



## Australia's Human Rights Score Card

### Australia's 2015 UPR—NGO Coalition Fact Sheet 7

## Counter Terrorism

### Introduction

Since 2001, Australia has enacted over 60 counter-terrorism laws.<sup>1</sup> These laws contain a wide range of criminal offences and grant broad investigative powers to the police and intelligence agencies. Many of these laws infringe upon fundamental human rights by restricting the rights to liberty, privacy, and the freedoms of speech, movement, and association.

### Offence of Entering or Remaining in a 'Declared Area'

In October 2014, the Abbott government passed the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (Foreign Fighters Act) in response to the threat of foreign fighters returning from the conflicts in Iraq and Syria. The Foreign Fighters Act introduced a new offence, punishable by 10 years' imprisonment, of entering or remaining in a 'declared area'.<sup>2</sup> The Minister for Foreign Affairs may declare part of a foreign country as a declared area if he or she is satisfied that a terrorist organisation is engaged in a hostile activity in that area.<sup>3</sup> This might include, for example, parts of Iraq, Syria, Afghanistan, Pakistan or Indonesia.

There are no other elements to this offence, such as an intention to engage in hostile activity.<sup>4</sup> The person needs merely to enter or remain in the area. As a defence, the person may show that he or she travelled to the area solely for a legitimate purpose.<sup>5</sup> There is a list of specified legitimate purposes, such as conducting official duties, visiting a family member or providing humanitarian aid.<sup>6</sup> However, this list of defences is short and does not include a range of legitimate reasons why a person might travel to a foreign country in

conflict (such as visiting a friend, or conducting business transactions).

The government has not technically reversed the onus of proof, as the prosecution must still prove each element of the offence beyond reasonable doubt. However, the offence is framed in such a way that it has essentially the same effect. The offence clearly infringes the right to freedom of movement by prohibiting Australians from travelling to designated 'no-go zones'.

#### Proposed Recommendation

Australia should repeal the offence of entering or remaining in a declared area.

### Offence of Advocating Terrorism

The Foreign Fighters Act also introduced a new offence of 'advocating terrorism'.<sup>7</sup> This offence will be made out where the person counsels, encourages, urges or promotes terrorism, and is reckless as to whether another person will engage in terrorism as a result.

While it should be (and is) a criminal offence to incite unlawful acts,<sup>8</sup> this offence goes beyond the existing law of incitement.<sup>9</sup> In doing so, it restricts the freedom of individuals to voice legitimate opinions on overseas conflicts. For example, the offence could apply to an individual who posted on a website that fighters opposing the Assad regime in Syria should engage in further attacks. In any conflict there will be difficult lines as to what acts are legitimate to encourage or promote, but clearly there should be scope in a free democratic society to adopt differing viewpoints on such difficult and divisive issues.

#### Proposed Recommendation

Australia should repeal the offence of advocating terrorism.

<sup>1</sup> George Williams, 'The Legal Legacy of the War on Terror' (2013) 12 *Macquarie Law Journal* 3, 7.

<sup>2</sup> *Criminal Code Act 1995* (Cth), s 119.2.

<sup>3</sup> *Criminal Code Act 1995* (Cth), s 119.3(1).

<sup>4</sup> As in other foreign incursions offences: see *Criminal Code Act 1995* (Cth), s 119.1.

<sup>5</sup> *Criminal Code Act 1995* (Cth), s 119.2(3).

<sup>6</sup> *Criminal Code Act 1995* (Cth), s 119.2(3).

<sup>7</sup> *Criminal Code Act 1995* (Cth), s 80.2C.

<sup>8</sup> *Criminal Code Act 1995* (Cth), s 11.4.

<sup>9</sup> Because it extends to the 'promotion' of violence, and because the person need only be reckless (rather than intend) that violence will occur: see, eg, *R v Chonka* [2000] NSWCCA 466 [77].

## Counter-Terrorism Powers

Some of Australia's most controversial counter-terrorism powers – namely control orders,<sup>10</sup> preventative detention orders (PDOs),<sup>11</sup> and a power that allows ASIO (Australia's domestic intelligence agency) to question non-suspects while detaining them for up to a week<sup>12</sup> – were due to expire under sunset clauses in late 2015 and early 2016. Through the Foreign Fighters Act, the Abbott government extended the operation of these powers until September 2018.<sup>13</sup>

These powers allow the police and ASIO to place significant restrictions on an individual's liberty without a finding of criminal guilt. They had been discredited in major inquiries by the Independent National Security Legislation Monitor (INSLM), the COAG Counter-Terrorism Review and parliamentary committees, which recommended that the powers be repealed or substantially amended.<sup>14</sup> For example, the COAG Counter-Terrorism Review remarked that powers such as PDOs 'might be thought to be unacceptable in a liberal democracy'.<sup>15</sup> In extending the operation of these powers, the government bypassed a major opportunity for their amendment or repeal.

Other new powers relating to the threat of terrorism – including a mandatory data retention regime – pose a significant risk to the privacy of Australian citizens.<sup>16</sup> These laws should similarly be reviewed and amended in line with Australia's international human rights obligations.

### Proposed Recommendation

Australia should review and amend its counter-terrorism powers – particularly control orders, PDOs, ASIO's questioning and detention powers, and mandatory data retention – to ensure that they are consistent with the rights to liberty, privacy, and Australia's other international human rights obligations.

<sup>10</sup> *Criminal Code Act 1995* (Cth), div 104.

<sup>11</sup> *Criminal Code Act 1995* (Cth), div 105.

<sup>12</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), pt III div 3.

<sup>13</sup> *Criminal Code Act 1995* (Cth), ss 104.32, 105.53; *Australian Security Intelligence Organisation Act 1979* (Cth), s 34ZZ.

<sup>14</sup> Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 44, 67; Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) 68; Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) vii.

<sup>15</sup> Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) 68.

<sup>16</sup> *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth). See also ASIO's power to seek computer access warrants in *Australian Security Intelligence Organisation Act 1979* (Cth), s 25A.