

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY
INQUIRY INTO THE COUNTER-TERRORISM LEGISLATION AMENDMENT (FOREIGN
FIGHTERS) BILL 2014

Questions on Notice

1. Senator the Hon Penny Wong asked the following question at the hearing on 3 October 2014:

- a) What is the Commission's view of the submission made by the Inspector-General of Intelligence and Security about the effect of the proposed insertion of the definition 'engage in subverting society' in the Criminal Code, and its effect on the definition of 'security' in the *Australian Security Intelligence Organisation Act 1979* (Cth)?

The answer to the honourable Senator's question is as follows:

- a) The Commission agrees with the submissions of the Inspector-General (IGIS) on this issue.
- b) As outlined in the IGIS's written submission, the Bill would introduce into the Criminal Code new criminal offences relating to 'engaging in hostile activities' in foreign states. 'Engaging in hostile activities' would include 'engaging in subverting society'. The phrase 'engage in subverting society' is in turn defined in such a way as to include a number of acts that might be crimes, but that are not necessarily related to terrorism. Specifically, those acts would not necessarily involve an action or threat done or made:
- (i) with the intention of advancing a political, religious or ideological cause; and
 - (ii) with the intention of:
 - i. coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - ii. intimidating the public or a section of the public.
- c) As also noted by IGIS, the effect of the Bill would be to enliven ASIO's powers with respect to a range of conduct that has no necessary link to terrorism or Australia's national security.
- d) The justification given in the supporting materials for the passage of the Bill is the need to address the risk posed by terrorism, and in particular risks posed by persons returning to Australia who have engaged in conflict or terrorist activities abroad. The Commission considers that the relevant provisions of the Bill have not been shown to be connected to this objective. They have therefore not been demonstrated to be necessary and proportionate to achieving a legitimate objective.

2. The Hon Anthony Byrne MP asked the following question at the hearing on 3 October 2014:

- a) With respect to the Bill's proposed extension of various sunset provisions, would one way forward be to not conduct the review of the provisions... but to enact a sunset clause of somewhere between three and five years?

The answer to the honourable Member's question is:

- a) The Commission submits that there is no urgency in the extension of the relevant sunset clauses. It repeats its submission that they should not be renewed unless and until a review of the relevant clauses demonstrates that that renewal is necessary and proportionate to achieving a legitimate objective.
- b) The appropriate length of any extension of the sunset provisions would itself be an appropriate matter to be considered in the course of a review. The Commission considers that an extension for a period of ten years is likely to be excessive. A period of between three and five years is more likely to be appropriate.

3. Senator the Hon Penny Wong asked the following question at the hearing on 3 October 2014:

- a) The Bill proposes to change the definition of a 'serious Commonwealth offence' in 219ZJA of the *Customs Act 1901* (Cth) to mean any Commonwealth offence punishable by a minimum of 12 months' imprisonment. Are there any particular offences that would fall within the scope of the new definition that are of particular concern to the Commission?

The answer to the honourable Senator's question is:

- a) The Commission's concern with the proposed amendment is that it is a significant broadening of the current definition, and no justification has been given for the change.
- b) The justification given in the supporting materials for the passage of the Bill is the need to address a heightened risk of terrorism, and specifically risks posed by persons returning to Australia having engaged in conflicts or terrorist activities abroad.
- c) The expansion of the definition of 'serious Commonwealth offence' is not required to achieve that purpose. Offences relating to terrorism carry minimum terms of imprisonment of significantly more than 12 months.
- d) The expanded definition would cover a very wide range of offences unconnected with terrorism, customs, or migration. (To take only two random examples – offences under the *Dairy Produce Act 1986* and the *Dental Benefits Act 2008*).
- e) The Commission's concerns are heightened because of the proposed amendments to the Customs Act that would enable an officer to detain a person suspected of *intending* to commit a serious Commonwealth offence. In its written submission, the Commission has recommended that the power to detain on the basis of such a suspicion should be limited to offences relating to terrorist acts.
- f) The Commonwealth has not demonstrated that the provision is necessary and proportionate to achieving a legitimate objective.

4. The Hon Anthony Byrne MP asked the following question at the hearing on 3 October 2014:

- a) With respect to the proposed offence of entering or remaining in a declared area (Item 110 of Schedule 1 of the Bill; proposed section 119.2 of the Criminal Code):
 - i. What issues arise with respect to the right to silence?
 - ii. Does the Commission foresee there could be difficulties in obtaining prosecutions under the proposed provisions?

The answer to the honourable member's question is:

- a) The proposed law does not on its face abrogate the right to silence.
- b) However, the only elements of the offence are that:
 - i. A declaration is in effect with respect of an area
 - ii. A person enters or remains in that area.
- c) An exception to the offence exists if an accused enters or remains in the area for a legitimate purpose. The accused bears an evidential burden in that regard.
- d) In the event that an accused exercises their right to silence, it is difficult to see how they could discharge the evidential burden to enliven the exception. In that way, the law does have implications for the right to silence. That is of serious concern – particularly as the act criminalised is not inherently wrongful, and the offence would be liable to punishment by 10 years' imprisonment.
- e) The Commission does not have particular expertise in criminal prosecutions. Whether there would be difficulties in obtaining prosecutions under the proposed provision is a question that might better be addressed by Commonwealth prosecution agencies.

5. Senator the Hon Penny Wong asked the following question at the hearing on 3 October 2014:

- a) The Bill would make it an offence for a person to enter, or remain in, a declared area. Is the Commission aware of any comparable legislation in other jurisdictions?

The answer to the honourable Senator's question is:

- a) The Commission regrets that it has not, in the time available, been able to undertake a survey of relevant legislation in comparable jurisdictions.
- b) The Commission considers that the proposed law has not been demonstrated to be a necessary and proportionate response to a legitimate aim. The Commission refers to paragraphs [38]-[52] of its written submissions in that regard.

6. The Hon Tanya Plibersek MP asked the following question at the hearing on 3 October 2014:

- a) The Bill would make it possible for certain welfare payments to be cancelled where a person's visa is cancelled following the receipt of an adverse security assessment.
 - i. Has the Commission considered what arrangements might be made to continue payments for the support of families?
 - ii. If there is a serious enough concern about a family for welfare payments to be stopped, does the Commonwealth then have an obligation to report that family to child protection officers at a state jurisdiction level?

The answer to the honourable Member's question is:

- a) The Commission refers to recommendation 14 in its written submission:

Consideration be given to establishing a payment nominee system for 'parental leave pay', 'dad and partner pay' and 'social security payments' where an individual has dependent family members, particularly children.

- b) The Commission acknowledges that there may be other mechanisms by which the same objective could be achieved.
- c) With respect to the second part of the honourable Member's question, the Commission offers the following general remarks:
 - i. Child protection in Australia is administered in Australia by State and Territory Agencies operating under various State and Territory legislative regimes. Currently, mandatory reporting requirements relating to child welfare vary by jurisdiction.
 - ii. In addition, there are in place protocols relating to the sharing of information between Commonwealth agencies and State and Territory Child protection agencies. (See for instance: Council of Australian Governments, *National Framework for Protecting Australia's Children 2009–2020* (2009), available at <http://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business?HTML>; *Information Sharing Protocol between the Commonwealth and Child Protection Agencies 2009*, available at http://www.community.nsw.gov.au/docswr/_assets/main/lib100044/information_sharing_protocol.pdf).
 - iii. The Commission anticipates that there may be difficulties in requiring mandatory reporting where that involves adverse security assessments.
 - iv. In principle, the Commission supports the sharing of information where that is necessary to protect a child from risk of harm. That would be in the best interests of the child, and would be consistent with a number of obligations in the Convention on the Rights of the Child (CRC) (for instance articles 3 and 6).
 - v. The Commission notes that article 9 of the CRC requires that no child should be 'separated from his or her parents against their will, except when ... such separation is necessary for the best interests of the child.'
 - vi. In some circumstances it is possible that an adverse security assessment may be based upon evidence suggesting a parent may pose a risk to their child's welfare. However, the mere fact that a parent had received an adverse security assessment would not, without more, necessarily demonstrate a risk to the welfare of a child.

7. Further Submission – Advocating terrorism and proscription of organisations that advocate terrorism

- a) At the Committee hearing on 3 October 2014, the Commission requested permission to make a short further written submission, with respect to any matters not fully addressed in our submission of 2 October or orally before the Committee. The Commission wishes to make a further submission about the following matters:
- i. The proposed creation of a new offence of advocating terrorism; and
 - ii. The proposed expansion of the grounds for proscribing an organisation that advocates terrorism.

Advocating terrorism

- b) The Bill would introduce a new offence of advocating terrorism into the Criminal Code (proposed section 80.2C). A person would ‘advocate’ a terrorist act if they ‘counselled’, ‘promoted’, encouraged’ or ‘urged’ the doing of a terrorist act or the commission of a terrorist offence.
- c) Article 19 of the International Covenant on Civil and Political Rights guarantees freedom of expression. Limits on that right may be justified only if they are shown to be necessary and proportionate to achieve a legitimate objective.
- d) The Commission notes that ss 80A and 80B of the Criminal Code already contain offences relating to urging violence against groups or members of groups. To commit an offence under these provisions, a person must urge the use of violence, and intend that that violence occur.
- e) In addition, inciting terrorism is already an offence under the Criminal Code. Section 11.4(1) of the Code provides that a person who urges the commission of an offence is guilty of the offence of incitement. A person does not incite an offence unless they intend that the offence be committed.
- f) There is nothing in the supporting materials which indicates that the existing offences of inciting terrorism and urging violence are not sufficient to achieve the Commonwealth’s objective of protecting national security and protecting the human rights of its citizens.
- g) The new offence of advocating terrorism would extend to conduct ‘promoting’ and ‘encouraging’ terrorist acts. It would also not require proof that an accused intended that any terrorist act be committed. Rather, it would be sufficient to show that an accused was reckless as to whether another person would engage in a terrorist act.
- h) The concept of ‘promoting’ terrorism is not defined. The Commission is concerned that it may include speech and conduct which is general, not directed at a specific audience, and not directed towards the commission of particular offences. Indeed, it is arguable that the ‘promotion’ and ‘encouragement’ of terrorist acts might include the praise or the publicising of terrorist acts or radical ideologies, or of political movements containing extremist elements.
- i) For this reason, the new offence appears to go further than is necessary to prevent the commission of terrorist acts.

Recommendation 1:

- j) **The Commission recommends that Items 61 and 62 of Schedule 1 of the Bill, which create the offence of advocating terrorism, not be passed.**
- k) **If this recommendation is not accepted, the Commission recommends that proposed s 80.2C be amended:**
- i. **To remove the words ‘promotes’ and ‘encourages’ from the definition of ‘advocates’**
 - ii. **To make it an element of the offence that it is likely that an act of advocacy will substantially increase the chance of a terrorist act occurring**
 - iii. **To make it an element of the offence that a person ‘advocating’ conduct intends their conduct to result in the commission of a terrorist act, or intends their conduct to substantially increase the risk of a terrorist act occurring.**

Proscribing terrorist organisations

- l) The Criminal Code currently allows the making of a regulation designating an organisation as a ‘terrorist organisation’ if the Minister is satisfied that the organisation, *inter alia*, directly or indirectly advocates the doing of a terrorist act (s 102.1(1)). As the Code stands, an organisation ‘advocates’ the doing of a terrorist act if it ‘counsels or urges’ the doing of such an act (s 102.1(1A)). The Bill would amend this definition to provide that an organisation also ‘advocates’ a terrorist act if it ‘promotes’ or ‘encourages’ such an act.
- m) For the reasons given above, the Commission considers that expanding the concept of advocacy to include ‘promotion’ and ‘encouragement’ in the definition of ‘advocacy’ is overbroad, and has not been shown to be necessary or proportionate to the protection of national security or the human rights of others.

Recommendation 2:

- n) **The Commission recommends that Item 64 of Schedule 1 of the Bill, which would allow an organisation to be designated a terrorist organisation if it ‘promotes’ or ‘encourages’ a terrorist act, not be passed.**
- o) **If this recommendation is not accepted, the Commission recommends that the Bill be amended such that an organisation may only be designated a ‘terrorist organisation’ on the grounds that it ‘promotes’ or ‘encourages’ a terrorist act if the Minister is satisfied that there is a substantial risk that such promotion or encouragement is likely to substantially increase the risk of a terrorist act occurring.**