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Human rights impacts of the Foreign Fighters Bill  
Submission to the Parliamentary Joint Committee on Intelligence  
and Security review of the Counter-Terrorism Legislation  
Amendment (Foreign Fighters) Bill 2014 (Cth)

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## About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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# 1. Introduction

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## 1.1 Background

1. On 24 September 2014, the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) (**Bill**) was introduced into the Senate and referred to the Parliamentary Joint Committee on Intelligence and Security (**Committee**) for review. The Committee has called for submissions on the Bill, due by 3 October 2014.
2. The Human Rights Law Centre (**HRLC**) welcomes the opportunity to make this submission to the Committee, but expresses concern at the very short period of time allowed for public consultation, especially given the length of the Bill and the significance of its proposed amendments to the protection of fundamental human rights.
3. Given the truncated timeframe, this submission can only briefly address the key human rights concerns raised by the proposed amendments under the Bill. It will cover:
  - (a) extension of the sunset clauses with respect to the control order regime, preventative detention order (**PDO**) regime, stop, search and seizure powers, and questioning and detention warrants;
  - (b) new offences relating to terrorism with respect to entering a declared area and advocating terrorism;
  - (c) new powers relating to the suspension or seizure of travel documents; and
  - (d) new emergency powers to cancel visas.

## 1.2 Recommendations

### **Recommendation 1:**

Given the extraordinary nature of Australia's existing counter-terrorism regimes (control order regime, PDO regime, stop, search and seizure powers, and questioning and questioning and detention warrants), it is neither appropriate nor necessary for these regimes to be reviewed in an expedited timeframe. The Committee should recommend that a proper public debate on the necessity of the regimes be facilitated and that the sunset clauses not be extended under the Bill.

***Recommendation 2:***

The control order regime has a real potential to unnecessarily and disproportionately limit fundamental human rights, such as freedom of movement, freedom from arbitrary detention and rights to family, employment and education. The Committee should reject those aspects of the Bill that would lower the threshold for the granting of interim control orders.

***Recommendation 3:***

The PDO regime imposes severe limitations on a range of human rights and is unnecessary given the range of other law enforcement powers available. The Committee should recommend that the proposed amendments to the PDO regime be removed from the Bill, so as to not further erode the already limited protections afforded to individuals under the regime.

***Recommendation 4:***

The stop, search and seizure powers given to the AFP unnecessarily and disproportionately interfere with fundamental human rights, such as freedom of movement and speech. The Committee should recommend that the stop, search and seizure powers be reviewed in accordance with the existing sunset clause timeframe to ensure compliance with international human rights obligations. Alternatively, the Committee should recommend that the operation of the powers be extended for a further 5 years only, as recommended by COAG.

***Recommendation 5:***

The questioning and detention warrant powers unreasonably restrict fundamental human rights. To date, ASIO has not used these powers, indicating that they are not necessary to achieve the desired objective. The Committee should strongly object to any extension of the sunset clause in relation to the questioning and detention warrant powers.

***Recommendation 6:***

The new offence of entering a declared area effectively reverses the onus of proof and places an unreasonable obligation on a defendant to lead evidence that their travel to the area was for a sole legitimate purpose. Further, the conduct criminalised by the new offence is already criminalised by existing legislation. The Committee should recommend that the new offence of entering a declared area be removed from the Bill.

***Recommendation 7:***

The new offence of advocating terrorism is unnecessarily broad and threatens to undermine the fundamental right to free speech. Further, much of the conduct criminalised by the new offence is already criminalised by existing legislation. The Committee should recommend that the new offence of advocating terrorism be removed from the Bill.

***Recommendation 8:***

The proposed powers to suspend or seize a person's travel documents place a disproportionate restriction on the right to freedom of movement in circumstances where the threshold for ASIO invoking the power is extremely low. The Committee should recommend that these powers be removed from the Bill.

***Recommendation 9:***

The emergency visa cancellation power not only disproportionately restricts the right to freedom of movement, but also risks violating the rights of family members and children in Australia who fall subject to the consequential cancellation power (namely the rights of the child, interference with family, and arbitrary detention). The Committee should recommend that the emergency visa cancellation power be removed from the Bill.

## 2. Human rights principles

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4. Counter-terrorism laws, either directly or indirectly, seek to regulate, control or otherwise affect the rights of individuals. It is therefore critically important to consider the human rights implications of such laws when debating the nature of any proposed amendments.
5. The protection of Australia from threats to national security and the protection and promotion of human rights are complementary goals that are both fundamentally concerned with protecting the community and individuals from harm.
6. At times, human rights can be limited for the purpose of protecting national security and countering terrorism. However, limitations on relevant human rights are only permissible where such limitations are absolutely necessary and are proportionate and rationally-connected to the threat posed.
7. The State bears the onus of establishing that a limitation is reasonable and demonstrably justified.<sup>1</sup> The more serious the infringement of rights, the higher the standard of proof required.<sup>2</sup> There must be clear, cogent and persuasive evidence in order to demonstrably justify a human rights infringement.
8. The concepts of necessity, reasonableness and proportionality are explored further throughout this submission.

## 3. Extension of sunset clauses

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9. The Bill proposes to extend the operation of the powers under each of the following counter-terrorism regimes by a further 10 years:
  - (a) the control order regime under Division 104 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**);
  - (b) the PDO regime under Division 105 of the *Criminal Code*;
  - (c) the stop, search and seizure powers under Division 3A of Part IAA of the *Crimes Act 1914* (Cth) (**Crimes Act**); and
  - (d) the questioning warrant and questioning and detention warrant powers under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth).

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<sup>1</sup> See *R v Oakes* [1986] 1 SCR 103, 66; *Kracke v Mental Health Review Board* [2009] VCAT 646, 108.

<sup>2</sup> See *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [150] (Warren CJ).

10. Currently, the first three of these regimes are due to expire in December 2015, and the fourth regime is due to expire in July 2016.<sup>3</sup> The Bill proposes to set a new 10 year sunset clause on each regime, such that the relevant powers expire in December 2025 and July 2026, respectively.<sup>4</sup>
11. The HRLC submits that, given the extraordinary nature of these counter-terrorism regimes and the serious risk they pose to fundamental human rights, it is neither appropriate nor necessary for the operation of these regimes to be reviewed in an expedited timeframe. There is still sufficient time under the existing sunset clauses for a public debate on the necessity of these powers and for relevant authorities to exercise their powers to respond to actual or potential terrorist acts or terrorism offences, or otherwise manage threats to Australia's national security.
12. Furthermore, since their introduction, the powers under the above four counter-terrorism regimes have either not been used or only used very infrequently by the relevant authorities. For example, only two control orders have been issued in Australia,<sup>5</sup> only three PDOs have been used (all in a single AFP operation in September 2014),<sup>6</sup> and, based on the most current information publicly available,<sup>7</sup> no questioning and detention warrants have been considered, sought or issued by the Australian Security Intelligence Organisation (**ASIO**) since the relevant provisions came into effect in 2003. This infrequency of use raises serious doubts as to the effectiveness, appropriateness and necessity of the powers under these regimes.
13. The HRLC has previously made public submissions to various legislative bodies and committees on the human rights implications of the above four counter-terrorism regimes and

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<sup>3</sup> *Criminal Code Act 1995* (Cth) sch (**Criminal Code**) ss 104.32, 105.53; *Crimes Act 1914* (Cth) s 3UK; *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZZ.

<sup>4</sup> Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) (**Bill**) sch 1 items 33, 43-45, 86-87, 107-108.

<sup>5</sup> Attorney-General's Department, *Control orders*, Commonwealth of Australia [www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Pages/Controlorders.aspx](http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Pages/Controlorders.aspx).

<sup>6</sup> Dan Box and Paul Maley, 'Three held under preventive detention orders' (20 September 2014) *The Australian* (online) [www.theaustralian.com.au/in-depth/terror/three-held-under-preventive-detention-orders/story-fnpdbcmu-1227064748235](http://www.theaustralian.com.au/in-depth/terror/three-held-under-preventive-detention-orders/story-fnpdbcmu-1227064748235); Australian Federal Police, 'Clarification of Operation Appleby numbers' (Media Release, 20 September 2014) <http://afp.gov.au/media-centre/news/afp/2014/september/media-release-clarification-of-operation-appleby-numbers.aspx>.

<sup>7</sup> Independent National Security Legislation Monitor, *Declassified Annual Report 20<sup>th</sup> December 2012* (2013) Commonwealth of Australia, 105 [www.dpmc.gov.au/INSLM/docs/INSLM\\_Annual\\_Report\\_20121220.pdf](http://www.dpmc.gov.au/INSLM/docs/INSLM_Annual_Report_20121220.pdf); Inspector-General of Intelligence and Security, *Annual Report 2012-2013* (2013) Commonwealth of Australia, 19 [www.igis.gov.au/annual\\_report/12-13/pdfs/IGIS\\_annual\\_report\\_12-13.pdf](http://www.igis.gov.au/annual_report/12-13/pdfs/IGIS_annual_report_12-13.pdf).



powers.<sup>8</sup> The key concerns of the HRLC are summarised in sections 4 to 0 below, together with new concerns over proposed amendments under the Bill to some of the regimes.

**Recommendation 1:**

Given the extraordinary nature of Australia's existing counter-terrorism regimes (control order regime, PDO regime, stop, search and seizure powers, and questioning and questioning and detention warrants), it is neither appropriate nor necessary for these regimes to be reviewed in an expedited timeframe. The Committee should recommend that a proper public debate on the necessity of the regimes be facilitated and that the sunset clauses not be extended under the Bill.

## 4. Control order regime

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14. On the whole, control orders are an unnecessary and disproportionate limitation on human rights.
15. Control orders can interfere with freedom of movement, freedom from arbitrary detention and rights to family, employment and education.<sup>9</sup> As such, they should only ever be used where absolutely necessary.
16. The Independent National Security Legislation Monitor (**INSLM**) has recommended that the control order regime be repealed, partly due to the unnecessary restrictions imposed on a person's liberty in the absence of a finding of criminal guilt.<sup>10</sup> If the control order regime is to exist, it should be replaced with one based on a person's ongoing dangerousness post-conviction.

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<sup>8</sup> Human Rights Law Centre, *Submission to the Council of Australian Governments (COAG) Review of Australia's Counter-Terrorism Legislation* (19 October 2012) [www.hrlc.org.au/wp-content/uploads/2012/10/HRLC-Submission-COAG-Review-of-Counter-Terrorism-Laws.pdf](http://www.hrlc.org.au/wp-content/uploads/2012/10/HRLC-Submission-COAG-Review-of-Counter-Terrorism-Laws.pdf); Human Rights Law Centre, *Submission to the Independent National Security Legislation Monitor: Review of Australia's Counter-Terrorism and National Security Legislation* (10 September 2012) [www.hrlc.org.au/files/HRLC\\_Submission\\_Independent\\_Monitor\\_Sept\\_2012.pdf](http://www.hrlc.org.au/files/HRLC_Submission_Independent_Monitor_Sept_2012.pdf); Human Rights Law Centre, *Review of Australia's Counter-Terrorism and National Security Legislation: Submission to the Independent National Security Legislation Monitor* (26 October 2011) [www.hrlc.org.au/files/HRLC-Submission-to-National-Security-Legislation-Monitor.pdf](http://www.hrlc.org.au/files/HRLC-Submission-to-National-Security-Legislation-Monitor.pdf).

<sup>9</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (**ICCPR**) arts 12(1), 9(1), 17(1), 23; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 6, 10, 13.

<sup>10</sup> Independent National Security Legislation Monitor, above n 7, 67 (Recommendation III/4).

17. Further, the HRLC notes that reviews of similar regimes in comparable jurisdictions (namely the United Kingdom and Northern Ireland) have concluded that the legislative powers allow the executive to impose intrusive measures on an individual that are not easily challenged, and that their use should be kept to an absolute minimum.<sup>11</sup>
18. In addition to extending the regime's operation, the Bill proposes to amend the threshold for seeking an interim control order from 'considers' to 'suspects', such that an Australian Federal Police (AFP) member may request the Attorney-General's consent for an interim control order based on a lower degree of certainty as to whether the order would 'substantially assist in preventing a terrorist act'.<sup>12</sup>
19. This amendment would require 'a lower degree of certainty'<sup>13</sup> in order to obtain an interim control order, thereby further threatening basic human rights, such as the freedom from arbitrary detention and arrest in article 9 of the *International Covenant on Civil and Political Rights (ICCPR)*. The control order regime may operate so as to severely limit a person's liberty and freedom of movement. For this reason, consent for an interim control order should not be sought where the requester lacks sufficient evidence for the order and is merely acting on a subjective and slight opinion.<sup>14</sup>

**Recommendation 2:**

The control order regime has a real potential to unnecessarily and disproportionately limit fundamental human rights, such as freedom of movement, freedom from arbitrary detention and rights to family, employment and education. The Committee should reject those aspects of the Bill that would lower the threshold for the granting of interim control orders.

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<sup>11</sup> See David Anderson, *Control Orders in 2011: Final Review of the Independent Reviewer on the Prevention of Terrorism Act 2005* (2012) <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/control-orders-2011.pdf> and Committee on the Administration of Justice, *War on Terror: Lessons from Northern Ireland* (2008) <http://www.caj.org.uk/contents/539>.

<sup>12</sup> Bill sch 1 item 70 amending s 104.2(2)(a) of the Criminal Code.

<sup>13</sup> Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) (**Explanatory Memorandum**) [173].

<sup>14</sup> See eg *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303 (Kitto J) quoted in *George v Rockett* (1990) 170 CLR 104 where the High Court of Australia considered the meaning of 'suspicion'.

## 5. Preventative detention order regime

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20. The HRLC continues to be concerned with many aspects of the PDO regime, including the power to detain an individual on virtually untested bases and information, the inability to appeal or challenge the detention, and the potential prohibition of contact with a lawyer through a 'prohibited contact order'. The HRLC is concerned over the potential use of secret information in the making of PDOs, contrary to the right to a fair trial.<sup>15</sup>
21. Overall, the evidence suggests that the PDO regime is unnecessary and disproportionate. The INSLM has recommended that the power to issue a PDO be repealed on the grounds that '[t]here is no demonstrated necessity for these extraordinary powers' and that '[p]olice should instead rely on their established powers to take action against suspected criminals through the arrest, charge, prosecution and lengthy incarceration of suspected terrorists'.<sup>16</sup>
22. Additionally, the Council of Australian Governments Review of Counter-Terrorism Legislation released in 2013 recommended that the PDO regime be repealed.<sup>17</sup>
23. In addition to extending the sunset clause, the Bill seeks to lower certain thresholds and safeguards in the PDO regime. For example, it is proposed to amend the PDO regime to allow a senior AFP member to may make an initial PDO where a person's full name is not known but that person can otherwise be identified as the intended subject.<sup>18</sup> The Bill also seeks to lower the threshold required for an AFP member's state of mind when applying for a PDO, such that the member may apply merely if they 'suspect' on reasonable grounds that the subject will engage in a terrorist act, possesses a thing that is connected with the preparation for a terrorist act, or has done any act in preparation for a terrorist act.<sup>19</sup>
24. The HRLC's concerns with respect to the PDO regime are only heightened by these proposed amendments. The existing regime poses a real risk to the right to freedom from arbitrary detention and arrest (as embodied in article 9 of the ICCPR) and it is concerning that the Bill not only seeks to extend the operation of this regime, but weaken the already inadequate safeguards afforded to persons who may be subject to its application.

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<sup>15</sup> ICCPR art 14.

<sup>16</sup> Independent National Security Legislation Monitor, above n 7, 44 (Recommendation II/4).

<sup>17</sup> Council of Australian Governments, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) Commonwealth of Australia, 68 (Recommendation 39) [www.coagctreview.gov.au/Report/Documents/Final%20Report.PDF](http://www.coagctreview.gov.au/Report/Documents/Final%20Report.PDF).

<sup>18</sup> Bill sch 1 item 94 amending s 105.8(6)(a) of the *Criminal Code*.

<sup>19</sup> Bill sch 1 item 88 amending s 105.4(4) of the *Criminal Code*.

**Recommendation 3:**

The PDO regime imposes severe limitations on a range of human rights and is unnecessary given the range of other law enforcement powers available. The Committee should recommend that the proposed amendments to the PDO regime be removed from the Bill, so as to not further erode the already limited protections afforded to individuals under the regime.

## 6. Stop, search and seizure powers

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25. The HRLC remains concerned that the stop, search and seizure powers given to the AFP unnecessarily and disproportionately interfere with liberty and security and could impact on the right to express political opinions through lawful demonstrations (especially where the powers are exercised with respect to a 'prescribed security zone' as declared by the Attorney-General).
26. Additionally, the HRLC remains extremely concerned about the broad power granted to the AFP to search without a warrant and to re-enter premises (particularly in the absence of any judicial or other oversight), and the risk that these powers infringe the right to privacy protected by article 17 of the ICCPR.
27. The HRLC expresses further concern that the Bill proposes to extend the stop, search and seizure powers regime under Part IAA of the Crimes Act by a further 10 years, despite the Council of Australian Governments (**COAG**) recommending the sunset clause be renewed only for a 5 year period.<sup>20</sup>

**Recommendation 4:**

The stop, search and seizure powers given to the AFP unnecessarily and disproportionately interfere with fundamental human rights, such as freedom of movement and speech. The Committee should recommend that the stop, search and seizure powers be reviewed in accordance with the existing sunset clause timeframe to ensure compliance with international human rights obligations. Alternatively, the Committee should recommend that the operation of the powers be extended for a further 5 years only, as recommended by COAG.

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<sup>20</sup> Council of Australian Governments, above n 17, 88 (Recommendation 44).

## 7. Questioning and detention warrants

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28. The HRLC remains concerned that the questioning and detention warrant powers given to ASIO have the potential to undermine the right to liberty, a fair hearing and the right to take proceedings to a court to have the legality of a person's detention determined by an independent and competent authority.<sup>21</sup> The powers also restrict access to legal counsel and the secrecy provisions prevent the media, academics and human rights advocates from independently monitoring the use of ASIO questioning and detention powers, which has the potential to allow human rights violations to go unnoticed in a climate of impunity.
29. The INSLM has recommended that ASIO's special powers to detain persons for the purpose of questioning should be repealed on the grounds that questioning and detention warrants are not a justifiable intrusion on personal liberty, particularly in view of Australian's international human rights obligations under article 9(1) of the ICCPR.<sup>22</sup>

### **Recommendation 5:**

The questioning and detention warrant powers unreasonably restrict fundamental human rights. To date, ASIO has not used these powers, indicating that they are not necessary to achieve the desired objective. The Committee should strongly object to any extension of the sunset clause in relation to the questioning and detention warrant powers.

## 8. New offences relating to terrorism

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### 8.1 Offence of entering declared area

30. The Bill proposes a new offence under the Criminal Code if a person enters, or remains in, an area in a foreign country (or an entire foreign country) that has been declared by the Minister for Foreign Affairs as an area where a terrorist organisation listed under the Criminal Code is engaging in a hostile activity.<sup>23</sup> The offence carries a maximum penalty of 10 years' imprisonment and is subject to a 10 year sunset clause.
31. A person suspected of entering or remaining in a declared area may rely on a defence if their travel was *solely* for a specified 'legitimate purpose' (defined to include, among other things, providing humanitarian aid, reporting as a journalist, a bona fide visit to a family member, or

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<sup>21</sup> ICCPR art 14.

<sup>22</sup> Independent National Security Legislation Monitor, above n 7, 106 (Recommendation V/1).

<sup>23</sup> Bill sch 1 item 110 inserting s 119.2 into the *Criminal Code*.

- performing official duties). The prosecution 'will then be required to prove that the person was not in the declared area solely for that purpose beyond reasonable doubt'.<sup>24</sup>
32. This is an extraordinary offence not least because it effectively, although not technically, reverses the onus of proof. Criminal liability will be *prima facie* established where a person has entered or remained in a declared area – the prosecution need not establish that the person has travelled to that area for the purpose of engaging in terrorism, other unlawful activities or for any purpose at all. The onus will be on an accused person to provide evidence of a sole legitimate purpose for entering or remaining in the area. The prosecution will *then* be required to disprove that evidence beyond reasonable doubt.
33. A defendant may also be faced with the difficult task of adducing sufficient evidence to demonstrate a reasonable possibility that their travel was *solely* for a legitimate purpose. Even if there is no indication that a defendant travelled to a declared area for multiple purposes, a literal reading of the proposed provisions suggests that, in order to claim the defence, the defendant may nevertheless need to prove a negative (ie that he or she did not travel to the declared area for a purpose or purposes other than the sole legitimate purpose on which the defendant wishes to rely). Such an operation of this provision would be a perverse administration of the criminal process.
34. The effective reversing the onus of proof is a violation of the right to a fair trial and presumption of innocence articulated in article 14 of the ICCPR. The Explanatory Memorandum to the Bill (**Explanatory Memorandum**) states that any limits on article 14 are 'reasonable, necessary and proportionate to countering the threat posed to Australia and its national security interests by foreign fighters returning to Australia from [declared areas]'.<sup>25</sup>
35. As stated above, the onus is on the Australian Government to justify limitations of fundamental human rights. In this case, the Australian Government has not provided adequate evidence for its justification for limiting rights, beyond broad statements such as the need to 'deter Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity'.<sup>26</sup> Further, given that existing legislation already criminalises (and deters) the relevant conduct, it is not clear why these legislative changes are required to pursue the same policy objectives.<sup>27</sup>

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<sup>24</sup> Explanatory Memorandum [222].

<sup>25</sup> *Ibid* [229].

<sup>26</sup> *Ibid* [225].

<sup>27</sup> See eg *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) ss 6-7.

**Recommendation 6:**

The new offence of entering a declared area effectively reverses the onus of proof and places an unreasonable obligation on a defendant to lead evidence that their travel to the area was for a sole legitimate purpose. Further, the conduct criminalised by the new offence is already criminalised by existing legislation. The Committee should recommend that the new offence of entering a declared area be removed from the Bill.

## 8.2 Offence of advocating terrorism

36. The Bill proposes a new offence under the Criminal Code if a person intentionally counsels, promotes, encourages or urges 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.<sup>28</sup> The offence carries a maximum penalty of 5 years' imprisonment.
37. The intentional incitement of violence should be a criminal offence, but the HRLC is concerned that the scope of this new offence is unnecessarily wide and risks criminalising legitimate expressions of free speech. The proposed offence for advocating terrorism goes beyond incitement to include 'promotion' and 'encouragement' which, when read together with the broad definitions of 'terrorist act' and 'terrorist offence', is likely to have an unduly restrictive effect on legitimate free speech. For example, 'terrorist act' covers not only specific actions but also the *threat* of those actions, meaning that any act preparatory to or in planning for specified actions would be captured by the definition.<sup>29</sup> This means the new offence of advocating terrorism would extend to persons who recklessly promote or encourage the *threat* of a terrorist act, but do not actually advocate, either intentionally or otherwise, for the *doing* of a terrorist act.
38. The proposed mental element of the offence – recklessness – may also have inappropriate consequences where a person promotes or encourages the doing of a terrorist act or the commission of a terrorism offence but does so without intending the conduct to occur. For example, a person may be caught by the offence if they publish comments on social media supporting fighters opposing the Assad regime in Syria, without actually intending the audience to engage in the relevant conduct. Criminalising this legitimate exercise of the right to free speech – as protected by article 19(2) of the ICCPR – is not consistent with the principles of Australia's free and democratic society.

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<sup>28</sup> Bill sch 1 item 61 inserting s 80.2C into the *Criminal Code*.

<sup>29</sup> See *Criminal Code* s 100.1.

39. The Explanatory Memorandum provides that the restriction on free expression is justified on the basis that advocating the commission of a terrorist act or terrorism offence is conduct that jeopardises the security of Australia, its people and its national interests.<sup>30</sup> While the HRLC accepts that the right to freedom of expression in article 19(2) of the ICCPR may be limited if it is necessary to achieve a legitimate purpose,<sup>31</sup> the Criminal Code already criminalises the incitement of a terrorist act or a substantive terrorism offence, thereby making the new offence for advocating terrorism unnecessary.<sup>32</sup> The government has not provided any adequate or evidence-based justification for further limiting free speech in the terms proposed.

**Recommendation 7:**

The new offence of advocating terrorism is unnecessarily broad and threatens to undermine the fundamental right to free speech. Further, much of the conduct criminalised by the new offence is already criminalised by existing legislation. The Committee should recommend that the new offence of advocating terrorism be removed from the Bill.

## 9. Suspension or seizure of travel documents

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40. The Bill proposes amendments enabling the Minister for Foreign Affairs, if requested by ASIO, to suspend a person's Australian travel documents<sup>33</sup> or seize a person's foreign travel documents<sup>34</sup> for a period of 14 days. ASIO may request suspension or seizure if it suspects on reasonable grounds that the person *may* leave Australia to engage in conduct that *might* prejudice the security of Australia or a foreign country, and the documents should be suspended or seized to prevent the person from engaging in the conduct.
41. Suspending or seizing a person's travel documents, even temporarily, would restrict that person's freedom of movement contrary to article 12(2) of the ICCPR which protects the right to be free to leave any country. The HRLC is concerned by the extremely low threshold required to be met by ASIO in order to request the suspension or seizure of a person's travel documents.

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<sup>30</sup> Explanatory Memorandum [136].

<sup>31</sup> ICCPR art 19(3).

<sup>32</sup> See *Criminal Code* s 11.4.

<sup>33</sup> Bill sch 1 item 21 inserting s 22A into the *Australian Passports Act 2005* (Cth).

<sup>34</sup> Bill sch 1 item 129 inserting s 15A into the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) and item 131 inserting s 16A into the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth).



42. While article 12(2) may be restricted if it is necessary to protect national security<sup>35</sup> – as is reasoned by the Explanatory Memorandum – the restriction must still be necessary and proportionate. The HRLC submits that the terms of the Bill do not reflect a proportionate restriction on the right to freedom of movement given the threshold for invoking the power is very low. Similarly, the HRLC rejects the justification that the restriction on article 12(4) of the ICCPR is ‘reasonable, necessary and proportionate to mitigate the security risk arising from *persons travelling overseas* who may be planning to engage in activities of security concern’.<sup>36</sup> This is because the power would not only apply to persons travelling overseas, but would apply to persons who *may* leave Australia.
43. Further, prohibiting a person from leaving Australia or re-entering a person’s home country for a period of 14 days is excessive, especially in view of the INSLM’s recommendation that the suspension operate only for an initial 48 hour period, with any subsequent extension requiring approval by ASIO’s Director-General of Security and subject to a maximum period of 7 days.<sup>37</sup> It is conceivable that a person may need to travel internationally on short notice in urgent situations (eg illness or death of a family member or friend), and delaying this travel by up to 14 days would be unduly oppressive on such a person. Articles 17(1) and 23 of the ICCPR may also be infringed by the proposed provision to the extent it operates to undermine the right to respect for family.

**Recommendation 8:**

The proposed powers to suspend or seize a person’s travel documents place a disproportionate restriction on the right to freedom of movement in circumstances where the threshold for ASIO invoking the power is extremely low. The Committee should recommend that these powers be removed from the Bill.

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<sup>35</sup> ICCPR art 12(3).

<sup>36</sup> Explanatory Memorandum [51] (emphasis added).

<sup>37</sup> Independent National Security Legislation Monitor, *Annual Report 28<sup>th</sup> March 2014* (2014) Commonwealth of Australia, 48

[www.dpmc.gov.au/INSLM/docs/INSLM\\_Annual\\_Report\\_20140328.pdf](http://www.dpmc.gov.au/INSLM/docs/INSLM_Annual_Report_20140328.pdf).

## 10. Emergency cancellation of visa

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### 10.1 Emergency power to cancel visa

44. The Bill seeks to amend the *Migration Act 1958* (Cth) to provide for the mandatory cancellation of any visa (permanent or temporary) where ASIO forms a reasonable suspicion that the visa holder *might* be, directly or indirectly, a risk to security.<sup>38</sup> The emergency cancellation will be without notice or notification, will not be merits reviewable and is not subject to the rules of natural justice.
45. Visa cancellation will have the effect of preventing the visa holder from entering Australia for up to 28 days, during which time ASIO must determine whether the person *is* a risk to security (in which case the visa cancellation will be upheld) or the person *is not* a risk to security (in which case the cancellation will be revoked), otherwise the visa will be automatically reinstated after 28 days have lapsed. If ASIO confirms the person is a security risk, members of the visa holder's family unit will automatically have their own visas subject to a discretionary cancellation power.

### 10.2 Application of human rights obligation outside Australia

46. The Explanatory Memorandum provides that the Australian Government only owes human rights obligations to persons within its territory and/or jurisdiction, and therefore human rights obligations will not extend to persons subject to the primary visa cancellation power.<sup>39</sup> Human rights obligations will only extend to members of the family unit within Australia who are subject to the consequential visa cancellation power.<sup>40</sup>
47. The HRLC submits that the question of whether the Australia's human rights obligations extend to persons outside its territory and/or jurisdiction is not as unambiguous as the Explanatory Memorandum suggests. The concept of control is central to the exercise of jurisdiction. Australia's human rights obligations under the ICCPR and other human rights treaties can be enlivened in relation to activities 'within the power or effective control' of Australian authorities.<sup>41</sup>

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<sup>38</sup> Bill sch 4 item 4 inserting sub-div FB into the *Migration Act 1958* (Cth).

<sup>39</sup> Explanatory Memorandum [307].

<sup>40</sup> *Ibid.*

<sup>41</sup> Human Rights Committee, *General Comment No 31: Nature of the General Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.14 (29 May 2004) [10].

48. In exercising the proposed emergency power to cancel a person's visa, the Australian Government is effectively controlling the activities of that person, namely his or her freedom of movement and ability to return to Australia. It follows that Australia cannot absolve its international human rights obligations by reason only that the relevant subject is physically outside the territory of Australia.

### 10.3 Consequential power to cancel visa

49. The HRLC is concerned by the impact on the family unit (particularly children) of the consequential visa cancellation power which may be exercised at the discretion of the Minister for Immigration and Border Protection without notice.<sup>42</sup> Using the proposed provision to cancel the visa of a person who has family members in Australia would mean that the (former) visa holder is no longer able to return to Australia, effectively separating them from their family, potentially permanently. The provision may also operate to allow the discretionary cancellation of the visas of the family members in Australia, which would result in their immediate detention or removal of from Australia as unlawful non-citizens.

50. Preventing a (former) visa holder from reuniting with their family in Australia would risk violating article 17 of the ICCPR which provides that no one shall be subjected to arbitrary or unlawful interference with his family, and article 23 of the ICCPR which requires the State to protect the family as the fundamental group unit of society. The HRLC is particularly concerned by these possible infringements in circumstances where the threshold for the Minister cancelling a visa (and subsequently confirming its cancellation) is that ASIO merely has a reasonable *suspicion* that the relevant person *might* be a risk to security. Proven engagement in conduct that threatens Australia's national security or other criminal behaviour is not required. This aspect of the power is particularly troubling given that the Minister's decisions under the power are not merits reviewable and not subject to the rules of natural justice.

51. The HRLC is extremely concerned by the implications of the proposed emergency visa cancellation power where a (former) visa holder's family includes a child. The consequential cancellation power risks violating article 3 of the *Convention on the Rights of the Child* which provides that the best interests of the child shall be a primary consideration in all actions concerning children. Prohibiting a parent or guardian from reunification with their child in Australia, or detaining or deporting a child from Australia because of a *risk* posed by their parent, are incompatible with the best interests of the child. The HRLC does not accept the justification set out in the Explanatory Memorandum that the 'best interests of the child may be

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<sup>42</sup> Bill sch 4 item 4 inserting s 134F(2) into the *Migration Act 1958* (Cth).

outweighed by other countervailing primary considerations, such as the integrity of Australia's migration system and the safety of the Australian community'.<sup>43</sup>

52. Lastly, the HRLC is concerned that the emergency visa cancellation power may result in an infringement of article 9 of the ICCPR which provides that no one shall be subjected to arbitrary detention. Under this article, detention must have a legitimate purpose, be predictable in the sense of the rule of law, and it must be reasonable or proportional in relation to the purpose to be achieved.<sup>44</sup> Consequentially cancelling the visa of a person in Australia whose family member outside Australia has had their own visa cancelled under the primary operation of the proposed provision will result in the first person being deemed an unlawful non-citizen and subject to immediate detention (and possibly deportation). The HRLC submits that detention in these circumstances is not a reasonable or proportional measure to achieving the overall objective of the legislative amendments, that being to 'enhance the Government's capacity to respond to prospective security threats in a responsive and proportionate manner'.<sup>45</sup>

**Recommendation 9:**

The emergency visa cancellation power not only disproportionately restricts the right to freedom of movement, but also risks violating the rights of family members and children in Australia who fall subject to the consequential cancellation power (namely the rights of the child, interference with family, and arbitrary detention). The Committee should recommend that the emergency visa cancellation power be removed from the Bill.

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<sup>43</sup> Explanatory Memorandum [309].

<sup>44</sup> Ibid [319].

<sup>45</sup> Ibid [300].