



**Media, Entertainment & Arts Alliance
(MEAA)**

**submission to the Parliamentary Joint
Committee on Intelligence and Security
inquiry into the**

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

October 3 2014

The Media, Entertainment & Arts Alliance (MEAA)

MEAA is the largest and most established union and industry advocate for Australia's creative professionals. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians. MEAA's Media section members are bound by the MEAA *Journalist Code of Ethics*.

Introduction

The Media, Entertainment & Arts Alliance (MEAA) is concerned about elements of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* – the second of three tranches of national security legislation being introduced by the government.

MEAA would like it noted that this second tranche has been introduced in a great haste and is being rushed through the parliament without sufficient opportunities being given for considered discussion and debate.

There is no good reason for including the extension of the sunset clauses in this legislation because it does not take effect until more than a year and there has not been a proper opportunity for public or parliamentary debate as to why there is a need to extend the clauses for a further decade without any significant change.

MEAA is also concerned by the new offence of advocating for terrorism and believes that this new offence, coupled with the problematic definition of “terrorist act” has the potential to infringe on freedom of expression and particularly the role of journalists who receive leaked documents.

MEAA would also like it noted that it has already made a submission to the Committee regarding the first tranche of national security changes: the *National Security Legislation Amendment Bill No.1 2014*. MEAA has also appeared at the public hearing into that first tranche. We urge the committee to consider this second Bill in light of the concerns we raised in that first submission about the threats to press freedom, freedom of expression, the right to access information and the public’s right to know.

Those concerns have been echoed by your fellow parliamentarians, by media groups in their submissions, by concerned organisations in Australia, and globally by international freedom of expression organisations.

As MEAA has said before, we believe our concerns about the threats to press freedom and media rights must be considered in any proposed amendments to existing legislation or new laws involving national security, counter-terror, intelligence gathering and surveillance powers.

Failing to do so represents a fundamental assault on the vital role of the media as the fourth estate and will have a chilling effect on journalists and their journalism.

Sunset clauses

MEAA has been raising its concerns over Australia's regime of counter-terror legislation from the outset. Since 9/11 and the Bali bombings, Australia has implemented its counter-terror response through a series of new laws or amendments to increase the powers of its law enforcement and surveillance agencies.

Annually, MEAA catalogues its concerns about these laws in our State of Press Freedom Reports – the archive can be viewed at: <http://www.pressfreedom.org.au/administration/press-freedom-report-archives>

MEAA has written regularly to attorneys-general, state and federal, to directly raise our concerns about infringements on press freedom. We have often worked in concert with Australia's Right To Know (ARTK), the lobby group of media organisations, to highlight these concerns. (MEAA has signed on to the joint media organisations' submissions for both the first and second tranches of national security law changes.)

Past errors by government agencies when it comes to wielding their power should mean that current actions must not go unreported or unchecked; and should mean that powers that have been granted should be subject to review.

The application of sunset clauses on various elements of counter-terror legislation regime is recognition that they are an extraordinary and exceptional response, to operate over a defined time-frame, subject to review.

The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* seeks to extend some of these powers beyond their expiry dates:

- the *Criminal Code's* Division 104 control and preventative detention orders beyond the current sunset date of December 2015;
- the *Crimes Act's* Part IAA, Division 3A stop, search and seizure powers relating to terrorism offences beyond the current sunset date of December 2015; and
- the powers relating to questioning and detention warrants in Division 3 of the *Australian Security Intelligence Organisation 1979 (ASIO Act)* beyond the current sunset date of July 2016.

MEAA believes sunset clauses in Australia's counter-terror legislation regime must be allowed to operate as the law originally intended and scheduled, without extension, and that prior to the expiration of each sunset clause the law should be extensively reviewed and reconsidered by the parliament with appropriate consultation and involvement by the public.

Definition of "terrorist act" and new offence of "advocating terrorism"

MEAA has always believed that the current definition of "terrorist act" in s 100.1 of the *Criminal Code* has been excessively broad and poorly defined. The effect of this is that legitimate areas of free speech and advocacy may be caught as "terrorism".

This is not an unreasonable fear. We should remember that our colleague Australian journalist Peter Greste is currently jailed in Egypt on charges of spreading fabricated news and aiding the Muslim Brotherhood which had been designated a terrorist organisation by Egyptian authorities.

Currently, the *Criminal Code* allows general advocacy activities to fall outside the definition of a terrorist act. As the Law Council noted in 2012 in its submission to COAG's Counter-Terrorism Review Committee:

Actions that take place as a result of advocacy, protest, dissent or industrial action, and are not intended to cause serious harm that is physical harm to a person; cause a person's death; endanger the life of a person other than the person taking the action; or create a serious risk to the health or safety of the public or a section of the public, fall outside the definition of a 'terrorist act'.

However, the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* now seeks to establish a new offence in Subdivision C of Division 80 of the *Criminal Code*. The Bill's Explanatory Memorandum says: "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 and the person is reckless as to whether another person will engage in a terrorist act or commit a terrorist offence." This new offence would be punishable by up to five years' jail.

MEAA is concerned that the definition of "advocacy" could now be used to constrain free speech. For journalists, it could also capture reporting of legitimate news stories that reported on banned advocacy. (The very offence for which Grete has been jailed).

The Law Council warned in its 2012 submission that just such an over-reach was possible:

Whilst the exemption of actions that take place as a result of advocacy, protest, dissent or industrial action from the definition of 'terrorist act' is arguably a safeguard against misuse of the terrorism powers, the use of this safeguard is untested. Concerns have been raised that similar safeguards in the context of 'move on' powers have not been effective. It has been suggested that guidelines should be developed to govern the investigation and prosecution of 'Issues Motivated Groups' which emphasise the importance of respecting the right to peaceful protest, association and freedom of expression and draw a distinction between the activities of such groups and terrorist groups.

MEAA further notes that "promotion" would criminalise generally accepted definitions of freedom of expression. And because the terrorism definition extends to actions against foreign governments, it would capture advocates of even legitimate actions against foreign oppressive regimes. This new offence could also capture journalists reporting on foreign powers using documents that have been leaked to them.

Under section 100.1(1) of the *Criminal Code*, a "terrorist act" includes, among other things, seriously interfering with, or seriously disrupting or destroying an electronic system including and information, telecommunications or financial system et al. Journalists are often handed information by a source as the basis of a news story. Most leaked documents that are given to journalists by whistleblowers and other sources, are leaks that originate from "interfering" with a computer system.

Although there have been no prosecution of whistleblowers under this provision, we have seen the application of State-based laws concerning unauthorised access (analogous to interfering) to computer systems used against whistleblowers and against journalists reporting in the public interest.

Given the treatment of whistleblowers overseas, it would be an easy step for authorities to prosecute whistleblowers – even those in areas far removed from national security – under this provision.

Under the new offence of advocating terrorism, journalists could also be caught for counselling, promoting, encouraging or urging a whistleblower to leak a document. Indeed, the provision is drawn so widely, that urging leaking of documents in general terms may fall within this clause.

MEAA recommends that, so far, as it affects journalists, “terrorist act” should be redefined to bring it into line with internationally accepted norms and existing definitions.

Press freedom concerns

The second tranche also raises concerns relating to how journalists go about their work in the public interest.

Crimes Act 1914 Division 8 Section 3ZZHA Unauthorised disclosure of information

This section creates an offence of unauthorised disclosure of information relating to delayed notification search warrants.

Under the Bill, a delayed notification search warrant must be executed within 30 days of issue, with notice to be given to an occupier within six months of execution. An extension of time may be granted on more than one occasion, provided that the extension is not by more than six months at a time. An extension beyond 18 months may be provided with the Minister’s approval. The offence of unauthorised disclosure of information relating to a delayed notification search warrant carries a maximum penalty of two years imprisonment.

The extraordinary potential time lag between the issuing of a warrant and the notification to the occupier has the potential to impede journalists seeking to report a legitimate news story in the public interest. The creation of the offence would criminalise journalists for doing their job. It also has the potential to threaten whistleblowers, seeking to legitimately expose illegality, misuse, corruption, fraud or health and safety violations.

As such, both journalists and whistleblowers could be subject to jail terms for revealing information in the public interest, particularly any wrongdoing associated with the execution of the warrant.

MEAA believes that either this provision relating to unauthorised disclosure should be removed from the Bill or that an exemption be introduced to protect legitimate disclosure and reporting that are in the public interest.

Criminal Code Act 1995 - New division 119 of Part 5.5

MEAA notes the new division 119 of Part 5.5 of the *Criminal Code Act 1995* relating to the offence if a person enter, or remain in, an area in a foreign country and that area is an area declared by the Foreign Affairs Minister.

Sub-section 119.2(3) describes conduct that would be classed as being for a legitimate purpose in regard to the new offence, and includes:

“[For the purpose of]...

f. making a news report of events in the area, where the person is working in a professional capacity as a journalist or is assisting another person working in a professional capacity as a journalist”

MEAA is grateful for this acknowledgement but believes the words “in a professional capacity” does not reflect the reality of modern media practice.

Conflict zones and other “hostile areas” are locations for legitimate news gathering and reporting in the public interest. There could be several “types” of media practitioner working legitimately (as a reporter, photographer, sound recordist, camera operator, documentary maker and so on...) in these areas:

- Foreign correspondents permanently on overseas assignment for their media organisation;
- “Stringers”, or casual employees, usually already living in the area, who are employed as required by a media organisation;
- Freelance journalists, working as independent contractors, pursuing news stories that they may contribute to media organisations; and
- Writers, authors, bloggers and others seeking to legitimately gather information about the area, conflict or related matter.

Furthermore, other personnel working alongside these media practitioners could be their “fixers”, interpreters, drivers and personal security/close protection. They may be local people or others familiar with an area, language, ethnicity, religion or in some other capacity.

The wording “in a professional capacity as a journalist” is therefore overly proscriptive and hard to define in terms of modern media practice. It also risks being interpreted as excluding some other class of people who would normally be considered as having a legitimate reason to be in the area, working alongside media practitioners.

MEAA believes both references to “in a professional capacity” are entirely unnecessary and in terms of current media practice, meaningless, and should be removed from the Bill.

Summary

As MEAA did with the first tranche of national security legislation – the *National Security Legislation Amendment Bill (No 1) 2014* – we urge the Australian Parliament to carefully consider the threats to press freedom and media rights contain in this second tranche: *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*.

The implications for journalists seeking to carry out their duties in reporting legitimate news stories in the public interest and for whistleblowers seeking to legitimately shed light on wrongdoing but also for journalists and media organisations whose work could be criminalised are grave.

There are also grave concerns for freedom of expression and press freedom arising out of the new offence for advocating terrorism.

MEAA believes this legislation has been introduced in haste and insufficient time is being given to its consideration, particularly as there has been little opportunity for interested parties to scrutinise the legislation, little opportunity for interested parties to attend the public hearings and that there has been a scant 10 days from the time the legislation was introduced to the closing date for public submissions.

Such important legislation affecting, amending and undermining cherished rights and freedoms in Australian society deserves greater consultation and consideration.

Equally, any move to extend current legislations' sunset clauses for another 10 years without proper review or inquiry should be expunged from this Bill.

MEAA urges the Parliament and the Australian Government to take all steps to ensure that media rights and press freedoms are understood, protected and observed in all legislation it is considering relating to national security and anti-terror powers including intelligence gathering and surveillance.