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## **Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014**

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### **Submission to the Parliamentary Joint Committee on Intelligence and Security**

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## Executive summary

The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Bill) proposes changes to the powers of a number of Commonwealth agencies. This submission is focused on matters relevant to the oversight of the Australian Security Intelligence Organisation (ASIO) by the Inspector-General of Intelligence and Security (IGIS). This submission does not address proposed changes that affect the Australian Federal Police or Customs as those agencies do not come within the ordinary jurisdiction of the IGIS. This submission notes that:

- Changes to various offences, particularly those relating to ‘foreign incursions’, will have the effect of extending the definition of ‘security’ in the ASIO Act. The new offences cover a broad range of serious criminal conduct overseas, without any requirement that such conduct have the political or ideological motivation required for terrorism offences. The definition of ‘security’ in the ASIO Act is central to ASIO’s functions and underpins the tests for when various ASIO powers such as warrants and metadata authorisations can be used. The effect of the expansion of the definition of security is that ASIO will have the legislative authority to use its powers to gather intelligence about criminal conduct overseas that is not associated with terrorism or activity that would ordinarily be described as relevant to national security.
- IGIS oversight of ASIO actions in relation to the proposed suspension of travel documents and temporary cancellation of visas will be important, particularly given the limitation on other types of review. Close oversight will be warranted of any decision to recommend a second or subsequent suspension which would have the effect of extending the 14 or 28 day limit.
- Recommendations in relation to the suspension of travel documents and cancellations of visas are to be made by ASIO the entity rather than a particular individual such as the Director-General of Security. ASIO can make a request where it ‘suspects on reasonable grounds ...’. From an oversight perspective it will be difficult to establish what an entity reasonably suspects. Better practice is for decisions to be made by nominated individuals who are then accountable for those decisions.
- ASIO last used a questioning warrant in 2009-10 and no questioning and detention warrant has ever been issued. The proposed lowering of the threshold for questioning warrants will provide more scope for these warrants to be sought. Should a questioning or questioning and detention warrant be issued it is my expectation that I, or a senior staff member from my office, would attend to provide assurance that the various safeguards and requirements are adhered to.

The *Inspector-General of Intelligence and Security Act 1986* (the IGIS Act) provides sufficient authority for the IGIS to oversee the new ASIO powers contained in the Bill.

## Background

### Role of the Inspector-General of Intelligence and Security

The Inspector-General of Intelligence and Security (IGIS) is an independent statutory officer who reviews the activities of the Australian intelligence agencies:

- Australian Security Intelligence Organisation (ASIO)
- Australian Secret Intelligence Service (ASIS)
- Australian Signals Directorate (ASD)
- Australian Geospatial-Intelligence Organisation (AGO)
- Defence Intelligence Organisation (DIO)
- Office of National Assessments (ONA).

The IGIS is able to inquire into a matter relating to an intelligence or security matter relating to *any* Commonwealth agency at the request of the Prime Minister. Since it was introduced in 2010 this extended jurisdiction has been used three times. Two of those inquiries involved the AFP.

The IGIS is currently supported by 12 staff. The Office of the IGIS is an agency for the purposes of the *Public Service Act 1999* and a non-corporate Commonwealth entity for the purpose of the *Public Governance, Performance and Accountability Act 2013*. On 5 August 2014, the Prime Minister announced new counter-terrorism measures noting that ‘the Government will increase the resources of the independent office of the Inspector-General of Intelligence and Security.’

The Office of the IGIS is situated within the Prime Minister’s portfolio. The IGIS is not subject to direction from the Prime Minister, or other ministers, on how responsibilities under the *Inspector-General of Intelligence and Security Act 1986* (the IGIS Act) should be carried out.

The IGIS Act provides the legal basis for the IGIS to conduct inspections of the intelligence agencies and to conduct inquiries of the Inspector-General’s own motion or at the request of a Minister.

The overarching purpose of IGIS’s activities is to ensure that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives, and is consistent with human rights. A significant proportion of the resources of the office has in the past been directed towards ongoing inspection and monitoring activities, so as to identify issues, including about the governance and control frameworks within agencies, before there is a need for major remedial action. OIGIS staff have access to all documents of the intelligence agencies and the IGIS is often proactively briefed about sensitive operations.

The inspection role of the IGIS is complemented by an inquiry function. In undertaking inquiries the IGIS has strong investigative powers, including the power to require any person to answer questions and produce relevant documents, take sworn evidence, and enter agency premises. IGIS inquiries are conducted in private because they almost invariably involve highly classified or sensitive information, and the methods by which it is collected. Conducting an inquiry is resource intensive but provides a rigorous way of examining a particular complaint or systemic matter within an agency.

The IGIS has a statutory role in providing expert evidence to the Administrative Appeals Tribunal and the Information Commissioner in disputed Archives and Freedom of Information matters. The IGIS can receive disclosures and has a coordination role under the *Public Interest Disclosure Act 2013* in relation to the intelligence agencies.

## Schedule 1 – Main counter-terrorism amendments

### Changes that expand the scope of the definition of ‘security’

#### The definition of security is central to ASIO functions

The definition of ‘security’ of the Australian Security Intelligence Organisation Act 1979 (the ASIO Act) is central to ASIO’s function in s17 of that Act and underpins all of the tests for warrants and other intrusive powers that ASIO is able to access. Any changes to the definition of security has consequences for ASIO’s mandate and the circumstances in which its special powers can be accessed (including warrants).

New powers proposed by this Bill, including in relation to suspending travel documents and cancelling visas, also turn on whether ASIO suspects that a person might be, directly or indirectly, a risk to ‘security’.

#### The definition of ‘security’

The term ‘security’ in the ASIO Act has a specific, and quite complex, definition.<sup>1</sup> The core of the definition is:

‘security’ means:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

- (i) espionage;
- (ii) sabotage;
- (iii) politically motivated violence;
- (iv) promotion of communal violence;
- (v) attacks on Australia's defence system; or
- (vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

Many of these terms are then further defined. In relation to terrorism offences and foreign incursions the relevant offences form part of the definition of ‘politically motivated violence’. That term currently relevantly means:

(a) acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts or threats carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere; or

(b) acts that:

- (i) involve violence or are intended or are likely to involve or lead to violence (whether by the persons who carry on those acts or by other persons); and

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<sup>1</sup> See s4 of the ASIO Act for the full definition of ‘security’

(ii) are directed to overthrowing or destroying, or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory; or

(ba) acts that are terrorism offences; or

(c) acts that are offences punishable under the *Crimes (Foreign Incursions and Recruitment) Act 1978* , ...

...

The term 'terrorism offence' is also defined. It currently means:

(a) an offence against Subdivision A of Division 72 of the Criminal Code ; or

(b) an offence against Part 5.3 of the Criminal Code.

### **Expansion of definition of security in relation to 'foreign incursions'**

Item 27 of Schedule 1 to the Bill deletes the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Foreign Incursions Act) from the definition of politically motivated violence in the ASIO Act and replaces it with reference to Division 119 of the *Criminal Code Act 1995* (the Criminal Code). The effect of this is that offences punishable under proposed Division 119 of the Criminal Code are part of the definition of security.

Division 119 of the Criminal Code is to be inserted by item 110 of Schedule 1 to the Bill. Division 119 would create a range of new offences including entering or remaining in declared areas, recruiting a person to serve with an armed force in a foreign country, and entering a foreign country with the intention of engaging in hostile activities. Some of these offences seem to be quite broad.

For example, the offence of entering a foreign country with the intention of engaging in 'hostile activities' is underpinned by a definition of 'hostile activities' in proposed s117.1. That definition includes 'engaging in subverting society' – a definition which includes a broad range of criminal acts.

Despite the phrase 'engaging in subverting society' being used there is no requirement that these acts be accompanied by an intention to coerce or intimidate a government or to intimidate the public or a section of the public or to have any other 'subverting society' effect. Such an intention is part of the definition of a terrorist act in the Criminal Code.<sup>2</sup> This means that the offence in proposed s119.1 and related offences can be enlivened by conduct (such as serious damage to property or causing serious physical harm to a person) that does not have the political or ideological intention associated with, for example, the current fighting in Iraq and Syria and could be motivated by purely criminal or financial motives. For example, going overseas to commit an assault as part of a family dispute or to rob a bank could come within the definition of 'security' and be a legitimate focus for ASIO attention. Such conduct, while serious, has not previously been considered 'security' related.

The consequence of this expansion of the definition of security is that ASIO's powers would be able to be used in a broader range of circumstances. The definition of 'security' underpins when ASIO can obtain search or computer access warrants and also when ASIO employees can authorise access to telecommunications metadata. The definition of security also regulates when a person can be assessed as a 'risk to security' for the purpose of a visa security assessment or other security assessments.

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<sup>2</sup> See s100.1 of the Criminal Code

### **Some new offences not incorporated into ASIO Act definition of security**

The Bill proposes that a new offence of ‘advocating terrorism’ be inserted into Division 80 of the Criminal Code.<sup>3</sup> This offence will not form part of the definition of ‘security’ for the purposes of the ASIO Act. (This is because the ASIO Act definition of security only covers terrorism offences in Division 72 and Part 5.3 of the Criminal Code.) The conduct which may amount to the proposed offence of ‘advocating terrorism’ may, however, also constitute other offences or actions that do form part of the definition of security.

The omission of ‘advocating terrorism’ from the definition of security may lead to some challenges for ASIO in ensuring that ASIO staff understand that although the AFP might investigate this new offence, it may not be within ASIO’s functions.

### **Suspension of travel documents**

Item 21 of Schedule 1 to the Bill proposes introducing a new provision into the *Australian Passports Act 2005* (the Passports Act) to enable the Minister for Foreign Affairs to exercise a discretion to suspend an Australian travel document on the basis of ASIO advice. There are similar powers for foreign travel documents.<sup>4</sup> The suspension of travel documents is for 14 days.

### **Request from ASIO not a specific office holder**

The proposed power for the Minister to suspend a travel document is enlivened if the Minister receives a request from ASIO to suspend the documents *because it suspects* on reasonable grounds that a person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country and their travel documents should be suspended to prevent this. The request must come from ASIO the organisation, rather than from a specific individual such as the Director-General of Security.<sup>5</sup> Currently, a specified person must request the Minister for Foreign Affairs to cancel a passport on the basis that the passport holder’s conduct might prejudice the security of Australia.<sup>6</sup>

From an oversight and review perspective it will be difficult to establish that ASIO the organisation has a reasonable suspicion. Better practice would be for the legislation to provide that the request come from an individual (such as the Director-General or a Deputy Director-General of Security). That individual could then be held accountable for establishing the reasonable basis for their suspicion.

### **Limited review rights**

The holder of an Australian passport cancelled on security grounds currently has access to merits review by the Administrative Appeals Tribunal (AAT). This will not be the case with a suspension. The explanatory memorandum notes that:

Under the new suspension scheme, it is intended that a person only have judicial review rights under the Constitution. This is to reduce the operational security risk that arises from making such decisions reviewable ...(paragraph 404)

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<sup>3</sup> See Schedule 1 items 57-63.

<sup>4</sup> See Schedule 1 items 127-131.

<sup>5</sup> Current s14 of the Passports Act allows certain *persons* to make a cancellation request in relation to an individual where they suspect on reasonable grounds that if the person had a passport they would be likely to engage in conduct that might prejudice the security of Australia. There is scope for the Minister to allow a non-corporate Commonwealth entity to make a request to cancel a passport but only in relation to the security of a *foreign country*. See part (b) of the definition of a competent authority.

<sup>6</sup> See part (a) of definition of a competent authority in s14 of the Passports Act. Note that ‘security’ is not defined in the Passports Act but if it is interpreted to mean ‘security’ in the ASIO Act sense then that definition also covers Australian’s responsibilities to any foreign government.

There is provision in s8(1)(c) of the IGIS Act for the Attorney-General to request that the IGIS inquire into a security assessment that could not be reviewed by the AAT, including into whether the person should be informed of the report and given an opportunity to make submissions. This provision has not been used in recent years.

Limited access to review rights is not unreasonable where the suspension is for 14 days and there is opportunity for merits review of any subsequent cancellation decision.

### **Multiple suspension requests**

The proposed s22A(3) of the Passports Act contemplates that there may be multiple requests and suspensions in relation to the same travel documents. This means that the actual period of suspension could be longer than 14 days. The explanatory memorandum notes that:

New subsection 22A(3) allows ASIO to make an additional request in relation to the person where it has new information that was not before it at the time of the suspension request and during the period of the suspension. The subsection allows ASIO to make a request where there is genuinely new information before it. However, the subsection is not intended to allow for consecutive rolling suspensions, which would defeat the purpose of the limited 14-day suspension period. (paragraph 437)

Because passport cancellations are subject to AAT review they are not an area that has traditionally been subject to IGIS scrutiny.<sup>7</sup> Suspension requests are not subject to AAT review and I anticipate that suspension requests, particularly any cases of multiple requests, will be subject to IGIS oversight.

### **Delegation of decision to suspend travel documents**

Item 26 of Schedule 1 to the Bill would, if enacted, allow the Minister for Foreign Affairs to delegate the power to decide to suspend a passport on the basis of an ASIO request.<sup>8</sup> The delegation can be to certain DFAT officials or to any person, or class of persons, specified in an instrument made by the Minister.<sup>9</sup> This could include ASIO employees. If the power to suspend travel documents based on a recommendation from ASIO is delegated to one or more ASIO employees there will need to be arrangements in place to ensure that the delegates can make an appropriately independent decision.

### **Changes to ASIO questioning and questioning and detention powers**

The questioning and questioning and detention powers in Division 3 of Part III of the ASIO Act have a number of safeguards and oversight mechanisms. These include a specific role for the IGIS.

Questioning and questioning and detention warrants are only available in relation to 'terrorism offences'<sup>10</sup>, this will include the amendments to offences proposed by items 64-69 of Schedule 1 to the Bill, but not the proposed offence of 'advocating terrorism'.<sup>11</sup>

The Bill proposes changing the threshold for when a questioning warrant is available to remove the 'last resort' test.<sup>12</sup> The IGIS does not review decisions by Ministers such as the decision by the

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<sup>7</sup> Section 9AA(c) of the IGIS Act limits the IGIS inquiry power where matters are, or could be, subject to AAT review.

<sup>8</sup> Section 51 of the Passports Act currently allows cancellation decisions to be delegated.

<sup>9</sup> See ss51 and 52 of the Passports Act and the definition of an officer in s6(1) of that Act.

<sup>10</sup> Defined in s4 of the ASIO Act as offences against Subdivision A of Division 72 of the Criminal Code and offences against Part 5.3 of the Criminal Code.

<sup>11</sup> The proposed offence of advocating terrorism is not a 'terrorism offence' for ASIO Act purposes because it is to be part of Division 80 of the Criminal Code and the definition of a 'terrorism offence' in the ASIO Act only covers Subdivision A of Division 72 and Part 5.3 of the Criminal Code.



Attorney-General to consent to a request for a questioning warrant. However, a submission from ASIO to the Attorney-General in relation to such a request would be subject to IGIS inspection. My expectation is that such an inspection would take place as part of a review after the warrant operation had been completed.

ASIO has not sought a questioning warrant in the period since I have been the Inspector-General and has never sought a questioning and detention warrant.<sup>13</sup> As such I cannot comment on ASIO's use of these powers. It would be my expectation that ASIO would notify me at the earliest possible time and it is my intention that I, or a senior member of my staff, would be present during any questioning under warrant.<sup>14</sup>

## **Schedule 2 – Stopping welfare payments**

Schedule 2 creates a scheme for the cancellation of certain welfare payments. Under the scheme the Minister for Foreign Affairs and the Minister for Immigration have discretion to write to the Attorney-General to advise him or her that they have cancelled a passport or a visa on the basis of ASIO advice. The Attorney-General then has discretion to give a notice to the Minister for Social Services recommending certain payments and benefits be stopped (or paid to someone else).

While the original security assessment from ASIO to the Minister for Foreign Affairs or the Minister for Immigration in relation to the travel documents or visa may be inspected by the IGIS the other decisions under the scheme in Schedule 2 fall outside IGIS jurisdiction.

## **Schedule 4 – Cancelling visas on security grounds**

Schedule 4 to the Bill creates a scheme that requires the Minister for Immigration to cancel a visa held by a person who is outside Australia if ASIO provides the Minister with an assessment that ASIO suspects that the person might be, directly or indirectly, a risk to security (within the meaning of s4 of the ASIO Act). Because the Minister for Immigration has no discretion, the practical effect is that this is a decision by ASIO. A cancellation has effect for 28 days. For the cancellation to become permanent ASIO must make an assessment that the individual is directly, or indirectly, a risk to security).

The Minister for Immigration has discretion to cancel the visas of other people who hold a visa only because the relevant person held a visa (for example spouse visas). This decision does not require an ASIO assessment of any risk to security that the other person may pose.

Where a permanent resident visa is permanently cancelled on the basis of an ASIO security assessment the individual is entitled to make a review application to the AAT (though there may be some practical difficulties with this as they will be outside the country and may not have been notified of the cancellation).

## **Multiple temporary cancellation requests**

The threshold for the temporary cancellation of a visa (*might* be a direct or indirect risk to security) is lower than that for a permanent cancellation (*is* a direct or indirect risk to security). There is no express provision allowing or preventing ASIO from making multiple temporary cancellation requests

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<sup>12</sup> See item 28 of Schedule 1 to the Bill which amends s34D(4)(b) of the ASIO Act.

<sup>13</sup> ASIO has not sought a questioning warrant since 2009-10 (statistics are published in the annual ASIO report to Parliament)

<sup>14</sup> Note s34ZI requires certain information be provided to the IGIS and s34P makes clear that the IGIS or her representative may be present at the questioning or taking into custody of a person for the purpose of Division 3 of Part III of the ASIO Act.

consecutively – effectively extending beyond 28 days the period a visa can be cancelled on the basis of the lower test and delaying a decision that may be subject to AAT review.

The explanatory memorandum notes that:

There is no provision for ASIO to seek an extension of the 28 day period in circumstances where additional time is required to conclude an assessment. ASIO can, however, issue a further assessment under section 134B, which would require the reinstated visa to again be cancelled. This would restart the 28 day period. While it is not intended to unreasonably fetter ASIO in the task of assessing security risks, it is also not intended that this mechanism would be used in serial fashion to continue extending the period within which ASIO must form an opinion about whether a person is a risk to security. The operation of the emergency cancellation power will be monitored and reviewed within the established framework of accountability measures applying to ASIO. (Paragraph 1192)

Temporary cancellation requests are not subject to AAT review and such requests, particularly any cases of multiple requests, will be subject to IGIS scrutiny.