Castan Centre for Human Rights Law
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Submission to the Parliamentary Joint Committee on Intelligence and Security

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

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This submission from the Castan Centre for Human Rights Law to the Parliamentary Joint Committee on Intelligence and Security addresses the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (hereafter "the Bill"). It is opposed to the passage of the Bill. The reasons for this opposition are set out in a series of detailed comments relating to the various provisions of the Bill.

More could be said against the Bill than is said in this submission. This is because the submission has been prepared in a very short time: the draft of the Bill was released by the Attorney-General, Senator Brandis, on Tuesday September 23rd. Notification of this inquiry was received on Friday September 26th.

This is an extremely short time in which to adequately analyse and prepare submissions on a Bill of more than 160 pages amending more than 20 other statutes. There is an established pattern of counter-terrorism legislation being forced through the public and Parliamentary process with inadequate time for thorough review, but this is an extreme example of that pattern.

The Castan Centre for Human Rights Law understands that other submissions (eg the submission from Liberty Victoria) are calling for a more thorough review of the Bill (or, if enacted, of the legislation) to be undertaken with a more realistic timeframe and reporting date (eg 6 months in the future). This submission supports such a proposal.

Schedule 1

Administrative Decisions (Judicial Review) Act 1977, Australian Passports Act 2005, Foreign Passports (Law Enforcement and Security) Act 2005

These provisions are described as implementing certain recommendations from the INSLM in his fourth annual report.

The INSLM suggested suspension periods of 48 hours to 7 days. The Bill would implement a 14 day period. The INSLM also recommended that where "an adverse security assessment in relation to the person is not issued before the interim passport cancellation expires, then ASIO should have to pay to the person the lost travel costs of the person (eg airline ticket and cancellation accommodation)" (INSLM 4th Annual Report, p 48). The Bill contains no such provision. Indeed, the Bill does not expressly link the temporary suspensions/surrender of travel documents to the security assessment process at all.

The greater period of time also makes removal of such decisions from the ambit of ADJR review a serious matter. The INSLM described the lack of such review being a "trade off" against a short time period. If there is a concern with the provision of reasons, there is also scope to list a class of decisions under Schedule 2 rather than Schedule 1 of the ADJR Act.

Australian Security Intelligence Organisation Act 1979

Item 28 of Schedule 1 would extend the grounds on which an ASIO warrant for compulsory questioning may be issued, from grounds of *necessity* ("that relying on other methods of collecting that intelligence would be ineffective") to grounds of *convenience* ("that, having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued").

This is a major expansion of a coercive power that is covert in its functions (section 34ZS of the *ASIO Act 1979*). In proposing it, the INSLM put the following argument (2nd Annual Report, p 62):

> it is not as if the obligation to answer questions, with accompanying obligations of attendance and secrecy, are clearly more intrusive than other accepted (and acceptable) powers available to ASIO…
>
> The special warrant powers available to ASIO under Div 2 Part III of the ASIO Act are not powers of last resort even though they permit intrusions into personal liberty (including the right to be left alone) on a par with, or even more substantial than, compulsory questioning …

With respect to the INSLM, this disregards the *coercive* character of questioning warrants. ASIO is a covert agency, acting under the direction of the political arms of government (the Attorney-General and, ultimately, Cabinet). It is bound to have regard to foreign policy goals in carrying out its functions (*ASIO Act 1979*, ss 4 and 17 – section 4 includes "responsibilities to any foreign country" within the definition of *security*). It does not carry out criminal investigations – prior reviews of ASIO's questioning powers have repeatedly emphasised the contrast between gather intelligence and collecting evidence for criminal prosecution. Consider, for example, these remarks concluding Chapter 1 of the 2005 Review by the (then) Joint Parliamentary Committee on ASIO, ASIS and DSD (paragraphs 1.74–1.75):

> The Committee questioned witnesses about the intentions of the provisions and the way they have, in fact, operated. Whether the questioning powers were intended to be purely for intelligence gathering or part of police investigations matters. Intelligence gathering, where compulsory questioning is the only way to elicit information, which is important in relation to a terrorist offence, was put forward on the introduction of the Bill as necessary for the protection of the community. It was to be a measure of last resort. The assumption was that extraordinary powers were necessary to protect the community in the face of terrorism threats. Secrecy, it was argued, was necessary because the powers are part of the intelligence gathering of ASIO, whose methods and collected information needed to be protected on national security grounds. Because the powers were extraordinary, because they involved secret processes and a secret service, because they could not be scrutinised in the way that normal police powers are scrutinised, the Parliament inserted into the Act a series of protections, including the protection of immunity from prosecution, albeit not derivative use immunity, for any information given under compulsion.
>
> The Committee, therefore, would be concerned if the use of the powers were to slip, in practice, into investigative and policing powers and to be simply part of ongoing policing operations. Separating police investigations from intelligence gathering is important. Maintaining the separate functions, methods and systems of accountability of ASIO and the criminal law is also important.

There is a phrase to describe a coercive, law-enforcement agency whose activities are covert and not subject to ordinary requirements of transparency and judicial oversight: *secret police*. The Committee, in the passage just quoted, was expressing a proper concern that ASIO not become a secret police. The regularisation of the use of powers of compulsory questioning, by reducing the threshold for the issuing of a warrant, is a trend in exactly the opposite direction.

In this regard, it should also be noted that both the Committee in its above-quoted report (Recommendation 1, p 37) and the INSLM in his 2nd Annual Report (p 61) noted that there is no reason why the issuing authority should not also have to be satisfied in relation to the necessity requirement for the issuing of warrants for compulsory questioning.

Item 32 would remove the legal obligation to call upon a person to surrender (where practicable to do so), before using serious or deadly force to attempt to bring a person into custody, and would also remove the requirement that such use of force be a last resort ("the officer believes on reasonable grounds that the person cannot be taken into custody in any other manner"). This would be a serious departure from the law of arrest (see eg *Crimes Act 191*4, s 3ZC). The EM does not state any reason in its favour.

When the legislation that introduced Division 105 in the *Criminal Code* was subject to public debate, there was public concern about a "shoot to kill" provision in that legislation. That concern was probably unwarranted, as the draft provision replicated the *Crimes Act* principles cited above. In any event, the matter was resolved by section 105.19(2) providing that the ordinary law of arrest operates in the context of bringing a person into custody pursuant to a preventative detention order.

For the reasons stated above, Item 32 is much closer to a "shoot to kill" provision. It ought to be strongly opposed. The permissible use of force, including deadly force, should not be greater in relation to fugitives from compulsory questioning by an intelligence agency than it is in respect of fugitive criminals.

Crimes Act 1914

In his 3rd Annual Report, discussing preventative detention orders, the INSLM observed (pp 47–48):

> While belief and suspicion are different states of mind, the difference between suspecting on reasonable grounds (PDO threshold) and believing on reasonable grounds (Commonwealth arrest threshold) is not very great.

In his 4th Annual Report, the INSLM stated (pp 63–64):

> It may be doubted whether a special rule, evidently intended to facilitate arrest, should be promulgated for terrorism, compared to (ordinary) conspiracy to murder….
>
> [T]he AFP has drawn to attention the position in the UK, which involves both generally and for terrorism reasonable grounds to suspect the commission of an offence….
>
> [I]n the INSLM's view, it may be that the semantic distinction between "suspect" and "believe" has escaped substantive attention.
>
> Be that as it may, the INSLM regards the AFP's suggestions as well founded, sensible and of some practical utility. This does not mean that the INSLM supports a special rule for terrorism offences in relation to arrest: that would be hard to justify.

No clear reason is given for distinguishing certain terrorism from other offences, in so far as the threshold for arrest is concerned. In practice, it seems that terrorism arrests in Australia take place after extensive, multi-agency investigations. There does not appear to be any public evidence that the current law of arrest in section 3W of the *Crimes Act 1914* serves as an impediment to the carrying out of terrorism arrests or the disruption of terrorist conspiracies.

In this context, and given the INSLM's remarks about the lack of clarity in the suspicion/belief contrast in this context, it is not clear what the significance of **Item 47** would be beyond a symbolic

carving out of terrorism offences as needing extraordinary laws. There is already an excess of such symbolism in Australian statute law.

Item 51 would introduce a covert search warrant regime into Commonwealth law. In his 4th Annual Report, the INSLM saw (p 62):

> no reason why the AFP should not be able to access a delayed notification search warrant scheme for the investigation of terrorism offences. Such a scheme would increase the capability of the AFP to investigate and prosecute terrorism offences and would improve the effectiveness of Australia's counter-terrorism laws.

It seems beyond bout that such a scheme *would* increase the capabilities of the AFP. But that is not the only relevant consideration. There are also considerations of personal liberties and privacy, plus broader considerations of the relationship between investigating authorities and the community that they investigate (which is also the community that they are meant to be protecting).

The recently-passed National Security Legislation Amendment Bill (No. 1) 2014 has increased ASIO's powers of surveillance, including conferring extended powers to use force against individuals as well as property. This Bill would enhance ASIO's powers of compulsory questioning. The significance of the conferral of covert search powers upon the AFP must be understood in this context, as yet a further increase in the covert surveillance of and interference with individuals, and a reduction in ordinary expectations of transparency and accountability around law enforcement.

It is also noteworthy that Item 51 would introduce a general secrecy provision around such warrants. This contrasts with the provisions of (say) the Victorian *Terrorism (Community Protection) Act 2003*, which (in section 12) establishes secrecy surrounding the issue of such warrants, but not their execution. In Victoria, also, such warrants are issued by the Supreme Court. There are Constitutional complexities to having Commonwealth warrants issued by courts as opposed to *persona designata*, but it nevertheless highlights a further concern around the proposed covert search warrant regime.

Criminal Code – control orders

Items 71 and **73** would expand the grounds on which control orders may be sought. Control orders are already an objectionable device – as noted by the INSLM (2nd Annual Report, p 32) the burdens that may be imposed under a control order (and that have been imposed by the two that have actually been issued) go well beyond those typical of an apprehended violence order or a peace bond.

Training with terrorist organisations is already an offence, and the wording of that ground for a control order in items 71 and 73 corresponds to the amendments to section 102.5 of the *Criminal Code* found in item 69 of the Bill.

Engaging in hostile activity in a foreign country is already an offence under the *Crimes (Foreign Incursion and Recruitment) Act 1978* and has been for over 30 years. If the Bill is enacted it will continue to be an offence under the *Criminal Code*.

There is therefore no need for control orders grounded on these bases. Individuals reasonably suspected of such conduct (a *suspicion* threshold would replace the current *considers* threshold were items 70 and 76 of the Bill to be enacted) will be liable to arrest if item 47 of the Bill were enacted; currently the test for arrest is *belief*, but as noted above (and in the INSLM's 2nd Annual Report, p 15) terrorism investigations are undertaken on a sophisticated and highly-resourced scale, such that *belief on reasonable ground* should not be a difficult threshold to reach. Where arrest and prosecution is possible, control orders are not needed; where arrest and prosecution are not possible (eg because there is insufficient evidence to obtain a conviction) than individuals are entitled to their liberty. This is a fundamental principle of justice.

Issuing control orders on the basis of past conviction is also highly questionable, and when not connected to any obligation to prove that the target of the control order is an ongoing threat should be opposed. (As Hayne J noted in *Thomas v Mowbray*, the control order regime, in requiring that the provisions of a control order be "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act", does not require that the protection be *from the target of the control order*.) Issuing such orders on the basis of *foreign* convictions is doubly questionable: consider the recent farce over the service of an Interpol notice for a man in Australia convicted of terrorism by the previous authoritarian government of Egypt.

Criminal Code – preventative detention orders

The attempt to breathe new life into the preventive detention order regime should be opposed. The regime is constitutionally suspect, authorising as it does detention of citizens outside the context of arrest and charge within the criminal process, for reasons that nevertheless appear intimately connected to criminal guilt (see *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1; Emerton and Lee, "Judges and non-judicial functions in Australia" in Lee, *Judiciaries in Comparative Perspective* (CUP, 2011), p 419).

Criminal Code – foreign incursions and recruitment

The definition of "hostile activity" would significantly expand that found in the existing *Crimes (Foreign Incursion and Recruitment) Act*. As well as overthrowing governments, damaging their property, or putting the public into fear of life or limb, it would encompass other forms of intimidation, and "subverting society", which is very expansively defined to include harm even to a single individual, other creations of risk, and disruption of systems. This suggests that, for instance, denial of service attacks would constitute "hostile activity" and hence enliven the possibility of life imprisonment.

The penalties would also be significantly increased – having already gone from 14 to 20 years they would go to life imprisonment, and from 7 to 25 years for recruitment.

All of this is in an environment in which there have not been a large number of arrests or prosecutions under the existing regime.

There is also the new regime for "declared areas". This would make it an offence for Australians to travel to overseas conflict zones. This is blatantly discriminatory, in two ways. First, it empowers the Commonwealth Executive to criminalise some but not all such conflict zones, once again making

criminal liability in Australia turn upon the foreign policy opinions of the executive government. This is contrary to the basic principles of a pluralist democracy. Second, once a declaration is made it discriminates against Australians based on their country of origin. Looking at currently listed organisations, for example, it is likely to discriminate disproportionately against Australians of Arab, Afghani, Jewish, Turkish and Pakistani origin, who therefore have connections to conflict zones in North Africa, West, Central and South Asia.

Foreign Evidence Act 1994

Item 125 would set the threshold for exclusion of such material as being a *substantial* adverse effect on the right of another party to receive a fair hearing. And the limitations on duress and torture are very narrow, not going to duress and torture inflicted by non-state organisation, or by quasi-state agencies not acting in an official capacity.

Given the notoriously politicised character of intelligence agencies in many countries, and the rampant use of duress and torture, this is all quite objectionable.

Schedule 2

This is highly objectionable. Eligibility for family assistance and other social security benefits should be determined by the relevant statutory criteria that reflect basic principles of need and the right to a decent material standard of living. People deemed to be of "bad character" are not deserving of homelessness or starvation, and nor are their families. – the whole suggestion is abhorrent.

There are already ample laws (eg regulation of fertilisers, firearms, explosives, nuclear materials, etc) to prevent recipients of social security spending that money for criminal, including terroristic, purposes.

Schedule 3

Yet another detention provision (**item 8**) is objectionable. The notion of "security", as defined in the *National Security Information (Criminal and Civil Proceedings) Act 2004* is very expansive. Australians trying to leave the country to engage in foreign incursions can be arrested. Unlawful entrants are subject to immigration detention. There is no warrant for a broader power of detention as part of the customs regime.