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# Counter-terrorism Legislation Amendment (Foreign Fighters) Bill 2014

## Supplementary Submission

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### **Parliamentary Joint Committee on Intelligence and Security**

**7 October 2014**

## Introduction

1. On 3 October 2014, the Law Council of Australia made a submission to the Parliamentary Joint Committee on Intelligence and Security as part of its inquiry into the Counter-terrorism Legislation Amendment (Foreign Fighters) Bill 2014. The Council later appeared before the Inquiry and took a question on notice about the use of biometric material in border control systems and passenger processing.
2. The Law Council also takes this opportunity to highlight some potentially unintended consequences associated with the definition of 'engaging in hostile activities'.
3. Due to the short timeframes for consideration of the proposals, the Law Council has not had the opportunity to consult broadly with its Constituent Bodies and specialist Committees regarding Schedules 5 and 6 of the Bill.

## Collecting personal identifiers at automated border control eGates

4. Schedule 5 of the Bill makes changes to the *Migration Act 1958* (Cth) by providing that the existing Automated Border Clearance systems (SmartGate and eGates) will be an 'authorised system' for the purposes of the Act.<sup>1</sup> The Explanatory Memorandum explains the effect of this proposal at paras 330 – 336.
4. As we understand it, the current impact of the changes would be to permit photographs to be taken of non-citizens for comparison to the photograph in their passports. Para 330 confirms:

*Amendments to sections 166, 170 and 175 of the Migration Act will authorise a clearance authority, which is defined as a clearance officer or an authorised system (such as the Automated Border Clearance systems), to collect and retain personal identifiers (specifically a photograph of the person's face and shoulders) of citizens and non-citizens who enter or depart Australia or who travel on an overseas vessel from one port to another within Australia. The amendments will also permit the disclosure of that information for specified purposes.<sup>2</sup>*

5. At paragraphs 335 to 350 the Explanatory Memorandum sets out the consideration given by the Department of Immigration and Border Protection to the privacy issues which the proposal obviously raises. The detailed consideration given to the issues this raises is noted and the Law Council accepts the proportionality of the proposal as it relates to the current technology applied to smart gates.
6. We note that at paragraph 333 the Explanatory Memorandum states that the biometric information sought to be used may in the future extend beyond photographic data and that such further material could be prescribed by regulation. This general statement obviously gives rise to a need for careful scrutiny if any extension of the means of information gathering or analysis is later proposed.
7. The Law Council also notes that the amendments proposed in the Bill appear to broaden the purposes for which certain biometric material can be shared between agencies. At the same time, these Schedules make changes to the existing legislative safeguards governing the collection, use and sharing of biometric material under the Migration Act. This has the potential to have significant privacy implications, including

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<sup>1</sup> Explanatory Memorandum to the Bill, at [330]- [336].

<sup>2</sup> Ibid.

implications for how sensitive personal information (that may in the future include material such as fingerprints) is stored and destroyed.

8. The Law Council recommended in its submission that Schedules 5 and 6 of the Bill be reviewed by the Office of the Australian Information Commissioner (known as the OAIC) and a comprehensive Privacy Impact Assessment (PIA) be conducted of the proposed changes to the Automated Border Clearance systems. The Law Council notes that the OAIC has provided evidence to the Committee and understands that a PIA may have been conducted of the Automated Border Clearance systems during its pilot stage but the findings do not appear to have been made public. This could be of great assistance to the Committee.
9. The Law Council, in a 2010 submission – which was substantially based on comments from our constituent body - the Law Institute of Victoria, identified issues with the increasing use of biometrics such as fingerprints in administrative jurisdictions, including migration, as:
  - (a) administrative law does not provide the same safeguards to protect biometric information as the criminal law; and
  - (b) the collection and use of biometric information in the administrative context may not subject to regular judicial scrutiny or require demonstrated admissibility if the material is to be used against a person<sup>3</sup>.
10. It appears that the provision of public information about the use of such material may be the only way a person will be alerted to the privacy implications under some of the changes proposed in the Bill. For example:
  - The Explanatory Memorandum provides that, any collection, storage and disclosure of information made under the proposed changes in Schedule 5 will be undertaken in accordance with the Australian Privacy Principles contained in the Commonwealth *Privacy Act 1988*.<sup>4</sup> It also explains that the eGates will specifically comply with Australian Privacy Principle 5 (APP5) which requires persons to be notified of a number of matters before personal information is collected (or as soon as practicable after the collection if it is not practicable to inform the person beforehand).<sup>5</sup> The Explanatory Memorandum provides that people will be notified of these through signs, information sheets, and information on DIBP's and Customs' websites.<sup>6</sup>
  - The Explanatory Memorandum also makes it clear that the safeguards in sections 258B 258E, and 261AL of the Migration Act (which relate to the manner in which identification tests are to be conducted by authorised officers, the information that is to be provided to a person before an identification test, and to the protection of minors and incapable persons)<sup>7</sup>, are not being applied

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<sup>3</sup> Law Council of Australia, *Biometrics and Offshore Processing of Asylum Seekers*, Submission to the Department of Immigration and Citizenship, 18 November 2010, pp. 5-6. Available at <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2400-2499/2444%20Biometrics%20and%20Offshore%20Processing%20of%20Asylum%20Seekers.pdf> at paragraph 21

<sup>4</sup> Explanatory Memorandum to the Bill, at [337].

<sup>5</sup> *Ibid*, [338].

<sup>6</sup> *Ibid*.

<sup>7</sup> For example, under section 258B this information includes: why the personal identifier is required; how the personal identifier will be collected and used; the circumstances under which the personal identifier might be disclosed to a third party; that the personal identifier might be produced in evidence in a court or tribunal, and information about the *Privacy Act 1988* and the person's rights under the *Freedom of Information Act 1982*.

to identification tests carried out by authorised systems such as SmartGate or eGate. This is justified on the grounds that these safeguards are either not relevant or impractical when personal identifiers (specifically, a photograph of the person's face and shoulders) are obtained by an authorised system. The Explanatory Memorandum explains that the usual safeguards are impractical, and that for the eGates or SmartGate to provide this information or to fulfil the safeguard requirements in respect of every person would either be impractical and/or slow the process down unreasonably. Instead, some of the information required to be disclosed under these provisions will be made available on signs and information sheets at the airport and on DIBP's website.<sup>8</sup>

11. It is critical therefore, that this information be prepared in a way that ensures that those persons who have their biometric material collected and shared under the Automated Border Clearance systems fully understand: why such material is being collected and shared; who it is being shared with; what their rights are; and how to make a complaint. The Law Council has previously noted that it is important for individuals subject to the collection of biometric data to be aware of the reason for the collection; who will have access to such data and for what purposes; and how this may affect an individual's privacy<sup>9</sup>. The Law Council strongly supports the provision of clear information to those affected by the use of biometric material, which may include:
- (a) the use of examples;
  - (b) providing details of the particular domestic or international agencies that may have access to this data;
  - (c) providing information about the application of the Privacy Act and the role of the OAIC; and
  - (d) how to make a complaint about misuse of information.
12. The Law Council considers the OAIC may be well placed to assist with the preparation of the explanatory material.

### Changes to the definition of 'engaging in hostile activity'

13. Item 110 of the Schedule 1 to the Bill inserts a new Division 119 into the Criminal Code. Division 119 includes proposed offences for entering a foreign country with the intention of engaging or actually engaging in hostile activities,<sup>10</sup> or preparing to do so.<sup>11</sup> These offences are underpinned by a definition of 'engaging in hostile activity' in proposed section 117.1. These offences carry a maximum sentence of life imprisonment.
14. As currently drafted, this Division may give rise to unintended consequences in the scope of the proposed offences, as:

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Under section 258 E this includes the requirement to conduct an identification test to obtain a facial image away from the view of other people because the system is in a public place (paragraphs 258E(a) and (b) refer). See Explanatory Memorandum to the Bill, at [340]-[342]

<sup>8</sup> Explanatory Memorandum to the Bill, at [340].

<sup>9</sup> Law Council of Australia, Biometrics and Offshore Processing of Asylum Seekers, Submission to the Department of Immigration and Citizenship, 18 November 2010, at paragraphs 30 to 32

<sup>10</sup> Proposed section 119.1 of the Criminal Code.

<sup>11</sup> Proposed section 119.4 of the Criminal Code.

- (a) The definition of 'engaging in hostile activity' in proposed section 117 includes bodily injury to a public official.<sup>12</sup> This could include minor offences within the scope of the proposed offence, would this mean that preparing to go overseas to punch a police officer could come within the definition of engaging in hostile activity?
  - (b) The definition also includes damage to a public building.<sup>13</sup> Does this mean that engaging in graffiti on a public building in a foreign country could come within the definition?
15. Such conduct, while serious, is not generally regarded as related to foreign incursion or terrorist related activity. The Law Council questions whether such a potentially broad offence is intended.
16. Proposed paragraphs 117.1(1)(d) and (e) regarding bodily injury to a public official or damage to a public building may also be unnecessary given the incorporation of a definition of 'subverting society' which includes a broad range of criminal acts including causing serious physical harm to another person or causing serious damage to property.<sup>14</sup>
17. In this regard, the Law Council notes the Inspector-General of Intelligence and Security's (IGIS) views regarding the definition of 'engaging in subverting society'.<sup>15</sup> In particular, the IGIS noted that this includes a broad range of acts where 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. Such an intention is part of the definition of a 'terrorist act' in the Criminal Code.<sup>16</sup> As noted by the IGIS, this means that the offence in proposed section 119.1 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 normally associated with foreign incursion or terrorist motives.<sup>17</sup> The consequence of such a change is that a broader range of criminal activity will now come within ASIO's ambit and expand the definition of 'security' under the *Australian Security and Intelligence Organisation Act 1979* (Cth).<sup>18</sup>

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<sup>12</sup> Proposed paragraph 117.1(d) of the Criminal Code.

<sup>13</sup> Proposed paragraph 117.1(e) of the Criminal Code.

<sup>14</sup> Proposed subsection 117.1(3) of the Criminal Code.

<sup>15</sup> Inspector-General of Intelligence and Security, Submission to the Parliamentary Joint Committee on Intelligence and Security's Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 1 October 2014, p. 6.

<sup>16</sup> See section 100.1 of the Criminal Code.

<sup>17</sup> Inspector-General of Intelligence and Security, Submission to the Parliamentary Joint Committee on Intelligence and Security's Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 1 October 2014, p. 6.

<sup>18</sup> Ibid.

## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.