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Australian Parliamentary Joint Committee on Intelligence and Security

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Re: Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill

Dear Committee Members,

This submission raises concerns about the proposed new offenses of advocating terrorism, travel to “declared zones,” and the extended use of control orders and preventative detention in the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill (the “Foreign Fighters Bill”). Human Rights Watch believes these measures are unnecessary and ineffectual in the fight against terrorism, while simultaneously depriving individuals of fundamental rights in violation of international law. We are concerned that the proposed amendment would enshrine into law excessive restrictions on freedom of expression and freedom of movement and exacerbate problems under existing law pertaining to preventative detention and control orders.

Due to the short timeframe given to analyze the 158-page bill, we have not been able to address all human rights aspects of the legislation, and instead have concentrated on areas in which Human Rights Watch has previously commented in Australia and elsewhere. We urge the Australian government to provide ample opportunity for public analysis and discussion, which is crucial for any legislation but particularly important in this case as the bill has serious and long-term human rights implications.

1. “Advocating Terrorism”

The Foreign Fighters Bill introduces a new offense of “advocating terrorism”, whereby a person “intentionally counsels, promotes,

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encourages or urges” a terrorist act or offense, punishable by five years in prison. A person commits the offense if they intentionally advocate a terrorist act or if they are “reckless” about whether another person will engage in a terrorist act in response to their speech.

International law provides that speech which incites violence should be punished as a criminal offense. Australia already has laws that criminalize incitement to violence. Terms such as “encourage” or “promote” are overbroad and vague, greatly expanding the range of possible behavior that is criminalized. This raises serious concerns about undue infringement on free expression. For instance, a preacher expressing support for an Islamic Caliphate could potentially be prosecuted under the proposed law. Similarly, a person who “likes” or Tweets a controversial video on social media could face prosecution for encouraging or promoting the actions portrayed.

The Explanatory Memo asserts that this provision is a legitimate restriction on article 19(2) of the International Covenant on Civil and Political Rights because “freedom of expression may be limited if it is necessary to achieve a legitimate purpose, such as it is necessary in the interests of national security.” While national security interests can be a basis for restrictions on freedom of expression, any such limitations must not only be necessary but also proportionate to a legitimate government aim. According to the United Nations Human Rights Committee, in its General Comment No. 27, for restrictive measures to be lawful, “they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; [and] they must be proportionate to the interest to be protected.” Australia has provided no explanation as to how these limitations either further national security interests and if they do, that they are sufficiently narrow and proportionate. Simply saying in the Explanatory Memo that this is a “reasonable, necessary and proportionate measure” does not make it so.

The fact that speakers may commit the offense not only when they intend the speech to encourage terrorism but also when they are “reckless” as to the impact of the speech underscores the lack of legal certainty in the bill. As the Human Rights Committee has stated in its General Comment No. 34, laws restricting speech “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.” Moreover, the bill does not require a causal link between the offending speech and reckless encouragement—it is irrelevant whether an actual terrorist act has occurred or will occur.

There is little or no evidence that imposing criminal penalties on such speech will deter terrorism, while there is a very real risk that the law will deter free expression through a

chilling effect that provokes self-censorship and inhibits political discourse, including criticism of the government.

Human Rights Watch considers this offense to be unnecessary and could set a dangerous precedent to limit the right to freedom of expression. The breadth of the speech covered by the offense, the vagueness of the language used in the bill, and the fact that existing legislation already covers incitement to violence mean that this provision fails the test of necessity and proportionality for permissible limitations on free expression.

We urge the joint committee to remove this offense from the bill.

2. Entering or Remaining in a ‘Declared Area’

Human Rights Watch does not oppose laws prohibiting the direct engagement in hostilities. However, a new offense, punishable by 10 years in prison, would make it a crime where a person “travels, or remains in, a declared area where terrorist organizations engage in hostile activity.” In such cases, “the person is assumed to be engaging in hostile activities with that terrorist organization” unless the person can “demonstrate a sole legitimate reason for entering, or remaining in, the foreign state.”

The Foreign Fighters Bill provides a list of activities that would constitute a “legitimate purpose” and thereby exempt an individual from prosecution. These include delivering humanitarian aid, journalism, or bona fide visits to family. The bill states that more reasons may be declared under regulations. This places the evidential burden on a criminal defendant of proving that they entered or remained in the declared area for a legitimate purpose, raising presumption of innocence concerns.

The proposed list of exemptions fails to recognize that during wartime there are a myriad of legitimate reasons for people to travel to areas caught up in armed conflict, including business, selling property and personal effects, or working for a civil society organization that does not deliver aid, running or voting in an election, and for religious pilgrimage. For instance, a Human Rights Watch researcher investigating abuses would not be protected under the current list. During the Sri Lankan conflict, a number of Australian Tamils returned to sell personal effects, but then assisted civil society groups advocating against the war, or were forcibly held by the Tamil Tigers. None of these acts is covered by the proposed exemptions.

The offense of “remaining” in a declared area is particularly problematic because, when an area becomes a “declared area,” the onus apparently falls on any Australian citizen, resident, or a holder of an Australian visa to leave the area, which may encompass an

entire country. This may prove extremely difficult for individuals who find themselves in a conflict zone, but the bill makes no allowance for this. While a person who is unable to leave because they are detained or unable to cross a border may not have the requisite intention to commit the offense, if they are later investigated for this crime they may find it difficult to demonstrate a reason for remaining in the area that is not considered an offense.

The right to freedom of movement may only be limited for reasons of national security when necessary, limited, and proportionate.

This provision of the bill is overbroad and will excessively restrict freedom of movement and therefore should be removed.

3. 'Subverting Society'

Under the Foreign Fighters Bill the definition of “engaging in a hostile activity” would be broadened to include the “engagement of a person in subverting society in that or in any foreign country”. The precise definition of “subverting society” is defined in detail in the bill and contains important exceptions for conduct such as advocacy, protest, and dissent. However, Human Rights Watch urges that the joint committee remove the term “subversive society” as it is misleading and could lead to inappropriate interpretations. Instead, we suggest that it incorporate the specific elements and exceptions into the offense of “engaging in hostile activity.”

Furthermore, some elements of the definition of “subverting society,” including “conduct that creates a serious risk to the health or safety of the public or a section of the public” and conduct that “causes serious damage to property” are very broad and encompass acts that should not be treated as terrorism offenses. The UN special rapporteur on human rights and counterterrorism has stated that the concept of terrorism includes only those acts or attempted acts “intended to cause death or serious bodily injury” or “lethal or serious physical violence” against one or more members of the population, or otherwise risks human life, such as “the intentional taking of hostages.” For example, an act of arson likely “causes serious damage to property.” Selling cigarettes, causing pollution, or spreading an infectious disease all “create a serious risk to the health or safety of a section of the public.” Those acts are already be illegal in some circumstances and legal in others—they should not be treated as terrorism offenses unless a further aggravating element, making the conduct recognizable as “terrorism,” is present.

4. Preventive Detention Orders

The Foreign Fighters Bill extends for 10 years the government's authority to use preventive detention orders, which is due to expire on December 16, 2015. Preventive detention orders may be imposed when there are reasonable grounds to suspect that:

- A person will engage in a terrorist act, the issuance of an order will substantially assist in preventing an imminent terrorist act occurring, and detaining a person is reasonably necessary; or
- In situations where a terrorist act has occurred and it is necessary to detain a person to preserve evidence relating to the terrorist act.

Existing Australian law already allow persons suspected of terrorism to be detained for questioning before charge for up to 24 hours. Under preventive detention orders, police may detain an individual for an initial period of 24 hours, which a judicial officer may extend for an additional 24 hours if necessary. Significant restrictions are placed on detainees, who are held under extreme secrecy. Should the police obtain a "prohibited contact order," the detainee will not be able to exercise the right to contact and communicate with a lawyer. The police may obtain a prohibited contact order where it is "reasonably necessary" to avoid a risk to action being taken to prevent a terrorist act, prevent serious harm to a person, or avoid other specified risks.

Although detainees may contact a family member, they are restricted in what can be communicated and may not disclose the fact that a detention order has been made, the fact of the detention, or the period for which they are being held. Furthermore, the contact is limited to "letting the person contacted know that the person being detained is safe but is not able to be contacted for the time being." All contact with lawyers and visitors may be monitored by police exercising the preventive detention order, though such communications are not admissible as evidence against the person in court.

Preventive detention entails the deprivation of liberty by the executive with no intent to prosecute the individual through the criminal justice system. It results in the detention or restriction on movements of persons—sometimes indefinitely—without charging them with a criminal offense or bringing them to trial. Countries often use preventive detention for matters that fall squarely within the application of existing criminal law, with the intent of avoiding the scrutiny of an independent and qualified justice system. As such, preventive detention subverts the rule of law by granting executive officials powers that should properly be the domain of the judiciary.

Australia's Independent National Security Legislation Monitor has previously recommended the repeal of preventive detention orders. Human Rights Watch opposes preventive detention laws because they invariably result in violations of due process rights.

5. Control Orders

The Foreign Fighters Bill extends the operation of control orders, due to expire on December 16, 2015, for a further 10 years. It expands the criteria for control orders to include persons who have participated in terrorist training, engaged in hostile activity in a foreign country, or been convicted of a terrorism offense in Australia or abroad.

Control orders impose serious restrictions on the fundamental rights of individuals suspected of involvement in terrorism—such as freedom of movement, association and expression, and the right to privacy and family life. It is a criminal offense to contravene the terms of a control order, rendering the person liable to imprisonment for up to five years.

Control orders include prohibitions and restrictions on freedom of movement, including the use of a tracking device; communicating or associating with specified people; using specified technologies such as the Internet; possessing specified substances; and engaging in specified activities including those involved in one's occupation.

The Australia Federal Police, with consent of the attorney general, can apply for a court to issue the control order. Restrictions may be imposed on the basis of a low standard of proof—"balance of probabilities" rather than "beyond reasonable doubt"—and even on the basis of secret evidence. The police are not obligated to provide any information that would prejudice "national security." Britain's highest court has ruled that procedural fairness and the right to a fair hearing under human rights law means that the imposition of similar orders in the United Kingdom cannot be based largely or wholly on secret evidence not disclosed to the person subject to the order.

The court may impose the order for an initial period of up to 12 months, but then may make successive orders in relation to the same person.

Human Rights Watch is concerned that control orders are imposed on individuals in a cumulative manner so as to be tantamount to indefinite detention. UK courts have found in a number of cases that the combination of restrictions—including curfews as long as 18 hours a day, electronic tagging, limitations on visitors to their homes, and prohibitions on using the Internet—amounted to unlawful deprivation of liberty under UK law. The UK system of control orders also faced criticism from rights groups and the UN Human Rights

Committee; it was replaced by a less restrictive system in 2012. The Foreign Fighters Bill does little to address these concerns besides introducing a maximum curfew of twelve hours within a 24-hour period.

Australia's Independent National Security Legislation Monitor has previously recommended the repeal of control order provisions. Human Rights Watch calls for the repeal of control orders that violate rights to basic liberties. So long as control orders are in effect, the Australian Parliament should introduce the following minimum safeguards:

- Do not over-broaden the scope of use of control orders to those who have “participated in terrorist training” or “engaged in hostile activity in a foreign country.” Use should be limited to those who have been convicted of crimes in Australia or countries that have laws which meet international standards, as a number of other countries have overly broad definitions of terrorism.
- Restrictions should be imposed through a process in which credible evidence of their necessity is provided to the court and the person subject to the order;
- The criminal standard of proof (“beyond a reasonable doubt”) should be applied;
- Persons affected by control orders and their lawyers should have access to sufficient evidence to ensure the right to an effective defense;

Due regard should be given upon the making of a control order (and subsequently upon its review by the courts) to ensure that the cumulative effect of restrictions, including but not limited to the hours of curfew, is not tantamount to deprivation of liberty, and on the impact on the rights of family members living with the person subject to the order.

We hope you find this information useful. Please do not hesitate to contact us for additional information.

Sincerely,

Elaine Pearson
Australia Director
Human Rights Watch