Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

The Foreign Fighters Bill

Submission to the Parliamentary Joint Committee on Intelligence and Security

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

3 October 2014

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WHO WE ARE

The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

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INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security in its inquiry into the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill* 2014 ('the Bill').

We note that the time frame provided for this inquiry is very short, with just eight days to analyse legislation which will have considerable impact upon the operation of the rule of law and civil liberties in Australia.

We also note with concern that the inquiry website states that 'due to the need for Parliament to consider the Bill in the week of 20 October 2014, the Committee is conducting an intensive inquiry and will report by 17 October 2014.' This provides the Committee just 15 days to compile submission responses and its own conclusions regarding the Bill.

We raise concern at this rushed process, particularly in the current political climate, which is focused very much on fear-based messages, the threat of terrorism and the need for freedoms to be watered down in order to ensure security. We believe that all legislation which threatens the fundamental rights of Australian citizens must be considered carefully and with proper acknowledgment of the value of the rights which are being curtailed.

We also question the grounds upon which the Parliament must consider the Bill in the week of 20 October 2014.

LIFE SENTENCES FOR PREPARATION OFFENCES

We are concerned at the disproportionate mandatory penalties being given for 'preparation' offences. These include:

- Imprisonment for life for:
    - Preparation for incursions into foreign countries for purpose of engaging in hostile activities (cl 119.4), including accumulating weapons (cl 119.4(2)), providing or participating in training (cl 119.4(3)), giving or receiving goods and services to promote the commission of an offence (cl 119.4(4)).
    - The lease or use of rooms, vessels, aircraft (cl 119.5).
- Imprisonment for 25 years for recruiting others to an association that may engage in a hostile activity (cl 119.6);

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- Imprisonment for 10 years for recruiting others to serve with foreign armed forces (cl 119.7) or for advertising a recruitment opportunity (cl 119.8)

The penalty of life imprisonment for offences under clause 119.4 will lead to cases of cruel, unusual and disproportionate punishment being imposed by the courts. That is, punishment will go well beyond what is necessary for the achievement of the aim of the legislation. The provisions seemingly draws no distinction between the most egregious of recruitment activity (such as making threats to someone's family) as against the mildest (handing out a pamphlet with a mild urging).

The sentences also do not provide scope for the rehabilitation of individuals.

RETROSPECTIVE WARRANTS

The Bill proposes that judicial officers will be able to issue a 'delayed notification search warrant' – which in essence appear to be warrants that retrospectively authorise the activity undertaken.

Judicial officers of the Federal Court of Australia, or of a Supreme Court of a State or Territory, or a nominated AAT member would be eligible to issue these warrants, under the proposed s3ZZAD to the *Crime Act.*

However, the chief officer of an eligible agency may authorise an eligible officer of the agency to apply for a delayed notification search warrant. In certain circumstances, this may be done in person, or by other means of voice communication – thus permitting a fast processing of the application for a retrospective warrant.

An 'eligible agency' is the Australian Federal Police (under the proposed s3ZZAA(3)).

It is difficult to see what justification there can be for retrospective warrants. Security and police agencies and services are easily able to respond rapidly to situations now with the system of prospective warrants.

Retrospective warrants will lead to poor decision making and lazy policing.

A LACK OF PUBLIC SCRUTINY

Furthermore, to disclose information about the delayed notification search warrants is unlawful, earning a maximum of 2 years imprisonment. There is no exception for public interest disclosure (under the proposed s3ZZHA).

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These changes serve to restrict reporting on Commonwealth law enforcement via the operations of the Australian Federal Police.

So too, the *National Security Legislation Amendment (No. 1) Bill* 2014, which has now been passed, restricts reporting on 'special intelligence operations' conducted by ASIO or an 'ASIO affiliate'[2]. Again, no public interest disclosure exception is provided.[3]

The combination of these changes serve to restrict public knowledge of the operations of the Australian Federal Police, and of ASIO.

To criminalise freedom of speech is generally anathema in a democratic society except where it is to protect vulnerable groups. It should certainly not be done to prevent the community knowing how security agencies wield their power, particularly where they abuse it.

Threats of imprisonment to those who disclose the wrongdoing of security agencies will lead to greater tolerance of wrongdoing in those organisations.

PUNITIVE TREATMENT WITHOUT APPEAL

Schedule 2, Part 1 of the Bill, proposes to amend *A New Tax System (Family Assistance) Act* 1999 (Cth), the *Paid Parental Leave Act* 2010 (Cth), the *Social Security Act* 1991 (Cth).

Under these amendments, people that are suspected (but not proven) of prejudicing Australia's security may have their welfare payments ceased. This includes family assistance (cl 57GI); parental leave pay or dad and partner pay (cl278B) or social security assistance (cl 38M). (Child care benefits and the child care rebate are not affected (cl 57GQ).

As described in the simplified overview:

> 'Individuals who **might prejudice** the security of Australia or a foreign country may lose family assistance.' (cl 57GH)

In the case of people receiving social security payments, they may also lose their relevant concession cards (cl 57GQ).

The cessation of welfare payments occurs on the same day that the Minister receives a security notice (see e.g. under cl 57GI(2)).

Under the proposed cl 57GJ, a security notice is a written notice from the Attorney-General, which may be given to the Minister [under the relevant act to be amended]

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if the Foreign Affairs Minister provides a notice to the Attorney-General under cl 57GK (or the relevant cl 278D for parental leave pay; cl 38P re social security payments; or the Immigration Minister provides a notice under cl 57GL (or the relevant 278E for parental leave pay; cl 38Q for social security payments).

Cl 57GK (and its relevant counterparts) refers to when the Foreign Affairs Minister refuses to issue or cancels an Australian Passport.

Cl57GL (and its relevant counterparts) allows the Immigration Minister the discretion to cancel a visa due to assessments conducted by ASIO regarding the individual being a risk to security; or emergency cancellation on security grounds.

Furthermore, it appears that decisions of the relevant Minister regarding the cessation of payments, and the decisions of the Foreign Affairs Minister and Immigration Minister are not entitled to receive reasons for the decision under amendments under Schedule 2, Part 2, cl 8 of the Bill.

Section 13 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) provides that reasons for decisions may be obtained. Schedule 2 of the same Act provides the classes of decisions to which s13 does not apply. Decisions made in relation to the above have been added to this list.

Therefore, individuals will effectively be blocked from accessing an effective appeal to the AAT, as they will not have access to the reasons that decisions have been made against them. This is extraordinary given the consequences of the infringement of rights on those adversely impacted.

Any citizen is entitled to access the social security system. Benefits are paid not only towards the recipient, but also a spouse and children. We all have the right to turn to the government for assistance if we fall on hard times. Normally, government officials and Minister has are not provided with the power to arbitrarily remove those rights with immunity from review. No matter how great the terror threat, it is in no way necessary to vest such omniscient power in Ministers now.

By all means, suspend or cancel welfare benefits for those who are breaking the law, but at the same time, maintain the rule of law – require governments to prove that the punishment is warranted.

DETENTION

Section 219ZJB of the *Customs Act* 1901 (Cth) currently provides that:

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> 'An officer may detain a person if:
>
> (a) the person is in a designated place; and
>
> (b) the officer has **reasonable grounds to suspect that the person has committed, or is committing**, a serious Commonwealth offence or a prescribed State or Territory offence.'

The Bill proposes to insert an amendment, 'or is intending to commit'. This significantly widens the powers of an officer to detain a person and reduces the standard for arrest.

Whilst the 'reasonable grounds' test is vague, there is at least a body of law defining what it means. It is a major expansion of the powers of customs officers to detain, to remove the test for reasonable grounds and replace it with suspicion.

It can be assumed that more people will be detained as a result of this section.

This is also of concern given the extension of time from 45 minutes to 4 hours that a person can be held by an officer under s219ZJB of the *Customs Act* 1901 (Cth) without the ability to contact a family member or other person.

Fundamental to our rights as citizens is the right to be free. The power to detain without warrant, without charge, without access to legal advice is normally reserved for dictators and tyrants. No free society unnecessarily cedes to its government powers of detention without review.

EXTENSION OF TIME ON DETENTION

Section 219ZJB relates to the detention of people suspected of committing a serious Commonwealth offence or prescribed state or territory offence. The section currently provides:

> '(5) Subject to subsection (7), if a person is detained under this section for a **period of greater than 45 minutes**, an officer who is detaining the person under this section must inform the person of the right of the person to have a family member or another person notified of the person's detention.'

This period of time will be altered under the Bill to a period greater than 4 hours.

Of note, this is regarding a person *being informed* of a right to contact someone and notify them of their detention.

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'Serious Commonwealth offence', as defined in s15GE of the *Crimes Act* 1914 (Cth), incorporates a number of matters that are punishable on conviction for a period of 3 years or more. 'Prescribed state or territory offences', as defined by s219ZJAA are offences against the laws of a state or territory that are punishable on conviction by imprisonment for a term of at least 3 years and are to be prescribed by the regulations.

Many of these offences are not threatening the lives of others.

It is not reasonable that people should be detained for up to 4 hours without being simply informed that they have a right to inform someone that they have been detained.

This proposed extension of time could lead to:

- undue pressure upon an individual, which may lead to false information implicating them in a crime which may later be used against them;
- provoke mental stress for people with mental illness;
- lazy and/or aggressive policing wherein individuals are regularly detained for upto 4 hours before being informed that they have a right to contact someone.

There also does not appear to be an exception for minors, or people claiming to be minors. This is of significance, especially given that customs officials have previously detained minors for people smuggling and foreign fishing offences, including 180 individuals who were identified as individuals of concern to the Australian Human Rights Commission in their report *An age of uncertainty* (2012).

SEPARATION OF POWERS

On a more systemic level, we are concerned that the Bill undermines the doctrine of the separation of powers in a number of ways.

The issuing of retrospective warrants appears to seek a *carte blanche* from judicial officers for the authorisation of the activities of the AFP. This is inappropriate.

The cancellation of relevant welfare payments on the basis of ministerial decisions, also provides the power for the executive to punish: a power traditionally reserved for the judiciary. Legislating to expressly not permit access to reasons why a decision was made effectively places the decisions of the executive outside the bounds of judicial review.

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An independent judiciary with power to curtail the excesses of executive government is a fundamental check and balance on executive authority. Revolutions have been fought for rights of access to an independent judiciary by free men and women. We should not lightly or willingly surrender rights which were once fought so hard for in a few moments of fear.

OTHER CONCERNS

We also raise concern at the fact that foreign government material may be adduced as evidence in terrorism-related proceedings (cl 27B). This may prove problematic if a foreign government which is committing human rights abuses alleges that a person has been involved in terrorism offences. While evidence is inadmissible if the court is satisfied that it has been 'obtained directly as a result of torture or duress' (cl 27D(2)), we note that this will be a difficult test for courts to satisfy, given the complexity of obtaining further information from foreign governments.

CONCLUSION

We are happy to elaborate upon any of the issues that we have raised at public hearings to the Committee.

ATTACHMENT 1: Australian Lawyers Alliance Media release:

'Foreign Fighters' law will lead to innocent people being detained

25 September 2014

The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill* lowers the threshold for the arrest of individuals on alleged terrorism offences and will lead to innocent people being arrested and detained, the Australian Lawyers Alliance (ALA) said today.

The Bill was introduced into the federal parliament yesterday by Commonwealth Attorney-General George Brandis.

"Previously the Act said authorities had to 'believe' a terror crime was about to be committed, however the new Foreign Fighters legislation means they only have to 'suspect' a crime is to be committed to be able to charge someone," ALA

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spokesperson and criminal barrister Greg Barns said.

“If you are arrested for a terrorist offence you will be in jail for a long time, as it is almost impossible to get bail. If you are going to arrest people under these circumstances then you want it to be done on more than a whim or a guess”.

“It is inevitable that if you lower the threshold for an arrest innocent people are detained. This will lead to community resentment,” Mr Barns said.

Mr Barns was also concerned that sentences for offences covered in new ‘Foreign Fighters’ anti-terror legislation are onerous and totally disproportionate to the nature of the crimes they address.

The Foreign Fighters Bill would see people who are suspected of preparing for or participating in a foreign incursion receive punishments ranging from life imprisonment to loss of social security benefits.

Mr Barns said that the new legislation was oppressive and included sentencing provisions that did not match the gravity of the prospective offences.

“The Foreign Fighters legislation in its current form could be used to jail people for life even when they haven’t killed anyone, haven’t planned any terrorist acts or haven’t travelled overseas,” Mr Barns said.

“This is a totally disproportionate penalty. Our legal system is based on the concept of proportionality – that the punishment must fit the crime. In Australia, life imprisonment is quite rightly reserved for people who commit the most serious crime of all, murder.”

“However, under this new legislation, an individual could receive a life sentence just for being associated with another person or people planning to fight overseas. They could be handed a life sentence for attending a training session or even for offering a room to be used for a meeting,” Mr Barns said.

“If a young teenager innocently follows his friends or family members to a meeting, they would also be jailed for life, even if they had no knowledge of or intention of participating in proceedings.”

“The new laws also give authorities the power to cancel social security entitlements for people suspected of being associated with terrorist activity,” Mr Barns said.

“They don’t have to give a reason for doing so – once again, this penalty is totally disproportionate to the crime. If that social security payment is the main source of income for a family then innocent parents, partners or children could be left

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destitute."

Mr Barns said that the Foreign Fighters legislation was especially dangerous because it combines harsher penalties with a much lower threshold of evidentiary proof.

"Passing laws in this type of political climate is never a good idea as you are dealing with the fundamental ideas of liberty and freedom," Mr Barns said.

"This type of legislative review should be carried out in a calmer, more reasoned atmosphere, and not just be a knee-jerk reaction to what happened yesterday or last week."

REFERENCES

[1] Australian Lawyers Alliance (2012) <www.lawyersalliance.com.au>
[2] *National Security Legislation Amendment (No. 1) Bill* 2014 (Cth), Schedule 3, cl 1
[3] *National Security Legislation Amendment (No. 1) Bill* 2014 (Cth), Schedule 3, cl 35P.

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