



Blueprint for Free Speech

Submission to:

Parliamentary Joint Committee on Intelligence and Security in respect of the Inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015

11 December 2015

Parliamentary Joint Committee on Intelligence and Security (the “Committee”) in respect of the Inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 (respectively the “Bill” and the “Inquiry”).

11 December 2015

1 Introduction

Thank you for the opportunity to provide comments to the Committee in respect of the Inquiry.

Blueprint for Free Speech (**Blueprint**) is an Australian based, internationally focused not-for-profit concentrating on research into ‘freedoms’ law. Our areas of research include public interest disclosure (whistleblowing), freedom of speech, defamation, censorship, right to publish, shield laws, media law, Internet freedom (net neutrality), intellectual property and freedom of information.

You may be aware that Blueprint is a regular participant in the inquiries conducted by this Committee and we are very pleased to once again be able to provide our expertise and perspective on these matters.

We wish to take the opportunity to repeat a paragraph from an earlier submission we put to this committee:

“Protecting Australia’s interests is a vitally important and equally complicated task. We understand that the Government, at the core of its actions, is seeking to protect the interests and safety of Australians. However, this legislation, in combination with the raft of legislation passed by this government (as has been witnessed by this Committee) tells the story of broad-brush stroke increases in power for the intelligence and national security community. The approach has been deliberate and broad and in each case a piece of the rule of law or protections enshrining personal privacy has been eroded. We are very concerned with these developments, and see that this current proposed Bill is another step in that direction.”

This proposed Bill is yet another tranche in a long series of legislation that has been put to the Committee without significant consequential amendment. On each occasion, the draft is put to the members, we all go through this process of examination, public deliberation, and ultimately this consultation process comes to no avail (with the exception perhaps of some minor changes).

There are a couple of reasons for this. The first is that we live in a prevailing political climate that encourages and demands some or any kind of solution to a complex geo-political problem that we cannot seem to grapple. What results is an attitude that we ‘better do something’ seemingly without too much concern for the necessity, effectiveness or proportionality of such measures. The second is that the reform process has been iterative. One building block upon another so that to a non-careful eye, it may seem that the proposed changes here are innocuous. This is an incorrect approach. Rather, one should look holistically at the suite – tranche after tranche – of this legislation

and examine it in its entirety. Have the amendments been effective – have they fulfilled their stated purpose? What cost has come to the community and individual rights of citizens as a result? Instead, the climate dictates that once a law has passed, we accept it, and the next tranche isn't that bad so we don't take its encroachments on our individual rights too seriously.

Blueprint would like to see a holistic examination of the entire suite of national security legislation, rather than fighting these iterative battles. We want Australia to be as safe as anyone else, but we want to ensure that it's not done at a cost to liberty not worth bearing.

We reserve our right to later comment on other matters that we have not covered in this submission.

2 Classification (*Publication, Films and Computer Games*) Act 1995

Schedule 13 of the Bill seeks to amend Section 9A(2)(a) of the *Classification (Publication, Films and Computer Games) Act 1995* (**Classification Act**) by inserting the words “*promotes, encourages*” to the list of things a publication/film/computer game (a **Publication**) should not do in relation to a terrorist act. The consequences of this would be that any Publication that promotes or encourages a terrorist attack must be classified ‘RC’ (Refused Classification (in other words, banned)).

Currently, the relevant section in the Classification Act reads as follows:

“9A Refused Classification for publications, films or computer games that advocate terrorist acts

- (1) *A publication, film or computer game that advocates the doing of a terrorist act must be classified RC.*
- (2) *Subject to subsection (3), for the purposes of this section, a publication, film or computer game **advocates** the doing of a terrorist act if:*
 - (a) *it directly or indirectly counsels [Proposed amendment: promotes, encourages] or urges the doing of a terrorist act; or*
 - (b) *it directly or indirectly provides instruction on the doing of a terrorist act; or*
 - (c) *it directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the Criminal Code) that the person might suffer) to engage in a terrorist act.*
- (3) *A publication, film or computer game does not advocate the doing of a terrorist act if it depicts or describes a terrorist act, but the depiction or description could reasonably be considered to be done merely as part of public discussion or debate or as entertainment or satire.*
- (4) *In this section:*

terrorist act *has the meaning given by section 100.1 of the Criminal Code (no matter where the action occurs, the threat of action is made or the action, if carried out, would occur).*

*Note: The definition of **terrorist act** in that section covers actions or threats of actions.”*

As can plainly be seen, the addition of the words ‘promotes, encourages’ makes the section much more restrictive. Of particular note is how the safeguard set out in sub-section 9A(3) is almost diminished to the point of irrelevance by the addition of these two words. Currently, the two verbs in that sentence, namely ‘counsels’ and ‘urges’ have a direct application. It would be easier for a classifier to determine on the basis of the material of the publication whether it directly ‘counselled’ or ‘urged’ a terrorist act, because those words are clear and have a reasonably high threshold. The words ‘promotes, encourages’ debase that clear standard and would lead to a bias on the side of refused-classification.

Let’s use an example – a popular television series ‘*Homeland*’. In that series, on multiple occasions, one of the key protagonists (“Brody”) switches between as being perceived (and acting) as a terrorist and on the other hand, a loyal US Marine. The show’s complex narrative explores the distinction between what a terrorist is, whether a particular person is a terrorist and most importantly for our purposes, the show depicts a number of terrorist attacks. On the face of the Classification Act as it stands, it would be difficult to argue that *Homeland* either directly or indirectly counsels or urges the doing of a terrorist attack. This is simply because it’s fiction, the perceptions of the characters often change, and the overriding moral of the shows include service to country, grey lines between right and wrong and of course the danger of mixing prescription drugs with alcohol consumption (Carrie). However, consider if the operative verbs also included ‘promotes’ and ‘encourages’. There are certain points in the plot where the audience would in fact be excited by the idea of an explosion. There are also certain points where we would in fact advocate for an explosion (greater good, grey lines, etc.). Could this be promotion? Does this in a sense ‘encourage’ a terrorist act?

The point here really is that no reasonable person (who wasn’t already planning a terrorist attack) would watch *Homeland* and then suddenly feel compelled to engage in an act of violence. Instead, we have a popular television show which deals with important issues of our time potentially falling foul of our national classification body under the proposed Act. The proposed amendments to the Classification Act are too broad and out of step with public opinion in Australia.

We can engage in matters of semantics *ad infinitum*, but a reasonable person should expect to be disappointed if a classification body would deem this or similar shows ‘RC’ – which, on first reading, there is scope to do. The dangerous situation is that this over-classification leads to a slippery slope whereby discussion of these matters is not permitted – or indeed never had – because the material that sparks such discussion can never be released. Further public debate on such matters stemming from popular TV shows or films, for example on talk back radio, might progress in places like the United States, but leave Australia behind. This is in addition to the clear damage such over-classification would have on artistic freedom. History has taught us that a limitation on artistic freedom is one of the hallmarks of a nanny-state. We do not want Australia to slide to that point.

Perhaps the most pernicious justification is the statement in the Bill's Explanatory Memorandum ("EM"), which asserts that such an amendment is compliant with the *International Covenant on Civil and Political Rights* (ICCPR). We have replicated this in full:

"Classification (Publications, Films and Computer Games) Act 1995

Definition of "advocates the doing of a terrorist act"

30. Paragraph 9A(2)(a) (Refused Classification for publications, films or computer games that advocate terrorist acts) of the Classification Act is amended to give "advocates the doing of a terrorist act" the same meaning as that given under paragraph 102.1(1A)(a) of the Criminal Code. This ensures that a publication, film or computer game that directly or indirectly "promotes" or "encourages" (as well as "counsels" or "urges") the doing of a terrorist act must be classified Refused Classification (RC), so cannot therefore be published under state and territory classification enforcement laws.

The right to freedom of expression in Article 19 of the ICCPR, the prohibition on advocacy of racial or religious hatred in Article 20 of the ICCPR

31. Article 19(2) of the ICCPR provides that everyone has the right to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds through any media. However, Article 19(3) provides that the freedom of expression may be limited where the limitations are provided for by law and are necessary for the protection of national security. This restriction on free expression is justified on the basis that advocating the commission of a terrorist act or terrorism offence is conduct which jeopardises the security of Australia, the personal safety of its population and its national security interests.

32. Article 20(2) sets out a requirement for laws to prohibit any advocacy for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

33. Terrorist acts represent the gravest threats to the welfare of Australians as they include causing serious physical harm or death, damaging property, creating a serious risk to the health or safety of the public and interfering with electronic systems. It is reasonable that such conduct should not be advocated and that reasonable steps should be taken to discourage behaviour that promotes such actions. Importantly, deterring the advocacy of such acts, which can at its most serious include causing a person's death, promotes the rights of others (in accordance with Article 19(3)(a)). In this instance, this may include protecting people's right to life as covered by Article 6 of the ICCPR.

34. This restriction on freedom of expression is a reasonable, necessary and proportionate measure to protect the public from terrorist acts. Individuals who travel overseas to participate in foreign conflicts often return with radicalised ideologies that include violent extremism. Advocating terrorism heightens the probability of the commission of terrorism offences on Australian soil and encourages others to join the fight overseas.

blueprint for
FREE SPEECH

35. *The RC classification for material that “promotes” or “encourages” (as well as “counsels” or “urges”) the doing of a terrorist act does not disproportionately limit freedom of expression. Material that is classified RC contains content that is very high in impact and falls outside generally accepted community standards, including the category of detailed instruction or promotion in matters of crime or violence .*

36. *Accordingly, the limitation on the freedom of expression is reasonable, necessary and proportionate and unlikely to be greater than the restriction as it is currently worded. Article 20(2) also supports the expanded definition of advocating a terrorist act and the prohibition of such advocacy.”*

There are a few issues with the commentary in the EM. First, at paragraph 31 (relevant section highlighted), it notes that “...Article 19(3) provides that the freedom of expression may be limited where the limitations are provided for by law and are necessary for the protection of national security...” The problem here of course is that by simply saying that there is a necessity to protect national security doesn't explain *why* or *how* it is necessary to make this particular amendment. In other words, what effect will it have?

Paragraphs 32 and 33 of the EM follow through with the argument that no publication should ‘advocate’ for the doing of any terrorist act. However, the amendment to be sought here is the addition of the words ‘promotes, encourages’. This argument is disingenuous, because ‘promotes’ and ‘encourages’ are not of the same character as ‘advocates’. Relying on the exemption for activity that ‘advocates’ for terrorist acts in Article 20(2) of the ICCPR is misleading.

What is perhaps the most unfathomable argument of all – in that it makes no practical sense – is that the great threat is from those who travel to other countries and return to Australia to commit terrorist offences (see paragraph 34 of the EM). In this case, it remains to be seen how the refusal of classification for a publication would do anything to stop such activity.

On account of an examination of the proposed Bill and the EM, one cannot see how the ‘*limitation on the freedom of expression is reasonable, necessary and proportionate and unlikely to be greater than the restriction as it is currently worded* (paragraph 36 of the EM).”

If you are going to take away a little bit more of our freedom to speak freely, you must at a bare minimum illustrate clearly and to the entire Australian public that doing so has a provable and large impact on our safety. No evidence has been presented to the public. “Just trust us” is not evidence, it is assertion. Nor is presentation of a handful of anecdotal cases. Hard evidence – in large measure – of causality not just correlation must be provided publicly.

Accordingly, we strongly recommend against any amendment to the Classification Act.

3 Reduction in minimum age of control orders from 16 to 14

The Bill proposes by its Schedule 2 to amend specific sections of the *Criminal Code Act 1995* (Cth), the effect of which will be to lower the minimum age of a person who may be subject to a control

blueprint for
FREE SPEECH

order from 16 to 14. A control order is essentially a measure taken to control or restrict a person and certain activities of the person to whom it is subject. It is usefully explained in the EM:

“78. A control order does not authorise detention. A child will not be separated from family and will be able to attend school. Where the issuing court is satisfied on the balance of probabilities that a restriction on the child’s movements is reasonably necessary and appropriate and adapted to achieving one of the purposes of the control order regime, it can impose a requirement that the child remain at specified premises between specified times each day or on specified days. This “curfew” can be for up to a total of 12 hours in any 24-hour period.

79. The court can also require that the child wear a tracking device, require them to be photographed and fingerprinted, and require that they report to specified people at particular times and places. They can be prohibited or restricted from being at certain places, leaving Australia, communicating with specified people or accessing particular forms of telecommunications or technology, including the internet, possessing or using of specified articles or substances and the carrying out of specified activities.”

The EM also states that such an order is not ‘punitive’ but rather ‘protective’ of the community. These, of course, are not mutually exclusive. It is hard to reconcile the limitation of someone’s liberty by movement, access to communication, right of passage to leave the country or the right to own particular things as not being punitive. Moreover, such an order is made without a person being charged of any offence. In the case of minors, the maximum length of time that such an order can be granted is for a period of 3 months (cf adults up to 12 months).

The justification for these amendments rests on the idea that a child younger than 16 (the current limit) can engage in terrorist activities. This is no doubt true. In fact, children as young as 7 or 8 could in theory contribute in some manner to the running, execution or planning of a terrorist attack.

As we know, a child is also capable of stealing chocolate bars, burning down houses, using weapons to kill people, voicing subversive and treasonous ideas among a plethora of other things, which might otherwise have them grounded or sent to the naughty step. But the important distinction we make as a society is that we treat children differently in matters of criminal law. The philosophy behind this is simple - they don’t know any better, and therefore should be held to a different measure of responsibility. Lowering the age from 16 to 14 isn’t just a matter of saying well; if a 14 year old can commit the same act (let’s call it *actus reus* as we’re talking about criminal law) then they should be subject to the same punishment (and yes, let’s not avoid this idea, these orders punish children). However, it forgets the other element of a crime – the *mens rea* – or ‘intent’. Just as a 16 year old isn’t an 18 year old, a 14 year old is not a 16 year old. Their capacity to intend to commit any crime is very different, and markedly so. Indeed many would argue that the gap in awareness and intent is far greater between age 14 and 16, than between 16 and 18. They should not be treated the same. At the age of 14 banks don’t even consider children responsible enough to take charge of a *Dollarmites* account without parental signature.

More broadly, the control order regime has come under criticism from a number of people, not least including the former Independent National Security Legislation monitor, Bret Walker SC. Walker advocated for the abolition of the regime entirely in his 2012 report.¹ Currently, the safeguards for control orders are subject to review by the current Independent National Security Legislation Monitor, Roger Gyles QC.² The Committee should at least consider the result of that review before it takes the drastic step to lower the age to 14.

We oppose the reduction in the minimum age to control orders and recommend Schedule 2 be deleted from the Bill.

4 Allowing a court to make an order that is inconsistent with regulations made under the NSI Act if the Attorney-General has applied for the order

Schedule 16 of the Bill amends the *National Security Information (Criminal and Civil Proceedings) Act 2004*. Relevantly, it seeks to give the Attorney-General the power to request that a court make an order that it would otherwise not be permitted to make under the *National Security Information (Criminal and Civil Proceedings) Regulation 2015*. The design of this power is to ensure that the Attorney-General maintains control over information both in criminal and civil proceedings over national security information.

Although this power seeks to extend an existing power, and builds further flexibility into the management of information in a trial, which includes evidence of this nature, the consequences are that an accused, and even their legal representation (even if they have the appropriate security clearance) may be excluded from seeing the evidence against them. This is another example similar to that which was raised in the introduction – it is not a massive leap forward in the creation of a new power, but part of a slow creep that invests a great deal of power in the executive arm of government. This comes at the cost of the running of a fair trial. What is especially concerning is of course the discretion to disallow legal representation to either see the evidence, or put his or her client's case in a proper manner.

As was noted in a recent article by Jessie Blackbourn³, this has a substantial effect on the ability of a judge to weigh the evidence. She quotes from a judgment by Lord Kerr on the subject of the use of this 'secret evidence':

*"The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead."*⁴

¹ http://www.dpmc.gov.au/sites/default/files/files/INSLM_Annual_Report_20121220.pdf

² <http://www.dpmc.gov.au/pmc/about-pmc/core-priorities/independent-national-security-legislation-monitor>

³ <https://theconversation.com/national-security-bill-opens-the-door-to-expanded-control-orders-and-secret-evidence-49361>

⁴ <http://www.bailii.org/uk/cases/UKSC/2011/34.html>, extracted from <https://theconversation.com/national-security-bill-opens-the-door-to-expanded-control-orders-and-secret-evidence-49361>



We strongly recommend that this trend be reversed and reconsidered and that the automatic extension of this power to the Attorney-General be reconsidered.

5 Conclusion

Our consistent participation in inquiries conducted by this committee has so far been, frankly, unfruitful. We have repeatedly researched and made recommendations in the interest of the broader Australian community, and the protection of individual rights, which support the fair balancing of the need to protect Australia's interests without encroaching on the individual rights of citizens. However this Committee seems to consistently be closing its ears to evidence-based and human rights arguments.

The risk of doing so is two-fold. The first risk is that what is produced from this Committee becomes out of step with what the broader Australian community wants, particularly younger Australians. The second risk is that community based organisations, which have limited resources, will simply exit from this process. In doing so, you close a door to your broader constituency but also to moderate and thoughtful sectors of our society that seek a reasonable balance between the need for security and the enduring need to protect the freedom of expression and individual rights. The public and media discussion of these issues will also be less informed if important voices remove themselves from these processes. It is also directly contradictory to the government's desire to commit and contribute to the Open Government Partnership.⁵

As we advocated in our introduction, the creep and extension of powers to the Attorney-General and the intelligence agencies needs to be reviewed. There should and needs to be a wholesale examination of the powers conferred on these bodies over the last 15 years – powers which seem, on the face of it to be completely out of step with community standards and disproportionate to the effect they seem to have. The strategy behind how the creep has occurred has been impressive in its deliberateness and success. However, we need to take a step back and examine each of the powers we're progressively granted to these agencies over the last 15 years. We need to take a fresh, holistic view.

Blueprint would like to take the opportunity again to thank the Committee for its time in considering our submission and reiterate its enthusiasm in assisting the Committee further in whatever way it might deem us to be helpful.

Please contact us about this submission or any other matter.

Blueprint for Free Speech

11 December 2015

⁵ <http://ogpau.govspace.gov.au/national-action-plan/>