7 of the *International Covenant of Civil and Political Rights* and in the commonality and consistency of language regarding torture and cruel, inhuman and degrading treatment or punishment in the ICCPR Human Rights Committee General Comment No 2: Article 7 (Prohibition of torture or other cruel, inhuman or degrading treatment or punishment).

The definitions that exist of “cruel or inhuman treatment or punishment” and “degrading treatment or punishment” in section 5 of the *Migration Act 1958* (Cth) provide adaptable definitional examples for the inclusion in the Bill of this third exception:

¹⁶ UN Document CAT/C/GC/2 24 January 2008

Cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;
but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the articles of the Covenant

Degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant

. Arrest threshold standards for terrorism offences – reduction of the arrest threshold from reasonable belief to reasonable suspicion

The Bill proposes that the arrest threshold for arrest without warrant for terrorism offences (including foreign incursion offences) be changed from belief on reasonable grounds¹⁷ to the lesser standard of suspects on reasonable grounds.¹⁸

In the Haneef matter, which led to the Clarke Inquiry,¹⁹ the applicable standard for arrest without warrant under s.3W (1)(a) of the *Crimes Act 1914* (Cth) was “that at the time of the arrest the constable must have a reasonable belief that the arrested person has committed or is committing an offence”.

The Clarke Inquiry discussed the suitability of the threshold requirement for arrest under the *Crimes Act 1914* (Cth), both in the context of the relevant standard applying in different Australian jurisdictions²⁰ and in relation to the preceding series of factual circumstances prior to the arrest of Dr Haneef that the AFP arresting officer could believe on reasonable grounds that Dr Haneef had committed the offence of providing support or resources to a terrorist organisation contrary to s.102.7 of the *Criminal Code*.²¹

Mr Clarke QC observed as follows:

¹⁷ See s.3W (1) *Crimes Act 1914* (Cth)

¹⁸ See proposed s.3WA (1) Item 47 of Bill.

¹⁹ *Report of the Inquiry into the case of Dr Mohamed Haneef*. (Clarke Inquiry)

²⁰ See Clarke Inquiry 235-236

²¹ See Clarke Inquiry Chapter 3, 49-53

A requirement of reasonable belief presents a higher threshold than a requirement of reasonable suspicion. Nevertheless, s.3W (1) does not require proof in relation to each element of the offence in question. Accepting for present purposes that Simms (the arresting officer) formed a subjective belief that Dr Haneef had committed an offence against s.102.7, the question is whether he had reasonable grounds for that belief in all the circumstances...

The Inquiry does not exercise judicial power, and I do not consider it appropriate for me to reach a definitive conclusion or to make a finding on the question whether the arrest of Dr Haneef was lawful. I consider, however, it is at least arguable that there existed reasonable grounds for a belief that Dr Haneef had committed an offence against s.102.7 (1) or s.102.7 (2) of the *Criminal Code* at the time the arrest was made. (the question about whether there was a continuing reasonable belief as circumstances transpired was a separate question)

The most pressing question here is whether the post-Haneef reforms to the custody and detention procedures in the *Crimes Act 1914* (Cth) following arrest without warrant, and the reform of AFP internal processes, are robust enough and can be confidently predicted to prevent a repetition of the Haneef matter or something similar.

This is in an environment of the further expansion of terrorism offences under the Bill²² and in a lowering of the threshold standard for arrest without warrant under the *Crimes Act 1914* (Cth)- that is where more terrorism offences will exist (including the 80.2C offence of advocating terrorism, which is captured by the text of the proposed s.3WA of the *Crimes Act 1914* (Cth)), and a lower threshold will apply to affect arrest without warrant.

It is submitted that the present Inquiry needs to consider these questions to make a proper appraisal of the appropriateness of reducing the present arrest without warrant threshold in the *Crimes Act 1914* (Cth) for a terrorism offence or an offence of advocating terrorism.

It may be that an introduction of a lower standard of reasonable suspicion demands the introduction of compensatory further safeguards in the custodial and review processes in the *Crimes Act 1914* (Cth) after arrest for terrorism offences without warrant.

. Reporting, communication and retention of information in relation to persons leaving Australia – Border Security reforms

Schedule 6 of the Bill creates a range of *new* border security obligations including the obligation to report on persons *departing from* Australia (s.245LA) – including specified information that includes, inter alia, personal identifiers, and may include personal information, from the operator of an aircraft

²² As terrorism offence is defined in s.3 of the *Crimes Act 1914* (Cth). The additions to terrorism offences in the Bill are (i) offences against Subdivision B of Division 80 of the Criminal Code; offences against Part 5.5 of the Criminal Code (Foreign incursions and Recruitment) and certain offences under Part 4 and Part 5 of the *Charter of the United Nations Act 1945* Cth

or ship due to depart from a place in Australia on a flight or voyage to a place outside Australia – to the Department of Immigration.

Under s.245LB (1) the Department may then collect information (including personal identifiers) from the above reports and is then required under s.245LB (3) to disclose that information (including personal identifiers) to the Australian Customs and Border Protection Service.

The collection and disclosure of that information to the Australian Customs and Border Protection Service extends to *personal information* – see the application of the access to information and disclosure of information facilitation provisions of the *Migration Act 1958* (Cth) – ss 336D (access to identifying information), 336E (disclosure of identifying information), and 336F (disclosure of identifying information to foreign countries) – by the text of proposed s.245LB – stating that the aforementioned provisions “apply to personal information collected under this Division, or under subsection 64ACA (11) or 64ACB(8) of the *Customs Act 1901*, in the same way as they apply to identifying information.”

This reporting of information on persons departing from Australia to the Australian Customs and Border Protection Service is linked to the increase in Customs Officers powers to detain under the Bill’s proposed amendments to the *Customs Act 1901* (Cth) – see Schedule 3, proposed s.219ZJCA of the Bill ‘Detention of person for national security or security of a foreign country’

The critical issues in these reforms are:

. s.5 of the *Migration Act 1958* (Cth) states that personal information has the same meaning as in the *Privacy Act 1988*.

s.6 of the *Privacy Act* states that personal information means:

information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion *is true or not*; and
- (b) whether the information or opinion is recorded in a material form or not (emphases added)

. The information to be reported on a passenger or crew member by the operator of an aircraft or ship must, under proposed 245LA (4) “include the information relating to the passenger or crew member that is specified, as mentioned in subsection 245J(3), in relation to the relevant approved primary reporting system”.

S.245J (1) of the *Migration Act 1958* (Cth) states that “The Secretary, must, for each kind of aircraft or ship to which this Division applies, by legislative instrument, approve a system for the purposes of reporting under this Division. The system may be an electronic system or a system requiring reports to be provided in documentary form”. S.245J (3) of the *Migration Act* (as to be amended) states that the instrument of approval of a system for reporting on passengers or crew must also specify the information (including personal identifiers) about passengers or crew that is to be reported by that system.

. The reforms therefore anticipate the mass transmission of personal information of all persons departing Australia (which is defined as above to include opinions about identified individuals, whether the opinion is true or not and potentially sourced from information or opinions not recorded

in a material form), from the Department of Immigration to the Australian Customs and Border Protection Service.

In the Attorney General's media release of 23 September 2014 "Counter Terrorism Legislation Amendment (Foreign Fighters) Bill" (see appendix a to this submission) under the heading "Border Security" it is anticipated that the Bill's reforms will:

enhance border security by ensuring certain biometric information can be appropriately obtained, retained and used" and 'better support the use of automated border processing technology (known as e-Gate) to collect and retain personal identifiers of citizens and non-citizens in immigration clearance or upon departure, and to permit the disclosure of that information and require air and sea carriers to provide information in advance on departing travellers through an approved reporting system.

Whilst s.245J (1) of the *Migration Act 1958* (Cth) devises a reporting system by legislative instrument, the reforms proposed in Schedule 6 of the Bill make no reference to any obligation governing arrangements for the management and destruction of personal information and personal identifiers of the overwhelming majority of innocent persons departing Australia, who are not of, and never will be of, national security interest either for Australia or for foreign countries, and for whom exceptionally based personal information – consisting of opinions which may or may not be true and consisting of opinions which may not be recorded in a material form - might well have been transmitted from the operator of a ship or aircraft, to the Department of Immigration and then reported to the Australian Customs and Border Protection Service under the legislative reforms.

Several changes could usefully be made:

In this respect, the Schedule 6 of the *Counter Terrorism Legislation Amendment (Foreign Fighters) Bill* raises quite similar issues to the breadth of retained information from expanded ASIO computer access warrants under the *National Security Legislation Amendment Bill (No 1) 2014* – please see the discussion of this matter the PJCIS *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014* at 45-46.

It is therefore appropriate that Division 6 of the Bill be amended to include a clause obliging the Minister (in relation to the arrangements for the reporting of persons departing from Australia under proposed s.245LA, the subsequent collection of information under proposed s.245LB(1) and the disclosure of that information under proposed s.245LB to the Australian Customs and Border Protection Service) to consult with the Australian Privacy Commissioner and the Australian Customs and Border Protection Service and develop guidelines (under the authority of a further amendment to the *Migration Act 1958* (Cth))as to the subsequent management, review, destruction and retention of personal information so transmitted for persons not reasonably, or no longer reasonably, of national security interest. Such guidelines should also be required to be tabled in Parliament.

In this respect, reference should be made also to Recommendation 4 of the PJCIS *Advisory Report on the National Security Legislation Amendment Bill 2014*, which recommends a review of existing Attorney General's guidelines issued under s.8A of the *ASIO Act 1979* (Cth) regarding requirements to govern ASIO's management and destruction of information obtained on persons who are not relevant, or no longer relevant, to security matters – in the present context, security matters relating to foreign incursions and recruitment.

Referral of Bill to the Parliamentary Committee on Human Rights

The Bill overall raises a range of issues about Australia's compliance with its seven major international human rights treaty obligations²³ and the Bill's Statement of Compatibility With Human Rights (prepared under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*) claims that the Bill is compatible with the human rights and freedoms recognised

That claim is contestable at several points. It is not at all apparent that where a derogation is permitted under international human rights law from the relevant human right, that the means always chosen are necessary, proportionate or reasonable in the circumstances, or manifest the requisite textual specificity to be properly considered as prescribed by law.

These are questions which would be best considered by the Parliamentary Committee on Human Rights.

Following the report of the PJCIS on the Bill, it is submitted that the Bill should be referred to the Parliamentary Joint Committee on Human Rights to examine- in the light of further information elicited during the PJCIS Inquiry and Report – the Bill for compatibility with human rights so defined in Act, and to report to both Houses of the Parliament on that issue, under its s.7 function in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

I would be pleased to provide the Parliamentary Joint Committee on Intelligence and Security with further information in relation to this submission, or to attend a scheduled public hearing of the Parliamentary Joint Committee on Intelligence and Security in relation to this submission.

Yours faithfully

Dr Greg Carne

Associate Professor
School of Law
University of New England
Armidale NSW 2351

²³ For a list of these treaties, see the definition of "human rights" in *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)

"A"



Attorney-General for Australia
Minister for the Arts
Senator the Hon George Brandis QC

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill

23 September 2014

Today I am releasing the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill which I will introduce into the Senate tomorrow (24 September 2014). The Bill will then be referred to the Parliamentary Joint Committee on Intelligence and Security for review.

The suite of reforms in this Bill address the most pressing gaps in our counter-terrorism legislative framework. Measures are focused on the prevention and disruption of domestic terrorist threats.

The escalating security crisis in Iraq and Syria poses an increasing threat to Australia. The Government is particularly concerned about Australians who travel to conflict zones and return to Australia with skills and intentions acquired from fighting or training with proscribed terrorist groups.

Australia's intelligence agencies estimate there are around 60 Australians involved directly in the conflict in Syria and Iraq, with around 100 providing support roles in Australia.

The Government's comprehensive review of Australia's national security and counter-terrorism legislation showed that it does not sufficiently address the emerging and unique domestic security threats posed by the return of Australians who have participated in foreign conflicts, trained with extremist groups, or people in Australia who provide support to those who may seek to do us harm.

In order to tighten existing laws to combat these threats, the Bill will:

- create new offences for 'advocating terrorism' and for entering or remaining in a 'declared zone';
- broaden the criteria and streamline the process for the listing of terrorist organisations;
- extend instances in which a control order may be sought; extend the sunset provisions of the preventative detention order and control order regimes; and include a sunset clause for the 'declared zone' offence;
- provide certain law enforcement agencies with additional tools needed to investigate, arrest and prosecute those supporting foreign conflicts;
- limit the means of travel for foreign fighting or support for foreign fighters; and
- strengthen protections at Australia's borders.

The Government has engaged in extensive consultation with Australia's national security agencies, State and Territory governments, the Opposition, Senate crossbenchers, and community leaders and representatives in the development of these important measures.

The Government thanks all the stakeholders and acknowledges the Opposition's constructive and supportive approach towards the implementation of necessary reforms to Australia's national security legislation.

Given the importance of this legislation, and the fact that it bears directly on the safety of the public, I call upon the Labor Party to expedite its passage through the Parliament without any unnecessary delay.

[Counter-Terrorism Legislation Amendment \(Foreign Fighters\) Bill 2014 \[PDF 1MB\]](#)

[Counter-Terrorism Legislation Amendment \(Foreign Fighters\) Bill 2014—explanatory memorandum \[PDF 1.5MB\]](#)

[Counter-Terrorism Legislation Amendment \(Foreign Fighters\) Bill—media release \[PDF 187KB\]](#)

23 July 2014

BACKGROUND

New Offences

New offence of entering, or remaining in a 'declared area'

A new offence will provide that if a person travels, or remains in, a declared area where terrorist organisations engage in hostile activity, the person is assumed to be engaging in hostile activities with that terrorist organisation. An area will be declared where the Foreign Affairs Minister is satisfied that a terrorist organisation listed under the Criminal Code is engaging in a hostile activity in a particular area of the foreign country. The new offence will enable the prosecution of people who intentionally enter an area in a foreign State where they know, or should know, that the Australian Government has determined that terrorist organisations are engaging in hostile activities and the person is not able to demonstrate a sole legitimate reason for entering, or remaining in, the foreign State.

This new offence will be subject to a 10 year sunset clause.

New offence of 'advocating terrorism'

The Bill introduces the offence 'advocating terrorism'. A person commits an offence if they intentionally counsel, promote, encourage or urge the doing of a terrorist Act or the commission of a terrorism offence. The offence carries a maximum penalty of 5 years imprisonment.

Terrorist organisations—listings and offences

- authorise the Attorney-General to add, remove or alter aliases of a listed terrorist organisation, where satisfied the alias or aliases are those of the listed terrorist organisation
- broaden the terrorist organisation listing criteria in relation to advocacy
- expand the relevant training offence to include participating in training with a terrorist organisation

Control orders

- include additional criteria for control orders where:

the person has engaged in armed hostilities in a foreign state
the person has been convicted of a terrorism offence

amend the criteria for control orders on training grounds to include participating in training with a terrorist organisation, in alignment with the proposed amendment to the training offence

make the threshold for an AFP applicant to request a control order consistent across all criteria as 'suspects on reasonable grounds'

require the AFP member serving an order on a person to advise the person of appeal/review rights

insert a maximum curfew period of 12 hours within a 24 hour period for curfew conditions

allow AFP to use telecommunications interception, under warrant, to investigate the breach of a control order

Preventative detention orders

enable applications for initial preventative detention orders and prohibited contact orders to be made orally or electronically in urgent circumstances

require that the AFP applicant must 'suspect on reasonable grounds', the matters set out in the issuing criteria

provide that a person must be satisfied that it is 'reasonably necessary' to detain the subject for one of the purposes listed

provide for orders to be made where the person's full name is not known provided the person can be identified

Sunset provisions

provide for the continuation of the control order and preventative detention order regimes in the *Criminal Code Act 1995* and certain powers relevant to the investigation of terrorism related offences in the *Crimes Act 1914* for a further 10 years beyond 2015, and the questioning and detention warrant regimes in the *Australian Security Intelligence Organisation Act 1979* beyond July 2016

ASIO's questioning warrant powers

create a new offence for destroying or tampering with a record or thing to prevent its production under a questioning warrant and make other appropriate enhancements to the regime

Search warrants

introduce a delayed notification search warrant scheme—with appropriate safeguards and limits—to allow a search warrant to be executed without the knowledge of the occupier of the premises to ensure suspects are not immediately alerted to the investigation

Arrest threshold

reduce the arrest threshold for terrorism offences (including foreign incursions offences) to 'suspects' on reasonable grounds

Admission of foreign evidence

allow courts greater flexibility to admit material obtained from overseas in terrorism related proceedings, providing that the material was not obtained as a result of torture or duress

Persons of security concern

ensure welfare payments can be terminated for people who have been assessed as a serious threat to Australia's national security where the person's visa or passport has been cancelled

improve the ability of the Australian Security Intelligence Organisation to request the cancellation of a visa based on security concerns and introduce a power to suspend Australian passports and seize foreign passports for 14 days

remove the requirement to immediately notify an individual of the cancellation of a passport to avoid alerting the individual to the existence of an investigation

Border security

enhance border security by ensuring certain biometric information can be appropriately obtained, retained and used

address shortcomings in the current powers of Customs officers under the *Customs Act 1901* to detain persons of interest, and to introduce a new set of circumstances in which a person may be detained by a Customs officer in a designated place (such as an airport)

better support the use of automated border processing technology (known as e-Gate) to collect and retain personal identifiers of citizens and non-citizens in immigration clearance or upon departure, and to permit the disclosure of that information, and

require air and sea carriers to provide information in advance on departing travellers through an approved reporting system.

Other amendments

create consistency in the definition of 'terrorist act' across a number of Acts

amend the definition of a 'terrorist offence' in a range of Acts to include foreign incursions and treason offences and offences against Part 4 of the *Charter of the United Nations Act 1945* and Part 5 of that Act insofar as it relates to terrorism—providing that certain powers in those Acts can be used in relation to these offences

list the Attorney-General's Department as a designated agency under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to allow the department to more efficiently and effectively develop and implement policy around terrorism financing risks, and ensure a more holistic approach to the Government's foreign fighters national security response.