Inquiry Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT 2600

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

This submission responds to the Committee's invitation to comment on the inquiry into the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Cth).

Provisions in the Bill affect many Australians, rather than merely those who are suspected of engaging in or supporting terrorist activity. Both specific aspects of the Bill and an apparent commitment on the part of the national Government to fast-track the legislation raise substantive concerns for legal practitioners, civil society advocates and ordinary citizens.

In summary –

- The Government is to be commended for embracing recommendations by the Independent National Security Legislation Monitor (INSLM), particularly given the historic disregard by both the Coalition and ALP of past reports by the INSLM and the announcement – since reversed – that the INSLM would be abolished because the Monitor added no value. The Bill demonstrates that the INSLM has significant value in the provision of independent authoritative advice on national security legislation and, by extension, in reinforcing the legitimacy of the national security framework.
- Much of the Bill is unexceptional and is endorsed. The proposed legislation is, however, flawed. In some instances it conflates bureaucratic convenience with the national interest.
- It is so flawed that it should be rigorously evaluated and in places redrafted, for example to correct the egregious provision regarding authorisation by an Administrative Appeals Tribunal member rather than judge. Redrafting is an opportunity to address the concerns of people
- The extraordinarily limited time for public consideration of the Bill and provision of advice to the Committee is deeply regrettable. Fast-tracking fosters unintended perceptions that the Bill has been drafted and introduced on the basis of political expediency. It is axiomatic that community respect for law, for lawmaking and for law enforcement agencies is strengthened through meaningful public consultation. Formulaic reference to "danger" and "threat" does not make the danger any more real and make the erosion of current law any more legitimate.

My recommendation is accordingly that the Committee should engage in a dispassionate and comprehensive scrutiny of the Bill, drawing on community input and discussion within an appropriate timeframe and disregarding the temptation to endorse the Bill on the basis that it is advantageous to be seen to be responding to potential terrorist activity. Australia does need informed policy regarding national security law and practice. Cursory consideration, and Committee endorsement of the

Bill, does *not* foster good policy and does *not* provide an effective basis for improved public understanding.

Basis

The submission is made by Assistant Professor Bruce Baer Arnold. I teach law (in particular privacy, confidentiality and secrecy law) at the University of Canberra. I have published widely in those areas, have made invited submissions to a range of national and state/territory law reform and policy governance bodies, and have been recurrently cited in reports and discussion papers by those bodies.

The following paragraphs do not represent what would reasonably be construed as a conflict of interest.

They do not reflect a political affiliation and are independent of the University of Canberra and civil society organisations. They have informed but are independent of the submission by the Australian Privacy Foundation, a civil society organisation that has no political affiliation and whose board includes leading law academics, legal practitioners and information technology specialists.

Community Engagement

The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Cth) comprises some 158 pages, with an Explanatory Memorandum that occupies 227 pages and involves reference to 22 Commonwealth enactments covering a wide range of activities.

The Bill features provisions that significantly alter Australia's national security framework in ways that are necessarily contentious and require careful consideration. It forms part of a suite of legislation, with the potential for 'law enforcement creep'. (That creep is evident in the AML/CTF provision that gives the Attorney-General's Department access to AUSTRAC information for policy rather than law enforcement reasons.)

When enacted into law it will affect many Australians (for example **all** people entering and leaving Australia, including Members of Parliament and their families). It is not restricted to the handful of individuals who are engaging in terrorist activity, who advocate or actively support terrorist activity or who are perceived by a low-level member of the Australian Federal Police to be 'suspect'.

Community trust in national security policy and administration is fundamental. It is one thing that differentiates Australia as a liberal democratic state – in which government agencies are subject to the rule of law, policymakers are accountable to voters and people are free to openly discuss matters of national importance – from totalitarian regimes. It is axiomatic that legislators ventilate policy issues and trust voters.

The very short period for public comment on the Bill is regrettable. Given the length, complexity and significance of the proposed legislation it would have been highly appropriate to allow a longer period for advice to the Committee by specialist and non-specialist members of the Committee alike.

Failure to provide for a longer period of consultation is not justified by an existential threat to Australia's government and society. Failure disrespects voters and does not foster trust. Instead it encourages perceptions that Australia is headed towards a

'khaki election', ie the management of the Bill is a matter of political opportunism. Such perceptions undermine the legitimacy of the Government and inhibit informed discussion on issues where there is genuine, legitimate disagreement.

Lawfulness and Bureaucratic Convenience

The Explanatory Memo for the Bill recurrently emphasises that action under the proposed legislation will be lawful, reasonable, necessary and proportionate as a response to "grave", "serious" etc threats to the lives of Australians.

Neither I nor most Australians oppose legitimate action by Commonwealth/state police officers and personnel of national security agencies such as ASIO against terrorism. Reiteration of words such as 'lawful' and 'proportionate' do not however make any and all action by those entities legitimate.

I suggest that the Committee scrutinise the provisions in the Bill rather than signing it off at short notice. 'Lawful' in practice is simply a matter of having the requisite number of votes in the two chambers of the national parliament and not acting outside the national Constitution.

The Committee should look hard at provisions that, as in recurrent proposals regarding cybercrime and other offences, are a matter of bureaucratic convenience. Law enforcement agencies inevitably seek a relaxation from rules that they perceive as inhibiting their freedom to act. In some instances their calls for relaxation are endorsed, even strongly promoted by an Attorney-General's Department which we might otherwise expect to offer cautions and to publicly acknowledge that the national interest is not necessarily the same as that of ASIO or the AFP or other agencies. That national interest is evident in legislation that has bounded the operation of the agencies and has been endorsed by the Australian electorate.

Limitations on arbitrary search and seizure and on invasions of privacy may be inconvenient for law enforcement personnel but are an accepted part of Australian law – and what differentiates Australia from states such as Saudi Arabia and Syria. They have been since at least the time of *Entick v Carrington* (1765). The Government has so far not made a persuasive case for erosion of civil liberties. The Committee should be wary about quickly endorsing wide-ranging proposals on the basis that it is assured by the Government that all action will be lawful and will reflect guidelines and a high level of competence on the part of law enforcement personnel.

I have a high respect for and have taught Australian Federal Police and Australian Defence Force personnel. I believe that most are diligent and conscientious. I also believe that they are human. On occasion they make mistakes. A recent example of that is the Australian Federal Police search of the Seven Network's offices, where senior AFP personnel belated admitted 'we got it wrong' ... got it wrong despite what we might assume is diligent and expert advice from within the AFP and within the Attorney-General's Department.

Passports

I note that the 2nd Reading Speech characterises an Australian passport as a privilege of citizenship, rather than a right. In a liberal democratic state that characterisation is abhorrent.

A passport is not a reward for good behaviour. It is not a privilege. It is, with all respect to the Attorney-General, a right ... a right that is accompanied by

responsibilities and that should be respected by the Government and society alike. Our nation is different to East Germany, The USSR and other totalitarian regimes in which a passport was regarded as an extraordinary privilege denied to anyone other members of the elite.

The characterisation is a reminder that Australia has a striking absence of constitutionally enshrined rights. In embedding anti-terrorism and border protection enactments with the broader legal framework we should underpin that law through a justiciable national Bill of Rights. Failure to do so perpetuates the situation that repugnant activity may be quite lawful and 'proportionate', both of which merely require a sufficient degree of party discipline, votes in both chambers of the national legislature and ingenuity in statutory drafting.

National Interest

In some instances the Bill conflates bureaucratic convenience with the national interest, a traditional phenomenon in law enforcement and national intelligence activity but one that must be resisted.

That conflation is unsurprisingly reflected in the Attorney-General's reported statement that the Bill has been "approved" by the Australian Federal Police and the Australian Security Intelligence Organisation. Those agencies may indeed welcome the Bill but approval is a matter for the national legislature, not for officials, the Committee's consideration of the Bill is an opportunity for Parliament to remind the Executive that

The extraordinarily limited time for public consideration of the Bill and provision of advice to the Committee is deeply regrettable and fosters unintended perceptions that the Bill has been drafted and introduced on the basis of political expediency. The Australian community has not been provided with substantive evidence that either the government or Australia as a liberal democratic state face an existential threat, ie one so grave that as a society we should relinquish the rights and responsibilities that differentiate Australia from terrorist groups and from totalitarian states. Recurrent reference in the Explanatory Memorandum to 'danger' and 'threat' is formulaic; recitation does not make the danger any more real and make the erosion of current law any more legitimate.

Most Australians are covered

The Bill has been promoted by the Government as a timely and sensible response.

Although the emphasis is on "lawful" responses to people who are engaged in or foster terrorist activity, it covers all people who enter and depart from Australia using conventional means. (We can assume that some terrorists or intended terrorists will depart by unconventional means, in what might be characterised as reverse people smuggling.)

It includes provisions (Part IAAA) that would allow entry under an assumed identity into the premises of the law-abiding neighbours of suspected terrorists (the threshold for suspicion has been lowered) and for retrospective disclosure – after say six months – to the suspected terrorist that the person's premises have been searched. Such searching includes scope for seizure of laptops and other devices. It includes provision for lawful covert break-ins.

If you are unfortunate enough to live next to a terrorist – or merely someone whom a law enforcement officer suspects is a terrorist – you may find an uninvited national security representative in your bedroom. You should not resist that representative, who will under the Bill be authorised to use force to deal with you and need not provide evidence of that authorisation for several months.

As someone who writes on privacy (for example as a contributor to and former general editor of the leading privacy law practitioner journal) I note the Explanatory Memorandum's recurrent reference to action as being "in accordance" with the Australian Privacy Principles and the Attorney-General's Guidelines. As with the emphasis on "lawful" that is not necessarily a great comfort, particularly given the Government's commitment tyo abolish the Office of the Australian Information Commissioner and the absence of any indication that the Privacy Commissioner will be both adequately resourced and encouraged to actively address privacy complaints.

Governance: the INSLM

The Government's announcement earlier this year that it would abolish the Independent National Security Legislation Monitor (INSLM) was correctly criticised by a range of observers and has sensibly been reversed. The Explanatory Memorandum characterises the INSLM as "vital". The Government's belated acknowledgement of the INSLM – an entity that provides independent, authoritative and practical advice – is commended. Adoption of INSLM recommendations in the Bill is a significant metric of the INSLM's credibility and a demonstration of why the Monitor is needed in future.

I suggest that the Committee strengthen both that acknowledgement and the legitimacy of Australia's anti-terrorism legislative framework by calling on the Government to –

- appoint a new Monitor without delay
- adequately resource the Monitor
- be seen to respect (ie embrace) concerns and recommendations expressed by the Monitor.

There is no point in having a body such as the INSLM if its reports are ignored. Disregard of expressions of concern erodes trust in the overall national security framework and the legitimacy of policymakers.

Governance: the LEO and IGIS

The Bill provides for monitoring of some provisions– eg Part IAAA – by the Commonwealth Ombudsman (as the Law Enforcement Ombudsman (LEO)).

In principle that monitoring invites disrespect as an exercise in 'divide and disregard'. Two matters are of concern.

The first is resourcing of the Ombudsman, an agency that – like the national Privacy Commissioner – has historically and fundamentally been hobbled by under-resourcing. If monitoring is to be meaningful the Ombudsman must not be spread too thin. Funding of the Ombudsman is cost-effective and demonstrates any Government's commitment to the accountability that underpins the Australian community's support for public administration.

The second matter is that the monitoring needs to go beyond mere sighting and publication of statistics.

On that basis it would be both sensible and achievable to place the monitoring responsibility with the Inspector-General of Intelligence & Security (IGIS). That body should be similarly resourced.

Adequate resourcing would foster community trust in both national security policy and in specific legislative provisions, particularly in an environment where there is uncertain protection for whistleblowers and where there are perceptions – so far not allayed by the Attorney-General – that legitimate media reporting and criticism of anti-terrorist activity may attract criminal sanctions.

The Bill features the emphasis on authorisation by the A-G and by AFP/ASIO officers (potentially junior officers) that we have seen in recent proposals, along with an emphasis on agency guidelines (which proved so effective in the AFP search of Seven Network promises regarding the supposed Corby payment) and "important internal safeguards. In my submission I will be expressing concern that action can be authorised by a member of the Administrative Appeals Tribunal (ie someone who is not a judge and indeed may not have a law degree) rather than by a judge or magistrate.

Population Scanning

Schedule 5 (p65 in the Explanatory Memorandum) covers extension of SmartGate and eGates – the biometric 'automated border clearance system' – to cover **all** people entering/leaving Australia, rather than just non-citizens. That extension permits disclosure of information.

The Government has indicated that data collection, storage and disclosure will be 'in accord' with the Australian Privacy Principles under the *Privacy Act 1988* (Cth). Importantly, safeguards under s 258B of the Migration Act will not apply. If you want to know what is taking place you will need to read a sign at the gate or the DIBP website; in practice you will not have a choice as to whether your data is collected, processed and shared.

Given the trust issues noted above and the ongoing creep of national security law a law abiding citizen might credibly presume that in future the data that has been collected 'at the gate' will be used for a range of purposes other than verifying the identity of the person departing Australia.

That perception would be consistent with provision regarding 'advanced passenger processing', under which airlines and operators of maritime vessels will be required to alert the Department of Immigration & Border Protection that a person intends to leave Australia prior to that individual appearing at the gate.

Control Orders

The inclusion under s 104.12(1)(b) of a requirement to alert 'controlled' people to their rights is endorsed as a positive and practical measure.

However, lowering of the threshold for seeking and granting of control orders, ie s 104.2(2)(a), is inappropriate. I suggest that the onus should be on the Attorney-General to substantiate why lowering of the threshold is necessary.

The restriction under s 104.22(3) on use (ie misuse) of biometric information is appropriate and should not be weakened.

Preventive Detention

I have referred to bureaucratic convenience. The Bill emphasises what is in the mind of the reasonable Australian Federal Police officer and the mind of the Attorney-General, rather than in the mind of a court.

I suggest that the Committee in considering preventive detention should be very wary of unsupervised authorisation by an AFP constable. Australian law currently and appropriately provides for short term detention. Longer term detention may well be appropriate but must be embedded within coherent and meaningful safeguards.

There is long-standing recognition in Australian law of safeguards in the form of judicial oversight. Most directly, warrants are authorised by courts rather than by junior law enforcement or national security personnel. That authorisation is appropriate and effective. There has been no credible reporting that courts have refused to authorise properly constituted applications for warrants. There has been no credible reporting that consideration by courts of those applications has resulted in significant delay.

Judicial oversight and authorisation of preventive detention is feasible. It can be given effect, consistent with the previous comment, without fettering judicial discretion. There is no reason to believe that

- a court would refuse a properly constituted request,
- judicial consideration of that request would be so protracted as to endanger public safety (given the existing scope for detention) and
- judicial consideration would pose a high likelihood that sensitive information will be released into the public domain. (We might, in that respect, correctly assume that judges have an understanding of law and national security that equals if not surpasses the understanding of junior AFP personnel.)

Independent authorisation will reinforce trust in the national security regime. It may momentarily inconvenience AFP and ASIO personnel. That inconvenience is however appropriate and is not an impediment in the circumstances that can be inferred from the Explanatory Memorandum.

Does an existential threat justify extraordinary measures

National security and law enforcement legislation in Australia over the past 130 years has been promoted as an essential response to unprecedented, fundamental and immediate dangers to the lives of ordinary Australians and the continuity of Government. History suggests that the Committee should not embrace overheated rhetoric regarding contemporary terrorism. It should look beyond headlines about terrorist outrages and beyond self-interested advocacy by particular agencies or politicians.

Australia does not face an existential threat. Accordingly we should be very wary of ongoing reduction of those freedoms that differentiate us from authoritarian regimes. The Committee may well consider that claims by the Attorney-General, ASIO and the AFP are compelling. In reaching a conclusion it should however do so on an informed

basis, something that requires time and would benefit from advice by entities outside the Executive. Being seen by the community to seek and receive that advice is a foundation of public trust in national security law.

In conclusion I note rhetoric that Australia is entering an unprecedented environment, will be engaged in a 'hundred year war on Terror' (now that we've won the hundred years war on communism) and that as a society we must accordingly abandon or suspend a range of rights.

Those rights – and our respect for the law that articulates and enshrines those rights and responsibilities – are fundamental to being Australian. They should not be disregarded on an ill-considered and opportunistic basis. If we are going to become a 'national security state' we should do so on a fully informed basis – rather than on the basis of claims by law enforcement agencies – and with a community consensus. That requires a sustained and vigorous discourse rather than merely endorsement of a specific Bill or a suite of Bills.