



**Parliamentary Joint Committee
on Intelligence and Security**

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

**Submission by the
Australian Federal Police**

October 2014

Introduction

The Australian Federal Police (AFP) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Bill).

2. This submission follows the AFP's appearance before the Committee on 3 October 2014 and seeks to provide the operational context for the proposed legislative reforms, as well as addressing several key measures contained in the Bill in more detail.

3. The Government has raised the National Terrorism Public Alert level from Medium to High. This reflects security and intelligence agency advice that there is an increased likelihood of a terrorist attack in Australia. The AFP is taking an unprecedented level of operational activity to detect, prevent and investigate terrorist activity both domestically and internationally, to maintain the safety of Australia and the Australian public. Some of these activities have been subject to significant media exposure. These include: the charging of two Brisbane men in relation to foreign incursion and terrorism offences (10 September 2014), Operation APPLEBY (18 September 2014), the police shooting incident in Endeavour Hills (23 September 2014), and the charging of a Melbourne man with terrorism financing offences (30 September 2014). The investigations associated with these activities are ongoing.

4. The AFP strongly supports the package of reforms contained in the Bill. The key measures in the Bill from the AFP's perspective include: strengthening police powers (arrest, delayed notification search warrants and control orders); the new advocating terrorism offence; and foreign evidence reforms. The AFP also considers continued access to preventative detention orders a critical operational response of last resort, to ensure that the AFP can undertake action to quickly disrupt imminent threats.

5. The AFP considers that the measures in the Bill work as an integrated package to address the full breadth of issues posed by foreign fighters. The Bill will address current gaps in the existing legislative regime, enhancing the AFP's ability to identify, prevent, disrupt and prosecute terrorist threats against Australia. While the reforms are not a panacea to the foreign fighter problem, they represent a significant step forward in ensuring the AFP is able to combat terrorism in the changing threat environment.

Changing nature of the terrorist threat environment

6. Until recently, counter-terrorism legislation and operational activities in Australia have predominantly focused on preventing single acts or the activities of identified and structured organisations or associations.

7. Up to this point, domestic counter-terrorism investigations have mainly concentrated on local actors who have shown the intent to act on Australian soil, but lacked, or required time to develop, the necessary capability. The Syria and Iraq conflicts have changed the terrorist threat environment, providing a significant opportunity for Australians to travel overseas and develop the necessary capability to undertake terrorist acts. In addition to this capability, the AFP is concerned that Australian foreign fighters will return further

radicalised and 'hardened' by their experiences fighting overseas. To that end, we must prevent the creation of a cadre of Australians willing and able to engage in terrorism in Australia, recruit others to travel overseas and engage in hostile activities, and raise funding for terrorist organisations.

The need for legislative reform

8. The AFP's ability to effectively respond to terrorist threats depends on legislation which provides an appropriate suite of police powers, offences and procedures which can be applied to achieve the best prevention outcomes, commensurate with the risk posed to the Australian community.

9. Australia's counter-terrorism legislative framework was largely established in 2002 and 2005 and enhanced by subsequent amendments. However, this legislative framework has not kept pace with the changing nature of the terrorist threat environment. The investigation of those directly and indirectly supporting foreign conflicts has tested the limits of the existing legislative framework. The reforms contained in the Bill strengthen the legislative response to dealing with the threat posed by those who engage in or support terrorist activity domestically and abroad.

Key measures in the Bill

10. Terrorism investigations differ from traditional investigations into major or organised crime due to the high risk and threat to public safety, which requires a law enforcement response that takes into consideration all possibilities, balancing prevention, disruption and prosecution.

11. The very nature of the terrorist threat to public safety requires a response which is proactive and prevention-focused. The ability of the AFP, and its State and Territory law enforcement partners, to move swiftly in this prevention role is particularly important given that terrorist attacks can be planned and executed rapidly. It will not always be appropriate for police to delay traditional criminal justice action (ie arrest) until sufficient evidence has been obtained to meet relevant threshold tests. There is a need for special preventative powers (including preventative detention orders and control orders) to operate alongside traditional criminal justice processes in order to effectively respond to and manage terrorist threats.

Arrest on suspicion for terrorism offences

12. Schedule 1 of the Bill will amend the *Crimes Act 1914* and enable the AFP to arrest a person without warrant, where there are reasonable grounds to suspect the person has committed or is committing a terrorism offence or an offence against section 80.2C of the *Criminal Code*. This reform lowers the threshold for arrest in relation to terrorism matters from *belief* on reasonable grounds, to *suspects* on reasonable grounds.

13. The AFP proposed this reform in its submissions to the COAG Review and to the INSLM's inquiry as part of his Fourth Annual Report. The INSLM acknowledged the operational utility of the reform and recommended that the Government give consideration to the merits of the proposal (rec VI/III). Lowering the threshold to suspicion on reasonable grounds is consistent with the approach taken in relation to arrest powers in New South Wales (NSW),

Queensland (Qld), Western Australia (WA), South Australia and the Australian Capital Territory, as well as the United Kingdom (UK) where suspicion-based arrest is considered consistent with Article 5 of the *European Convention on Human Rights*.

Delayed notification search warrants

14. Schedule 1 of the Bill will also amend the Crimes Act by introducing a new delayed notification search warrant (DNSW) regime. DNSW will only be available for the investigation of serious terrorism offences which carry a penalty of seven years imprisonment or more.

15. The AFP proposed this reform in its submissions to the COAG Review and to the INSLM's inquiry as part of his Fourth Annual Report. The INSLM specifically recommended that a DNSW scheme be enacted (rec VI/2). Regimes for DNSW or covert searches are in place in NSW, Qld, Victoria, WA and the Northern Territory, as well as the Canada, the UK and the United States of America.

16. The proposed DNSW regime will allow the AFP to identify and collect information about: other suspects involved in terrorist activity, the proposed location of and methodology for any planned attack, and the means of communication among suspects. In addition, the proposed DNSW regime would give the AFP the opportunity to identify and decipher any encryption techniques a suspect may be using to protect electronic communications. The ability to examine and potentially overcome these techniques without the knowledge of the suspect would facilitate the ongoing lawful monitoring of communications while preserving evidential material.

Preventative detention

17. Traditional law enforcement response (prosecution initiated through arrest and charge) will not always be possible to address an immediate terrorist threat. Alternative measures such as preventative detention orders under Division 105 of the Criminal Code must remain available so that the AFP can take action commensurate with the level of risk to the community, based on the information available at the time.

18. The COAG Review (rec 39) and INSLM Second Annual Report (rec III/4) recommended the repeal of the preventative detention order regime. The INSLM also recommended changes to the regime if preventative detention orders were to be retained (recs III/1-III-3). However, the AFP notes that these recommendations were made *prior to* any use of preventative detention orders in Australia, and prior to the significant recent changes to the terrorist threat environment. The detention of three men under NSW preventative detention order legislation as part of Operation APPLEBY in September 2014 demonstrates, in the AFP's view, the operational utility and necessity of this special preventative power. The AFP considers the retention of the Commonwealth preventative detention regime as a key measure of the Bill.

19. The AFP continues to take the position that preventative detention will remain a tool of last resort and, wherever possible, the AFP will seek to pursue a traditional criminal justice response (arrest, charge and prosecution). Having said this, in the AFP's view, the current terrorist threat environment points to an increase in the likelihood that the police will need to use such powers to take rapid, preventative action to ensure a terrorist attack is not carried out on Australian soil.

20. The current preventative detention order regime does not permit questioning of persons in detention. Further, it is not clear that the AFP can use (as evidence) any information the person may volunteer while in detention. The AFP is not requesting that the legislation should be changed to permit questioning. The purpose of a preventative detention order is *preventative* rather than *investigative*.

Control orders

21. The advantage of the control order regime is that it is a preventative measure which has the flexibility to be tailored (through specifically imposed conditions) to the particular threat the individual is suspected of posing to the community. The use of control orders in appropriate circumstances allows police to effectively monitor the person's movements and minimise the risk of future terrorist activity. The AFP considers that control orders remain a necessary and proportionate preventative measure and form an important part of the counter-terrorism toolkit. The AFP notes that the COAG Review supported the retention of the control order regime (rec 26) and is pleased that the Bill would allow the control order regime to continue.

22. Currently, the control order regime is directed at persons posing a threat of a terrorist act or who have trained with a listed terrorist organisation (the issuing criteria) *and* where the purpose of the conditions to be imposed by the order is to *prevent a terrorist act*. The Bill will expand the regime to include: persons who have participated in training with listed terrorist organisations; persons who have engaged in hostile activities overseas (foreign fighters) and persons convicted of certain Australian and foreign terrorism offences. The court will still only be able to make an order where it is satisfied that the conditions to be imposed are for the purpose of preventing a terrorist act.

23. The Bill will also make other amendments to the regime. This includes changing the state of mind required of the applicant (AFP) from *considers* on reasonable grounds to *suspects* on reasonable ground. While technically this lowers the threshold for the applicant, it does not change the threshold the court needs to be satisfied of. The Bill also implements COAG Review recommendations in relation to setting a maximum on the curfew period which can be imposed under a control order (rec 34) and requiring the AFP, when serving a control order, to advise the person of appeal and review rights (rec 32). The AFP supports these amendments and considers that they will enhance the operational utility of the control order regime.

24. The AFP continues to consider the application of the control order regime to current counter-terrorism investigations. In light of recent operational experience, the AFP is of the view that further urgent refinements to control order legislation are necessary to address the current terrorist threat environment.

25. For example, the application process for control orders as set out in the current legislation is complex and time-consuming. The AFP considers that this process could be streamlined in a way that does not detract from any important accountability mechanisms or safeguards. One option for reform relates to refining the documentation to be provided to the Attorney-General (in seeking consent to apply for an interim control order) and to the court (in applying for an interim control order).

26. Currently, the legislation practically requires the AFP to have its entire case ready – akin to a brief of evidence – before seeking an interim control order. In a live operational environment, the AFP will be trying to manage a known terrorist threat, but will still be working through the information that has been collected as the result of search warrants, and is still be collected by investigators and intelligence officers.

27. In addition, when making an interim control order, the court must set a date for the confirmation hearing "as soon as practicable", but not earlier than 72 hours after making the interim order. This is designed to allow the respondent time to prepare materials to challenge the control order. The AFP does not seek to unnecessarily delay the confirmation hearing. However, the AFP considers that it should be open to the court, in setting the date for the hearing, to take into account any particular needs of the respondent or the AFP in preparing their case. For example, the respondent may need time to seek legal assistance, translate the order and gather material to support their case. The AFP may also need time to convert material relied upon at the interim stage into evidential form, collect additional material in relation to the order (including from overseas) or translate documents.

28. Another example of potential additional reform relates to expanding the preventative purposes for which a control order can be applied. As discussed above, a court can currently only issue a control order for the purposes of preventing a *terrorist act*. This will not change as a result of reforms contained in the Bill even though the issuing criteria are being expanded. This means that control orders would not be available where a person has engaged in conduct which falls just short of directly engaging in training or hostile activity overseas or who is supporting or facilitating terrorist acts (but not directly committing such acts). More importantly, control orders would not be available where the purpose of the order is to prevent persons supporting or facilitating terrorist acts or hostile overseas activity.

29. From an operational perspective, the risk posed by individuals engaging in behaviours that support or facilitate terrorism or foreign incursions is as great as the risk posed by persons engaging in terrorist acts or foreign incursions. The AFP considers that the overriding purpose of the control order regime should be to prevent terrorism. This means targeting both persons directly committing acts of terrorism or hostile activities overseas, and persons who provide critical support to those activities (without whom the act or hostility would not be possible). Preventing or disrupting those providing support is just as important and effective as preventing/disrupting acts of terrorism or hostility themselves.

New offence of advocating terrorism

30. The new offence in proposed section 80.2C of the Criminal Code will apply where a person intentionally advocates the doing of a terrorist act or commission of a terrorism offence, reckless as to whether another person will engage in a terrorist act or commit a terrorism offence.

31. The AFP is very concerned about the impact those who advocate terrorism have on the foreign fighter problem. Terrorist acts and foreign incursions generally require a person to have three things: the capability to act, the motivation to act, and the imprimatur to act (eg endorsement from a person with authority). The new advocating terrorism offence is directed at those who supply the motivation and imprimatur. This is particularly the case where the person advocating terrorism holds significant influence over other people who sympathise with, and are prepared to fight for, the terrorist cause.

32. Where the AFP has sufficient evidence, the existing offences of incitement (section 11.4 of the Criminal Code) or the urging violence offences (in Division 80 of the Criminal Code) would be pursued. However, these offences require the AFP to *prove* that the person intended to urge violence or a crime and *intended* the crime or violence to be committed. There will not always be sufficient evidence to meet the threshold of intention in relation to the second aspect. This is because persons advocating terrorism can be very sophisticated about the precise language they use, even though their overall message still has the impact of encouraging others to engage in terrorist acts.

33. In the current threat environment, returning foreign fighters, and the use of social media, is accelerating the speed at which persons can become radicalised and prepare to carry out terrorist acts. In the AFP's view, it is no longer the case that explicit statements (which would provide evidence to meet the threshold of intention) are required to inspire others to take potentially devastating action in Australia or overseas. The cumulative effect of more generalised statements when made by a person in a position of influence and authority, can still have the impact of directly encouraging others to go overseas and fight or commit terrorist acts domestically. This effect is compounded with the circulation of graphic violent imagery (such as beheading videos) in the same online forums as the statements are being made. The AFP therefore require tools (such as the new advocating terrorism offence) to intervene earlier in the radicalisation process to prevent and disrupt further engagement in terrorist activity.

Foreign evidence amendments

34. Schedule 1 of the Bill amends the *Foreign Evidence Act 1994* (FEA) to enable material obtained on an agency-to-agency basis to be adduced in circumstances where obtaining the material under mutual assistance (MA) is not available. The reforms will also mean that the normal rules of evidence, which apply to adducing and admitting foreign material, will not apply.

35. The AFP raised the need for reforms to the FEA in its submission to the INSLM Fourth Annual Report inquiry. The INSLM recommended that consideration be given to amendments to relevant legislation so as to permit the collection of information, and its admission into evidence, from foreign countries, where the political circumstances or states of conflict render impracticable for the making of a request of the government of that country, for assistance in gathering evidence (rec IV/2).

36. Currently, foreign evidence must be obtained under MA and meet domestic rules relating to admissibility. This has created genuine issues for the AFP, meaning that particular material cannot be led in terrorism prosecutions, leading to pursuing lesser offences or not proceeding with a prosecution at all. The nature of the Syria and Iraq conflicts will heighten the difficulties the AFP has already experienced relating to collecting evidence in admissible form and meeting MA requirements.

37. The AFP strongly supports the reforms to the FEA, but note that their utility does not change the need for other measures in the Bill in relation to increased police powers and changes to the criminal offence framework.