AUSTRALIAN SENATE

David Leyonhjelm
BVSc LLB MBA
Liberal Democrats Senator for NSW

10 November 2014

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

Dear Secretary,

RE: Inquiry into *Counter-Terrorism Legislation Amendment Bill (No 1) 2014*

I have a number of concerns with the *Counter-Terrorism Legislation Amendment Bill (No 1) 2014*, although I support the proposed legislation in part.

Once again – as with the National Security Bill and the Foreign Fighters Bill – at no point has the passage of much of this Bill into law been justified evidentially. In my previous two submissions I asked for credible examples of harmful activities that only the passage of this Bill will prevent or discourage, even if identifying details are redacted for security reasons. Once again, I make the same request.

Supported changes

I endorse the enactment of a formal, statutory basis for ASIS to provide assistance to the ADF in support of overseas military operations, and to cooperate with the ADF on intelligence.[1] I understand that this support has previously only been provided on an ad hoc basis, without parliamentary authority. In short, this law makes overt what was formerly covert.

These changes appear an obvious way to improve the efficacy of the ADF's overseas operations, with ASIS-ADF cooperation now based on a firm statutory footing.

[1] In Schedule 2, items 1 through 17.

Parliament House
CANBERRA ACT 2600
Tel: (02) 6277 3054
Fax: (02) 6277 5945
Email: senator.leyonhjelm@aph.gov.au

PO Box 636
DRUMMOYNE NSW 1470
Tel: (02) 8289 9820
Fax: (02) 8289 9829
Toll Free: 1300 884 092

Specific concerns

Control Orders

I am particularly concerned with the expansion of the Control Orders regime.[2] In and of itself, the Control Orders regime is obnoxious because it confounds the basic principle that people should not be deprived of their liberty without a finding of guilt.

While it is true that only two Control Orders have been issued so far, this Bill will make it much easier to obtain them due to an expansion of the grounds that provide the basis for issuance. In addition to the five grounds already present in existing law,[3] two new grounds are proposed:

6. that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or
7. that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country. [4]

These provisions are vaguely drafted and do not attach to any particular criminal offence. I believe they could be used – and I see no evidence to the contrary in this Bill or the Explanatory Memorandum – to constrain speech, in particular speech that falls short of incitement but endorses the activities of extremist Islamist organisations like Da'ish. As I said in the Chamber, it seems to me that the intended targets of both this bill and the Foreign Fighters bill is Hizb ut-Tahrir and organisations like it. Presumably, there will be further legislation if these fail to silence them.

Similarly, the vagueness attaching to 'hostile activity in a foreign country' means all sorts of legitimate objections could be caught as to what is perceived to be foreign tyranny. What, for example, of individuals from Australia who both historically and more recently have involved themselves in conflicts in the former Yugoslavia? What also of Australians who may, in the future, choose to facilitate hostile activity against the regime in Pyongyang or Harare? Because laws of this type must be drafted to be of general application, it is impossible to know in advance which conflicts will attract censure and which will not.

---

[2] In Division 104 of the Criminal Code Act 1995 (Cth)

[3] 1. that the order would substantially assist in preventing a terrorist act;
2. that the person has provided training to, received training from or participated in training with a listed terrorist organisation;
3. that the person has engaged in a hostile activity in a foreign country;
4. that the person has been convicted in Australia of a terrorism offence; or
5. that the person has been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence

[4] *Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (Cth), sch 1 item 7.

Control Orders are civil orders – grounds for their issuance must only be made out on the balance of probabilities – yet breach of one attracts a penalty of five years' imprisonment.[5] The idea of sending someone to gaol for five years for something he says – however obnoxious, and that falls short of incitement – should not be entertained in a liberal democracy.

Emergency ministerial authorisations

As the law currently stands, emergency authorisations under the *Intelligence Services Act* 2001 (Cth) must be made personally by a relevant minister – one of the Prime Minister, the Defence Minister, the Foreign Minister, or the Attorney-General.[6]

This Bill proposes[7] – when it comes to emergency ministerial authorisations for ASIO, ASIS, ASD (the old defence signals directorate), and the AGO (Geospatial Intelligence Organisation) – that the relevant Minister may have his or her emergency authorisation power exercised automatically on his behalf by the head of one of those agencies in the event that he cannot be contacted. Both the minister and, it would seem, the agency head, may also give the emergency authorisation orally, with a written record to follow.

Matters subject to emergency authorisation and the procedures to be used are set out in sections 8(1)(a)(i) and (ii)and 9(1A). It is reasonably obvious that authorisations could be made for targeted killings of Australians engaged in terrorism overseas, in addition to other operations.

In principle, I have no particular difficulty with this – unlike some commentators.[8] However, it needs to be recognised for what it is, and the 'buck' has to stop, in my view, with an elected parliamentarian, not an unelected civil servant.

There is a basic principle in constitutional and administrative law, present in both Roman and common law systems, that '*delegata potestas non potest delegari*', meaning 'one to whom power is delegated cannot further delegate that power'. The principle has been undermined in both Australia and the UK (in the *Carltona*[9] case), although not to the same extent in this country.

The proposed authorisation regime in this Bill contradicts the fundamental common law principle that a delegate cannot authorise someone else to exercise all his powers. The *Carltona* decision is broad,

[5] *Criminal Code Act 1995* (Cth), s 104.27.
[6] In section 9A.
[7] In Schedule 2 (9A Authorisations in an emergency – Ministerial authorisations).
[8] http://theconversation.com/security-bill-opens-door-to-targeted-killings-and-broader-control-orders-33631
[9] [1943] 2 All ER 560 (CA).

but it does not permit that. It is meant to make matters of routine government administration more streamlined, not to allow a given Minister to abrogate his decision-making powers entirely. The Bill is plain on its face that if a minister is not contactable, then the agency head will be able to make the authorisation decision alone.

My concern is particularly acute in light of the fact that the *Intelligence Services Act* in its unamended form seems to have been drafted with the intent that the Minister's decision is to be a personal one. The traditional common law caution regarding authorisations where significant individual rights and liberties (in this case – life, movement, association) would be affected is important here, and suggests that a regime whereby at least one relevant minister is *always* contactable should be instituted.

Finally, I find the power to issue emergency authorisations orally deeply disquieting, as the time lag before they have to be 'written up' may well allow for considerable fudging of the relevant record. Once again, it is a basic principle of administrative law that authorisations of this type – where significant rights and liberties are impinged – be reduced to writing contemporaneously.

Concluding comments

The loosening of definitions in the Foreign Fighters Bill when it comes to advocating terrorism, hostile acts, and foreign countries has been carried over into this Bill.

The expanded grounds for the issuance of Control Orders not only abrogate the presumption of innocence but introduce unwanted vagueness into the law, making misuse possible by future governments. There is likely to be a serious chilling effect on speech, such that it may become even more difficult to establish who (or what) is a genuine threat to Australia and its people.

Where an emergency authorisation concerns – as it almost certainly will – a matter of life and death, the Minister should exercise that authority personally, and provide a contemporaneous written record. The convention of Ministerial Responsibility demands nothing less.

Yours faithfully,

David Leyonhjelm
Senator for NSW