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**SUBMISSION OF CIVIL LIBERTIES COUNCILS ACROSS AUSTRALIA TO THE  
PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY  
INQUIRY INTO THE COUNTER-TERRORISM LEGISLATION AMENDMENT  
(FOREIGN FIGHTERS) BILL**

**3<sup>rd</sup> October 2014**

Councils for civil liberties across Australia (New South Wales Council for Civil Liberties, Liberty Victoria, Queensland Council for Civil Liberties, South Australia Council for Civil Liberties, Australian Council for Civil Liberties) have come together to make a joint submission on the Australian Government's Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Bill) .

**1. Review Timeframe**

While we endorse the Government's referral of The Bill to the Parliamentary Joint Committee on Intelligence and Security (PJICIS), we wish to register in the strongest terms our protest at the ridiculously short time frame of one week permitted for analysis and consideration of 227 pages of explanatory memorandum and 158 pages of amendments across 20 pieces of legislation.

It is simply not possible for community organisations reliant on volunteer input to give due consideration to all important aspects of this Bill within this deadline. Like most citizens who wish to engage in the democratic process of dialogue with Government, we must do so in our 'spare'time. The CCLs note also that it is school holidays in NSW, Queensland and Victoria and consequently CCL committee members with expertise in these areas are away.

Furthermore, the CCLs are not convinced that the extreme haste with which these laws are being rushed through Parliament is warranted-with the exception of the provisions relating to temporary suspension of passports and making abduction of foreign evidence easier. Even in relation to these provisions, it is difficult to see that an extra few weeks would have made any material difference in terms of the security of the Australian people.

The Attorney-General has described the proposals in this bill as *addressing 'most pressing gaps in our counter-terrorism legislative framework'*. In fact, few of the proposals can be so described. Australia already has one of the most extensive counter-terrorism statutory regimes amongst western democracies - if not **the** most extensive. We have long argued that parts of this regime are

redundant in that the powers already exist in criminal law or unnecessary as their need has not been demonstrated or disproportionate.

As we indicated in our recent submission to the PJCS, a more reasonable time frame for a considered response on such complex and significant legislation would be in the order of at least 6 to 8 weeks. We note that this time frame would allow the Government to debate the Bill in late November and would enable the Bill to be dealt with in the spring session.

Plainly, the Government was not intent on a serious or genuine consultation process for this review.

We consider the Government -and the Opposition, if indeed compliant with this timeframe - have shown a disappointing lack of respect for civil society organisations and their legitimate and important voice in the democratic process of lawmaking – especially so when the laws being rushed through are of such significance.

We also consider the rush to push this legislation through Parliament to be a reckless approach to law making-especially given the current hyped media coverage of terrorism and Middle East conflicts.

*‘The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.’<sup>1</sup>*

### **Recommendation 1**

- a) The review process for the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill be extended to allow reasonable time for the public and our parliamentarians to properly understand and analyse this important legislation and its impacts on existing liberties and rights.**
- b) Organisations that have not been able to provide submissions within the time frame be given the opportunity to do so, and those who have put together rushed and incomplete submissions be invited to submit supplementary submissions.**
- c) A minimum of one extra month should be provided for a proper and serious review process.**

### **2. Parliamentary Representation on PJCS**

The CCLs are non-party political and determinedly preserve our non-partisan status. From this perspective, we want to register our concern that the PJCS –which has such a central role in the oversight of intelligence agencies – has no membership from the Australian Greens Party or from cross benchers who have in the past manifested strong interest and expertise in the area. If this is a

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<sup>1</sup> Lord Hoffman in the 2004 [Belmarsh](#) case, in which the UK Law Lords found that the indefinite detention of terrorist suspects was incompatible with the European Convention on Human Rights. Quoted in Jessie Blackburn: “*Real Threats to the Life of the Nation*” Inside Story online 2/10/14

deliberate exclusion of informed dissenting voices from the PJCS we consider it a disturbing development which would undermine the parliamentary oversight role and should be immediately remedied.

### **3. General Contextual Comments**

The CCLs do not dispute that there is a real threat of terrorist activity within Australia and that this has become more serious in recent times.

The CCLs accept that a small number of Australians are choosing to travel to Middle East regions in which there is current terrorist activity and, in some cases, are choosing to fight with terrorist groups. We acknowledge that there is the possibility that some of these ‘jihardist’ or ‘foreign fighters’ may, on their return to Australia, pose a real threat of engaging in terrorist activity against the Australian people or the Australian Government. And we do note that our per capita rate of participation in these foreign wars is relatively high –nonetheless the actual numbers are not great and are not likely to become huge.<sup>2</sup>

There are also other valid perspectives on this matter. A recent report looking at the European experience made the following observations:

*‘The current focus on the ‘returnees’ from Syria is another example of simplistic and mechanical views. Sensational reporting around few cases should not hide that, as shown in the literature on militant trajectories, the continuities in the commitment after direct involvement of violent conflicts are the exception rather than the norm’ (emphasis in the original).<sup>3</sup>*

*.... and there is no evidence that veterans of conflicts move in this direction. Some individuals might continue in Europe the struggle they have started to engage with in Mali, Syria or elsewhere, but not necessarily in a violent way. More likely, most of the returnees will not continue the struggle. The most important unknown here is to what extent special measures taken against them will affect their behaviours.’<sup>4</sup>*

We also accept- notwithstanding the Government’s surprising and repeated assertions to the contrary-that there is strong likelihood that Australia’s engagement in military interventions in the Middle East will increase the risk of terrorist activity in Australia and against Australians overseas.

The CCLs are not disputing there is an issue. We are concerned that it may be exaggerated or manipulated to limit proper scrutiny of unwarranted counter-terrorism laws.

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<sup>2</sup> The INSLM reported that between 1990-2010, 30 Australians travelled to Afghanistan or Pakistan to train or fight with extremists. Nineteen were of concern on return to Australia. Of the nineteen, eight were convicted of terrorism related offences whilst some others were charged with offences overseas. INSLM Annual Report 2012-3; March 2014, p44

<sup>3</sup> Committee on Civil Liberties, Justice and Home Affairs; European Parliament: *Preventing and Countering Youth Radicalisation in the EU* p11.

<sup>4</sup> Ibid p15

We also note there is a deal of history and current research to suggest that the so called 'soft' strategies may constitute a more effective approach to preventing Australians going to these foreign wars in the first place and in dissuading them from ongoing terrorist or other hostile activity on their return.

**In this context, the CCLs accept that ASIO and other intelligence and security organisations should have the powers and resources necessary for the protection of national security including protection of the Australian people against a real threat of terrorist activity in Australia - with the essential caveat that they are consistent with our core democratic values.**

The CCLs do not accept that it is clear that existing laws are grossly inadequate or require major changes to deal with the current threat. The current level of reported police activity in relation to apparent threats demonstrates that existing powers are producing real results.

Where the proposed changes expand existing ASIO powers and/or weaken balancing safeguards and protections, our endorsement is dependent upon persuasive evidence justifying such changes and clear demonstration that rights and liberties are not being unwarrantedly or disproportionately encroached upon by new laws.

We note that while the views of our intelligence and security agencies are important in this analysis— it does not follow that all powers they request should be granted by the Parliament without sound, evidence based reasons and robust analysis of their impact on rights, liberties and our democratic values. In recent times, it has appeared that intelligence agencies views are increasingly sufficient to establish need and proportionality – even where significant civil liberties and human rights are acknowledged to be diminished.

We have seen progressive, incremental encroachments on democratic values, liberties and rights since our very first 'tranche' of counter-terrorism laws in 2003. This week the Australian Parliament passed the National Security Legislation Amendment Bill (No 1) 2014 which included some particularly disturbing proposals which are now law and which will inevitably seriously erode important rights and liberties in Australia. (Creating a Special Intelligence Operations (SIO) regime which provides ASIO officers immunity from civil and criminal prosecution for unlawful acts; a new offence punishable by 5 years imprisonment for any person disclosing any information about a SIO and extraordinarily wide ASIO access to (undefined) networks of computers of both suspects and non-suspects on the basis of a single warrant. Collectively these provisions will have a profound chilling effect on journalism and a free media, on legitimate whistle-blowers and, ultimately on free discourse.)

We are concerned that this new Foreign Fighters' 'tranche' of counter-terrorism laws, while having some reasonable and sensible proposals, continues this trend with new and extended encroachments on Australians' liberties and rights and potential alienation of large sections of the Australian Islamic community

#### **4. General comments on the Bill.**

We have been forced to confine our written comments to preliminary and general reactions to some of the most significant and most disturbing provisions in the Bill. Our analysis is still in progress.

The CCLs are supportive of some of the proposed laws in the Foreign Fighters' Bill, concerned about the impact on civil liberties and rights with others and strongly opposed to some proposals because of their disproportionate and unwarranted impact on liberties and rights and our justice system.

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#### **DETAILED COMMENTS ON PROPOSALS**

##### **5. Extension of Sunset Clauses**

The Bill proposes to extend existing sunset clauses for specified counter-terrorism laws for a further 10 years. These sunset clauses, relating to control orders, preventative detention orders (PDOs), and ASIO's questioning and detention powers, were incorporated into relevant legislation because it was accepted that these powers were extraordinary and should be temporary.

When initially enacted, the ASIO powers were to expire after 3 years. These were extended in 2006 for a further decade to 2016. The Government now proposes to extend all these sunset clauses to 2025.

Laws that will have been in place for over 20 years are likely to be de facto permanent. They will have transformed from 'extraordinary' to normal. They are likely to have further spilled over into 'ordinary' state criminal jurisdictions.

Australia does not have a charter or bill of human rights as a bedrock protection of our fundamental rights and liberties. To allow these 'extraordinary' counter-terrorism laws to become embedded in our justice system has very significant and dangerous implications for our democratic values and traditional liberties. The CCLs were concerned about the long term implications when the ASIO sunset clauses were extended in 2006. In 2012 our concern was such that we launched a national campaign focussed on a proportionate balance between rights and security in our counter-terrorism legislative regime. An explicit goal of this campaign is the expiry of the short term 'extraordinary' counter-terrorism powers relating to control orders, PDOs and ASIO's questioning and detention warrant powers as provided for in the sunset clauses.

The more contentious of these powers have been the subject of wide concern and have been subject to reviews recommending their repeal. This arbitrary and untested proposal to maintain all these powers for another decade runs counter to a range of recommendations from formal review

processes in recent years. The INSLM, the COAG review and the PJCIS (and its predecessor) have all made recommendations questioning the continuation of some of these powers.<sup>5</sup>

The CCLs strongly oppose the inclusion of the provision for the rollover of the current sunset clauses for a further decade in this Bill. Some of these laws should not have been enacted even as temporary measures. The need to continue with any of them beyond their scheduled sunset date must be carefully and independently assessed.

A decision to roll-over these sunset clauses, especially for such a lengthy period, should only be made after careful evaluation of their necessity, proportionality and broad impact on democratic values and civil liberties and rights.

### **Recommendation 2**

**The current sunset clauses relating to extraordinary counter-terrorism laws should not be extended without a considered and formal review process prior to their current scheduled expiry in December 2015 and July 2016. These proposals should be withdrawn from the Foreign Fighters Bill and referred to the Independent National Security Legislation Monitor and to the PJCIS for review prior to their respective expiry dates.**

## **6. Part 5.5 – Foreign Incursions And Recruitment**

### **6.1. Foreign Incursion Offences**

The Bill proposes a new Part 5.5 of the Criminal Code dealing with foreign incursions and recruitment, although the name of the Part is somewhat misleading, given that its reach is far more extensive. The crimes it creates relate to actions well beyond those nominated in the title. The essential purpose of the Part is to enable the investigation, arrest, prosecution and punishment of people supporting foreign conflicts. The secondary purpose is to limit the opportunities for, and means of, travel for foreign fighting and support for foreign fighters.

Speaking generally, there is no particular problem with criminalizing such activities. The problems with Part 5 are different and include the following.

- Several of the crimes created are so loosely worded that they may capture either innocent activity or activity which, in and of itself, involves relevant actors in activities that fall far short of the commission of serious crime.

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<sup>5</sup> Independent National Security Legislation Monitor, *Declassified Annual Report (2012)* 44, 67 ('*INSLM 2012 Report*'). Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation (2013)* 68 ('*COAG Review*'). 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)

- Ministerial discretion in relation to the declaration of certain matters that then form the basis of the crimes defined is cast far too widely.
- The penalties imposed in relation to most of the crimes are seriously disproportionate to those that might apply domestically for similar offences.

The Bill inserts a new part 5.5 into the Criminal Code Act, creating a series of new offences under the heading “foreign incursion and recruitment”, namely:

- Entering foreign countries with the intention of engaging in hostile activities
- Engaging in a hostile activity in a foreign country
- Entering, or remaining in, declared areas
- Preparatory acts to an incursion offence
- Accumulating weapons etc
- Providing or participating in training
- Giving or receiving goods and services to promote the commission of an offence
- Use of buildings for preparatory acts
- Use of vessels or aircraft for preparatory acts
- Recruiting persons to join organisations engaged in hostile activities against foreign governments
- Recruiting others to serve with foreign armed forces
- Publishing recruitment advertisements
- Facilitating recruitment

Each of these offences turns upon whether the accused has “engaged in a hostile activity”, or intends to do so, or has done or intends to do something that is in some way connected to a person who has “engaged in a hostile activity”, or intends to do so. The definition of “engages in a hostile activity” is therefore key to understanding the scope of these offences. The definition of ‘a hostile activity’ is defined as follows in s117.1(1):

*“a person **engages in a hostile activity** in a foreign country if the person engages in conduct in that country with the intention of achieving one or more of the following objectives (whether or not such an objective is achieved):*

- (a) the overthrow by force or violence of the government of that or any other foreign country (or of a part of that or any other foreign country);*
- (b) the engagement, by that or any other person, in subverting society in that or any other foreign country;*
- (c) intimidating the public or a section of the public of that or any other foreign country;*
- (d) causing the death of, or bodily injury to, a person who:*
  - i. is the head of state of that or any other foreign country; or*
  - ii. holds, or performs any of the duties of, a public office of that or any other foreign country (or of a part of that or any other foreign country);*

*(e) unlawfully destroying or damaging any real or personal property belonging to the government of that or any other foreign country (or of a part of that or any other foreign country)."*

The existing offences of "incursions into foreign states with intention of engaging in hostile activities" and preparations for such incursions, contained in sections 6 and 7 of the Crimes (Foreign Incursions) Act 1978 (Cth), similarly rely on a definition of "engaging in a hostile activity in a foreign state". That existing definition, in s6(3) of the Crimes (Foreign Incursions) Act, mirrors paragraphs (a), (d) and (e) of the proposed definition set out above, with the addition of "engaging in armed hostilities in the foreign state". However, the inclusion of the terms "subverting society" and "intimidating the public or a section of the public" in paragraphs (b) and (c) of the proposed definition make this a much broader concept than the corresponding concept in the Crimes (Foreign Incursions) Act. Accordingly, all of the offences proposed to be added to this part of the Criminal Code Act, which turn on this much broader concept of "engaging in a hostile activity", have much broader scope than the existing offences in the Crimes (Foreign Incursions) Act.

The essential problem with the foreign incursion offences may best be illustrated by three practical examples.

First: The Bill creates an offence in s.119.1 for a person who enters a foreign country with the intention of engaging in a hostile activity in that or any other foreign country, when the person is *inter alia* an Australian citizen or resident. Such an offence would clearly have been committed by George Orwell, Ernest Hemingway, Laurie Lee and many other concerned Europeans who entered Spain during the Spanish Civil War, with a view to assisting Spanish republicans in fighting, and then overthrowing, the violent, autocratic and repressive government of General Franco.

Second: It is the case that s.119.8 permits the Minister to declare that these provisions do not apply to a person serving in the armed force of a government, or in any other armed force in a foreign country in a specified capacity. But this exception applies only if, first, a declaration is made and, secondly, if the Minister is satisfied that it is in the interests of the defence or international relations of Australia to permit the service. This would not cover any Australian who fought with the Spanish International Brigade. Such Australians might in normal circumstances, however, be lauded as heroes.

Closer to home, the provisions would have been directly relevant to East Timorese who had achieved citizenship or residency status, and had returned to East Timor to fight with their national counterparts, or support their families and friends, during the genocidal actions of the then Suharto regime in repressing the East Timorese rebellion in favour of independence. Jose Ramos Horta, who subsequently obtained the Nobel Peace Prize for this diplomatic work for the achievement of independence, was resident in Australia for a substantial period of time. Should this legislation have been in place it is possible (though admittedly unlikely) that he would have been greeted with a life sentence for advocating for, engaging in, and supporting the commission of hostile activity against



the Indonesian Government. One might also consider how these provisions play out in relation to West Papua and other areas where a foreign government is concerned about terrorist activities.

Thirdly, take the current example of Syria. The application of the foreign incursion provisions to a person engaging in the subversion of Syrian society would produce highly paradoxical results. As the legislation stands, a person who travels to Syria to fight the Assad regime, even in the Free Syrian Army, would fall foul of the foreign incursion offences contained in the Bill. If, however, a person travelled to Syria to fight in the Syrian Army loyal to President Assad, the criminal offences contained in the Bill would not apply as fighting in the army of a foreign country is excluded from the relevant criminal provisions. So, fighting for a government that has been responsible for the deaths of almost 200,000 of its citizens would be permissible. But fighting for a rebel group attempting to overthrow such a murderous regime would attract the heaviest of penalties.

CCLs also perceive an issue in relation to proposed s119.3. It is unsatisfactory that the Minister is able to, in effect, determine whether entry into particular areas amounts to a criminal offence. At the very least, any declaration by the Minister should be subject to parliamentary disallowance. Failure to provide for parliamentary oversight gives rise to the possibility of a Constitutional challenge to the scheme.

These examples make it clear that the crimes defined in s.119 are in need of radical re-drafting if they are not to catch a wide array of activities by Australian citizens and residents in justified or unexceptional circumstances. It is not good enough just to provide that a relevant Minister can declare armies or fighters as good or bad. These are inherently political decisions and, therefore, inherently unpredictable. The legislation needs to be much tighter than that. In what follows, we make comment on the breadth of some of the crimes defined and the penalties proposed to be assigned to them

The Bill creates a large number of foreign incursion offences. They are all too often defined so widely that they may embrace and penalize severely activity that in normal circumstances would be considered as no more than preparatory to the commission of a minor criminal offence. And the penalties that apply to them are draconian. To take some examples:

- S.119.4(1) creates an offence if a person engages in conduct (whether within or outside Australia) and the conduct is in preparation for an offence against s.119(1). No indicative instances of preparatory conduct are provided or specified. The penalty for any such preparation is imprisonment for life. Any number of preparatory activities may qualify. It would seem, for example, that the making or purchasing of hard-wearing boots to send to a relative engaged in conflict may qualify. A person who provides a contribution to the initial accommodation costs of a relative or friend travelling to a foreign country for the purposes of engaging in rebellion, might be liable to life imprisonment for their donation. A person providing another with medications for persistent backache or headache expected to be experienced while in a foreign country would also seem to be caught. The breadth of the

offence is completely unacceptable.

The life sentences for preparatory activities are completely disproportionate and draconian. The wrong is not the actual commission of a criminal act, nor is it an attempt to engage in a criminal act, nor is an action reckless as to the commission of a criminal act or an attempted commission of such an act. Domestically one might expect a penalty for preparatory activity that falls far short of one appropriate to the actual commission of specified crime. Here, simple preparation, largely undefined, opens out the possibility of lifetime incarceration.

- S.119.4(2) creates an offence if a person is present at a meeting, where the person intends to provide, or participate in providing, military training to another person that relates to the commission of an offence under s.119.1. One might, for example, go to a firing range to teach a friend or colleague with similar religious beliefs, who intends to travel to Homs to fight the Assad regime in Syria, how to shoot more accurately. The person themselves may have no intention whatever to join the Syrian rebellion or to commit terrorist acts in Australia. Nevertheless, the person who instructs will then be liable to life imprisonment. This is an absurd prospect.
- S.119.4(4) creates an offence if a person recruits another person to become the member of a body and the objectives of the body include any one or more of the objectives referred to in the definition of 'engage in a hostile activity' as defined in subsection 117.1(1). The definition of engage in hostile activity is cast very widely. Among other things it includes intimidating the public or a section of the public of a foreign country; and unlawfully damaging any real or personal property belonging to the government of that country. In different countries, different actions may be regarded as intimidating. So, for example, it might be intimidating to a section of the public of a foreign country to display, desecrate or hurl abuse at an image of the Prophet Muhammad in a country in the Middle East, yet not elsewhere. The property of an oppressive government may be damaged whether intentionally or otherwise during the course of an illegal but nevertheless legitimate political protest in favour of greater political and democratic freedoms (think here of the present protests in Hong Kong). Recruiting a person to join a body having such objectives even if only distantly in mind may nevertheless land the recruiter (who will neither intimidate nor damage any property) in gaol for 25 years.

The same kinds of argument may be applied to, and expose, serious difficulties with almost every one of the offences contained s.119. Regrettably, given the time constraints applying to the period in which submissions must be provided, do not allow for any more extensive analysis to be undertaken here. But the message should be clear.

The Crimes (Foreign Incursions) Act 1978 (Cth) already contains offences of “incursions into foreign states with intention of engaging in hostile activities” and preparations for such incursions, in sections 6 and 7 of that Act. The current Bill would repeal the Crimes (Foreign Incursions) Act and incorporate those offences into sections 119.1 and 119.4 of the Criminal Code Act.

As noted above, the definition of “engaging in a hostile activity” is significantly broader in the current Bill than in the existing offences, with the result that the new offences in sections 119.1 and 119.4 are considerably broader than the corresponding offences that would be repealed.

The penalty for incursion into a foreign state with intention to engage in hostile activities under s6 of the Crimes (Foreign Incursions) Act is 20 years imprisonment. The penalty for the proposed offence in s119.1 of the Criminal Code Act is life imprisonment. Similarly, the preparatory offences in s7 of the Crimes (Foreign Incursions) Act carry a penalty of 10 years imprisonment, while the much broader offence in the proposed s119.4 attracts a penalty of life imprisonment. The only reason given in the explanatory memorandum for the dramatic increase in penalties is to align the penalties with the existing terrorism offences in the Criminal Code.<sup>6</sup>

In our view, there is no justification for the dramatic broadening of the scope of the existing offences, nor for their loose drafting, nor for the increased penalties. If the Crimes (Foreign Incursions) Act is to be repealed and its offences incorporated into the Criminal Code Act, we recommend that the scope of the offences and the penalties remain unchanged from sections 6 and 7 of the Crimes (Foreign Incursions) Act.

### **Recommendation 3**

- a) Delete the entirety of division 119 and rely instead on the existing offences contained in the Crimes (Foreign Incursions) Act 1979. Or in the alternative:**
- b) Amend the definition of “engages in a hostile activity” as recommended above and retain the penalties in the Crimes (Foreign Incursions) Act for the proposed new offences that are intended to replace the repealed offences in that Act.**

Before concluding this section some consideration should also be given to the definition of ‘subverting society’ also contained within s.119. The term “subverting society” is defined in the proposed s117.1(3) and is extraordinarily broad. It covers:

- conduct that causes serious harm that is physical harm to another person;
- conduct that causes serious damage to property;
- conduct that causes another person’s death;
- conduct that endangers another person’s life, other than the life of the person taking the action;

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<sup>6</sup> Explanatory memorandum, para 216.

- conduct that creates a serious risk to the health or safety of the public or a section of the public;
- conduct that seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
  - an information system; or
  - a telecommunications system; or
  - a financial system; or
  - a system used for the delivery of essential government services; or
  - a system used for, or by, an essential public utility; or
  - a system used for, or by, a transport system.

That definition is subject to an exception in s117.1(4) for protest or dissent that is not intended to cause death or serious physical harm, endanger life or cause a threat to public health or safety.

It is not difficult to imagine a scenario in which an act which is essentially innocent – or indeed an act that may be illegal in itself but entirely unconnected to terrorism or armed conflict – falling within this definition. Recalling that several of the new offences require only an indirect connection to the hostile act, such as providing goods or services to a person who intends to engage in a hostile activity, this definition is far too broad for the intended purpose. It will criminalise activity that has no connection whatsoever to terrorism or armed conflict.

While no complaint can be made against those parts of the definition that relate to actions that cause death, serious harm, serious risks to the health or safety of the public or which endangers life, significant reservations can be expressed concerning additional property related damage or disruption.

So, for example, one might face life imprisonment if one engages in conduct in Australia preparatory to the disruption of a foreign country's postal, transport or financial system. Such actions may cause significant inconvenience to the residents of another country but, here again, should not under any circumstances attract a penalty of life whether in commission or preparation. It should also be noted in this regard, that the criminal conduct here is nowhere in the legislation related specifically to the commission of 'terrorist acts'. In other words, the legislation criminalizes any disruption of any electronic, communications, postal, or transport system and every and any infringement upon property rights. If the definition is to be retained, which in our view it ought not to be, it should be amended to relate directly to the definition of a 'terrorist act' in s.100.1 of the Criminal Code.

#### **Recommendation 4**

- a) The definition of 'subverting society' should not be retained in the Bill**
- b) If retained it should be amended to tighten the definition and relate directly to the definition of a 'terrorist act' in s.100.1 of the Criminal Code.**

## **6.2. No-Go Zones**

We find the underlying nature of this offence objectionable. In our view, the starting presumption in a liberal democracy should be that its residents are free to travel wherever they please. If there is a need to limit freedom of travel in the context of terrorism, any limitation should require a connection to terrorist activity, as in the case of the incursion offences discussed above.

Criminalising travel per se is an extraordinary departure from Australia's liberal democratic values. For that reason, we strongly recommend the deletion of this proposed offence from the Bill.

S.119.2 provides that it is an offence for a person to enter an area in a foreign country that has been declared by the Foreign Affairs Minister, if the Minister is satisfied that a listed terrorist organization is engaging in a hostile activity in that area. To enter or remain in a declared areas attracts a penalty of 10 years imprisonment. S.119.2(3) provides an exception of the person has entered the territory for specified reasons which include, for example, to engage in humanitarian, journalistic or family related activity. The scope of the offence is extraordinarily wide. In effect, it means that a person will be liable to prosecution for crossing a geographical line determined in the absolute discretion of a Minister, and drawn, potentially, in any part of the world, depending on the Minister's judgment as to circumstance. Once having crossed the line, the onus of proof shifts, in effect, to the person in the zone declared. He or she must then demonstrate that their presence in the area falls within the statutory exceptions. The exceptions themselves, however, are narrow. They may not cover adventurers, tourists, those having entered inadvertently, others who have gone to support friends and so on. The exception for journalists extends only to those who are working 'in a professional capacity', which would rule out, social media commentators, bloggers, researchers, and many other classes of person who would not come within the definition of conducting themselves professionally. Even the exemption for those visiting family creates problems of proof for specified individuals who may find it difficult to demonstrate that the purpose of travel was *not* to engage in suspected and prevalent hostile or subversive activity despite, or even because of, their family connection.

As noted previously, this offence has been the subject of considerable debate on the question of whether the onus of proof is essentially reversed, with an accused required to prove his or her innocence. The government asserts that the onus of proof is not reversed, because the prosecution will still have to prove the elements of the crime beyond reasonable doubt. However, in our view, that assertion is misleading, due to the construction of the elements of this offence.

More technically, the elements of the offence, which the prosecution will be required to establish beyond a reasonable doubt, are only that the area has been declared by the Foreign Affairs Minister under s119.3 and that the accused has either entered into the declared area after the declaration by the Minister, or has remained in that area after the declaration. It is not an element of the offence that the accused entered or remained in the declared area for any untoward purpose, with the result that this need not be established by the prosecution for the offence to be made out. In other words, if the prosecution can establish that the accused entered or remained in a declared area after the declaration, the accused will be guilty of the offence unless he or she can demonstrate that a defence applies. In this way, it is the accused who will bear the burden of demonstrating an innocent intent, rather than requiring the prosecution to demonstrate a nefarious intent (or the lack of innocent intent). While this might technically satisfy the requirements of the presumption of innocence, the substantive burden of exonerating oneself clearly lies with the accused as the

proposed offence is structured.

This situation is directly contrary to the fundamental values of the Australian criminal justice system and to the human right to a fair trial. The assertion in the Statement of Human Rights Compatibility that there is no reversal of the onus of proof, thus emphasising the technical view rather than the substantive effect, is disingenuous and alarming, as is the assertion that any limitation of the right to a fair trial is a necessary and proportionate response to the threat of terrorism.<sup>7</sup>

If the offence is to be retained, contrary to our recommendation, the offence should require intent to engage in terrorist activity (or “engage in hostile activity” if the scope of that definition is amended as recommended above) as one of its elements, meaning that intent would need to be demonstrated by the prosecution. However, adopting this formulation would effectively duplicate the foreign incursion offence, which supports our view that this proposed offence is unnecessary.

If, contrary to these recommendations, this offence is retained in its present form, it should at least broaden the range of innocent purposes available in the defence in s119.2(3). All of the purposes listed in that subsection relate to a person’s official functions, for example as an aid worker, journalist, or UN or government official, except for the single purpose of “making a bona fide visit to a family member” in s119.2(3)(g). There are undoubtedly many other innocent reasons for visiting or remaining in a declared area, including visiting friends, conducting business, transit between other destinations, and many other reasons that cannot be exhaustively listed.

### **Recommendation 5**

- a) The proposed offence in s119.2 (and related provision in s119.3) of the Criminal Code Act should be deleted from the Bill.**
- b) If the offence remains, contrary to this recommendation, it should be reframed to include an intent to engage in hostile activity as an element of the crime.**
- c) If the offence remains as currently structured, contrary to these recommendations, the list of innocent purposes in s119.2(3) should be considerably expanded and expressed as inclusive rather than exhaustive.**

### **6.3. Personal Jurisdiction**

Each of the offences in the proposed part 5.5 of the Criminal Code Act purports to apply to activity outside Australia not only by Australian citizens and residents, but also to anyone holding an Australian visa of any sort, and anyone voluntarily placing himself or herself under Australian protection but without a visa, which presumably covers people arriving to claim asylum who have not yet been granted a visa.

While we do not object in principle to the exercise of extraterritorial jurisdiction, this Bill seeks to exercise criminal jurisdiction over persons who have a very tenuous connection to Australia – those who merely hold an Australian visa – and who may not have been present in Australia for a long time before or after the relevant conduct. The Australian government would presumably object to

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<sup>7</sup> Explanatory memorandum, paras 227-9.

any country seeking to exercise criminal jurisdiction over Australian nationals on such a tenuous basis. For that reason, we recommend that the scope of the proposed offences be limited to the more direct connection to Australia contained in s6(2) of the Crimes (Foreign Incursions) Act, namely Australian citizens, persons ordinarily resident in Australia or a person whose presence in Australia was connected in some way with the relevant conduct.

#### **Recommendation 6**

**Replace the jurisdictional formulation in sections 119.1(1)(b), 119.1(2)(b), 119.2(1)(c), 119.4(1)(c), 119.4(2)(c), 119.4(3)(c), 119.4(4)(c), 119.4(5)(c), 119.5(1)(d), 119.5(2)(d) (insofar as any of those provisions are not deleted), and anywhere else the formulation appears, with the narrower jurisdictional formulation in s6(2) of the Crimes (Foreign Incursions) Act.**

#### **6.4. Consent of The Attorney-General to Prosecution**

We welcome the safeguard proposed in s119.11 that requires the consent of the Attorney-General for the prosecution of an accused for an offence under the proposed division 119 of the Criminal Code. We further welcome the clarification in s119.11(3) that nothing in that section “prevents the discharge of the accused if proceedings are not continued within a reasonable time.”

However, we are concerned that there is no onus on a detaining authority to release a detained person if the Attorney-General’s consent to prosecute is not forthcoming within a certain time. As this provision stands, a person could be charged, arrested and detained in connection with an alleged offence under division 119, and then detained indefinitely without facing trial because the Attorney-General has not consented to prosecution. That situation is inconsistent with the human right to be free from arbitrary detention and the right to a fair trial, which includes the right to an expeditious trial. Section 119.11(3) should therefore be amended to impose a positive duty on a detaining authority to release a detained person if the Attorney-General has not consented to prosecution within a specified time.

#### **Recommendation 7**

**The proposed s119.11(3) should be amended to require that an accused be released if the Attorney-General refuses consent to prosecute, or fails to grant consent within a specified time.**

#### **7. Advocacy Offence**

It is the view of the CCLs that the proposed law to criminalize incitement or generalized expression of support for or ‘promoting and encouraging’ terrorism is an unacceptable restriction on free speech. In order to establish the necessary connection between speech and action such that the speech can be made unlawful, the law must require that the prosecution prove:-

- (a) An intention to encourage violence; and
- (b) A specific connection between the conduct of the speaker and the actual use of force or violence or the commission of an act of terrorism.

On any view of the proposed laws they go far beyond these requirements.

The CCLs view permits the advocacy of revolution against an authoritarian state. Some argue this is dangerous. Some point out that this might allow an Islamist group to come to power or an outbreak of violence. This argument from the “Paradox of Tolerance” is defective in three respects.

Firstly, it contains the unstated empirical premise that unlimited tolerance must lead to the disappearance of freedom. Whereas it is possible the opposite might occur, through the absurdity of a view being revealed.

Secondly, freedom means nothing if it is only for those with whom you agree.

Finally, it relies on the ability of the State to impartially and effectively identify threatening groups. History would lead us to seriously doubt that the State has such a capacity. The fact that Burns and Sharkey were successfully prosecuted for their plainly mild remarks shows that, especially in times of crisis, be it real or imagined, these powers will be misused.

Not only does proscribing speech strike at a fundamental value, it has a tendency to be dysfunctional. Mistrust of the State leads people to react with curiosity when an idea is assaulted; what are “they” trying to hide. If “they” despise it, it might be good. This tends to increase the awareness of a doctrine. The alienation and suppression of people is an evil in itself. Suppressed people react defensively, reaffirming their commitment to their opinions. As suppression is never totally successful, the suppressed re-double their efforts and their ideas continue to spread. The spread of their ideas is facilitated by the availability of martyrs.

The CCLs wish to make it clear that they do not support the views of militant Islam or violence. However, that is to miss the point entirely. The point that the best armoury that society can give to itself against authoritarian ideas is freedom of discussion and education. We must strive to maintain and expand the openness of our Society and not constrict it.

If there are militant Islamists in our society they will not be defeated by these laws. They will simply go under ground and become harder to combat.

### **Recommendation 8**

**The proposed amendments to the *Criminal Code Act 1995* concerning the creation of a new offence of ‘advocating terrorism’ should be deleted from the Bill.**

### **8. Delayed Notification Warrants**

Notwithstanding that this measure has the support of the INSLM we remain concerned that these warrants involve a significant departure from established principles.

A search of a person’s premises, particularly a person who is an innocent third party, represents a serious violation of that person’s right to privacy. That such persons are entitled to be notified of that violation of their privacy is fundamental to ensuring that such powers are not abused.

We note that law enforcement agencies already have significant powers including:

- The power to conduct controlled operations, which powers are extended by this legislation to ASIO
- The power to enter premises to covertly install surveillance devices



- The power to intercept telecommunications is also being expanded
- The power of ASIO to obtain a warrant which allows them to covertly enter premises for the purposes of accessing records will substantially assist the collection of intelligence.

However, if the power is to be granted, it needs to be subject to the following stringent safeguards having regard to the points of principle made above:

- The warrant should be issued by judicial officers only, not by the AAT
- The Commonwealth should introduce the concept of the Public Interest Monitor (PIM) found in Queensland law. The role of the Ombudsman is very much a case of shutting the gate after the horse has bolted. Similarly, IGIS's role and resources are not appropriate for the provision of effective oversight in respect of such warrants.
- The PIM should have the right to be notified of applications for such warrants and to make submissions in relation to their issue and also to be able to send a representative on any execution of a warrant to assess personally how it is conducted
- Whilst the Bill makes the existence of alternative methods of obtaining evidence, a factor to be considered, it should in our submission be a pre-condition to the issuing of the warrant that the Applicant demonstrates that it is not possible to obtain the evidence in another way and in particular it is not possible to execute a warrant in the ordinary fashion.

The CCLs consider the time period for which notification may be delayed is too long. We note that in the United States it is variously seven days or 45 days.<sup>8</sup> In Canada it is 90 days – see s196.1 of the Canadian *Criminal Code*.

We consider the power under s3ZZDC(6) is too broad. The circumstances in which the notification of the delay is extended should be strictly limited to those relating to the investigation of an actual offence. The committee should ask the Attorney General, a former member of the QCCL, what he consider might constitute “exceptional circumstances”.

### **Recommendation 9**

- a) That a position of Public Interest Monitor be created, similar to the position in Queensland and other common law based democracies, with powers to make submissions in relation to the issue of Delayed Access Warrants.**
- b) That the maximum time for notification in respect of a Delayed Notification Warrant be no more than 90 days.**

## **9. Suspension of Travel Documents**

The INSLM recommended in his report referred to above at page 47 that the Minister be given a power to suspend passports which should not be the subject of merits or judicial review, except of course under s75(V) of the Constitution. He noted on page 48 that the trade-off for such a proposal would be “A strict timeframe on the interim cancellation. It may be that an additional period of 48

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<sup>8</sup> In *Dalia v The United States* 441 US 238 the Supreme Court of the United States held there was no constitutional prohibition on a covert search so long as it was authorised by a warrant. In *United States v Freitas* 800 F 2d 1451 and *United States v Villetas* 899 F2d 1324, it was held in the absence of a specific showing notification must take place within 7 days of the search. In a later case of *United States v Simons* 206 F 3d 392 a 45 day delay in notice period was considered acceptable.

hours followed by extensions up to 48 hours at a time for a maximum period of 7 days may be appropriate”.

It is also clear that the recommendation was that the power should be limited to situations where its purpose is to prevent a person from leaving the country to participate in a terrorist activity.

Whilst a power along the lines recommended by the INSLM could be acceptable the current Bill does not reflect that proposal. The Government has not provided any justification for doubling the maximum period to 14 days. This extended period is not accepted by the CCLs as reasonable. The power is not limited as recommended by the INSLM.

The problem is compounded by the proposed s48A which allows the Minister to refuse to provide the grounds of any refusal or cancellation of a passport to the person. The CCLs oppose this proposal. We have taken a consistent position of opposing the increasing use of devices allowing governments to withhold from citizens the bases of decisions depriving them of basic rights or of the evidence upon which accusation have been made against them.

### **Recommendation 10**

- a) **That proposed sections 22A and 48A not proceed.**
- b) **That Section 22A be replaced by the provisions recommended by the INSLM including a maximum suspension period of 7 days for passports and travel documents.**

### **10. Foreign Evidence Act**

As noted above, we have some sympathy for the views of the INSLM concerning the difficulty of proof in these cases. It is noted that Mr Walker recommends a careful consideration of the issue including close consultation with the legal profession and other civil society interlocutors. That has not occurred. As a result the Government’s proposals do not merit support as they stand.

The proposed provision is not limited as recommended by Mr Walker to situations where there is a lack of control or presence in the relevant territory by a foreign state.

Whilst the Bill does give the Court a power to exclude the evidence where it would have a “Substantial adverse effect on the right of another party to the proceeding to receive a fair trial” there is no reference to the judicial warning proposed by Mr Walker.

Furthermore, the definition of “duress” in Clause 27D(3) is too narrow. It needs to go beyond threats of death or serious injury. Duress may also come in the form of threats to property. It should extend to threats beyond family members to include close associates. Furthermore, the threat should be “real” or “imminent”.

### **Recommendation 11**

- a) **That these provisions include the provisions recommended by the INSLM.**
- b) **Alternatively the provisions be referred to the Legal and Constitutional Affairs Committee for that Committee to conduct an inquiry into the issue of the admissibility of foreign evidence for the purpose of prosecuting foreign fighters**

## **11. Customs Powers**

The Bill proposes to give a customs official the extraordinary power to detain a person indefinitely (and *incommunicado* for the first four hours) on the basis that in the opinion of the officer, that person “Is or is likely to be involved in an activity that is a threat to national security or the security of a foreign country”. What controls can be placed on such an extraordinary discretion?

Customs officers already have powers to detain people who are suspected of having committed, or are committing a serious Commonwealth offence officer for 45 minutes before the detainee can communicate with someone.

As a matter of principle people should only be detained for a specific identifiable conduct amounting to a criminal offence. They should not be detained on the basis of the amorphous opinion of an official of the state that they are a threat to the national security of somebody. Napoleon would approve!

We also note that under the cover of this terrorism legislation the general detention powers of customs officers are being increased so that they can now detain people who they believe have committed, or are committing, *or intend to commit*, an offence punishable by imprisonment for 12 months or more rather than that they have committed, or are committing an offence punishable by more than *three years* imprisonment.

It is not clear to us how this general increase in the powers of customs officers, who are not subject to the same disciplines as police, to detain people is connected with the general terrorism purposes of this legislation.

### **Recommendation 12**

- a) That the current definition of ‘serious Commonwealth offence’ be maintained**
- b) That the current limit of 45 minutes before the detainee can communicate with someone be maintained**

## **12. Welfare Payments**

As the Parliamentary Joint Committee on Human Rights has recently noted in its report *Examination of Legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011* released on 29 September 2014 there is a fundamental right to social security and to an adequate standard of living.

A citizen’s rights must precede their duties to the State because the fulfilment of the citizen’s rights is necessary for the discharge of any duties they maybe have. For this reason civil libertarians have opposed the imposition of collateral consequences to criminal convictions arguing that punishment beyond that imposed by the Court such as the deprivation of welfare benefits or of the right to vote, creates a second class citizenship.

In this context persons are to be deprived of their social security without conviction on the say so of the Minister without any right of review. This is entirely unacceptable.

At the very least, if the measure is to proceed, a full merits right of review needs to be provided.

### **Recommendation 13**

- a) **That the amendments in Schedule 2 in part 1 not proceed.**
- b) **If they the amendments proceed the person whose welfare payments are terminated should have a full right of merits review.**

### **13. Concluding Comments**

The CCLs have collaborated on this preliminary submission because of the obvious national importance of the proposed legislation and the potential for major impacts on civil liberties and rights.

We hope our preliminary submission is of assistance to the PJCIS and the Government.

We are particularly hopeful that the Government or Parliament will extend the time for this review to complete it work so that the CCLs can present a more comprehensive and detailed response. As indicated, this was not possible – despite considerable effort by CCL members – in the very short time frame.

This submission was written jointly by Liberty Victoria, Queensland CCL and NSWCCCL on behalf of the nominated CCLs across Australia. Significant contributions were made by Professor Spencer Zifcat, Aggy Kapitiniak and Adam McBeth from Liberty Victoria, Michael Cope from Queensland CCL and Stephen Blanks and Dr Lesley Lynch from NSWCCCL.

#### **Contact in relation to this submission**

**Dr Lesley Lynch**

**Secretary NSW Council for Civil Liberties**

#### **Attachment**

Committee on Civil Liberties, Justice and Home Affairs; European Parliament: *Preventing and Countering Youth Radicalisation in the EU*