

The Senate

Legal and Constitutional Affairs
Legislation Committee

Counter-Terrorism Legislation Amendment
(Foreign Fighters) Bill 2014

October 2014

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Majority report

1.1 The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Bill) was introduced into the Senate by the Attorney-General, Senator Brandis, on 24 September 2014.¹ On the same day, the Attorney-General referred the Bill to the Parliamentary Joint Committee on Intelligence and Security pursuant to subsection 29(1)(b)(i) of the *Intelligence Services Act 2001*. The next day, the Senate (on the recommendation of the Selection of Bills Committee) referred the Bill to the Senate Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report.² Both the Parliamentary Joint Committee and this committee were due to make their reports by 17 October 2014.

1.2 The Bill is the second of three pieces of legislation that have been introduced in the context of current threats to national security. The first, the National Security Legislation Amendment Bill (No. 1) 2014,³ was passed by the Senate on 25 September and by the House of Representatives on 1 October.⁴ The third, which is to be introduced later this year, will mandate the retention of metadata by telecommunications and internet service providers.⁵

1.3 As noted above, the Bill has been referred to this committee and also to the Parliamentary Joint Committee on Intelligence and Security. That committee has made a public call for submissions and has held public hearings. This committee's website will direct interested parties to the relevant Parliamentary Joint Committee on Intelligence and Security inquiry webpage.

1.4 Given that the Bill, which primarily concerns intelligence and security matters, has already been referred to the Parliamentary Joint Committee on Intelligence and Security, the committee has decided not to duplicate the work of that committee by conducting a parallel inquiry.

Senator the Hon Ian Macdonald Chair

¹ *Journals of the Senate*, No. 55—24 September 2014, p. 1487.

² *Journals of the Senate*, No. 56—25 September 2014, pp. 1506-1507.

³ This bill aims to 'modernise and improve the legislative framework that governs the activities of the Australian Intelligence Community', especially the *Australian Intelligence Organisation Act 1979* and the *Intelligence Services Act 2001*: Replacement Explanatory Memorandum, National Security Legislation Amendment Bill (No. 1) 2014, p. 2.

⁴ *Journals of the Senate*, No. 56—25 September 2014, p. 1535; House of Representatives, *Votes and Proceedings*, No. 71—1 October 2014, p. 870.

⁵ Senator the Hon George Brandis, Attorney-General, 'George Brandis joins Insiders', Interview with Barrie Cassidy, 14 September 2014.

Additional comments by the Australian Labor Party

1.1 The Australian Labor Party is deeply concerned by the failure of the Legal and Constitutional Affairs Legislation Committee to fulfil the duties that it has assumed to the Senate to inquire into and report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.

1.2 On 25 September 2014, the Senate Standing Committee for the Selection of Bills recommended to the Senate that the Bill be referred to this committee for inquiry and report by 17 October 2014.¹ Appendix 2 of the Selection of Bills Committee's report recommended that the Bill be referred to this committee because it is a '[s]ignificant piece of national security legislation'.²

1.3 In the debate that followed the tabling of the report in the Senate chamber, it was made clear that any inquiry held by this committee would be 'concurrent' to that being held by the Parliamentary Joint Committee on Intelligence and Security.³ The Senate was fully aware of this fact, therefore, when it referred the Bill to this committee without division.⁴

1.4 Despite the fact that the Senate clearly expressed its will that this committee inquire into and report on the Bill concurrently with the Parliamentary Joint Committee on Intelligence and Security, this has not occurred. This committee has, therefore, expressly refused to do that which the Senate has explicitly asked it to do.

1.5 The committee system of the Australian Senate is well-established. It is an effective way of, *inter alia*, reviewing legislation that the government presents to the Parliament. It allows the Senate to satisfy itself that the legislation is worthy of passage, and to explore possible amendments.

1.6 It is well-established procedure that, when the Senate refers a Bill to a committee 'for inquiry and report', inquiry and report should occur. The Australian Labor Party regrets that this committee has failed to follow this well-established procedure in this case.

Senator Jacinta Collins
Deputy Chair

1 *Journals of the Senate*, No. 56—25 September 2014, p. 1506.

2 *Senate Hansard*, 25 September 2014, p. 23.

3 *Senate Hansard*, 25 September 2014, pp. 27-28.

4 *Senate Hansard*, 25 September 2014, p. 28.

Dissenting Report of the Australian Greens

Executive summary

1.1 This is a significant and complex piece of legislation which will have long term impacts on how ordinary Australians go about their lives – including whether and where people travel, the circumstances in which people can be detained and questioned by ASIO, customs officials or the police, and what kind of personal information is collected at the airport.

1.2 The safety and security of the Australian community is of paramount importance to the Australian Parliament and the Australian Greens. However, the Parliament has been given a completely inadequate timeframe to even begin to understand some of the most significant counter-terrorism changes in our lifetime. The Australian Greens believe this is irresponsible and anti-democratic.

1.3 The agencies established to identify, investigate and address threats to national security already have a vast array of intelligence gathering and investigative powers, accompanied by an extensive list of criminal offences designed to criminalise terrorist-related conduct.

1.4 This Bill seeks to significantly expand the existing regime with consequences for the broader community in ways that cannot be fully determined in the time allocated for this Inquiry.

1.5 It is the recommendation of the Australian Greens that the bill should not be passed in its current form.

1.6 We believe the inquiry period should be extended and parliamentary debate postponed until a more extensive report can be produced.

1.7 The new offence of entering or remaining in a 'declared area' should be removed from the legislation or amended to incorporate a fault element by specifying some illegitimate purpose.

1.8 The proposed new offence of advocating terrorism duplicates and unnecessarily expands existing criminal offence provisions.

1.9 Preventative detention orders should be removed from the Criminal Code and control orders amended in line with recommendations by the Independent National Security Legislation Monitor.

1.10 The Australian Greens also oppose the Schedules in this Bill that seek to expand the collection, use and sharing of biometric material in airport passenger processing systems.

1.11 We also seek amendments to powers to suspend travel documents to bring the timeframes into line with expert advice and increase transparency and accountability as well as removing provisions to allow the cancellation of welfare payments.

1.12 Our dissenting report also covers a number of other concerning features of this legislation and recommends these measures not be passed without further

consideration. This includes delayed notification search warrants, and safeguards against the use of foreign evidence derived from torture in Australian courts.

Introduction

1.13 The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 ('the Bill') is a significant and complex piece of legislation which, if passed, will have serious implications for the rights and freedoms of Australians. The Australian Greens support proper parliamentary scrutiny of this legislation, including a robust inquiry which offers legal experts and relevant stakeholders the opportunity to analyse and provide comment on the Bill.

1.14 The failure to provide adequate opportunity for this Parliament and the Australian community to even begin to understand some of the most significant counter-terrorism changes in our lifetime is irresponsible and anti-democratic. The trump card of national security must not be played so as to undermine the most basic tenets of our parliamentary democracy.

1.15 The Bill was introduced into the Senate by the Attorney-General, Senator Brandis, on 24 September 2014. On the same day, the Attorney-General referred the Bill to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) pursuant to subsection 29(1)(b)(i) of the *Intelligence Services Act 2001*. On 25 September 2014, the Senate (on the recommendation of the Selection of Bills Committee) referred the Bill to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report. Both the PJCIS and this committee were due to table their reports by 17 October 2014.

1.16 The Australian Greens opposed the subsequent decision of the government-dominated Legal and Constitutional Affairs Legislation committee not to call for or accept submissions, nor hold hearings into the Bill. This refusal to hold a full inquiry effectively renders the Senate's decision to refer the Bill to that committee meaningless.

1.17 The Australian Greens are excluded from the Parliamentary Joint Committee on Intelligence and Security (as are any Senators or MPs who are not from Labor or the Coalition parties) and, as such, have had no avenue to explore this Bill through a full committee inquiry process. The PJCIS does not reflect the make-up of the Senate and the report of that Committee does not represent the views of the Australian Greens.

1.18 The timeframe for submissions and inquiry into the Bill through the PJCIS was grossly inadequate given the significant and complex nature of this legislation. The Australian Greens understand the importance of listening to the legal experts and stakeholders who specialise in this area. Many of the submissions made to the PJCIS expressed dissatisfaction with the inadequate timeframe allowed for submissions.¹

1 For example, see *Submission 12*, p. 46; *Submission 7*, p. 3; *Submission 19*, p. 1; *Submission 13*, p. 3; *Submission 16*, p. 1. Note: As the committee refused to accept submissions in relation to this inquiry, all submissions referred to in this report are submissions to the inquiry of the Parliamentary Joint Committee on Intelligence and Security into this Bill.

Indeed, the public had only seven business days in which to provide a submission. This is particularly relevant given the haste in which the PJCIS recently inquired into the National Security Legislation Amendment Bill (No.1) 2014.

Inadequate Parliamentary Scrutiny

1.19 Each Schedule of this Bill requires careful, thorough scrutiny to ensure that the measures proposed focus exclusively on the legitimate need to protect the Australian community, and do not impose an unjustified or disproportionate burden on the rights and freedoms of individuals who pose no security risk or harbour no criminal intent. Such scrutiny has been precluded by the unreasonably short time frames imposed in respect of this inquiry and that conducted by the PJCIS.

1.20 The adoption of such short time frames has been explained by reference to the urgent need to address the danger posed by returning foreign fighters. However, as highlighted in a number of submissions made to the PJCIS Inquiry,² many of the provisions in the Bill cannot be characterised in this way.

1.21 In particular, a number of reforms proposed in the Bill seek to extend by a further ten years sunset clauses on certain law enforcement and intelligence gathering powers which are not due to expire for more than a year. This means that they are currently available to the authorities and will continue to be so for at least another 12 months. As the Gilbert + Tobin Centre for Public Law submission explains, 'these reforms are not specifically targeted at the threat posed by foreign fighters, and instead relate to the extension of powers that were enacted after the London bombings in July 2005'.³ These powers, which include the power to detain a person or to restrict a person's movements and associations prior to any criminal charge being laid, are exceptional in character and depart from established principles of criminal law.⁴ A number of these powers have also been found by independent review bodies to be unnecessary or in need of reform.⁵

1.22 These, and all other features of the current Bill demand careful and thorough scrutiny by those experts best placed to assess necessity and effectiveness, in light of their intrusive impact on individual rights.

1.23 This approach is especially appropriate given that an Independent National Security Legislation Monitor has not yet been appointed and therefore that office is unable to participate in the current inquiry. The office of the Monitor was established to help ensure that Australia's national security legislation is in fact effective in deterring and preventing terrorism and terrorism-related activity which threatens

2 For example, see *Submission 3*, p. 2; *Submission 2*, p. 2; *Submission 7*, p. 3; *Submission 12*.

3 *Submission 3*, p. 2.

4 For a description of these powers and their relationship to established principles of criminal law, see *Submission 12*, Attachment A.

5 For example, see Independent National Security Legislation Monitor, *Declassified Annual Report* (2012), pp. 44, 67; Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013), p. 68; *Submission 3*, p. 3; *Submission 12*, pp. 7, 21-24.

Australia's security as well as being consistent with Australia's international obligations under international law and contains appropriate safeguards for protecting the rights of individuals.⁶ It is deeply regrettable that the office should remain vacant at a time of the most significant legislative reform in this area for almost a decade.

1.24 It is also deeply troubling that other independent bodies with expertise in this area, including the Inspector General of Intelligence and Security and the Office of the Australian Information Commissioner, have been precluded from providing the type of comprehensive, careful analysis on which this Parliament depends when evaluating the necessity, effectiveness and impact of counter terrorism laws.

Recommendation 1

1.25 A suitably qualified, fully funded Independent National Security Legislation Monitor should be appointed as a matter of urgency.

Recommendation 2

1.26 The time frame for the current Inquiry should be extended and the Bill should not be debated by the Parliament until that inquiry has concluded.

Specific concerns about the Bill

1.27 This Bill makes changes to over 20 existing Acts, introduces a range of new and very serious criminal offences, extends the scope of many other existing criminal offences and significantly expands the range and scope of powers available to law enforcement and intelligence gathering agencies.

1.28 These changes are being pursued without adequate consideration of the broad range of existing offence provisions and powers that are currently already available to such agencies to protect the Australian community against threats to national security, and without a careful analysis of whether each individual reform proposed is a necessary and proportionate response to the current threat posed by the return of foreign fighters to Australia.

1.29 Notwithstanding the completely inadequate opportunity provided for this committee to inquire into the Bill, and despite the fact that the PJCIS (through no fault of its own) only gave submitters seven business days in which to make submissions,⁷ that committee nonetheless received a number of impressively detailed submissions. Many of them complained about the limited time that they had been given to review the Bill and its Explanatory Memorandum (which together run to almost 400 pages), describing this level of public review as 'deeply regrettable'⁸ and 'grossly inadequate',⁹

6 *Independent National Security Legislation Monitor Act 2010* (Cth), section 3.

7 The PJCIS released a Media Alert calling for public submissions on 25 September 2014. Submissions closed at midday on 3 October 2014.

8 *Submission 19*, p. 1.

9 *Submission 16*, p. 1.

and also part of 'an established pattern of counterterrorism legislation being forced through'.¹⁰

1.30 Many of the Australian Greens' concerns about this legislation are similar to those expressed in submissions to the PJCIS by the Law Council of Australia,¹¹ the Castan Centre for Human Rights,¹² the Gilbert + Tobin Centre for Public Law,¹³ the Human Rights Law Centre¹⁴ and the Australian Human Rights Commission.¹⁵

New offence of entering or remaining in a 'declared area'

1.31 The new offence for entering or remaining in a 'declared area' is of particular concern. It is an extraordinary offence that criminalises the act of travelling to a certain place, rather than targeting concerning behaviour, such as participating in violence or conflict overseas which is already any offence under Australian law. As a result, this new offence is likely to criminalise a range of legitimate behaviours and has the potential to significantly affect Australians' freedom of movement.¹⁶ It will operate so as to render any person who has travelled to an area, declared by the Minister, liable to face criminal charges upon return, regardless of the purpose of that travel. A person charged with this offence must then actively prove on the balance of responsibilities that he or she has a legal defence, namely that the travel was solely for a specified 'legitimate reason'. As the Gilbert + Tobin Centre and the Law Council of Australia submitted, 'legitimate reason' is narrowly framed and may not include, for instance, travel to a foreign country for religious reasons (pilgrimage) or to visit friends, for research and teaching purposes or to give legal advice.¹⁷ The offence also ignores the very real practical difficulties people may face in terms of gathering relevant evidence to establish that their travel was solely for a legitimate purpose, particularly in regions experiencing a breakdown in government administration such as Syria or Iraq.¹⁸

1.32 Also of significant concern is the chilling effect of this offence on freedom of movement in Australia, particularly for members of the Australian community with family or friends located in regions experiencing conflict. The idea of visiting loved ones in such regions would be irreparably infused with the fear and uncertainty of facing criminal sanctions upon return, regardless of how prosecutorial discretion may be applied to the new offence. This in turn may operate to further entrench

10 *Submission 17*, p. 1.

11 *Submission 12*.

12 *Submission 17*.

13 *Submission 3*.

14 *Submission 18*.

15 *Submission 7*.

16 *Submission 7*, pp. 10-11.

17 *Submission 12*, *Submission 3*.

18 *Submission 12*, *Submission 3*.

experiences of alienation in the very communities that Australia most relies upon to assist in the prevention of domestic security risks, including radicalisation.

1.33 Given the exceptional and intrusive nature of this new offence, it is incumbent upon the government to demonstrate why it is necessary, having regard to the range of existing offences designed to criminalise conduct which amounts to participating in or inciting violence or political conflict overseas. This responsibility has yet to be discharged. In particular, insufficient information has been provided to explain why the existing foreign incursion offences, which already make it an offence to engage in or prepare for 'hostile activity' overseas (such as armed hostilities or destruction of property), are inadequate to guard against the threat posed by foreign fighters returning to Australia, particularly in light of the range of investigative and surveillance powers these offences attract, and the fact that such offences will be significantly expanded in scope, and attract life sentences, should this Bill pass.

Recommendation 3

1.34 Proposed section 119.2 of the Criminal Code should be removed from the Bill.

Recommendation 4

1.35 If this recommendation is not accepted, a fault element should be established in the offence. This could be achieved by specifying some illegitimate purpose (such as an intent to engage in terrorism-related activity, 'hostile activity' or other activity listed by regulation) as an element of the offence contained in proposed section 119.2. An alternative approach would be specifically to provide that the offence does not apply to a person if that person enters, or remains in, an area solely for a purpose or purposes not connected with engaging in hostile activities. Subject to these changes, the range of 'legitimate purposes' set out in the defence provision should also be expanded to include providing legal advice to a client; making a bona fide visit to a friend, partner or business associate; performing bona fide business, teaching and/or research obligations; and any other purpose considered by the court to be legitimate having regard to the circumstances of the case.

New offence for advocating terrorism

1.36 The Bill would establish a new offence with a maximum of five years' imprisonment where a person intentionally advocates the doing of a terrorist act or terrorism offence and is reckless as to whether another person will engage in that conduct as a result. The definition of 'advocates' is broad and includes situations where a person 'promotes' or 'encourages' the doing of a terrorist act or terrorism offence.

1.37 Legal experts have to date expressed concern at the broad scope of the proposed new offence and queried why it is needed, given the broad range of existing terrorism-related offences. For example, the Law Council submitted that it is already an offence to urge another person to engage in inter-group violence or violence against members of groups or to recruit others to join terrorist organisations

or organisations engaging in hostile activities against foreign governments.¹⁹ Existing incitement offences already cover a person who urges the commission of an offence, such as a terrorist-related offence. It is also already an offence to be a member of or provide support to a terrorist organisation.

1.38 As the Gilbert+Tobin Centre explained in its submission to the PJCIS inquiry, unlike the proposed new offence, these existing offences generally require a person's words to operate directly on an intended audience in some way and generally require the person to intend to cause another to behave in a certain way.²⁰ In contrast, by including the term 'promotes' the new offence could encompass a general statement of support for terrorism that is posted online, with no particular audience in mind. The new offence also only requires the person to be reckless as to whether their words will cause another person to engage in terrorism, rather than intending to cause this result.

1.39 Although the new offence would include a 'good faith' defence to cover legitimate expressions by artists or writers and genuine debate of issues in the public interest, concerns have been raised that due to uncertainty in the scope of key terms such as 'promotion' the offence may have a chilling effect on an individual's ability to legitimately comment on issues relating to topics of public interest such as politically and religiously motivated violence. As the Gilbert + Tobin Centre submitted '[i]n any conflict there will be difficult lines as to what acts it is legitimate to encourage or promote, but clearly there should be scope in a free democratic society to adopt differing viewpoints on such difficult and divisive issues.'²¹

1.40 The Australian Greens consider that the proposed new offence of advocating terrorism duplicates and unnecessarily expands existing criminal offence provisions that already capture conduct or speech that advocate the commission of terrorist acts.

Recommendation 5

1.41 The Australian Greens consider that the proposed new offence of advocating terrorism duplicates and unnecessarily expands existing criminal offence provisions that already capture conduct or speech that advocates the commission of terrorist acts. If the proposed new offence is pursued, it should be amended to provide that the fault element required is intention (rather than recklessness); and to remove the term 'promotes' from definition of 'advocates'.

Sunset clauses

1.42 The Australian Greens have concerns about the extension of sunset provisions for control orders, preventative detention orders (PDO),²² ASIO's questioning and detention warrant powers,²³ and certain stop, search and seizure powers relating to

19 *Submission 12*, p. 16.

20 *Submission 3*, p. 13

21 *Submission 3*, p. 14.

22 *Criminal Code Act 1995* (Cth), sections 104.32 & 105.53.

23 *Crimes Act 1914* (Cth), section 3UK.

terrorism offences available to the police under the Crimes Act.²⁴ These powers are due to expire in December 2015 and July 2016, subject to the passage of this Bill which seeks to extend the operation of these powers for a further ten years.

1.43 As noted above, these are exceptional powers that allow authorities to operate outside the traditional criminal justice process²⁵ for example by permitting restriction of liberty of people not charged with or even suspected of engaging in a criminal offence. They have been subject to careful review by a number of independent bodies including the INSLM and the 2012 COAG Review of Counter-Terrorism Measures ('the COAG Review'). Both of these bodies considered whether these powers remained necessary and effective tools to counter terrorism, having regard to whether and when they had been used and information provided by law enforcement and intelligence agencies.

1.44 Both the INSLM and the COAG Review recommended that the PDO regime be repealed, describing the PDO regime as being 'at odds with our normal approach to even the most reprehensible crimes'²⁶ and may be thought to be 'unacceptable in a liberal democracy'.²⁷ The INSLM also recommended the replacement of the control order regime with a regime that would permit restrictions of liberty for people previously convicted of terrorist related offences, observing that 'control orders in their present form are not effective, not appropriate and not necessary'.²⁸ Similar comments were made by the former Parliamentary Joint Committee on ASIO, ASIS and DSD in an earlier inquiry about the ASIO's questioning and detention powers. That committee suggested that the ASIO powers 'would undermine key legal rights and erode the civil liberties that make Australia a leading democracy'.²⁹

1.45 The reforms proposed in this Bill ignore these recommendations and preclude the opportunity for further review of these powers such as by the PJCIS, which is required to review the operation, effectiveness and implications of ASIO's questioning and detention warrant powers by 22 January 2016.

1.46 Of further concern are those aspects of the Bill that extend the reach of these powers, for example by making it easier for the police to obtain and enforce control orders.

24 *Australian Security Intelligence Organisation Act 1979* (Cth), section 34ZZ.

25 *Submission 3*, p. 2.

26 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012), pp. 44, 67.

27 Australian Government, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013), p. 68

28 Independent National Security Legislation Monitor Annual Report (20 December 2012), p 1.

29 Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002), p. vii.

Recommendation 6

1.47 Those aspects of the Bill that extend the current sunset clauses relating to control orders, PDOs, stop and search, and ASIO's questioning and detention warrant regime should be removed from the Bill.

Recommendation 7

1.48 The PDO regime should be removed from Division 105 of the Criminal Code and the control order regime in Division 104 be amended in line with the relevant recommendations made by the Monitor in his 2012 report.

Suspension of travel documents

1.49 At present, the Minister for Foreign Affairs may cancel a person's Australian travel document³⁰ at the request of an ASIO officer if the officer 'suspects on reasonable grounds' that the person 'would be likely' to engage in conduct that 'might prejudice the security of Australia or a foreign country'.³¹ There are provisions for the surrender of 'foreign travel documents', including foreign passports, on similar grounds.³²

1.50 The Bill seeks to supplement these existing provisions by empowering the Minister to suspend Australian³³ and foreign travel documents for 14 days³⁴ at the request of an ASIO officer, where that officer believes on reasonable grounds that the person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country; and suspension of travel documents is necessary to prevent the person from engaging in the conduct'.³⁵

1.51 Suspension decisions may not be challenged under the *Administrative Decisions (Judicial Review) Act*, nor may the adverse security assessment leading to the suspension of an Australian passport be reviewed in the Security Division of the Administrative Appeals Tribunal (where other adverse security assessments may be challenged).³⁶ The only form of review available would appear to be in the High Court under section 75(v) of the *Constitution*.

1.52 This proposal is objectionable for a number of reasons.

1.53 First, the Explanatory Memorandum justifies these changes on the basis that they 'implement several recommendations of the [Independent National Security

30 *Australian Passports Act 2005*, section 22(2)(d).

31 *Australian Passports Act 2005*, sections 14 & 18.

32 *Foreign Passports (Law Enforcement and Security) Act 2005*, sections 15 & 16.

33 The Bill, Schedule 1, Item 21 (proposed section 22A(1)).

34 The Bill, Schedule 1, Item 21 (proposed section 22A(1)).

35 The Bill, Schedule 1, Item 21 (proposed section 22A(2)).

36 The Bill, Schedule 1, Item 34.

Legislation Monitor's] Fourth Annual Report'.³⁷ The submission of the Attorney-General's Department repeated this assertion.³⁸ It is misleading.³⁹ While a form of temporary suspension power was supported by the Monitor, he also made it clear that, as a 'trade-off' for the harshness of the scheme, there 'would *need to be* a strict timeframe' (emphasis added).⁴⁰ The Monitor suggested an initial suspension period of 48 hours, which could be extended by further suspensions of up to 48 hours at a time for a maximum period of seven days.

1.54 Contrary to this recommendation, the Bill seeks to implement an initial suspension timeframe that is seven times longer than recommended and a maximum suspension time that is double what was recommended.

1.55 The Monitor also argued that, if the suspension expired without ASIO issuing an adverse security assessment, ASIO should be required to pay any travel costs lost by the person by reason of the suspension (i.e. airline tickets, accommodation etc.).⁴¹ The Bill makes no provision for this.

1.56 The Explanatory Memorandum does not justify why these safeguards recommended by the Monitor have not been included in the Bill beyond the vague and unsupported assertion that a 14-day suspension 'is necessary to ensure the practical utility of the suspension period'.⁴² In those circumstances, the Australian Greens believe that it is fundamentally dishonest to describe these provisions as 'implementing several recommendations' made by the Monitor.⁴³

1.57 Secondly, it is concerning that the threshold and the level of review available are both lower for a suspension request than for a cancellation request.⁴⁴ The Australian Greens appreciate that this is a temporary power, but agree with the concerns raised by the Law Council of Australia that allowing essentially unreviewable suspension decisions to be made where there is a suspicion that harmful conduct is merely possible (as opposed to a suspicion that such conduct is likely) is granting too much power with too little review.⁴⁵

1.58 Third, there are insufficient safeguards to prevent ongoing multiple suspensions. The Bill states that subsequent suspension requests must be made on grounds that include information ASIO obtained after the end of the previous suspension. In circumstances where there is virtually no scope for reviewing ASIO's

37 Explanatory Memorandum, p. 80.

38 Attorney-General's Department, *Submission 8*, p. 11-12.

39 See *Submission 3*, pp. 20-21.

40 Independent National Security Legislation Monitor, *Annual Report (2014)*, p. 48.

41 Independent National Security Legislation Monitor, *Annual Report (2014)*, p. 48.

42 Explanatory Memorandum, p. 13.

43 See *Submission 3*, pp. 20-21; *Submission 12*, pp. 25-26.

44 *Submission 12*, p. 26. See also *Submission 2*, p. 2.

45 *Submission 12*, p. 26.

requests, nor the suspensions made pursuant to them, this is insufficient.⁴⁶ The fact that the Explanatory Memorandum says that these provisions are 'not intended to allow for consecutive rolling suspensions'⁴⁷ does not change the fact that they do.

1.59 Fourthly, as noted by the Inspector-General of Intelligence and Security, the amendments would allow the Minister for Foreign Affairs to delegate his or her passport suspension powers to *any person*.⁴⁸ This would allow the Minister for Foreign Affairs to delegate the power to an officer of ASIO itself.⁴⁹ If this were to happen, ASIO would be a law unto itself insofar as the suspension of passports were concerned. The Australian Greens strongly recommend that this possibility be removed.

1.60 Finally, the Inspector-General of Intelligence and Security pointed out in her submission to the PJCIS that the way in which these provisions have been drafted makes it very difficult for her to exercise her oversight functions.⁵⁰ In particular, proposed section 22A of the *Australian Passports Act 2005* specifies that 'ASIO may request the Minister to suspend all Australian travel documents issued to a person if it suspects on reasonable grounds' that certain enumerated circumstances are present. The Inspector-General noted that:

From an oversight and review perspective it will be difficult to establish that ASIO the organisation has a reasonable suspicion. Better practice would be for the legislation to provide that the request come from an individual (such as the Director-General or a Deputy Director-General of Security). That individual could then be held accountable for establishing the reasonable basis for their suspicion.⁵¹

1.61 The Inspector-General confirmed at a hearing of the PJCIS that her office had been unable to find a precedent for this.⁵²

1.62 The Australian Greens share the concerns of the Inspector-General and, if these provisions are to be passed, recommend that the provision be amended in line with the recommendations made by Inspector General and the Monitor.

Recommendation 8

1.63 The proposed new power to suspend travel documents should be amended to:

46 *Submission 12*, pp. 26-27.

47 Explanatory Memorandum, p. 82.

48 *Submission 1*, p. 8.

49 *Submission 1*, p. 8.

50 *Submission 1*, p. 7.

51 *Submission 1*, p. 7.

52 Inspector-General of Intelligence and Security, *Committee Hansard*, 2 October 2014, p. 4.

- **provide for an initial suspension period of a maximum of 48 hours, which could be extended by further suspensions of up to 48 hours at a time for a maximum period of seven days;**
- **remove the power for the Minister for Foreign Affairs to delegate his or her passport suspension powers to *any person*; and**
- **make it clear that a request to suspend a travel document must be made by an individual ASIO officer, so as to ensure appropriate oversight of relevant processes by the Inspector General.**

Visa cancellation

1.64 The Bill seeks to extend the Minister for Immigration's existing visa cancellation powers, to enable cancellation to occur where ASIO receives intelligence about a permanent or temporary visa holder who is outside Australia, but that intelligence alone is not sufficient to enable ASIO to furnish an adverse security assessment to meet existing legal thresholds in the Migration Act.⁵³

1.65 The new power provides that the Minister for Immigration *must* cancel the visa of a person outside Australia if 'ASIO suspects that the person might be, directly or indirectly, a risk to security' and recommends that all visas held by the person be cancelled.⁵⁴ This effectively means that the person is unable to enter Australia. The cancellation must be revoked (i.e. the visa must be reinstated) after 28 days, unless ASIO again assesses that the person is a risk, directly or indirectly, to security and recommends that the cancellation not be revoked.⁵⁵ The visa holder need not be notified at the time of the initial cancellation, nor if the cancellation is revoked.

1.66 If a visa is cancelled, the Minister is empowered to cancel the visa of any other person who holds a visa by virtue of the cancelled visa. This is intended to apply to holders of family visas and sponsored visas, including refugee families holding protection visas.⁵⁶

1.67 The amendment provides that '[t]he rules of natural justice do not apply to a decision made under this Subdivision'. The ASIO assessment on which visa cancellation decisions are based cannot be challenged in the way that other ASIO security assessments can be (except in the case of permanent visas), nor can the cancellation be reviewed by the Migration Review Tribunal.

1.68 Numerous concerns have been raised about these 'complex new systems that will impact on the privacy and other rights of many individuals, including those that pose no threat to national security'.⁵⁷

53 Explanatory Memorandum, p. 61.

54 The Bill, Schedule 4, Item 4.

55 The Bill, s 134D; Explanatory Memorandum, p, 190.

56 Explanatory Memorandum, pp. 190-191.

57 *Submission 12*, p. 29.

1.69 First, the power relies on the definition of 'security' in the ASIO Act. As explained by the Inspector-General of Intelligence and Security:

Changes to various offences, particularly those relating to 'foreign incursions', will have the effect of extending the definition of 'security' in the ASIO Act. The new offences cover a broad range of serious criminal conduct overseas, without any requirement that such conduct have the political or ideological motivation required for terrorism offences. The definition of 'security' in the ASIO Act is central to ASIO's functions and underpins the tests for when various ASIO powers such as warrants and metadata authorisations can be used. The effect of the expansion of the definition of security is that ASIO will have the legislative authority to use its powers to gather intelligence about criminal conduct overseas that is not associated with terrorism or activity that would ordinarily be described as relevant to national security.⁵⁸

1.70 The new definition of 'security' includes the vaguely-defined concept of 'subverting society' which contains a number of 'garden variety' offences⁵⁹ and which, it has been suggested, extends to travelling overseas to commit an assault as part of a family dispute⁶⁰ or even to sell cigarettes.⁶¹ It is wholly inappropriate for visa cancellation powers to be activated on the basis of such comparatively minor offences, and it is disingenuous to describe the power as 'emergency cancellation on security grounds' in those circumstances.

1.71 Secondly, the threshold for cancellation is 'very low'.⁶² ASIO need only 'suspect' that the person 'might be' a security risk. Such a low threshold could be met by many people who hold Australian visas but who are not, according to any reasonable perspective, such a security risk that their visa should be cancelled. These proposed sections do not even require—as much other legislation does—that the suspicion be held 'on reasonable grounds'.⁶³

1.72 Thirdly, the Minister is to have no discretion and 'the practical effect is that this is a decision by ASIO'.⁶⁴ How granting unilateral power to ASIO to cancel and refuse to revoke the cancellation of visas is compatible with the nature of ASIO as an intelligence-gathering organisation is totally unclear to the Australian Greens.

1.73 Fourthly, as noted by the Inspector-General of Intelligence and Security, there is nothing to stop ASIO from making consecutive temporary cancellation requests, thereby allowing them to permanently make use of the lower threshold to effect a

58 *Submission 1*, p. 2.

59 *Submission 2*.

60 *Submission 1*, p. 6.

61 *Submission 21*, p. 4.

62 *Submission 7*, p. 15.

63 *Submission 3*, p. 22; *Submission 7*, p. 15.

64 *Submission 1*, p. 9. See also *Submission 3*, p. 21; *Submission 7*, p. 15.

permanent cancellation.⁶⁵ The Explanatory Memorandum states that it is 'not intended that this mechanism would be used in serial fashion to continue extending the period within which ASIO must form an opinion about whether a person is a risk to security',⁶⁶ but no effort has been made to prevent this from being permitted at law.

1.74 Fifthly, in relation to the cancellation of family and sponsored visas, there is no requirement that such persons be of any kind of security risk whatsoever. The Australian Greens agree with the Australian Human Rights Commission that the cancellation of family and sponsored visas risks violating a range of human rights.⁶⁷ The Australian Greens do not agree with the government that it is sufficient to manage these risks using only internal policy and administrative processes;⁶⁸ if this amendment is to be made, the Minister should be required to take human rights concerns into consideration.

1.75 Furthermore, in relation to the cancellation of family and sponsored visas, the Australian Greens do not accept that it is sufficient for the Explanatory Memorandum to state merely that 'it is *intended* that former visa holders will be notified of the cancellation of their visa, the grounds on which their visa was cancelled and the effect of that visa cancellation on their status, including review rights if relevant' (emphasis added).⁶⁹ Important safeguards cannot be adequately secured merely through a vaguely-worded expression of intention; the Australian Greens agree with the Law Council of Australia that this intention should be made a requirement at law.⁷⁰

Recommendation 9

1.76 The proposed new powers to cancel visas on security grounds should be amended to ensure that:

- **these powers can only be invoked in relation to serious risks to national security (rather than the proposed more expansive definition of 'security' that can include relatively minor conduct);**
- **the Minister is provided with a discretion as to whether or not to cancel a person's visa on the basis of a recommendation made by ASIO;**
- **the suspicion held by ASIO officers to invoke these powers must be held 'on reasonable grounds';**
- **there are clear restrictions on the making of consecutive temporary cancellation requests; and**

65 *Submission 1*, pp. 9-10.

66 Explanatory Memorandum, p. 189.

67 *Submission 7*, pp. 15-16.

68 Explanatory Memorandum, pp. 62-64. See also *Submission 12*, p. 31.

69 Explanatory Memorandum, p. 64.

70 *Submission 12*, p. 31.

- **the Minister is required to have regard to human rights considerations when considering whether to exercise the power to cancel family and sponsored visas, which rely upon the visa subject to the cancellation request.**

Cancellation of welfare payments

1.77 Schedule 2 of the Bill amends three pieces of social security legislation to provide for the cancellation of welfare payments for individuals who have had certain security-related passport or visa decisions made about them and in respect of whom the Attorney General has issued a security notice.

1.78 Again, there are a number of concerning elements to this proposal.

1.79 First, the Prime Minister says that these reforms are required because '[t]he last thing we want is terrorism tourism on the taxpayer', but this completely ignores the wide range of existing laws targeted at preventing the financing of terrorism. These include the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the *Proceeds of Crime Act 2002*, Division 103 of the *Criminal Code* and their State and Territory equivalents. The case has not been made as to why these laws are insufficient.⁷¹

1.80 Secondly, the scheme is left almost entirely to the unfettered discretion of the Foreign Affairs Minister, the Immigration Minister and the Attorney-General. The Explanatory Memorandum seeks to assure the public that 'welfare payments will only be cancelled in circumstances where the receipt of welfare payments was relevant to the assessed security risk posed by the individual' and 'where it is appropriate and justified'.⁷² There is, however, no guarantee of this sort in the legislation. The Australian Greens agree with the recommendation of the Law Council of Australia that the Attorney-General's decision to issue a security notice should be made on reasonable grounds and that the Attorney-General should be required to consider:⁷³

- (a) whether there are reasonable grounds to suspect that a person is or will be directly involved in activities which are prejudicial to security;
- (b) whether there are reasonable grounds to suspect that a person's welfare payments are being or will be used to support these activities;
- (c) the necessity and likely effectiveness of cancelling welfare payments in addressing the prejudicial risk, having regard to the availability of alternative responses; and
- (d) the likelihood that the prejudicial risk of the person to security may be increased as a result of issuing the security notice.

71 *Submission 14*, p. 2.

72 Explanatory Memorandum, p. 169.

73 *Submission 12*, p. 44.

1.81 Thirdly, the scheme does not appear to take sufficient account of the devastating effect that it could have on families and children. A number of the payments affected are directly relevant to the welfare of the families and children of the people to whom they are paid. The Australian Greens agree with the recommendation of the Australian Human Rights Commission that if these amendments are pursued, the effect of cancellation of payments on the family and children of the individual concerned be a mandatory consideration for the issuance of a security notice by the Attorney-General.⁷⁴

1.82 Fourthly, a bar on receiving welfare payments would remain in effect until the Attorney-General revoked the security notice. There is no obligation on the Attorney-General ever to consider revoking a security notice,⁷⁵ nor any matters that he or she must take into account if he or she does consider taking such a course.

1.83 Fifthly, the paucity of review measures is unwarranted. The Bill effectively removes the possibility of meaningful merits review of these decisions by exempting such decisions from the requirement in section 13 of the *Administrative Decisions (Judicial Review) Act* to provide reasons for a decision.⁷⁶ The Explanatory Memorandum seeks to justify this on the basis that 'the decision to issue the notices will be based on security advice which may be highly classified and could include information that if disclosed to an applicant may put Australia's security at risk'.⁷⁷

1.84 Once again, this explanation is insufficient. Whilst the Australian Greens appreciate that there are risks to the disclosure of some information of relevance to national security, the most that is claimed in the Explanatory Memorandum is that the advice on which decisions will be based *may* be highly classified and *could* include information that should not be disclosed. No information has been provided to explain why this justifies a blanket exemption from the requirement to provide any reasons. Nowhere has any attempt been made to explain why it would not be appropriate to provide reasons where the advice is not 'highly classified', or to provide reasons where the sensitive information has been redacted or otherwise amended into an unclassified form. As noted by Mr Stephen Blanks at a hearing of the PJCIS:

[In relation to refugees who have been given adverse security assessments,] ASIO has started given reasons. And it has recently emerged that ASIO is able to give quite substantial reasons without impacting on national security. So legislation which specifically removes the need for ASIO to give reasons for its decisions is not genuinely based on national security concerns. ASIO can, and does, regularly provide reasons for adverse security assessments to Australian citizens and to non-citizens as well.⁷⁸

74 *Submission 7*, p. 17.

75 *Submission 14*, p. 1.

76 *Submission 7*, p. 18.

77 Explanatory Memorandum, p. 180.

78 Mr Stephen Blanks, President, New South Wales Council for Civil Liberties, *Committee Hansard*, 3 October 2014, p. 1.

1.85 The Australian Greens agree with the Law Council of Australia that if these reforms are pursued, appeals against the Attorney-General's decision to issue a security notice should lie in the Security Division of the AAT.⁷⁹ Consideration should also be given to the Australian Human Rights Commission's suggestion of 'establishing a role of a Special Advocate to appear in judicial review proceedings where there is a national security reason to withhold part or all of the reasons from an individual'.⁸⁰ This is a mechanism that has been successfully used in Queensland and around the world.⁸¹

Recommendation 10

1.86 The Australian Greens recommend that Schedule 2 be removed from the Bill.

1.87 If this recommendation is not adopted, the Schedule should be amended to provide that:

- **the Attorney-General's decision to issue a security notice should be made on reasonable grounds and that the Attorney-General should be required to consider a range of matters including whether there are reasonable grounds to suspect that a person is or will be directly involved in activities which are prejudicial to security and the likelihood that the prejudicial risk of the person to security may be increased as a result of issuing the security notice.**
- **appeals against the Attorney-General's decision to issue a security notice should lie in the Security Division of the AAT.**
- **consideration be given to the Australian Human Rights Commission's suggestion of 'establishing a role of a Special Advocate to appear in judicial review proceedings where there is a national security reason to withhold part or all of the reasons from an individual'.**

Expansion of use of biometric material

1.88 Measures proposed in Schedule 5 relate to the use of automated border processing control systems to identify persons in immigration clearance. Those proposed in Schedule 6 seek to extend the use of biometrical material as part of the Advance Passenger Processing system. These reforms have the potential to impact on the privacy of a vast array of individuals, including those who pose no risk to Australia's national security.

1.89 Expanding the collection, use and sharing of biometric material as part of the advanced passenger processing regime is a particularly significant change with the

79 *Submission 12*, p. 45.

80 *Submission 7*, pp. 18-19.

81 Mr Stephen Blanks, President, New South Wales Council for Civil Liberties, *Committee Hansard*, 3 October 2014, p. 2.

potential for negative privacy impacts for all outgoing passengers leaving Australia. Many significant questions remain about how the proposed new automated border processing control and Advance Passenger Processing systems will work in practice, including: precisely what forms of biometrical material will or can be collected, used and shared under these reforms and under what circumstances and with whom this material can be shared.

1.90 In the inadequate time frames available for submissions, many individuals and organisations with expertise in this area have been unable to provide comprehensive submissions on the impacts of these reforms. This has prompted some submission makers to call for a privacy impact analysis to be undertaken to assess the privacy implications of these changes.⁸² As the Privacy Commissioner told the Parliamentary Joint Committee on Intelligence and Security, a privacy impact assessment:

could be done in a way to help inform the bill to see whether any additional safeguards need to be built into the legislative base to add additional protections to that information.⁸³

1.91 The Privacy Commission also emphasised:

the importance of ensuring that any expansion of existing powers accords with community expectations about the handling of personal information. This balance can be achieved by ensuring that where the handling of an individual's personal information is authorised in the broader interests of the community, including upholding national security, those activities are accompanied by an appropriate level of privacy safeguards and accountability.⁸⁴

1.92 Given the lack of scrutiny provided in respect of these aspects of the Bill the Australian Greens are not satisfied that the proposed changes include an appropriate level of privacy safeguards and accountability. It is of particular concern that the proposed changes allow for additional forms of biometric materials to be added to the Advance Passenger Processing system by way of regulation, which could see the addition of highly sensitive personal information such as fingerprints or iris scans.

Recommendation 11

1.93 The Australian Greens recommend that the reforms proposed in Schedules 5 and 6 relating to the expanded use of biometric material for passenger processing at Australia's border be removed from the Bill.

Other Concerning Features of the Bill

- As a consequence of the short time frames for this Inquiry, many of the reforms proposed in the Bill have not been subject to detailed consideration by the Committee despite their potential to unduly or disproportionately

82 *Submission 12*, p. 31

83 Mr Timothy Pilgrim, Privacy Commissioner, *Committee Hansard*, 8 October 2014, p. 3.

84 Mr Timothy Pilgrim, Privacy Commissioner, *Committee Hansard*, 8 October 2014, p. 1.

infringe upon the rights and liberties of Australians who pose no risk to national security. These include:

- Changes to the foreign incursion offences that some submission makers have identified as relying upon broad, poorly defined terms such as 'subverting society' which risk attributing serious criminal liability to otherwise legitimate forms of speech or conduct ;⁸⁵
- Expanding the basis upon which an organisation can be listed as a 'terrorist organisation' to include organisations that 'encourage' or 'promote' terrorism, that some submission makers consider to unduly broaden the power of the Executive to criminalise groups that have no direct link to criminal or terrorist activity;⁸⁶
- Expanding the powers of customs officials to detain people without charge on suspicion of engagement in a broad range of offences including less serious offences, criticised by some submission makers as going well beyond what is necessary to protect national security and lacking appropriate safeguards to protect against arbitrary detention;⁸⁷
- Introducing a system of delayed notification search warrants to enable police to search premises without the inhabitants' knowledge, described by some submission makers as constituting a substantial departure from the ordinary search warrant scheme, which ensures that a person whose premises are searched is aware of the basis and the authority for the search, and is in a position to challenge or make a complaint about the issue of the warrant and/or its method of execution.⁸⁸
- Changes to the current provisions governing the use of foreign evidence in Australian criminal proceedings, prompting legal experts to recommend that careful consideration be given to ensure adequate safeguards are in place to guard against the introduction of evidence derived from torture in Australian courts.⁸⁹

1.94 These aspects of the Bill demand careful analysis by independent bodies such as the Monitor, the Inspector-General and the Office of the Australian Information Commissioner who are well placed to assess whether they are necessary, effective counter terrorism tools and whether they are subject to appropriate limitations or include appropriate safeguards to protect against unjustified intrusion into individual rights and liberties.

1.95 It is highly inappropriate that these and other expert submission makers have been precluded from providing this Committee, and the public more broadly, with

85 See, for example, *Submission 2*, p. 1; *Submission 21*, p. 4; *Submission 12*, p. 33.

86 See, for example, *Submission 3* pp. 15-17.

87 See, for example, *Submission 7*, p. 12

88 *Submission 12*, pp. 33-34; *Submission 17*, p. 5.

89 See, for example, *Submission 12*, p. 38. *Submission 16*, pp. 4-5; *Submission 27*, p. 9.

their considered and comprehensive analysis of the Bill due to the unreasonably short time frames imposed by this government.

Recommendation 12

1.96 In the absence of further considered analysis, the Australian Greens recommend that these aspects of the Bill not be passed.

Conclusion

1.97 The safety and security of the Australian community is of paramount importance to the Australian Parliament and the Australian Greens. The agencies established to identify, investigate and address threats to national security must be empowered to perform their functions effectively and efficiently. These agencies already have a vast array of intelligence gathering and investigative powers, accompanied by an extensive list of criminal offences designed to criminalise terrorist related conduct, including conduct in preparation or support of terrorist activity. This Bill seeks to significantly expand the existing regime with consequences for the broader community in ways that cannot be fully understood in the time allocated for this Inquiry. If enacted it will have long term impacts on how ordinary Australians go about their lives – including whether and where people travel, the circumstances in which people can be detained and questioned by ASIO, customs officials or the police, and what kind of public commentary on controversial issues is legal.

1.98 It is essential that this Committee has access to independent advice as to the need for these changes, their effectiveness and their impact on the rights and liberties of the Australian community.

**Senator Penny Wright
Australian Greens**