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NEW SOUTH WALES



FACULTY OF LAW

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OF PUBLIC LAW

7 November 2014

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

Dear Secretary

Inquiry into Counter-Terrorism Legislation Amendment Bill (No 1) 2014

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

As noted in our previous submission on the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (Foreign Fighters Act), we recognise the serious threat posed by the Islamic State organisation, particularly the risk that individuals fighting in Iraq and Syria may return to Australia and engage in terrorism. For this reason, we accept that there are reasons to improve cooperation between the Australian Secret Intelligence Service (ASIS) and the Australian Defence Force (ADF) in the course of their overseas operations, and to streamline the processes by which ASIS can authorise the collection of intelligence on Australians overseas.¹

We are concerned, however, by the possibility that increased cooperation between ASIS and the ADF may lead to the targeted killings of Australian citizens fighting in Iraq and Syria. Such killings raise significant and difficult questions of domestic policy, human rights and international law,² and in the absence of greater parliamentary and public debate about these matters, this should not be facilitated by this Bill.

¹ Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth)

² See Rebecca Ananian-Welsh, 'Security Bill Opens Door to Targeted Killings and Broader Control Orders', *The Conversation*, 6 November 2014.

Our submission otherwise focuses on changes that would amend the control order regime in Division 104 of the *Criminal Code Act 1995* (Cth) (Criminal Code). As we noted in our previous submission to this Committee,³ there are serious doubts as to whether the control order regime – in any form – should be retained. The continuation and expansion of that regime through the Foreign Fighters Act conflicted with the findings of recent major inquiries,⁴ and the current Bill seeks to expand the regime further still.

In particular, serious questions have been raised about the effectiveness of control orders as a crime prevention tool.⁵ The Independent National Security Legislation Monitor (INSLM), after reviewing the confidential material on which control order applications were based, concluded that the powers were ‘not effective, not appropriate and not necessary’.⁶ In light of such conclusions, it is difficult to see how the proposed expansion of the control order regime is necessary to address the threat of domestic terrorism.

The Explanatory Memorandum to the Bill justifies the proposed strengthening of the control order regime by referring generally to the threat posed by Islamic State and returning foreign fighters.⁷ This general claim is not sufficient to justify the significant expansion of measures that have already been discredited by major inquiries. In the absence of some significant evidence presented by the government as to why these changes are necessary to prevent terrorism, we believe that the Committee should recommend against their enactment.

Control Orders

The control order regime in Division 104 of the Criminal Code allows a range of restrictions to be placed on an individual’s liberty for the purpose of preventing terrorist acts. For example, an individual subject to a control order may be required to remain in a specified place at specified times and to wear an electronic monitoring device.⁸ They may also be prohibited from being in certain areas or from communicating or associating with specified individuals.⁹

A senior member of the Australian Federal Police (AFP) must first seek the Attorney-General’s consent to request an interim control order from an issuing court.¹⁰ After recent amendments introduced by the Foreign Fighters Act,¹¹ the Attorney-General’s consent may be sought if the senior AFP member suspects any of the following on reasonable grounds:

1. that the order would substantially assist in preventing a terrorist act;

³ Gilbert + Tobin Centre of Public Law, Submission No 3 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Cth), 1 October 2014, 3-4, 7-8. See also Lisa Burton and George Williams, ‘What Future for Australia’s Control Order Regime?’ (2013) 24 *Public Law Review* 182.

⁴ Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) (*INSLM 2012 Report*); Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) (*COAG Review*).

⁵ *INSLM 2012 Report*, 4, 36. See also HM Government, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (London, TSO, January 2011, Cm 8004) 38, 40.

⁶ *INSLM 2012 Report*, 4.

⁷ Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth), 1.

⁸ *Criminal Code Act 1995* (Cth), s 104.5(3).

⁹ *Criminal Code Act 1995* (Cth), s 104.5(3).

¹⁰ *Criminal Code Act 1995* (Cth), s 104.2(1).

¹¹ *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), ss 70-71.

2. that the person has provided training to, received training from or participated in training with a listed terrorist organisation;
3. that the person has engaged in a hostile activity in a foreign country;
4. that the person has been convicted in Australia of a terrorism offence; or
5. that the person has been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence¹²

The issuing court may then make an interim control order if it is satisfied of any of these options on the balance of probabilities.¹³ Where subsequently confirmed by the issuing court, a control order may last for a maximum of 12 months.¹⁴

1. Grounds for Seeking and Issuing Control Orders

The current Bill proposes to expand the grounds listed above to include the following:

6. that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or
7. that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country¹⁵

These amendments would dramatically expand the circumstances in which control orders could be sought against individuals. The current grounds for seeking and issuing a control order, including those introduced by the Foreign Fighters Act, are directed at serious criminal activity (namely, participation in terrorism, terrorist training or hostile activities).¹⁶ While support or facilitation of terrorism attracts criminal liability,¹⁷ the wording of these amendments is not attached to any particular criminal offence. As such, a control order could potentially be sought against controversial street preachers or others who spread extremist interpretations of Islam and express their support for violent acts overseas.

A person who expresses controversial views in public might legitimately draw the attention of the police and security services (i.e., to ensure that such statements do not develop into more serious conduct that might trigger an investigation). However, statements of support for terrorism should not in themselves trigger a civil order that imposes substantive restraints on liberty and attracts a criminal penalty of five years' imprisonment for breach of its terms.¹⁸

This proposed expansion of the control order legislation is particularly problematic given, as noted above, that the continuation of the regime in any form conflicts with the findings of major recent inquiries. The INSLM recommended the repeal of the regime, in part because significant restrictions should not be placed on an individual's liberty in the absence of a

¹² *Criminal Code Act 1995* (Cth), s 104.2(2).

¹³ *Criminal Code Act 1995* (Cth), s 104.4(1)(c).

¹⁴ *Criminal Code Act 1995* (Cth), s 104.5(1)(f).

¹⁵ Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth), sch 1 item 7. The same grounds would provide the basis for the AFP Commissioner to later vary the terms of a control order: Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth), sch 1 item 25.

¹⁶ *Criminal Code Act 1995* (Cth), ss 104.2(2), 104.4.(1)(c).

¹⁷ For example, the offences of funding a terrorist organisation, or providing support to a terrorist organisation: *Criminal Code Act 1995* (Cth), ss 102.6, 102.7.

¹⁸ *Criminal Code Act 1995* (Cth), s 104.27.

finding of criminal guilt.¹⁹ The COAG Counter-Terrorism Review did not go so far as to recommend the repeal of the control order regime, but it did accept the need for the legislation to undergo ‘substantial change ... to provide greater safeguards against abuse’.²⁰

In light of such conclusions, we believe that the Committee should resist any further expansion of the grounds for seeking and issuing control orders. In the alternative, if the grounds relating to support and facilitation are to be enacted, they should be linked directly to existing criminal offences, such as funding or supporting terrorist organisations.²¹

2. Purpose of Issuing Control Orders

Another area of concern is that the Bill would fundamentally alter the purpose of issuing control orders. Currently, the issuing court must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions contained in the order is ‘reasonably necessary, and reasonably appropriate and adapted, for the purpose of *protecting the public from a terrorist act*’.²² That is, the issuing court undertakes a proportionality analysis in which it weighs the specific terms of the order against the ultimate goal of preventing serious harm to the public.

The Bill would alter this by introducing additional purposes to which the terms of a control order may be directed. The Bill would require that the court be satisfied that the control order is reasonably necessary, and reasonably appropriate and adapted, for one of three possibilities:

- (i) protecting the public from a terrorist act;
- (ii) preventing the provision of support for or the facilitation of a terrorist act; or
- (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country

This wording would also be reflected in the object clause of Division 104,²³ putting it beyond doubt that the purpose of control orders would be not only to prevent terrorist acts, but also to prevent the support and facilitation of terrorism. This would set a significantly lower bar for imposing a control order as preventing support and facilitation would become ends in themselves – regardless of whether doing so is likely to prevent a future terrorist act. In addition, the Bill would weaken the court’s role by no longer requiring it to assess each obligation and restriction requested in the control order application. Rather, the court would assess the order *as a whole* against those purposes outlined above.²⁴

These proposed changes would give control orders an operation that was never contemplated when the measures were first devised as a legislative response to terrorism. Under the original legislation introduced in 2005, there were two alternative grounds for seeking and issuing control orders: (1) that the order would substantially assist in preventing a terrorist act, or (2) that the person was reasonably suspected of involvement in terrorist training.²⁵

¹⁹ *INSLM 2012 Report*, 6, 26, 44.

²⁰ *COAG Review*, 54.

²¹ *Criminal Code Act 1995* (Cth), ss 102.6, 102.7.

²² *Criminal Code Act 1995* (Cth), s 104.4(1)(d).

²³ Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth), sch 1 item 6.

²⁴ Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth), sch 1 item 12.

²⁵ *Criminal Code Act 1995* (Cth), ss 104.2(2), 104.4(1)(c).

However, the issuing court has always assessed the proportionality of the terms contained in the order *only with regard to the first ground* (i.e. preventing a terrorist act).²⁶ This requirement was maintained even as the grounds for seeking and issuing control orders were expanded by the Foreign Fighters Act.²⁷ In other words, while there are multiple possible grounds for seeking and issuing control orders, the individual terms of a control order will only be justified if they contribute to the ultimate purpose of preventing a terrorist act.

The United Kingdom legislation on which Division 104 was based confirms that the purpose of imposing control orders on individuals should be only to prevent terrorist acts, and not directly to prevent support or facilitation of terrorism. Under the *Prevention of Terrorism Act 2005* (UK), which is now repealed but provided the template for the Australian regime, the Home Secretary was required to consider that a control order was ‘necessary ... for purposes connected with protecting members of the public from a risk of terrorism’.²⁸ This requirement has been continued through the *Terrorism Prevention and Investigation Measures Act 2011* (UK), which establishes a less intrusive alternative to control orders in that jurisdiction.²⁹

At no point has control order legislation been justified on the grounds that its primary purpose is to prevent support, facilitation, training or any other conduct that is ancillary to the commission of a terrorist act. Control orders are extraordinary measures that place substantive restraints on individual liberty without a finding of criminal guilt. They run counter to the long accepted principle in Australia and other liberal democracies that the state should not deprive a person of their liberty without such a finding. As such, if control orders are to be retained, they should be reserved only for the most serious cases, such as where a person is involved in terrorism but cannot be prosecuted or deported, or where a person has served time for a terrorism offence and still poses a significant danger to the community.

We recommend that the Committee resist any further expansion of the control order regime, and that the current approach of a court assessing the proportionality of control order restrictions should be retained. That is, the issuing court should be required to consider whether ‘each of the obligations, prohibitions and restrictions to be imposed ... is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act’.³⁰ No alternative grounds should be added to this provision.

Yours sincerely

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²⁶ *Criminal Code Act 1995* (Cth), ss 104.4(1)(d).

²⁷ *Criminal Code Act 1995* (Cth), 104.4(1)(d).

²⁸ *Prevention of Terrorism Act 2005* (UK) c 2, s 2(1)(b) (now repealed).

²⁹ *Terrorism Prevention and Investigation Measures Act 2011* (UK) c 23, s 3(3).

³⁰ *Criminal Code Act 1995* (Cth), 104.4(1)(d).