

**AMNESTY
INTERNATIONAL**



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Mr Dan Tehan MP
Chair
Joint Standing Committee on Intelligence and
Security
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Parliament House, Canberra
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Dear Mr Tehan,

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

On behalf of Amnesty International Australia's 414,000 supporters, I write to provide Amnesty International's submission to the Committee's inquiry into the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (the Bill).

Amnesty International recognises that the primary role of any government is the protection of its citizens and those within its territory. We further recognise the significant terror threat posed by the group calling itself the Islamic State and the potentially increased risks associated with Australian citizens travelling to Iraq and Syria to engage in the fighting. However, these measures must always be subject to international human rights standards including those for fair trials, freedom of expression and movement.

There are a number of elements in the Bill which extend Australia's counter-terror laws beyond internationally accepted human rights standards. Other components of the Bill, such as Control Orders, Preventative Detention Orders and the Australian Security and Intelligence Organisation's (ASIO) questioning and detention powers already pose significant human rights concerns.

Amnesty International has serious concerns that the provisions of the proposed legislation significantly undermine Australia's adherence to its human rights responsibilities when read with laws already in place to counter terrorism. This is particularly the case in relation to the recently passed *National Security Legislation Amendment Bill (No. 1) 2014* which expands the powers and immunity of Australia's security agencies.

Amnesty International is dismayed at the extremely short time period allotted for organisations and the Australian public to provide submissions to the inquiry about this significant legislation. As such, the organisation is unable to submit an exhaustive assessment of the human rights implications of

the Bill. Rather the points below are provided to outline key concerns. Amnesty International would be pleased to provide more information to the Committee upon request.

1. Control orders, Preventative Detention Orders (PDOs) and ASIO Questioning and Detention Powers

The Bill seeks to extend the sunset clauses for the Control Order, PDO and ASIO questioning and detention powers regimes for a further 10 year period after the current expiry date. Amnesty International has long raised significant human rights concerns relating to these regimes.¹ Given that all of these powers have at least 12 – 24 months remaining of their current sunset clauses, the proposed extension is entirely unnecessary. The organisation recommends that these regimes be repealed rather than extended.

Amnesty International holds that control orders are in breach of a person's right to a fair trial² as the imposition of a control order is tantamount to "trying" and "sentencing" a person without the fair trial guarantees required in criminal cases. In addition, Amnesty International is concerned control orders violate the right to liberty and security of the person,³ the right to freedom from arbitrary detention and the right to freedom of movement,⁴ the right to freedom of religion,⁵ the rights to freedom of expression and association,⁶ and the right to be presumed innocent.⁷ Although international human rights law allows for some limitations to these rights under prescribed certain circumstances including national security⁸, Amnesty International does not believe that the use of control orders to restrict the rights and remove the rights of individuals who have not been convicted of any crime can be adequately justified.

The PDO regime undermines key human rights protections including freedom from arbitrary detention;⁹ the right to confidential communication with a lawyer;¹⁰ and the prohibition of secret

¹ See, for example: Amnesty International, Submission to the Senate Legal and Constitutional Affairs Committee inquiry regarding the *Anti-Terrorism Bill (NO. 2) 2005*, 11 November 2005. Available at: http://www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2004_07/terrorism/submissions/sub141.pdf.ashx

² Article 10 *UDHR*; Article 14 *ICCPR*. Control orders deny a person's right to be informed promptly and in detail, of the nature and cause of the accusations against oneself; right to trial within a reasonable time or to release pending trial; right to the presumption of innocence which applies to all persons charged with a criminal offence, including during times of emergency, and requires the state to prove the charge "beyond reasonable doubt"; right to equality before the law and equal protection of the law without any discrimination; right to have a criminal charge against oneself determined by an independent tribunal which has the quality of finality and determinativeness; and right to defend oneself in person or through legal assistance of one's own choosing.

³ Article 9(1) *ICCPR*

⁴ Article 12 *ICCPR*

⁵ Article 18 *ICCPR*

⁶ Article 19 *ICCPR*

⁷ Article 14 *ICCPR*; Article 11 *UDHR*

⁸ Article 4 *ICCPR*

⁹ Article 9 of the *ICCPR*

¹⁰ Under international human rights standards, communications between the accused and their counsel must be confidential. See Principle 22, 'Basic Principles on the Role of Lawyers Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders', Havana, Cuba, 27 August to 7 September 1990

detention.¹¹ Amnesty International also has specific concerns that PDO provisions as currently in place apply to children aged 16 and above – in breach of Article 37(b) of the Convention on the Rights of the Child (CRC) which requires that children only be detained as a last resort.

The extensive detention powers of ASIO officers in their existing form breaches the right to freedom from arbitrary or unlawful detention¹² and to effective judicial review of detention.¹³ These powers further undermine the fundamental principles of detention without charge, undermining of rights while in detention, and the presumption of innocence.

2. Travel to declared areas

The new offences relating to travel to ‘declared areas’ are of significant concern.

The Bill seeks to establish a regime criminalising entry into and remaining within an area ‘declared’ by the Minister for Foreign Affairs in foreign country in which a ‘listed terrorist organization is engaging in hostile activity’. The penalty is imprisonment for 10 years. The Bill outlines very limited defences to this regime in which the person was in the ‘declared area’ for ‘legitimate purposes’. These can exclusively include the provision of humanitarian assistance, performing official government or UN business or attending under a court (or similar body) order, working as a professional news journalist or assistant to a professional news journalist, or entering the declared area for a ‘genuine family visit’. The Bill sets out that it is incumbent on the defendant to prove that their presence in the declared area was solely for a legitimate purpose as outlined.

The regime impacts on the right of freedom of movement.¹⁴ Amnesty International is concerned that this regime could capture a range of otherwise innocent reasons for being in a certain part of a foreign country. These could include religious pilgrimage (potentially breaching the right to freedom of religion)¹⁵, private commercial business reasons or other reasons such as archaeological visits. International fair trial standards giving effect to the presumption of innocence¹⁶ require the prosecution to prove the crime was committed beyond a reasonable doubt. While on its face the burden of proof has not been reversed, in that the prosecution must prove the entry and presence in the declared area, in practice it requires the defendant to prove that their entry and presence in the declared area was for solely legitimate purposes.

¹¹ Section 105.41 of the Criminal Code Act provides that it is an offence for a person being detained under a preventative detention order to disclose that a preventative detention order has been made in respect of them. These provisions essentially create a system of secret police detention.

¹² Article 9(1) ICCPR

¹³ Article 9(4) ICCPR

¹⁴ Article 12 ICCPR

¹⁵ Article 18 ICCPR

¹⁶ Article 14(2) ICCPR

3. Foreign Incursions

The Bill seeks to repeal the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) and inserts its provisions into the *Criminal Code Act 1995* (Cth). In doing so it also seeks to significantly increase the penalties to life imprisonment for both engaging in hostile activities in a foreign country and preparing to engage in hostile activities in a foreign country, and to extend these offences to include engaging in 'subverting society' in a foreign country. Subverting society carries a sentence of life imprisonment and is stated to include: causing serious physical harm to a person or damage to property, causing death to another person, endangering another person's life, or interfering with an electronic system such as a telecommunication systems, financial systems, systems delivering essential government services and transport systems. The Bill does include exceptions for advocacy, protest, dissent or industrial action which is not intended to cause harm.

Engaging in 'subverting society'

The inclusion of activities which are aimed at subverting society in the definition for engaging in hostilities in a foreign country encompasses a range of activities which would not be connected to any terrorist or attack against a foreign government or its assets. There is the potential that these activities – while undoubtedly criminal – would attract a significantly higher penalty than if they were conducted in Australia. Such activities unconnected with terrorism could include any kind of personal dispute or those committed by a person with mental health issues such as extreme paranoia. The expanded definition lacks the specificity required to achieve the outcome of connecting the conduct with terrorist intent overseas.

Amnesty International urges the Committee to recommend that this new offence of 'subverting society' not proceed.

Increasing penalties to life imprisonment

Under Australian criminal law and international human rights law, punishments must be proportionate to the nature, type and severity of the crimes they address. Fair trial rights, the prohibitions against cruel, inhuman and degrading punishment as well as the principle of proportionality all require that different punishments exist depending on the different levels of intent, criminal acts and culpability of an accused person. Attaching a penalty of life imprisonment in particular to the preparatory offences is disproportionate to the offence and must not proceed.

4. 'Advocating Terrorism' Offence

The Bill creates the new offence of 'advocating terrorism' with a maximum penalty of five years' imprisonment for advocating the doing of a terrorist act or a terrorism offence and the person is reckless as to whether another person will engage in that conduct as a result.

Amnesty International is particularly concerned the Bill allows for a person to be arrested for the offence on the grounds of ‘reasonable suspicion’, which is an inadequate standard of proof for arrest under international fair trials law.¹⁷ Further, the definition of ‘advocates’ in the Bill extends to situations where a person *encourages or promotes* the doing of a terrorist act or the commission of a terrorism offence which could likely encompass a range of legitimate speech acts, impinging on the right to freedom of opinion and expression.¹⁸ It may well limit the ability of individuals to comment freely on issues relating to politically and religiously motivated violence, such as current events overseas.

Amnesty International rejects the assessment set out in the bill's Statement of Compatibility with Human Rights, that the legislation as proposed 'is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*'. Not only is the bill incompatible with a range of Australia's human rights obligations, but sufficient safeguards to ensure proportionality for the limiting of these rights have not been established.

Amnesty International urges the Committee to recommend that this bill not be passed. Should the Committee require any further information, please contact Sophie Nicolle, Government Relations Adviser on _____ or via _____

Yours sincerely,

pp Claire Mallinson
National Director
Amnesty International Australia

¹⁷ The right to be presumed innocent in Article 14 (2) of the ICCPR requires the prosecution to prove guilt beyond all reasonable doubt. As stated by the Human Rights Committee in General Comment 32: The presumption of innocence 'imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond a reasonable doubt [and] ensures that the accused has the benefit of the doubt'

¹⁸ Articles 19 and 20 *ICCPR* and Art 5(d)(viii) *CERD*.