



THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

GILBERT + TOBIN CENTRE
OF PUBLIC LAW

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

Dear Secretary

Inquiry into Counter-Terrorism Legislation (Foreign Fighters) Bill 2014

Thank you for the opportunity to make a submission to this inquiry. We do so in our capacity as members of the Gilbert + Tobin Centre of Public Law at the Faculty of Law, University of New South Wales. We are solely responsible for the views and content in this submission.

We recognise the serious threat posed by the Islamic State organisation, particularly the risk that individuals fighting in Iraq and Syria may return to Australia and become involved in terrorism-related activity. We therefore support the urgent enactment of measures that are specifically targeted at this threat. In particular (and subject to some more specific concerns detailed below), the introduction of a power to temporarily suspend passports and the relaxation of current restrictions on adducing foreign evidence are welcome reforms. These measures are much needed – even overdue – in order to overcome limitations in the existing law.

On the other hand, there are a number of reforms proposed in the Counter-Terrorism Legislation (Foreign Fighters) Bill 2014 (the Bill) which we do not support. Some of the reforms are unworkable and others are in need of significant amendment prior to enactment.

A additional concern is that many of the reforms cannot be cast as in any way requiring urgent action. The key example of this is the extension of sunset clauses on powers which are not due to expire for more than a year. Indeed, these reforms are not specifically targeted at the threat posed by foreign fighters, and instead relate to the extension of powers that were enacted after the London bombings in July 2005. There is no reason why these matters need to be debated and passed by the Commonwealth Parliament before the end of this month. Any measures which are not urgently needed to address the danger of returning foreign fighters should be included in a separate Bill to be carefully and thoroughly scrutinised at a later date. This approach is especially appropriate given that an Independent National Security Legislation Monitor (INSLM) has not yet been appointed and therefore this office is unable to participate in the current inquiry.

1. Sunset clauses

Sunset clauses, which cause statutory powers to expire after a specified period, are sometimes attached to counter-terrorism powers in recognition of their exceptional nature. Currently, the control order and preventative detention order (PDO) provisions in the *Criminal Code Act 1995* (Cth) (Criminal Code) are due to expire in December 2015.¹ The stop, search and seizure powers relating to terrorism offences are due to expire at the same time.² The powers of the Australian Security Intelligence Organisation (ASIO) to seek questioning and detention warrants are due to expire in July 2016.³ The Bill would attach new sunset clauses to these powers so that each will operate for a further 10 years beyond their current expiry dates.

We are concerned about the extension of control orders, PDOs and ASIO's questioning and detention warrant powers in particular. These powers have been widely recognised as problematic due to their significant impact on civil liberties and the way in which they allow the authorities to operate outside the traditional criminal justice process. In this regard, it is

¹ *Criminal Code Act 1995* (Cth), ss 104.32, 105.53.

² *Crimes Act 1914* (Cth), s 3UK.

³ *Australian Security Intelligence Organisation Act 1979* (Cth), s 34ZZ.

significant that the powers in their current form are unique to Australia. The United Kingdom repealed its control order regime in 2011, and replaced it with a less invasive regime,⁴ and there is no equivalent to PDOs or ASIO's questioning and detention warrant powers in any comparable nation.⁵ If nations like the United Kingdom and United States do not have such regimes in place, it must be asked why Australia is in a different position.

Recent major inquiries have raised significant concerns about each of these regimes. We believe that they should not be renewed, and certainly this should not even be considered without an appropriate opportunity to determine whether their extension is warranted.

Indeed, in sharp contrast to the current proposal to extend the powers for 10 years, the INSLM recommended the repeal of both the control order and PDO regimes, and the ASIO regime in so far as it relates to detention.⁶ He described control orders as 'striking because of their provision for restraints on personal liberty without there being any criminal conviction or even charge'.⁷ He described the PDO regime as being 'at odds with our normal approach to even the most reprehensible crimes'.⁸

The COAG Review also recommended the repeal of the PDO regime.⁹ It remarked that such powers 'might be thought to be unacceptable in a liberal democracy'.¹⁰ Similar comments were made by the predecessor to this Committee (the Parliamentary Joint Committee on ASIO, ASIS and DSD) in an earlier inquiry about the ASIO's questioning and detention powers. That Committee suggested that the ASIO powers 'would undermine key legal rights and erode the civil liberties that make Australia a leading democracy'.¹¹

In addition to these principled concerns, there are practical reasons why the regimes are unworkable. Multiple submissions by federal, state and territory police forces to the INSLM

⁴ *Terrorism Prevention and Investigation Measures Act 2011* (UK) c 23.

⁵ See, eg, Lisa Burton, Nicola McGarrity and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) 36 *Melbourne University Law Review* 415.

⁶ Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 44, 67 ('*INSLM 2012 Report*').

⁷ *Ibid* 6.

⁸ *Ibid* 47.

⁹ Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) 68 ('*COAG Review*').

¹⁰ *Ibid* 68.

¹¹ Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) vii.

and COAG Review inquiries indicated that the authorities are unlikely to rely upon PDOs because other, more suitable, detention powers are available.¹² The INSLM therefore concluded in relation to the preventative detention regime that ‘no material or argument demonstrated that the traditional criminal justice response to the prevention and prosecution of serious crime through arrest, charge and remand is ill-suited or ill-equipped to deal with terrorism’.¹³ In particular, the pre-charge detention regime in Part 1C of the *Crimes Act 1914* (Cth) allows the Australian Federal Police to detain a suspect for questioning for up to 24 hours (not including any ‘dead time’). As the Bill aims to lower the threshold for arrest (from reasonable belief of the commission of a terrorism offence to reasonable suspicion of the same) it will be even easier for the authorities to rely on traditional law enforcement powers.¹⁴

The INSLM made similar points regarding control orders and ASIO’s detention power. He concluded that ‘control orders in their present form are not effective, not appropriate and not necessary’.¹⁵ After repeatedly questioning government agencies as to why ASIO’s warrant powers are necessary, the INSLM was presented with ‘[n]o scenario, hypothetical or real ... that would require the use of a QDW [questioning and detention warrant] where no other alternatives existed to achieve the same purpose’.¹⁶ In relation to the PDO and control order provisions, he went so far as to describe them as counter-productive in that an individual subject to a PDO cannot be questioned,¹⁷ and an individual subject to a control order is not likely to engage in any further activity that could form the basis for a conviction.¹⁸

These points are supported by the fact that only two control orders have ever been issued, the PDO provisions have only been used to detain three individuals during the recent terrorism raids in Sydney, and ASIO has never detained anybody for questioning. In our opinion, the powers could safely be repealed without affecting the ability of the authorities to protect the community from terrorism.

¹² See *INSLM 2012 Report*, 56; *COAG Review*, 68-70.

¹³ *INSLM 2012 Report*, 52.

¹⁴ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 47.

¹⁵ *INSLM 2012 Report*, 4.

¹⁶ *Ibid* 105.

¹⁷ *Ibid* 56-59; *COAG Review*, 70.

¹⁸ *INSLM 2012 Report*, 36.

The Bill ignores these concerns. It would instead provide for the continuation of each of the regimes for a further 10 years beyond their current expiry dates. Doing so is, at this point in time, unnecessary in order to meet the danger posed by returning foreign fighters. These powers will remain in force until either late 2015 or mid-2016. This means that they are currently available to the authorities and will continue to be so for at least another 12 months. There is therefore no urgent reason why these powers need to be addressed in, and debated as part of, the current Bill.

The extension proposed by the Bill would postpone a major upcoming opportunity to review these controversial powers. The Parliamentary Joint Committee on Intelligence and Security (PJCIS) is required to review the operation, effectiveness and implications of ASIO's questioning and detention warrant powers by 22 January 2016.¹⁹ It is expected that similar reviews would accompany the extension of the control order and PDO regimes (presumably by this same Committee). The Bill would delay these important inquiries until 2025 / 2026.

We recommend that the continuation of each of these powers – control orders, PDOs, stop and search, and ASIO's questioning and detention warrant regime – be considered in separate legislation introduced around their current expiry dates. This would ensure that the powers are considered in a careful and thorough way that is commensurate with their exceptional nature.

Recommendation 1:

The sunset clauses relating to control orders, PDOs, stop and search powers and ASIO's questioning and detention regime should not be extended. The extension of these powers should be considered, as otherwise planned, in late 2015 and early 2016.

2. Control orders

The control order provisions in Division 104 of the Criminal Code allow a range of restrictions to be placed on an individual's liberty for the purpose of preventing terrorist acts.

¹⁹ *Intelligence Services Act* (Cth), s 29(1)(bb).

For example, an individual subject to a control order may be required to remain in a specified place at specified times and to wear an electronic monitoring device.²⁰ They may also be prohibited from being in certain areas or from communicating or associating with specified individuals.²¹

Currently, a senior member of the Australian Federal Police (AFP) may seek the Attorney-General's consent to request an interim control order from an issuing court if he or she: (a) considers on reasonable grounds that the order would substantially assist in preventing a terrorist act; or (b) suspects on reasonable grounds that the person has provided training to, or received training from, a terrorist organisation.²² The issuing court may then make an interim control order if it is satisfied, on the balance of probabilities, of either of those grounds.²³ Where subsequently confirmed by the issuing court, a control order may last for a maximum of 12 months.²⁴

The Bill would expand the grounds on which a senior AFP officer may seek the Attorney-General's consent to request an interim control order. It would do so with regard to both grounds (a) and (b) set out above. First, with regard to ground (a), the officer would need only *suspect* (rather than 'consider') on reasonable grounds that the order would substantially assist in preventing a terrorist act. This contradicts the findings of the COAG Review, which recommended that control orders should not be sought 'on the basis of mere suspicion'.²⁵ It viewed 'considers' as a higher standard that was more consistent with the issuing court's obligation to be satisfied of that conduct on the balance of probabilities.²⁶ In line with the COAG Review's findings, we recommend not only that the current standard of 'considers' be retained for ground (a), but also that the current standard of 'suspects' in ground (b) be raised to 'considers'.

Secondly, with regard to ground (b), the Bill would include alternative reasons for seeking the Attorney-General's consent. These would require suspicion on reasonable grounds that

²⁰ *Criminal Code Act 1995* (Cth), s 104.5(3).

²¹ *Criminal Code Act 1995* (Cth), s 104.5(3).

²² *Criminal Code Act 1995* (Cth), 104.2(2).

²³ *Criminal Code Act 1995* (Cth), 104.4(1)(c). The court must also be satisfied that each of the obligations or restrictions contained in the order are 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act': *Criminal Code Act 1995* (Cth), s 104.4(1)(d)

²⁴ *Criminal Code Act 1995* (Cth), s 104.16(1)(d).

²⁵ *COAG Review*, 58.

²⁶ *Ibid* 57-58.

the person: (i) ‘participated in’ training with a terrorist organisation, (ii) ‘engaged in a hostile activity in a foreign country’, or (iii) has been convicted of a terrorism offence in Australia or a foreign country.²⁷

We are particularly concerned by the last of these possibilities, namely that a control order could be sought against a person who was convicted of a terrorism offence *in a foreign country*. This is problematic for two reasons. First, other countries do not have the same statutory definition of a ‘terrorist act’ as Australia. In particular, the Australian definition of terrorism incorporates an important exemption for advocacy and political protest which is not present in many other countries’ legal definitions of terrorism.²⁸ Secondly, many foreign countries do not have the same procedural protections attaching to the criminal trial as does Australia. As such, the mere fact of being convicted of a terrorism offence in a foreign country does not guarantee that the person was involved in terrorism-related activity as that term is understood in Australia. For example, a person could be convicted *in absentia* by a foreign court for engaging in legitimate opposition against an oppressive regime.

Aside from these specific reforms to the control order regime, we are concerned – as noted in the previous section – about the proposal in the Bill to retain this regime for a further 10 years without sufficient opportunity to debate whether any extension is warranted. The INSLM recommended repeal of the control order regime, in part because significant restrictions should not be placed on an individual’s liberty in the absence of a finding of a criminal guilt.²⁹ Alternatively, if the powers are to be retained, he recommended that the legislation should require prior conviction of a criminal offence *and* some finding as to the ongoing dangerousness of the person.³⁰ Such a mechanism would be similar to orders available in some Australian states and territories for convicted sex offenders. The reforms proposed in the Bill to ground (b) obviously fall short of the recommendations of the INSLM in not requiring any finding as to the ongoing dangerousness of the person.

The COAG Review did not go so far as to recommend the repeal of the control order regime. However, it accepted the need for the legislation to undergo ‘substantial change ... to provide

²⁷ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 71.

²⁸ *Criminal Code Act 1995* (Cth), s 100.1(3).

²⁹ *INSLM 2012 Report*, 6, 26, 44.

³⁰ *Ibid* 37.

greater safeguards against abuse'.³¹ For example, as set out above, it recommended that the legislation require the senior AFP member to *consider* (rather than 'suspect') that the person has provided or received terrorist training.³²

The proposed reforms would therefore conflict with the findings of two major reviews of the control order legislation. In this respect, it is significant to note that the INSLM had access to the classified information on which control order applications are based, and the COAG Review received private briefings from the AFP and ASIO. Both reviews were therefore informed by the operational benefits of issuing control orders and not solely based on principled concerns. If the control order regime is to be retained, we recommend that the Committee adopt the recommendations contained in the INSLM and COAG Review reports. This would ensure that the powers are appropriately limited, and could be used only (in the words of the COAG Review) as a 'last resort'.³³

Recommendation 2:

The grounds for requesting an interim control order under s 104.2(2) of the Criminal Code should require that the senior AFP member 'considers' (rather than 'suspects') on reasonable grounds that the relevant conduct has occurred.

Recommendation 3:

The ground for requesting an interim control order on the basis that the person has been convicted of a terrorism offence in a foreign country should be removed from the Bill.

Recommendation 4:

The ground for requesting an interim control order on the basis that the person has been convicted of a terrorism offence should require not only proof of conviction but also some finding as to the ongoing dangerousness of the person.

3. New offence for entering or remaining in a 'declared area'

The Bill would create a new offence, punishable by 10 years' imprisonment, which would be made out where a person enters or remains in a 'declared area'. The Minister for Foreign

³¹ *COAG Review*, 54.

³² *Ibid* 57.

³³ *Ibid* 58.

Affairs would be able to declare an area in a foreign country as a ‘declared area’ where he or she is satisfied that a listed terrorist organisation is engaging in hostile activity in that area.³⁴ It would be a defence under sub-section (3) for the person to show that they entered or remained in the declared area *solely* for a legitimate purpose.³⁵ The legislation provides a list of legitimate purposes, such as providing humanitarian aid, making news reports or making bona fide visits to family members (as well as any others set out in the regulations).

This is an extraordinary offence that is likely to criminalise a range of legitimate behaviours. While the government is not technically reversing the onus of proof (as the prosecution must still prove the elements of the offence beyond reasonable doubt), the offence is framed in such a way that it has essentially the same effect. Criminal liability will be *prima facie* established wherever a person enters or remains in a declared area. No other physical elements of the offence are required. The government need not establish, for example, that the person travelled to the area for the purpose of engaging in terrorism or some other illegitimate activity. This is problematic because it is that purpose – rather than the mere fact of travel – which renders the conduct an appropriate subject for criminalisation.

The defences available (such as bona fide visits to family members) are welcome inclusions. However, they are narrow in being limited to a few specified categories. It is possible to conceive of a wide range of legitimate behaviours which would not fall within this list of exceptions. These might include: conducting a pilgrimage or fulfilling some other religious obligation; visiting friends; working as a freelance journalist; or conducting business and commercial transactions. Indeed, somebody might travel to the area as a tourist or they might even venture into a declared area inadvertently. It might seem unlikely that individuals would travel to Iraq or Syria for these reasons given the current state of conflict. However, individuals could certainly travel to other areas of other foreign countries where terrorists are currently operating and which might plausibly be designated as declared areas, such as in Indonesia or Israel.

The idea that it would be a criminal offence simply to travel to an area because the Minister for Foreign Affairs has designated that area as a no-go zone is something that should not be supported in a liberal democracy. It is possible that other legitimate purposes such as those

³⁴ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 110, cl 119.3.

³⁵ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 110, cl 119.2(3).

set out above might be specified in the regulations.³⁶ However, it would be impossible as a matter of practicality to prospectively identify in the regulations *every* legitimate purpose for travel.

The burden of proof that would be placed on defendants with regard to establishing legitimate purposes also raises significant concerns. A defendant would displace the required evidentiary burden by demonstrating a reasonable possibility that he or she travelled to the declared area *solely* for a legitimate purpose. It is not clear how this would be interpreted by a court, but it could very well mean that defendants are placed in the very difficult position of proving a negative; that is, a defendant may be required to adduce evidence not only that he or she travelled to the area for one of the enumerated purposes but also that this was the *only* purpose for travel. This would require the defendant to provide factual evidence that he or she did *not* travel to the area with the intention of engaging in a terrorism-related purpose. It is not clear what evidence a defendant would be able to adduce to establish the absence of such an intent.

A similar point can be made in relation to the defence of *bona fide* family visits. How would a defendant adduce evidence that he or she was visiting their family for ‘genuine’ reasons, as opposed to visiting them in order to, for example, provide a cover for engaging in terrorism? Presumably, a defendant would need to demonstrate some evidence that they were *not* intending to become involved in foreign conflict. This would put him or her in a very difficult position and, indeed, it is difficult to see how such a requirement would work in practice.

For these reasons, we believe that the declared area offence should be removed from the current Bill. The only viable alternative would be if the government specified some illegitimate purpose as an element of the actus reus of the offence. However, if such an amendment were adopted, the offence would be superfluous as it would overlap very significantly with the foreign incursion offences detailed below. Those foreign incursion offences already have a broad scope and cover the kinds of activities to which the declared area offence is directed – namely, to prevent individuals from participating in hostilities overseas.

³⁶ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 110, cl 119.2(3)(h).

Recommendation 5:

The declared area offence should not be enacted.

Recommendation 6:

In the alternative, if the declared area offence is to be retained, the government should specify some illegitimate purpose (such as an intent to engage in terrorism-related activity) as an element of the offence.

4. Foreign incursions offences

Currently, s 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (Foreign Incursions Act) provides a maximum penalty of 20 years' imprisonment where a person enters a foreign State with intent to engage in a hostile activity.³⁷ Hostile activity is defined as including the overthrow of the government, armed hostilities and the unlawful destruction of property belonging to the foreign State.³⁸ Section 7 provides a maximum penalty of 10 years' imprisonment where a person does any act that is preparatory to that substantive offence.³⁹

The Bill would repeal the Foreign Incursions Act and recreate these offences in the Criminal Code with some amendments. First, it would raise the penalty for both offences to a maximum of life imprisonment. It would also expand the definition of hostile activity to include 'subverting society'.⁴⁰ The definition of 'subverting society' is considered below.⁴¹

We are concerned by the fact that a maximum penalty of life imprisonment would apply to any preparatory conduct that reveals an intent to participate in a foreign conflict. This would extend to packing a suitcase or booking a plane ticket online. Our concern is not with such conduct being unlawful where an intent to engage in hostile activity is present (indeed, such preparatory conduct is already an offence under the Foreign Incursions Act). It is that the significant increase in the maximum penalty from 10 years to life imprisonment is disproportionate.

³⁷ *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), s 6(1.)

³⁸ *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), s 6(3).

³⁹ *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), s 7(1).

⁴⁰ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 110, cl 117.1(1)(b).

⁴¹ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 110, cl 117.1(3).

In the absence of some compelling justification as to why the maximum penalties for the foreign incursion offences should be increased to life imprisonment, we believe that their current penalties should be retained. A maximum penalty of life imprisonment could plausibly be justified for the offence, proposed in s 119.1(2), where a person actually *engages* in a hostile activity.⁴² However, much greater justification is needed to apply this penalty to the offences of entering a foreign country with the intent to engage in a hostile activity or preparing to do so.⁴³

We are also concerned that definition of ‘subverting society’ would unduly expand the kinds of conduct that would trigger the foreign incursion offences. The Explanatory Memorandum states that subverting society is ‘similar to that which constitutes a “terrorist act” in section 100.1’.⁴⁴ This is generally accurate but at the same time misleading. The definition of ‘subverting society’ would include the list of harms referred to in the definition of a ‘terrorist act’ in the Criminal Code and it would incorporate the same exemption for political advocacy and protest.⁴⁵ However, the definition of ‘subverting society’ does not include other important elements in the definition of a ‘terrorist act’, namely, that an act is done or a threat is made with a particular *intention* (to influence a government by intimidation, or to intimidate a section of the public) and a particular *motive* (to advance a political, religious or ideological cause).⁴⁶ In the absence of these additional requirements, some of the harms listed in the definition of terrorism would constitute much less serious offences (such as vandalism and assault).

Because of this, the definition of subverting society would encompass a range of behaviours that have no connection to the foreign government or ongoing hostilities. It would encompass serious damage to *any* property, serious interference with *any* electronic system, or serious harm to *any* person. The section could apply, for example, to a private dispute between individuals where one person seriously damages another person’s house and endangers the person’s life in doing so. Such conduct might be criminal, but it should not attract a maximum penalty of life imprisonment under the foreign incursion offences. We recommend

⁴² Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 110, cls 119.1(2).

⁴³ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 110, cls 119.1, 119.4.

⁴⁴ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), 7.

⁴⁵ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 110, cl 117.1(3).

⁴⁶ *Criminal Code Act 1995* (Cth), s 100.1(1).

that the definition of subverting society be removed from the Bill and that the foreign incursion offences instead refer directly to the definition of a ‘terrorist act’ in s 100.1 of the Criminal Code.

Recommendation 7:

The offences of entering a foreign country with intent to engage in a hostile activity, and preparing to enter a foreign country with intent to engage in a hostile activity, should retain their current penalties of 20 years’ and 10 years’ imprisonment, respectively.

Recommendation 8:

The definition of ‘subverting society’ should be replaced with a reference to the definition of a ‘terrorist act’ in s 100.1 of the Criminal Code.

5. New offence for advocating terrorism

The Bill would establish a new offence that would be made out where a person: (a) advocates the doing of a terrorist act or a terrorism offence; and (b) is reckless as to whether another person will engage in that conduct as a result.⁴⁷ This offence would be punishable by a maximum of five years’ imprisonment.

While we accept that the incitement of violence should constitute a criminal offence, the proposed offence goes beyond this in two respects. First, the offence defines advocacy as including the ‘promotion’ of violence. This appears to be broader than definitions of incitement, which capture a range of speech acts such as ‘urging’, ‘stimulating’, ‘commanding’, ‘advising’ or ‘encouraging’ a person to commit an unlawful act.⁴⁸ Each of these alternatives suggests that incitement requires a person’s words to operate directly on an intended audience in some way. Promotion, by contrast, could encompass a general statement of support for terrorism that is posted online, with no particular audience in mind.

⁴⁷ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 61, cl 80.2C.

⁴⁸ *R v Chonka* [2000] NSWCCA 466 [77].

Secondly, the proposed offence would require only that the person is ‘reckless’ as to whether their words will cause another person to engage in terrorism. By contrast, the offence of incitement requires that the person *intends* that the conduct should occur.⁴⁹

To the extent that the proposed offence encompasses genuine cases of incitement (namely, where a person urges or encourages another person to commit a terrorism act or offence, and does so intending that the conduct will occur), it is superfluous. By virtue of s 11.4 of the Criminal Code, it is already an offence to incite a terrorist act or a substantive terrorism offence.⁵⁰

By taking a broader approach than the law of incitement, the proposed offence is likely to criminalise a range of legitimate speech acts. For example, the offence could apply to an individual who expressed support for fighters opposing the Assad regime in Syria, and encouraged further resistance by those groups. The acts of those groups would fall under the definition of a ‘terrorist act’ in the Criminal Code,⁵¹ and could therefore provide a basis for making out the new offence of advocating terrorism.

In any conflict there will be difficult lines as to what acts it is legitimate to encourage or promote, but clearly there should be scope in a free democratic society to adopt differing viewpoints on such difficult and divisive issues. Determining right and wrong in a foreign conflict is far too difficult an issue to expose individuals to criminal liability for encouraging or promoting the acts of one side. Certainly, there will be serious cases (such as the recent beheadings conducted by Islamic State) where most people would agree that the conduct is so morally reprehensible that it cannot be justified in any civilised society. But an offence that criminalises the encouragement or promotion of terrorism would apply beyond such cases to a wide range of grey areas and difficult moral questions.

In this regard, it is significant that the proposed offence of advocating terrorism raises similar issues to the sedition laws introduced by the Howard government in 2005.⁵² Those laws attracted a public outcry and a damning report by the Australian Law Reform Commission.⁵³

⁴⁹ *Criminal Code Act 1995* (Cth), s 11.4.

⁵⁰ *Criminal Code Act 1995* (Cth), s 11.4.

⁵¹ *Criminal Code Act 1995* (Cth), s 100.1.

⁵² *Anti-Terrorism Act (No. 2) 2005* (Cth), sch 7.

⁵³ Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (2006).

They were later substantially amended by the Rudd government in 2010,⁵⁴ at which point they took their current form as ‘urging violence’ offences in Division 80 of the Criminal Code.⁵⁵ The current Bill would now expand Division 80 by including a broader offence targeting the encouragement and promotion of terrorism. The previous experience with the sedition offences should indicate that this path is not worth going down again. It should not be a criminal offence in a liberal democracy for a person to express a particular view about terrorism or a foreign conflict, unless the person urges another person to commit an unlawful act and does so intending that the unlawful act will occur.

It is notable that a defence for acts done in good faith, found in s 80.3 of the Criminal Code, would apply to the proposed offence of advocating terrorism. However, it is not clear that this defence would be available in the examples relating to Syria or Israel given above. The defence would, for example, be available where a person urges the *lawful* change of a law or policy in another country.⁵⁶ This would not apply where the acts being promoted were unlawful terrorist acts. The defence would also not likely be available where it could be shown that the person was acting with ‘malice’ (that is, an improper motive or the lack of an honest belief in the truth in the material).⁵⁷ For example, a person might post a malicious statement online calling for the death of Bashar al-Assad. Such conduct might be disagreeable, but should not attract a penalty of five years’ imprisonment in a liberal democracy committed to free speech.

Recommendation 9:

The proposed offence for advocating terrorism should be removed from the Bill.

6. Advocacy as ground for proscription of terrorist organisation

Currently, s 102.1(2)(b) of the Criminal Code provides that an organisation may be listed by the Governor-General as a terrorist organisation if it ‘advocates’ the doing of a terrorist act.⁵⁸ An organisation advocates terrorism where it: (a) ‘directly or indirectly counsels or urges the

⁵⁴ *National Security Legislation Amendment Act 2010* (Cth), sch 1.

⁵⁵ *Criminal Code Act 1995* (Cth), ss 80.2, 80.2A, 80.2B.

⁵⁶ *Criminal Code Act 1995* (Cth), s 80.3(c).

⁵⁷ See Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (2006) 246-249.

⁵⁸ *Criminal Code Act 1995* (Cth), s 102.1(1)(b).

doing of a terrorist act’; (b) ‘directly or indirectly provides instruction on the doing of a terrorist act’; or (c) ‘directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act’.⁵⁹ The Bill would amend this definition (in line with the offence for advocating terrorism) so that it also includes the promotion and encouragement of terrorism.⁶⁰

It is already problematic that an organisation can be proscribed on the basis that it advocates terrorism and any expansion of this power should be considered with extreme caution. In 2006, the Security Legislation Review Committee (Sheller Committee) recommended that the advocacy ground be repealed or substantially revised because it was likely to contribute to a sense of fear and alienation in Australia’s Muslim communities.⁶¹ The provision was recently narrowed slightly in line with one of the Committee’s recommendations.⁶² However, its basic concerns were recently echoed by the COAG Review, which described the power as having the capacity to ‘cast something of an Orwellian blanket over free and democratic discussion’.⁶³ The COAG Review recommended that the grounds for advocacy be restricted to (a) and (b) set out above (that is, urging or counselling the doing of a terrorist act, or providing instruction on the doing of a terrorist act).⁶⁴

The Committee should give serious consideration to the warnings of the Sheller Committee and COAG Review and resist any attempt to expand this ground for proscription. This is firstly because the consequences of listing are significant. A range of serious offences is triggered by the listing process, including for membership of that organisation and association with its members.⁶⁵ Members of an organisation should only be exposed to these criminal offences in the most serious cases – either where the organisation is directly involved in terrorism, where the organisation directly urges others to commit terrorist acts or where the organisation provides instruction to others so that a terrorist attack may take place.

⁵⁹ *Criminal Code Act 1995* (Cth), s 102.1(1A).

⁶⁰ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 64.

⁶¹ Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 5-6.

⁶² *Ibid* 70. See *National Security Legislation Amendment Act 2010* (Cth), sch 2 cl 1.

⁶³ *COAG Review*, 24.

⁶⁴ *Ibid* 23.

⁶⁵ *Criminal Code Act 1995* (Cth), ss 102.3, 102.8.

A second reason is that an organisation could be proscribed for advocacy on the basis of the views expressed by a few of its members. These views might not be representative of the views of all members of that organisation and, as such, a member of that organisation could be exposed to a range of serious criminal offences on the basis of views that they do not even agree with or support.

A more general danger with expanding the definition of advocacy is that it may further alienate sections of Australia's Muslim population. The proposed reforms would do so by making it easier to criminalise organisations that are engaged in public debates on current events overseas. This may contribute to perceptions that the government is unfairly targeting Muslim communities with its counter-terrorism powers.

It is significant that no organisation has yet been proscribed for advocating terrorism. In light of this, it is not clear why the government urgently needs this amendment to address the danger posed by returning foreign fighters. In the absence of any significant evidence demonstrating that the expansion of the proscription regime would help to prevent terrorism, it seems that the dangers of the proposed changes far outweigh their potential benefits. We therefore recommend that the encouragement and promotion of terrorism should not be included as grounds for the proscription of a terrorist organisation.

In the alternative, if these reforms are to be enacted, the promotion of terrorism should be included under limb (c) of the definition of 'advocates' as set out above. Under limb (c), an organisation that praises terrorism may only be proscribed if there is a *substantial risk that such praise might lead a person to engage in a terrorist act*.⁶⁶ By contrast, the promotion of terrorism would be included under limb (a),⁶⁷ which does not require this additional standard. Indeed, under sub-section (a), the promotion of terrorism could be 'indirect' as well as direct. This means that an organisation could be proscribed for indirectly promoting terrorism, regardless of any risk that such speech acts may – let alone are likely – to cause others to engage in terrorism. We believe that promoting terrorism is more akin to 'praising' terrorism than it is to 'urging', 'counselling' or 'encouraging' terrorism. If this ground is to be included in the legislation, it should therefore be included in sub-section (c) of the definition of advocacy. This would impose a higher standard, such that an organisation could only be

⁶⁶ *Criminal Code Act 1995* (Cth), s 102.1(1A)(c).

⁶⁷ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 64.

proscribed for promoting terrorism where there is a *substantial risk that such promotion will cause others to engage in terrorism*.

Recommendation 10:

The encouragement and promotion of terrorism should not be included as grounds for the proscription of a terrorist organisation.

Recommendation 11:

In the alternative, the promotion of terrorism should be included within sub-section (c) of the definition of ‘advocates’, such that an organisation may only be proscribed as a terrorist organisation where there is a *substantial risk that such promotion is likely to cause others to engage in terrorism*.

7. Admission of foreign evidence

Part 3 of the *Foreign Evidence Act 1994* (Cth) currently provides for the admission of evidence received from foreign countries where the Attorney-General makes a formal request for that material, the evidence has been taken on oath or affirmation, and the material purports to be signed or certified by a judge, magistrate or other officer of the foreign country.⁶⁸ As noted by the INSLM, such requirements are not practical where the foreign country in question does not have the same levels of government administration (for example, because the country is in a state of civil war).⁶⁹

The Bill would overcome these limitations by explicitly allowing foreign material to be adduced in terrorism-related proceedings.⁷⁰ It would give Australian courts the discretion to exclude that material where it would have a ‘substantial adverse effect’ on the defendant’s right to a fair hearing.⁷¹ Furthermore, the material could not be adduced where the court is satisfied that the information was obtained through torture or duress.⁷²

⁶⁸ *Foreign Evidence Act 1994* (Cth), pt 3.

⁶⁹ *Foreign Evidence Act 1994* (Cth), ss 21-22.

⁷⁰ Independent National Security Legislation Monitor, *Annual Report* (2014) 35-36 (*‘INSLM 2014 Report’*).

⁷¹ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 125, cl 27C.

⁷² Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 item 125, cl 27D.

These proposed changes are broadly consistent with the recommendations of the INSLM in his 2014 report.⁷³ They are a welcome step towards overcoming the limitations of the existing laws relating to foreign evidence. However, the INSLM also remarked that an attempt to relax the current standards could be ‘more trouble than it is worth’ due to the risks of adducing evidence that is ‘problematic and untestable’.⁷⁴ He stressed that any changes should include a safeguard to protect the defendant’s right to a fair trial,⁷⁵ and that ‘specially adapted’ warnings should be given to juries regarding evidence obtained from foreign jurisdictions that relates to terrorism offences.⁷⁶

The safeguards included in the Bill (relating to the defendant’s right to a fair trial and material obtained through torture or duress) are positive inclusions. However, due to the serious risk that evidence obtained from states without formal government processes may be prejudicial to the accused, we believe that some additional protections are warranted. One possibility would be for the legislation to include an explicit requirement that judges in terrorism-related proceedings must direct the jury as to the potentially prejudicial nature of foreign evidence. The importance of this was recognised by the INSLM.⁷⁷ Another possibility would be to include a requirement that the evidence may only be adduced under the proposed Part 3A (relating to proceedings for terrorism offences) if it is impractical to obtain the foreign government’s formal assistance due to a state of conflict or similar circumstances. This would also be consistent with the INSLM’s views,⁷⁸ and it would ensure that the existing procedures relating to formal requests are followed wherever possible.

Recommendation 12:

The proposed Part 3A of the *Foreign Evidence Act 1994* (Cth) should include a requirement that judges in terrorism-related proceedings direct the jury as to the potentially prejudicial nature of foreign evidence relating to terrorism offences.

Recommendation 13:

The proposed Part 3A of the *Foreign Evidence Act 1994* (Cth) should include a requirement that foreign evidence may only be adduced under that Part if it is impractical to obtain the foreign government’s formal assistance due to a state of conflict or similar circumstances.

⁷³ See *INSLM 2014 Report*, 31-36.

⁷⁴ *Ibid* 36.

⁷⁵ *Ibid*.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*.

⁷⁸ *Ibid*.

8. Passport suspension

Currently, the Minister for Foreign Affairs may cancel an Australian passport where ASIO suspects on reasonable grounds that the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country.⁷⁹ On the basis of such an assessment, the Minister for Foreign Affairs may also order the surrender of a person's foreign passport and travel documents.⁸⁰ The Bill would supplement these powers by introducing a new power to temporarily suspend passports and other travel documents (including foreign passports and travel documents) where a person may be travelling overseas to participate in hostilities. These temporary suspensions would give ASIO time to conduct further checks leading to final cancellation or surrender of the documents. Such a mechanism would serve an important function in allowing the authorities to quickly prevent a person from travelling while the particular danger that he or she poses is assessed.

The Bill would amend the *Australian Passports Act 2005* (Cth) and the *Foreign Passports Act 2005* (Cth) so that ASIO may request the Minister for Foreign Affairs to suspend a person's passport and travel documents for a 14-day period.⁸¹ ASIO would be able to make such requests where it suspects on reasonable grounds that: (a) the person may leave Australia to engage in conduct that is prejudicial to the security of Australia or a foreign country; and (b) the person's travel documents should be suspended in order to prevent the person from engaging in the conduct.⁸² Sub-section (a) sets a lower threshold compared to a final cancellation or surrender, as it requires reasonable grounds to suspect that the person 'may' (rather than 'would be likely to') engage in conduct that might prejudice security.

The Explanatory Memorandum to the Bill states that these changes 'implement several recommendations of the INSLM's Fourth Annual Report'.⁸³ This is misleading. The INSLM did recommend that the government enact a temporary power to suspend passports and travel documents, but he emphasised as a 'trade-off' for this power that it only be permitted for an initial 48-hour period.⁸⁴ He recommended that any subsequent extensions of that period

⁷⁹ *Australian Passports Act 2005* (Cth), ss 14, 22.

⁸⁰ *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth), s 16.

⁸¹ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 items 21, 129.

⁸² Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 1 items 21, 129.

⁸³ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), 12.

⁸⁴ *INSLM 2014 Report*, 48.

should require approval by the Director-General of Security and be limited to circumstances where ASIO officers are conducting an adverse security assessment and further time is needed.⁸⁵ He also recommended an overall limit of 7 days on the period of suspension.⁸⁶

If the temporary suspension power is to be enacted, it should be limited to the 7-day period recommended by the INSLM. The government has claimed that the longer 14-day limit is ‘necessary to ensure the practical utility of the suspension period’.⁸⁷ However, it has not produced sufficient evidence to justify this claim.

Recommendation 14:

The proposed power to temporarily suspend passports and travel documents should be limited to a 7-day period.

9. Emergency visa cancellation

The *Migration Act 1958* (Cth) allows the Minister for Immigration to cancel a person’s visa where ASIO makes an assessment that the person *is* a direct or indirect risk to national security’.⁸⁸ The Bill would establish a new power that would allow for the emergency cancellation of a person’s visa while ASIO conducts further checks. The power would apply to any visa (permanent or temporary) and it would be available where ASIO suspects that a non-citizen outside Australia ‘*might be, directly or indirectly, a risk to security*’.⁸⁹

Where ASIO provides an assessment containing such advice to the Department of Immigration and Border Protection (DIBP), the Minister for Immigration *must* cancel the visa.⁹⁰ Then, within a period of 28 days, ASIO will provide a subsequent assessment; that assessment will confirm either that the person *is* a direct or indirect risk to security (in which case the cancellation will be upheld), or that the person is not a direct or indirect risk to

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), 13.

⁸⁸ *Migration Act 1958* (Cth), ss 116, 501.

⁸⁹ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 4 item 4, cl 134B(b).

⁹⁰ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 4 item 4, cl 134B.

security (in which case the visa will be reinstated).⁹¹ If ASIO does not issue a further assessment within that period, the visa will be reinstated.⁹²

Our major concern is that ASIO need only ‘suspect’ that the person ‘might be’ a direct or indirect risk to security. This sets a very low threshold, and could be said of large numbers of people returning from foreign countries. Given that the power would cause significant disruption and inconvenience to individuals who are later shown not to pose any risk to security, we believe that a higher standard for imposing the initial cancellation would be appropriate to sensibly confine the power. The legislation should require that ASIO suspects *on reasonable grounds* that a person might be a direct or indirect risk to security. This threshold would be consistent with the proposed power to temporarily suspend passports and travel documents.

We are also concerned by the inclusion of a power to cancel other visas attaching to the person’s visa where the cancellation is upheld after the 28-day period.⁹³ This would affect the family members of a non-citizen overseas who is found to be a security risk. Where those

Recommendation 15:

The proposed emergency visa cancellation power should require ASIO to *suspect on reasonable grounds* that the person might be a direct or indirect risk to security.

Recommendation 16:

Any consequential cancellations under the proposed emergency visa cancellation power should require notice to be given to affected family members.

family members are in Australia, they would be exposed to immediate detention and/or deportation. If this power is to be included in the legislation, it should at least require that notice be given for these consequential cancellations.

10. Customs powers

Currently, s 219ZJB of the *Customs Act 1901* (Cth) allows customs officers to detain a person if the officer suspects on reasonable grounds that the person has committed, or is committing,

⁹¹ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 4 item 4, cl 134C.

⁹² Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 4 item 4, cl 134C.

⁹³ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 4 item 4, cl 134F.

a serious Commonwealth offence.⁹⁴ A serious Commonwealth offence is defined as one that involves particular conduct or items (including violence, theft, fraud or controlled substances) and is punishable by at least three years' imprisonment.⁹⁵ In addition, where a person is detained under that power for more than 45 minutes, the officer must inform the person that they are allowed to notify a family member or another person that they are being detained.⁹⁶

The Bill would expand the definition of a 'serious Commonwealth offence' by defining it as an offence punishable by at least 1 year's imprisonment. The government has described the changes to customs powers as necessary to 'overcome vulnerabilities' in the existing legislation.⁹⁷ However, it is not clear why this definition needs to be relaxed to cover offences of between 1 and 3 years' imprisonment when all of the terrorism offences are punishable by much higher penalties (ranging from 10 years to life imprisonment).⁹⁸ One possibility is that customs officers would be able to justify searches relating to the prevention of terrorism by demonstrating reasonable suspicion as to some more minor offence. This scenario would, however, be covered in any case by the alternative proposed power for detention on national security grounds.⁹⁹ In the absence of some significant evidence why this amendment is justified, we believe that the current definition of a 'serious Commonwealth offence' should be retained.

The Bill would also significantly increase the time allowed before the detaining officer must inform the person that he or she is allowed to contact another person (from 45 minutes to 4 hours).¹⁰⁰ The government claims that this extension will not constitute 'an unreasonable restriction on correspondence with the detainee's family'.¹⁰¹ We disagree with this statement, and believe that the current limit of 45 minutes should be retained. We accept that there may be a risk of detainees prejudicing investigations by alerting others that they have been detained, but this possibility is already covered by the legislation. The detaining officer has a discretionary power to deny contact with another person where the officer believes on

⁹⁴ *Customs Act 1901* (Cth), s 219ZJB.

⁹⁵ *Customs Act 1901* (Cth), s 219ZJA; *Crimes Act 1914* (Cth), s 15GE.

⁹⁶ *Customs Act 1901* (Cth), s 219ZJB(5).

⁹⁷ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), 8.

⁹⁸ *Criminal Code Act 1995* (Cth), ss 101.1, 101.4(2). The exception to this is the offence of associating with members of a terrorist organisation, which is punishable by 3 years and would still qualify under the existing definition of a serious Commonwealth offence: s 102.8.

⁹⁹ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 3 item 8, cl 219ZJCA.

¹⁰⁰ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 3 item 6.

¹⁰¹ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), 60.

reasonable grounds that this will safeguard law enforcement or protect the life or safety of any person.¹⁰² The current Bill would expand these grounds to include safeguarding national security or the security of a foreign country.¹⁰³

Recommendation 17:

The current definition of ‘serious Commonwealth offence’ should be retained.

Recommendation 18:

The current time limit of 45 minutes before a customs officer must inform a detainee that he or she has the right to contact another person should be retained.

Yours sincerely,

Mr Keiran Hardy

Research Associate, Gilbert + Tobin Centre of Public Law, University of New South Wales

Dr Nicola McGarrity

Lecturer, Gilbert + Tobin Centre of Public Law, University of New South Wales

Professor George Williams AO

Anthony Mason Professor and Foundation Director, Gilbert + Tobin Centre of Public Law,
University of New South Wales

¹⁰² *Customs Act 1901* (Cth), s 219ZJB(7).

¹⁰³ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), sch 3 item 7.