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Australian legal responses to foreign fighters

Keiran Hardy and George Williams*

In 2014–2015, the Abbott government introduced new counter-terrorism laws into the Federal Parliament. These laws were portrayed as a response to the threat of foreign fighters returning from Iraq and Syria, and the ongoing problem of home-grown terrorism. The laws also dealt with a wider range of matters, including whistleblowing by intelligence officers and the retention of metadata. This article details these laws with a view to analysing whether they were needed and are likely to be effective, the process by which they were enacted and their impact on democratic and other rights, so that lessons may be drawn more generally for the making of future counter-terrorism laws in Australia.

INTRODUCTION

Australia faces a significant threat of terrorism from individuals connected with or inspired by Islamic State. From its inception in 2003, the National Terrorism Public Alert System set the threat level to Australia at “medium”, indicating an assessment that a terrorist attack “could occur”.¹ In September 2014, this was increased to “high”, indicating that a terrorist attack is “likely”.² This change reflected the heightened danger posed by “foreign fighters” travelling to Iraq and Syria, joining Islamic State and returning home trained and prepared to engage in terrorism. As of February 2016, around 110 Australians were believed to be fighting in Syria and Iraq, with another 40 having returned home from those conflicts, and another 190 actively supporting Islamic State through financing and recruitment or by seeking to travel overseas to engage in terrorism.³

A further, related threat is posed by young radicalised individuals within Australia who support Islamic State and seek to advance its cause. Making the task of the authorities more difficult is that these people may not act in concert with others, but may be so-called “lone wolf” terrorists who emerge without warning to harm innocent civilians. Recent events demonstrate that this threat is real and ongoing. In September 2014, police shot dead an 18-year old terrorism suspect who stabbed two police officers outside a police station in South-East Melbourne.⁴ In December 2014, a gunman held 17 hostages in the Lindt Café in Sydney’s Martin Place, forcing his captives to stand at windows holding a black flag similar to that used by Islamic State.⁵ Two hostages and the gunman died in the

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¹ George Williams, “A Decade of Australian Anti-Terror Laws” (2011) 35 *Melbourne University Law Review* 1136, 1137. See generally Edward Santow and George Williams, “Terrorism Threat Assessments: Problems of Constitutional Law and Government Accountability” (2012) 23 *Public Law Review* 33.

² Latika Bourke and Lisa Cox, “Terror Risk High: Tony Abbott Announces Increase in National Terrorism Public Alert System”, *Sydney Morning Herald*, 12 September 2014. In November 2015, the National Terrorism Threat Advisory System was updated from a four-tier to five-tier system, with the current threat levels from least to most serious being “Not Expected”, “Possible”, “Probable”, “Expected” and “Certain”: Australian National Security, *National Terrorism Threat Advisory System* (2015) <<http://www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/National-Terrorism-Threat-Advisory-System.aspx>>. See Lisa Cox, “Turnbull Government Unveils New Five-Tier Terror System”, *Sydney Morning Herald*, 26 November 2015.

³ “Australian IS Fighters ‘Highly Expendable’”, *The Australian* (Sydney), 9 February 2016.

⁴ Cameron Houston et al, “Terror Suspect Shot Dead After Two Police Officers Stabbed in Endeavour Hills”, *The Age* (Melbourne), 24 September 2014.

⁵ Michael Safi and Shalailah Medhora, “Sydney CBD Siege: Hostages Forced to Hold Black and White Islamic Flag”, *The Guardian* (Sydney), 15 December 2014; David Wroe and James Massola, “Flag Being Held by Lindt Chocolat Café Hostages Is Not an Islamic State Flag”, *Sydney Morning Herald*, 16 December 2014.

16-hour ordeal. In October 2015, a 15-year old who was unknown to authorities but connected to a larger group of terrorism suspects shot dead a NSW Police accountant outside police headquarters in Parramatta.⁶

This complex threat raises a range of difficult legal questions about what governments can and should do to prevent domestic acts of terrorism. Should individuals returning from the conflicts in Iraq and Syria be prohibited from entering the country, or should they be arrested at the border and prosecuted for criminal offences? If they are to be prosecuted, are existing criminal offences adequate? What should occur if, due to the difficulties in gathering evidence in foreign jurisdictions, there is no evidence of a specific crime being committed? Are existing powers and offences adequate to monitor and disrupt the activities of radicalised individuals operating domestically? Should the law impose sanctions other than criminal penalties, such as revoking a person's citizenship? Which legal responses are necessary, and which are appropriate, to respond to this serious and ongoing threat?

This article focuses on the legal responses to this threat of terrorism enacted by the Australian Parliament. Its initial aim is to set out the laws introduced during the time of the Abbott government over the 2014–2015 period. While many of these laws were more tangentially related to the threat of foreign fighters, such as offences for intelligence whistleblowing and a mandatory data retention regime, each of the laws set out below was framed as part of the government's response to that threat.⁷ Because of this, the article addresses all the national security laws introduced during this period – not only those powers and offences directly related to foreign fighters returning from Syria and Iraq.

Cataloguing these new national security laws is an important task as the legislation was passed with such urgency that a detailed and accurate survey has not yet been conducted.⁸ Following a change of Prime Minister, it is also appropriate to look back on the Abbott government's legal responses to terrorism as a distinct period in national security lawmaking. The wider aim in doing so is to comment on the substance of these laws and the process by which they were enacted. This article does so with a view to drawing lessons for the making of counter-terrorism laws more generally.

In its third part, this article sets out the state of counter-terrorism law in Australia before these new national security laws were introduced. In response to the 11 September 2001 and subsequent terrorist acts, Australia enacted a counter-terrorism law framework which provides extensive powers and offences to prevent domestic terrorism. This article will not comprehensively catalogue these laws,⁹ but provide an overview sufficient to enable recent changes to be understood in light of the prior state of the law.

In its third part, this article sets out the national security laws introduced during the term of the Abbott government. These laws were introduced initially in three tranches. The first tranche related to intelligence gathering and whistleblowing, the second focused directly on the threat of returning foreign fighters, and the third established a mandatory data retention regime. Following these, the Abbott government had Parliament enact a fourth tranche to allow the revocation of the Australian citizenship of dual nationals involved with terrorism.¹⁰ A fifth tranche dealing with further amendments to the control order regime and other matters was introduced into Parliament by the new

⁶Nick Ralston, "Parramatta Shooting: Curtis Cheng Was on His Way Home When Shot Dead", *Sydney Morning Herald*, 3 October 2015.

⁷See George Brandis, "National Security Legislation Amendment Bill (No 1) 2014" (Media Release, 16 July 2014); George Brandis, "New Laws Targeting Foreign Fighters Come Into Effect" (Media Release, 10 January 2015); Tony Abbott and George Brandis, "Legislation to Strip Terrorists of Citizenship" (Joint Media Release, 23 June 2015); George Brandis, "New Counter-Terrorism Legislation" (Media Release, 12 November 2015).

⁸Shorter commentary was written in response to the new laws being introduced, but this analysis has not previously been consolidated: see, eg, Sangeetha Pillai, "Bill Targets Foreign Fighters Before Departure and After Return", *The Conversation* (Melbourne), 24 September 2014; Keiran Hardy and George Williams, "National Security Reforms Stage Two: Foreign Fighters" (2014) 7 *Law Society Journal* 68; Gabrielle Appleby, "The 2014 Counter-Terrorism Reforms in Review" (2015) 26 *Public Law Review* 1.

⁹As this has been done previously: see Williams, n 1, 1144; Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Anti-Terrorism Laws and Trials* (NewSouth Publishing, 2015).

¹⁰*Citizenship Legislation Amendment (Allegiance to Australia) Act 2015* (Cth).

Turnbull government in November 2015,¹¹ and remains to be enacted following a report by the Parliamentary Joint Committee on Intelligence and Security (PJCIS).¹² When passed, this fifth tranche will raise the number of counter-terrorism laws passed since 2001 by the Australian Parliament to 67.¹³

In its final part, this article identifies key issues arising from this period of national security lawmaking. Given the speed with which these laws were enacted, this is the first time that considered reflection of Australia's legal responses to foreign fighters has been possible. In addition to commenting on the scope of the laws and the process by which they were enacted, this article considers whether new laws were needed, given the counter-terrorism law framework already in place. Consideration is also given to whether the laws are likely to be effective in responding to the threat of foreign fighters, and how their effectiveness might be aided by community-based policy initiatives that address the causes of radicalisation.

PRIOR LEGAL RESPONSES TO TERRORISM

The Australian Parliament had enacted a vast array of legislation directed at terrorism by the time it began considering new laws to deal with the problem of foreign fighters. In fact, at that point in mid-2014, Parliament had enacted 61 pieces of counter-terrorism legislation.¹⁴ Most of these laws were introduced by the Howard government in response to the 9/11 attacks and the London bombings, at a rate of one new piece of legislation every 6.7 weeks.¹⁵ These remarkable statistics led one expert to describe Australia's approach to counter-terrorism as one of "hyper-legislation".¹⁶ Despite a range of identified problems with many of these laws,¹⁷ they remain on the statute books largely unchanged from their original form.

This existing framework of counter-terrorism laws comprised:

- (1) a statutory definition of a "terrorist act";¹⁸
- (2) the offence of committing a terrorist act and preparatory terrorism offences (including for doing "any" act in preparation for a terrorist act);¹⁹
- (3) offences for financing terrorism and a regulatory regime placing obligations on businesses to report suspicious transactions;²⁰
- (4) bombing offences for targeting public places and government infrastructure with explosive devices;²¹
- (5) terrorist organisation offences and an executive power to proscribe terrorist organisations;²²

¹¹ *Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (Cth).

¹² Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (2016).

¹³ Before 2014, the Australian Parliament had passed 61 counter-terrorism laws: George Williams, "The Legal Legacy of the War on Terror" (2013) 12 *Macquarie Law Journal* 3, 7. The addition of six new pieces of legislation in response to foreign fighters (five main tranches and the *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (Cth), which was passed shortly after the second tranche) brings the number to 67.

¹⁴ Williams, n 13, 7.

¹⁵ Williams, n 1, 1145.

¹⁶ Kent Roach, *The 9/11 Effect* (Cambridge University Press, 2011) 309.

¹⁷ See generally 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"); and discussion below.

¹⁸ *Criminal Code Act 1995* (Cth) s 100.1.

¹⁹ *Criminal Code Act 1995* (Cth) Div 101.

²⁰ *Criminal Code Act 1995* (Cth) Div 103.

²¹ *Criminal Code Act 1995* (Cth) Div 72.

²² *Criminal Code Act 1995* (Cth) Div 102.

- (6) surveillance powers to investigate terrorism offences, including “B-Party Warrants” which permit surveillance of innocent people in contact with terrorist suspects;²³
- (7) increased police powers, including powers to arrest terrorism suspects without a warrant and to detain them for a longer period without charge;²⁴
- (8) questioning and detention warrants, which allow the Australian Security Intelligence Organisation (ASIO) to detain non-suspects for up to a week for coercive questioning;²⁵
- (9) special evidence procedures which allow classified information to be admitted in the courtroom in summary or redacted form;²⁶
- (10) offences for urging violence against groups of individuals on the grounds of race or religion;²⁷
- (11) classification restrictions on publications, films or computer games that advocate the doing of a terrorist act;²⁸
- (12) control orders, which allow a range of restrictions and obligations to be imposed on individuals without a finding of criminal guilt;²⁹
- (13) Preventative Detention Orders (PDOs), which allow police to detain individuals for up to 48 hours (or two weeks under state legislation) where a terrorist act is imminent or to preserve evidence in the aftermath of a terrorist act;³⁰ and
- (14) improved border security measures, including expanded powers for customs officers and enhanced screening procedures at airports.³¹

Most of these laws were enacted by 2005,³² meaning that Australia had a comprehensive counter-terrorism law framework in place for nearly a decade before Islamic State emerged as a national security issue.³³

Indeed, the threat of Australians travelling overseas to train and fight with foreign terrorist organisations was not a new issue in 2014, as this had been a key problem that the Howard government’s counter-terrorism laws were designed to address. The case of David Hicks, who had travelled to Afghanistan to fight with al-Qaeda before the 9/11 attacks and subsequently found himself incarcerated at Guantanamo Bay, is well known. The case of Jack Thomas, who had travelled to Pakistan and Afghanistan and received training from al-Qaeda, also received much public attention.

What is different now is the scale of the problem. Attorney-General George Brandis has declared that “per capita, Australia is one of the largest sources of foreign war fighters to the Syrian conflict

²³ *Telecommunications (Interception and Access) Act 1979* (Cth) ss 9, 46.

²⁴ *Crimes Act 1914* (Cth) Div 3A.

²⁵ *Australian Security Intelligence Organisation Act 1979* (Cth) Pt III Div 3.

²⁶ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

²⁷ *Criminal Code Act 1995* (Cth) ss 80.2–80.2B.

²⁸ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9A.

²⁹ *Criminal Code Act 1995* (Cth) Div 104.

³⁰ *Criminal Code Act 1995* (Cth) Div 105.

³¹ See *Border Security Legislation Amendment Act 2002* (Cth).

³² The only exceptions are the B-Party interception warrants, which were introduced in 2006, and the urging violence offences, which were introduced in 2010 as amendments to the sedition offences introduced in 2005: *Telecommunications (Interception) Amendment Act 2006* (Cth); *National Security Legislation Amendment Act 2010* (Cth) Sch 1.

³³ The Rudd government only made relatively minor changes to these offences and powers, such as by amending the sedition offences into “urging violence” offences; introducing limits on the amount of “dead time” that could be claimed in the pre-charge detention of terrorist suspects; and introducing new warrantless search powers: *National Security Legislation Amendment Act 2010* (Cth) Sch 1, 3–4. The Rudd government also established the office of the Independent National Security Legislation Monitor: *Independent National Security Legislation Monitor Act 2010* (Cth). This office has had little substantive impact on the scope of the laws, although it has produced several detailed reports and remains an important review mechanism for controversial counter-terrorism powers: see, eg, INSLM 2012 Report, n 17; Independent National Security Legislation Monitor, *Annual Report* (2014) (“INSLM 2014 Report”).

from countries outside the region”.³⁴ As mentioned in the introduction, around 110 Australians are believed to be fighting in Iraq and Syria, with another 30 having returned home from those conflicts.³⁵ In 2014–2015, the number of ongoing terrorism investigations conducted by ASIO rose to 400 – twice the number of the previous year.³⁶

The scale of the threat has certainly increased, but this does not necessarily mean that powers directed to this long term problem have since become inadequate. The extent to which the Abbott government’s legal responses to foreign fighters were needed to address that threat is considered in more detail later. Certainly there were some gaps and problems with the existing law, such as restrictions on adducing foreign evidence in terrorism-related proceedings, or the lack of a power for ASIO to temporarily suspend a person’s passport while conducting further checks.³⁷

On the other hand, there is no question that the counter-terrorism laws introduced by the Howard government provided the police and intelligence services with extensive powers to investigate, arrest and prosecute individuals for planning acts of domestic terrorism, whether or not such individuals had previously taken part in conflicts overseas. Before the Abbott government took office, a total of 37 men had been charged with terrorism offences, with 25 of those being convicted.³⁸ Many of these resulted in long sentences for the accused. Faheem Khalid Lodhi was sentenced to 20 years’ imprisonment for planning an attack on Australia’s energy supply network.³⁹ Abdul Nacer Benbrika was sentenced to 15 years’ imprisonment for leading 12 other accused in preparing a terrorist act, possibly against the Australian Football League Grand Final or Melbourne Grand Prix.⁴⁰ Mohamed Elomar and four other men received sentences of between 23 and 28 years’ imprisonment for conspiring to commit a terrorist act, possibly against the Lucas Heights Nuclear Reactor.⁴¹ Wissam Fattal and three other men were sentenced to 18 years’ imprisonment for conspiring to attack the Holsworthy Army base in Sydney.⁴²

Prior responses also included monitoring and disrupting the activities of those who travelled overseas to train and fight with foreign terrorist organisations. The first control order issued prevented Jack Thomas from leaving his house between midnight and 5 am, required him to report to police 3 days a week, and restricted his ability to communicate and associate with others.⁴³ A second control order imposing similar conditions was issued against David Hicks after he was transferred from Guantanamo Bay and served the remainder of his sentence in an Australian prison.

The Abbott government therefore inherited a vast counter-terrorism law framework which included a range of offences and other coercive powers to counter the threat of terrorism, both domestically and internationally. After taking office, the Abbott government not only maintained that framework, but also expanded it with significant new powers and offences.

LEGAL RESPONSES TO FOREIGN FIGHTERS

The Abbott government responded to the threat of foreign fighters in 2014 and 2015 by seeking to have Parliament enact a range of new legal measures. In his address to Parliament on 22 September 2014, Tony Abbott said:

³⁴ George Brandis, “Securing Our Freedoms” (Speech delivered at the Center for Strategic and International Studies, Washington DC, 8 April 2014) 6.

³⁵ Commonwealth, *Parliamentary Debates*, Senate, 12 November 2015, 27 (George Brandis).

³⁶ Australian Security Intelligence Organisation, *ASIO Report to Parliament 2014–2015* (2015) 3.

³⁷ See INSLM 2014 Report, n 33, 31–36, 48.

³⁸ Williams, n 1, 1153.

³⁹ *R v Lodhi* (2006) 199 FLR 364; [2006] NSWSC 691.

⁴⁰ *R v Benbrika* (2009) 222 FLR 433; [2009] VSC 21.

⁴¹ *R v Elomar* (2010) 264 ALR 759; [2010] NSWSC 10.

⁴² *R v Fattal* [2011] VSC 681.

⁴³ See *Jabbour v Thomas* (2006) 165 A Crim R 32; [2006] FMCA 1286, Sch 1.

Regrettably, for some time to come, Australians will have to endure more security than we are used to and more inconvenience than we would like. Regrettably, for some time to come, the delicate balance between freedom and security may have to shift.⁴⁴

While these laws made changes in a number of areas, each has been framed as a response to the increased threat of terrorism from Islamic State.⁴⁵ For example, the Attorney-General described the changes to intelligence gathering and whistleblowing as designed to “ensure the community is protected from radicalised and militarised extremists returning from the Middle East”.⁴⁶ Many of these laws were rushed through Parliament under the auspices of being necessary responses to foreign fighters, but in fact dealt with a range of other issues that could have been debated on a much less urgent timetable.

Intelligence gathering and whistleblowing

The *National Security Legislation Amendment Act (No 1) 2014* (Cth) (“*NSLA Act*”) made a large number of amendments to the legal framework surrounding Australia’s intelligence agencies. Many of these were technical and uncontroversial, such as renaming the defence intelligence agencies and updating employment conditions for ASIO officers.⁴⁷ In other areas, the Act introduced substantive new powers and offences, as set out below.

Computer access warrants

Section 25A of the *Australian Security Intelligence Organisation Act 1979* (Cth) (“*ASIO Act*”) allows the Attorney-General, on request by the Director-General of Security, to issue a “computer access warrant”. Previously, such warrants allowed ASIO officers to gather intelligence by accessing data held in a single computer. By virtue of amendments in the *NSLA Act*, these warrants now allow ASIO officers to access data held in one or more computers, computer systems or computer networks.⁴⁸ This means that a single computer access warrant can now grant ASIO access to all of the computers on a network used by a university, hospital or other institution.

Special intelligence operations

A “Special Intelligence Operation” (SIO) is an undercover operation approved by the Attorney-General in which ASIO officers are granted immunity from civil and criminal liability.⁴⁹ An SIO does not provide immunity for acts that cause death or serious bodily injury, involve the commission of a sexual offence, cause serious property damage, or constitute torture.⁵⁰

Section 35P of the *ASIO Act* is a disclosure offence attaching to the SIO regime. The offence provides a penalty of five years’ imprisonment where a person (a) discloses information, and (b) the information relates to an SIO.⁵¹ There are no other elements to this offence, such as an intention to prejudice security or defence. An aggravated version of the offence punishable by 10 years’

⁴⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 2014, 9957.

⁴⁵ See Brandis, “National Security Legislation Amendment Bill (No 1) 2014”, n 7; Brandis, “New Laws Targeting Foreign Fighters Come Into Effect”, n 7; Abbott and Brandis, n 7; Brandis, “New Counter-Terrorism Legislation”, n 7.

⁴⁶ Brandis, “National Security Legislation Amendment Bill (No 1) 2014”, n 7.

⁴⁷ *National Security Legislation Amendment (No 1) Act 2014* (Cth) Sch 1, 7.

⁴⁸ *Australian Security Intelligence Organisation Act 1979* (Cth) s 22.

⁴⁹ *Australian Security Intelligence Organisation Act 1979* (Cth) ss 4, 35K.

⁵⁰ *Australian Security Intelligence Organisation Act 1979* (Cth) s 35K(e).

⁵¹ *Australian Security Intelligence Organisation Act 1979* (Cth) s 35P(1). At the time of writing, the Independent National Security Legislation Monitor (INSLM) has released a report on s 35P which contains a number of recommendations for amendment of that offence: Independent National Security Legislation Monitor, *Report on the Impact on Journalists of section 35P of the ASIO Act (2015)* (“INSLM s 35P Report”). The government has indicated that it will support these changes, although it has not yet introduced any amending legislation into Parliament: George Brandis, “Government Response to INSLM Report on the Impact on Journalists of section 35P of the ASIO Act 1979” (Press Release, 2 February 2016). If the INSLM’s recommended changes are made, the base offence in s 35P will require in addition that the person was reckless as to whether disclosure would endanger health or safety or prejudice an SIO: INSLM s 35P Report, 3.

imprisonment applies where the disclosure of information endangers the health or safety of any person or prejudices the SIO, or where the person intends such results.⁵²

Disclosure offences

The *NSLA Act* significantly increased the penalties for existing disclosure offences in the *ASIO Act* and the *Intelligence Services Act 2001* (Cth), and it introduced new offences so that these are consistent across all of the intelligence agencies. It is now an offence punishable by 10 years' imprisonment for an employee of an intelligence agency to disclose information obtained in the course of their duties.⁵³

The *NSLA Act* also introduced new offences for "unauthorised dealing with records".⁵⁴ These are punishable by three years' imprisonment, and apply where an intelligence officer copies or records information in circumstances outside the terms of the person's employment.

Foreign Fighters Act

In introducing the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) ("*Foreign Fighters Act*") into Parliament, Attorney-General George Brandis stressed that the threat posed by foreign fighters "is one of the most significant threats to Australia's national security in recent years".⁵⁵ The major changes introduced by the *Foreign Fighters Act* are detailed below.⁵⁶

Sunset clauses

Sunset clauses, which cause legislative provisions to expire after a specified period, are sometimes attached to counter-terrorism powers in recognition of their exceptional nature.⁵⁷ The *Foreign Fighters Act* extended the sunset clauses on the control order and PDO powers (which were set to expire in December 2015) and ASIO's questioning and detention warrant powers (which were set to expire in July 2016).⁵⁸ Each of these powers will now expire in September 2018.⁵⁹

Declared area offence and foreign incursion offences

The *Foreign Fighters Act* introduced a new offence, found in s 119.2 of the *Criminal Code Act 1995* (Cth) ("*Criminal Code*"), for entering or remaining in a "declared area".⁶⁰ There are no other elements to this offence, such as an intention to engage in terrorism overseas. The offence is punishable by 10 years' imprisonment.

It is a defence for an accused to show that they entered or remained in the declared area *solely* for a legitimate purpose.⁶¹ The legislation sets out a list of legitimate purposes, which includes providing humanitarian aid, making news reports "in a professional capacity", or making bona fide visits to

⁵² *Australian Security Intelligence Organisation Act 1979* (Cth) s 35P(2). If the government introduces amendments to Parliament based on the INSLM's recommendations (as it has indicated it will), the aggravated offence will require knowledge that the disclosure would endanger health or safety or prejudice an SIO: INSLM s 35P Report, n 51, 3; George Brandis, "Government Response to INSLM Report on the Impact on Journalists of section 35P of the ASIO Act 1979" (Press Release, 2 February 2016).

⁵³ *Australian Security Intelligence Organisation Act 1979* (Cth) s 18(2); *Intelligence Services Act 2001* (Cth) ss 39–40B.

⁵⁴ *Intelligence Services Act 2001* (Cth) ss 40C–40M.

⁵⁵ Commonwealth, *Parliamentary Debates*, Senate, 24 September 2014, 65 (George Brandis).

⁵⁶ Other changes included: relaxing restrictions on adducing foreign evidence in terrorism-related proceedings; introducing a power for the Minister for Foreign Affairs to suspend a person's passport and travel documents for 14 days on ASIO's request; and introducing an emergency visa cancellation power where ASIO suspects that a person might be a risk to security. See *Foreign Evidence Act 1994* (Cth) s 27A; *Australian Passports Act 2005* (Cth) s 25A; *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) s 16A; *Migration Act 1958* (Cth) s 134B.

⁵⁷ See Nicola McGarrity, Rishi Gulati and George Williams, "Sunset Clauses in Australian Anti-Terror Laws" (2012) 33 *Adelaide Law Review* 307.

⁵⁸ It also extended (to the same date of September 2018) the sunset clause on the stop, search and seizure powers for terrorism offences in *Crimes Act 1914* (Cth) s 3UK.

⁵⁹ *Criminal Code Act 1995* (Cth) ss 104.32, 105.53; *Crimes Act 1914* (Cth) s 3UK.

⁶⁰ *Criminal Code Act 1995* (Cth) s 119.2.

⁶¹ *Criminal Code Act 1995* (Cth) s 119.2(3).

family members.⁶² However, the list does not include a range of other legitimate reasons why somebody might travel to a foreign country in a state of conflict, such as undertaking a religious pilgrimage, conducting business or commercial transactions, or visiting friends.

The *Foreign Fighters Act* also increased the penalties for a range of foreign incursions offences previously found in the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) and moved these offences into the *Criminal Code*.⁶³

Advocating terrorism

A new offence in s 80.2C of the *Criminal Code* makes it an offence to advocate the doing of a terrorist act or terrorism offence where the person is reckless as to whether another person will engage in that conduct as a result.⁶⁴ The offence is punishable by five years' imprisonment. A person advocates terrorism if he or she "counsels, promotes, encourages or urges the doing of a terrorist act or the commission of a terrorism offence".⁶⁵ This wording has also been used to expand the grounds for proscribing a terrorist organisation under Div 102 of the *Criminal Code*.⁶⁶

Control orders

In addition to extending the expiry date of the control order powers, the *Foreign Fighters Act* also expanded the scope of that regime. Previously, a control order could be made if an issuing court was satisfied on the balance of probabilities that "making the order would substantially assist in preventing a terrorist act".⁶⁷ The *Foreign Fighters Act* added new grounds relating to training with terrorist organisations, engaging in hostile activity overseas, and convictions for terrorism offences.⁶⁸

Further grounds were added by the *Counter-Terrorism Legislation Amendment (No 1) Act 2014* (Cth) (CTLA Act), a shorter piece of legislation which was passed shortly after the Foreign Fighters Act. These grounds relate to the support or facilitation of a terrorist act or engagement in hostile activity in a foreign country.⁶⁹

Metadata

The third tranche of national security legislation implemented a mandatory data retention regime. This requires communications service providers (CSPs) to retain metadata for two years.⁷⁰ Metadata is a popular term used to refer to information other than the substance or contents of a communication – such as the time, date and location of a phone call, email or SMS.

This data may be accessed by "enforcement agencies" on request to a CSP. Such requests may be made – without a warrant – where access to metadata would be reasonably necessary for the enforcement of a criminal law, to find a missing person, or to enforce a law which imposes a pecuniary penalty or protects the public revenue.⁷¹

An ongoing concern with this regime relates to the disclosure of metadata which would reveal the identity of journalists' confidential sources. As a result, a "journalist information warrant" regime was

⁶² *Criminal Code Act 1995* (Cth) s 119.2(3).

⁶³ *Criminal Code Act 1995* (Cth) ss 119.1, 119.3, 119.4.

⁶⁴ *Criminal Code Act 1995* (Cth) s 80.2C.

⁶⁵ *Criminal Code Act 1995* (Cth) s 80.2C(3).

⁶⁶ *Criminal Code Act 1995* (Cth) s 102.1(1A)(a).

⁶⁷ *Criminal Code Act 1995* (Cth) s 104.4(1)(c)(i).

⁶⁸ *Criminal Code Act 1995* (Cth) ss 104.4(1)(c)(ii)–(v).

⁶⁹ *Criminal Code Act 1995* (Cth) ss 104.4(1)(c)(vi)–(vii).

⁷⁰ *Telecommunications (Interception and Access) Act 1979* (Cth) s 187A. The Metadata Act did not formally include a definition of metadata but it sets out a list of categories of information which CSPs must retain, including the subscriber of a communications service; the source and destination of a communication; the date, time and duration of a communication; and the location of equipment used in connection with a communication. See *Telecommunications (Interception and Access) Act 1979* (Cth) s 187AA.

⁷¹ *Telecommunications (Interception and Access) Act 1979* (Cth) ss 178–179.

introduced into the Bill, and access to a journalist's metadata is now restricted unless "the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source".⁷² However, journalists will not be able to contest these warrants, and the regime will not prevent journalists' metadata from being collected in relation to controversial disclosure offences such as s 35P of the *ASIO Act*.

Citizenship

The *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) ("*Citizenship Act*") was introduced by the Abbott government in June 2015 and, after a change of Prime Minister, passed both houses in December 2015. It amended the *Australian Citizenship Act 2007* (Cth) to allow the Australian citizenship of dual nationals involved with terrorism to be revoked. This can be done on three grounds.

First, a dual national's Australian citizenship is automatically revoked if they engage in a range of conduct outside of Australia such as committing a terrorist act or financing terrorism.⁷³ Second, they automatically cease to be an Australian citizen if, while outside Australia, they serve in the armed forces of a country at war with Australia; or fight for, or are in the service of, a declared terrorist organisation.⁷⁴ In each of these cases, the Minister for Immigration has a power to exempt a person from the operation of the provision. Third, the Minister may declare that a dual national ceases to be an Australian citizen if they have been convicted, and sentenced to a period of imprisonment of at least six years, of certain offences relating to terrorism.⁷⁵

LESSONS AND OBSERVATIONS

The recent period of counter-terrorism lawmaking has raised certain key issues. This section addresses whether new laws were needed, the process by which these laws were enacted, their impact on rights and liberties, and their effectiveness as responses to the threat of foreign fighters. The lessons suggest that the cycle of problematic counter-terrorism lawmaking in Australia that was experienced in response to the 9/11 and subsequent attacks is continuing.

Not directed at the problem

In light of the significant counter-terrorism legal framework that Australia had put in place by 2005, it must first be questioned whether this recent expansion of national security legislation to terrorism was needed to address the threat of foreign fighters. In introducing the *Foreign Fighters Act*, Attorney-General George Brandis explained that the threat was "unparalleled and demands specific and targeted measures to mitigate this threat".⁷⁶ The Explanatory Memorandum to the *Foreign Fighters Bill* claimed that "[e]xisting legislation does not adequately address the domestic security threats posed by the return of Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas".⁷⁷

Such claims are doubtful given that Australia had a comprehensive counter-terrorism legal framework in place nearly a decade before these responses were introduced. Since 2002, this framework has included broad preparatory and group-based offences for terrorism, extensive surveillance powers, control orders, PDOs and ASIO's coercive questioning powers.⁷⁸ As outlined above, these offences and powers had been used to monitor, disrupt and prosecute individuals for planning domestic acts of terrorism, as well as for training with overseas extremist groups.

⁷² *Telecommunications (Interception and Access) Act 1979* (Cth) ss 180L, 180T(2)(b).

⁷³ *Australian Citizenship Act 2007* (Cth) s 33AA.

⁷⁴ *Australian Citizenship Act 2007* (Cth) s 35.

⁷⁵ *Australian Citizenship Act 2007* (Cth) s 35AA.

⁷⁶ Commonwealth, *Parliamentary Debates*, Senate, 24 September 2014, 65.

⁷⁷ Explanatory Memorandum, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Cth) 2.

⁷⁸ *Criminal Code Act 1995* (Cth) Divs 101–102, 104–105; *Telecommunications (Interception and Access) Act 1979* (Cth) ss 9, 46; *Australian Security Intelligence Organisation Act 1979* (Cth) Pt III Div 3.

There was certainly a case for enacting additional “specific and targeted measures” in response to the threat of foreign fighters.⁷⁹ Even though the counter-terrorism laws introduced by the Howard government from 2002 were designed to address the threat of individuals fighting with al-Qaeda and other organisations overseas, some changes to the law were necessary to address the increased scale of the threat posed by individuals supporting Islamic State. Laws which could be justified as fitting this description include changes recommended by the Independent National Security Legislation Monitor (“INSLM”),⁸⁰ such as relaxing restrictions on foreign evidence in terrorism-related proceedings to facilitate prosecutions for acts done overseas,⁸¹ and granting ASIO the power to temporarily suspend the passports and travel documents of suspected terrorists while conducting further checks.⁸²

However, the suite of laws enacted under the banner of “urgent responses to foreign fighters” went far beyond such specific and targeted measures. As set out above, these measures included new offences for intelligence whistleblowing, mandatory large-scale data retention, and expanded intelligence gathering powers for ASIO – all of which remain relevant to national security concerns more generally, but are not targeted at the threat of returning foreign fighters and associated home-grown terrorism. Indeed, these measures had been the subject of longer-term discussions under the Labor governments, before foreign fighters became a major threat to security.⁸³ Under the cover of a significant and genuine threat to national security, a wide range of controversial legal measures tangentially related to that threat were enacted in a way that prevented appropriate scrutiny of those powers.

A related problem was that changes were made to the legislation which could not in any way be cast as urgent or necessary at the time. The clearest example of this was the extension of sunset clauses on controversial powers which were not yet due to expire. The control order and PDO powers, and ASIO’s questioning and detention warrant powers, were at that time not due to expire for at least another 12 months. Given that major problems with these powers had recently been identified by the INSLM and the COAG Review of Counter-Terrorism Legislation,⁸⁴ the extension of these sunset clauses bypassed a major upcoming opportunity to review those laws for no immediate benefit to security.

Inadequate parliamentary process

A second major feature of this recent period of counter-terrorism lawmaking was the speedy passage of these bills through Parliament. This was a major recognised issue with the counter-terrorism laws introduced by the Howard government from 2002,⁸⁵ and suggests that this problematic cycle of national security lawmaking is continuing. While a strong argument can be made for enacting new laws as quickly as possible to respond to the serious threat of terrorism, it is a key feature of our democratic system that new legislation be given an appropriate level of attention and debate in its passage through Parliament. This is arguably more – not less – important when the proposed laws may impact on important rights like those to freedom of speech and movement. Thorough parliamentary scrutiny of counter-terrorism laws is particularly important given that such rights are not formally protected by the Australian *Constitution*.

⁷⁹ Commonwealth, *Parliamentary Debates*, Senate, 24 September, 65 (George Brandis).

⁸⁰ INSLM 2014 Report, n 33, 31–36, 48.

⁸¹ *Foreign Evidence Act 1994* (Cth) s 27A.

⁸² *Australian Passports Act 2005* (Cth) s 25A; *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) s 16A.

⁸³ Computer access warrants, SIOs and metadata had all been the subjects of a previous inquiry by the PJCS requested by the Labor government: Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into Potential Reforms of National Security Legislation* (2013).

⁸⁴ INSLM 2012 Report, n 17, 44, 67, 106; COAG Review, n 17, 54, 68.

⁸⁵ See Andrew Lynch, “Legislating with Urgency: The Enactment of the Anti-Terrorism Act [No 1] 2005” (2006) 31 *Melbourne University Law Review* 747; Greg Carne, “Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes in Enacting the Anti-Terrorism Act (No 2) 2005 (Cth)” (2007) 10 *Flinders Journal of Law Reform* 17; Joo-Cheong Tham, “Parliamentary Deliberation and the National Security Executive: The Case of Control Orders” (2010) (Jan) *Public Law* 79.

The clearest example of the limited time made available for public and parliamentary scrutiny of these laws could be seen with the passage of the *Foreign Fighters Act*. The Bill amounted to more than 160 pages of amendments and introduced some of the most controversial counter-terrorism powers seen since those introduced in response to 9/11 and the London bombings – yet interested parties were given just eight days to make submissions to the Parliamentary Joint Committee on Intelligence and Security (“PJCIS”) inquiry. The legislation was then given three days’ scrutiny in Parliament, with debate in the House limited to just two hours. The timetable for the *NSLA Act* was only marginally better, with interested parties given less than three weeks to respond to a 120-page bill which made a wide range of amendments to the legal framework governing Australia’s intelligence agencies.

The reports produced by the PJCIS on each tranche of legislation have been detailed – especially considering the short timeframe available – but its recommendations have generally been weak in the face of the many problems identified with the new powers and offences. Few changes of significance were recommended to the *NSLA Act* or the *Foreign Fighters Act*, despite significant controversy over much of the legislation.

The changes recommended by the PJCIS were often described as substantive even though they did not address the legislation’s major issues. For example, the PJCIS recommended that the Minister for Foreign Affairs should not be able to declare a whole country as a “declared area” for the purposes of the declared area offence.⁸⁶ The government described this as a substantive change that it was willing to accept,⁸⁷ but the amendment did nothing to address the significant impact of that offence on the freedom of movement and the presumption of innocence.

The PJCIS sought to resolve other controversies by recommending only that the government clarify the operation of a provision in the Explanatory Memorandum – without recommending any change to the primary legislation.⁸⁸ These kinds of compromises meant that the PJCIS reports had the appearance of a rigorous critique, and the government was able to receive positive media for accepting the Committee’s recommendations – whereas, in reality, the vast majority of the legislation was enacted in its original form, and many identified problems were left substantially un-remedied.

Other significant problems with the legislation have been identified or sought to be addressed only after the passage of the legislation – at which point it is often too late to achieve meaningful change. For example, it was only *after* the *NSLA Act* was enacted that sections of the media became aware of the substantial impact that s 35P was likely to have on journalists by criminalising the disclosure of any information relating to SIOs, even if such information would be in the public interest. A vocal media and community reaction then led Opposition Leader Bill Shorten to write to the Prime Minister to request that the legislation be referred to the INSLM. The media’s slow reaction to the dangers of s 35P was lamented by Laurie Oakes in his remarks at the 2015 Melbourne Press Freedom Dinner. He conceded that journalists “didn’t take up the issue at the start, and once the law is on the statute books winding it back becomes a very difficult proposition”.⁸⁹ However, the lack of recognition of the impact of that offence was in large part due to its speedy passage through Parliament.

⁸⁶ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) xv (Recommendation 18).

⁸⁷ George Brandis, “Government Response to Committee Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014” (Media Release, 22 October 2014).

⁸⁸ See Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014* (2014) xi (Recommendation 10); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) xiii (Recommendations 4–7); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015) xiv (Recommendations 5, 7, 8).

⁸⁹ Laurie Oakes, “These Things Can’t Just Be Left to Government” (Speech delivered at the Melbourne Press Freedom Dinner, 25 September 2015) transcript available at Walkley Foundation website (28 September 2015) <<http://www.walkleys.com/these-things-cant-just-be-left-to-government-transcript-of-laurie-oakes-remarks-at-melbourne-press-freedom-dinner>>.

The Metadata and Citizenship Bills provide positive counter-examples, as these did undergo notable changes in response to recommendations by the PJCIS.⁹⁰ At the same time, some of the changes to these Bills were so significant that they did give cause to wonder whether the government had made ambit claims for new powers in the knowledge that some of these would not succeed, or whether the legislation contained several drafting errors.⁹¹

That many of these laws were introduced very quickly and largely in their original form can be explained by the bipartisan support underlying the Bills. While the Opposition expressed misgivings about some powers and offences, it nonetheless indicated that it would support the passing of the laws – even before it had seen the details of the legislation or the Committee had begun its work.⁹² In the case of the second tranche, this support extended to the truncated timetable by which the government wanted to enact the legislation.

This is not to suggest that the effectiveness of an Opposition party should be judged on the extent to which it disagrees with new measures proposed by the government. Indeed, a bipartisan stance on national security can be useful to the extent that it promotes an image of stability and common purpose in responding to difficult international challenges like terrorism. It also suggests that there was, to some degree, broad community support for the introduction of new legal powers in response to the threat of foreign fighters. However, given that many of the proposals still attracted significant public controversy, and that many of the powers were only tangentially related to that threat, the Opposition might have at least pressed the government to focus only those powers that were urgently needed, and to debate the remainder of the legislation on a less urgent timetable. Certainly, supporting the passage of new laws before seeing the draft legislation is likely to undermine an Opposition's ability to suggest amendments to those laws at a later date.

Impact on rights

In many respects, the four tranches of national security legislation introduced by the Abbott government effected greater incursions into individual rights and liberties than many of the most controversial measures introduced in response to 9/11 and the London bombings. The declared area offence, which effects serious incursions into the freedom of movement, is a prime example. The offence also impacts on the presumption of innocence, as in effect it reverses the onus of proof. Defendants are required to put evidence to show that they entered or remained in the area *solely* for a legitimate purpose.⁹³

The offence of advocating terrorism is another example.⁹⁴ By going beyond the incitement of violence, this offence unduly impacts on the freedom of speech by criminalising a range of legitimate speech acts. The offence could apply to reckless statements of support for terrorism posted online,

⁹⁰ For example, the Metadata Bill as originally drafted would have allowed the Attorney-General to make regulations granting any organisation access to metadata. Under the legislation as enacted, an organisation may only be granted access to metadata for a period of 40 days before that emergency declaration expires and an amendment must be made to the primary legislation: *Telecommunications (Interception and Access) Act 1979* (Cth) ss 176A(3), (10). In relation to the Citizenship Bill, the list of offences triggering citizenship loss no longer includes the offence of damaging federal property, and the law no longer applies to children under the age of 14: *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) Sch 1 cll 33AA(1)–(2).

⁹¹ An example of this is the Attorney-General's power to make emergency regulations granting an organisation access to metadata for a period of 40 days. For an organisation to be declared under those regulations, the Attorney-General must be satisfied on reasonable grounds that the functions of the agency include enforcing the criminal law, imposing a pecuniary penalty or protecting public revenue: *Telecommunications (Interception and Access) Act 1979* (Cth) ss 176A(3B), (10). It was notable that the government backtracked so quickly in approving this amendment, when the Bill as originally drafted would have given the Attorney-General the power to make regulations with no expiry period, and which could have granted any organisation access to metadata.

⁹² Emma Griffiths, "Bill Shorten Gives Qualified Backing to Stripping Terrorists of Citizenship", *ABC News* (online), 4 June 2015; Ben Grubb, "Labor 'Picks Battles' in Backing New Spy Laws", *Sydney Morning Herald*, 30 September 2014; Heath Aston, "Labor Demands Detail on Foreign Fighters Bill Before Pledging Support", *Sydney Morning Herald*, 21 September 2014.

⁹³ *Criminal Code Act 1995* (Cth) s 119.2(3).

⁹⁴ *Criminal Code Act 1995* (Cth) s 80.2C.

even where the person has no intention to commit a terrorist act or to encourage others to do so. The idea of “promotion” could even plausibly extend to a “retweet” or Facebook “like” of another person’s comments, meaning that an individual could be prosecuted for words they did not say, but simply repeated or agreed with. While most people would agree that acts of Islamic State cannot be justified in any civilised society, it does not follow that criminal liability should attach to speech acts which fall below the level of intentionally inciting violence.

The right to freedom of speech – and freedom of the press in particular – is also directly affected by s 35P of the *ASIO Act*, which prevents any public discussion of SIOs. Journalists will face five years in prison for disclosing any information relating to SIOs, or twice that penalty if the disclosure endangers health or safety or prejudices the operation.⁹⁵ These penalties could apply even if a journalist revealed that an ASIO officer did some unlawful act outside the terms of an SIO – such as physically harming a suspect, stealing money or property from a suspect’s home, or using information gained during the operation to blackmail a person for financial advantage. The offence has consequently been criticised as an “outrageous attack on press freedom” and “not worthy of a healthy, functioning democracy”.⁹⁶ This is made worse by the possibility that journalists’ metadata may still be accessed to investigate a breach of s 35P or other criminal offence relating to the disclosure of information.

Finally, the stripping of citizenship is an extreme measure which continues the Abbott government’s hard-line stance on terrorism. This permits dual nationals, including children between the ages of 14–18 years, to lose their Australian citizenship. This can occur without there necessarily being a prior finding of fact or conviction imposed by court, and those affected have limited rights to natural justice. While the range of offences triggering loss of citizenship has been narrowed compared to the original Bill, the breadth of many terrorism offences – including the new declared area and advocacy offences discussed above – means that revocation of citizenship even on terrorism-related grounds remains problematic.

An argument can be made for limiting the scope of some of these rights in response to the serious and ongoing threat of terrorism. Indeed, the adoption of strengthened legal measures in response to the threat of foreign fighters has been mandated by the United Nations Security Council.⁹⁷ Since 2005, the Security Council has mandated that states enact laws specifically targeting the incitement of terrorism.⁹⁸ However, the new offence of advocating terrorism clearly goes beyond the law of incitement by not requiring an intention for others to engage in terrorism and by criminalising promotion of terrorism. To this extent, the Australian offence of advocating terrorism goes beyond that required at the international level and, in so doing, risks unduly undermining the right to freedom of speech.

The declared area offence and s 35P of the *ASIO Act* also go beyond what would be possible in other nations with constitutional protections for the freedoms of movement and speech. It must be questioned whether Australia is justified in taking such extreme responses to the threat of foreign fighters, beyond those adopted by comparable Western countries like the United Kingdom, Canada and the United States.

Effective?

It is doubtful how effective the Abbott government’s expanded counter-terrorism laws are likely to be in combating the threat of foreign fighters. In large part, this is because prosecution of foreign fighters for criminal offences is likely to be difficult. This may be because Australians who travel to Iraq and

⁹⁵ *Australian Security Intelligence Organisation Act 1979* (Cth) s 35P.

⁹⁶ Media, Entertainment and Arts Alliance, *MEAA Says National Security Law an Outrageous Attack on Press Freedom in Australia* (26 September 2014) Media, Entertainment and Arts Alliance Media Room <<https://www.meaa.org/mediaroom/meaa-says-national-security-law-an-outrageous-attack-on-press-freedom-in-australia>>; Christopher Warren and Mike Dobbie, *Surveillance State Seizes Its Chance*, (24 October 2014) Walkley Foundation <<http://walkleys.com/surveillance-state-seizes-its-chance>>.

⁹⁷ SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001); SC Res 2178, UN SCOR, 69th sess, 7272nd mtg, UN Doc S/RES/2178 (24 September 2014).

⁹⁸ SC Res 1373, UN SCOR, 60th sess, 5251st mtg, UN Doc S/RES/1624 (14 September 2005).

Syria to fight intend to stay overseas rather than return home. For example, after an arrest warrant was issued for Tareq Kamleh (a 29-year old doctor from Adelaide who featured in a propaganda video for Islamic State), Kamleh responded on Facebook saying that he had “no concerns” about the warrant or whether he would have his citizenship or medical licence revoked as he did not intend to return to Australia.⁹⁹ Indeed, the laws might even be counter-productive for this reason, if it means that Australians who might otherwise return and be convicted for a terrorism offence are deterred from returning home, such that they remain at large fighting with extremist organisations overseas.

Police will also face ongoing difficulties in gathering sufficient evidence for successful prosecutions – not only in foreign conflict zones but also on Australian soil. For example, after an alleged plot to launch an attack at the Anzac Day commemorations in Melbourne, 18-year old Harun Causevic was held initially under a PDO and then charged with conspiring to do a terrorist act, possessing materials connected with a terrorist act and failing to provide a computer password to police.¹⁰⁰ The terrorism charges were subsequently dropped due to a lack of evidence and Causevic pleaded guilty to three summary weapons charges under Victorian law.¹⁰¹ For those charges, he received a 12-month good behaviour bond without conviction.¹⁰² Other men have recently been charged with relatively minor weapons offences rather than offences under the new or existing terrorism laws.¹⁰³

More generally, the ongoing threat of terrorism demonstrates that enacting more and stronger counter-terrorism laws will not of itself solve the problem. The shooting of NSW Police accountant Curtis Cheng in October 2015 by 15-year old Farhad Jabar demonstrates that Australia’s strong counter-terrorism law framework, including those laws introduced by the Abbott government, is not always deterring young individuals from becoming involved in terrorism. Nor is prosecution possible after the fact when such attacks also lead to the death of the perpetrator.

This is not to say that severe penalties should not be imposed on those who are involved in such activities and can be successfully prosecuted, but there is a risk in the meantime that introducing ever stronger counter-terrorism powers may cause a further set of harms. Overbroad criminal offences and counter-terrorism powers can contribute to a sense of grievance amongst communities that are targeted disproportionately with those laws.¹⁰⁴ Given that a key aim of the Australian government is to address the underlying causes of terrorism, such as through policy programs for improving community cohesion,¹⁰⁵ such grievances appear to undermine the preventive aims of counter-terrorism laws. These grievances are also likely to undermine the ability of police and intelligence agencies to gather

⁹⁹ Helen Davidson, “Isis Doctor Tareq Kamleh: I Don’t Care About Losing Australian Citizenship”, *The Guardian* (Sydney), 21 June 2015.

¹⁰⁰ Micahel Bachelard, “Anzac Day Terror Charges against Harun Causevic Dropped Embarrassing Authorities”, *Sydney Morning Herald*, 24 August 2015.

¹⁰¹ Bachelard, n 100.

¹⁰² Adam Cooper, “Harun Causevic, Who Had Anzac Day Charge Dropped, Avoids Conviction Over Knives”, *Sydney Morning Herald*, 12 November 2015.

¹⁰³ Jessica Kidd, “New Weapons Charges Laid Against Talal Alameddine, Accused of Supplying Gun for Parramatta Shooting”, *ABC News* (online), 13 November 2015; Adam Cooper, “Mehran Azami, Accused Weapons Supplier for Anzac Day ‘Terror Plot’, Admits Arms Charges”, *The Age* (Melbourne), 27 July 2015.

¹⁰⁴ See, eg, Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter-Terrorism Legislation* (December 2006) 24; Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *ASIO’s Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (November 2005) 77–79; David Anderson, *The Terrorism Acts in 2012: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (July 2013) 93, 99; Tufyal Choudhury and Helen Fenwick, *The Impact of Counter-Terrorism Measures on Muslim Communities* (Equality and Human Rights Commission, *Research Report 72*, 2011) vi; Islamic Council of Victoria, Submission No 42 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 7 October 2014.

¹⁰⁵ Australian Government, *Living Safe Together: Building Community Resilience to Violent Extremism* (2016) <<http://www.livingsafetogether.gov.au/pages/home.aspx>>.

valuable information from communities. As Prime Minister Turnbull noted in his National Security Statement, “[h]uman intelligence, relationships with communities, are more important than ever”.¹⁰⁶

These damaging perceptions could be seen in particular with the introduction of the *Foreign Fighters Bill*. Alongside other Muslim organisations, the Islamic Council of Victoria argued in its submission to the PJCIS inquiry that the proposed laws would be “counterproductive” as they would be a “source of discontent and marginalisation for members of the Australian Muslim community”.¹⁰⁷ The Council added that some members of the community might view them as a “provocation to act out”.¹⁰⁸

Given these limits and costs in using the criminal law to prevent terrorism, an important role should be given to community-based policy strategies which address the underlying causes of terrorism. The Australian government came relatively late to this realisation, with the Labor government allocating \$9.7 million over four years in its 2010 budget for community-based strategies to counter violent extremism.¹⁰⁹

The Abbott government initially cut this funding from the 2014 budget,¹¹⁰ although in response to the threat of foreign fighters, it later announced nearly \$20 million to counter violent extremism at the community level.¹¹¹ A number of more specific initiatives – such as a program for countering terrorist propaganda online – have since been announced.¹¹² However, the balance is still skewed heavily in favour of coercive counter-terrorism measures, with an extra \$630 million provided overall to the country’s security agencies to combat the threat of foreign fighters.¹¹³

Careful thought also needs to be put into how these community-based policy strategies are designed. The UK’s experience with the *Prevent* strategy demonstrates that policy efforts to counter violent extremism are not unproblematic and can equally generate perceptions that the government is unfairly targeting Muslim communities with counter-terrorism programs.¹¹⁴ There has also been significant controversy in the UK over the spread of the *Prevent* strategy into schools, universities and other public institutions.¹¹⁵ Similar problems are beginning to appear in Australia, with communities expressing concerns about the secrecy of the grants program and the neglect of certain sections of the Muslim community.¹¹⁶ These issues suggest there is a real danger that *Prevent*-style strategies may aggravate rather than mitigate the dangers of counter-terrorism laws. What is needed is genuine

¹⁰⁶ Malcolm Turnbull, “National Security Statement” (Speech delivered at Parliament House, Canberra, 24 November 2015).

¹⁰⁷ Islamic Council of Victoria, n 104, 1.

¹⁰⁸ Islamic Council of Victoria, n 104, 1.

¹⁰⁹ *Countering Violent Extremism* (2010) Commonwealth Attorney-General’s Department <www.ag.gov.au/cve>.

¹¹⁰ George Williams, “Weekend Raids Raise Questions About Counter-Terrorism Laws”, *Sydney Morning Herald*, 19 April 2015.

¹¹¹ Tony Abbott and George Brandis, “Counter-Terrorism Measures for a Safer Australia” (Joint Press Release, 26 August 2014). This figure was announced as being \$64 million: “Tony Abbott Announces \$64 million to Combat Home-Grown Terrorism”, *SBS News* (online), 26 August 2014. However, as can be seen in the joint press release, only the first and second bullet points on p 1 (totalling \$19.6 million) relate to community-based initiatives: Tony Abbott and George Brandis, “Counter-Terrorism Measures for a Safer Australia” (Joint Press Release, 26 August 2014). The third and fourth bullet points relate to the disruption, investigation and disruption of terrorism.

¹¹² Michael Keenan, “Australia-first Efforts to Counter Violent Extremism” (Media Release, 30 September 2015).

¹¹³ “Tony Abbott Outlines Details of Funding for Security Agencies to Help Fight Home-Grown Terrorists”, *ABC News* (online), 26 August 2014.

¹¹⁴ See generally House of Commons Communities and Local Government Committee, Parliament of United Kingdom, *Preventing Violent Extremism: Sixth Report of Session 2009-2010* (HC 65, 30 March 2010).

¹¹⁵ See, eg. Ryan Gallagher and Rajeev Syal, “University Staff Asked to Inform on ‘Vulnerable’ Muslim Students”, *The Guardian* (London), 30 August 2011.

¹¹⁶ Adam Gartrell, Natalie O’Brien and Michael Bachelard, “Secret Grants for Countering Violent Extremism Programs Split Communities”, *Sydney Morning Herald*, 31 May 2015.

consultation with Muslim communities as to how such programs should be designed, so that effective support can be provided to marginalised youth who might otherwise be inspired by events overseas to become involved in terrorism.

CONCLUSION

Australia has now gone through a number of cycles of enacting national counter-terrorism laws. Many such laws were enacted soon after the 9/11 attacks, and then again after the 2005 London bombings. These waves of lawmaking have now been followed by the introduction during the time of the Abbott government of a number of further, significant statutes directed at the threat posed by foreign fighters and a range of other matters.

Our analysis has shown that the government was right in identifying that some further counter-terrorism measures did need to be enacted. The task of fashioning an effective framework of counter-terrorism laws will never be completed. Gaps will emerge, or further responses needed, because new technologies emerge or the scale of existing problems has shifted. In this case, Australia's existing counter-terrorism laws needed to be amended in order to account for the increased threat posed by Australian citizens travelling overseas to fight with terrorist organisations and returning home to engage in terrorism. The need for these new measures reflects the fact that the Australian community faces a very real threat from terrorism. Recent events are evidence of this serious threat.

The problem that emerges from this period of lawmaking is not that new counter-terrorism laws were made, but rather the over-broad content of those laws and the way in which they were enacted. Rather than responding by way of a deliberate, considered process for enacting the laws, Parliament instead acted with undue haste. Inadequate time was given for scrutiny of the laws, and the cover of bipartisanship meant that extraordinary new measures were enacted without adequate debate. It is telling that key problems with these laws have indeed only emerged after they have been enacted. Counter-terrorism laws often involve concerning incursions into individual liberties and require heightened vigilance and scrutiny. Instead, the laws received a truncated and often ineffective parliamentary process.

This was particularly concerning given that many of the laws did not even relate directly to the threat of foreign fighters, and instead related to national security issues more generally (in the case of intelligence whistleblowing) and a wide range of other criminal behaviour (in the case of metadata retention). As is frequently the case with enacting new counter-terrorism laws,¹¹⁷ urgency was the catch cry even when there was no demonstrable justification that the laws were needed on a short timeframe.

An even more significant issue is that many of the laws greatly overreach. The laws represent some of the most extreme enacted in Australia since 11 September 2001 in terms of their impact upon democratic and other rights, including those to movement, speech and privacy. Measures such as these have no comparators in other nations, in part because Australia is alone among all democratic nations in lacking some form of national human rights act or Bill of Rights.¹¹⁸

In any event, it is not clear that these laws, even given their overreach, will be effective in protecting the community. This has been questioned in major inquiries by the INSLM and COAG Review, which have doubted whether measures such as PDOs or control orders are useful to authorities in combating terrorism.¹¹⁹ A larger point is that the enactment of these laws can actually prove counter-productive in how Australia responds to the threat. Laws such as these may actually contribute to the cycle of radicalisation that can cause a person to consider acts of violence against members of the community. They can do this by heightening the sense that sections the community

¹¹⁷ Lynch, n 85; Carne, n 85; Tham, n 85.

¹¹⁸ George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 2.

¹¹⁹ INSLM 2012 Report, n 17, 44, 67, 106; COAG Review, n 17, 54, 68.

are being targeted for unfair treatment by the authorities. In such a case, the laws can actually become part of the problem, rather than the solution to terrorism.

The Australian government has recognised this by complementing its coercive legal measures with new programs directed at countering radicalisation and building communities. These programs are welcome, but at this stage represent more of an afterthought than a core focus of Australia's counter-terrorism strategy. They are not yet well integrated with Australia's legal responses, and may ultimately demonstrate some of the problems evident in the United Kingdom's national *Prevent* strategy. More work and thought is required in respect of these programs if they are to be effective, including how the impact of Australia's counter-terrorism laws on Muslim communities can be minimised.

The above analysis suggests that, unfortunately, the mistakes of the past have been repeated when it comes to the enactment of new counter-terrorism laws in Australia. Australia has seen further expanded powers for the police and intelligence agencies and the undermining of democratic scrutiny – driven again by the need to be seen to be “doing something” in response to terrorism. This reveals a problematic cycle of lawmaking in the name of national security, and raises a key question: will Australia ever be satisfied with the counter-terrorism laws it has enacted, or, as former Prime Minister Abbott suggests, will Australians continually sacrifice their liberty in response to new threats to security?