

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

***Inquiry into the Australian Border Force Bill 2015 and Customs and Other
Legislation Amendment (Australian Border Force) Bill 2015***

**Joint Submission of the Department of Immigration and Border Protection
and the Australian Customs and Border Protection Service**

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The Department of Immigration and Border Protection ('the department') and the Australian Customs and Border Protection Service ('ACBPS') welcome the opportunity to provide a joint submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Australian Border Force Bill 2015 ('ABF Bill') and the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 ('ABF Amendment Bill'), following the introduction of the Bills into the House of Representatives on 25 February 2015.

Detailed information on the specific provisions within the Bills themselves is included in the Explanatory Memoranda ('the EM') to the Bills. This submission provides additional information in relation to the Bills.

1. Purpose of the Bills

Australia's border is a national asset and is fundamental to our sovereignty, national security, economic growth and social cohesion. A strong and prosperous economy and a safe and secure Australia is only possible if we maintain our borders as a secure platform for legitimate trade, travel and migration. Border protection is a core responsibility of Government because it is our border that defines the space within which we are a sovereign nation state and can apply the rule of law and operate our democracy.

On 9 May 2014, the Government announced that, from 1 July 2015, the department and the ACBPS would be integrated into a single department of state and the Australian Border Force ('ABF'), an operational border control and enforcement entity, would be established within the department.

Since federation, when the customs functions were first performed by the Department of Trade and Customs, we have helped shape the safety, security, and lifestyle of the Australian community. From our earliest days, we focused on collecting revenue and preventing the smuggling of goods.

After World War II, the Department of Immigration was established to build the Australian nation and help with the resettlement of people displaced following the war. More than seven million people have migrated permanently to Australia since 1945, with just under five million people becoming Australian citizens since the creation of Australian citizenship in 1949.

Today, the Immigration and Border Protection Portfolio has a global reach that works across the border continuum—before, as and after people and goods reach and cross our border. We have immigration responsibilities to manage the entry and stay of temporary and permanent migrants, to provide assistance to people who need Australia's protection through the Humanitarian Programme and to confer Australian citizenship. Our responsibilities also include collecting border revenue and trade and travel statistics. The effective border controls we provide allow people and goods to move seamlessly across our borders, which is critical to enhancing trade, travel and migration, which also adds to our economic competitiveness and prosperity. In short, we have significant policy, service and enforcement roles, which when combined create a unique organisation that affects the Australian community every hour of every day.

The integration of the department and the ACBPS into a single organisation, and establishment of the ABF, represents the single most significant change to immigration, customs and border protection arrangements since federation.

The department's broader mission extends across the border continuum and as such, our work and the information we hold is valuable to organised crime syndicates, who continuously seek to circumvent border controls, reduce border integrity and threaten national security. In this context, it is important the department can support and maintain an ethical and disciplined workforce and implement an integrity framework that is commensurate with the integrity risks that exist in this new operating context.

The ABF Bill provides the legislative framework that enables the operation of the ABF within the department and supports the management of a professional and disciplined departmental workforce that exercises its powers and functions with the highest standards of integrity. The ABF is to be headed by a statutory office holder to be known as the Australian Border Force Commissioner ('the ABF Commissioner') and will consist of Immigration and Border Protection workers who are in the ABF, or whose services are made available to, or who are performing services for, the ABF.

The ABF Bill is substantively based on the *Customs Administration Act 1985* ('Customs Administration Act') that established the ACBPS and the role of its Chief Executive Officer ('CEO of Customs'). As such, the majority of the provisions contained in the ABF Bill have been subject to parliamentary scrutiny on various occasions in the past.

Specifically, the ABF Bill will:

- i) establish the statutory office and role of the ABF Commissioner who will have control of the operations of the ABF. The ABF Commissioner will have a dual role as the Comptroller-General of Customs with responsibility for the enforcement of customs law and collection of border related revenue
- ii) provide that the ABF Commissioner and Australian Public Service ('APS') employees in the ABF will be able to exercise powers under the *Customs Act 1901* ('Customs Act'), the *Migration Act 1958* ('Migration Act'), the *Maritime Powers Act 2013* ('Maritime Powers Act') and other Commonwealth laws
- iii) provide for binding written directions to be issued by the ABF Commissioner and the Secretary of the department regarding the administration and control of the ABF and the department respectively and in relation to the performance of functions or exercise of powers under laws of the Commonwealth
- iv) provide the ability to require Immigration and Border Protection workers, including contractors and service providers, to undergo alcohol and prohibited drug screening tests
- v) establish information protection and disclosure provisions for the department and
- vi) provide for the management of serious misconduct, including resignation and declaration provisions for employees involved in serious misconduct.

The ABF Amendment Bill has been introduced to repeal the Customs Administration Act upon commencement of the ABF Act, which will abolish the ACBPS as a statutory agency and the office of the CEO of Customs. The ABF Amendment Bill will also amend the Customs Act and other legislation to update terminology to reflect the abolishment of the ACBPS. For example references to 'ACBPS' or 'Customs' will generally be replaced with new terms such as the 'Department of Immigration and Border Protection' or 'the Department' and references to the 'CEO of ACBPS' will generally be replaced with 'ABF Commissioner' or 'Comptroller-General of Customs'. The changes are largely

technical and simply update references to terms that will no longer exist to new terms to ensure continuity.

The ABF Amendment Bill also includes a number of more substantial changes, including the extension of the jurisdiction of the Australian Commissioner for Law Enforcement Integrity to the integrated department and amendments to the *Work Health and Safety Act 2011* ('WHS Act'). These amendments are addressed in further detail in Part 3 of this submission.

The Bills will therefore effectively enable the full integration of functions currently assigned to the ACBPS and the department. They will also support the establishment of a professional and flexible workforce for the integrated department. The Bills do not make any material changes to customs, immigration, citizenship or border protection laws.

2. Content of the Australian Border Force Bill 2015 ('ABF Bill')

2.1 Creation of the statutory office and role of the ABF Commissioner (and Comptroller-General of Customs) (clauses 8-23 of the ABF Bill, paragraphs 53–112 of the EM)

Unlike the current ACBPS, the ABF will not be a separate agency for the purposes of the *Public Service Act 1999* ('Public Service Act'), the *Public Governance, Performance and Accountability Act 2013* ('PGPA Act') or the *Privacy Act 1988* ('Privacy Act'). The Secretary of the department will remain the Accountable Authority for PGPA Act purposes and remain Agency Head for Public Service Act purposes.

The proposed statutory officer, the ABF Commissioner, will have control of the operations of the ABF and will be directly accountable to the Minister for Immigration and Border Protection in relation to those operations. The ABF Bill will confer on the ABF Commissioner a dual role as Comptroller-General of Customs with responsibility for the enforcement of customs laws and the collection of border related revenue. The Secretary of the department will make available budget, resources and corporate and enabling supports for the effective operation of the ABF.

The ABF Commissioner will be delegated Public Service Act employment powers by the Secretary of the department to support the management of the ABF workforce. The ABF Commissioner will provide relevant information and support to the Secretary of the department in relation to the requirements under the PGPA Act, the Privacy Act and the WHS Act.

Consistent with the ABF Commissioner's direct accountability to the Minister, the ABF Bill will enable the Minister to give written directions to the ABF Commissioner about policies that should be pursued and priorities that should be followed in relation to the operations of the ABF. This Ministerial directions power does not override section 19 of the Public Service Act, which limits the Minister from giving direction to Agency Heads with regard to breaches of the APS Code of Conduct and individual employment matters.

2.2 Requirement for the ABF Commissioner to make an oath or affirmation and establishment of sworn officers within the Australian Border Force (clauses 13 and 24 of the ABF Bill, paragraphs 64–66 and 97–104 of the EM)

To underpin a professional and ethical culture, the ABF Commissioner will be required and certain ABF officers will be requested to make and subscribe to an oath or affirmation. This is critical in an environment where significant enforcement powers are being exercised and there is community expectation of the highest standards of integrity.

The ABF Commissioner will have the same standing as the Chief of the Defence Force and the Australian Federal Police Commissioner. These offices have oaths or affirmations attached to them. It is therefore appropriate that the ABF Commissioner should also be required to make and subscribe an oath or affirmation and that he or she should be able to request certain ABF officers to make and subscribe an oath or affirmation as well. It is anticipated that the oath or affirmation given by these officers would be similar to the kind prescribed for certain Australian Federal Police officers under section 36 of the *Australian Federal Police Act 1979*.

The oath or affirmation will set an upfront marker that the Government and the public expect the highest standards of professionalism and integrity for the office of the ABF Commissioner and certain ABF workers that exercise significant powers. The oath or affirmation will therefore enhance government and public confidence in the ABF, as well as the confidence of other partners including intelligence organisations and foreign governments.

2.3 Provide for a professional integrity framework in the integrated department

Existing and new employees, and other specified persons whose services are made available to department, will be collectively known as ‘Immigration and Border Protection workers’. Immigration and Border Protection workers will make decisions and exercise powers that affect the safety, rights and freedoms of individuals (sometimes significantly and irrevocably) as well as trade and commerce in Australia. They will hold a privileged place at the border and in the community, with access to secure environments and law enforcement databases. They will also exercise significant enforcement powers under the Customs Act, the Migration Act, the Maritime Powers Act and other Commonwealth laws. The community and Government trust Immigration and Border Protection workers to exercise these powers reasonably, lawfully, impartially and professionally.

Accordingly, the ABF Bill contains a number of integrity provisions to increase resistance to criminal infiltration and corruption and to enhance government and public confidence in Immigration and Border Protection workers as well as the confidence of other partners including intelligence organisations and foreign governments.

Provide the ABF Commissioner and Secretary with powers to set standards for the workforce (clauses 25–27 and 53–56 of the ABF Bill, paragraphs 113–139 and 247–289 of the EM)

It is imperative that the ABF be established as a disciplined and professional workforce that can be flexibly deployed in line with changing requirements and risks. The ABF Bill will enable the Secretary of the department and ABF Commissioner to issue written directions to Immigration and Border Protection workers which relate to internal departmental procedures. These directions powers are

broadly modelled on section 4B of the Customs Administration Act, which provides that the CEO of Customs can make orders with respect to the control of the ACBPS.

Under these provisions, the Secretary and ABF Commissioner may give directions to workers regarding the administration and control of the department. In practice, it is likely directions will be issued in relation to essential qualifications for the workforce, such as health and fitness requirements, professional and/or technical qualifications, learning and development, organisational suitability, and security clearances, and requirements for reporting of serious misconduct and criminal activity.

Establishing a specific legislative power to issue such directions will assist the department to ensure the workforce has the necessary skills and attributes relevant to the roles being performed within the integrated department and enable the highest standards of operational effectiveness and professional integrity to be achieved. These directions will be binding and failure to follow them may be a breach of the APS Code of Conduct.

Provide a framework for a drug and alcohol testing regime (Part 5 of the ABF Bill, paragraphs 175–206 of the EM)

To increase resistance to corruption across the department and ensure a safe working environment, the ABF Bill provides that an authorised person may direct an Immigration and Border Protection worker to undergo an alcohol breath or screening test and/or provide a body sample for a prohibited drug test.

A core element of the integrated department's responsibilities will be to detect, deter and disrupt the movement of illicit drugs and prohibited and restricted goods across Australia's border. Where Immigration and Border Protection workers are privately participating in the use and possession of illicit drugs, this behaviour is in direct conflict with their official duties and may enhance vulnerability to corruption. Corruption can have a significant detrimental effect on the ability to enforce the law, and the introduction of a drug and alcohol testing regime will provide another tool to detect corruption and misconduct across the broader department.

The Government also considers that implementation of drug and alcohol testing is an appropriate response to the significant consequences that could arise from Immigration and Border Protection workers acting under the influence of drugs or alcohol in the course of their duties. These duties may include driving, operating machinery and making decisions about the application of force including the use of firearms. The proposed regime also recognises the obligations owed to a worker by the department under the WHS Act and is considered necessary to ensure a safe working environment for all staff no matter what part of the department they make be working in.

Drug and alcohol screening arrangements have been proven to operate effectively for the ACBPS, as well as the Australian Federal Police and the Australian Crime Commission. Under the arrangements currently in place for the ACBPS, drug use in the workforce has been identified, which has also revealed behaviours by officers that are misaligned to the ACBPS mission.

Procedural requirements for drug and alcohol testing will be provided for in the rules to ensure flexibility to meet rapidly evolving technologies and updated standards. It is intended that drug testing processes will be in line with the *Australian Standards – Procedures for specimen collection*

and the detection and quantitation of drugs of abuse in urine (AS/NZS 4308: 2008) and *Procedures for specimen collection and the detection and quantitation of drugs in oral fluid* (AS 4760-2006).

These standards provide safeguards to minimise interferences with privacy. In relation to alcohol testing procedures, it is anticipated the department will use evidentiary breath analysing instruments which are recognised by Australian courts of law.

2.4 Provide a framework for dealing with serious misconduct in the integrated department

Power to substitute the date of effective resignation where it is reasonably believed that an employee has engaged in serious misconduct (Part 3 of the ABF Bill, paragraphs 140–157 of the EM)

The ABF Bill proposes that where an employee is reasonably believed to have engaged in serious misconduct or is being investigated for such conduct and the employee provides notice of resignation, the Secretary of the department and ABF Commissioner will have a non-delegable power to defer an employee's date of resignation by up to 90 days from written notification of resignation.

This provision is similar to the provision to delay resignation available to the Australian Federal Police Commissioner under section 30A of the *Australian Federal Police Act 1979*. The definition of 'serious misconduct' in clause 4 of the ABF Bill mirrors the definition of 'serious misconduct' in the *Australian Crime Commission Act 2002* and the *Australian Federal Police Act 1979*, and this definition includes corruption, a serious abuse of power, a serious dereliction of duty, or any other seriously reprehensible act or behaviour.

Under current provisions of the Public Service Act, an investigation into a breach of the APS Code of Conduct can continue after an employee has resigned but there is no provision to apply a sanction to the person as he or she is no longer an employee. This confines the ability of the department to address instances of serious misconduct and corrupt conduct. The proposed power to delay the date of effect of a person's resignation is an appropriate measure to address this issue as it will permit any investigation to be concluded, and where warranted, sanctions to be applied. This is an important demonstration to staff, the Government and the wider community of the department's commitment to professionalism and high standards of integrity and its unwillingness to tolerate conduct that threatens these values.

To support this power, clause 29 of the ABF Bill mandates a minimum 14 days' written notice of an employee's intention to resign from the department (unless otherwise agreed). This 14-day notice period is consistent with the *Department of Immigration and Citizenship Enterprise Agreement 2011–2014* and section 30 of the *Australian Federal Police Act 1979*.

Declaration of serious misconduct (Part 4 of the ABF Bill, paragraphs 158–174 of the EM)

The ABF Bill proposes to give the Secretary of the department and ABF Commissioner a non-delegable power to make a declaration of serious misconduct when terminating the employment of an employee for serious misconduct. The effect of a serious misconduct declaration is to remove the right of a terminated employee to seek a remedy in relation to their dismissal under

the *Fair Work Act 2009* ('the Fair Work Act'), except under Part 3–1 and Division 9 of Part 3–3 of that Act.

This provision is essential in instances of serious misconduct (including corrupt conduct) as review under the Fair Work Act may otherwise impact on the ability of the Secretary or ABF Commissioner to quickly and decisively remove an employee from the department. Any delay sends a mixed signal to the community and workforce about the department's tolerance of serious misconduct and reinstatement of a dismissed employee could result in the exposure of highly sensitive information.

The proposed declaration provision does not alter or reduce the obligation on the department under the Public Service Act to accord an employee fair process when determining whether or not they have breached the APS Code of Conduct, and if they have, whether they should be dismissed as a sanction for that breach. Although remedies under the Fair Work Act will be limited, a declaration will not limit other legal avenues available under legislation or the common law, such as a General Protections claim under Part 3–1 of the Fair Work Act, claims under anti-discrimination legislation or judicial review of decisions, including under the *Administrative Decisions (Judicial Review) Act 1977*.

This provision mirrors the declaration provision currently applicable to ACBPS workers under section 15A of the Customs Administration Act and it is proposed to replicate its effect across the integrated department. Section 15A of the Customs Administration Act was modelled on the declaration of serious misconduct provisions applicable to Australian Crime Commission and Australian Federal Police staff. The provision was introduced in 2012 as part of a series of measures designed to increase the resistance of Commonwealth law enforcement agencies to corruption and to enhance the range of tools available to agencies to respond to suspected corruption. The declaration provisions were subject to parliamentary scrutiny at that time and the Committee recommended passage of the provisions in their entirety.

The Government considers it is appropriate that this declaration power be extended to the whole of the integrated department. The integrated department will have an expanded law enforcement role and the workforce will be exposed to increased attempts by criminal elements to penetrate and corrupt officers. Therefore it is appropriate that the declarations power be applicable across the integrated department to any worker whose employment is terminated for serious misconduct.

2.5 Extend information protection and disclosure requirements to the integrated department (Part 6 of the ABF Bill, paragraphs 208–245 of the EM)

Every day, the proposed ABF and the broader department will create, receive and use critical and important information including intelligence and personal information. Much of this information will be sensitive and complex. Accordingly the Government considers it appropriate and necessary that information protection and disclosure arrangements, supported by a criminal offence provision, should be in place to not only protect sensitive information but to also ensure that disclosure is enabled in appropriate circumstances.

Since 1985, provision has existed in section 16 of the Customs Administration Act to prohibit the unauthorised recording or disclosure of certain information held by the ACBPS. The Customs Administration Act provides for exemptions (authorised disclosure) in controlled circumstances, including in relation to the disclosure of personal information.

While the proposed provisions are modelled on the Customs Administration Act provisions, they have been adapted so as to ensure that they can operate efficiently and effectively within the context of the broader functions of the department and with other information protection and disclosure provisions within the Migration Act, the *Australian Citizenship Act 2007*, the *Freedom of Information Act 1982* and the Privacy Act.

For example, where an Immigration and Border Protection worker discloses information in the course of their employment, the disclosure must be in accordance with the protections provided in the Privacy Act and the Australian Privacy Principles. In addition, the Secretary of the department may authorise, for specific purposes, the disclosure of protected information that contains personal information to a body or person specified in the ABF Bill provided that specified conditions are complied with. Such disclosure will be authorised under Australian law for the purposes of the Privacy Act. These measures are designed to strike an appropriate balance between the need to protect sensitive and personal information and the need to disclose of such information where lawful and appropriate.

The proposed application of these information protection provisions to the integrated department will enable the department to regulate the disclosure of sensitive information in a way that is appropriate and measured. This framework will also provide partner agencies and stakeholders, including industry and international law enforcement and intelligence partners, with assurances that information provided to the department can only be disclosed in the manners contemplated by the information protection provisions.

Similar information protection and disclosure provisions also exist in comparable legislation such as the *Australian Federal Police Act 1979*, the *Australian Security Intelligence Organisation Act 1979*, the *Income Tax Assessment Act 1997* and the *Australian Crime Commission Act 2002*.

3. Content of the Consequential and Other Legislation Amendment (Australian Border Force) Bill 2015 ('ABF Amendment Bill')

3.1 Extend the jurisdiction of the Australian Commissioner for Law Enforcement Integrity ('Integrity Commissioner') (clauses 84–90 of the ABF Amendment Bill, paragraphs 648–666 of the EM)

The Integrity Commissioner is responsible for the investigation of serious and systemic corruption issues in law enforcement agencies, which currently includes jurisdiction over the ACBPS. The ABF Amendment Bill proposes amendments to the *Law Enforcement Integrity Commissioner Act 2006* to extend the jurisdiction of the Integrity Commissioner to the integrated department.

The proposed integrated department will play a critical role in protecting Australia's sovereignty and security, authorising the movement of travellers and goods across Australia's border, managing the stay in Australia and departure of non-citizens, protecting Australia's maritime domain and managing the collection of border-related revenue. In performing these functions, Immigration and Border Protection workers will have access to secure environments, protected systems and sensitive information which are valuable and therefore attract a heightened integrity risk.

The Australian community expects these officers to demonstrate the highest level of integrity and professionalism in the exercise of their powers. The consequences of any corruption in the department, including in the ABF, would pose a significant threat to the integrity of the border and Australia's national security. Corruption within any key law enforcement agency can have a significant detrimental effect on their ability to enforce the law.

These provisions will ensure the Integrity Commissioner's unhindered ability to investigate suspected law enforcement related corrupt activity across the integrated department regardless of the specific role, location or job title of the individual worker. While some law enforcement functions will be performed exclusively by the ABF, others will be delivered or supported by workers within the broader department. As such, the Government considers it appropriate and necessary to extend the Integrity Commissioner's jurisdiction to the entirety of the department. This will cover, for example, a situation where an IT officer who reports to the Secretary and is not part of the ABF is assisting an ABF officer to corruptly manipulate system data.

3.2 Extend existing provisions in the Work Health and Safety Act 2011 ('WHS Act') in relation to Australia's defence and national security to the ABF (Schedule 4 of the ABF Amendment Bill, paragraphs 300–324 of the EM)

The ABF Amendment Bill contains amendments to the WHS Act, to provide the ABF Commissioner the power to issue a declaration about how provisions of the WHS Act apply (or are modified) for ABF workers who are participating in specific operations relating to Australia's defence or national security.

The current WHS Act imposes duties on workers to take 'reasonable care' to protect the health and safety of themselves and others. The standard of what is 'reasonable' would necessarily be proportionate to the control a worker is able to exercise over his or her work activities or environment. It is critical that workers can be confident they are able to perform the tasks required of them professionally and diligently in what can be demanding environments, such as fast moving maritime security operations. In this regard, the ABF Amendment Bill will extend the assurance currently provided to other national security agencies and the Defence Force to the ABF and its workers that a person is not required to take, or refrain from taking, any action under the WHS Act that would be, or could reasonably be expected to be, prejudicial to Australia's national security or defence.

To make a declaration, the ABF Commissioner will need to consult with the Secretary of the department and obtain approval from the Minister for Employment. For declarations under section 12C of the WHS Act, the ABF Commissioner will also need to consult the Director-General of Security to assure the Minister for Employment that the operations relate to the protection of Australia's national security. To make a declaration under section 12D of the WHS Act, the Commissioner will need to consult the Chief of the Defence Force to assure the Minister for Employment that the operation relates to Australia's defence. These consultation provisions included in the ABF Bill are designed to ensure the Minister for Employment will have the benefit of these expert opinions when considering a declaration.

The proposed amendments to the WHS Act appropriately recognise the risks faced by Australian Border Force officers in protecting Australia's national security and defence. The declarations are not

intended to weaken protections for workers, or remove any obligations for the department as an employer to ensure a safe workplace. In contrast, they can only be put in place where necessary, and with the required consultations and Ministerial approvals, to remove any uncertainty for ABF workers regarding their obligations under the WHS Act.

It is intended that ABF officers will continue to undertake risk assessments, follow instructions and be well-trained and equipped for the performance of all duties. At all times, the department will prioritise the health and safety of its workers and promote the objectives of the WHS Act to the greatest extent consistent with maintenance of Australia's national security and defence.

3.3 Repeal of the *Customs Administration Act 1985* and consequential amendments to other legislation

Repeal of the *Customs Administration Act* (Schedule 2 to the ABF Amendment Bill, paragraphs 254–257 of the EM)

Subject to the passage of the ABF Bill, from 1 July 2015 the functions of the ACBPS are to be moved to the integrated department. Accordingly, it is necessary to repeal the *Customs Administration Act*, which provides the legislative basis for the ACBPS as a statutory agency.

Consequential amendments to the *Customs Act 1901* (Schedules 1 to the ABF Amendment Bill, paragraphs 3–253 of the EM)

These consequential amendments to the *Customs Act* and the *Migration Act* are required to ensure that all officers within the department are able to continue exercising powers relevant to their roles (including powers within the new ABF).

Consequential amendments to the *Migration Act 1958* (Schedule 3 to the ABF Amendment Bill, paragraphs 290–299 of the EM)

These consequential amendments to the *Migration Act* are necessary to confer on the ABF Commissioner some relevant functions and powers currently held by the Secretary of the department under that Act. These functions and powers will facilitate the ABF Commissioner's control of the operations of the ABF.

Consequential amendments to other Commonwealth legislation (Schedules 2, 5, 6 and 7 to the ABF Amendment Bill, paragraphs 258–289, 325–803 of the EM)

The proposed changes to organisational arrangements and statutory roles associated with the integration of the department, including the repeal of the *Customs Administration Act*, require transitional provisions and consequential amendments to other Commonwealth legislation. These amendments will ensure continuity of operations and information and intelligence sharing between relevant agencies.