



Professor Ben Saul BA(Hons) LLB(Hons) *Sydney* DPhil *Oxford*
Professor of International Law
Australian Research Council Future Fellow

Parliamentary Joint Committee on Intelligence and Security

1 October 2014

Dear Committee

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

Thank you for the opportunity to make this submission. I make these points:

1. **The offence relating to a ‘declared area’** would criminalize conduct which is not of itself demonstrably harmful, violent or terrorist – namely, travelling to a declared place. As such, it is an unnecessary, disproportionate and unjustified restriction on the human right to freedom of movement and contrary to Australia’s obligations under Article 12 of the International Covenant on Civil and Political Rights 1966 (‘ICCPR’). It is also a misuse and over-extension of the criminal law in view of existing, extensive offences of foreign incursion and terrorism.
2. **The offence of ‘advocating terrorism’** may, depending how it is applied, infringe freedom of expression as guaranteed by Article 19 of the ICCPR. A person who ‘urges’ the commission of a federal offence (including terrorism) is already liable for ‘incitement’ under s. 11.4 of the Criminal Code (Cth). If the new offence is co-extensive with incitement then it is simply unnecessary. If it is intended to go beyond incitement, it may capture speech which is not proximately or causally connected to the likely commission of terrorism, and may thus constitute a disproportionate limitation on Article 19. Further, it is unclear what kinds of speech would fall within the definition of the offence, rendering it difficult for individuals to prospectively know the scope of their criminal liability, and thus raising a separate infringement of the principle of legality under Article 15 of the ICCPR (as an accepted element of the freedom from retrospective criminal punishment therein).
3. **The offence of ‘subverting society’** (as a species of hostile activity) can be committed by seriously harming people or property in another country. As such, it transforms many ‘garden variety’ crimes under foreign national law (such as assault, malicious wounding, or arson), into an Australian national security offence. No further element is required (such as a connection to terrorism, overthrowing a government, or the existence of conflict in the foreign territory). Such an offence is thus overbroad and not justified by its purported security rationale. The Explanatory Memorandum is entirely misleading to suggest (at p. 7) that the definition of this offence is similar to the definition of a ‘terrorist act’, since the latter also includes the conjunctive requirements that conduct be intended to (a) advance a political, religious or ideological cause and (b) coerce or influence a government, or intimidate the public.
4. **Preventive detention** is unnecessary and should be repealed. If grounds exist for the imposition of such an order (namely, to prevent an imminent terrorist act), it will almost always be the case that there would be evidence and grounds to charge the person with one or more of the many existing preparatory terrorism offences, or to hold the person for extended pre-charge questioning in terrorism matters under existing powers to gather further evidence. Preventive detention unjustifiably circumvents the full judicial safeguards of criminal procedures. It would normally still be necessary to lay charges at the end of the preventive detention period, yet the detention period itself cannot be utilized to question the person and gather evidence.

5. **Control orders** should not be renewed or expanded until they are made subject to enforceable human rights safeguards. The defects with control orders have been elaborated in numerous previous inquiries.
6. **ASIO detention powers** should be repealed not extended. Detaining non-suspects for up to seven days, virtually incommunicado and without effective review at the time, removing the right to silence on penalty of imprisonment, and criminalizing any disclosure of detention, is excessive and disproportionate in view of existing powers, the level of terrorist threat, and the absence of any declared public emergency justifying derogation from protected human rights. The regime violates the freedom from arbitrary or unlawful detention under Article 9(1) of the ICCPR and the right to effective judicial review of detention under Article 9(4) of the ICCPR.
7. **New powers to suspend passports**, like the existing powers in respect of passports generally, are not subject to sufficient guarantees of procedural fairness. In particular, in some cases the non-disclosure of sensitive information to an affected person may preclude their ability to effectively and meaningfully challenge adverse, untested allegations on which a decision concerning their passport is made. In such cases the absence or diminution of due process may constitute an arbitrary and unlawful interference in human rights (such as freedom of movement under Article 12, or the right to a fair hearing, under Article 14 of the ICCPR).
8. **The Attorney-General's power to list terrorist organisations** should be exercised judicially not by the executive, for reasons given by previous inquiries.
9. **The cessation of welfare payments** to those whose passports have been cancelled or refused, or visas cancelled, may infringe the right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights 1966 ('ICESCR') in certain cases, depending on how it is applied. The restriction of payments could only be justified as necessary and proportionate where there is evidence that such payments are being used to contribute to terrorism. Pre-emptive restriction in the absence of concrete evidence of abuse of welfare cannot be justified given the importance of social security to the survival of a person still present in Australia. Nor is it justifiable to withdraw payments to punish a person for their involvement with terrorism, where the payments have not been misused.

Further, if a person is left destitute by a decision, Australia may additionally violate its obligation not to commit cruel, inhuman or degrading treatment under Article 7 of the ICCPR. The impoverishment of a person may also engage the right to an adequate standard of living under Article 11 of the ICESCR, and family and children's rights under Articles 17, 23 and 24 of the ICCPR and Article 10 of the ICESCR.

The non-disclosure of security sensitive information may also infringe an affected person's right to effective judicial review of social security decisions, contrary to the ICESCR, where a person is unable to adequately know and thus to challenge the adverse allegations against them.

10. **Sunset provisions of ten years** in respect of various powers are far too long. The point of a sunset clause is to closely align and justify the necessity of particularly invasive powers with the exigencies of a specific current security threat. The threat in 10 years cannot be known with any meaningful degree of certainty. A period of three years would be appropriate.
11. **On the broader policy issues**, I firstly note that since 9/11 Australia has adopted amongst the largest number of counter-terrorism laws, of the most invasive kind, of any comparable democracy – but in the absence of a bill of rights and adequate judicial safeguards. Some of these laws, including the present bill, have also been enacted with undue haste and inadequate public consultation in view of the complexity of the laws and the interests at stake. Secondly, even in the light of recent events, the terrorist threat to Australia remains small-scale and very modest in global terms. As one who has researched international and comparative counter-terrorism laws for 13 years, in my view Australia's response is distinctive for its over-reaction, lack of proportion, and inattention to fundamental rights.

Yours sincerely

[Professor Ben Saul]