

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



## **SUBMISSIONS TO THE PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY**

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**1. Introduction**

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- 1.1 The Muslim Legal Network (NSW) appreciates the opportunity to provide the following submission to the Parliamentary Joint Committee Intelligence and Security Inquiry (“PJCIS”) into the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill (2014) (“the Inquiry”).
- 1.2 The Muslim Legal Network (NSW) recognises the serious threat posed to Australia and the need to pass legislation swiftly in order to protect Australian citizens. We support that securing the convictions of those who have acted contrary to Australia’s national security; however, such convictions should be justly founded on the high standard of evidence required in other offences by a court of law. We believe that in order to strike the appropriate balance between national security and civil liberties, an appropriate amount of time for careful consideration, critique and deliberation of the Bill is required. In this regard, much like the inquiry into the National Security Legislation Amendment Bill (2014), the Australian public has had a mere nine days to comprehensively review the proposed Bill in its entirety and to prepare submissions. Nine days is not enough time to examine how the proposed legislation will impact upon the civil liberties and fundamental freedoms of Australians, as well as the Bill’s potential breaches into many of Australia’s obligations under International Law.
- 1.3 Particularly for the Australian Muslim community, we note that the date for the Inquiry is also the week preceding the Islamic religious festival of Eid-ul-Adha, which has been a further cause for time restraints to the writers of this submission. This has severely impacted upon our ability to engage and consult with members of the Australian Muslim community.
- 1.4 The Bill and Explanatory Memoranda contains about 400 pages worth of reading material and consequently, we have chosen to limit our submissions to eight points only. We acknowledge and appreciate the Committee’s generosity in assisting us to complete our submission on time and contributing to the necessary debate regarding the Bill.
- 1.5 In our last submission to the Committee concerning the inquiry into National Security Legislation Amendment Bill (2014), we respectfully submitted that the Prime Minister’s use of the phrase ‘Team Australia’ was divisive and caused further marginalisation of the

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Muslim community. We received correspondence from the Attorney General's Department stating that as a result of public consultation, the Department would be mindful of the language used when speaking about the Muslim community and encourage harmony.

1.6 It is with great disappointment that the Prime Minister is still embarking on dangerous and divisive rhetoric when commenting on the Muslim community. There has been a significant rise in Islamophobia since this Bill was introduced and a number of racially motivated attacks have been committed towards Muslim Australians. In the midst of this, the Prime Minister has made inflammatory comments towards Muslim women who choose to wear the face veil (Niqab) and called for their segregation at Parliament House after being screened by security. For the Prime Minister to have a national discussion on the practice of an extremely small minority of Australians invokes disharmony and prejudice at a time when tensions against the Muslim community are high. We submit that the Government's current rhetoric is working to increase the risk to the safety of visibly identifiable Muslims in their day-to-day lives, namely Muslim women who choose to wear the Hijab or Niqab.

1.7 The Muslim Legal Network (NSW) is concerned with the limited discussions regarding the root causes of radicalisation of Australia. Radicalisation affects not only a small percentage of the Australian Muslim community, but also the rising right wing groups that are absent from the national discussion regarding radicalisation. Preventing radicalisation in Australia will never be achieved by a purely legal approach and we must embrace holistic and multi-faceted approaches to address and eradicate radicalisation. This includes engaging in a series of grassroots community projects such as People against Violent Extremism (PaVE) offered by co-founder Anne-Azza Aly

1.8 The interplay between racial and ethnic profiling and the expansive definition of advocating terrorism is likely to give rise to the discrimination of ethnic, racial and religious groups. This could lead to the marginalization of those already at risk of radicalisation and in turn, increase the risk of terrorism.

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### **2 Recommendations**

#### **Advocating Terrorism**

1. The proposed offence should be removed from the Bill.
2. Alternatively, if the proposed offence remains in the Bill, we respectfully submit that:
3. The definition of advocacy should be construed narrowly as opposed to the expansive definition currently proposed.
4. That there be an exemption for historical religious stories being used in sermons.
5. That there be no departure from the burden of proof being placed on the prosecution.
6. That specific intent remains as the mens rea necessary to constitute the offence and not mere “recklessness”.

#### **Custom’s detention Powers:**

7. That the definition of serious commonwealth offence as stated in section 219ZJB of the Customs Act remain.
8. That the time limit for customs officers to detain suspected persons remain at 45 minutes and not be increased to 4 hours.
9. That further safeguards be introduced to the provision that would ensure that the accused be afforded legal representation.
10. There is currently no mechanism for monetary compensation being given to innocent people who are questioned and they miss their flights. The Muslim Legal Network (NSW) proposes there should be compensation should be awarded to innocent people who suffer reasonable financial lost, such as that caused by missing a flight.

#### **Entering or remaining in a ‘declared area’**

11. That the appropriate test be for the Prosecution to prove (as the second element of the offence) that the accused travelled for an illegitimate purpose.
12. That a statutory limitation be placed with respect to this offence of 6 months.

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13. That the cessation of declaration be reduced from three years to one.

**Delayed Notification**

14. That the provision be removed from the Bill.

15. Any amendments to the regime for issuing warrants should retain the requirement that the issuing officer concludes that there are “reasonable grounds for believing” that a terrorism offence is about to be committed, and that entry and search will substantially assist in the prevention or investigation of such offences.

16. Any amendment or change to the regime for issuing warrants be limited to only those situations where it is believed that a terrorism offence is about to be committed. Investigations of terrorism offences that have already occurred ought be dealt with in the same way as the investigation for other serious offences.

17. Any power to conduct covert entry and search of premises be limited only to those premises subject of a reasonable belief that search of the premises will substantially assist in the investigation or prevention of a terrorist offence.

18. With respect to the time for giving the occupier’s notice; s 3ZZDC. It is noted that there is a 6 month limit, with the possibility for extension. It is proposed that there be a requirement that such notice be given “as soon as practicable” after the search. Such a requirement would permit the secrecy whilst there is a genuine investigative imperative to do so, whilst emphasizing that individuals should be notified as soon as possible of the covert entry to their premises.

19. 3ZZDC should be amended to ensure that occupier’s are notified “as soon as practicable” of the entry and search of their premises.

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**3 Foreign Sourced Evidence**

3.1 The amendments to the Foreign Evidence Act 1994 (FA ACT), seek to broaden the scope of a 'designated offence' to include 'terrorism-related proceedings' and to make an exception to the admissibility of evidence in such 'terrorism-related proceedings'. A Designated Offence already covers offences under Part 5.3 (Terrorism) and Part 5.4 (Harming Australians) of the Criminal Code 1995. Certain amendments to the above definition are necessary to bring the Act in line with other amendments currently being debated in this Bill. For example a new Part 5.5 of the Criminal Code Act 1995.

3.2 The Explanatory Memorandum has suggested that the current FA Act is limiting as far as it relates to 'Foreign Government material'. The reasoning behind this amendment is that in many situations where countries are involved in War/dispute, there is no 'functioning Government'.

3.3 Prima facie, a number of issues surface. First of which, is the impact on the separation of powers. The amendments grant further powers to the Executive that should in fact reside with the Judiciary. The other issue is its lack of necessity since these evidentiary issues are covered by the Evidence Act. Namely, section 65 of the Evidence Act 1995 which creates an exception to the hearsay rule if the maker is not available. Last of which, is the dangers of the rules of evidence not applying.

3.4 Delving into the detail, the MLN is concerned that in countries where there is extreme conflict, especially in war where it is alleged there is 'no functioning Government', there is every likelihood that there will be a lack of a 'foreign authority'. Secondly, on what basis can we safeguard the foreign evidence which is obtained in circumstances that the foreign country is not subject to the same rules of law that we take pride in Australia? The MLN supports the submission by the Gilbert & Tobin Centre of Public Law that caution should be taken when adducing evidence that is 'problematic and untestable' (we'll need the reference for this).

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- 3.5 Furthermore, there is a risk that political allegiance within conflict zones will increase the likelihood of bias foreign evidence. This notion is not exclusive to evidence obtained in a country of conflict, it is similarly applicable to foreign evidence acquired from coalition countries. It will then be extremely difficult for the courts to assess any levels of bias or ulterior motive behind the adduced evidence. Should these amendments be implemented, there will be a need for increased precaution by the courts to disallow foreign evidence from becoming the common source of evidence.
- 3.6 Section 27B deals with adducing ‘foreign government material’ in terrorism-related proceedings and provides that such evidence must be adduced in the following manner; it must be annexed to a written statement by a senior AFP member, verified on oath or affirmation by the member, and meet the following requirements in subsection (2) which is to relate only to foreign government material annexed to the statement, state what the material is, state on the basis of the best information held by the Australian Federal Police, and state how the material and any information contained was obtained by the first foreign authority and each step in the process by which the material or information came from that foreign authority into the possession of the senior AFP member.
- 3.7 The countries which these provisions will most likely apply are in current conflict and the reliability of such evidence would be in doubt due to the instability and methods of collection which are less stringent than ours. The AFP member is required to provide evidence that the information received from foreign government was not via torture to ensure it is admissible. The issue pertaining to how the AFP member would ensure that the collection process of the evidence in the country of origin was done in an acceptable manner to be adduced in an Australian Court, will be difficult to establish.” The Explanatory Memorandum details the need for an AFP member to stipulate how the evidence was obtained and what methods were used to obtain the evidence ‘to the best of the member’s knowledge’.
- 3.8 Section 27C gives the Court a discretion to prevent material being adduced under s27B. However it limits that evidence to be produced only by the Prosecution, a responsible authority under the Proceeds of Crime Act 2002, or a member of the AFP. There is no scope in the proposed legislation for a defendant to question the Ministers’ decision, and by extension the admissibility of the evidence, or to ascertain their own foreign evidence



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to rely upon. This will impinge on their right to a fair trial and their right to fairness generally.

3.9 Moreover, the MLN supports the mandatory exception of obtaining evidence under duress or torture. However, additional safeguards are needed on the basis that some individuals giving evidence would be reluctant to disclose certain information if they were in fear of repercussions in their country of residence. The witness may be in fear of evidence being made available on public record and thus may not disclose that they have fears for their safety. The MLN suggests that torture and duress through indirect means should also be included in the exception under the proposed section 27D. We also submit that the exception should be broadened to allow the defendant to rely on indirect evidence and material that suggests torture is practiced by a particular individual or organisation, rather than only being able to rely on 'direct' torture by an 'official'.

3.10 It must be noted that section 27D explicitly states the Rules of Evidence do not apply. Again, this is of fundamental concern to any defendant receiving a fair trial. An individual charged with a terrorist-related offence should be treated the same as any other individual charged under Australian law. We accept that terrorist-related offences are serious criminal charges and individuals should have every right to have their freedoms protected in a Court of law. Evidence obtained through Certificates, and if the maker is not available, is an exception under the hearsay rule (Section 59 and 65 respectively of the Evidence Act 1995). The MLN strongly opposes the Government's proposal to exclude the rules of evidence.

3.11 The MLN adopts the Gilbert & Tobin's submission proposing the necessity for jury directions in warning the jury of the prejudicial nature of foreign evidence so the appropriate evidentiary weight may be given. We therefore suggest the need for a list of considerations that must be taken into account by a Court when balancing the reliability of the evidence. For example, whether immunity or leniency has been obtained, whether the evidence is bias due to a particular political or religious alliance, etc.

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**4 Advocating Terrorism: Section 80.2C of the Foreign Fighter Bill**

While we believe that the incitement of violence should be criminalised, the introduction of an “advocating terrorism” provision will erode the fundamental civil liberties of Australians, breaches the International Covenant on Civil and Political Rights and will have a chilling effect on intellectual discourse and debate, journalism and religious communities. This provision is an ideological attack on the fundamental human right of freedom of expression. There is also sufficient legislation that already exists that criminalises the incitement of terrorism.

4.1 The definition of Advocacy is contained in section 80.2C(3) as:

*“...a person advocates the doing of a terrorist act or the commission of a terrorism offence if the person counsels, encourages, or urges the doing of a terrorist act or the commission of a terrorism offence”.*

4.2 The definition of a “terrorist act” has the same meaning as in section 100.1 of the Criminal Code, being:

*“terrorist act means an action or threat of action where:*

*(a) the action falls within subsection (2) and does not fall within subsection (3); and*

*(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and*

*(c) the action is done or the threat is made with the intention of:*

*(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or*

*(ii) intimidating the public or a section of the public”.*

4.3 The definition of terrorism offence is the same meaning as in subsection 3(1) of the Crimes Act 1914.

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- 4.4 The expansive definition of the term “advocacy” is not limited to the physical conduct of an accused, but also extends to statements that could be interpreted as the counselling, encouraging or urging a third party to commit a terrorist act or the commission of a terrorist offence. This is irrespective of whether a terrorist act or the commission of a terrorism offence actually occurs. Essentially, this section will target people based on their speech, rather than conduct. This will have a chilling effect on criticism being made regarding the Australian Government’s foreign policies, which will effectively work to undermine the nature of intellectual debate and discourse, which is a central pillar of democracy.
- 4.5 Under this proposed offence for example, it is unclear whether the condemnation of Israel’s apartheid would constitute advocating terrorism. Or for example, whether people asserting their support for the freedom fighters opposing the Assad regime in Syria, or the support of the ANC in South Africa during the 1990’s.
- 4.6 It is unclear whether journalists, who choose to investigate and publish stories, that may affect Australia’s national security interests, but which are fundamental to broader debates regarding public interest, would also satisfy the elements of the offence. This proposed offence would silence “whistle-blowers” that may have information pivotal to the interests of the public. This is a frightening proposition to consider in a democracy such as ours. This provision will limit the public’s ability to speak openly about war, armed conflicts and foreign policy, especially if it involves Australia or her allies.
- 4.7 Another cause for concern is the relationship between the proposed offence under the Bill and the role of social media and the Internet. If for example, a third party posts material either to your social media account, or if an individual engages with material deemed to be considered ‘advocating terrorism’ through a mere “like” or share on social media sites, the charge could arguably be proven. This works to place a large proportion of individuals at risk of prosecution and could potentially be considered a limitation on the expression of free speech. If this sounds far fetched, it’s because it is due to the expansive definition of advocacy. We do not know how this provision will relate to social media.

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4.8 Australia's obligations under International Covenant of Civil and Political Rights (ICCPR) should not be discharged under the guise of national security as the proposed "advocate terrorism" offence is not proportionate to the need to protect national security. This, coupled with the current political climate of the foreign fighters bill being introduced and the government's rhetoric regarding the sacrificing of certain freedoms to ensure the security of the nation, should give rise to this Bill being further scrutinized and reviewed for the potential impact on human rights obligations.

4.9 We respectfully submit that there is a failure of adequate safeguards in place to allow the restriction, suspension of these fundamental rights for the operation of the proposed section 80.2C.

4.10 Specifically, we submit that the proposed offence violates the following articles under the ICCPR:

- a) Article 4 (2) of the ICCPR provides that the freedom of thought, conscience and religion.
- b) Furthermore, article 19(2) of the ICCPR regarding the right to freedom of expression is breached.

4.11 We respectfully submit that this provision will have severe limitations upon the operation of the freedom of expression in Australia, which is not proportionate to the threat against Australia's national security. By curtailing speech, the result will be those who are at risk of becoming radicalised will go "underground". It will not limit the influence of those advocating violent extremism and radical ideologies, especially in the context of sheik google and sheik youtube in the context of social media. The restrictions on the freedom of expression are not reasonable, necessary or proportionate to the threat faced by Australia.

4.12 Australia has one of the most comprehensive counter terrorism laws in the developed country. We strongly disagree with Senator George Brandis assertion that there is a "current gap in the law around individuals promoting terrorism". The current laws

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already criminalise behaviour that encourages terrorist acts or the commission of terrorism offences.

4.13A current example of the effectiveness of the current legislation and the unnecessary introduction of further legislation is *The Queen v Khazaal* [2012] HCA 26 (10 August 2012) (“Khazaal Case”).

4.14 In the Khazaal Case, the accused collated a 110 page book titled “*Provisions of the Rules of Jihad: Short Judicial Rulings and Organisational Instructions for Fighters and Mujahideen Against Infidels*”. He was found guilty of making a document in connection with a terrorist act and sentenced to 12 years imprisonment. The Jury was unable to reach a verdict on the additional charge of attempting to incite others to commit a terrorist act. In 2011 the New South Wales Court of Criminal Appeal (NSW CCA) overturned the conviction and ordered a retrial, to be heard with the incitement retrial. The Crown was granted special leave to appeal to the High Court, on the basis of provisions in the Criminal Code Act 1995 relating to evidence. The High Court of Australia rejected the accused’s assertion that the manual had not been intended to incite extremism.

4.15 On 10 August 2012 the High Court unanimously allowed the appeal of the Commonwealth Director of Public Prosecutions, overturning the NSW CCA decision and reinstating the conviction. The court remitted the matter to the NSW CCA to consider Mr Khazaal’s sentence appeal. On 13 June 2013 the NSW CCA dismissed Mr Khazaal’s appeal against the severity of his sentence. Mr Khazaal may be eligible for release on parole in 2017.

4.16 We respectfully submit that the introduction of this section is not required, as the criminalisation of inciting the carrying out of terrorism act or a substantial terrorist offence is enshrined in section 11.4(1) of the Criminal Code which states that:

- a) “A person who urges the commission of an offence is guilty of the offence of incitement”.
- b) Section 11.4(2) of the Code states that “the person to be guilty, the person must

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intend that the offence incited be committed”.

- c) Section 11.4(3) of the code states that “a person may be found guilty even if committing the offence incited is impossible”.

4.17 The existing good faith defence enshrined in section 80.3 of the Code, is not a complete defence but rather espouses considerations that can be taken into account when determining whether the accused is guilty of an offence. It is unclear how the good faith defence will operate in the context of terrorism offences. The defence does not ensure that communication of particular ideas intended to encourage public debate are not criminalized. By placing the onus on the accused to prove beyond reasonable doubt that their conduct or speech was undertaken in “good faith”, it is essentially a reversal of the onus of proof.

4.18 The reversal of the onus of proof marks a serious departure from the cornerstone of our legal system. It should be a rare event, rather than being the default stance of our Government.

4.19 The assignment of legal burden also has implications for the application of evidentiary principles. The erosion of an accused’s right to silence, when combined with the reversal of the burden of proof will also have an impact on the right to a fair trial.

4.20 There are also serious concerns regarding the inclusion of “recklessness” in determining the intention of the accused.

4.21 Religious communities could also face being charged with this offence if they refer back to stories in the Quran, Bible or the Torah in their sermons. Although taken out of context, based on the broad definition of advocacy, it would satisfy the elements of the offence. As such, we respectfully submit that this proposed offence is not lawful, in that it could operate to restrict or prohibit the free exercise of any religion. The intellectual discourse regarding comparative religions, espousing stories of the followers of the prophets and other historical stories from religious texts will be affected.

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**Recommendations**

- 1. The proposed offence should be removed from the Bill.**

**Alternatively, if the proposed offence remains in the Bill, we respectfully submit that:**

- 2. The definition of advocacy should be construed narrowly as opposed to the expansive definition currently proposed.**
- 3. That there be an exemption for historical religious stories being used in sermons.**
- 4. That there be no departure from the burden of proof being placed on the prosecution.**
- 5. That specific intent remains as the mens rea necessary to constitute the offence and not mere “recklessness”.**

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### **5 Customs' Detention Powers**

5.1 The proposed amendments to the detention power in section 219ZJB of the Customs Act relate to:

- Extending serious Commonwealth offence' to *any Commonwealth offence that is punishable upon conviction by imprisonment for a period of 12 months or more;*
- Expanding the applicability of the detention powers to include where an officer has reasonable grounds to suspect that the person is *intending* to commit a Commonwealth offence;
- Expanding the required timeframe by which an officer must inform the detainee of their right to have a family member or other person notified of their detention from *45 minutes to 4 hours;* and
- Introducing a new section with a new set of circumstances in which a person may be detained in a designated area that relates to national security or security of a foreign country.

5.2 It is our submission that the aforementioned amendments to Customs detention powers will significantly conflict with the International Covenant on Civil and Political Rights (ICCPR). In particular, Articles 9, 12, 17, 18 and 19 will be breached as a result of the amendments.

5.3 Article 9 of the ICCPR provides that no one shall be subjected to arbitrary arrest or detention, or deprived of their liberty except on such grounds and in accordance with such procedures as are established by law. The expanded scope of the Customs detention power will engage a detainees' right to freedom from arbitrary detention, and will considerably restrict their freedom of movement. This is exemplified by the reduced threshold for a detainable offence, the reduced onus of proof and the expanded timeframe of detention from 45 minutes to 4 hours. Although the proposed amendments are an attempt to target the threat posed by foreign fighters, they considerably hinder an individuals liberty where the threshold to carry out such powers is extremely low.

5.4 Article 12 of the ICCPR provides for right to liberty of movement, which is completely rescinded by the proposed amendments. In particular, the expansion of the required



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timeframe by which an officer must inform the detainee of their right to have a family member or other person notified of their detention will be expanded from 45 minutes to 4 hours. It is our submission that such an expansion will not only compromise the individuals rights under the ICCPR, but also serves no legitimate purpose to strengthen Australia's national security. The timeframe of 45 minutes should act as a significant buffer to allow a thorough customs' analysis before alerting a detained person of their right to notification. Expanding the time frame to 4 hours is not only burdensome on a detained person, but does not serve a legitimate purpose of protecting our national security.

5.5 Articles 17, 18 and 19 of the ICCPR provide protection against unlawful interference with an individual's privacy, and the right to freedom of thought, consciousness and religion, as well as opinions without interference. We respectfully submit that the proposed amendments to the Customs Act display a clear invasion of a person's privacy, as well as an incursion of their personal beliefs. The proposed amendments highlight that a person may be detained over areas that may deemed to be a threat to national security, however such a threshold is highly subjective and does not adequately address the concerns as to why an individual may be stripped of their civil liberties for extended periods of time over a mere suspicion. It is essential to note that the proposed amendments are aimed at strengthening our national security, however it must be noted that the civil liberties of a person must not be deprived of throughout the process.

5.6 This provision attempts to expand the definition of serious commonwealth offences. There is no legislative reason to expand the definition or introduce this offence. Currently, under section 219ZJB of the Customs Act 1901 (Cth) currently states that:

*(1) An officer may detain a person if:*

*(a) the person is in a designated place; and*

*(b) the officer has reasonable grounds to suspect that the person has committed, or is committing, a serious Commonwealth offence or a prescribed State or Territory offence.*

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*(2) The officer must advise a police officer of the person's detention as soon as practicable after detaining the person.*

*(3) An officer who is detaining a person under this section must ensure that the person is delivered, as soon as practicable, into the custody of a police officer to be dealt with according to law.*

*(4) If an officer who is detaining a person under this section ceases to have reasonable grounds to suspect that the person has committed, or was committing, a serious Commonwealth offence or a prescribed State or Territory offence, the officer must release the person from detention immediately.*

*(5) Subject to subsection (7), if a person is detained under this section for a period of greater than 45 minutes, an officer who is detaining the person under this section must inform the person of the right of the person to have a family member or another person notified of the person's detention.*

*(6) Where a person detained under this section wishes to have a family member or another person notified of the person's detention, the officer must take all reasonable steps to notify the family member or another person.*

*(7) An officer who is detaining the person under this section may refuse to notify a family member or another person of the person's detention if the officer believes on reasonable grounds that such notification should not be made in order to:*

*(a) safeguard the processes of law enforcement; or*

*(b) protect the life and safety of any person.*

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**Recommendations:**

- 6. That the definition of serious commonwealth offence as stated in section 219ZJB of the Customs Act remain.**
- 7. That the time limit for customs officers to detain suspected persons remain at 45 minutes and not be increased to 4 hours.**
- 8. That further safeguards be introduced to the provision that would ensure that the accused be afforded legal representation.**
- 9. There is currently no mechanism for monetary compensation being given to innocent people who are questioned and they miss their flights.**

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**6 Entering or remaining in a 'declared area'**

- 6.1 The proposed Section 119.2 creates the new offence of entering or remaining in a 'declared area.'
- 6.2 The Explanatory Memoranda provides that the offence will be framed in such a way that the prosecution proves the enter or remaining in a declared area, then the burden of proof shifts to the accused to prove a legitimate purpose by a standard of reasonable possibility, which then reverts back to the prosecution to disprove that evidence beyond reasonable doubt.
- 6.3 We are opposed to the inclusion of this offence in its entirety. We submit that it is not effective in achieving its aims and that the test is fundamentally problematic.
- 6.4 The explanatory memoranda states that this provision is intended to provide a safeguard against Australians who return from a declared area with enhanced capabilities that may facilitate terrorist acts in Australia. However, if this provision is legislated, it is submitted that those intent on fighting overseas will simply enter declared areas from indirect routes to avoid detection by the authorities that would defeat the fundamental purpose of this provision.
- 6.5 This provision does infringe on civil liberties, such as the right to silence and the presumption of innocence. Consequently, the question arises should this threat disturb the civil liberties that this country regards highly?
- 6.6 The offence places the evidential burden on the defendant to prove that they entered or remained in a 'declared area' For a legitimate purpose, The Explanatory Memoranda states that this does not involve a reversal of the onus of proof as it contains an offence-specific defence. Although the burden of proof initially rests with the Prosecution, the elements of the offence are easier to prove than the defences set out in 119.2(3). The only element to the offence that the prosecution is required to prove is simply the entering or remaining into a declared area. In the case where a whole country is a 'declared' area, a passport stamp would be deemed to be sufficient evidence required by the prosecution to establish the elements of an offence. As the legislator assumes that by travelling to a

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declared area, the accused has travelled to that area for an illegitimate purpose, it is highly likely that the accused would be convicted if he exercised his right to silence and did not give evidence. Therefore, it is a reversal of onus and a presumption of guilt. In fact, the provision expressly states that the evidential burden is on the defendant which is essentially, a reversal of the onus of proof.

6.7 Furthermore, offences where that contain a reversal of the onus of proof are usually tightly defined. For instance, in a case of a deemed supply of drugs, the trafficable and indictable amounts of that prohibited drug are expressly defined. However, in this offence, declared areas are not subject to tightly defined or reviewable criteria. The status of a declared area can fluctuate and there is no scope for review of the classification of the declaration of an area. We respectfully submit that for an offence with a reversal of the onus of proof, the terms of the section are unprincipled for the reason that they are not tightly defined.

6.8 The test of proving a 'legitimate purpose' is also problematic and difficult to prove. Those who travel to such areas for legitimate purposes in order to visit family members<sup>1</sup> could face difficulty in providing documentation that would suffice to prove such a legitimate purpose. Such witnesses would be overseas, potentially with limited English and potentially in areas where it may be difficult to keep in regular contact. The practical difficulties in the defendant needing to adduce evidence proving a 'legitimate purpose' may force the defendant to give evidence at trial and raise real issues to an accused's right to silence.

6.9 We are concerned by the fact that entire countries have been included in section 119.3(2)(b) despite comments from the Prime Minister and Attorney General that they would most likely not be. This would work to place a large proportion of individuals travelling overseas for legitimate visitation reasons under the operation of the new Act.

6.10 If entire countries are declared, whole ethnic or religious groups will feel targeted and marginalised as merely returning to their country of origin could result in criminal charges under the operation of the new Act. This section could also include areas such as

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Gaza or Kurdistan where specific groups of people will be affected and feel further targeted and marginalised by the Government.

6.11 A practical example of unintended people being targeted by this provision is for example, if the southern suburbs of Beirut were to become a declared area due to the fact that Hezbollah have control over that region, anyone who has travelled to Beirut Airport could be charged with entering a declared area, regardless of their activities whilst in Beirut. Also, Indonesia harbours terrorist organisations such as Jamih Islamiya, however, the Australian Bureau of Statistics recorded that in 2013-2014 1 012 000 Australians visited Indonesia. If Indonesia was to become a declared area, potentially over 1,000,000 Australians could be charged with entering or remaining in a declared area. It is respectfully submitted that this an extremely disproportionate and unjustified response to any perceived threat of foreign fighters facilitating terrorist activity in Australia. It does not target those who are fighting, but rather casts a net to capture a significant amount of innocent Australians.

6.12 We are also concerned that ‘remaining’ in a declared area is part of this offence. This raises several practical difficulties. If an Australian has travelled to a certain area and during the visit that place becomes a ‘declared area’, how are the Australian authorities to ensure that this person is actually aware of that place being ‘declared’?

6.13 We express our concerns that where a person is unaware of being listed in a declared area, this will not be included as a defence under 119.2(3).

6.14 This offence essentially criminalises travel and does not require the Prosecution to prove any conduct that would otherwise be considered criminal, such as committing acts of violence or assisting a terrorist organisation. It is the legislator’s assumption that there is no other activity possible but warfare, without actually proving that the accused engaged or took part in such warfare. We understand it is to serve as a ‘back-up’ or alternate offence to the more serious offences of terrorism in the Act. Generally, back-up offences still require the Prosecution to prove elements that involve criminal activity or links with criminal activity. However, this offence does not involve either and carries a significant maximum penalty of 10 years for such an act. We submit that the maximum penalty is excessive considering the level of criminality contained in the offence.

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6.15 Another issue with this provision is that there is no statutory limit on the offence. It is an offence where the accused is likely to be asked questions relating to minute detail of their travel (potentially over a long time.) If considerable time has elapsed between the time of questioning and the travel, it is highly likely that the accused's memory of such detail will not be as reliable as it would be closer to the travel. Since it is an offence where the accused will most likely have to give evidence, we submit that a statutory limitation period of six months should apply to this offence to prevent unfairness to the accused.

6.16 We also submit that the cessation of declaration be reduced from three years to one, so that it can be appropriately reviewed annually. This would assist that the rights of Australians are not unjustifiably limited for a prolonged period.

6.17 It is our ultimate submission that this offence is not necessary in achieving the objects of the Act. Travel itself is not indicative of criminal conduct and should not be criminalised. The current legislation is exhaustive and adequately covers the conspiring of terrorist acts, the funding of listed terrorist organisations and adequately provides alternative charges.

**Recommendations:**

**10. That this proposed offence be removed from the Bill.**

**Alternatively:**

**11. That the appropriate test be for the Prosecution to prove (as the second element of the offence) that the accused travelled for an illegitimate purpose.**

**12. That a statutory limitation be placed with respect to this offence of 6 months.**

**13. That the cessation of declaration be reduced from three years to one.**

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**7 Delayed Notification Warrants**

7.1 The right of individuals to privacy, and security of their premises is subject to the right of the community to have offences, especially serious offences, investigated and prosecuted. The balance that is to be struck can be a difficult task. Ultimately, the only way to guarantee that no serious offence, or in particular no terrorism offence, will be committed, is to permit law enforcement agencies to have complete and unfettered access to our property, premises, communication, and indeed the complete and unfettered right to hold and interrogate our selves. This is, of course, untenable, as it would fundamentally alter what we understand to be a free society. Equally fundamental, however, to the operation of a free society, is that any legislative amendment aimed at giving more power to law enforcement authorities only occur as a response to the clearest evidence that such expansion is needed, and that the corresponding curtailment of our individual liberties can be justified by the threat sought to be averted. Ultimately, it is submitted that the proposed amendments fail to show why there is such a clear need to expand the already extensive range of powers available to the AFP and other law enforcement agencies.

7.2 The response to the proposed amendments to permit, by way of the insertion of a new Part 1AAA, the issue of “delayed notification warrants” falls into two categories. The primary response is that there is in truth, no established need to so fundamentally alter a requirement that has sought to strike a balance between the rights of individuals to privacy and the sanctity of their home, as against the right of the community, and the State, to investigate the commission of serious crimes. Even if parliament ultimately concluded that such a fundamental shift were required, the proposed amendments, in their current form, extend well beyond any justifiable need to extend the powers of law enforcement authorities, and specific clauses ought not be enacted.

*Is there a need for delayed notification warrants at all?*

7.3 It is important to keep in mind that these warrants are proposed to operate in a context where the law enforcement body has already been empowered with substantially increased powers of investigation. This includes powers of surveillance, and interrogation well beyond what has traditionally been available to law enforcement officers.



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7.4 Law enforcement authorities have been able to successfully detect, investigate, and prosecute persons planning terrorism offences in this country. Such investigation has taken place from a very early stage in the preparation for such offences, and the existing legal framework has not proven to be an impediment in their investigative work.

7.5 Conversely, the proposed amendments fundamentally alter a balance that has been struck over many years and as a result of a great deal of experience. These amendments strike at fundamental rights and privileges of individuals. The status quo ought not be disturbed unless the clearest possible case for a change is made out.

7.6 There is no question that terrorism offences are of the most serious gravity. Nor that there is a need to meet the threat of terrorism in Australia. However, the power to enter a premises, without the consent of the occupier, is a circumvention of what is widely regarded as a fundamental right. Such powers exist, and are being used as part of a suite of powers available to investigating officials. There is no evidence that establishes that expanding powers in this way will substantially mitigate the threat of a terrorist offence, at least in a way that does not fundamentally alter the freedoms we enjoy.

7.7 The INSLM summarized the AFP submission on the question of delayed notification warrants.<sup>2</sup> Actual experience in NSW and Victoria has not shown a need for the expansion of AFP powers in the way they have asserted. In NSW<sup>3</sup> AFP and state police were able to employ existing powers to successfully identify suspects, collect evidence, and prevent the execution of a terrorist offence. Indeed, in the NSW experience, the use of existing surveillance powers was essential to the success of that investigation.

7.8 Part 5.3 of the Criminal Code deals with “Terrorism”, s 100 defined what a terrorist act is, and a number of sections that follow proscribe various acts as terrorism related offences. Importantly, s 100.4 sets out that the Part “generally applies to all terrorist acts and preliminary acts”. The existing legislation already permits the investigation and arrest of persons at a very early stage of planning for any terrorism offence. In NSW, a number of

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<sup>2</sup> INSLM report 4, pp 60-61

<sup>3</sup> see *R v Elomar & Ors*

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persons were convicted of a conspiracy (or plan) to commit acts in preparation for a terrorist act. An extensive amount of information and material was collected by the AFP and other agencies utilizing the existing law and there was no demonstrated disadvantage or loss of evidence as a result of not being able to conduct covert searches of homes. Indeed, it was the extensive covert surveillance, conducted under existing laws, and over a long period, that proved essential in determining the scope of the conspiracy, and its participants.

7.9 In response to the AFP submission to the INSLM, it is noted that the search warrant only becomes a relevant investigative tool *after* enough material is collected to permit a suspicion or belief that an offence has been or is about to be committed.

7.10 The law surrounding the power of law enforcement officers to enter premises without the consent of the occupier, to search, and seize relevant material has long been the subject of a balancing exercise. The presentation of an occupier's notice has been an important aspect of the balance struck, following many years experience. Parliament should carefully consider whether there is a need for such a fundamental change to this balance between the rights of individuals and the need to investigate serious offences, in circumstances where the existing legislative framework has proven to be entirely effective in the past.

7.11 The requirement to provide an occupier's notice is not only protective of the occupier, of course. The potential for violence, and increased risk of confrontation resulting from the proposed amendments is obvious. Further, removing the requirement for an occupier's notice to be served at the time of the search, and its attendant protections, gives rise to the increased potential for allegations or tampering or "planting" evidence to be made against law enforcement bodies.

The existing regime is protective of investigative agencies, as well as occupiers.

*Submissions with respect to particular provisions.*

7.12 It is important to keep in mind the context in which such legislative amendments are to operate. By the time law enforcement authorities seek a warrant, such "executing

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officer”: s 3ZZAC, must already be seized of sufficient information to permit the “eligible issuing officer”: s 3ZZAD, to conclude that the “conditions for issue” of the warrant have been met. These are set out in s 3ZZBA, and, in summary, require there to be:

- (a) a reasonable suspicion that one or more terrorism offences have been, or about to be committed; AND
- (b) a reasonable suspicion, that entry and search of the premises will substantially assist in the prevention or investigation of one or more of these offences; AND
- (c) a reasonable belief that such entry and search be conducted without the knowledge of the occupier.

7.13 To date, the test for the issue of a search warrant has required a “reasonable belief” with respect to matters in (a) and (b), above, see *George v Rockett*. No explanation as to why the threshold test ought be lowered from the existing need for a “belief” to one requiring only a “suspicion” has been preferred. With respect to any other alleged offence, the required state of mind remains, as it always has; a “reasonable belief” in such matters before a warrant will be issued. The different test immediately results in a special rule for terrorism offences. This is something the INSLM’s report concluded would be “hard to justify”<sup>4</sup>

7.14 Further, attention is drawn to the context in which such an application is made. Firstly, to state the obvious, if a terrorism offence has occurred, it cannot be that a delayed notification warrant will have any capacity to “prevent” such offence. In the event that such an offence has occurred, it does not seem that there could be any justification for a delayed notification warrant at all. A warrant, issued with the traditional requirement for an occupier’s notice to be given at the time of the search would be the appropriate mechanism to permit investigation.

7.15 Nothing in the AFP submission suggests any basis for permitting covert incursion to properties *neighbouring* the premises. This, regardless of the view taken as to whether delayed notification warrants might assist in the detection of offences, is an unwarranted expansion of the power to investigate offences.

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<sup>4</sup> INSLM report 4, pp 61-62

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**Recommendations:**

- 14. That the provision be removed from the Bill.**
- 15. Any amendments to the regime for issuing warrants should retain the requirement that the issuing officer concludes that there are “reasonable grounds for believing” that a terrorism offence is about to be committed, and that entry and search will substantially assist in the prevention or investigation of such offences.**
- 16. Any amendment or change to the regime for issuing warrants be limited to only those situations where it is believed that a terrorism offence is about to be committed. Investigations of terrorism offences that have already occurred ought to be dealt with in the same way as the investigation for other serious offences.**
- 17. Any power to conduct covert entry and search of premises be limited only to those premises subject of a reasonable belief that search of the premises will substantially assist in the investigation or prevention of a terrorist offence.**
- 18. With respect to the time for giving the occupier’s notice; s 3ZZDC. It is noted that there is a 6 month limit, with the possibility for extension. It is proposed that there be a requirement that such notice be given “as soon as practicable” after the search. Such a requirement would permit the secrecy whilst there is a genuine investigative imperative to do so, whilst emphasizing that individuals should be notified as soon as possible of the covert entry to their premises.**
- 19. 3ZZDC should be amended to ensure that occupier’s are notified “as soon as practicable” of the entry and search of their premises.**

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**8 Cancellation of Welfare Payments & Visa Cancellations**

8.1 As regards the “welfare cancellation” provisions, we specifically endorse the recommendations offered by:

1. The Australian Human Rights Commission Submissions dated 2 October 2014; specifically, page 16-19; and
2. Professor Ben Saul Ba (Hons) LLB (Hons) Sydney DPhil Oxford Submissions dated 1 October 2014, specifically page 2; paragraph 9.

8.2 In respect of the “visa cancellation” amendments, we specifically endorse the recommendations offered by:

1. The Australian Human Rights Commission Submissions dated 2 October 2014; specifically, page 16-19, specifically page 14-16; and
2. Gilbert + Tobin Centre of Public Law Submissions dated 1 October 2014 specifically, page 21-22.