

Chapter Five - Scharneese Philipp, *Australia's response to foreign fighters: Security without a bill of rights*

Australia's response to foreign fighters:

Security without a bill of rights

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In October 2014 the Federal Government passed significant legislative amendments to existing counter-terrorism laws, introduced in *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).¹ The *Act* is notable for amendments to the *Criminal Code Act 1995* and the expansion of existing counter-terrorism regimes to include: new criminal offences related to terrorism, unprecedented powers afforded to government agencies and restrictive measures with the aim of strengthening national security.² The stated purpose of these amendments is to address the security threat posed by 'foreign fighters,' radicalized Australian residents supporting and participating in foreign conflicts, returning to Australia. However, the expedited passing of the *Act* raises human rights concerns for its encroachment on fundamental liberties and its capacity to both repeal and amend significant domestic statutes.³

It is the aim of this paper is to examine the effects of legislative amendments contained in the *Act*, assess its ability to combat foreign fighters and consider the Australian legal system's response to terrorism without an agreement of our basic rights.⁴ It will be established that a

¹ *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

² Ibid.

³ Rhys Ryan, 'Foreign Fighters Bill: expanded counter-terrorism laws encroach on human rights' (17 December 2014) *Human Rights in Australia Right Now* <<http://rightnow.org.au/writing-cat/article/foreign-fighters-bill-expanded-counter-terrorism-laws-encroach-on-human-rights/>>.

⁴ George Williams, *Responding to Terrorism without a Bill of Rights: The Australian Experience* (2004) 2 *AsiaRights; Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Cth).

discussion of an Australian statement of rights, is arguably a necessity for the protection of fundamental human rights in Australia.⁵

Foreign fighters under international law

In the last decade, Australia has introduced new laws to combat the threat of terrorism with unprecedented legislative changes, including broadened censorship, restrictions on freedom of speech and increased powers to detain and question by the Australian Security Intelligence Organization (ASIO).⁶ International law has required Australia to enact preventative legislation to address the increasing mobilization of “foreign terrorist fighters” following the September 11 attacks.

In response to al-Qaeda and its associates, the UN Security Council adopted sanctions including *Resolution 1373*, to take the necessary preventative measures against the commission of terrorist acts.⁷ The *Resolution* established a framework to combat terrorism however neglects to define terrorism, terrorist acts or its designation of organizations as ‘terrorist’; however, states are obligated to extradite, criminalize, prosecute, and deny the financing of terrorist acts.⁸ More recently, the rapid expansion of Islamic State in Syria and Iraq has prompted the Security Council to adopt *Resolution 2170*, recognizing the violent extremism and the systematic and widespread abuses of human rights and violations of international humanitarian law; providing that states should refrain from trading with Islamic State, who allegedly control Syrian and Iraqi oil fields.⁹ *Resolution 2170* requires states to suppress the recruitment of ‘foreign terrorist fighters’ and supports the criminalisation of terrorism-related conduct.¹⁰ It provides further, that

⁵ *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

⁶ *Australian Security Intelligence Organisation Act 1979* (Cth); George Williams, *A Decade of Australian Anti-Terror Laws* (2011) Melbourne University Law Review, 1136-1176.

⁷ *Ibid*; United Nations Security Council, *Resolution 1373 (2001)* (28 September 2001) United Nations Security Council <http://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf>.

⁸ *Ibid*.

⁹ Security Council, *Security Council Adopts Resolution 2170 (2014) Condemning Gross, Widespread Abuse of Human Rights by Extremist Groups in Iraq, Syria* (15 August 2014) United Nations <<http://www.un.org/press/en/2014/sc11520.doc.htm>>; Geneva Academy, *Foreign fighters under International Law* (October 2014) Geneva academy of International Humanitarian Law and Human Rights <<http://www.geneva-academy.ch/docs/publications/Briefings%20and%20In%20briefs/Foreign%20Fighters%20Under%20International%20Law%20Briefing%20no7.pdf>>.

¹⁰ *Ibid*.

states will prosecute nationals attempting to travel, prepare, plan, participate and perpetrate terrorist training and acts; wilful financing and recruitment of foreign terrorist fighters.¹¹

Returning foreign fighters may be liable for prosecution when they return to their home country for their involvement in international war crimes committed while participating in armed conflicts abroad.¹² In Europe, the European Union member states ratified the Rome Statute, enabling the implementation of legislation to exercise jurisdiction over a range of crimes, including crimes committed during an armed conflict abroad.¹³

In Australia, foreign fighters attempting to join organizations officially listed as a terrorist organization may be investigated and indicted under domestic terrorism legislation.¹⁴ The detention of foreign fighters may invite diplomatic protection and public pressure to intervene; however, Australia's complicity in the unlawful, indefinite detention of David Hicks and Mamdouh Habib in Guantanamo Bay is consistent with the laws.¹⁵

Foreign Fighters - defined?

Foreign fighters are hardly a new phenomenon, present in the Spanish civil war, the 1989 Soviet invasion of Afghanistan, the 1948 Arab-Israeli War, and the more recent armed conflicts in Iraq and Syria have a ubiquitous presence of foreign fighters throughout history.¹⁶ Since the attacks on the World Trade Centre, the phenomenon of foreign fighters grew prominent with foreign fighters present in the ranks of al-Qaeda and the Taliban in Afghanistan.¹⁷ However, the definition of 'foreign fighter' remains ambiguous and is variously understood; Hegghammer writes, [foreign fighters] constitute an intermediate actor, lost between local rebels and international terrorists.¹⁸ Conversely, Malet provides that non-citizens of conflict states who join insurgencies during civil war define foreign fighters; the emergence of Western foreign fighters

¹¹ Ibid.

¹² Ibid.

¹³ Ibid; United Nations Codification Division, *Rome Statute of the International Criminal Court* (19 December 2003) United Nations < <http://www.un.org/law/icc/index.html>>.

¹⁴ *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

¹⁵ Ibid.

¹⁶ Geneva Academy, above n 9.

¹⁷ Ibid.

¹⁸ Geneva Academy, above n 9; Hegghammer, 'The Rise of Muslim Foreign Fighters' (2010/11) 35(3) *International Security*, 53, 55.

like the ‘Australian Taliban’ David Hicks and more recently, ‘jihad Jake’ indicates an increased mobilization of Australians recruited and fighting amongst transnational, armed conflicts.¹⁹

Foreign Fighters Legislation

The amendments contained in the *Act* reflect concerns for human rights issues protected under the *International Covenant on Civil and Political Rights (ICCPR)*, including the right to privacy, freedom of movement and arbitrary detention, including *habeas corpus*.²⁰ The substantial extensions to existing counter-terrorism regimes will be discussed briefly, the extent of the amendments has prompted express concern about the broad application the *Act* may have beyond its stated purpose.²¹

Extension of Sunset Clauses

The *Act* proposes to extend the sunset clauses in relation to control orders, preventative detention orders, search and seizure powers and extensive powers for the questioning and acquisition of warrants by ASIO.²² The regimes introduced under the Howard Administration have been extended until September 2018 and must be reviewed to assess the regimes’ effectiveness by the Parliamentary Joint Committee on Intelligence and Security.²³

Arbitrary Detention

Article 9 of the ICCPR relevantly states’ a person’s right not to be subject to arbitrary detention, deprived of liberty and is entitled to be informed of the reasons for the arrest, the charges against him and access to legal proceedings where the arrest is unlawful.²⁴ The *Act* would amend customs detention powers, defined in section 219ZJB of the *Customs Act* and allows a customs

¹⁹ Ibid; Michael Bachelard, *Jake Bilardi’s death used for propaganda value by Islamic State* (17 March 2015) The Sydney Morning Herald < <http://www.smh.com.au/world/jake-bilardis-death-used-for-propaganda-value-by-islamic-state-20150317-1m0ssu.html>>.

²⁰ Australian Human Rights Commission, *Inquiry into the counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2 October 2014) Australian Human Rights Commission <www.humanrights.gov.au>.

²¹ Ibid.

²² *Criminal Code 1995* div 104, div 105; *Crimes Act 1914* (Cth) div 3A; *Australian Security Intelligence Organization Act 1979* (Cth) div 3.

²³ Ryan, above n 3.

²⁴ Ibid.

official to detain a person is suspected of *intending* to commit an offence; preventative detention can, the Commission considers, be justified where it is necessary to protect “severe” threats to national security however exempts the customs official from obtaining a detention warrant or order.²⁵

Visas, passports & the deprivation of nationality

The *Act* has proposed emergency cancellation powers to the Minister for Immigration and Border Protection under amendments of the *Migration Act 1958* (Cth). Under section 134B(a), the Minister is obliged to cancel a visa where an assessment by ASIO advising whether a person is a risk to security.²⁶ The ICCPR provides that a person's freedom of movement is not subject to restriction except where it is necessary to protect public order, public health, the morals rights and freedoms of other and the protection of national security. It provides further that no one will be arbitrarily deprived of the right to leave and enter his own country.²⁷

These amendments lower the threshold for the government and organizations such as ASIO, to suspend passports and visas if persons are suspected to be a risk to security or of leaving the country to engage in conduct that may threaten Australian security; it has the power to detain persons without charge that are suspected of committing a federal offence or preparing to commit an offence that is punishable by more than 12 months imprisonment, extending previous detention powers for specific offences punishable by more than three years imprisonment.²⁸

Declared Areas

The offence states that persons attempting to travel to a declared zone without legitimate purpose may be detained by customs on reasonable grounds that the person intends on committing an offence or is a threat to national security or the security of a foreign country.²⁹ In

²⁵ *Crimes Act 1901* (Cth) s 219ZJB(1)(b); Australian Human Rights Commission, above n 20.

²⁶ *Ibid.*

²⁷ *Ibid*; *International Covenant of Civil and Political Rights* (ICCPR), Art 12.

²⁸ Ryan, above n 3.

²⁹ Anna Pha, 'Foreign Fighters Bill: wide open to abuse' (5 November 2014) *The Guardian* (Sydney) <<http://search.informit.com.au.ezproxy.scu.edu.au/fullText;dn=730068263007738;res=IELAPA>>; TimeBase, 'Australia Declares Raqqa Province Off Limits to Australians' (14 January 2015) *TimeBase* <<http://www.timebase.com.au/news/2015/AT009-article.html>>.

response to the conflicts in Syria and Iraq, a proposed section 119.2³⁰ of the *Criminal Code* would make it an offence for a person to enter or remain in a declared area, where the Minister of Foreign Affairs is satisfied that a listed terrorist organization is conducting and participating in hostile activity.³¹ Pursuant to the provisions contained in the *Act*, the Australian Government has exercised this power, declaring Syria's Raqqa province, known as Islamic State group's self-proclaimed caliphate and de facto capital, as a designated declared area to combat the radicalization of Australians joining Islamist militant groups.³²

The offence effectively reverses the onus of proof, undermines the right to fair trial and unfairly prejudices the accused person to prove legitimate purpose for travelling in a declared area overseas.³³ The accused entering or remaining in a declared area would need to adduce evidence that they were in the declared area for a predefined legitimate purpose; it was considered by the Commission, to "impermissibly infringe the freedom of movement protected by article 12 of the ICCPR."³⁴

Expanding Counter-Terrorism Regimes: ASIO

Prior to *Foreign Fighters*, Australia has been criticised for its haste, "knee-jerk" anti-terrorism laws, and its extension of disproportionate powers to combat terrorism. Australian intelligence organizations have traditionally enjoyed extensive powers, including the use of personal tracking devices; telephone tapping; monitor online discussions, obtain warrants to search premises, and conduct clandestine surveillance on political activists and suspect organizations.³⁵ *The Australian Security Intelligence Organization Legislation Amendment (Terrorism) Bill 2002* contained provisions that afforded ASIO powers to detain adults and children who were not terrorist suspects; denied access to legal representation, the opportunity to inform family members and silence was

³⁰ *Criminal Code*, Schedule 1, item 110.

³¹ Parliament of Australia, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* Bill Digest (17 October 2014) <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1415a/15bd034>.

³² TimeBase, above n 29.

³³ Pha, above n 29; *Criminal Code Act 1995* s 100.1; *International Covenant of Civil and Political Rights* (ICCPR), Art 14.

³⁴ Geneva Academy, above n 9.

³⁵ Sarah Sorial, 'The Use and Abuse of Power and why we need a bill of rights' (2008) 34(2) *Monash University Law Review* 402; *Australian Security Intelligence Organisation Act 1979* (Cth) Div 2, ss 25-29.

punishable by five years in prison.³⁶ The regime was applicable to all Australians and despite the bill stating that detainees are treated with humanity and respect for human dignity, ASIO officers faced no penalty for subjecting detainees to cruel, inhuman or degrading treatment.³⁷ Certainly such treatment may contravene international human rights legislation including the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ratified by Australia in August 1989.³⁸

Case Studies

According to Williams, Australian laws have restricted individual rights and following a terrorist attack, the Australian legal system is considerably strained.³⁹ The legal response of the federal government has defined the following cases:

Haneef

Dr Mohammed Haneef was arrested at Brisbane airport in 2007, under Australia's new anti-terrorism laws, and was charged after his mobile SIM card was linked to the failed terrorist attacks in London and Glasgow.⁴⁰ Held in isolated detention for twelve days without tangible evidence, it was established that the Immigration Minister, Kevin Andrews and the Federal Cabinet had interfered and influenced Dr Haneef's investigation and Haneef was charged with providing support to a terrorist organization.⁴¹ Haneef was subjected to a hostile media campaign, branding him a 'terrorist', was prevented from challenging the charges and his visa

³⁶ Williams, above n 4.

³⁷ Ibid.

³⁸ Ibid; Human Rights Commission, *Chart of Australian Treaty Ratifications as of May 2012 –Human Rights at your fingertips* (2012) Human Rights Commission <<https://www.humanrights.gov.au/chart-australian-treaty-ratifications-may-2012-human-rights-your-fingertips-human-rights-your>>.

³⁹ Williams, above n 4.

⁴⁰ Paul Maley, 'Weakness of Mohamed Haneef case exposed' (16 May 2008) *The Australian* <<http://www.theaustralian.com.au/archive/news/weakness-of-haneef-case-exposed/story-e6frg600-111116354108>>; Russ Kientsch, 'Terror accused Mohamed Haneef returns and he would love to stay' (22 November 2010) *The Australian* <<http://www.theaustralian.com.au/national-affairs/terror-accused-mohamed-haneef-returns-and-he-would-love-to-stay/story-fn59niix-1225958043240>>.

⁴¹ Ibid; Law Council of Australia, *Mohamed Haneef Case* (20 May 2015) <<http://www.lawcouncil.asn.au/lawcouncil/index.php/10-divisions/145-mohamed-haneef-case>>; Sorial, above n 35.

cancelled unlawfully.⁴² His deprivation of liberty was justified under the premise of security is fraught with political manipulation and abuse of state and legislative power.

Hicks

The incarceration of David Hicks in an Australian prison was followed by the overturn of his conviction in February.⁴³ Hicks' incarceration was a consequence of his guilty plea to providing material support to a terrorist organization obtained through interrogation, inhumane torture, and psychological breakdown, to an American military court.⁴⁴ Hicks did not commit a criminal offence known to the Australian legal system, US or international law and was afforded no legal or diplomatic protection for his rights.⁴⁵ In 2004, the United States Supreme Court held that enemy combatants had the right to challenge their detentions, with a *habeas corpus* action in the landmark case *Rasul v Bush*; despite violations of the Geneva Conventions and Australia's immovable stance on Guantanamo's continued operations and its tribunals.⁴⁷

Gardiner

Former Labor Party leader Matthew Gardiner was interrogated for several hours after arriving in Australia, following his departure to Kurdish-controlled regions in Syria or Iraq, where he is believed to have been fighting alongside Kurdish forces against Islamic State.⁴⁸ Gardiner was detained by the Australian Federal Police however was released without charge despite enquiries into Gardiner's overseas activities; the penalty of entering a region deemed to be a declared area

⁴² Law Council of Australia, above n 41.

⁴³ Sky News, 'David Hicks wins challenge to conviction' (19 February 2015) *Sky News Top Stories* <<http://www.skynews.com.au/news/top-stories/2015/02/19/david-hicks-wins-challenge-to-conviction.html#sthash.17XZS9ZW.dpuf>>.

⁴⁴ Ibid.

⁴⁵ Geneva Academy, above n 9.

⁴⁶ Sorial, above n 35, 420.

⁴⁷ Alfred W McCoy, 'The Outcast of Camp Echo' (June 2006) *The Monthly* <<https://www.themonthly.com.au/monthly-essays-alfred-w-mccoy-outcast-camp-echo-punishment-david-hicks-229>>.

⁴⁸ Mark Schliebs, 'NT Labor foreign fighter Matthew Gardiner risks jail term' (6 April 2015) *The Australian* <<http://www.theaustralian.com.au/in-depth/terror/nt-labor-foreign-fighter-matthew-gardiner-risks-jail-term/story-fnpdbcmu-1227292549512>>.

without a valid reason carries a ten-year jail sentence.⁴⁹ Gardiner may be indicted under these laws for participation in the Syrian conflict, and will face a lengthy prison term if convicted.⁵⁰

Should Australia adopt a bill of rights?

The *Foreign Fighters* amendments are representative of anti-terror legislative framework inconsistent with comparable legislation in other jurisdictions including the United Kingdom, Canada and New Zealand.⁵¹ Arguably, these jurisdictions developed their legislative responses to terrorism laws with a bill of rights, preventing the abrogation and infringement of human rights.⁵² An inquiry into the *Act* warns of the potential violations of human rights and the legal burdens of proving legitimate purpose and the presumption of innocence. The *Act* may infringe and criminalize more than its stated purpose of prosecuting foreign fighters.

In Australia, human rights may be established in the Constitution, the common law and in legislation however international rights regulatory bodies have urged Australia to implement a bill of rights; it would establish the fundamental rights of citizens and a means of balancing those rights against security dilemmas; Australian Parliaments face little resistance from passing new laws if it both clear in its intent and is within constitutional limits.⁵³ In the absence of a bill of rights, Australia must respond with international law, and as Williams argues, that the safeguards to unchecked power of parliaments and governments is reliant on the “goodwill of political leadership” and political debate.⁵⁴

Conclusions

The High Court of Australia provides some protection to individual rights, however fundamental human rights can be negated by recent legislation, and the exercise of the Australian

⁴⁹ Ibid.

⁵⁰ Rachel Olding, ‘Terrorism experts: Matthew Gardiner would be assisted by new friends online’ (26 January 2015) *Canberra Times* < <http://www.canberratimes.com.au/act-news/terrorism-experts-matthew-gardiner-would-be-assisted-by-new-friends-online-20150126-12yidy.html>>; *Rasul v Bush* (03-334) 542 U.S. 466 (2004) 321 F.3d 1134.

⁵¹ Sorial, above n 35, 419.

⁵² Ibid.

⁵³ Williams, above n 4.

⁵⁴ Ibid.

government's power has few restraints.⁵⁵ Consequently, individual liberties have been limited under the illusory premise of national security with new laws and without a bill of rights with legal force; Australia's anti-terrorism laws may compromise individual freedoms and inundate the High Court with protection and remedy orders.⁵⁶ It is the view of this paper that provisions in the *Act* undermine existing international law conventions including the ICCPR and ratified international conventions against inhumane treatment and human rights restrictions. A bill of rights remains a contested concept however, may protect our basic rights.⁵⁷

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⁵⁵ Ryan, above n 3.

⁵⁶ Young Presidents Association, 'A Bill of Rights for Australia - But do we need it?' (14 December 1997) *Law & Justice Foundation*, <<http://www.lawfoundation.net.au/ljf/app/&id=/a60da51d4c6b0a51ca2571a7002069a0>>.

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