

## **Schedule 1—Main counter-terrorism amendments**

### **Introduction**

- 2.1 This chapter addresses Schedule 1 of the Bill, which contains the main counter-terrorism amendments.
- 2.2 A number of issues concerning this schedule were raised with the Committee. Some were of a more minor nature and in these cases the Committee has made no comment. In other cases where there was a lack of clarity about particular provisions, the Committee has sought further information on these provisions.
- 2.3 The chapter focusses on the issues that were of most concern to the Committee, informed by the evidence received from inquiry participants. These issues were:
- amending the definition of ‘terrorism offence’ in the *Crimes Act 1914*
  - extension of the power to arrest without a warrant and introduction of delayed notification search warrants
  - introduction of a new offence of advocating terrorism into the Criminal Code
  - amending the process and criteria for listing terrorist organisations
  - changes to the control order regime
  - changes to the preventative detention order regime

- extending the operation of the
  - ⇒ control order regime
  - ⇒ preventative detention order regime
  - ⇒ stop, search and seizure powers relating to terrorism offences
  - ⇒ questioning and detention warrants regime in the *Australian Security Intelligence Organisation Act 1979*
- amending the definition of serious offence in the *Telecommunications (Interception and Access) Act 1979*
- amending the definition of security in the *Australian Security Intelligence Organisation Act 1979*
- changes to questioning and detention powers in Part III of the *Australian Security Intelligence Organisation Act 1979*
- amending the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to include the Attorney-General's Department as a 'designated agency'
- changes to the *Foreign Evidence Act 1994* to provide greater discretion in admission of foreign material in terrorism-related proceedings
- repeal of the *Crimes (Foreign Incursions and Recruitment) Act 1978* and its replacement with a new part 5.5 in the Criminal Code, and
- amendments to the *Australian Passports Act 2005*.

## **Amendments to the Crimes Act 1914 – definition of terrorism offence**

- 2.4 Schedule 1 of the Bill includes a proposed amendment to the definition of 'terrorism offence' within section 3 of the *Crimes Act 1914* (Crimes Act). The proposed amendments will mean that offences against Subdivision B of Division 80 (treason, urging violence and advocating terrorism offences) and proposed Part 5.5 (foreign incursion offence) of the Criminal Code and parts of the *Charter of the United Nations Act 1945* will be terrorism offences for the purposes of the Crimes Act.
- 2.5 The amendments are considered to be particularly important in the context of the Crimes Act, as there are a range of special police powers in that Act which rely on the definition of 'terrorism offence':

- Division 3A of Part 1A which provides powers in relation to terrorist acts and terrorism offences
- Section 15AA which relates to bail not being granted in certain cases
- Section 19AG which relates to non-parole periods for sentences for certain offences
- New section 3WA in Part 1AA which inserts a new power of arrest without a warrant for a terrorism offence or offence of advocating terrorism
- New Part 1AAA which inserts the delayed notification search warrant scheme, and
- Part 1C which provides powers to detain a person for the purpose of investigating a terrorism offence.<sup>1</sup>

2.6 The Explanatory Memorandum states that the amendment will implement Recommendation VI/6 of the Independent National Security Legislation Monitor (INSLM)'s Fourth Annual Report:

In this recommendation the INSLM reiterates his position stated in his third annual report that 'there is no reason in principle or policy to distinguish [United Nations] Charter Act terrorism financing offences which implement Australia's international counter-terrorism obligations under 1373 and relate to potentially very serious terrorism financing activity, from terrorism offences under the Criminal Code.' Further to this, he notes that the Foreign Incursions Act criminalises politically motivated violence, including conduct that would fit within the meaning of 'terrorist act' under the Criminal Code and criminalises engaging in hostile activity with an organization which is a proscribed terrorist organization under the Criminal Code. For this reason there is similarly [no] reason in principle or policy to distinguish between the offences under the Foreign Incursions Act, which cover potentially very serious terrorist activity, from terrorism offences under the Criminal Code.<sup>2</sup>

2.7 The reference to the Foreign Incursions Act offences will be covered by referring to proposed Division 119 of the Code.

2.8 The Explanatory Memorandum also notes that the amended definition will be used for the purposes of the *Proceeds of Crime Act 2002*.<sup>3</sup>

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1 Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 [CTLA(FF) Bill], *Explanatory Memorandum*, pp. 90-91.

2 CTLA(FF) Bill, *Explanatory Memorandum*, p. 91.

3 CTLA(FF) Bill, *Explanatory Memorandum*, p. 91.

- 2.9 The Islamic Council of Victoria noted that the existing definition of ‘terrorism’ already creates confusion within the Muslim community, as many in that community see groups engaged in conflicts throughout the world as legitimate forms of armed struggle:

The broad definition of ‘terrorism’ and the way in which it is sometimes selectively applied to such groups is problematic in and of itself ...

Broadening this definition to include ‘foreign incursions’ and ‘treason’ when Australia already has laws which deal with these further muddies the water on the issue of what can be considered terrorism and what should be considered legitimate resistance to oppression.<sup>4</sup>

### **Committee comment**

- 2.10 While some concern was expressed about the range of offences that would be deemed to be terrorism offences, the Committee did not receive any substantive submissions or comments on specific offences which should not be included in the definition.
- 2.11 Further, while acknowledging that there is an ongoing debate about the definition of ‘terrorism’ in Australian legislation, the Committee did not receive evidence to suggest the amendment should not proceed.
- 2.12 On the evidence presented to it, the Committee supports the Government’s efforts to ensure consistency across legislation and to implement the INSLM’s recommendation.
- 2.13 While there was agreement to update the definition, there were a variety of views on the specific implications that arise.

### **Extension of stop, search and seizure powers**

- 2.14 The Bill proposes to extend the operation of the ‘stop, search and seizure powers’ in Division IIIA of the Crimes Act relating to terrorism offences for a further 10 years to 15 December 2025.
- 2.15 The Explanatory Memorandum outlines that:

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4 Islamic Council of Victoria, *Submission 42*, p. 2.

In light of the enduring threat of terrorism, these powers will be maintained for an extended period of ten years to give law enforcement agencies the appropriate tools they need to deal with this threat.<sup>5</sup>

- 2.16 While some submitters expressed concern about these powers,<sup>6</sup> the focus of submissions was on the length of the proposed extension. This will be dealt with separately below.

## Power of arrest without a warrant

- 2.17 The Bill inserts new section 3WA into the Crimes Act which will give constables the power to arrest, without a warrant, a person who the constable suspects on reasonable grounds has committed or is committing a terrorism offence or an offence against section 80.2C. Additionally, the constable must also reasonably suspect that issuing a summons against the person would not achieve one or more of the purposes specified in proposed subparagraphs 3WA (1)(i)–(vi).

- 2.18 The section changes, in relation to terrorism offences, the existing power to arrest without a warrant in section 3W of the Crimes Act, which requires a constable to believe on reasonable grounds the same matters outlined above.

- 2.19 According to the Explanatory Memorandum, the threshold for suspicion is

lower than that of ‘believing’ on reasonable grounds ... [h]owever, there would need to be some factual basis for the suspicion and there would need to be more than idle wondering. An arrest threshold based on suspicion is not a new concept in Australian law and is used in a number of Australian jurisdictions.<sup>7</sup>

- 2.20 The intent of the new section is to

give police the option to intervene and disrupt terrorist activities and the advocating of terrorism at an earlier point than would be possible where the threshold is reasonable grounds to believe.<sup>8</sup>

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5 CTLA(FF) Bill, *Explanatory Memorandum*, p. 93.

6 For example, the Australian Human Rights Commission noted that these powers ‘involve restrictions on the freedom of movement and the right to privacy’ (*Submission 7*, p. 8).

7 CTLA(FF) Bill, *Explanatory Memorandum*, p. 93.

8 CTLA(FF) Bill, *Explanatory Memorandum*, p. 93.

- 2.21 The Explanatory Memorandum states that a different arrest threshold for terrorism offences is required

due to the extraordinary risk posed to the Australian public by terrorism and the time critical nature that a response to such offences is needed.<sup>9</sup>

- 2.22 Submitters questioned whether there was a demonstrable need for the new power, and its creation of a distinction between terrorism offences and other offences for the purposes of arrest. The Castan Centre for Human Rights Law stated in their submission that there is a lack of public evidence that the current arrest provision in 3W of the Crimes Act is an impediment to successful police action through arrests or disruption.<sup>10</sup>

- 2.23 Both the Castan Centre and the Law Council of Australia noted that in his Fourth Annual Report, the INSLM considered a suggestion from the Australian Federal Police (AFP) that the arrest threshold for terrorism offence should be lowered from 'believe' to 'suspect'. The INSLM stated that

it may be that the semantic distinction between 'suspect' and 'believe' has escaped substantive attention.

Be that as it may, the INSLM regards the [Australian Federal Police]'s suggestions as well founded, sensible and of some practical utility. This does not mean that the INSLM supports a special rule for terrorism offences in relation to arrest: that would be hard to justify.<sup>11</sup>

- 2.24 Two additional points were raised in submissions. Australian Lawyers for Human Rights stated that the ability to arrest an individual without a warrant, based on reasonable suspicion, would appear to be a breach of Article 9(2) of the *International Covenant on Civil and Political Rights* (ICCPR):<sup>12</sup>

If persons can be arrested only on suspicion, then they cannot promptly be informed of proposed charges against them – which by definition would appear to be unformed when there is only a basis of 'suspicion'. Nor can they be informed of the 'reason' for their arrest in the sense of being told what grounds have given

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9 CTLA(FF) Bill, *Explanatory Memorandum*, p. 94.

10 Castan Centre for Human Rights Law, *Submission 17*, p. 3.

11 Independent National Security Legislation Monitor (INSLM), *Fourth Annual Report*, p. 64.

12 'Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him'.

rise to a belief that particular charges should be brought against them – because that belief has not been formed.<sup>13</sup>

2.25 Amnesty International Australia also noted that arrest on the grounds of ‘reasonable suspicion’ is an inadequate standard of proof for arrest under international fair trials law.<sup>14</sup>

2.26 Contrary to this position, the Explanatory Memorandum states that:

An arrest threshold based on suspicion is not a new concept in Australian law and is used in a number of Australian jurisdictions. The arrest threshold in the United Kingdom is ‘reasonable grounds for suspecting’, a position which is consistent with the European Convention on Human Rights.<sup>15</sup>

2.27 Dr David Connery stated that the ability to arrest without a warrant for advocating terrorism would require police officers to make

a snap political and social judgment [that] the cause being advocated was indeed about terrorism. It is possible to imagine volatile situations where such statements may be made, and the action of trying to arrest a person for this might inflame the situation.<sup>16</sup>

2.28 Dr Connery suggested that a better approach would be to require the officer to seek a warrant in such circumstances.

2.29 In his submission, Dr Greg Carne raised questions about whether further safeguards would be required if the new provision is passed as it stands:

It may be that the introduction of a lower standard of reasonable suspicion demands the introduction of compensatory further safeguards in the custodial and review processes in the *Crimes Act 1914* (Cth) after arrest for terrorism offences without warrant.<sup>17</sup>

2.30 This position was echoed by the President of the Australian Human Rights Commission, who considered that many provisions in the Bill were lowering thresholds in relation to accessing powers:

[M]any of these amendments, as you will be aware, significantly lower the thresholds of existing law and the words ‘may’ and ‘might’ and ‘suspicion’ are used rather than words that require

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13 Australian Lawyers for Human Rights, *Submission 15*, p. 5.

14 Amnesty International Australia, *Submission 22*, p. 5.

15 CTLA(FF) Bill, *Explanatory Memorandum*, p. 21.

16 Dr David Connery, *Submission 26*, p. 3.

17 Associate Professor Greg Carne, *Submission 27*, p. 11.

reasonableness and higher levels of 'shall' and so on. So they are drafting differences but quite profound in lowering these thresholds to levels that we think raise concerns. In broad terms we would like to see a greater use of the concept of reasonableness of belief and we would like to see proper procedural safeguards as a practical matter. Many human rights are protected through proper safeguards rather than necessarily substantive provisions.<sup>18</sup>

- 2.31 The AFP noted that in the exercise of all its powers there is a significant degree of oversight of its operations and management:

At the moment, obviously, we appear before parliamentary inquiries such as this, we have Senate estimates, we appear before the [Parliamentary Joint Committee on Law Enforcement] as well, we have the Ombudsman, we have [the Australian Commission for Law Enforcement Integrity] and ultimately we are responsible to the courts and to the community for our actions.<sup>19</sup>

### **Committee comment**

- 2.32 The Committee notes the AFP requested the lowering of the threshold for this specific power.
- 2.33 The Committee notes that if a law enforcement officer suspects an individual of committing a terrorism related offence, the officer must first consider proceeding by way of summons, consistent with the existing arrest without warrant power in the Crimes Act.<sup>20</sup> The constable may only arrest without a warrant if they reasonably suspect that a summons would not achieve one or more of the specified purposes, which include ensuring the appearance of the person before a court, preventing repetition or continuation of an offence or preserving the safety of the person.<sup>21</sup>
- 2.34 The Committee particularly notes that lowering the arrest threshold within the Crimes Act for terrorism purposes in no way impacts on the use of other police powers, such as control orders or preventative detention orders. Such powers have their own thresholds, which must be met and which are discussed in other sections of this report.

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18 Professor Gillian Triggs, *Committee Hansard*, Canberra, 3 October 2014, p. 5.

19 Assistant Commissioner Neil Gaughan, *Committee Hansard*, Canberra, 3 October 2014, p. 24.

20 Section 3W of the Crimes Act.

21 Proposed paragraph 3WA (1) (b) of the CTLA(FF) Bill.

- 2.35 Australia is facing an increased threat from terrorism. The Committee considers the police should be appropriately equipped to disrupt terrorism activity at the earliest possible stage to ensure community safety.
- 2.36 The Committee notes that other Australian jurisdictions (Queensland, Western Australia, South Australia and the Australian Capital Territory) have powers for arrest without warrant for terrorism offences based on reasonable suspicion.<sup>22</sup> In his Fourth Annual Report, the INSLM found that the existence of suspicion based arrest in other jurisdictions
- suffice[s] to dispel concern that liberalizing the test for arrest would disturb appropriate social balances.<sup>23</sup>
- 2.37 The Committee also notes that the arrest threshold in the United Kingdom for a suspected terrorist is one of ‘reasonable grounds to suspect’,<sup>24</sup> which is consistent with the European Convention on Human Rights.<sup>25</sup>
- 2.38 The Committee notes the safeguards in the Crimes Act and the oversight mechanisms which apply to the AFP. This accountability would be enhanced by the Committee’s proposed oversight of the AFP’s counter-terrorism operations, which is discussed later in this chapter.
- 2.39 The Committee notes the comments in relation to ensuring proper procedural safeguards are included in the Bill. Throughout this report the Committee details where changes to existing powers have been made or new powers created, and the justifications provided for such changes or additions. The Committee also gives consideration to ensuring that there are appropriate safeguards in each instance.

## Delayed Notification Search Warrants

- 2.40 The Bill proposes to introduce a delayed notification search warrant scheme into the Crimes Act.
- 2.41 A delayed notification search warrant would allow an AFP member or special member to search a property without immediate notification to the occupier if they:

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22 Section 365, *Police Powers and Responsibilities Act 2000* (Qld); section 128, *Criminal Investigation Act 2006* (WA); section 75, *Summary Offences Act 1953* (SA); section 212, *Crimes Act 1900* (ACT).

23 INSLM, *Annual Report*, 28 March 2014, p. 64.

24 Section 41 of the *Terrorism Act 2000* (UK).

25 Article 5 of the European Convention on Human Rights.

- suspect, on reasonable grounds, that one or more eligible offences have been, are being, are about to be or are likely to be committed
  - suspect, on reasonable grounds, that entry and search of the premises will substantially assist in the prevention or investigation of one or more of those offences, and
  - believe, on reasonable grounds, that it is necessary for the entry and search of the premises to be conducted without the knowledge of the occupier of the premises or any other person present at the premises.<sup>26</sup>
- 2.42 An 'eligible offence' is a terrorism offence that is punishable by imprisonment for seven years or longer.<sup>27</sup>
- 2.43 Notification to the occupier is delayed, initially for a period of not more than 6 months,<sup>28</sup> which can be extended in certain circumstances.<sup>29</sup>
- 2.44 Before applying for a warrant, the AFP Commissioner must have first authorised the member to do so, and only if the Commissioner is satisfied that the conditions for issuing the warrant are met.<sup>30</sup>
- 2.45 The member may then apply to eligible issuing officers, which are certain judges and members of the Administrative Appeals Tribunal (AAT).<sup>31</sup>
- 2.46 Under existing search warrant provisions in the Crimes Act, notification of the search warrant is required to be provided to the occupier of the search property at the time of execution of the warrant.<sup>32</sup> The occupier may then also observe the search as it occurs.<sup>33</sup>
- 2.47 According to the Explanatory Memorandum, the scheme will differ from the existing search warrant provisions so as to enable
- AFP officers to covertly enter and search premises for the purposes of preventing or investigating Commonwealth terrorism offences, without the knowledge of the occupier of the premises.<sup>34</sup>
- 2.48 The ability to conduct a covert search is considered important because it will
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26 Proposed section 3ZZBA of the CTLA(FF) Bill.

27 Proposed section 3ZZAA of the CTLA(FF) Bill.

28 Proposed section 3ZZBE of the CTLA(FF) Bill.

29 Proposed section 3ZZDC of the CTLA(FF) Bill.

30 Proposed section 3ZZBB of the CTLA(FF) Bill.

31 Proposed section 3ZZAD of the CTLA(FF) Bill.

32 Section 3H of the Crimes Act.

33 Section 3P of the Crimes Act.

34 CTLA(FF) Bill, *Explanatory Memorandum*, p. 95.

ensure that the investigation remains confidential. This is considered critical to the success of certain investigations by the AFP, particularly when carrying out investigations of multiple suspects over an extended period...

Operational experience has shown that the individuals and groups who commit such offences are highly resilient to other investigative methods and pose significant threats to the Australian community.<sup>35</sup>

- 2.49 A range of concerns with the proposed scheme were raised in submissions. These concerns focussed on:
- departures from established human rights and privacy principles
  - the ability of AAT members to issue warrants
  - introduction of a Commonwealth Public Interest Monitor
  - conditions which must be satisfied before a warrant is granted
  - the time frame in which notification of the search is delayed
  - adequacy of the compensation scheme
  - potential impact on Legal Professional Privilege (LPP)
  - the safety of occupiers and executing officers
  - disclosure offences, and
  - use of information seized during a search.
- 2.50 Key issues arising from the evidence are discussed below.

## Precedents

- 2.51 Submitters raised significant concerns that the introduction of a delayed notification warrant scheme would represent a substantial departure from established privacy and police investigatory principles.<sup>36</sup> The Muslim Legal Network (NSW), for example, did not consider that sufficient evidence had been presented to justify the new powers:

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35 CTLA(FF) Bill, *Explanatory Memorandum*, pp. 23, 95.

36 Councils for civil liberties across Australia, *Submission 25*, p. 16; Law Council of Australia, *Submission 12*, p. 33; Members of the Victorian Bar Human Rights Committee, *Submission 29*, p.2.

The proposed amendments fail to show why there is such a clear need to expand the already extensive range of powers available to the AFP and other law enforcement agencies.<sup>37</sup>

2.52 The Law Council of Australia stated that the existing warrant scheme 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.<sup>38</sup>

2.53 Immediate notification to an occupier was considered to be fundamental to reducing the risk of abuse of the power by officials.<sup>39</sup> However, submitters also recognised the importance of the safeguards that will accompany the proposed new regime.<sup>40</sup>

2.54 The Explanatory Memorandum notes that a delayed notification warrant scheme would be in keeping with other Commonwealth covert investigative powers. Additionally:

Several Australian states and territories have either delayed notification or covert search warrant regimes for investigating terrorism offences including New South Wales, Victoria, Queensland, Western Australia and the Northern Territory. Covert or delayed notification search warrants are also available in both Canada and New Zealand.<sup>41</sup>

2.55 The AFP submission also noted that covert style search warrants are available to police in the USA and the UK.<sup>42</sup>

2.56 The Explanatory Memorandum goes on to state that:

A delayed notification search warrant will only be used in limited operational situations and will be subject to a number of safeguards to balance the legitimate interests of the Commonwealth in preventing terrorism with the need to protect human rights.<sup>43</sup>

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37 Muslim Legal Network (NSW), *Submission 43*, p. 24.

38 Law Council of Australia, *Submission 12*, p. 33.

39 Councils for civil liberties across Australia, *Submission 25*, p. 16; Muslim Legal Network (NSW), *Submission 43*, p. 26.

40 Councils for civil liberties across Australia, *Submission 25*, p. 17.

41 CTLA(FF) Bill, *Explanatory Memorandum*, p. 95.

42 Australian Federal Police, *Submission 36*, p. 4.

43 CTLA(FF) Bill, *Explanatory Memorandum*, p. 95.

2.57 The AFP supported introduction of the warrant scheme as it would allow it 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.<sup>44</sup>

## Issuing criteria and issuing officers

2.58 The criteria that must be satisfied before the warrant can be granted are at proposed section 3ZZBD (2)(a)–(c). Some submitters argued that criteria (2)(b), which requires the issuing officer to ‘have regard to’ the existence of alternative means of obtaining the evidence or information sought was not stringent enough. The councils for civil liberties across Australia argued there should be

a pre-condition to the issuing of the warrant that the Applicant demonstrates that it is not possible to obtain the evidence in another way and in particular it is not possible to execute a warrant in the ordinary fashion.<sup>45</sup>

2.59 Similarly, the Victorian Bar Human Rights Committee favoured a necessity test for why a normal search warrant would not be sufficient.<sup>46</sup>

2.60 The Law Council of Australia considered that issuing officers should have to consider possible impacts on LPP before issuing a warrant.<sup>47</sup>

2.61 The Explanatory Memorandum states that the ‘two-step’ authorisation process and the proposed issuing criteria which both the AFP Commissioner and issuing authority need to be satisfied of will ensure that

a delayed notification search warrant is not authorised where it is not appropriate to do so, for example, where there would be a disproportionate impact on the occupier’s privacy or there is a

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44 Australian Federal Police, *Submission 36*, p. 4.

45 Councils for civil liberties across Australia, *Submission 25*, p. 17.

46 Members of the Victorian Bar Human Rights Committee, *Submission 29*, p. 2.

47 Law Council of Australia, *Submission 12*, p. 33.

more appropriate means of obtaining the evidence or information sought.<sup>48</sup>

2.62 Some submitters questioned the power of an AAT member to issue a warrant. For example, the Australian Privacy Foundation expressed

strong 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.<sup>49</sup>

2.63 The Victorian Bar Human Rights Committee suggested that only AAT members who were former judges should be able to become an issuing officer, due to a greater perceived degree of independence.<sup>50</sup>

2.64 The Attorney-General's Department noted that enabling AAT members to be issuing officers would be consistent with other Commonwealth covert power schemes, and that there were strong operational reasons for following this precedent:

Including nominated AAT members as eligible issuing officers greatly enhances accessibility to the pool of individuals authorised to issue delayed notification search warrants. Limiting the group to judges of the Federal Court and the Supreme Courts of states and territories could be problematic in urgent operational settings, or where operations are being conducted in remote areas. AAT members have consistently proven to be available out-of-hours to deal with the operational needs of the AFP.

AAT members will have the power to issue delayed notification search warrants in relation to premises located anywhere in the country, whereas state and territory judges will be limited to premises located within their jurisdiction. This is particularly relevant in the context of terrorism investigations, where the offending activity is likely to be cross-border in nature. The AFP can reduce the administrative burden on the courts by approaching the same AAT member for warrants in multiple states or territories rather than having to go to separate judges in those jurisdictions. This also serves to improve transparency of the investigation as the same AAT member will have oversight of

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48 CTLA(FF) Bill, *Explanatory Memorandum*, p. 25.

49 Australian Privacy Foundation, *Submission 20*, p. 2. See also Councils for civil liberties across Australia, *Submission 25*, p.16; and Members of the Victorian Bar Human Rights Committee, *Submission 29*, p. 3.

50 Members of the Victorian Bar Human Rights Committee, *Submission 29*, p. 3.

the extent of delayed notification search warrants and any related warrants being sought.<sup>51</sup>

## Period of notification delay

- 2.65 The proposed scheme will allow notice of a search conducted under a delayed notification search warrant to be delayed for six months.<sup>52</sup> In certain circumstances, this period can be extended for up to 18 months and, in exceptional circumstances, beyond.<sup>53</sup>
- 2.66 The period of delay was considered too long by some contributors and the test for any subsequent extensions not strict enough. The councils for civil liberties across Australia noted that comparable powers in the United States and Canada have notification periods of seven (or 48) days and 90 days respectively.<sup>54</sup> The Law Council of Australia suggested that the
- timeframe needs to be proportionate given that such a warrant is intended to investigate a relevant offence, and is not a general intelligence gathering exercise.<sup>55</sup>
- 2.67 The initial six month delay period may be extended if the issuing officer is satisfied that there are reasonable grounds for continuing to delay giving notice to the occupier.<sup>56</sup> The councils for civil liberties across Australia considered that the test for extending the initial delay period was not sufficiently rigorous, and should be strictly limited to those relating to the investigation of an actual offence.<sup>57</sup>
- 2.68 The Law Council of Australia also recommended that when a person is charged with an offence, and the evidence to be used against them includes evidence gained through a delayed notification search warrant, the material should be provided to them immediately upon charge. The Victorian Bar Human Rights Committee agreed, specifically noting that while the Bill provides that the person be notified as ‘soon as practicable’ after being charged:

[the] phrase is robbed of content when that is defined as the earlier of the end of the delay period (ie 6 months or as extended) and the

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51 Attorney-General’s Department, *Supplementary Submission 8.1*, pp. 16–17.

52 Proposed section 3ZZBE (1)(i) of the CTLA(FF) Bill.

53 Proposed section 3ZZDC (6) of the CTLA(FF) Bill.

54 Councils for civil liberties across Australia, *Submission 25*, p. 17.

55 Law Council of Australia, *Submission 12*, p. 34.

56 Proposed section 3ZZDC (5) and (6) of the CTLA(FF) Bill.

57 Councils for civil liberties across Australia, *Submission 25*, p.17.

time when the prosecution brief of evidence is presented: cl  
3ZZDC(3) – this may be many, many months later.<sup>58</sup>

## Disclosure offences

2.69 Submitters raised concerns about the offence provisions under proposed section 3ZZHA, particularly that a well-intentioned person, such as a journalist, who disclosed information about a delayed notification search warrant which that person considered to be in the public interest, may face prosecution. For example, the Joint Media Organisations raised concerns that the offence

would see journalists jailed for undertaking and discharging their legitimate role in our modern democratic society – reporting in the public interest.<sup>59</sup>

2.70 The Media, Entertainment and Arts Alliance was of the same opinion, noting that the ‘time-lag’ between the issuing of a warrant and the provision of notification has the potential to impede journalists seeking to report a legitimate news story in the public interest.<sup>60</sup>

2.71 The Joint Media Organisations suggest that the provision be removed or, alternatively, a public interest exception be created.<sup>61</sup> Senator David Leyonhjelm agreed with this approach, arguing that

we are not here talking about a major security operation. It is merely the issuance of a *warrant*. The provision seems calculated to remove the AFP from any and all journalistic scrutiny, and is in any case excessively broad.<sup>62</sup>

2.72 Mr Bret Walker SC, the former INSLM, while noting his in-principle support for secrecy provisions attached to such powers, identified some issues with the provision and similarly to

section 35P of the [Australian Security Intelligence Organisation] Act, in a cognate bill section 3ZZHA has, I suspect, some further work to be done, I hope without unpleasant experiences actuating

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58 Victorian Bar Human Rights Committee, *Submission 29*, p.3.

59 Joint Media Organisation, *Submission 23*, p.7.

60 Media, Entertainment and Arts Alliance, *Submission 44*, p.6.

61 Joint Media Organisation, *Submission 23*, p. 7. See also Australian Lawyers Alliance, *Submission 13*, p. 5.

62 Senator David Leyonhjelm, *Submission 45*, p. 3.

it, before an appropriate allowance of so-called whistleblowing in the case of illegality is provided for.<sup>63</sup>

- 2.73 The Explanatory Memorandum states that the provision is similar to an existing provision in Part 1AB of the Crimes Act relating to controlled operations, and that:

The intention of this offence provision is to maintain confidentiality of the information as long as operational sensitivities require. The exceptions at 3ZZHA(2) ensure that no offence is committed if information is disclosed by officers in the performance of their duties.<sup>64</sup>

- 2.74 No issues have been raised to date in relation to the Crimes Act provisions.<sup>65</sup> In its previous inquiry into the National Security Legislation Amendment Bill (No 1) 2014, the Committee received evidence that a disclosure offence such as section 3ZZHA would operate with a ‘recklessness’ threshold, and that

the prosecution would be required to prove that a person who communicated information on [a delayed notification search warrant] was ‘reckless as to the possibility that the information related to [a delayed notification search warrant]’. This was a result of the application of the Criminal Code’s ‘fault element of recklessness’, which

requires proof beyond reasonable doubt of two matters: firstly, that the person was aware of a substantial risk that the information related specifically to [a delayed notification search warrant] and, secondly, that the person nonetheless and unjustifiably in the circumstances took that risk of communicating the information.<sup>66</sup>

## Other matters

- 2.75 Three further points of particular note were raised with the Committee in relation to delayed notifications search warrants: powers available in the execution of the warrants, the use of information gained through the warrants and their potential use for other crime types.

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63 Mr Bret Walker SC, *Committee Hansard*, Canberra, 8 October 2014, p. 38.

64 CTLA(FF) Bill, *Explanatory Memorandum*, p. 116.

65 Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the National Security Legislation Amendment Bill (No 1) 2014*, September 2014, p. 57.

66 Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the National Security Legislation Amendment Bill (No 1) 2014*, September 2014, p. 56.

- 2.76 Some submitters, such as the Victorian Bar Human Rights Committee, Senator David Leyonhjelm and the Muslim Legal Network (NSW), raised concerns about the powers available to executing officers, in particular the ability to impersonate others and gaining access to the search premises through adjoining property. These powers were considered to be an unwarranted expansion of the power to investigate offences.<sup>67</sup> The Explanatory Memorandum states that these powers are necessary to ensure that the covert nature of the warrant is maintained,<sup>68</sup> and can only be authorised if such measures are reasonably necessary.<sup>69</sup>
- 2.77 In his submission, Dr David Connery noted concerns around the range of agencies that would have access to delayed notification search warrants.<sup>70</sup> While the Bill makes it clear that only members or special members of the AFP may apply and execute a delayed notification search warrant,<sup>71</sup> section 3ZZEA of the Bill includes an expansive list of purposes for which things seized under a warrant may be used and shared.
- 2.78 The Australian Crime Commission provided evidence that there is a growing nexus between organised crime and terrorism:
- The confluence between serious and organised crime and terrorism today is at a stage where it is becoming difficult to identify between the two.<sup>72</sup>

## Committee comment

- 2.79 The Committee received a wide range of evidence about the proposed introduction of delayed notification search warrants. The following comments are limited to the main issues identified above.
- 2.80 In general, on the evidence presented, the Committee accepts that there is a need for delayed notification search warrants for the investigation of serious terrorism offences by the AFP, and notes that their proposed introduction follows a recommendation by the INSLM. The Committee has considered, however, whether amendments are required to the scheme to address privacy and other concerns.

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67 Muslim Legal Network (NSW), *Submission 43*, p. 27.

68 CTLA(FF) Bill, *Explanatory Memorandum*, p. 23.

69 CTLA(FF) Bill, *Explanatory Memorandum*, p. 26.

70 Dr David Connery, *Submission 26*, p. 2.

71 Proposed section 3ZZAA of the CTLA(FF) Bill.

72 Mr Paul Jevtovic, Executive Director, Operations, *Committee Hansard*, Canberra, 8 October 2014, p. 23.

## Precedents

- 2.81 While the Committee notes that delayed notification search warrants do represent a significant departure from the normal search warrant scheme provided for in the Crimes Act, it also notes that many other Australian police forces have access to similar, if not more intrusive, powers. Given the threat posed by terrorism and foreign fighters, the Committee considers it is appropriate that the AFP have access to these powers for serious terrorism offences.
- 2.82 These powers were supported by the INSLM in his Fourth Annual Report, where he stated that he saw
- no reason why the AFP should not be able to access a delayed notification search warrant scheme for the investigation of terrorism offences. Such a scheme would increase the capability of the AFP to investigate and prosecute terrorism offences and would improve the effectiveness of Australia’s counter-terrorism laws.<sup>73</sup>
- 2.83 The Committee notes the safeguards attached to delayed notification search warrants, which include:
- a ‘two-step’ authorisation process
  - regular reporting to the Ombudsman and the Minister on use of the warrants, and
  - the high threshold for the issuing of a warrant
- in conjunction with the existing reporting and oversight mechanisms in place for the AFP,<sup>74</sup> will provide safeguards and accountability. While this Committee does not currently have oversight of the AFP, a change to this effect is recommended later in this chapter.

## Issuing criteria and issuing officers

- 2.84 The Committee accepts that the proposed issuing criteria will allow issuing officers to take into account concerns of privacy and the availability of other investigative techniques before deciding that the warrant is appropriate.
- 2.85 Requiring an issuing officer to be exhaustively satisfied that no other investigative methods are available may have a detrimental effect on the

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73 INSLM, *Annual Report*, 28 March 2014, p. 62.

74 Attorney-General’s Department, *Supplementary Submission 8.1*, pp. 15–16.

operational effectiveness of the warrant scheme. Similarly, requiring eligible officers to show that a delayed notification search warrant was the only available method may result in less effective, more time-consuming and more dangerous methods having to be evidenced in every application. It may even require such methods to be tried before making the application.<sup>75</sup>

- 2.86 The Committee acknowledges the operational benefits of allowing AAT members to issue warrants. The Committee also recognises that delayed notification search warrants are an intrusive power and that those authorised to be issuing officers should be suitably qualified. The Committee therefore recommends that the Attorney-General amend the Bill to remove the ability of 'members' or 'part-time senior members' of the AAT to be eligible issuing officers.

### **Recommendation 1**

**The Committee recommends that the Attorney-General amend the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 to remove the ability of 'members' or 'part-time senior members' of the Administrative Appeals Tribunal to be eligible issuing officers for a delayed notification search warrant.**

#### **Period of notification delay**

- 2.87 The Committee accepts that a six-month notification delay (possibly extended to 18 months or beyond) could be considered an overly long interval for a person to be made aware of a search of their house or business. However, this view must be balanced with the operational need for police to be able to maintain the covert nature of an investigation for fear of 'tipping off' those subject to investigation.
- 2.88 The Committee notes that a similar delayed notification search warrant scheme, with an initial six month delay period, was proposed in the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006, which was the subject of inquiry by the Senate Legal and Constitutional Affairs Committee. The Senate Committee's report did not recommend any changes to the notification period in this Bill.

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75 Mr Walker SC, *Committee Hansard*, Canberra, Wednesday 8 October 2014, p. 44.

- 2.89 The Committee believes that the initial six month period strikes a sufficient balance between operational utility and an individual's right to know of a search of their property. The ability to extend this period is dependent on satisfying an independent third party, including in some instances the Minister, which provides sufficient protection against potential misuse of the power.
- 2.90 The Committee does, however, consider that an 18-month period before Ministerial authorisation is required is too long. This is an important oversight requirement and the Committee considers that a 12-month period would be more appropriate. This will ensure that each delayed notification search warrant that involves a long-term investigation will be subject to an appropriate degree of scrutiny. The Committee notes that this does not affect the ultimate delay period that is found to be required for maintaining operational confidentiality.

## Recommendation 2

**The Committee recommends that the Attorney-General amend the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 to reduce the extension of a notification period for a delayed notification search warrant without requiring Ministerial authorisation from 18 to 12 months.**

- 2.91 Where a person is charged based on evidence gained during a delayed notification search warrant, the Committee does not agree that the evidence should be provided to the charged person 'immediately'. If this were the case, it may result in situations where a person is charged with an offence and given parts of the brief of evidence against him or her, without any further context of the charges or other evidence against them. It would also result in notification of police operational behaviour and methodology before the police may be willing to reveal such information. Further, it would create issues if the person's charges were dropped before the start of criminal proceedings.

## Disclosure offences

- 2.92 Concerns about disclosure offences were also raised in relation to the creation of the Australian Security Intelligence Organisation (ASIO)'s Special Intelligence Operations (SIO) in the National Security Legislation

Amendment Bill (No.1) 2014. The Committee reiterates the comments made in its report into the SIO provisions:

The Committee paid close attention to concerns raised by inquiry participants about the potential impact of the proposed offences on press freedom. The Committee considers that in order to ensure the success of highly sensitive operations and to protect the identity of individuals involved, it is essential that information on these operations not be disclosed.

However, the Committee also considers that it is important for this need for secrecy not to penalise legitimate public reporting. The Committee notes that, under the Criminal Code Act 1995, the fault element of 'recklessness' would apply to any prosecution of offences under proposed section 35P. This would mean that to be successful, the prosecution would be required by legislation to prove that a disclosure was 'reckless'. The structure of the offence provisions, as well as the requirement for the Commonwealth Director of Public Prosecutions to take the public interest into account before initiating a prosecution, provides an appropriate level of protection for press freedoms while balancing national security. However the Committee sees value in making these safeguards explicit in the Bill or the Explanatory Memorandum.

...the Committee does not consider it appropriate to provide an explicit exemption for journalists from the proposed offence provisions. Part of the reason for this is that the term 'journalism' is increasingly difficult to define as digital technologies have made the publication of material easier. The Committee considers that it would be all too easy for an individual, calling themselves a 'journalist', to publish material on a social media page or website that had serious consequences for a sensitive intelligence operation. It is important for the individual who made such a disclosure to be subject to the same laws as any other individual.<sup>76</sup>

- 2.93 The Committee also notes that the offences are designed to mirror existing provisions relating to the controlled operations scheme in the Crimes Act.<sup>77</sup> The Committee notes that there is no public interest test in either the controlled operations or the SIO provisions.

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<sup>76</sup> Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the National Security Legislation Amendment Bill (No 1) 2014*, September 2014, pp. 61–62.

<sup>77</sup> CTLA(FF) Bill, *Explanatory Memorandum*, p. 116.

- 2.94 As noted previously, the operations of the AFP are already subject to significant safeguards and oversight, with potential for an expansion of this oversight to this Committee (as discussed later in this chapter). The Committee is satisfied that these safeguards and accountability provisions provide appropriate protections.
- 2.95 Several Committee members were concerned that the Bill may prevent legitimate reporting of important matters in the public interest when it comes to delayed notification search warrants. While it is noted that the Bill does not intend to criminalise reporting of matters that are in the public interest, some members believed this could be further clarified. Members reiterated the importance of protection of public interest publication.
- 2.96 The Committee notes that the current Commonwealth Director of Public Prosecutions ‘Prosecution Policy’ already refers to a ‘public interest’ test.<sup>78</sup> The Committee therefore recommends that the Attorney-General’s Department explain this public interest requirement in the Explanatory Memorandum to make it clear that the Commonwealth Director of Public Prosecutions must take the public interest into account before initiating a prosecution.
- 2.97 Reflecting evidence received, especially from the former INSLM, the Committee is concerned to ensure that there is adequate protection for those who identify any potential illegality regarding the use of delayed notification search warrants. To ensure that individuals may seek legal advice on this illegality, without being liable for prosecution under the disclosure offences, the Committee recommends the introduction of an explicit exemption from the offences for disclosure of information in the course of obtaining legal advice.
- 2.98 As for the protection of whistleblowers, the Committee also supports explicit exemptions for the disclosure of information to the Commonwealth Ombudsman. To avoid any doubt about the applicability of the *Public Interest Disclosure Act 2013*, the Committee considers it should be made explicit in the Bill that this exemption applies to all persons making a complaint to the Commonwealth Ombudsman, including public officials.

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78 Available at <<http://www.cdpp.gov.au/publications/prosecution-policy-of-the-commonwealth/>>.

### Recommendation 3

The Committee recommends that additional exemptions be included in the offence provisions relating to disclosure of information on delayed notification search warrants in proposed section 3ZZHA of the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 to explicitly enable:

- disclosure of information in the course of obtaining legal advice,
- disclosure of information by any person in the course of inspections by the Commonwealth Ombudsman, or as part of a complaint to the Commonwealth Ombudsman or other proactive disclosure made to the Commonwealth Ombudsman, and
- communication of information by Commonwealth Ombudsman staff to the Commonwealth Ombudsman or other staff within the Office of the Commonwealth Ombudsman in the course of their duties.

### Recommendation 4

The Committee recommends that the Attorney-General amend the Explanatory Memorandum of the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 to confirm that the Commonwealth Director of Public Prosecutions must take into account the public interest, including the public interest in publication, before initiating a prosecution for the disclosure of information relating to a delayed notification search warrant.

#### Other matters

- 2.99 While the powers available to executing officers of delayed notification search warrants will differ markedly from the powers available under the normal Crimes Act search warrant provisions, the Committee accepts that these powers are required to maintain the covert nature of such searches. The Committee also notes that in Australian jurisdictions that already have covert search warrants, such powers are available.<sup>79</sup>

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<sup>79</sup> Section 27 of the *Terrorism (Extraordinary Powers) Act 2005* (WA) and section 27O of the *Terrorism (Police Powers) Act 2002* (NSW).

- 2.100 The Committee is also satisfied that the list of purposes for which things seized under a delayed notification search warrant can be shared and used is appropriate. While not an exhaustive list, the Committee recognises that items seized under a delayed notification search warrant may be relevant for other offences or other agencies and that existing sharing and handling safeguards continue to be important and appropriate.
- 2.101 The Committee acknowledges that while the Bill is specifically designed to counter the threat from terrorism and foreign fighters, having access to delayed notification search warrants for other serious criminal offences would be of operational benefit to the AFP. The Committee notes that in other Australian jurisdictions, police have access to delayed notification or covert search warrants for offences other than terrorism offences.
- 2.102 The Committee also notes the increasing collaboration and intersection between organised crime and terrorist activity, and considers it important the police have the appropriate tools to be able to investigate both sets of criminal activity, especially where there is direct interaction between them.

## **Amendments to the Criminal Code – new offence of advocating terrorism**

- 2.103 The Bill will introduce section 80.2C into the Criminal Code, making it an offence for a person to advocate the doing of a terrorist act or the commission of a terrorist offence, being reckless as to whether another person will engage in a terrorist act or commit a terrorism offence.
- 2.104 For the purposes of the section, ‘terrorist act’ is given the same meaning as in section 100.1 of the Criminal Code. ‘Terrorism offence’ has the same meaning as section 3(1) of the Crimes Act, and is further limited by only covering offences that are punishable by 5 or more years imprisonment.<sup>80</sup>
- 2.105 The proposed section also includes a definition of when a person ‘advocates’ the doing of a terrorist act or commission of a terrorism offence, which includes counselling, promoting, encouraging or urging.
- 2.106 The offence will be committed even if there is no direct link between the act of advocacy and an actual act of terrorism.

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<sup>80</sup> Proposed section 80.2C (2) of the CTLA(FF) Bill.

2.107 The Explanatory Memorandum states that as terrorism represents a grave threat to Australia, it is reasonable that conduct which increases the likelihood of terrorism occurring should be discouraged and penalised:

Advocating terrorism heightens the probability of terrorist acts or the commission of terrorism offences on Australian soil and encourages others to join the fight overseas. The criminalisation of behaviour which encourages terrorist acts or the commission of terrorism offences is a necessary preventative mechanism to limit the influence of those advocating violent extremism and radical ideologies.<sup>81</sup>

2.108 The AFP requested inclusion of the proposed offence on the basis of concern

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.<sup>82</sup>

2.109 A number of submissions identified issues with the proposed offence, including:

- the sufficiency of the existing incitement and urging violence offences in capturing those who directly encourage others to engage in criminal acts
- a 'recklessness' threshold is a disproportionate impingement on the right to free speech
- the potentially counter-productive nature of the offence
- the definition of 'advocacy' is overly vague and does not provide sufficient clarity to enable people to know what activity could be deemed illegal, and
- the 'good faith' defence does not sufficiently capture the full range of activities that should be covered.

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81 CTLA(FF) Bill, *Explanatory Memorandum*, p. 29.

82 Australian Federal Police, *Submission 36*, p. 7.

## Existing offences

2.110 Section 11.4 of the Criminal Code makes it an offence for a person to urge another person to commit an offence. The person must intend that the offence incited be committed.<sup>83</sup>

2.111 Section 80.2A of the Criminal Code makes it an offence for a person to urge force or violence against a particular group. The person must intend for the force or violence to occur.<sup>84</sup>

2.112 Some submitters claimed that these offences provided sufficient coverage for the activity of ‘advocating’ terrorism. For example, the Gilbert + Tobin Centre of Public Law noted that:

To the extent that the proposed offence encompasses genuine cases of incitement (namely, where a person urges or encourages another person to commit a terrorism act or offence, and does so intending that the conduct will occur), it is superfluous. By virtue of s 11.4 of the Criminal Code, it is already an offence to incite a terrorist act or a substantive terrorism offence.<sup>85</sup>

2.113 Against this position, the AFP submitted that the current offences are not appropriate for the current range of activity which is increasing the risk of terrorism:

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.<sup>86</sup> [italics in original]

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83 Section 11.4 (2) of the Criminal Code.

84 Section 80.2A (1) (b) of the Criminal Code.

85 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 14. See also Australian Lawyers for Human Rights, *Submission 15*, p. 7; Members of the Victorian Bar Human Rights Committee, *Submission 29*, p. 5; Human Rights Watch, *Submission 21*, p. 2.

86 Australian Federal Police, *Submission 36*, p. 7.

## Recklessness

2.114 Having a test of recklessness for whether another person would engage in or commit a terrorist act or terrorism offence was seen as problematic by a number of submitters.

2.115 By not requiring a direct link between the speech and terrorist acts or offences, the Gilbert + Tobin Centre of Public Law raised concerns about the possible infringement on free speech:

By taking a broader approach than the law of incitement, the proposed offence is likely to criminalise a range of legitimate speech acts.<sup>87</sup>

2.116 This concern was echoed by the Muslim Legal Network (NSW), which stated:

This provision is an ideological attack on the fundamental human right of freedom of expression.<sup>88</sup>

2.117 The councils for civil liberties across Australia stated that for any speech to be made unlawful there needs to be a necessary connection between the speech and unlawful action, with the person providing the speech intending such an outcome.<sup>89</sup> Gilbert + Tobin agreed, stating that without such a link, there was too great a risk that the offence would stifle the ability of differing viewpoints about terrorism and foreign conflict to be discussed in public debate:

In 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. Determining right and wrong in a foreign conflict is far too difficult an issue to expose individuals to criminal liability for encouraging or promoting the acts of one side.<sup>90</sup>

2.118 The Law Council of Australia suggested that for the offence to be proportionate, there would need to evidence of

a link between the advocacy and a demonstrable substantial risk that the promotion would encourage or lead a person to engage in a terrorist act. So it would need to be more than just a minimal

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87 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 14.

88 Muslim Legal Network (NSW), *Submission 43*, p. 10.

89 Councils for civil liberties across Australia, *Submission 25*, p. 15.

90 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 14.

chance that someone would act on the promotion. But if there was a substantial risk, that would be sufficient to criminalise the act.<sup>91</sup>

- 2.119 Expanding its position on what sort of connection between the advocacy and an act would be required, the Law Council went on to say:

[a] substantial risk that they might then participate. It would not be necessary to prove that somebody acted on the promotion but simply to prove that the promotion was of such a character that there was a real risk that somebody would be encouraged to engage in a terrorist act.<sup>92</sup>

- 2.120 The justification for including a recklessness test in the offence is that it will allow police to disrupt and prevent the encouraging of terrorism before terrorist activity actually takes place:

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.<sup>93</sup>

- 2.121 Some submitters argued that the offence may actually be counter-productive in Australia's efforts to confront terrorist ideology. In not requiring an intention of behalf of the advocate and thereby covering a broader range of speech, the law

run[s] the risk of turning people into martyrs in some situations and actually causing a problem, as opposed to engaging in a

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91 Mr Phillip Boulten SC, *Committee Hansard*, Canberra, Friday 3 October 2014, p. 60.

92 Mr Boulten SC, *Committee Hansard*, Canberra, Friday 3 October 2014, p. 60.

93 CTLA(FF) Bill, *Explanatory Memorandum*, p. 29.

vigorous debate and making it clear how wrongheaded those ideas are.<sup>94</sup>

## Definition of advocates

2.122 A range of submitters noted concerns with the proposed definition of advocates, particularly the terms ‘promotes’ and ‘encourages’. These terms were considered to be overly broad and vague, and to not provide sufficient certainty as to what activity the offence covers:

The terms ‘encourages’ and ‘promotes’ are not defined in the Bill. The Law Council notes in this regard that these terms would take on their ordinary meaning and that these words are broad in their connotations.<sup>95</sup>

2.123 Professor Ben Saul similarly stated:

[I]t is unclear what kinds of speech would fall within the definition of the offence, rendering it difficult for individuals to prospectively know the scope of their criminal liability, and thus raising a separate infringement of the principle of legality under Article 15 of the ICCPR.<sup>96</sup>

2.124 The Muslim Legal Network (NSW) also questioned what actions would constitute ‘advocacy’, particularly in relation to activity on social media platforms:

If for example, a third party posts material either to your social media account, or if an individual engages with material deemed to be considered ‘advocating terrorism’ through a mere “like” or share on social media sites, the charge could arguably be proven. This works to place a large proportion of individuals at risk of prosecution and could potentially be considered a limitation on the expression of free speech... We do not know how this provision will relate to social media.<sup>97</sup>

2.125 The Network also questioned whether advancing a position that was in opposition to Government policy in relation to overseas conflicts would be

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94 Professor George Williams, *Committee Hansard*, Canberra, 3 October 2014, p. 52. See also Mr Stephen Blanks, councils for civil liberties across Australia, *Committee Hansard*, Canberra, 3 October 2014, p. 4; Muslim Legal Network (NSW), *Submission 43*, p. 12.

95 Law Council of Australia, *Submission 12*, p. 17. See also Islamic Council of Victoria, *Submission 42*, p. 2; Australian National Imams Council, *Submission 35*, p. 1.

96 Professor Ben Saul, *Submission 2*, p. 1.

97 Muslim Legal Network (NSW), *Submission 43*, p.11; see also Australian Lawyers for Human Rights, *Supplementary Submission 15.1*, p. 3.

deemed as ‘promotion’ of the other parties to the conflict, which could include terrorists. The Network questioned whether debates such as occurred during the Vietnam War would be legitimate under the proposed offence:

There was a significant degree of support amongst sections of the community for the efforts of the communist forces in Vietnam. Our concern is that that was a debate that took place back then; the question that we have is: if that same debate took place now, is one considered to be advocating terrorism? And, if that is the case, we say that these provisions go too far.<sup>98</sup>

- 2.126 Similarly, the Human Rights Commission questioned whether ‘promotion’ might cover general statements or support for particular ideas:

The Commission is concerned that it may include speech and conduct which is general, not directed at a specific audience, and not directed towards the commission of particular offences. Indeed, it is arguable that the ‘promotion’ and ‘encouragement’ of terrorist acts might include the praise or the publicising of terrorist acts or radical ideologies, or of political movements containing extremist elements.<sup>99</sup>

- 2.127 The Human Rights Law Centre expressed concern as to how the definition of ‘advocates’ would be read in conjunction with the definition of ‘terrorist act’ in section 100.1 of the Code:

The proposed offence for advocating terrorism goes beyond incitement to include ‘promotion’ and ‘encouragement’ which, when read together with the broad definitions of ‘terrorist act’ and ‘terrorist offence’, is likely to have an unduly restrictive effect on legitimate free speech. For example, ‘terrorist act’ covers not only specific actions but also the threat of those actions, meaning that any act preparatory to or in planning for specified actions would be captured by the definition. This means the new offence of advocating terrorism would extend to persons who recklessly promote or encourage the *threat* of a terrorist act, but do not actually advocate, either intentionally or otherwise, for the *doing* of a terrorist act.<sup>100</sup>

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98 Mr Ertunc Yasar Ozen, Member and Chief Executive Officer of the Australian Turkish Advocacy Alliance, *Committee Hansard*, Canberra, 8 October 2014, p. 35.

99 Australian Human Rights Commission, *Supplementary Submission 7.1*, p. 5.

100 Human Rights Law Centre, *Submission 18*, p. 12.

- 2.128 This concern was echoed by the Media, Entertainment & Arts Alliance who stated their continued objection to the current definition of 'terrorist act' in the Code :

[The Media, Entertainment & Arts Alliance] has always believed that the current definition of 'terrorist act' in s 100.1 of the Criminal Code has been excessively broad and poorly defined. The effect of this is that legitimate areas of free speech and advocacy may be caught as 'terrorism'.<sup>101</sup>

- 2.129 The Media, Entertainment and Arts Alliance were also concerned about how the advocacy offence may cover journalistic activity in reporting on foreign regimes and conflicts and the potential prosecution of whistleblowers:

And because the terrorism definition extends to actions against foreign governments, it would capture advocates of even legitimate actions against foreign oppressive regimes. This new offence could also capture journalists reporting on foreign powers using documents that have been leaked to them.

Under section 100.1(1) of the Criminal Code, a 'terrorist act' includes, among other things, seriously interfering with, or seriously disrupting or destroying an electronic system including and information, telecommunications or financial system et al. Journalists are often handed information by a source as the basis of a news story. Most leaked documents that are given to journalists by whistleblowers and other sources, are leaks that originate from 'interfering' with a computer system...

Under the new offence of advocating terrorism, journalists could also be caught for counselling, promoting, encouraging or urging a whistleblower to leak a document. Indeed, the provision is drawn so widely, that urging leaking of documents in general terms may fall within this clause.<sup>102</sup>

- 2.130 The Media, Entertainment and Arts Alliance therefore recommended that, only in so far as the law applied to journalists, the definition of 'terrorist act' should be redefined to bring it into line with internationally accepted norms and existing definitions.<sup>103</sup>

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101 Media, Entertainment and Arts Alliance, *Submission 43*, p. 4; See also Dr Wood, *Submission 31*, p.12; Joint Media Organisations, *Submission 23*, p. 2.

102 Media, Entertainment and Arts Alliance, *Submission 43*, pp. 4-5.

103 Media, Entertainment and Arts Alliance, *Submission 43*, p. 6.

- 2.131 The Explanatory Memorandum notes that while there may be some degree of duplication between the existing definition of ‘advocates’ in the Code and the proposed definition, the new definition provides important additional elements to the concept to reflect the intended scope of the new offence:

The terms ‘promotes’ and ‘encourages’ are not defined. The ordinary meaning of ‘encourages’ the doing of a terrorist act could include conduct or statements that inspire an individual to commit a terrorist act. The ordinary meaning of ‘promotes’ the doing of a terrorist act could include conduct or statements such as launching a campaign to commit terrorist acts.

While there may be some overlap with ‘counsels’ or ‘urges’ the doing of a terrorist act, which may include conduct such as inducement, persuasion or insistence, or to give advice, or an opinion about the doing of a terrorist act, the inclusion of the additional terms is designed to ensure coverage of a broader range of conduct that may be considered as advocating a terrorist act, beyond the conduct of ‘counsels’ or ‘urges’.<sup>104</sup>

- 2.132 The Explanatory Memorandum provides an example of precedent for the use of ‘promotes’ and ‘encourages’ in a definition of ‘advocacy’:

The inclusion of the terms ‘promotes’ and ‘encourages’ in paragraph 102.1(1A)(a) is consistent with section 3 of the United Kingdom’s *Terrorism Act 2000*, which provides that an organisation is *concerned in terrorism* if it promotes or encourages terrorism.<sup>105</sup>

## ‘Good faith’ defence

- 2.133 The existing defence in section 80.3 of the Criminal Code is said to provide an important safeguard against the risk that the offence represents a threat to free speech:

The good faith defence ensures that the communication of particular ideas intended to encourage public debate are not criminalised by the new section 80.2C. In the context of matters that are likely to pose vexed questions and produce diverse opinion, the protection of free expression that attempts to lawfully procure change, points out matters producing ill-will or hostility

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104 CTLA(FF) Bill, *Explanatory Memorandum*, p. 121.

105 CTLA(FF) Bill, *Explanatory Memorandum*, p. 121.

between different groups and reports on matters of public interests is vital. The maintenance of the right to freedom of expression, including political communication, ensures that the new offence does not unduly limit discourse which is critical in a representative democracy.<sup>106</sup>

- 2.134 While supporting the importance of the application of the existing defence, some submitters noted that the defence is limited to, relevantly, urging *lawful* change in another nation's law or policy.<sup>107</sup> Therefore, it would not apply to the advocacy of acts that are illegal (such as acts aimed at changing a despotic government through use of force).<sup>108</sup> The Islamic Council of Victoria stated that:

If the government is to decide what legitimate armed struggle is and what terrorism is and which groups are considered terrorists, then this measure could see to it that there are no voices of disagreement or debate on the subject for fear of prosecution.<sup>109</sup>

## Committee comment

- 2.135 The Committee recognises that the proposed advocating terrorism offence is a highly contentious issue which has generated considerable debate, both before the Committee and more broadly. The Committee is also mindful of any unintended consequences that may arise from the operation of such an offence.
- 2.136 The Committee accepts that the Government's intention in introducing the offence is to capture a broader range of behaviour than is currently covered under the existing incitement and urging violence offences in the Criminal Code. The Committee accepts that on the evidence provided to it, the current incitement offence is not appropriate to capture the range of activity being encountered and investigated by operational agencies. This is due to the requirement that police must prove an intention on behalf of the accused for another person to undertake a terrorist activity. The increasingly sophisticated methods being used by people advocating for others to commit terrorist activity means evidence of such intention is often not available, despite the risk that advocating can cause.

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106 CTLA(FF) Bill, *Explanatory Memorandum*, p. 29.

107 Section 80.3 (c) of the Criminal Code.

108 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 1. See also Mr Bonner, *Submission 34*, p. 8.

109 Islamic Council of Victoria, *Submission 42*, p. 2. See also Muslim Legal Network (NSW), *Submission 43*, p. 12; Media, Entertainment and Arts Alliance, *Submission 43*, p. 5.

- 2.137 To this end, a ‘recklessness’ threshold is an appropriate element of the offence, as it will not require evidence of a direct link between an act of advocacy and an act of terrorism. As a preventative tool, this is an important consideration in examining the new offence. The ‘recklessness’ fault element will mean that the offence, as drafted, would require the prosecution to prove that the accused was aware of a substantial risk that a terrorist act or terrorism offence would occur as the result of the accused’s conduct and, having regard to the circumstances known to him or her, it was unjustifiable to take that risk.
- 2.138 The Committee considers the ‘recklessness’ test in the Criminal Code is an appropriate tool for assessing an individual’s behaviour under the proposed offence. The Committee took evidence that, by allowing the offence to explicitly take into account a person’s unique circumstances, the offence will hold different people to standards which appropriately reflect any special positions of power or influence an individual may hold.
- 2.139 In coming to this conclusion, the Committee does recognise the range of issues that a ‘recklessness’ test may create, such as the impact on the right of free speech and uncertainty in the law. Terrorism and foreign conflicts are often topics of robust discussion in the community, with greatly divergent views, and it should not be the role of the law to strictly police such discussions and stifle debate. Advocating for others to undertake terrorist activity should be discouraged, regardless of the proximity between the act of advocacy and any subsequent actual act of terrorism.
- 2.140 As previously outlined, the Committee notes that if a law enforcement officer suspects an individual of advocating for a terrorist act, the officer must first consider proceeding by way of summons, consistent with the existing arrest without warrant power in the Crimes Act. The constable may only arrest without a warrant if they reasonably suspect that a summons would not achieve one or more of the specified purposes.
- 2.141 It was demonstrated in evidence that the capacity for radicalisation to occur has increased in pace in recent times. The ability for police to be involved early in the radicalisation process is an important preventative measure. Such action can assist in reducing the threat of terrorism by removing motivating elements which may influence individuals to undertake terrorist activity. The proposed offence will allow police to act against those who could otherwise act as a catalyst for terrorist activity.
- 2.142 The Committee notes that the Commonwealth Director of Public Prosecutions must take into account the public interest, including the public interest in publication, before initiating a prosecution for an offence

against section 80.2C of the Criminal Code regarding advocacy of terrorism. The *Prosecution Policy of the Commonwealth* states:

The factors which can properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. While many public interest factors militate against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution (for example, the seriousness of the offence, the need for deterrence). In this regard, generally speaking the more serious the offence the less likely it will be that the public interest will not require that a prosecution be pursued.<sup>110</sup>

- 2.143 A number of submitters raised concerns about the inclusion of the terms ‘promotion’ and ‘encouragement’ in the definition of advocacy. These terms are not defined in the Bill and, ultimately, it would be a consideration for judicial authority as to whether an individual had actually ‘advocated’ the doing of a terrorist act or terrorism offence. The Committee acknowledges the policy reason for including the terms in the definition. This definition is intended to broaden the offence beyond intentional behaviour.
- 2.144 The offence will require the person to intentionally advocate and be reckless to the outcome of such advocacy. To this extent, promoting or encouraging requires a degree of willingness; it is not merely that a person comments on or draws attention to a factual scenario (such as through a news report, social commentary or religious sermon). Successful prosecutions will only be possible where there is evidence that the advocate intentionally communicated about activity that is a terrorist act or offence, there is a substantial risk that somebody would take this speech as advocacy of such behaviour in the particular circumstances, and the advocate is aware of this risk and unjustifiably communicates on the topic anyway.
- 2.145 In the Committee’s opinion, this test will not stifle the true debate that occurs within a democratic and free society. It will, however, capture those communications which create an unacceptable risk of terrorist activity.
- 2.146 However, the Committee does recognise that there is a lack of clarity in relation to what behaviour could be deemed to be acts which ‘advocate’,

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110 *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process*, pp. 6-7. Available at <<http://www.cdpp.gov.au/publications/prosecution-policy-of-the-commonwealth/>>.

particularly concerning social media. For example, it is not clear whether a person who ‘likes’ a Facebook comment which contains favourable reference to terrorist activity is ‘advocating’ that others should undertake that behaviour.

- 2.147 In light of the evidence received by the Committee, the wide range of ordinary meanings of the terms ‘promotes’ and ‘encourages’, and the interaction with social and other media, some Committee members questioned whether there can be legal certainty established in relation to the scope of activities that would constitute offences.
- 2.148 The Committee also recognises that further clarity on the terms ‘encourage’ and ‘promote’ would assist people in prospectively knowing the scope of their potential criminal liability. For example, it is not clear whether a person ‘promotes’ a terrorist act or terrorism offence if the person states that they support a terrorist organisation, especially if that organisation is party to a conflict that Australia is also a party to. A terrorist organisation is one that is specified by regulation, or is one that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act.<sup>111</sup>
- 2.149 The Committee therefore recommends that the Attorney-General amend the Bill or the Explanatory Memorandum to clarify the activities that would be covered by the terms ‘encourages’, ‘promotes’ and, ‘advocacy’.
- 2.150 The Committee recognises that the Explanatory Memorandum will not provide an exhaustive list of examples of what activities could be considered as ‘advocacy’ or ‘promotion’. However, further legislative guidance for the public and the judiciary would be beneficial.

### **Recommendation 5**

**Whilst there were differing views within the Committee, the Committee recommends that the Attorney-General further clarify the meaning of the terms ‘encourage’, ‘advocacy’ and ‘promotion’ by amendment to either the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 or its Explanatory Memorandum in light of the evidence provided during the Committee’s inquiry.**

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111 Section 102.1 of the Criminal Code.

## Recommendation 6

**The Committee recommends that the Attorney-General amend the Explanatory Memorandum of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 to clarify the meaning of ‘promotion’ in relation to statements of support for the objectives or activities of a terrorist organisation as defined by the Criminal Code.**

- 2.151 The Committee recognises that the Australian Law Reform Commission previously completed a significant body of work on issues raised in this inquiry. In its 2006 report, *Fighting Words: A review of sedition laws in Australia* (2006), the Commission recommended that an offence of ‘encouragement’ (or glorification) of terrorism should not be introduced in Australia.<sup>112</sup> The Committee considers that this recommendation should not preclude the passage of the proposed offence for two reasons. Firstly, the current proposal is not limited solely to ‘encouragement’. It also does not include a ‘glorification’ element. Criticism of a UK provision by the Law Reform Commission and the Attorney-General’s Department itself (which could have been the precedent for an Australian offence) was largely based on the ‘glorification’ aspect.<sup>113</sup>
- 2.152 A second reason is the markedly different threat environment which the Committee recognises that Australia is now facing. The continuing rise of social media and the increased sophistication of terrorist propaganda material is having an effect on some Australians. The advocacy of terrorist acts across a wide variety of media is known to have played a part in the decision of some, mostly young, Australian males, vulnerable to suggestion, to leave Australia and participate in conflicts overseas. This is highly concerning for not only their own safety, but the safety of the Australian community and the population of the countries in which they are fighting.
- 2.153 While terrorist and other illegal groups have always tried to encourage others to join their ranks and elevate their cause, the communication tools now available to them for this purpose are allowing such messaging on a scale and scope which is unprecedented. The Committee accepts that the Government does have a responsibility for ensuring that advocacy of terrorism is discouraged and prevented, and that the existing offences do not cover this type of behaviour.

112 Australian Law Reform Commission, *Fighting Words: A review of sedition laws in Australia* (2006) pp. 126–127.

113 Australian Law Reform Commission, *Fighting Words: A review of sedition laws in Australia* (2006) pp. 125; See also section 1, *Terrorism Act 2006* (UK).

- 2.154 The Committee notes that the existing ‘good faith’ defence is entirely appropriate for the existing treason and urging violence offences and the proposed advocacy offence. It is proper that the defence should only extend to the advocating of acts connected to the lawful change of law or policy in Australia or another country. Without this requirement, courts would be required to pass judgement on not only whether a particular statement should be considered advocacy of a terrorism act or offence, but potentially also on the legitimacy of armed groups and foreign governments. This has never been, and should never be, a role for judicial officers.
- 2.155 The Committee notes that the existing defence requires an evidential burden on the person claiming the defence. An evidential burden requires a defendant to provide evidence that suggests a reasonable possibility that the exception or defence is made out. Once the defendant has met the evidential burden, the prosecution must refute the exception or defence and prove all elements of the offence beyond reasonable doubt. The Committee notes that under the *Guide to Framing Commonwealth Offences*, whether a statement was made in ‘good faith’ should be an element for the accused to make out:
- In general, the prosecution should be required to prove all aspects of a criminal offence beyond reasonable doubt. A matter should be included in a defence, thereby placing the onus on the defendant, only where the matter is peculiarly within the knowledge of the defendant; and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.<sup>114</sup>
- 2.156 The Committee considers that an evidential burden for an accused’s defence is appropriate for the proposed offence.
- 2.157 The Committee notes that the existing ‘good faith’ defence, other criminal law safeguards and the recommendations made in this section will ensure that an appropriate balance is struck between free speech, healthy public discourse and the illegal and unwanted encouragement of terrorism.

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114 Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (Guide to Framing Commonwealth Offences)*, September 2011 edition.

## Listing of terrorist organisations

- 2.158 The Bill will make three changes to the process and criteria for listing a terrorist organisation. These are:
- amending the definition of ‘advocates’ for the purposes of listing an organisation to include where a person encourages or promotes terrorist acts
  - enabling the Attorney-General to add, remove or alter the alias of a listed terrorist organisation by declaration, and
  - clarifying that any reference to ‘terrorist act’ in Division 102.1 includes a reference to the doing of:
    - ⇒ a terrorist act, even if a terrorist act does not occur
    - ⇒ a specific terrorist act, and
    - ⇒ more than one terrorist act.

### Definition of ‘advocates’

- 2.159 Submitters commented on the proposed amendment to the definition of ‘advocates’ to include where a person ‘promotes’ or ‘encourages’ the doing of a terrorist act. These terms are not defined and will have their ordinary meaning.
- 2.160 The Explanatory Memorandum outlines that
- the inclusion of the additional terms is designed to ensure coverage of a broader range of conduct that may be considered as advocating a terrorist act, beyond the conduct of ‘counsels’ or ‘urges’.<sup>115</sup>
- 2.161 The amendment was further justified on the basis that:
- An organisation could continue to have a significant influence in promoting or encouraging terrorism by others without necessarily engaging in terrorist acts itself, without directly counselling or urging the doing of a terrorist act.<sup>116</sup>

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115 CTLA(FF) Bill, *Explanatory Memorandum*, p. 120.

116 CTLA(FF) Bill, *Explanatory Memorandum*, p. 120.

- 2.162 The proposed amendment is consistent with section 3 of the United Kingdom's *Terrorism Act 2000*. This section provides that an organisation is *concerned in terrorism* if it promotes or encourages terrorism.<sup>117</sup>
- 2.163 Significant concerns were expressed about the proposed extension of what constitutes advocacy for the purposes of listing a terrorist organisation. The Law Council of Australia questioned the need for the extension noting that:
- Measures to criminalise the encouragement or promotion of terrorism may restrain freedom of association and freedom of speech. The question is whether those restraints are proportionate to the risk and it should be recognised that they may prove counter-productive.<sup>118</sup>
- 2.164 The Gilbert + Tobin Centre of Public Law agreed, noting:
- It is already problematic that an organisation can be proscribed on the basis that it advocates terrorism and any expansion of this power should be considered with extreme caution.<sup>119</sup>
- 2.165 On this basis, Gilbert + Tobin recommended that the amendment not be progressed. In particular:
- In the absence of any significant evidence demonstrating that the expansion of the proscription regime would help to prevent terrorism, it seems that the dangers of the proposed changes far outweigh their potential benefits.<sup>120</sup>
- 2.166 The Law Council of Australia outlined the consequences of an organisation being listed, including the offences for which members of that organisation are liable. On this point, they noted groups are rarely homogenous and there are generally a range of differing opinions within one organisation. As such, they expressed concern that this amendment (in addition to the existing definition of advocacy) could result in attributing the views of a minority of members on the whole group, leading to 'guilt by association'.<sup>121</sup> Specifically they stated:
- The result of the proposed amendment is that, under the Criminal Code, a person who is a member of an organisation could be prosecuted for a criminal offence if another member of that group

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117 CTLA(FF) Bill, *Explanatory Memorandum*, p. 121.

118 Law Council of Australia, *Submission 12*, p. 19.

119 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 16.

120 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 17.

121 Law Council of Australia, *Submission 12*, paragraph 76.

‘encourages or promotes’ a terrorist act, even when the person who encouraged or promoted the terrorist act is not the leader of the group, or when the statement is not accepted by other members as representing the views of the group.<sup>122</sup>

2.167 Similar sentiments were expressed by Gilbert + Tobin.<sup>123</sup> This was supported by Professor George Williams in evidence before the Committee:

[T]he current definition should be not extended to 'promotion' and 'encouragement' – it takes it considerably beyond where it is – and because the underlying problem is that it does enable criminalisation in circumstances for mere speech that is not justifiable.<sup>124</sup>

2.168 The Law Council of Australia also noted that the proposed amendment appeared to contradict the COAG review recommendation that paragraph (c) of the existing definition (praising the doing of a terrorist act) be repealed.<sup>125</sup> In support of this position, Gilbert + Tobin called for the Committee to give serious consideration to the COAG recommendation.<sup>126</sup>

2.169 The Law Council of Australia also expressed concerns that the drafting of the amendment meant that a group could be listed even where the encouraging or promoting has a very low or negligible risk of causing others to engage in a terrorist act or terrorism.

2.170 As such, if this amendment is implemented, the Law Council of Australia called for the proposed words to be included in paragraph (c) of the definition, rather than paragraph (a). This will require there to be a substantial risk that the conduct might have the effect of leading a person to engage in a terrorist act.<sup>127</sup> In response to questioning on what would be necessary to prove this risk before the Committee, the Law Council of Australia stated:

It is something that was likely to convince a court that there was such a connection, either direct or indirect, between the act or statement that promoted the organisation, and somebody actually acting on the promotion so as to carry out a terrorist act. It would

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122 Law Council of Australia, *Submission 12*, paragraph 75.

123 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 16.

124 Professor Williams, *Committee Hansard*, Canberra, 3 October 2014, p. 51.

125 Law Council of Australia, *Submission 12*, paragraph 80.

126 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 16.

127 Law Council of Australia, *Submission 12*, paragraph 85.

be difficult to be absolutely comprehensive in describing the examples here in this committee context.<sup>128</sup>

2.171 Gilbert + Tobin also recommended that ‘promoting’ be included in paragraph (c) on the basis that it is more akin to ‘praising’.<sup>129</sup>

2.172 In response to questioning on the effectiveness of the amendment and whether the conduct in question should be criminalised given the range of terrorism related offences already in place, Professor George Williams noted:

If you start jailing people for vague speech about terrorism, that has the potential to be very counterproductive where there is not a very clear link. As I say, if there is a link, you can be prosecuted. If there is any financial support or any of those things, they are all offences.

It gets to some of the big debates we are having about free speech in this country as to whether you want to jail people for that or whether you think it is better to meet it head on in public debate. I am very much of the view that it is usually better to meet this in public debate.

Let's not send this discussion underground; let's have leaders and others making it clear how wrong-headed that is. If you start jailing people you will radicalise people. Indeed this speech itself has been shown very significantly to be a strong source of potential radicalisation because it gives the sense of great grievance. If someone has not done something, they have merely said something, I cannot see that jailing them for a long time is going to help. I think it may actually hinder the fight.<sup>130</sup>

2.173 In support of this position, Gilbert + Tobin noted the broader effect the amendment could have:

A more general danger with expanding the definition of advocacy is that it may further alienate sections of Australia’s Muslim population. The proposed reforms would do so by making it easier to criminalise organisations that are engaged in public debates on current events overseas. This may contribute to

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128 Mr Boulten SC, *Committee Hansard*, Canberra, 3 October 2014, p. 60.

129 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 17.

130 Professor Williams, *Committee Hansard*, Canberra, 3 October 2014, p. 52.

perceptions that the government is unfairly targeting Muslim communities with its counter-terrorism powers.<sup>131</sup>

## Other amendments

2.174 The other amendments proposed by this part are that the Bill will clarify that any reference to 'terrorist act' in Division 102.1 includes a reference to the doing of:

- a terrorist act, even if a terrorist act does not occur
- a specific terrorist act, and
- more than one terrorist act.

2.175 The Bill will also amend the Criminal Code to provide that a regulation specifying an organisation to be a terrorist organisation can be updated to include another name the organisation is known by or remove a name in the regulation that the organisation is no longer known by.

2.176 While not directly relating their comments to this proposal, the Muslim Legal Network (NSW) outlined their view on the use of language in evidence before the Committee, specifically how best to reference the existing terrorist threat:

The major terrorist threat has consistently been identified as 'Islamic State' or 'ISIS', or in some other way using the term 'Islamic'. That is how they would wish to portray themselves. They in no way represent the aspirations or indeed the core beliefs of Islamic people in this country or indeed the majority of Islamic people across the globe. Referring to them continuously as 'Islamic'-anything not only plays into their propaganda war but tends to marginalise the Muslim population in this country. We would commend, to this committee and to legislators in future, when referring to organisations such as the 'Islamic State', adopting the approach that has been adopted with respect to other organisations. We do not translate 'Boko Haram' or 'al-Qaeda', for example. And, in the Arab world, what we here know as 'Islamic State' is known as 'Daesh', which is not only an acronym but also has quite a critical connotation, and we would commend to this committee consideration of identifying the 'Islamic State' by the name that has been adopted in the Arab world.<sup>132</sup>

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131 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 17.

132 Mr Ozen, *Committee Hansard*, Canberra, 8 October 2014, p. 32.

2.177 No other significant comments were made on these amendments.

### **Committee comment**

2.178 The Committee notes that the primary purpose of the proposed change to the definition of ‘advocates’ is to address behaviour falling short of ‘counselling’ or ‘urging’. In its supplementary submission, the Attorney-General’s Department noted:

An organisation may make statements more generally promoting or encouraging terrorism without directly stating ‘you should commit a terrorist act’. The Government considers that an organisation engaging in such conduct should not be able to evade the listing process.<sup>133</sup>

2.179 The Committee considers it important that any conduct that has a demonstrable effect of advocating a terrorist act is able to be used as a basis for an organisation to be listed.

2.180 While the Committee notes the views of submitters that expansion of the definition could result in members of an organisation being liable even where they do not agree with statements made by others in the group, it does not consider this is a sufficient reason to not support this change.

2.181 On this point, the Committee considers that the proposed amendment may have the beneficial effect of discouraging people from belonging to groups who subscribe to these views.

2.182 The Committee also notes further information provided by the Attorney-General’s Department on how these terms may impact on the use of the listing provisions:

The proposed ‘promotes’ and ‘encourages’ amendments are not designed to capture one-off instances of conduct which may fall within the definition of ‘advocates’ (such as an individual’s statement to carry out terrorism) unless the conduct is considered to have been undertaken by an organisation.<sup>134</sup>

2.183 The Committee is satisfied that appropriate prosecutorial discretion would be used in determining whether to prosecute a person for being a member of a group that has been listed on the basis of the expanded definition of ‘advocates’. This is supported by the existing use of the

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<sup>133</sup> Attorney-General’s Department, *Supplementary submission 8.1*, p. 10.

<sup>134</sup> Attorney-General’s Department, *Supplementary Submission 8.1*, p. 10.

provisions enabling the listing of a terrorist organisation and associated terrorism offences in the Criminal Code.

- 2.184 The Committee also supports the amendments which will enable the Attorney-General to add, remove or alter the alias of a listed terrorist organisation by declaration. The Committee considers this is a sensible amendment, which will ensure that the listing cannot be defeated simply through an organisation changing their name or using a different alias.
- 2.185 Additionally, the Committee endorses the comments made by the Muslim Legal Network (NSW) in evidence before the Committee as to how best to reference the terrorist organisation 'Islamic State' or 'ISIS'.
- 2.186 The Committee is determined to ensure that the name used to refer to this group, particularly in media reporting, is not used to further its propaganda campaign, including to recruit members and further marginalise the Muslim community. The Committee sees great benefit in ensuring that there is both clarity and consistency in how this terrorist organisation is publicly referenced. Although the Committee has not sought further evidence on this matter, on the evidence presented the Committee endorses the view put forward by the Muslim Legal Network (NSW) that the group be publicly referred to as 'Daesh'.
- 2.187 Based on the evidence presented, the Committee considers that referring to the group as 'Daesh' will help counter the group's desire to portray itself as representing the core beliefs of Islam. The Committee notes that the United States of America has included 'Daesh' in its listing of Islamic State and that the French Government refers to the organisation as 'Daesh'.
- 2.188 Further, while recognising the importance of public messaging, the Committee also seeks to ensure that the listing of all terrorist organisations (including 'Islamic State') are up to date and refer to all known names and aliases. This will ensure that the listing regime operates as effectively as possible.
- 2.189 It is important, however, that any change to the listing of a terrorist organisation is subject to appropriate oversight, similar to that provided for under the Criminal Code<sup>135</sup> when an organisation is listed.

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135 Section 101.1A of the Criminal Code.

### Recommendation 7

The Committee recommends that the Attorney-General review all current listings of terrorist organisations under the Criminal Code to determine whether additional names or aliases should be added to any listings.

### Recommendation 8

The Committee recommends that the Attorney-General notify the Committee of any proposed Regulation to alter the listing of a terrorist organisation by adding or removing a name or alias. The Committee also recommends that it have the power to determine if it wishes to review any proposed changes to listings.

## Control orders

2.190 A range of amendments are proposed to the control order regime in Division 104 of the Criminal Code. The key elements of these amendments are:

- altering the threshold for a senior AFP member to make an application for a control order from ‘considers’ to ‘suspects’
- amending the criteria for applying and issuing a control order to include where the person has:
  - ⇒ participated in training with a terrorist organisation
  - ⇒ engaged in a hostile activity in a foreign country, or
  - ⇒ been convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or a terrorist act
- clarifying that a reference to a ‘terrorist act’ includes a reference to:
  - ⇒ a terrorist act that does not occur
  - ⇒ a specific terrorist act, or
  - ⇒ more than one terrorist act
- limiting the time a person subject to a control order can be required to remain at a specified premises to a maximum of 12 hours in any 24 hour period

- ensuring a person subject to a control order is provided with certain information, and
- extending the operation of the control order regime for a further 10 years (until 15 December 2025).

## Continued application of regime

- 2.191 The continued application of the control order regime was a key issue for a number of submitters. This section of the report will canvass those views, however the timing and length of the proposed extension will be dealt with separately.
- 2.192 The Attorney-General's second reading speech justifies the amendments to the regime by noting that 'in the current heightened threat environment, it is vital our law enforcement and security agencies have effective mechanisms to manage emerging threats.'<sup>136</sup>
- 2.193 Supporting this position, the Explanatory Memorandum states that the extension of the control order regime recognises 'the enduring nature of the terrorist threat and the important role of control orders in mitigating and responding to that threat.'<sup>137</sup>
- 2.194 The AFP and the Attorney-General's Department also noted that the COAG review supported the retention of the control order regime.<sup>138</sup>
- 2.195 Despite the justifications above, and the amendments proposed in the Bill (including additional proposed safeguards), a number of submitters stated that the control order regime in its entirety should be repealed.
- 2.196 For example, the Australian Human Rights Commission noted that while the COAG Report recommended the regime be extended, it also went on to note that the existing safeguards are not adequate and substantial changes would be necessary to protect against abuse and ensure a fair hearing is held.<sup>139</sup>
- 2.197 In its submission, the Gilbert + Tobin Centre of Public Law outlined its concerns that the extension of the control order regime contradicts the INSLM's Second Annual Report, which recommended the control order
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136 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 24 September 2014, p. 65.

137 CTLA(FF) Bill, *Explanatory Memorandum*, pp. 128, 134.

138 Australian Federal Police, *Submission 36*, p. 5; Attorney-General's Department, *Submission 8*, p. 8.

139 Australian Human Rights Commission, *Submission 7*, p. 9; Law Council of Australia, *Submission 12*, p. 21.

regime be repealed.<sup>140</sup> In evidence to the Committee, Mr Bret Walker SC supported the recommendation he made while INLSM. In response to a question on whether his position has changed because of the raising of the terror alert level he noted:

No, not at all. The terror alert level, not that it is as exact as meteorology, has never been something that parliamentarians or the rest of us should be unconcerned about. So no critical point has been passed at all.<sup>141</sup>

2.198 Gilbert + Tobin drew on the INSLM report and noted his view that ‘control orders in their present form are not effective, not appropriate and not necessary’ and that ‘an individual subject to a control order is not likely to engage in any further activity that could form the basis for a conviction.’<sup>142</sup>

2.199 The Human Rights Law Centre agreed, noting that:

On the whole, control orders are an unnecessary and disproportionate limitation on human rights.<sup>143</sup>

2.200 Additionally, the Castan Centre for Human Rights Law, while noting that they consider control orders to be an objectionable device, queried the ongoing necessity of the regime given the lowering of the threshold, and amendments contained elsewhere in the Act to enable arrest for terrorism offences on the basis of suspicion.<sup>144</sup>

## Threshold for application

2.201 Currently, in requesting the Attorney-General’s written consent to an interim control order, a senior AFP member must:

- *consider* on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act, or
- suspect on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation.<sup>145</sup>

2.202 The amendments proposed by this Bill will require the senior AFP member to *suspect* (rather than consider) on reasonable grounds that the

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140 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 3.

141 Mr Walker SC, *Committee Hansard*, Canberra, 8 October 2014, p. 41.

142 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 4.

143 Human Rights Law Centre, *Submission 18*, p. 9.

144 Castan Centre for Human Rights Law, *Submission 17*, p. 5.

145 Section 104.2(2) of the Criminal Code.

order in the terms to be requested would substantially assist in preventing a terrorist act.

- 2.203 The Explanatory Memorandum states that this amendment responds to advice from law enforcement that the current threshold is too high.<sup>146</sup> It states the amendment will align the threshold with the existing threshold in the second limb of the test in paragraph 104.4(2)(b).
- 2.204 The Explanatory Memorandum also outlines that despite this threshold being lowered, the issuing court must still be satisfied of a range of matters before making an interim control order on the same threshold that currently exists.<sup>147</sup>
- 2.205 Notwithstanding this explanation, concerns were expressed with the proposed lowering of the threshold. The Gilbert + Tobin Centre of Public Law called for the threshold in the second limb to be changed to 'considers' rather the first limb lowered to 'suspects', in line with the recommendation made by the COAG review. Their submission stated that COAG
- viewed 'considers' as a higher standard that was more consistent with the issuing court's obligation to be satisfied of that conduct on the balance of probabilities.<sup>148</sup>
- 2.206 Similarly, the Law Council of Australia questioned the need to depart from the COAG recommendation in the absence of further reasons justifying the departure.<sup>149</sup>
- 2.207 Meanwhile, the Islamic Council of Victoria noted that lowering thresholds
- will create anger, tension and discontent. Far from addressing radicalisation these measures can act as a source of radicalisation, provoking those subjected to such socially and legally repressive measures to act out.<sup>150</sup>
- 2.208 In response to these concerns, in its supplementary submission, the Attorney-General's Department reiterated that the proposed change will only enable an application to the Attorney-General for his or her consent 'based on a slightly lower degree of certainty'.<sup>151</sup> The Department went on to outline that it considered the changed threshold to be 'appropriate for

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146 CTLA(FF) Bill, *Explanatory Memorandum*, p. 123.

147 CTLA(FF) Bill, *Explanatory Memorandum*, p. 123.

148 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 6.

149 Law Council of Australia, *Submission 12*, paragraph 95.

150 Islamic Council of Victoria, *Submission 42*, p. 3.

151 Attorney-General's Department, *Supplementary Submission 8.1*, p. 22.

the initial stages of seeking consent to apply for an interim control order'.<sup>152</sup>

2.209 The Department also confirmed that:

The same threshold that currently applies to the making of interim control orders – that the issuing court is satisfied on the balance of probabilities that the terms of the order are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from terrorism – must still be satisfied before an interim control order can be made against a person.<sup>153</sup>

2.210 Finally, in relation to the proposed change to the threshold, Mr Bret Walker SC in evidence before the Committee doubted the change would have a significant effect:

I am not quite sure that there is any true, appreciable lowering if things go as the bill presently proposes, any more than I think that there is any appreciable tightening if things went as COAG described.<sup>154</sup>

## Criteria for control orders

2.211 Currently, the only grounds on which a control order can be issued is where the person has provided training to, or received training from, a listed terrorist organisation. The Bill will expand the grounds on which an order can be sought and issued to also include where the person has:

- participated in training with a terrorist organisation
- engaged in a hostile activity in a foreign country, or
- been convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or a terrorist act.

2.212 The Explanatory Memorandum states that this amendment follows advice from law enforcement agencies that there is an existing gap that

precludes them from seeking consent to apply for a control order against a person who has actually engaged in foreign fighting activity or been convicted of a terrorism offence where those persons pose a risk to the community. The inclusion of these additional criteria will facilitate the placing of appropriate controls

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152 Attorney-General's Department, *Supplementary Submission 8.1*, p. 23.

153 Attorney-General's Department, *Supplementary Submission 8.1*, p. 23.

154 Mr Walker SC, *Committee Hansard*, Canberra, 8 October 2014, p. 45.

over such individuals where this would substantially assist in preventing a terrorist act.<sup>155</sup>

2.213 In relation to this amendment, the Law Council of Australia noted the former INSLM's recommendation in his Second Annual Report that the existing control order regime should be replaced with a narrower regime. In particular, it noted that the amendments do not 'include any requirement for proven continuing dangerousness and unsatisfactory prospects for rehabilitation.'<sup>156</sup>

2.214 This position was supported by the Human Rights Law Centre<sup>157</sup> and the Gilbert + Tobin Centre of Public Law who noted that the proposed amendments

fall short of the recommendations of the INSLM in not requiring any finding as to the ongoing dangerousness of the person.<sup>158</sup>

2.215 In support of this position, Amnesty International stated that

although international human rights law allows for some limitations to these rights under prescribed certain circumstances including national security, Amnesty International does not believe that the use of control orders to restrict the rights and remove the rights of individuals who have not been convicted of any crime can be adequately justified.<sup>159</sup>

2.216 Additionally, the Castan Centre for Human Rights Law stated that

issuing control orders on the basis of past convictions is also highly questionable, and when not connected to any obligation to prove that the target of the control order is an ongoing threat should be opposed.<sup>160</sup>

2.217 In response to these concerns, the Attorney-General's Department argued in its supplementary submission that:

The fact that a person has been convicted of a terrorism offence, even where there is strong evidence that the person has not been satisfactorily rehabilitated and continues to be dangerous, is not sufficient information on which to base an interim control order. For example, a person convicted of terrorism could be assessed as

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155 CTLA(FF) Bill, *Explanatory Memorandum*, p. 123.

156 Law Council of Australia, *Submission 12*, paragraph 97.

157 Human Rights Law Centre, *Submission 18*, p. 6.

158 Gilbert + Tobin Submission Centre of Public Law, *Submission 3*, pp. 7-8.

159 Amnesty International, *Submission 22*, p. 2.

160 Castan Centre for Human Rights Law, *Submission 17*, p. 5.

being a danger only to himself or to members of his family. Accordingly, the issuing court must also be satisfied on the balance of probabilities that the terms of the order are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from terrorism.<sup>161</sup>

- 2.218 Additionally, submitters also raised specific concerns about the use of a foreign conviction as a basis for a control order in Australia.<sup>162</sup>
- 2.219 Gilbert + Tobin noted that foreign countries may not have the same procedural protections as Australia for criminal trials, specifically pointing to the possibility of trials *in absentia* and on this basis recommended this aspect of the amendments be removed.<sup>163</sup> Human Rights Watch, while agreeing with the concerns of others, called for the amendments to be limited to those convicted of crimes in Australia or countries that have laws which meet international standards.<sup>164</sup>
- 2.220 The Law Council of Australia noted Australia's international obligations not to be complicit in 'criminal investigations and trials which do not comply with accepted fair trial principles.'<sup>165</sup> If this amendment proceeds, the Law Council of Australia called for the court to be satisfied that there were no fair trial concerns with the conviction.
- 2.221 The Law Council of Australia additionally proposed that protections along the lines of those in the *Mutual Assistance in Criminal Matters Act 1987* for determining whether or not to provide assistance to a foreign country, be considered for inclusion.<sup>166</sup>
- 2.222 In response to these concerns, the Attorney-General's Department again noted that the existence of a conviction is not enough to obtain a control order. The court must be also satisfied that the control order is necessary to protect the public from terrorism. The Department also noted:

When making a request to an issuing court for a control order, the AFP member is required to provide the issuing court with any facts as to why the order should not be made. This would include

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161 Attorney-General's Department, *Supplementary submission 8.1*, p. 22.

162 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 7; Castan Centre for Human Rights Law, *Submission 17*, p. 5, Law Council of Australia, *Submission 12*, p. 22.

163 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 7.

164 Human Rights Watch, *Submission 21*, p. 7.

165 Law Council of Australia, *Submission 12*, paragraph 99.

166 These grounds are contained in section 8 of the *Mutual Assistance in Criminal Matters Act 1987* and include grounds such as political offence, discrimination, dual criminality, and prejudice to the sovereignty, security or national interest of Australia.

any relevant information about the foreign investigation and trial process.<sup>167</sup>

## Other issues

2.223 A range of submitters also argued that the regime should not be extended without additional safeguards<sup>168</sup> such as:

- ⇒ a requirement to inform a person of his or her rights to legal representation, and
- ⇒ providing for a minimum standard of disclosure of information to be given to the subject about the allegations against him or her to enable effective legal instructions to be given in response.

2.224 The Law Council of Australia sought further information on the kind of conduct a person would need to engage in to make it impractical for the AFP member to comply with the requirements to inform a person of their appeal and review rights.<sup>169</sup> In response, the Department stated:

This provision is designed to protect the integrity of an interim control order served on a person who, for example, is behaving violently towards the AFP member seeking to explain the terms of the order. In contrast, it would not apply in circumstances where the person's limited English skills meant the person did not understand the terms. In such a case it would be reasonably practicable – and expected – that the AFP member would make arrangements for an interpreter to assist in explaining the person's appeal and review rights.<sup>170</sup>

## Committee comment

2.225 The Committee recognises that any proposed amendments to the control order regime are likely to trigger significant debate over the continued existence of these powers.

2.226 On the basis of evidence provided, the Committee is satisfied that it is necessary and appropriate that the AFP continue to have access to these powers in the fight against terrorism. The Committee's recommendations on the timing and length of the proposed extension are outlined separately in this chapter.

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167 Attorney-General's Department, *Supplementary Submission 8.1*, p. 23.

168 Law Council of Australia, *Submission 12*, pp. 22-24; Human Rights Watch, *Submission 21*, p. 7.

169 Law Council of Australia, *Submission 12*, p. 22.

170 Attorney-General's Department, *Supplementary Submission 8.1*, p. 24.

- 2.227 Given the scope of this inquiry, the Committee proposes to confine its consideration to the amendments proposed in this legislation. It is appropriate that broader issues raised by submitters be considered as part of a more comprehensive review of the operation of the control order regime.
- 2.228 In relation to the proposed lowering of the threshold for one of the elements of applying for a control order, it appears to the Committee that there is public confusion as to the effect of the amendment. On this point, the Committee recognises that the threshold for a senior AFP member to *request* an application is proposed to be lower. However, importantly, the amendments do not enable a court to issue a control order on the basis of mere suspicion. The threshold for a court to *issue* an order continues to be on the balance of probabilities. This is an appropriate threshold and the Committee notes that sufficient information will still need to be put before the court. In the enhanced threat environment, the Committee supports the amendment, as it will assist a senior AFP officer to *make* an application, noting appropriate safeguards are retained, and in some instances enhanced, by the Bill.
- 2.229 The Committee also supports the expanded grounds on which a control order can be sought. The Committee supports these powers being as effective as possible, particularly given the changing threat environment. The Committee considers that the existing ground (providing training to, or received training from, a listed terrorist organisation) is unnecessarily narrow and does not adequately capture the range of circumstances where a person may present a risk. For example, the existing grounds would not necessarily capture Australians who had returned from fighting in a foreign conflict if it could not be shown that they had provided training to, or received training from, a listed terrorist organisation. As such, the Committee supports amendments to address existing gaps in the circumstances in which control orders can be sought and issued.
- 2.230 The Committee notes calls from submitters for an additional requirement that there be a link to some ongoing threat or danger before a control order can be issued. However, the Committee notes on the basis of evidence before it, that the existing process for issuing a control order requires some level of ongoing threat. Specifically, the court must be satisfied on the balance of probabilities that *each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.*<sup>171</sup> If there is no risk, then there are no

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171 Section 104.4(1)(d) of the Criminal Code.

obligations that would need to be imposed and an order would not be sought nor imposed.

- 2.231 A number of submitters also called for additional safeguards to apply to the criteria enabling control orders to be issued on the basis of a foreign conviction. The Committee recognises that the criminal justice systems of other countries may not align with, or meet the standards in place in Australia. However, the Committee does not consider it to be appropriate for a court in issuing a control order to examine the merits of a foreign conviction.
- 2.232 However, the other criteria on which a control order may be sought are based on, or linked to conduct that would constitute a terrorist act, or, more broadly, a terrorism related offence. As such, while the Committee supports enabling control orders to be sought on the basis of a foreign conviction (supported by the requirement that the order be appropriate and adapted for the purposes of protecting the public from terrorism), the Committee considers it appropriate that the conduct for which the person was convicted in the foreign country must also constitute a terrorism related offence in Australia.

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## **Recommendation 9**

**The Committee recommends that the Government consider requiring that a control order can only be based on a foreign conviction where the conduct giving rise to the conviction would constitute a terrorism related offence in Australia.**

- 2.233 The Committee welcomes the additional safeguards to be implemented by the Bill and notes that the AFP proposes to develop a document to be used when serving control orders.<sup>172</sup>
- 2.234 In addition to this, the Committee also notes the Attorney-General's Department's supplementary submission in which the Department stated that

current counter-terrorism investigations continue to inform the Government's view of the adequacy of the control order regime. The Government is closely examining the application process and the purposes for which a control order may be sought with a view

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<sup>172</sup> Attorney-General's Department, *Supplementary Submission 8.1*, p. 23.

to further enhancing the regime and respond to contemporary operational challenges.<sup>173</sup>

### **Recommendation 10**

**The Committee notes that the Attorney-General’s Department and the Australian Federal Police have flagged the possibility of further enhancements to the control order regime given ongoing examination of the application process and purposes for which a control order can be sought.**

**Should further changes be proposed, the Committee recommends that these amendments are referred to this Committee with appropriate time for inquiry and review.**

## **Preventative detention orders**

2.235 The Bill proposes five sets of amendments to the preventative detention order (PDO) regime. These are:

- including a subjective test for the AFP member applying for a PDO to ‘suspect on reasonable grounds’ that the relevant person will do one of things listed in connection to a terrorist act
- changing the threshold to preserve evidence related to a terrorist act that has occurred in the last 28 days to ‘reasonably necessary’ rather than ‘necessary’
- allowing oral or electronic applications for PDOs or prohibited contact orders in urgent circumstances, while retaining written application as the usual method
- enabling PDOs to be issued based on a description of a person (including a partial name or nickname) where a person’s full name is not known, and
- extending the operation of the PDO regime for a further 10 years (until 15 December 2025).

2.236 The Explanatory Memorandum outlines that the purpose of PDOs is to enable law enforcement agencies to take action to prevent a terrorist threat from eventuating or to preserve evidence where arrest is not possible. It

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173 Attorney-General’s Department, *Supplementary Submission 8.1*, p. 3.

further states that PDOs are ‘particularly relevant in respect of emerging threats presented by Australians returning from conflict zones overseas.’<sup>174</sup> The Explanatory Memorandum goes on to argue that ‘it is vital that law enforcement agencies continue to have access to all tools that could be required to combat this threat and protect Australia and Australians from terrorist acts.’<sup>175</sup>

## Extension of PDO regime

2.237 The continued application of the PDO regime was a key issue for a number of submitters. This part will canvass those views, however, the timing and length of the proposed extension will be dealt with separately.

2.238 As with control orders, the Attorney-General’s second reading speech justifies extending the PDO regime on the basis that ‘in the current heightened threat environment, it is vital our law enforcement and security agencies have effective mechanisms to manage emerging threats.’<sup>176</sup>

2.239 Further, in its submission, the AFP stated that it considers

continued access to preventative detention orders [is] a critical operational response of last resort, to ensure that the AFP can undertake action to quickly disrupt imminent threats.<sup>177</sup>

2.240 While not commenting directly on the proposed amendments, a number of submitters instead called for PDOs to be repealed. For example, in calling for PDOs to be repealed, the Law Council of Australia repeated the view of the INSLM and stated:

In the INSLM’s view, discussions with the AFP ‘strongly suggested that ‘in a real, practical, urgent sense’ the ability to arrest a person is a more efficient and effective process for dealing with imminent terrorist threats than the complex and time consuming process of a PDO’.<sup>178</sup>

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174 CTLA(FF) Bill, *Explanatory Memorandum*, p. 128.

175 CTLA(FF) Bill, *Explanatory Memorandum*, pp. 128, 134.

176 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 24 September 2014, p. 65.

177 Australian Federal Police, *Submission 36*, p. 2.

178 Law Council of Australia, *Submission 12*, p. 48.

- 2.241 Additionally, the Gilbert + Tobin Centre of Public Law outlined its concerns that the extension of the PDO regime contradicts the COAG review and the former INSLM recommendations that it be repealed.<sup>179</sup>
- 2.242 Human Rights Watch also noted that PDOs were unnecessary because existing Australian law already enabled persons suspected of terrorism to be detained for questioning for up to 24 hours.<sup>180</sup> This was also consistent with the position taken by the former INSLM in his Second Annual Report, where he stated:
- [N]o material or argument demonstrated that the traditional criminal justice response to the prevention and prosecution of serious crime through arrest, charge and remand is ill-suited or ill-equipped to deal with terrorism.<sup>181</sup>
- 2.243 In evidence before the Committee, Mr Bret Walker SC supported the recommendation he made as the INSLM to repeal the PDO and control order regimes. When asked if he still stood by his previous recommendations given the heightened terror threat, he stated that he did.<sup>182</sup>
- 2.244 In support of this point, in evidence before the Committee, the Law Council of Australia noted:
- In the absence of a justification as to why existing powers of arrest are not sufficient, and particularly given the early stage of offending captured by terrorism offences, Law Council considers these recommendations appropriate in the light of detailed reasons provided in those reviews. We support the reviews of the PDOs conducted by COAG and by the monitor. We do not see that there is any real justification for the continuation of PDOs.<sup>183</sup>
- 2.245 Contradicting this view, and putting forward a case for retaining these powers, the AFP noted
- 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

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179 Gilbert + Tobin Submission Centre of Public Law, *Submission 3*, p. 3.

180 Human Rights Watch, *Submission 21*, p. 5.

181 INSLM, *Annual Report*, 20 December 2012, p. 52.

182 Mr Walker SC, *Committee Hansard*, Canberra, 8 October 2014, p. 41.

183 Mr Boulten SC, *Committee Hansard*, Canberra, 3 October 2014, p. 61.

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 ... [i]n 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.<sup>184</sup>

2.246 In response to questions from the Committee, the AFP went on to state that

the COAG review was done some time ago and was actually done prior to what I called the 'heightened operational tempo' that we are currently facing. I know that the COAG is meeting next [week] and that there has been some consideration in relation to those recommendations. There will probably be some changes to incorporate where we are with the current environment.<sup>185</sup>

2.247 The Gilbert + Tobin Centre of Public Law repeated the view of the INSLM that the PDO regime is 'at odds with our normal approach to even the most reprehensible crimes.'<sup>186</sup> Gilbert + Tobin went on to state:

Multiple submissions by federal, state and territory police forces to the INSLM and COAG Review inquiries indicated that the authorities are unlikely to rely upon PDOs because other, more suitable, detention powers are available.<sup>187</sup>

2.248 Amnesty International also called for the PDO regime to be repealed, rather than extended. They outlined their human rights concerns with each of these regimes, noting that the PDO regime 'undermines key human rights protections including freedom from arbitrary detention, the right to confidential communication with a lawyer and the prohibition of secret detention.'<sup>188</sup>

2.249 Arguing these powers are unnecessary, Gilbert + Tobin further noted:

As the Bill aims to lower the threshold for arrest (from reasonable belief of the commission of a terrorism offence to reasonable

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184 Australian Federal Police, *Submission 36*, p. 4.

185 Assistant Commissioner Gaughan, *Committee Hansard*, Canberra, 3 October 2014, p. 22.

186 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 3.

187 Gilbert + Tobin Centre of Public Law, *Submission 3*, pp. 3-4.

188 Amnesty International, *Submission 22*, pp. 2-3.

suspicion of the same) it will be even easier for the authorities to rely on traditional law enforcement powers.<sup>189</sup>

- 2.250 Further, while not expressly recommending the repeal of the existing provisions, the Human Rights Law Centre noted their significant concerns with the existing regime.<sup>190</sup>

## Other amendments

- 2.251 While extension of the regime was the focus of submitters, some comments were made on the other proposed amendments to the PDO regime.

- 2.252 The Human Rights Law Centre considered that the proposed reforms to enable a person to be specified in a PDO on the basis of a description rather than by name weakened the existing regime.<sup>191</sup> Similarly, the Law Council of Australia commented that

the recording of a detainee's name is important for oversight purposes. Therefore, the amendments should require that a description is only given where reasonable efforts to determine the detainee's name have failed. In that instance, a 'detailed' description should be provided.<sup>192</sup>

- 2.253 For the Human Rights Law Centre, the change to a subjective test for the AFP member to apply for a PDO (compared to the existing objective test) only 'heightened their concerns with the PDO regime.'<sup>193</sup>

- 2.254 The Explanatory Memorandum notes that this amendment responds to recommendation III/1 of the INSLM's Second Annual Report. The Explanatory Memorandum went on to state that the

threshold is being changed on the advice of law enforcement that the use of the subjective test of suspects on reasonable grounds is more appropriate. The use of that threshold is designed to ensure that, not only are there reasonable grounds upon which to form the suspicion, but the AFP member has actually formed the suspicion.<sup>194</sup>

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189 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 4.

190 Human Rights Law Centre, *Submission 18*, p. 11.

191 Human Rights Law Centre, *Submission 18*, p. 8.

192 Law Council of Australia, *Submission 12*, p. 48.

193 Human Rights Law Centre, *Submission 18*, p. 8.

194 CTLA(FF) Bill, *Explanatory Memorandum*, p. 128.

2.255 Notwithstanding this explanation, the Australian Privacy Foundation commented that

given the very serious breach of many normal criminal procedural protections and the extreme nature of the powers of such detention, it is more appropriate that a court be the decision maker satisfied.<sup>195</sup>

### **Questioning a person subject to a PDO**

2.256 While not related to any specific reform to the PDO regime, a further issue raised was the ability of police to question a person while they are subject to a PDO. Currently, a person subject to a PDO is not able to be questioned (subject to a few minor exceptions related to the PDO).<sup>196</sup>

2.257 In evidence before the Committee, the Attorney-General's Department noted the two different roles the AFP perform in relation to terrorism. The first is to protect the public by preventing acts of terrorism and the second is to have an eye on prosecution and ensure that any evidence collected can be adduced in proceedings. On this point, it was noted:

Preventative detention orders were established, as the title says, for the purpose of preventing the commission of a terrorist act, effectively. As the Assistant Commissioner has said, you can move through from preventative detention to arrest, and that is the point at which the police officer and the person in question are then governed, effectively, by the provisions of Part 1C of the Crimes Act. There would be concern if you could not invoke or you were not in a position to make use of those Part 1C protections, such as the right to silence, as to whether any evidence collected as part of a questioning process would then be admissible later in judicial process.<sup>197</sup>

2.258 In its submission, the AFP noted the difference between terrorism and traditional investigations, and the balance the police need to strike between prevention, disruption and prosecution. Specifically:

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

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<sup>195</sup> Australian Privacy Foundation, *Submission 20*, p. 3.

<sup>196</sup> Section 105.42 of the *Criminal Code Act 1995*.

<sup>197</sup> Ms Jamie Lowe, First Assistant Secretary, National Security Law and Policy Division, *Committee Hansard*, Canberra, 3 October 2014, p. 24.

orders and control orders) to operate alongside traditional criminal justice processes in order to effectively respond to and manage terrorist threats.<sup>198</sup>

2.259 The AFP went on to confirm that they have not requested that the legislation be changed to enable questioning, given the purpose of a PDO is to prevent rather than investigate.<sup>199</sup>

2.260 In a joint submission, the Hon Christian Porter MP and the Hon Jason Woods MP called for the PDO regime to be amended to enable questioning, arguing that:

Where a PDO is available on a different threshold to traditional arrest powers then it will likely apply in different circumstances than those covered by traditional arrest and it may follow that allowing questioning in those different circumstances could serve a substantial purpose to aid in the investigation, prevention or prosecution of terrorist acts.<sup>200</sup>

2.261 Further to this, Mr Porter and Mr Woods stated the possible benefits of enabling a person to be questioned, particularly where the person detained under a PDO may be willing to assist police with their inquiries.<sup>201</sup>

2.262 In response to calls for PDOs to enable questioning, the Attorney-General's Department reiterated that the original purpose of the PDO regime was preventing a terrorist act or preventing the destruction of evidence relating to terrorist act. The Department also stated that the changing threat level has not resulted in the existing regime for questioning in Part IC of the Crimes Act (and the safeguards within) being inappropriate.<sup>202</sup>

2.263 The Department also noted that:

The threshold for obtaining a preventative detention order and taking a person into detention is different, and should not be used to circumvent the requirements in Part IC.<sup>203</sup>

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198 Australian Federal Police, *Submission 36*, p. 2.

199 Australian Federal Police, *Submission 36*, p. 5.

200 The Hon Christian Porter MP and the Hon Jason Woods MP, *Submission 24*, pp 27-28.

201 The Hon Christian Porter MP and the Hon Jason Woods MP, *Submission 24*.

202 Attorney-General's Department, *Supplementary Submission 8.1*, p. 5.

203 Attorney-General's Department, *Supplementary Submission 8.1*, p. 5.

## Other issues

2.264 The existing PDO regime requires the Ombudsman to be:

- notified of the making of an initial and continued PDO and a prohibited contact order
- given a copy of the order, and
- notified if a person has been taken into custody.

This is an important safeguard in the PDO regime.

2.265 In evidence before the Committee, the acting Commonwealth Ombudsman, noted that:

The Criminal Code Act already imposes an obligation on the AFP to notify our office when a preventative detention order is executed...It would be helpful for the Act to spell out a time frame in which the AFP needs to provide that notification. At the moment the Act is silent to that, so it would be useful to augment that obligation just slightly.<sup>204</sup>

2.266 In the Ombudsman's supplementary submission, he specifically pointed to the ability of a person detained under a PDO to complain to the Ombudsman. As such, the Ombudsman outlined:

It may be reasonable to require the notification as soon as possible, to ensure that we are aware of the PDO and that we may receive a complaint.<sup>205</sup>

## Committee comment

2.267 On balance, the Committee supports the continued operation of the PDO regime. While there has been very limited use of the regime until recently, the increased threat environment demands appropriate tools are available to law enforcement to both prevent and prosecute terrorist acts. The Committee's recommendations on the timing and length of the proposed extension are outlined separately in this chapter.

2.268 The Committee does not support any change to the regime to allow for questioning. As raised in evidence, the PDO regime is focussed on preventing a terrorist act, rather than an information gathering tool to

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204 Mr Richard Glenn, Acting Commonwealth Ombudsman, *Committee Hansard*, Canberra, 3 October 2014, p. 63.

205 Commonwealth Ombudsman, *Supplementary Submission 10.1*, p. [1].

assist with investigations and prosecutions. Any change to allow questioning would fundamentally change the nature of the regime.

- 2.269 Notwithstanding the Committee's support for continuation of the PDO regime, the Committee considers it is essential that the safeguards that operate in relation to the regime not be weakened. As such, while the Committee recognises there may be circumstances in which a PDO should be issued on the basis of a description of a person, this should only occur where the name of the person is not known and it was not possible to determine the person's name based on reasonable inquiries. The Committee also considers it would be useful in enabling, in similar circumstances, the use of an alias as well as, or instead of, a description.

### **Recommendation 11**

**The Committee recommends that the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 be amended:**

- **to ensure that a preventative detention order is only able to refer to a *description* in circumstances where the person's true name is not known and not able to be determined based on reasonable inquiries.**
- **to enable a preventative detention order to refer to an *alias* (as well as, or instead of a description) instead of a name where the person's name is not known and not able to be determined based on reasonable inquiries.**

**The Committee also recommends that the Bill be amended so that where a description is included in the preventative detention order, it has sufficient detail so as to identify beyond reasonable doubt the person to whom it applies.**

- 2.270 The Committee agrees with the views of the acting Ombudsman that it would be useful to establish a timeframe in the legislation to guide when the notification is to be made. While there are benefits to the Ombudsman being put on notice that a person may complain, this needs to be balanced with the urgent nature of PDOs and the operational environment in which they are likely to be sought and executed. To ensure this safeguard operates as effectively as possible, it is important that it is clear on the face of the legislation when this obligation must be met by the AFP.

## Recommendation 12

The Committee recommends the existing preventative detention order regime be amended to specify that where the Ombudsman is required to be notified of certain events by the Australian Federal Police, this notification is required to take place as soon as is reasonably practicable.

## Sunset clauses

2.271 The Bill proposes to extend the operation of the:

- control order regime for a further 10 years to 15 December 2025
- preventative detention order regime for a further 10 years to 15 December 2025
- stop, search and seizure powers relating to terrorism offences for a further 10 years to 15 December 2025, and
- questioning and detention warrant regime in the *Australian Security Intelligence Organisation Act 1979* for a further 10 years to 22 July 2026.

2.272 Arguments for and against the proposed extension of these powers are dealt with in separate parts of this chapter. This section focuses on the

- timing of the extension
- length of the extension, and
- delay of the review of the questioning and detention powers until 2026.

## Timing of extension

2.273 The Bill proposes to extend the operation of these regimes despite the fact that the existing powers would not otherwise cease until 15 December 2015 (control orders, PDOs and stop, search and seizure powers) or 22 July 2016 (questioning and detention powers).

2.274 A range of submitters queried why the powers were being extended at this time. For example, the Gilbert + Tobin Centre of Public Law noted:

Doing so is, at this point in time, unnecessary in order to meet the danger posed by returning foreign fighters. These powers will remain in force until either late 2015 or mid-2016... There is

therefore no urgent reason why these powers need to be addressed in, and debated as part of, the current Bill.<sup>206</sup>

2.275 Amnesty International and the Human Rights Law Centre agreed,<sup>207</sup> with the Human Rights Law Centre noting:

There is still sufficient time under the existing sunset clauses for a public debate on the necessity of these powers and for relevant authorities to exercise their powers to respond to actual or potential terrorist acts or terrorism offences, or otherwise manage threats to Australia's national security.<sup>208</sup>

2.276 The councils for civil liberties across Australia also agreed, noting that:

A decision to roll-over these sunset clauses, especially for such a lengthy period, should only be made after careful evaluation of their necessity, proportionality and broad impact on democratic values and civil liberties and rights.<sup>209</sup>

2.277 The Australian Human Rights Commission also supported this position both in its submission and in evidence before the Committee.<sup>210</sup> In its submission, the Commission argued that the Government

has not established that the extension of the sunset clauses is necessary and proportionate to a legitimate aim. This is especially so as the relevant provisions are not due to expire for over 12 months. There is no urgency in relation to the passage of these items of the Bill.<sup>211</sup>

## Length of extension

2.278 A recurring theme in submissions and in evidence before the Committee was the proposed length of the extension of these powers.

2.279 In evidence to the Committee, the Attorney-General's Department noted that operational agencies were in support of the powers not sunsetting at all. Specifically, the Attorney-General's Department noted that operational agencies

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206 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 5.

207 Human Rights Law Centre, *Submission 18*, p. 5; Amnesty International, *Submission 22*, p. 2.

208 Human Rights Law Centre, *Submission 18*, p. 5.

209 Councils for civil liberties across Australia, *Submission 25*, p. 6.

210 Australian Human Rights Commission, *Submission 7*, p. 9; Professor Triggs, *Committee Hansard*, Canberra, 3 October 2014, pp 12–13.

211 Australian Human Rights Commission, *Submission 7*, p. 9.

do not see that there will be a date at which these powers will no longer be useful. As a result of consultation, particularly with the states and territories and the communities, the acknowledgement that this threat would continue indefinitely was somewhat difficult and the preference would be for there to be a sunset provision so that we do revisit these powers in 10 years' time. Effectively, the position that we got to was that the powers are important and need to continue.<sup>212</sup>

2.280 Further:

A number of these provisions require the agreement of the states and territories in order to take effect, to be passed. Through consultation with the states and territories the view was that the fact that we had a 10-year sunset provision at the moment seemed sensible and we should repeat that, so 10 years is really a repetition of a regime that the states and territories in particular were comfortable with.<sup>213</sup>

2.281 In evidence before the Committee, the AFP stated:

There was a lot of consultation with members of the community in relation to this issue and there were some very strong views put to Ms Lowe and myself and others that they wanted to see some type of sunset provision retained. After those consultations, I think the operational agencies were of the view that we were comfortable with something like 10 years being maintained based on those consultations.<sup>214</sup>

2.282 While not commenting on removing the sunset clauses altogether, Mr Bret Walker SC, in evidence to the Committee, outlined his position in relation to the use of sunset clauses:

Believing as I do in parliamentary government I think that we are bound and our destiny is with all future parliaments to consider what laws should remain and what new laws should be made...I am assuming that most legislation is important, and I am not happy therefore about the idea of legislating under cover of, as it were, an apology, by saying that this law will disappear by effluxion of time. If after all it has no usefulness, it will either not be used – that was true for example of preventative detention

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212 Ms Lowe, *Committee Hansard*, Canberra, 3 October 2014, p. 21.

213 Ms Lowe, *Committee Hansard*, Canberra, 3 October 2014, p. 28. See also, Attorney-General's Department, *Supplementary Submission 8.1*, pp 8–9.

214 Mr Gaughan, Australian Federal Police, *Committee Hansard*, Canberra, 3 October 2014, p. 28.

orders, until a couple of weeks ago – or it will strike anybody interested in the area as something calling for repeal.<sup>215</sup>

2.283 In relation to the use of sunset clauses for a truly emergency position, Mr Walker commented:

But that of course would be utterly wrong for counterterrorism, which is not an emergency position. It is a crime-fighting position and it should be seen as permanent.<sup>216</sup>

2.284 A number of submitters argued that a 10 year extension was too long. For example, the councils for civil liberties across Australia noted:

- [l]aws that will have been in place for over 20 years are likely to be de facto permanent. They will have transformed from ‘extraordinary’ to normal. They are likely to have further spilled over into ‘ordinary’ state criminal jurisdictions.<sup>217</sup>
- This arbitrary and untested proposal to maintain all these powers for another decade runs counter to a range of recommendations from formal review processes in recent years. The INSLM, the COAG review and the PJCIS (and its predecessor) have all made recommendations questioning the continuation of some of these powers.<sup>218</sup>

2.285 Similarly, Professor Ben Saul expressed concern about the extensions being for a further 10 years on the basis that it is not possible to know what the threat will be in 10 years’ time.<sup>219</sup>

2.286 Members of the Victorian Bar Human Rights Committee called for the extension to be limited to five years.<sup>220</sup> This timeframe accords with the COAG recommendation in relation to the stop, search and seizure powers. The Human Rights Committee specifically noted that:

If the search and seizure powers in the Crimes Act 1914 (Cth) are renewed in 2016, the Committee recommends amending section 3UK to provide that the relevant provisions should cease to exist as at the expiry date, which will be a five year period.<sup>221</sup>

2.287 The Australian Lawyers for Human Rights and the Human Rights Law Centre<sup>222</sup> also noted that the proposal to extend these powers for 10 years

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215 Mr Walker SC, *Committee Hansard*, Canberra, 8 October 2014, p. 40.

216 Mr Walker SC, *Committee Hansard*, Canberra, 8 October 2014, p. 40.

217 Councils for civil liberties across Australia, *Submission 25*, p. 5.

218 Councils for civil liberties across Australia, *Submission 25*, pp. 5–6.

219 Professor Ben Saul, *Submission 2*, p. 2.

220 Members of the Victorian Bar Human Rights Committee, *Submission 29*, p. 6.

221 COAG Review, Rec 44, p. 88.

222 Human Rights Law Centre, *Submission 18*, p. 12

goes beyond the COAG recommendation without sufficient justification. The Australian Lawyers for Human Rights stated:

That the reasoning in the Bill's explanatory memorandum for this failure...eludes the real issues and does not evidence a proportionate and appropriate response.<sup>223</sup>

2.288 In evidence before the Committee, the Australian Defence Association supported an extension of between five to 10 years. In supporting the use of sunset clauses, the Association stated:

The importance of sunset clauses in this type of legislation is really twofold. The first is simply that any temporary restriction of civil liberties must be examined regularly. Secondly, they reassure people that the changes are not permanent. To some extent, that is very useful in deterring some of the alarmist claims that continually seem to accompany any counter-terrorist legislation.<sup>224</sup>

2.289 In relation to the timeframe for sunseting, the Association went on to say:

One of the problems with the first tranche of counter-terrorist legislation was that some of the sunset clauses were arguably too short. We would not like to see the pendulum swing the other way and have them too long. Certainly somewhere between five and 10 years appears to be an appropriate time. The beauty of sunset clauses in particular is they allow legislation to be reviewed away from the heat of the particular crisis that triggered the legislation in the first place.<sup>225</sup>

2.290 Commenting on a possible timeframe, Professor Gillian Triggs of the Australian Human Rights Commission stated:

I personally think five years is so far into the future. It is a long time in the current global environment to wait five years before you review or bring those additional powers to an end.<sup>226</sup>

## **Delay of review**

2.291 The amendments also delay a review by this Committee of the questioning and detention powers that was due to take place by

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223 Australian Lawyers for Human Rights, *Submission 16*, p. 8.

224 Mr James, Executive Director, *Committee Hansard*, Canberra, 8 October 2014, p. 15.

225 Mr James, Executive Director, *Committee Hansard*, Canberra, 8 October 2014, p. 15.

226 Professor Triggs, *Committee Hansard*, Canberra, 3 October 2014, p. 13.

22 January 2016. The Bill will extend this provision so that the review is to take place by 22 January 2026. The Explanatory Memorandum noted:

It is appropriate this review be conducted shortly before the extended sunset provision expires in 2026.<sup>227</sup>

2.292 In its submission, ASIO did not specifically outline a reason justifying the delay of the review, other than stating that:

It is appropriate to amend the PJCIS review requirement in paragraph 29(1)(bb) of the IS Act to be consistent with the proposed amendment to the sunset provision in section 34ZZ of the ASIO Act.<sup>228</sup>

2.293 In response to suggestions that a review occur within the next 12 months, the ASIO commented:

We understand absolutely the need for review and total accountability, but I do not think the enduring nature of the threat would see us having any different view in terms of our need to use this as a tool in 12 months time.<sup>229</sup>

2.294 Further, in its supplementary submission, the Attorney-General's Department stated that:

The deferral of the PJCIS review was made because the Bill proposes a number of amendments to the questioning and detention provisions and there should be a reasonable time to assess the operation of the amended provisions before that review occurs. A review in 2016 would be too soon to examine arrangements likely to come into effect in late 2014/early 2015. A minimum of at least three years from the commencement of the proposed amendments would be needed to allow the PJCIS to properly assess the operation of the questioning and detention powers as part of its review.<sup>230</sup>

2.295 Submitters expressed concerns with the proposed delay.<sup>231</sup> The Australian Human Rights Commission argued that the

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227 CTLA(FF) Bill, *Explanatory Memorandum*, p. 166.

228 Australian Security Intelligence Organisation, *Submission 11*, p. 6.

229 Ms Kerri Hartland, Deputy Director-General, *Committee Hansard*, Canberra, 3 October 2014, p. 23.

230 Attorney-General's Department, *Supplementary submission 8.1*, p. 9.

231 Australian Lawyers for Human Rights, *Submission 15*, p. 7; Australian Human Rights Commission, *Submission 7*, p. 9; Associate Professor Greg Carne, *Submission 27*, pp. 4–8.

review would constitute an opportunity to determine whether the warrant powers are justified in the present security environment and should be retained.<sup>232</sup>

- 2.296 Professor George Williams also noted the benefits of review. Specifically, he noted in relation to the review and extension of ASIO's questioning and detention powers in 2006:

That was preceded by a very significant inquiry by this committee. We gave evidence to that. It led to deliberations on the improvement of the regime. We actually argued for repeal, but in the end the committee said, 'Let's actually improve it', and some very significant changes were made.<sup>233</sup>

- 2.297 Additionally, Dr Greg Carne outlined that the delay of the review would

set a dangerous precedent whereby the legislated periodic review accountability mechanisms over exceptional powers can be peremptorily and hastily set aside due to a executive claim of present circumstances or expediency and...also produce a legislative elision or slippage from the exceptional or unusual nature of such powers to their legislative normalisation and permanence.<sup>234</sup>

- 2.298 The Australian Human Rights Commission expressed the view that extending the provisions for a further 10 years without conducting a review is 'extremely dangerous'.<sup>235</sup> In relation to the purpose that a review would serve, Professor Triggs went on to say:

It underscores the point that we think those safeguards and monitoring processes have to be in place. I would have thought that good governments would want, in any event, to see how this is actually working, for all the practical reasons that you have been raising. How is it actually working? Are there ways of getting people to come in earlier in some administrative process so that they have some sort of checking process? How does the evidentiary burden actually work in practice? Have there been any prosecutions and, if so, were they successful? If not, why not? How often is foreign evidence dubious? How often is it valuable? It would be a wonderful opportunity for a proper review.<sup>236</sup>

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232 Australian Human Rights Commission, *Submission 7*, p. 9.

233 Professor Williams, *Committee Hansard*, Canberra, 3 October 2014, p. 53.

234 Associate Professor Carne, *Submission 27*, p. 6.

235 Professor Triggs, *Committee Hansard*, Canberra, 3 October 2014, p. 12.

236 Professor Triggs, *Committee Hansard*, Canberra, 3 October 2014, p. 13.

2.299 This position was supported by Mr Bret Walker SC who, while not necessarily supporting the use of sunset clauses, commented that

if we have sunset clauses in that spirit then at least they should always have a procedure mandated whereby a decent time out before the sunset occurs there is a minimum and reasonable level of public involvement in a highly formal review, such as by this committee, in the case of certain forms of legislation, so that there can be no concern of a kind that I have felt often, here and in other countries, that the sunset clause tends to rush, truncate and detract from the overall quality of the legislative deliberations necessary in order to continue the important powers in question. We should remove entirely the idea of 'Hurry up and pass this otherwise we won't have the power.' That is the effect that sunset clauses have in a number of areas, and I think it would be a great pity with counterterrorist laws if they had that difficulty added to what is already a very difficult area.<sup>237</sup>

2.300 The councils for civil liberties across Australia argued:

These proposals should be withdrawn from the Foreign Fighters Bill and referred to the Independent National Security Legislation Monitor and to the PJCIS for review prior to their respective expiry dates.<sup>238</sup>

2.301 Professor George Williams also supported a parliamentary review:

And the review that Bret Walker has done is of course very important, but even that is not sufficient; it needs to be a parliamentary review, because the houses are going to be voting on this, so this committee is the obvious vehicle for that.<sup>239</sup>

## Committee comment

2.302 As outlined in separate parts of this report, the Committee notes the continuing extension of each of the powers identified in paragraph 2.271. It is the Committee's view that, given the nature of these powers, it is important that their use and ongoing need is assessed within a reasonable time-frame. This is particularly relevant given that this Bill proposes to alter the grounds on which some of these powers could be used. Specifically, the Bill will:

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237 Mr Walker SC, *Committee Hansard*, Canberra, 8 October 2014, p. 41.

238 Councils for civil liberties across Australia, *Submission 25*, p. 6.

239 Professor Williams, *Committee Hansard*, Canberra, 3 October 2014, p. 54.

- alter the threshold for a senior AFP member to apply for a control order from 'considers' to 'suspects'
- expand the grounds on which a control order can be sought and issued to include where the person has:
  - ⇒ participated in training with a terrorist organisation
  - ⇒ engaged in a hostile activity in a foreign country, or
  - ⇒ been convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or a terrorist act
- include a subjective test for the AFP member applying for a PDO to 'suspect on reasonable grounds' that the relevant person will do one of the things listed in connection to a terrorist act
- amend the relevant threshold for applying for a PDO to preserve evidence related to a terrorist act to 'reasonably necessary' rather than necessary, and
- replace the 'last resort' test for an ASIO questioning warrant with a requirement that the Attorney-General be satisfied that, having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued.

2.303 Notwithstanding agreement that a review in a reasonable timeframe is necessary, the Committee holds differing views as to when the specified provisions should sunset and when a statutory review should occur.

2.304 The Committee has considered the views of participants in the inquiry and ultimately determined that it is important that the next Parliament have the opportunity to assess whether these powers continue to be necessary. The Committee notes a sunset date 24 months after the next Federal election would balance the need for agencies to have access to each of these powers in response to the current and emerging threat environment and ongoing justification for the existence of these powers.

2.305 The Committee also considers it is essential that the Parliament has sufficient time to consider whether these powers need to be further amended, repealed, extended or made permanent prior to the powers being due to sunset. This should be done through a thorough review of each power. The Committee therefore recommends that the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to complete a public inquiry into each of the powers 18 months after the next Federal election. Such a timeframe would provide sufficient time for a thorough review of the

powers as well as an opportunity for the Government to respond prior to the following Parliament.

- 2.306 The Committee also recommends that the use of each of these powers be subject to ongoing scrutiny. As such, the Committee recommends that the *Independent National Security Legislation Monitor Act 2010* be amended to require the INSLM to review the operation of these powers 12 months after the next Federal election. This timeframe would enable the INSLM report to be taken into account in this Committee's reviews of these powers.

### **Recommendation 13**

**The Committee recommends that the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 be amended so that the following powers sunset 24 months after the date of the next Federal election:**

- **control order regime in Division 104 of the Criminal Code Act 1995**
- **preventative detention order regime in Division 105**
- **the stop, search and seizure powers relating to terrorism offences in Division IIIA of the *Crimes Act 1914***
- **questioning and questioning and detention warrant regime in the *Australian Security Intelligence Organisation Act 1979***

**The Committee recommends that the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to complete a review of each of the powers listed above 18 months after the next Federal election.**

**The Committee recommends that the *Independent National Security Legislation Monitor Act 2010* be amended to require the INSLM to finalise a review of the operation of each of these powers 12 months after the next Federal election.**

- 2.307 While it is appropriate that this Committee review the use of each of these powers given their application to terrorism and national security matters, it highlights that this Committee does not have the power to otherwise consider the counter terrorism activities of the AFP more generally.

- 2.308 The Committee notes the AFP is already subject to a rigorous internal and external accountability regime which includes: the AFP Values and Code of conduct; a statutory based internal professional standards regime; independent oversight by the Ombudsman and the Australian Commission for Law Enforcement Integrity; scrutiny by the INSLM; oversight by the courts (in relation to the use of evidence in criminal proceedings); and oversight by Parliament through the Senate Estimates process, the Parliamentary Joint Committee on Law Enforcement and the Parliamentary Joint Committee on Intelligence and Security in relation to specific topics of inquiry referred to it (such as this Bill).
- 2.309 While not wanting to impinge on these oversight mechanisms including the important role played by the Parliamentary Joint Committee on Law Enforcement, the Committee considers its oversight powers should be extended to include the counter-terrorism activities of the AFP. The Committee can provide a useful additional oversight function, particularly in relation to classified material that is not able to be considered by other parliamentary committees.

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#### **Recommendation 14**

**The Committee recommends that the functions of the Parliamentary Joint Committee on Intelligence and Security be extended to encompass the counter-terrorism activities of the Australian Federal Police, including, but not limited to, anything involving classified material.**

### **Foreign incursions and recruitment**

- 2.310 Schedule 1 to the Bill includes the proposed repeal of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (the Foreign Incursions Act) and its replacement with a new Part 5.5 in the Criminal Code.<sup>240</sup> The intention of proposed Part 5.5 is to 'modernise the provisions of the Foreign Incursions Act' and to address the 'anomalies and mismatches' identified in the Fourth Annual Report of the INSLM.<sup>241</sup>
- 2.311 The provisions contain a series of offences relating to foreign incursions and recruitment. The part is 'designed to simplify the offences to ensure

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240 Items 110 and 144 of the CTLA(FF) Bill.

241 CTLA(FF) Bill, *Explanatory Memorandum*, p. 135.

they are easier to understand, and to respond to the significant threat to the safety and security of Australia and Australians posed by those who engage in foreign fighting or seek to do so'.<sup>242</sup> The offences include:

- An offence carrying a life sentence for incursions into foreign countries with the intention of 'engaging in a hostile activity' (clause 119.1).
- Offences carrying life sentences for preparations for incursions into foreign countries for the purpose of engaging in hostile activities (clause 119.4), including: specific offences for 'preparatory acts'; accumulating weapons; providing or participating in training; and giving or receiving goods or services to promote the commission of an offence. An exception is provided for conduct 'solely by way of, or for the purposes of, the provision of aid of a humanitarian nature'.
- Further offences for providing buildings, aircraft or vessels used for preparatory activities (clause 119.5); recruiting persons to join organisations engaged in hostile activities against foreign governments (clause 119.6); and recruiting persons to serve in or with armed forces of a foreign country, unless declared by the Foreign Minister to be in Australia's defence or international relations interests (clauses 119.7 and 119.8).

2.312 Additionally, clause 119.2 proposed to create a new offence, carrying a penalty of up to 10 years imprisonment, for 'entering into or remaining in' certain areas declared by the Foreign Affairs Minister.

2.313 The Attorney-General would be required to consent to any prosecution under any of the foreign incursions and recruitment offences contained in the proposed new Part 5.5. Further, defence and international relations officials would be exempted from the offences.

2.314 Evidence received from inquiry participants regarding both the reforms to the existing foreign incursions and recruitment offences, and the new 'declared area' offence, is discussed in the following two sections.

## **Reforms to existing foreign incursions and recruitment offences**

2.315 In evidence to the Committee, the former INSLM Mr Bret Walker SC indicated his support for the proposed reforms to the existing Foreign Incursions Act and its incorporation into the Criminal Code, noting they

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242 CTLA(FF) Bill, *Explanatory Memorandum*, p. 135.

the proposals were in accordance with the 'urgent' recommendations made in his Fourth Annual Report.<sup>243</sup>

2.316 Mr Neil James from the Australia Defence Association also welcomed the reforms to the Foreign Incursions Act, suggesting that the legislation they would replace was 'outmoded'. Mr James said that the existing offences had resulted in very few prosecutions because the evidence thresholds were 'set far too high'.<sup>244</sup>

2.317 However, many participants in the inquiry also argued against aspects of the proposed new foreign incursions regime.<sup>245</sup> Many of the concerns centred on the scope of activity potentially falling under the offence provisions. The breadth of the proposed definition of 'engaging in a hostile activity', which underpins many of the offences in the proposed part 5.5 of the Criminal Code, was particularly highlighted by participants. For example, the councils for civil liberties across Australia submitted:

[T]he inclusion of the terms 'subverting society' and 'intimidating the public or a section of the public' in paragraphs (b) and (c) of the proposed definition make this a much broader concept than the corresponding concept in the Crime (Foreign Incursions) Act. Accordingly, all of the offences proposed to be added to this part of the Criminal Code Act, which turn on this much broader concept of 'engaging in a hostile activity', have much broader scope than the existing offences in the Crimes (Foreign Incursions) Act.<sup>246</sup>

2.318 The term 'engaging in a hostile activity' is defined in clause 117.1 of the Bill as follows:

A person engages in a hostile activity in a foreign country if the person engages in conduct in that country with the intention of achieving one or more of the following objectives (whether or not such an objective is achieved):

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243 Mr Walker SC, *Committee Hansard*, Canberra, 8 October 2014, p. 38.

244 Mr James, *Committee Hansard*, Canberra, 8 October 2014, p. 20.

245 Gilbert and Tobin Centre of Public Law, *Submission 3*, pp. 11–13; Australian Lawyers Alliance, *Submission 13*, pp. 3–4; Australian Lawyers for Human Rights, *Submission 15*, p. 2; Castan Centre for Human Rights Law, *Submission 17*, p. 5; Amnesty International Australia, *Submission 22*, p. [4]; Joint media organisations, *Submission 23*, p. 3; councils for civil liberties across Australia, *Submission 25*, pp. 6–12; Dr A J Wood, *Submission 31*, p. 9; Mr Adam Bonner, *Submission 34*, pp. 10–14.

246 Councils for civil liberties across Australia, *Submission 25*, p. 8.

- (a) the overthrow by force or violence of the government of that or any other foreign country (or of a part of that or any other foreign country);
- (b) the engagement, by that or any other person, in subverting society in that or any other foreign country;
- (c) intimidating the public or a section of the public of that or any other foreign country;
- (d) causing the death of, or bodily injury to, a person who:
  - (i) is the head of state of that or any other foreign country; or
  - (ii) holds, or performs any of the duties of, a public office of that or any other foreign country (or of a part of that or any other foreign country);
- (e) unlawfully destroying or damaging any real or personal property belonging to the government of that or any other foreign country (or of a part of that or any other foreign country).

2.319 The Law Council of Australia questioned the inclusion of item (e) regarding the unlawful destruction or damaging of property, noting:

Technically, this means that a person may be subject to life imprisonment for entering a country with the intention of (or actually) defacing a government building (section 119.1). This penalty is not commensurate with the level of culpability involved.<sup>247</sup>

2.320 Other participants focused on the proposed definition of ‘subverting society’, which is also contained in clause 117.1 of the Bill. For example, Amnesty International contested that

the inclusion of activities which are aimed at subverting society in the definition for engaging in hostilities in a foreign country encompasses a range of activities which would not be connected to any terrorist or attack against a foreign government or assets. There is the potential that these activities – while undoubtedly criminal – would attract a significantly higher penalty than if they were conducted in Australia.<sup>248</sup>

2.321 The Gilbert + Tobin Centre of Public Law similarly submitted to the Committee that:

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<sup>247</sup> Law Council of Australia, *Submission 12*, p. 33.

<sup>248</sup> Amnesty International Australia, *Submission 22*, p. [4].

The definition of ‘subverting society’ would include the list of harms referred to in the definition of a ‘terrorist act’ in the Criminal Code and it would incorporate the same exemption for political advocacy and protest. However, the definition of ‘subverting society’ does not include other important elements in the definition of a ‘terrorist act’, namely, that an act is done or a threat is made with a particular *intention* (to influence a government by intimidation, or to intimidate a section of the public) and a particular  *motive* (to advance a political, religious or ideological cause). In the absence of these additional requirements, some of the harms listed in the definition of terrorism would constitute much less serious offences (such as vandalism and assault) ... [s]uch conduct might be criminal, but it should not attract a maximum penalty of life imprisonment under foreign incursions offences.<sup>249</sup>

2.322 At a public hearing, Mr Bret Walker SC expressed his dislike for the term ‘subverting society’, and suggested the need for the term could be avoided if it was replaced in the definition of ‘engages in a hostile activity’ with a direct cross-reference to the definition of ‘terrorist act’ in section 100.1 of the Criminal Code ‘minus the ideological motivation’.<sup>250</sup> Such cross-referencing was also supported by other participants in the inquiry, although with a preference that the elements of intention be retained.<sup>251</sup>

2.323 The Attorney-General’s Department explained to the Committee that the term ‘subverting society’ was intended to replace the term ‘armed hostilities’ in the existing Foreign Incursions Act, because the meaning of ‘armed hostilities’ had not been interpreted in the way intended when it had originally been inserted into the Foreign Incursions Act:

‘[A]rmed hostilities’ has a very particular meaning in international law which I do not think was completely acknowledged or understood or thought through at the time of those particular amendments. ‘Armed hostilities’ is basically in international law limited to the kind of conduct that takes place on a battlefield in an actual war. That is not what the insertion of that expression was intended to capture; it was intended to capture much broader conduct like mercenaries – people who are paid and do not have a

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249 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 12.

250 Mr Walker SC, *Committee Hansard*, Canberra, 8 October 2014, pp. 38, 42.

251 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 13; councils for civil liberties across Australia, *Submission 25*, p. 12; Law Council of Australia, *Supplementary Submission 12.1*; Australian Lawyers for Human Rights, *Supplementary Submission 5.1*, p. 2.

political motivation necessarily; they just want to get paid and they will do all sorts of heinous things.<sup>252</sup>

2.324 The Department added that the definition of ‘subverting society’ included in the Bill, while not directly cross-referencing to the definition of a ‘terrorist act’, picked up the same conduct as covered in that definition.<sup>253</sup>

2.325 The Inspector-General of Intelligence and Security (IGIS) pointed out to the Committee the link between the definition of ‘engaging in a hostile activity’ for the purposes of the foreign incursions offences and the definition of ‘security’ for the purpose of a range of ASIO functions. This interaction is discussed separately later in this chapter.

2.326 Several contributors to the inquiry raised concerns about the severity of the penalties attached to the proposed offences for foreign incursions and recruitment.<sup>254</sup> The existing maximum penalties under the Foreign Incursions Act are 20 years imprisonment for entering a foreign state with intent to engage in hostile activities, and 10 years imprisonment for acts preparatory to that offence. Responding to a recommendation by the INSLM for parity between the penalties for comparable Criminal Code and Foreign Incursions Act offences,<sup>255</sup> the maximum penalties for both actual and preparatory offences are proposed to be lifted to life imprisonment under the Bill.

2.327 The Law Council of Australia argued for a distinction between the two types of offences to be maintained:

It would seem appropriate to distinguish between the maximum penalties between actual and preparatory conduct. This provides an incentive for youths who arrive in a foreign country with the intention of engaging in hostile activity, but who wish to withdraw, to do so. If the penalties are the same for both, they may feel they have little to lose.<sup>256</sup>

2.328 Mr Bret Walker SC highlighted a concern about the definition of ‘prescribed organisation’ in proposed part 5.5 of the Bill,<sup>257</sup> which has

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252 Ms Karen Horsfall, Principal Legal Officer, *Committee Hansard*, Canberra, 3 October 2014, p. 19.

253 Ms Horsfall, *Committee Hansard*, Canberra, 3 October 2014, p. 37.

254 Gilbert and Tobin Centre of Public Law, *Submission 3*, p. 11; Law Council of Australia, *Submission 12*, p. 33; Australian Lawyers Alliance, *Submission 13*, pp. 34; Amnesty International Australia, *Submission 22*, p. [4]; councils for civil liberties across Australia, *Submission 25*, p. 11.

255 Attorney-General’s Department, *Submission 8*, pp. 9–10.

256 Law Council of Australia, *Submission 12*, p. 33.

257 The term ‘prescribed organisation’ is used in both the existing Foreign Incursions Act and proposed new Part 5.5 of the Bill.

implications both for the foreign incursion offence in clause 119.1 and the 'declared area' offence in clause 119.2. The proposed definition of 'prescribed organisation' is that

the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering:

- (a) a serious violation of human rights; or
- (b) subverting society in Australia or a foreign country allied or associated with Australia (see subsection (3)); or
- (c) a terrorist act (within the meaning of section 100.1); or
- (d) an act prejudicial to the security, defence or international relations of Australia.

2.329 Mr Walker suggested that the inclusion of acts prejudicial to Australia's international relations in this definition was a 'dangerous generalisation' and should be removed. He illustrated his argument as follows:

I expect there will be prejudice to the international relations of Australia by successful, peaceful agitation against, for example, foreign tyrants including, in particular, agitation to impose, for example, various kinds of sanctions, statutory or otherwise, on Australia's dealing with such a regime. If that is a regime in a country with which Australia trades, and that would be true of most, then it would be difficult to resist the proposition that the international relations of Australia may be prejudiced – that is, we may lose trade in order to advance an ethical principle. It seems to me that prejudicing the international relations of Australia is really most inappropriate to be put alongside prejudicing our security or defence, concepts which are well understood.<sup>258</sup>

2.330 Mr Walker also raised a further concern to the Committee regarding clause 119.12 of the Bill, which provides for declarations to be made by the Minister for the purposes of court proceedings. Mr Walker indicated his preference that such declarations should be considered conclusive, rather than prima facie evidence, to avoid a situation in which an Executive matter was required to be 'second guessed' by the Judiciary.<sup>259</sup>

2.331 A joint submission from Australian media organisations raised concerns about the provisions in clause 119.7 of the Bill relating to 'publishing

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258 Mr Bret Walker SC, *Committee Hansard*, Canberra, 8 October 2014, p. 38.

259 Mr Bret Walker SC, *Committee Hansard*, Canberra, 8 October 2014, p. 39.

recruitment advertisements’ for armed forces of foreign countries. The submission noted a lack of clarity about who and what the proposed offence was targeting. It called for subclause 119.7(3) to be removed from the Bill, or for defences for acts done in good faith and the public interest to be added. The submission also called for amendments to the wording of the offences and for a sliding scale of penalties to be introduced.<sup>260</sup>

## Committee comment

- 2.332 The Committee notes the proposed strengthening of the Foreign Incursions Act and its amalgamation into the Criminal Code are consistent with recommendations made by the former INSLM. The Committee understands that weaknesses in the existing Act have meant that prosecution under the offences has been extremely difficult. The proposed enhancements to the foreign incursions offences contained in this Bill will help strengthen the ability for authorities to respond to the threat posed by Australian’s engaging in conflicts overseas.
- 2.333 A concern raised by inquiry participants in regard to the proposed amendments to the foreign incursions regime was that, due to the broad definition of ‘engaging in a hostile activity’, persons could be charged under foreign incursions offences for actions overseas that would not be considered especially serious if conducted in Australia (such as defacing a government building with graffiti). Given that the foreign incursion offences would attract a maximum penalty of life imprisonment, this is a legitimate concern. The Committee notes, however, that this same difficulty could be said to apply to elements of the existing Foreign Incursions Act, from which the definition of ‘engaging in a hostile activity’ was based. Despite its existing coverage over actions such as damage to foreign government property, and causing ‘bodily injury’ to public officials, no evidence was presented to the Committee that these laws had been misdirected towards minor offences. On the contrary, the Committee heard that there had been very few prosecutions under the existing foreign incursions regime.
- 2.334 The Committee also acknowledges concerns raised about the term ‘subverting society’ that is proposed to be introduced within the definition of ‘engaging in a hostile activity’. The Committee notes that this term is a replacement for the term ‘armed hostilities’ in the existing Foreign Incursions Act. The Committee understands that ‘armed hostilities’ was intended to have a broad application, including for mercenary behaviour,

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<sup>260</sup> Joint media organisations, *Submission 23*, pp. 3–6.

but that the term was being interpreted more narrowly than had been anticipated when it was initially inserted into the Act.

- 2.335 The Committee notes that the elements of the proposed definition of ‘subverting society’ are taken directly from the definition of ‘terrorist act’ in section 100.1 of the Criminal Code, with the exception of provisions for motivational intent (for example, that the action is undertaken to advance a political, religious or ideological cause). To avoid introducing a new term that does not explicitly convey the conduct that it encapsulates, the Committee agrees with the former INSLM that it would be better for the term ‘subverting society’ to be replaced with a direct reference to the conduct described in section 100.1.
- 2.336 Some participants raised concerns that excluding motivational intent from this definition would broaden the scope of the offences beyond actions normally considered to be terrorism or foreign incursion. The Committee considers this to be a legitimate concern, as it is clear that the conduct in section 100.1 – which includes acts such as interfering with an information system – goes well beyond the conduct suggested by the original term ‘armed hostilities’, however it is interpreted. The Committee considers, however, that the precise motivational intent of persons who have committed serious crimes overseas could be very difficult for a prosecution to prove. The addition of motivational intent provisions could significantly undermine the purpose of the Bill to strengthen the foreign incursions legislation. The Committee also notes that the exclusion of intent would align with a former recommendation of the INSLM, and that the current Foreign Incursions Act also lacks any requirement for intent to be proven.
- 2.337 The Committee considers that a more useful way to limit the possibility of foreign incursions offences being used to punish relatively minor offences (such as vandalism of government buildings overseas) would be to limit the application of the term ‘engaging in a hostile activity’ to conduct that would be treated as a serious offence if it was undertaken in Australia. While the Committee has not sought evidence on precisely how a ‘serious offence’ should be defined for this purpose, it would be appropriate for a definition to be developed that is broadly in line with ‘serious offence’ provisions in other comparable areas of Australian criminal law. For example, for the purpose of controlled operations, section 15GE of the Crimes Act defines a ‘serious Commonwealth offence’ as an offence punishable by imprisonment for a period of three years or more (or one of a number of specific offences listed in the legislation).

### Recommendation 15

**The Committee recommends that the definition of ‘subverting society’ in proposed section 117.1 of the Criminal Code be replaced with a cross-reference to the conduct contained in the definition of ‘terrorist act’ in section 100.1 of the Criminal Code.**

### Recommendation 16

**The Committee recommends that the Attorney-General consider amending the definition of ‘engaging in a hostile activity’ in proposed section 117.1 of the Criminal Code to constrain it to conduct that would be considered to be a ‘serious offence’ if undertaken within Australia. The definition of ‘serious offence’ for the purposes of this section should be made in consideration of other comparable areas of Australian criminal law.**

- 2.338 Some inquiry participants raised concerns about the proposed increased maximum penalties for foreign incursion offences compared to the existing Foreign Incursions Act, particularly for offences relating to preparatory conduct. The Committee considers, however, that the increased penalties proposed in the Bill are a legitimate response to the serious nature of the conduct being targeted by the provisions, and the need to strengthen the capacity of foreign incursions legislation to appropriately penalise that conduct. The proposed penalties also implement a recommendation by the former INSLM for parity between the penalties for comparable Criminal Code and Foreign Incursions Act offences. The Committee further notes that while *maximum* life sentences would be available for some of the proposed offences, it would remain up to the discretion of courts to determine on a case-by-case basis the appropriate sentence to be applied. The availability of life sentences would give courts a greater range of penalties to impose in accordance with the seriousness of the specific crime.
- 2.339 In his evidence to the Committee, the former INSLM raised a concern that the proposed definition of ‘prescribed organisation’, which has implications for the applicability of serious foreign incursions offences, was too broad. In particular, he considered that including prejudicial to the ‘international relations’ of Australia in the criteria was open to much broader interpretation than was likely to be intended. Although the Committee has not received evidence on the rationale behind the term

‘international relations’ being included in the definition, the Committee is inclined to endorse Mr Walker’s proposal that it be removed. At a minimum, further specificity is needed as to the intent of the term.

### **Recommendation 17**

**The Committee recommends that the Attorney-General remove from, or more specifically define, acts prejudicial to the ‘international relations’ of Australia in the definition of ‘prescribed organisation’ contained in clause 117.1(2) for the proposed foreign incursions and recruitment offences.**

2.340 In regard to the other matter raised by Mr Walker concerning declarations to be made by the Minister for the purposes of court proceedings, the Committee does not consider it has received sufficient evidence to warrant change in this area.

2.341 Additionally, the Committee did not receive sufficient evidence to form a view with regard to the concern raised by media organisations about offences for the publication of ‘recruitment advertisements’ for foreign armed forces. The Committee notes, however, that the key elements of the proposed offences are taken directly from section 9 of the existing Foreign Incursions Act. Given this Act has been in operation for many years without problems occurring in this area, the Committee does not consider further amendment is required.

### **‘Declared area’ offence**

2.342 Clause 119.2 of the Bill proposes to create a new offence for persons who enter, or remain in, specific overseas areas declared by the Foreign Affairs Minister.

2.343 To make a declaration, the Foreign Affairs Minister would need to be ‘satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country’. The Foreign Affairs Minister’s declaration would take place via legislative instrument, and a single declaration could cover an entire foreign country or areas in two or more foreign countries. The Bill also includes a requirement for the Leader of the Opposition to be briefed before a declaration is made. The Foreign

Affairs Minister's declaration of an area would expire after three years, if not revoked before then due to changed circumstances.<sup>261</sup>

2.344 The following exception is included in relation to the proposed 'declared area' offence:

Subsection (1) does not apply if the person enters, or remains in, the area solely for one or more of the following purposes:

- (a) providing aid of a humanitarian nature;
- (b) satisfying an obligation to appear before a court or other body exercising judicial power;
- (c) performing an official duty for the Commonwealth, a State or a Territory;
- (d) performing an official duty for the government of a foreign country or the government of part of a foreign country (including service in the armed forces of the government of a foreign country), where that performance would not be a violation of the law of the Commonwealth, a State or a Territory;
- (e) performing an official duty for the United Nations or an agency of the United Nations;
- (f) making a news report of events in the area, where the person is working in a professional capacity as a journalist or is assisting another person working in a professional capacity as a journalist;
- (g) making a bona fide visit to a family member;
- (h) any other purpose prescribed by the regulations.<sup>262</sup>

2.345 The Bill notes that the defendant bears an evidential burden in relation to the 'legitimate purposes' exception. Further exceptions to the 'declared area' offence are provided for persons serving in armed forces other than 'prescribed organisations', and for instances of 'intervening conduct or event' or a 'sudden or extraordinary emergency'.<sup>263</sup>

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261 Item 110, subclause 119.3 of the CTLA(FF) Bill.

262 Item 110, subclause 119.2(3) of the CTLA(FF) Bill.

263 See item 110, subclause 119.2(4) and Note 2 after subclause 119.2(5) of the CTLA(FF) Bill. The 'intervening conduct or event' provisions in section 10.1 of the Criminal Code provides a defence against criminal liability for circumstances over which the person has no control. The 'sudden or extraordinary emergency' provisions in section 10.3 of the Criminal Code provide a defence for reasonable conduct in circumstances where committing an offence is 'the only reasonable way to deal with the emergency'.

2.346 The Bill includes a ‘sunset’ clause for the declared area offence provisions, meaning they would cease to have effect 10 years after their commencement.

2.347 Many inquiry participants expressed strong in-principle concerns about the impact of the proposed ‘declared area’ offence, and argued against its retention in the Bill.<sup>264</sup> Participants claimed that the offence would unjustifiably impact on the right to freedom of movement. For example, Professor Ben Saul summarised the offence as follows:

The offence relating to a ‘declared area’ would criminalise conduct which is not of itself demonstrably harmful, violent or terrorist – namely, travelling to a declared place. As such, it is an unnecessary, disproportionate and unjustified restriction on the human right to freedom of movement and contrary to Australia’s obligations under Article 12 of the International Covenant on Civil and Political Rights 1966 (‘ICCPR’). It is also a misuse and over-extension of the criminal law in view of existing, extensive offences of foreign incursion and terrorism.<sup>265</sup>

2.348 The Islamic Council of Victoria submitted that the proposed offence would have a particularly large impact on the Muslim community:

[T]his law is discriminatory against the Muslim community because it could potentially deem many parts of the Middle East and other parts of the Muslim world which are currently experiencing a great deal of political turmoil as “no go zones”. This directly impacts large sections of the Muslim community who have family and other business in the region and who may need to travel to that region without wanting to be involved in any conflict or violence.<sup>266</sup>

2.349 The Law Council of Australia similarly raised concerns about the particular impact the proposed offence would have on certain segments of the community, such as those with family connections or trading engagements in declared areas:

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264 Professor Ben Saul, *Submission 2*, p. [1]; Gilbert and Tobin Centre of Public Law, *Submission 3*, p. 10; Law Council of Australia, *Submission 12*, p. 15; Australian Human Rights Commission, *Submission 7*, p. 12; Amnesty International, *Submission 22*, p. [3]; councils for civil liberties across Australia, *Submission 25*, p. 14; Adam Bonner, *Submission 34*, p. 16; Australian National Imams Council, *Submission 35*, p. [3]; Islamic Council of Victoria, *Submission 42*, p. [2]; Muslim Legal Network (NSW), *Submission 43*, p. [20].

265 Professor Ben Saul, *Submission 2*, p. [1].

266 Islamic Council of Victoria, *Submission 42*, p. [2].

This impact (when combined with the breadth of the offence and the evidential burden on the accused) risks marginalising precisely those segments of the Australian community whose cooperation and goodwill is most essential to curbing the terrorist threat.<sup>267</sup>

- 2.350 Despite this opposition, a number of participants in the inquiry indicated a level of support for the declared area offence provisions.<sup>268</sup> Dr David Connery, for example, said that while the power to declare areas as ‘no-go zones’ would be ‘hard to operationalise ... in a fair way’ and need to be ‘limited to some very specific circumstances’, that did not mean the power should not be available:

We have seen people go to Somalia, we have seen people go to southern Lebanon, and when they get in trouble they expect the Commonwealth to come and pluck them out. We have also seen other places where areas have been lawless or ungoverned, and we have seen people enter for nefarious purposes ... I think the Australian government has an obligation to stop people, if it can, from going into these areas and fuelling this kind of conflict. I think that is a contribution that we can make to international security.<sup>269</sup>

- 2.351 Mr Neil James of the Australia Defence Association argued that the ‘declared areas’ offence would be an effective way to overcome some of the limitations in the existing Foreign Incursions Act:

There have always been enormous problems with prosecutions under the act, because the evidence thresholds were set far too high and the act basically came from a philosophical belief that Australians going to undertake armed operations in a foreign country were motivated by a political ideology and not a terrorist one as such. In some ways the 1978 act was a bit of a carryover from the Spanish Civil War way of looking at how Australians fought overseas. It is completely outdated and we think the changes in this area, with the ability by governments to proscribe areas and say Australians should not go there – because the only reason you would go there basically would be to undertake quite serious crimes, potentially even war crimes – is really just

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267 Law Council of Australia, *Submission 12*, p. 13.

268 Mr James, Australia Defence Association, *Committee Hansard*, Canberra, 8 October 2014, p. 20; Dr David Connery, *Committee Hansard*, Canberra, 8 October 2014, p. 30; Mr Bret Walker SC, *Committee Hansard*, Canberra, 8 October 2014, p. 38.

269 Dr David Connery, *Committee Hansard*, Canberra, 8 October 2014, p. 30.

updating a piece of outmoded legislation that our experience since 1978 has proved does not work.<sup>270</sup>

2.352 The Attorney-General's Department informed the Committee that it was not aware of any equivalent provisions to the proposed 'declared area' offence being enacted in other countries. However, it noted that other like-minded countries were 'actively considering their existing laws'.<sup>271</sup>

2.353 Many inquiry participants raised concerns about the wide range of legitimate activities not included in the list of exceptions that might require persons to travel to, or remain in, a declared area. Examples provided to the Committee included:

- visiting a friend or partner,
- conducting business,
- retrieving property,
- attending to personal or financial affairs,
- teaching, research or study,
- freelance journalism,
- providing legal advice,
- a pilgrimage or other religious obligation,
- missionary work,
- tourism,
- transits to other destinations.<sup>272</sup>

2.354 Members of the Victorian Bar Association pointed out a further range of scenarios in which a person may enter, or remain in, a declared area unintentionally. These included:

- being already present in the area before it was declared and while seeking to leave the area,

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270 Mr Neil James, Australia Defence Association, *Committee Hansard*, Canberra, 8 October 2014, p. 20.

271 Ms Lowe, Attorney-General's Department, *Committee Hansard*, Canberra, 3 October 2014, p. 20.

272 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 9; Australian Human Rights Commission, *Submission 7*, p. 11; Law Council of Australia, *Submission 12*, p. 14; Castan Centre for Human Rights Law, *Supplementary Submission 17.1*; councils for civil liberties across Australia, *Submission 25*, p. 14; Media, Entertainment & Arts Alliance, *Submission 44*, p. 7.

- being already present in the area at the time it was declared and not being able to leave due to circumstances beyond their control,
- persons kidnapped or otherwise taken into an area against their will, and
- persons fleeing into an area in order to escape threat or violence in an adjoining area.<sup>273</sup>

2.355 In its submission, the Law Council of Australia highlighted the rule of law principle that ‘offences should not be so broadly framed that they inadvertently capture a wide range of benign conduct and are overly reliant on law enforcement and prosecutorial discretion’. It further noted that while the fault element of ‘recklessness’ would apply to the offence, persons could nevertheless be ‘caught within the ambit of the offence *without knowing* that an area was declared and *without any intention* of engaging in a terrorist activity’.<sup>274</sup>

2.356 Participants also pointed out that the requirement for a defendant to prove that they were in a declared area *solely* for one of the listed acceptable reasons would present difficulties. For example, Professor George Williams told the Committee:

What is critically important here is that it must be demonstrated that the sole purpose of that person was to enter into those areas. It means, for example, that if someone went to visit a family member and to conduct some business then they would not be covered by the defence, because they have an additional thing that moves them out of having the ‘sole purpose’ of visiting a family member.<sup>275</sup>

2.357 In its submission, the Gilbert + Tobin Centre of Public Law argued that the ‘sole purpose’ requirement would place too high a burden of proof on the defendant:

[I]t could very well mean that defendants are placed in the very difficult position of proving a negative; that is, a defendant may be required to adduce evidence not only that he or she travelled to the area for one of the enumerated purposes but also that this was the *only* purpose for the travel. This would require the defendant to provide factual evidence that he or she did *not* travel to the area with the intention of engaging in a terrorism-related purpose. It is

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273 Members of the Victorian Bar Association, *Submission 29*, p. 7.

274 Law Council of Australia, *Submission 12*, pp. 13, 14.

275 Professor Williams, *Committee Hansard*, Canberra, 3 October 2014, p. 49.

not clear what evidence a defendant would be able to adduce to establish the absence of such an intent.<sup>276</sup>

2.358 Other inquiry participants similarly noted that, while the provisions may not technically reverse the onus of proof due to the requirement for the prosecution to prove the offence of entering or remaining in the declared area, a substantial burden would remain on the defendant to prove their innocence. The councils for civil liberties across Australia explained:

[I]f the prosecution can establish that the accused entered or remained in a declared area after the declaration, the accused will be guilty of the offence unless he or she can demonstrate that a defence applies. In this way, it is the accused who will bear the burden of demonstrating an innocent intent, rather than requiring the prosecution to demonstrate a nefarious intent (or the lack of innocent intent). While this might technically satisfy the requirements of the presumption of innocence, the substantive burden of exonerating oneself clearly lies with the accused as the proposed offence is structured.<sup>277</sup>

2.359 The Muslim Legal Network (NSW) added that:

Although the burden of proof initially lies with the Prosecution, the elements of the offence are easier to prove than the defences set out in 119.2(3). The only element to the offence that the prosecution is required to prove is simply the entering into or remaining in a declared area ... As the legislator assumes that by travelling to a declared area, the accused has travelled to that area for an illegitimate purpose, it is highly likely that the accused would be convicted if he exercised his right to silence and did not give evidence. Therefore it is a reversal of onus and a presumption of guilt.<sup>278</sup>

2.360 Mr Rabih Alkadamani raised particular concerns that would arise if an entire country, such as Syria or Iraq, were to be declared under the provisions. Mr Alkadamani highlighted the personal impact that such a declaration would have on his wife if she were to visit her family members in Syria:

It is simply frightening to contemplate the personal stress and anxiety to which she would thereby be subjected. Similarly, the expense associated with having to retain lawyers to prove that she

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276 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 10.

277 Councils for civil liberties across Australia, *Submission 25*, pp. 13–14.

278 Muslim Legal Network (NSW), *Submission 25*, pp. 13–14.

is entitled to the defence in section 119.2(3)(g), particularly in the event of a prosecution, is an oppressive burden.<sup>279</sup>

- 2.361 In response to concerns raised about the evidential burden on defendants, the Attorney-General's Department explained that the persuasive burden would remain on the prosecution:

The onus of proof for this offence has not been reversed ...  
If a defendant who relies on the offence-specific defence discharges the evidential burden, the prosecution must then disprove that matter (i.e. that the defendant entered or remained in a declared area not solely for a legitimate purpose or purpose) beyond reasonable doubt.<sup>280</sup>

- 2.362 Professor Gillian Triggs of the Australian Human Rights Commission, told the Committee that the approach of placing a preliminary element of evidence onto the defendant was 'not unreasonable' and was consistent with other areas of criminal law:

In the general scheme of things, my personal preference is always to have both the persuasive and evidentiary burden on the Crown, but this is a difficult area. In understanding people's motives in going to an area that has been declared to be a conflict zone where there are dangers, one could accept the argument of the government that it is not unreasonable to place some evidentiary burden on the person concerned, and I think that is really the key here ... They have taken the risk and they are in the best position to provide at least a first level of evidence before the persuasive burden is reactivated in terms of the crown.<sup>281</sup>

- 2.363 The Commission recommended to the Committee that, if the declared area offence was to be retained, it should include an overarching exception for persons who enter, or remain in, an area 'solely for the purpose or purposes not connected with engaging in hostile activities'.<sup>282</sup> Professor Triggs explained to the Committee that this approach would be preferable to attempting to list all possible legitimate purposes in the legislation:

[I]t would be our preference to have an opportunity for the evidential burden to rest on that person to demonstrate they had a legitimate reason and then for an officer conducting that inquiry to say, 'On the evidence you have produced, that looks to us to fit

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279 Mr Rabih Alkadamani, *Submission 46*, p. [2].

280 Attorney-General's Department, *Supplementary Submission 8.1*, pp. 11-12.

281 Professor Triggs, *Committee Hansard*, Canberra, 3 October 2014, pp. 5, 6.

282 Australian Human Rights Commission, *Submission 7*, p. 12.

within what we broadly see as an innocent or legitimate purpose.’ The other drafting mechanism is to have the overarching provision of legitimate purpose for a list of examples so that the officer dealing with the matter would have some illustrative examples – family, study or a pilgrimage – but would not be limited to them. It is a very nice drafting technique that gives you an overarching principle and gives the person an opportunity to raise something that is not on the list at all but which would be taken into account by an officer questioning them.<sup>283</sup>

- 2.364 Similarly, the Law Council of Australia suggested that the words ‘without limiting this subsection’ could be inserted into the wording of subclause 119.2(3). Such an amendment would allow the courts to exercise discretion to determine whether travel into a declared area was for a legitimate purpose, while retaining the current proposed list of defences. The Council suggested that this change would remove the need for other ‘legitimate purposes’ to be added by regulation.<sup>284</sup>
- 2.365 Some participants argued that, if the proposed offence was to be retained, the offence should specify, as one of its elements, an intention to enter a declared area to engage in a terrorist activity or other ‘illegitimate purpose’.<sup>285</sup> However, as the Gilbert + Tobin Centre of Public Law noted in its submission, such an amendment would render the offence ‘superfluous’ because it ‘would overlap very significantly with the foreign incursions offences’ contained elsewhere in the Bill.<sup>286</sup>
- 2.366 Mr Bret Walker SC, while not opposing the concept of a declared area offence in principle, similarly indicated doubts about its utility in light of the other foreign incursions offences in the Bill:

I do think that there is a problem in the exceptions provided in subsection 3, by the use of the word ‘solely’ because it contemplates the evidentiary burden, if it has been successfully discharged by the defendant so that the prosecution then has to prove beyond reasonable doubt that the trip was not solely for one of these permitted purposes. The difficulty that then arises is, if the Crown succeeds in that it will not have proved, of course, positively, necessarily any particularly bad conduct on the part of

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283 Professor Triggs, *Committee Hansard*, Canberra, 3 October 2014, p. 8.

284 Law Council of Australia, *Submission 12*, p. 15.

285 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 11; Law Council of Australia, *Submission 12*, p. 14; councils for civil liberties across Australia, *Submission 25*, p. 14; Associate Professor Greg Carne, *Submission 27*, p. 3; Muslim Legal Network (NSW), *Submission 43*, p. [23].

286 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 10.

the defendant; simply that the remaining and entering was not solely for one of the permitted purposes. That I think means that there will be most invidious decisions to be made concerning how to sentence such a person. There are other offences, which include life sentences, for carrying out hostile activities. It does seem to me that the utility of 119.2, which has understandably attracted a lot of attention, is greatly to be doubted.<sup>287</sup>

- 2.367 At a public hearing, the Attorney-General's Department argued that a limited range of exceptions was necessary in order for the offence to achieve the desired effect of deterring persons from travelling to declared areas:

We have specifically prescribed what the legitimate purposes would be in an attempt, quite deliberately, to limit range of exceptional circumstances that could arise, or the legitimate purposes that could arise, in an effort to discourage people from travelling in the first place. So the intent is to actively discourage people from travelling to a place that, by definition, is dangerous.<sup>288</sup>

- 2.368 In a supplementary submission, the Department added that the limited list of legitimate purposes in the defence was intended to address

the need to provide clear guidance to individuals about the acceptable reasons for entering or remaining in a declared area and the need to ensure the court is not being asked to exercise a legislative function by determining whether particular purposes are legitimate.<sup>289</sup>

- 2.369 The Department cautioned against an approach that did not provide a specific list of acceptable legitimate purposes:

Adopting a broad defence that provides no guidance to individuals could act as an even greater deterrent to people proposing to travel to or remain in a declared area because of the uncertainty about whether the person would be committing a criminal offence ... Conversely, leaving it open to the court to determine the scope of legitimate purpose could result in purposes not considered of sufficient significance being determined to be legitimate by the court. For example, the list of legitimate purposes does not include study or business activities. The government

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287 Mr Walker SC, *Committee Hansard*, Canberra, 8 October 2014, p. 39.

288 Ms Lowe, *Committee Hansard*, Canberra, 8 October 2014, p. 20.

289 Attorney-General's Department, *Supplementary Submission 8.1*, p. 13.

considers that if an area is dangerous enough to warrant declaration, it will be too dangerous for Australian to enter for business or study purposes.<sup>290</sup>

2.370 Some participants in the inquiry suggested a mechanism for members of the public to seek advice or pre-approval prior to travel to a declared area would be beneficial in helping reduce the burden placed on individuals to demonstrate the purpose of their travel.<sup>291</sup> The Australian Human Rights Commission indicated its support for such a mechanism at a public hearing:

I would like to see very clear public information as to which areas are now declared zones and, as you say, a very sensible support process so that you can go to the relevant authorities and advise them that you want to pursue a business arrangement or safeguard your investments or property there. It would be very sensible to do that in advance of visiting. It may be that the official says, 'My advice would be that you do not go there at all,' or 'Go there exclusively for that purpose and do what is required for your business purposes and come back.' In other words, if you have done it in advance you have a better chance of meeting that evidentiary burden if you take the risk of going. I would have thought that is thoroughly sensible.<sup>292</sup>

2.371 Responding to this suggestion, however, the Attorney-General's Department argued that a pre-approval process would be at odds with the intention of the provisions to deter travel to declared areas and would be 'open to misuse'. The Department also noted that there was already a mechanism for people to register with Smart Traveller website prior to travel, and that the Department had been encouraging people to use this service.<sup>293</sup> The Department of Foreign Affairs and Trade advised that it had already made information about the proposed 'declared areas' provisions available on the Smart Traveller website, and that if the legislation was passed and an area was declared that information would also be made available.<sup>294</sup>

2.372 The Attorney-General's Department also highlighted that not all travellers would be required to adduce evidence of their 'legitimate purpose':

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290 Attorney-General's Department, *Supplementary Submission 8.1*, p. 13.

291 Dr A J Wood, *Submission 31*, p. 7; Mr Rabi Alkadmani, *Submission 46*, p. [2].

292 Professor Triggs, *Committee Hansard*, Canberra, 3 October 2014, p. 8.

293 Ms Lowe, *Committee Hansard*, Canberra, 3 October 2014, p. 35.

294 Ms Julie Heckscher, Assistant Secretary, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 3 October 2014, p. 34.

The only point at which you would be required to adduce evidence as to your legitimate purpose is if you get to the point where you are prosecuted – where a decision is made by the Federal Police in consultation with the DPP that there is a reason to prosecute. It would be at that point that you would adduce evidence as to your legitimate purpose as a defence to the offence.<sup>295</sup>

- 2.373 Regarding the process which would apply to the declaration of an area by the Foreign Affairs Minister, the Attorney-General's Department advised that a public protocol would be developed similar to the listing of terrorist organisations. While noting the protocol was still under development, the Department gave a brief summary of the likely process to the Committee:

[T]he kind of process we are anticipating is that ASIO would do an assessment, and that would come to the department as the area responsible for this legislation, and we would use that assessment and any information that we require and would make a recommendation to the Minister for Foreign Affairs, probably through the Attorney-General.<sup>296</sup>

- 2.374 The Department added that much consideration had been given as to how adjustments to the boundaries of declared areas would be made in response to changing situations on the ground. It advised that

the legislation really constrains our ability to declare an area to that area in which the hostilities are actually occurring. It does not give us ambit to declare an area surrounding that just in case the hostilities shift ... the Minister for Foreign Affairs, once he or she is no longer satisfied that the hostilities are occurring in a particular area, is required under the legislation to revoke that declaration. What we are anticipating there is that if it is simply that the hostilities move from here to an area a small way away, then the process would be somewhat streamlined... But the whole process would need to be revisited.<sup>297</sup>

- 2.375 Noting that the declaration of an area would be in the form of a disallowable instrument, the Committee asked the Attorney-General's Department whether provision could be made for the PJCIS to review such instruments during the 15 day parliamentary disallowance period, in a way similar to the existing PJCIS reviews of listings of terrorist

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295 Ms Lowe, *Committee Hansard*, Canberra, 3 October 2014, p. 35.

296 Ms Horsfall, *Committee Hansard*, Canberra, 3 October 2014, p. 36.

297 Ms Horsfall, *Committee Hansard*, Canberra, 3 October 2014, p. 36.

organisations under subdivision 102.1A of the Criminal Code. The Department indicated that including such a provision would be possible.<sup>298</sup>

- 2.376 The Australian Human Rights Commission noted in its submission that, under the proposed provisions for a declaration to be made, the Foreign Affairs Minister would not need to consider the extent of hostile activity taking place in the area considered. It recommended that clause 119.3 be amended so that the Minister may only declare an area if she is satisfied that a terrorist organisation is engaging in a hostile activity *to a significant degree* in that area.<sup>299</sup>
- 2.377 In a joint submission, the Islamic Council of Queensland, the Council of Imams Queensland, the Queensland Association of Independent Legal Services and 818 signatories called for more stringent requirements to be enacted for the determination of a declared area. These included:
- a limit on the size of the declared area to, at a minimum, prevent entire countries from being declared,
  - a requirement for the Minister to review the declaration of areas on at least a monthly basis,
  - a mechanism to ensure against the Minister continually adding to a declared area rather than replacing areas which should no longer be declared, and
  - requiring the Minister to obtain parliamentary approval to deem an area to be declared.<sup>300</sup>
- 2.378 The joint submission also called for the proposed 10 year sunset clause on the declared area offence provisions to be reduced to five years.<sup>301</sup> Similarly, the Islamic Council of Victoria recommended that the sunset clause be reduced to two years.<sup>302</sup>
- 2.379 The Muslim Legal Network (NSW) recommended that the automatic cessation of the declaration of an area be reduced from three years to one year. It also called for a statutory limitation period of six months to be applied to the offence in order to limit the amount of time over which the

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298 Ms Lowe, *Committee Hansard*, Canberra, 3 October 2014, p. 38.

299 Australian Human Rights Commission, *Submission 7*, p. 12.

300 *Submission 30*, pp. 1–2.

301 Islamic Council of Queensland, the Council of Imams Queensland, the Queensland Association of Independent Legal Services and 818 individual signatories, *Submission 30*, p. 2.

302 Islamic Council of Victoria, *Submission 42*, p. [6].

accused would be required to recall the minute detail of their travel in order to support their defence.<sup>303</sup>

- 2.380 At a public hearing, the Committee asked the Law Council of Australia if it would support a reduction in the sunset period to three years, accompanied by PJCIS review of the Foreign Affairs Minister's declarations. The Council indicated it would support those proposals, but that it would also like to see other improvements (as noted above).

### **Committee comment**

- 2.381 The Committee received compelling evidence in its inquiry about limitations of existing offences in regard to foreign incursions and their reliance on foreign evidence. These limitations have meant that the existing set of laws in this area have not been strong enough to deal with the current threat posed by Australians travelling overseas to fight in foreign conflicts on behalf of listed terrorist organisations. While improvements to the existing offences and ability to admit foreign evidence in court are proposed in this Bill, the Committee is convinced that the new offence for entering, or remaining in, a declared area is necessary.
- 2.382 The areas targeted by the 'declared area' provisions are extremely dangerous locations in which terrorist organisations are actively engaging in hostile activities. The Committee notes the declared area provisions are designed to act as a deterrent to prevent people from travelling to declared areas. The Committee considers it is a legitimate policy intent for the Government to do this and to require persons who choose to travel to such places despite the warnings to provide evidence of a legitimate purpose for their travel. This is particularly the case given the risk individuals returning to Australia who have fought for or been involved with terrorist organisations present to the community. Additionally, there is a high cost to taxpayers in providing assistance to any persons who become trapped in a dangerous situation in a declared area.
- 2.383 The Committee is aware that the proposed 'declared area' offence has caused angst amongst sections of the community, primarily because of concerns that persons with legitimate reasons to travel to, or remain in, areas with which they have a connection may find themselves accused of a serious criminal offence. There are also concerns that the structure of the offence will place too high an evidential burden on the defendant to prove that they were in a declared area solely for a legitimate reason. The

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303 Muslim Legal Network (NSW), *Submission 43*, p. 23.

Committee considers that this does not amount to the onus of proof being reversed, as a prosecution would still need to prove beyond reasonable doubt that the defence offered by a defendant was unfounded. However, the Committee acknowledges those concerns and has identified a number of areas in which safeguards and oversight can be enhanced without reducing the efficacy of the provisions.

- 2.384 The Committee notes that there are a range of existing important safeguards in the Bill that would make it unlikely that any prosecution would proceed against a person who entered a declared area for a legitimate reason, who unwittingly found themselves in a declared area, who entered a declared area against their will, or who remained in a declared area when it was not safe to leave. These safeguards include:
- The exception for entering, or remaining in a declared area for one of the listed ‘legitimate purposes’. This includes a defence for ‘aid of a humanitarian nature’, which would cover not only aid organisations, but may also apply, for instance, to a person who travelled to a declared area to help a friend leave.<sup>304</sup>
  - The application of the fault element of ‘recklessness’, which would require the prosecution to prove that the defendant was ‘aware of a substantial risk’ that the area was declared, and that, having regard to the circumstances known to the defendant, it was ‘unjustifiable to take the risk’ by entering or remaining in the declared area.<sup>305</sup>
  - The availability of additional defences for entering, or remaining in, a declared area due to circumstances outside the defendant’s control, or due to an emergency situation.<sup>306</sup>
  - The requirement for the Attorney-General to provide written consent prior to any prosecution being initiated (clause 119.11).
  - The normal policy requirement for the Commonwealth Director of Public Prosecutions to take into account the public interest before initiating a prosecution.
- 2.385 The Committee notes concerns raised by many inquiry participants that the list of ‘legitimate purposes’ for travelling to a declared area is too narrow. Given that declared areas will be restricted to specific areas in which terrorist organisations are currently engaging in hostilities, it is

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304 Ms Horsfall, *Committee Hansard*, Canberra, 3 October 2014, p. 33.

305 Section 5.4 of the Criminal Code.

306 Section 10.1 (intervening conduct or event) and section 10.3 (sudden or extraordinary emergency) of the Criminal Code; see ‘Note 2’ after clause 119.2(5) of the Bill.

difficult to see why persons would want to travel to those areas for non-essential purposes such as study, research, tourism or to conduct business. The Committee accepts the argument that including such purposes as specific exceptions to the proposed offence would be contrary to the intent of providing a deterrent against travel to declared areas.

- 2.386 However, the Committee accepts that there are likely to be some legitimate reasons for travel to an area that are not covered in the proposed grounds of defence listed in subclause 119.2(3) of the Bill. It may be inconsistent, for example, for persons to be allowed to travel to a declared area for a social visit to a family member, while prohibiting travel to a declared area to visit a close friend who is dying. The Committee supports the inclusion in the Bill of a provision to allow additional legitimate purposes to be prescribed by regulation if needed. The Committee encourages the Attorney-General's Department to review the evidence provided by participants to this inquiry to identify legitimate purposes that could be added to the regulations in this manner, without reducing the deterrent effect of the offence.
- 2.387 Committee members had different views about whether the declared area offence as currently drafted would be an effective and workable provision. Some members of the Committee questioned whether the legitimate concerns presented in evidence had been adequately addressed, particularly in relation to the evidential burden and the limited range of legitimate purposes for travel to declared areas. The Committee notes that the proposed INSLM and Parliamentary Joint Committee on Intelligence and Security reviews leading into the sunset provision will enable this to be more fully explored.
- 2.388 Some members of the Committee believed that, given the seriousness of offences arising under this section that it is appropriate for there to be a 'wholly legitimate purposes' general provision in the legislation.
- 2.389 The Committee also notes the difficulties raised by requiring the defendant to prove that they entered, or remained in, a declared area *solely* for one or more of the legitimate purposes. For example, as was pointed out to the Committee, it may be hard for a person who travelled to a declared area primarily to visit a family member, but who also visited friends or attended to some business matters, to prove that they were *solely* in the declared area for visiting the family member. The Committee notes, however, that while this requirement may place an initial burden on the defendant to prove their sole reason for being in the area was legitimate, removing the requirement could make it impossible for a prosecution to succeed against a person who entered a declared area to

fight for a terrorist organisation, but who also visited a family member while they were there.

- 2.390 One solution offered to the Committee to circumvent these difficulties was to add a broad 'legitimate purpose' defence for travelling to, or remaining in, a declared area. This approach would give the court discretion to determine on a case-by-case basis what is a legitimate purpose, while the existing list of legitimate purposes could be retained as 'examples' to provide guidance. However, the Committee is concerned that, given the perils of relying on foreign evidence or the impossibility of being able to gather it, such an approach could risk placing too high a burden on the prosecution being able to persuasively prove that any evidence presented by a defendant was not legitimate. A broad definition of 'legitimate purpose' would also substantially reduce the deterrent intent of the legislation.
- 2.391 The Committee considers the most effective means of building on the existing safeguards in the Bill is by ensuring the integrity of the process behind the Foreign Affairs Minister's declarations. The test for an area to be declared by the Minister is that a 'terrorist organisation is engaging in a hostile activity' in that area. The Committee considers that, if this test is applied as intended, declared areas will only cover the most dangerous places in the world where terrorist organisations are actively engaged in hostile activity, to which the desire of people to travel to, even for 'legitimate purposes', will be extremely rare. The Committee notes concerns were raised by some participants that entire countries could be declared. The Committee considers, however, that declarations will be based on specific areas, not on borders. The likelihood of an entire country being declared is small, and the Committee does not consider that any country in the world would currently meet the necessary criteria, or would be likely to in the near future.
- 2.392 The Committee notes, however, that there is a provision in the Bill which explicitly states that a whole country could be declared, if the Minister was satisfied that a terrorist organisation was engaging in a hostile activity throughout the entire country. The Committee recommends that this provision should be removed. While the provision gives clarity that a declared area is not to be limited by borders, it also has the effect of implying that an entire country being declared is a likely circumstance to arise. While the Committee does not wish to remove the ability for the Minister to make such a declaration – if rare and exceptional circumstances demanded it – if such clarity is needed, it is suggested that it be included in the Explanatory Memorandum rather than in the Bill itself.

**Recommendation 18**

**The Committee recommends that proposed subsection 119.3(2)(b), which explicitly enables the Minister to declare an entire country for the purposes of prohibiting persons from entering, or remaining, in that country, be removed from the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.**

- 2.393 The Committee considers that it is crucial that the declaration of an area be strictly reserved for only those areas where terrorist organisations are actively engaging in hostilities. If declarations were to be applied too widely, or were to not keep up with current events in the areas concerned, then the considerable restrictions on travel would be open to much greater criticism.
- 2.394 The Committee considers that additional parliamentary oversight could be built into the process for declaration of an area to ensure that these conditions are met. As declarations will be made in the form of disallowable instruments, this oversight could be achieved through a similar provision to the existing process for the listing of terrorist organisations under subdivision 102.1A of the Criminal Code. This subdivision enables the PJCIS to review the listing of a terrorist organisation as soon as possible after it is made, and to report the Committee's comments and recommendations to both Houses of Parliament before the end of the 15 sitting day disallowance period. Extending the Committee's oversight to declared areas would provide a greater degree of assurance to the Parliament and to the public that thorough consideration has been given to the necessity of declaring a particular area.
- 2.395 Through its reviews, the Committee would examine the evidence as to why the particular area was declared. The Committee would seek to ensure that declarations were made only in the most pressing circumstances; that a sufficiently high level of specificity was included in regard to the areas declared; and that any overextension of the boundaries was minimised.

**Recommendation 19**

**The Committee recommends that the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 be amended to insert a clause that enables the Parliamentary Joint Committee on Intelligence and Security to conduct a review of the declaration of each area made under proposed section 119.3, within the disallowance period for each declaration. The clause should be modelled on the existing subdivision 102.1A of the Criminal Code in relation to the listing of terrorist organisations.**

- 2.396 The Committee notes that ‘declared area’ offences of the kind proposed in the Bill do not exist in any comparable jurisdictions overseas. It will therefore be particularly important that the laws be reviewed at an appropriate time after their implementation to ensure they are operating as intended. The Committee considers that a reduction in the proposed sunset clause from 10 years to two years after the next Federal election would provide a more timely opportunity for the Parliament to review and consider amendments to the regime after an initial period of operation.
- 2.397 It is further recommended that this Committee be given the opportunity to conduct a public inquiry into the operation of the provisions, including the list of ‘legitimate purposes’, well before the legislation’s sunset. It would assist the Committee if this inquiry was informed by a review of the provisions by the INSLM, prior to its commencement.

**Recommendation 20**

**If legislated, the Committee recommends that subclause 119.2(6), relating to the proposed offence for entering, or remaining in, a declared area, sunset two years after the next Federal election.**

## Recommendation 21

If legislated, the Committee recommends that the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to complete a public inquiry into the ‘declared area’ provisions in clauses 119.2 and 119.3 of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, including the list of ‘legitimate purposes’, 18 months after the next Federal election.

The Committee further recommends that the *Independent National Security Legislation Monitor Act 2010* be amended to require the Independent National Security Legislation Monitor to review and report on the operation of the ‘declared area’ provisions 12 months after the next Federal election.

## Amendments to the *Foreign Evidence Act 1994*

2.398 The Bill includes proposed amendments to the *Foreign Evidence Act 1994* (the Foreign Evidence Act), in particular to introduce a new Part 3A into the Act regarding the use of ‘foreign material’ and ‘foreign government material’ in terrorism related proceedings.<sup>307</sup> According to the Explanatory Memorandum, the primary purpose of the amendments is

to provide Australian judicial officers with greater discretion in deciding whether to admit foreign material in terrorism-related proceedings, while still providing appropriate judicial protection of the rights of the defendant.<sup>308</sup>

2.399 The Explanatory Memorandum notes that, currently, only foreign evidence obtained as a result of a ‘mutual assistance request’ (a formal government-to-government request by or on behalf of the Attorney-General to a foreign country) may be adduced as evidence in Australian court proceedings. The amendments aim to

avoid a situation where evidence is automatically excluded on the basis of a technical rule of evidence that may have no substantial bearing on the defendant’s right to a fair trial.<sup>309</sup>

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307 Items 115 to 126 of the CTLA(FF) Bill.

308 CTLA(FF) Bill, *Explanatory Memorandum*, p. 151.

309 CTLA(FF) Bill, *Explanatory Memorandum*, pp. 152–153.

- 2.400 The proposed amendments respond to a recommendation in the Fourth Annual Report of the INSLM. In the report, the INSLM noted that there was ‘very limited scope, if any at all’ for making mutual assistance requests or obtaining evidence from those requests under the existing Part 3 of the Foreign Evidence Act. This was because the procedures under the existing regime ‘presuppose a level of functioning government including judicial authorities that will be quite unrealistic in many cases’.<sup>310</sup>
- 2.401 The INSLM recommended that:
- Consideration should be given to examining the merits of amendments to the *Evidence Act 1995* and the *Foreign Evidence Act 1994* so as to permit the collection of information and its admission into evidence, from foreign countries, where political circumstances or states of conflict render impracticable the making of a request of the government of that country, for assistance in gathering evidence.<sup>311</sup>
- 2.402 In supporting comments, the INSLM indicated it was essential for the existing safeguard to be retained that a court be ‘satisfied that adducing the foreign material would not have a substantial effect on the right of the defendant to a fair trial’. Further, he added that the admission of such information as evidence ‘must be conditioned on specially adapted warnings’ to juries about the reliability of the evidence.<sup>312</sup> The INSLM had referred to provisions under the *Evidence Act 1995* for evidence to be admitted subject to the jury being warned that it ‘may be unreliable’, and ‘the need for caution in determining whether to accept the evidence and the weight to be given to it’.<sup>313</sup>
- 2.403 The proposed new Part 3A of the Bill would, subject to specific requirements, enable foreign evidence obtained on an agency-to-agency basis (‘foreign government material’) to be adduced as evidence in terrorism-related proceedings, in addition to ‘foreign material’ obtained through the existing mutual assistance processes. The new provisions also apply a streamlined set of rules to the process for adducing and admitting both types of material, applying ‘broad judicial discretion’ to the decision on whether the material be adduced, rather than the existing rules of evidence that would otherwise apply. Only material that was ‘obtained directly as a result of torture or duress’ by an official would be

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310 INSLM, *Annual Report*, 28 March 2014, p. 35.

311 INSLM, *Annual Report*, 28 March 2014, p. 36.

312 INSLM, *Annual Report*, 28 March 2014, pp. 34, 36.

313 INSLM, *Annual Report*, 28 March 2014, p. 34; section 165, *Evidence Act 1995*.

inadmissible, in line with Australia's obligations under Article 15 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>314</sup>

- 2.404 The Explanatory Memorandum to the Bill highlighted that the amendments would retain the discretion of the court to direct that evidence not be adduced if doing so would have a 'substantial adverse effect' on the defendant's right to receive a fair hearing'. It also noted that

in any criminal proceedings, the defence will have the opportunity to challenge such evidence and produce their own evidence to discredit the prosecution's case ... notwithstanding the change to the rule of evidence that will apply, the prosecution will continue to need to prove all elements of the specific offence have been satisfied beyond reasonable doubt.<sup>315</sup>

- 2.405 Several participants in the inquiry indicated in-principle support for the intent behind the proposed amendments.<sup>316</sup> For example, Dr David Connery highlighted the challenges faced by law enforcement agencies when gathering evidence about the activities of persons overseas:

For the most part, the well-practiced Mutual Assistance Request is used effectively to provide that evidence. However, there are many situations where a foreign government may not want to help, or places where a legitimate foreign government cannot collect evidence due to civil war or strife. In these latter circumstances, perpetrators of crimes against Australian law have a veritable free ticket to committee crimes. As the recent activities of some in Iraq appear to show, these can be very barbaric.<sup>317</sup>

- 2.406 The AFP indicated that it 'strongly supports' the proposed reforms to the Foreign Evidence Act, and also referred to the problems with the existing regime:

Currently, foreign evidence must be obtained under [Mutual Assistance] 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

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314 CTLA(FF) Bill, *Explanatory Memorandum*, pp. 52, 157–158.

315 CTLA(FF) Bill, *Explanatory Memorandum*, p. 52.

316 Ms Abby Zeith, *Submission 16*, p. [2]; Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 19; Dr David Connery, *Submission 26*, p. 4; Mr Neil James, Executive Director, Australia Defence Association, *Committee Hansard*, Canberra, 8 October 2014, p. 15.

317 Dr Connery, *Submission 26*, p. 3.

all. The nature of the Syria and Iraq conflicts will heighten the difficulties that AFP has already experienced relating to collecting evidence in admissible form and meeting [Mutual Assistance] requirements.<sup>318</sup>

- 2.407 Notwithstanding this level of support, many inquiry participants also highlighted areas for possible improvement in the proposed regime. For example, several participants called for a more precise adoption of the INSLM's recommendation by restricting the applicability of proposed new Part 3A to circumstances in which it is impractical to obtain formal assistance from the foreign government.<sup>319</sup> Dr Connery, for example, suggested an additional safeguard be added in which the AFP was required to show that a mutual assistance request was not feasible before being able to adduce foreign evidence under the proposed new powers.<sup>320</sup>
- 2.408 The Muslim Legal Network (NSW) registered its concerns about the reliability of foreign evidence obtained from areas of conflict, where there may be less stringent methods of collection and an increased likelihood of bias due to political allegiances.<sup>321</sup>
- 2.409 In line with the INSLM's call for warnings to be issued to juries about the reliability of foreign evidence (noted above), the Gilbert + Tobin Centre of Public Law recommended that the proposed Part 3A should include a requirement for judges in terrorism-related proceedings to direct the jury as to the 'potentially prejudicial nature of foreign evidence'.<sup>322</sup>
- 2.410 Other inquiry participants highlighted the desirability of expanding the provisions, found in subclause 27D(2), for evidence to be inadmissible if it was obtained 'directly as a result of torture or duress'. Suggestions included:
- amending subclause 27D(2) to further exclude material that was obtained *indirectly* as a result of torture or duress<sup>323</sup>
  - further prohibiting material obtained as a result of 'ill-treatment', such as cruel, inhuman or degrading treatment or punishment, which may fall below the threshold set by the definition of 'torture'<sup>324</sup>

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318 Australian Federal Police, *Submission 36*, p. 8.

319 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 19; Law Council of Australia, *Submission 12*, p. 39; Dr David Connery, *Submission 26*, p. 4.

320 Dr Connery, *Submission 26*, p. 4; *Committee Hansard*, Canberra, 8 October 2014, pp. 29-31.

321 Muslim Legal Network (NSW), *Submission 43*, p. [8].

322 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 19.

323 Ms Abby Zeith, *Submission 16*, p. 6; Members of the Victorian Bar Human Rights Committee, *Submission 29*, p. 8; Muslim Legal Network (NSW), *Submission 43*, p. [9].

- removing the parts of subclause 27D(2) that limit the mandatory exclusion of material to instances of torture or duress by, or associated with, public officials<sup>325</sup>
- expanding the definition of ‘duress’ in subclause 27D(3) to include threats to person’s associates, threats to property and threats that are real but not necessarily imminent<sup>326</sup>
- amending the provisions to place the burden of proof on the prosecution to satisfy the court that the material was not obtained under torture or duress.<sup>327</sup>

## Committee comment

- 2.411 The Committee notes that there appears to be broad support for the policy intent of allowing courts greater flexibility in determining whether to admit foreign evidence in terrorism-related proceedings. However, some inquiry participants had concerns about the adequacy of safeguards built into the scheme. Most of these concerns revolved around the possibility that, despite the ban on evidence obtained directly by torture or duress, it would be possible that evidence of questionable reliability could be admitted.
- 2.412 The Committee strongly opposes the admission of any evidence obtained under torture or duress being used in criminal proceedings. Nevertheless, the Committee considers the use of the word ‘directly’ is in line with the policy intent of the amendments to provide the court with greater discretion to admit foreign material in appropriate cases. Requiring the prosecution to fully satisfy a court that foreign evidence has not *indirectly* been obtained under torture or duress could be an impossible task in relation to evidence from some countries. Setting too high a threshold for the admissibility of evidence, or specifically placing the burden of proof on the prosecution, could risk an unintended consequence of important foreign evidence in a terrorism-related trial being unable to be admitted. This would defeat the purpose of the proposed amendments.
- 2.413 However, the Committee notes concerns expressed by some submitters in relation to the torture and duress mandatory exclusion being limited to

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324 Ms Abby Zeith, *Submission 16*, p. 4; Associate Professor Greg Carne, *Submission 27*, p. 9.

325 Law Council of Australia, *Submission 12*, p. 39; Castan Centre for Human Rights Law, *Submission 17*, p. 6.

326 Law Council of Australia, *Submission 12*, p. 39; councils for civil liberties across Australia, *Submission 25*, p. 19.

327 Law Council of Australia, *Submission 12*, p. 39; Ms Abby Zeith, *Submission 16*, p. [8].

material obtained by a person in the capacity of a public official, acting in an official capacity or acting at the instigation, or with the consent or acquiescence of a public official or other person action in an official capacity. The Committee notes these comments and recommends that material obtained by torture or duress should not be admissible, regardless of who originally obtained the material.

### **Recommendation 22**

**The Committee recommends that proposed section 27D of the *Foreign Evidence Act 1994*, which currently applies only to public officials and persons connected to public officials, be broadened to apply in circumstances where any person has directly obtained material as a result of torture or duress.**

- 2.414 The Committee also notes concerns expressed over the definition of duress. Under the definition in the Bill, 'duress' is limited to a threat to imminently cause death or serious injury to a person or a member of their family, to which a 'reasonable person would respond by providing the material or information'. The Committee notes that a reasonable person could be just as likely to respond to threats made to them against a close friend, innocent third parties (for example, a threat made against innocent schoolchildren) or a significant asset, such as their home or business. The Committee considers broadening the definition to capture threats of this nature would be appropriate and would not diminish the policy intent of the amendments.

### **Recommendation 23**

**The Committee recommends that the Government broaden the definition of 'duress' in proposed Part 3A of the *Foreign Evidence Act 1994* to include other threats that a reasonable person might respond to, including threats against a person's assets, personal associates or other third parties.**

- 2.415 As the INSLM pointed out in his Fourth Annual Report, the admissibility of evidence cannot be equated with reliability.<sup>328</sup> The clause excluding evidence obtained under torture or duress exists in fulfilment of

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328 INSLM, *Annual Report*, 28 March 2014, p. 34.

Australia's obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. If evidence passes this test, it would remain up to the court to determine the value and reliability of that evidence and for the prosecution to prove beyond reasonable doubt the guilt of the accused. The wide range of material that could potentially be admitted is part of the policy intent of the provisions to allow the court to exercise more discretion as to the reliability of the foreign evidence.

- 2.416 The Committee is concerned, however, that the risks pertaining to the reliability of foreign evidence admitted in such circumstances should be made clear to the court. The Committee agrees with the INSLM that it is important that appropriate direction be given to juries about the potential unreliability of foreign evidence, particularly if there are any doubts as to whether torture, duress or other forms of ill-treatment were involved. While conscious that it would be inappropriate for Government to direct the operation of the Judiciary, the Committee notes that a requirement for such 'warnings' already exists in the *Evidence Act 1995*.<sup>329</sup> The Committee supports similar provisions being incorporated into the proposed new Part 3A of the Foreign Evidence Act.

#### **Recommendation 24**

**The Committee recommends that proposed Part 3A of the *Foreign Evidence Act 1994* be amended, based on section 165 of the *Evidence Act 1995*, to require courts to provide appropriate direction to juries, where necessary, about the potential unreliability of foreign evidence admitted under Part 3A.**

- 2.417 The Committee does not consider it necessary for the proposed new Part 3A to be restricted in the legislation to instances where it is impractical to request formal assistance from a foreign government due to political circumstances or a state of conflict. In forming this view, the Committee notes the proposed requirement for the Attorney-General to certify that it was not practicable for evidence obtained at an agency-to-agency level to be obtained through a mutual assistance request. The Committee expects that this requirement, and the requirement for a senior AFP member to provide a statement with details of how the material was obtained, will ensure the primacy of mutual assistance request regime will be retained wherever practicable. The Committee also notes the observation of the

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329 section 165, *Evidence Act 1995*.

INSLM that, with respect to terrorism-related cases, there was ‘very limited scope, if any at all’ for making such mutual assistance requests or obtaining evidence from those requests under the existing provisions in Part 3 of the Foreign Evidence Act.

## **Amendments to the TIA Act – definition of serious offence**

2.418 The Bill includes a proposed amendment to the definition of ‘serious offence’ within section 5D of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to include a breach of a control order, and offences against Subdivision B of Division 80 and Division 119 of the Criminal Code.

2.419 The Explanatory Memorandum states that these amendments are necessary to enable police to gain access to interception warrants for offences which have been deemed sufficiently serious as to warrant the availability of such powers:

The offences identified, being treason, control order breaches and foreign incursion offences are those that jeopardise Australia and its national security interests and for which prevention and disruption are critical elements of the counter-terrorism strategy. The gravity of the threat posed by possible breaches of these regimes demonstrates a need to take reasonable steps to detect, investigate and prosecute those suspected of engaging in such conduct.<sup>330</sup>

2.420 The definition of ‘serious offence’ within section 5D of the TIA Act already includes offences relating to terrorism and other specifically named offence provisions within the Code, including offences under Divisions 101 (terrorist acts), Division 102 (terrorist organisation offences) and Division 103 (terrorist finance offences).

## **Committee comment**

2.421 The Committee is satisfied that the addition of offences relating to treason, control orders and the proposed foreign incursion offences to the TIA Act regime is justified, as all the offences are sufficiently serious as to justify police access to the interception warrants. The Committee is confident that

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330 CTLA(FF) Bill, *Explanatory Memorandum*, p. 54.

the existing safeguards and oversight regime for the TIA Act continues to be robust and appropriate.

## Amendments to the ASIO Act – definition of security

2.422 Schedule 1 to the Bill includes proposed amendments to the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). One of the amendments is to amend the definition of ‘security’ within section 4.

2.423 The definition of security includes reference to ‘politically motivated violence’:

security means:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

- (i) espionage;
- (ii) sabotage;
- (iii) politically motivated violence;
- (iv) promotion of communal violence;
- (v) attacks on Australia’s defence system; or
- (vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia’s territorial and border integrity from serious threats; and

(b) the carrying out of Australia’s responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).<sup>331</sup>

2.424 The definition of politically motivated violence includes offences against the Foreign Incursions Act and acts that are terrorism offences.<sup>332</sup>

2.425 As outlined in detail above, the Bill also proposes to repeal the Foreign Incursions Act, and recreate its provisions, with amendments, in new

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331 Section 4 of the ASIO Act.

332 Section 4 of the ASIO Act.

Division 119 of the Criminal Code. Division 119 includes a definition of 'engage in a hostile activity' which relies on a subsequent definition of 'engage in subverting society'. This definition differs from the existing definition within the Foreign Incursions Act.

2.426 The new Division 119 offences will be cross-referenced in the definition of 'politically motivated violence' in the ASIO Act. The Explanatory Memorandum states that the amended definition of 'security' within the ASIO Act is merely technical in nature, designed to

ensure that ASIO can continue to perform its statutory functions with respect to matters relevant to security that relate to politically motivated violence, in the form of the offences presently in the Foreign Incursions Act and proposed to be relocated to new Division 119 of the Criminal Code. As this amendment is technical in nature it does not extend, in any material way, ASIO's statutory functions or powers.<sup>333</sup>

2.427 The IGIS queried, in both her submission and evidence to the Committee, whether the amendment was solely technical in nature. Clarification on this point was considered important by the IGIS as:

The definition of 'security' of the Australian Security Intelligence Organisation Act 1979 (the ASIO Act) is central to ASIO's function in s17 of that Act and underpins all of the tests for warrants and other intrusive powers that ASIO is able to access. Any changes to the definition of security has consequences for ASIO's mandate and the circumstances in which its special powers can be accessed (including warrants).<sup>334</sup>

2.428 The IGIS also commented in relation to the definition of 'subverting society':

Despite the phrase 'engaging in subverting society' being used there is no requirement that these acts be accompanied by an intention to coerce or intimidate a government or to intimidate the public or a section of the public or to have any other 'subverting society' effect. Such an intention is part of the definition of a terrorist act in the Criminal Code. This means that the offence in proposed s119.1 and related offences can be enlivened by conduct (such as serious damage to property or causing serious physical harm to a person) that does not have the political or ideological

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333 CTLA(FF) Bill, *Explanatory Memorandum*, p. 85.

334 Inspector-General of Intelligence and Security, *Submission 1*, p. 6.

intention associated with, for example, the current fighting in Iraq and Syria and could be motivated by purely criminal or financial motives. For example, going overseas to commit an assault as part of a family dispute or to rob a bank could come within the definition of ‘security’ and be a legitimate focus for ASIO attention. Such conduct, while serious, has not previously been considered ‘security’ related.<sup>335</sup>

2.429 The IGIS considered that the ‘expanded scope’ of the offence may have the potential to expand ASIO’s current powers and functions:

The consequence of this expansion of the definition of security is that ASIO’s powers would be able to be used in a broader range of circumstances. The definition of ‘security’ underpins when ASIO can obtain search or computer access warrants and also when ASIO employees can authorise access to telecommunications metadata. The definition of security also regulates when a person can be assessed as a ‘risk to security’ for the purpose of a visa security assessment or other security assessments.<sup>336</sup>

2.430 In response to these concerns, ASIO referred the Committee to the overarching definition of ‘security’, which requires that the concept must be related to the protection of, and of the people of, the Commonwealth and the several States and Territories from, *inter alia*, politically motivated violence:

The term ‘politically motivated violence’ does not exist in a vacuum in the ASIO Act definition of security. PMV – politically motivated violence – is only a security issue if it is relevant to the security of Australia and its people or where Australia has a responsibility to a foreign country in that respect, as it does in relation to terrorism. Neither of those sorts of requirements would be fulfilled in respect of collecting intelligence on a person who, for example, was going overseas to commit an assault in a family dispute or to rob a bank. We have to look at it in the context of the mandate around security, in relation to the security of Australia and Australians.<sup>337</sup>

2.431 The Attorney-General’s Department also provided evidence about how the definition of ‘security’ in the ASIO Act should be read:

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335 Inspector-General of Intelligence and Security, *Submission 1*, p.6.

336 Inspector-General of Intelligence and Security, *Submission 1*, p.6.

337 Ms Hartland, *Committee Hansard*, Canberra, Friday 3 October 2014, p. 18.

The definition of security sets it out to say, with an opening chapeau of words, that it must be in relation to the protection of the people of the Commonwealth of Australia from politically motivated violence...

those opening words and the definition of 'security' saying that it must always relate to, 'the protection of the people of Australia' – that, in itself, is a limiting effect. We cannot simply have ASIO then having an investigation into a criminal conduct in another country; it must always be viewed through lens of whether or not the investigation of that activity could be seen to be for the protection of and of the people of the Commonwealth in the several states and territories of Australia.<sup>338</sup>

2.432 In its supplementary submission, the Attorney-General's Department provided further clarification as to how the definition in Division 119 will interact with the existing definition of 'security' for ASIO purposes:

'Security' (defined as is PMV [politically motivated violence] in section 4 of the ASIO Act) relevantly means

- (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from PMV;
- (aa) the protection of Australia's territorial and border integrity from serious threats; and
- (b) the carrying out of Australia's responsibilities to any foreign country in relation to PMV.

... It is the Department's view that a mere connection between an offence constituting PMV and the Commonwealth and its people is insufficient. The conduct constituting PMV would need to be capable of supporting a need to provide protection from that conduct.

The criminal conduct (eg assault) would only engage paragraph (b) of the definition of 'security' above if Australia had responsibilities to the foreign country, in respect to the relevant act of PMV. While we consider that Australia would have responsibilities in respect of its people engaging in terrorism or other conduct which is hostile to a foreign government, there would only be rare occasions where routine criminal conduct overseas (assault or bank robbery) would engage Australia's

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338 Mr Gifford, *Committee Hansard*, Canberra, Friday 3 October 2014, pp. 18-19.

responsibilities to a foreign country. This might arise for instance on those occasions in which a foreign country seeks extradition of the alleged perpetrator from Australia.<sup>339</sup>

## Committee comment

- 2.433 On this matter, the Committee notes the evidence provided by the Attorney-General's Department and ASIO is sufficient to address the concerns raised by the IGIS. The Committee accepts that conduct constituting 'politically motivated violence' within the ASIO Act must be read in relation to a need to provide protection from that conduct. Mere criminal conduct, which is arguably picked up by the 'subverting society' definition in new Division 119, would not be covered by this definition.
- 2.434 The Committee also notes that if the IGIS continues to be concerned about the new definition, the IGIS can investigate and report to that effect.
- 2.435 However, given the views of the IGIS, and the benefits which arise from absolute clarity in relation to the exercise of powers by intelligence and law enforcement authorities, the Committee recommends that the Attorney-General's Department amend the Explanatory Memorandum to clarify that the definition of 'politically motivated violence' must be read with reference to the opening words in the definition of 'security' in section 4 of the ASIO Act. This would ensure that consequential ASIO powers and processes reflect the national security focus of the organisation.

## Recommendation 25

**The Committee recommends that the Attorney-General amend the Explanatory Memorandum to make it clear that the definition of 'politically motivated violence' must be read with reference to the opening words in the definition of 'security' in section 4 of the *Australian Security Intelligence Organisation Act 1979*.**

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339 Attorney-General's Department, *Supplementary submission 8.1*, pp.25-26.

## Questioning and detention powers

- 2.436 The Bill proposes a number of amendments to the questioning and detention powers in Part III of the *Australian Security Intelligence Organisation Act 1979*. Specifically, the Bill will:
- replace the ‘last resort’ threshold for the issuing of questioning warrants with a requirement for the Attorney-General to be satisfied that, having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued
  - insert a new offence for destroying or tampering with ‘records or things’ requested to be produced under a questioning warrant
  - removal a specific threshold governing the use of lethal force by a police officer during execution of a warrant
  - extend the ‘sunset clause’ on the special powers in Division 3 of Part III of the ASIO Act (questioning warrants and questioning & detention warrants) from 22 July 2016 to 22 July 2026, and
  - under a proposed related amendment to the *Intelligence Services Act 2001*, extend the deadline for the PJCIS review of the special powers to 22 July 2026.

## Extension of regime and delay of review

- 2.437 The continued application of the questioning and detention warrant regime was a key issue for a number of submitters. This part will canvass those views, however, the timing and length of the proposed extension and timing of the review has been dealt with separately.
- 2.438 In justifying the extension of the questioning and detention powers, the Explanatory Memorandum outlines that there is a continued need for these powers. Specifically, it states:

The Government is of the view that there are realistic and credible circumstances in which it may be necessary to conduct coercive questioning of a person for the purposes of gathering intelligence about a terrorism offence – as distinct from conducting law enforcement action, or obtaining a preventive order under Divisions 104 and 105 of the Criminal Code – particularly in time critical circumstances. Intelligence is integral to protecting Australia and Australians from the threat of terrorism, and it is

important to ensure that ASIO has the necessary capabilities to perform this function.<sup>340</sup>

- 2.439 Since 2003, 16 questioning warrants have been obtained. ASIO considered that in the current heightened security environment the powers would continue to play an important role. In particular:

The ongoing and persistent threat of terrorism, particularly from Australians involved in and returning from armed conflicts in Syria and Iraq, presents a significant challenge to ASIO and other intelligence agencies. ASIO needs to be equipped with the necessary powers and capabilities to fulfil its statutory functions.<sup>341</sup>

- 2.440 However, a number of submitters questioned the extension, calling for the regime to be repealed.<sup>342</sup> For example, in his submission Professor Ben Saul called for the detention powers to be repealed on the basis that:

Detaining non-suspects for up to seven days, virtually incommunicado and without effective review at the time, removing the right to silence on penalty of imprisonment, and criminalizing any disclosure of detention, is excessive and disproportionate in view of existing powers, the level of terrorist threat, and the absence of any declared public emergency justifying derogation from protected human rights.<sup>343</sup>

- 2.441 The Gilbert + Tobin Centre of Public Law argued that the extension of the questioning and detention warrant regime contradicts the INSLM's Second Annual Report, which recommended the detention component of the regime be repealed.<sup>344</sup>

- 2.442 ASIO noted in relation to this report that:

Since the INSLM published his Second Annual Report, the terrorism threat in Australia has increased, as indicated by the raising of the terrorism threat level in September 2014.

Notwithstanding that ASIO has not previously applied for a questioning and detention warrant, ASIO strongly believes the current security environment, including the risk of onshore

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340 CTLA(FF) Bill, *Explanatory Memorandum*, p. 128.

341 Australian Security Intelligence Organisation, *Submission 11*, p. 6.

342 Professor Saul, *Submission 2*, p. 2; Human Rights Watch, *Submission 21*, p. 6, Amnesty International, *Submission 22*, p. 2-3, Australian Lawyers for Human Rights, *Submission 15*, p. 8-10. The ALHR outlined a range of concerns with the existing regimes, but did not explicitly call for them to be repealed; Human Rights Law Centre, *Submission 18*, p. 6.

343 Professor Saul, *Submission 2*, p. 2.

344 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 3.

terrorist attacks, supports the proposed extension of the sunset date for the questioning and questioning and detention warrant regime in Division 3 of Part III of the ASIO Act. In addition, current statutory thresholds ensure these special powers are not used arbitrarily or unnecessarily at any time.<sup>345</sup>

- 2.443 The Human Rights Law Centre also recommended that the Committee strongly object to any extension to the sunset clause. On this point they noted:

The powers also restrict access to legal counsel and the secrecy provisions prevent the media, academics and human rights advocates from independently monitoring the use of ASIO questioning and detention powers, which has the potential to allow human rights violations to go unnoticed in a climate of impunity.<sup>346</sup>

- 2.444 This view was supported by the Law Council, who stated to the Committee that the Council has

always been opposed to the questioning and detention power in substantive form, and we would call upon the parliament to undertake a very careful review of that, if there is to be a sunset clause.<sup>347</sup>

- 2.445 Amnesty International contended that:

These powers further undermine the fundamental principles of detention without charge, undermining of rights while in detention, and the presumption of innocence.<sup>348</sup>

- 2.446 The Explanatory Memorandum, in contrast, makes the following statement on the use of these powers in practice:

The judicious use of the powers conferred by Division 3 of Part III is consistent with their extraordinary nature and the intention that they should be used sparingly. Independent reviews of Division 3 of Part III have been undertaken by the INSLM in 2012-14 and the predecessor committee to the PJCIS in 2005 (the Parliamentary Joint Committee on ASIO, ASIS and DSD), which found no evidence of impropriety in the use of these provisions. The IGIS, in

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345 Australian Security Intelligence Organisation, *Submission 11*, p. 6.

346 Human Rights Law Centre, *Submission 18*, p. 10.

347 Mr Boulten SC, *Committee Hansard*, Canberra, 3 October 2014, p. 61.

348 Amnesty International, *Submission 22*, p. 3.

undertaking her standing oversight functions, has similarly found no evidence of impropriety or aberrant use.<sup>349</sup>

## Change to requirement for issuing a questioning warrant

- 2.447 Prior to applying to an issuing authority for a questioning warrant, the Director-General of ASIO must first obtain the Attorney-General's consent.
- 2.448 To consent to a questioning warrant application, the Attorney-General must currently be satisfied (among other matters) that relying on other methods of collecting that intelligence would be ineffective. The Bill proposes to replace this requirement so that the Attorney-General must instead be satisfied that having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued. The Bill does not alter the test the issuing officer is to apply in considering a questioning warrant application.<sup>350</sup>
- 2.449 This amendment implements a recommendation from the INSLM's Second Annual Report, which recommended that:
- The last resort requirement for QWs [questioning warrants] should be repealed and replaced with a prerequisite that QWs can only be sought and issued where the Attorney-General and issuing authority are 'satisfied that it is reasonable in all the circumstances, including consideration whether other methods of collecting that intelligence would likely be as effective'.<sup>351</sup>
- 2.450 The Explanatory Memorandum provides a detailed explanation of, and rationale for, this amendment. The Explanatory Memorandum states that the current test effectively operates as a last resort and therefore does not recognise that
- other available methods may be significantly less effective than a questioning warrant, may take considerably longer in time critical circumstances, or may involve a considerably greater risk to the lives or safety of persons collecting the intelligence.<sup>352</sup>

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349 CTLA(FF) Bill, *Explanatory Memorandum*, p. 89.

350 Paragraph 34E(1)(b) of the ASIO Act. The test is that the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

351 INSLM, *Annual Report*, 20 December 2012, p. 74.

352 CTLA(FF) Bill, *Explanatory Memorandum*, p. 85.

2.451 Further to this, the INSLM noted in his Second Annual Report that in relation to the existing test, the

Attorney-General would need evidence from ASIO that it had assessed all other methods of intelligence collection to be ineffective. In order to make this assessment, ASIO would usually have to use, or at least attempt to use, some of those methods.<sup>353</sup>

2.452 The Explanatory Memorandum also states that the new requirement means that

rather than being available only if the Attorney-General is satisfied that they are the sole means of collecting intelligence, questioning warrants will be available if the Attorney-General is satisfied that it is reasonable in the circumstances to obtain intelligence by way of a questioning warrant. The existence of other, less intrusive methods of obtaining the intelligence will therefore be a relevant but non-determinative consideration in decisions made under section 34D(4).<sup>354</sup>

2.453 In its submission, ASIO noted:

Questioning warrants are an important power for ASIO to compel a person to appear before a prescribed authority and answer questions and produce records (or other things). The proposed amendment will improve the effectiveness of these warrants as an intelligence collection tool.<sup>355</sup>

2.454 In evidence before the Committee, ASIO outlined that:

The removal of that 'last resort' requirement is certainly something we believe is going to make it easier for us to get those questioning warrants and to utilise those questioning warrants.<sup>356</sup>

2.455 The Explanatory Memorandum went on to note the safeguards that will continue to operate in relation to the issuing of a questioning warrant, which include:

The requirement for questioning warrants to be issued by an issuing authority who, before issuing a questioning warrant, must be satisfied that there are reasonable grounds for believing that the

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353 INSLM, *Annual Report*, 20 December 2012, p. 71.

354 CTLA(FF) Bill, *Explanatory Memorandum*, p. 85.

355 Australian Security Intelligence Organisation, *Submission 11*, p. 5.

356 Ms Hartland, *Committee Hansard*, Canberra, 3 October 2014, p. 26.

warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.<sup>357</sup>

2.456 The Explanatory Memorandum also notes that the Attorney-General's Guidelines require ASIO to undertake inquiries and investigations, wherever possible, using the least intrusive techniques to collect information.

2.457 These safeguards were also recognised by the INSLM. In relation to the Attorney-General's Guidelines and the statement of procedures required in relation to questioning warrants, he noted:

These Guidelines and statement of procedures constitute formidable and reassuring prerequisites for the issue and control of the execution of QWs. They are an appropriate reflection of the gravity of the power sought to be exerted against individuals in the public interest by way of QWs.<sup>358</sup>

2.458 The IGIS noted the safeguards, including the role of her office, in her submission. While not playing a role in reviewing decisions to issue a warrant, the IGIS noted that:

A submission from ASIO to the Attorney-General in relation to such a request would be subject to IGIS inspection. My expectation is that such an inspection would take place as part of a review after the warrant operation had been completed.<sup>359</sup>

2.459 The IGIS also noted in her submission and evidence before the Committee, that while she had no comment on the proposal itself, she would seek to be present during any such questioning.<sup>360</sup>

2.460 Despite the assurances in the Explanatory Memorandum, some submitters still expressed concern with this change.<sup>361</sup> Specifically, the Australian Human Rights Commission argued that the proposed amendment is not consistent with Australia's human rights obligations and do not achieve an appropriate balance:

Human rights may only be limited where a measure is necessary and proportionate to a legitimate objective. A questioning warrant necessarily entails a severe curtailment of liberty. It can only be

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357 CTLA(FF) Bill, *Explanatory Memorandum*, pp. 85–86.

358 INSLM, *Annual Report*, 20 December 2012, p. 73.

359 Inspector-General of Intelligence and Security, *Submission 1*, p. 9.

360 Inspector-General of Intelligence and Security, *Submission 1*, p. 9.

361 Australian Human Rights Committee, *Submission 7*, p. 10; Castan Centre for Human Rights Law, *Submission 17*, p. 3, Australian Lawyers for Human Rights, *Submission 15*, p. 5.

justified where no less intrusive alternatives exist. The Commission considers that the present standard more appropriately protects the right against arbitrary detention and the right to privacy.<sup>362</sup>

- 2.461 The Castan Centre for Human Rights Law, in expressing its concerns at what it saw as a major expansion of a coercive power, noted that '[t]he regularisation of the use of powers of compulsory questioning, by reducing the threshold for the issuing of a warrant' could lead to ASIO becoming a secret police.<sup>363</sup>

## Use of force

- 2.462 The Bill will amend subsection 34V(3) of the ASIO Act so that it is not limited to action that a police officer can take when a person is attempting to escape being taken into custody by fleeing. Specifically, it will enable an officer to do anything that is likely to cause the death of, or grievous bodily harm to, a person where the officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury.
- 2.463 In support of this amendment, ASIO outlined that the existing restrictions are inconsistent with the modern law of self defence and defence of others and are duplicating the restrictions already present in the current subsection (s34V(3)(a)).<sup>364</sup>
- 2.464 In contrast, the Castan Centre for Human Rights Law argued that:
- The permissible use of force, including deadly force, should not be greater in relation to fugitives from compulsory questioning by an intelligence agency than it is in respect of fugitive criminals.<sup>365</sup>

## Committee comment

- 2.465 The Committee notes the extension of the questioning and detention powers regime, including the proposed amendment to the 'last resort' test for the use of questioning warrants. The Committee recognises that the amendment would change the circumstances in which the Director-General of ASIO may seek the Attorney-General's consent to apply for a

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362 Australian Human Rights Committee, *Submission 7*, p. 10.

363 Castan Centre for Human Rights Law, *Submission 17*, p. 3.

364 Australian Security Intelligence Organisation, *Submission 11*, p. 6.

365 Castan Centre for Human Rights Law, *Submission 17*, p. 4.

questioning warrant. The Committee also notes that while this will expand the circumstances in which an application may be made, it will not alter the test that the issuing officer is to apply in considering a questioning warrant application.

2.466 Given the current threat environment, the Committee understands the need for this change as requested by ASIO.

2.467 Further, while the last resort test is changed, the issuing authority will still be required to be satisfied that ‘there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.’ Finally, this amendment only applies to the use of *questioning* warrants and not to the use of *questioning and detention* warrants.

2.468 The Committee notes the safeguards which will continue to govern the use of these powers and ensure that they are only used where necessary and appropriate. These include:

- extensive requirements to apply for a warrant including obtaining Director-General and Attorney-General consent before an application can be made to an issuing authority
- Attorney-General’s Guidelines requiring ASIO to undertake inquiries and investigations, wherever possible, using the least intrusive techniques to collect information, and
- IGIS oversight and attendance at questioning.

2.469 The Committee also notes comments made by Mr Bret Walker SC in evidence to the Committee. Mr Walker noted in relation to the use of questioning warrants by ASIO:

I was very impressed with over my three years in the office – namely, the professionalism and seriousness of the agencies and the officers in relation to these matters ... one of the overwhelming impressions I had was of the seriousness and earnestness with which the safeguards were observed.<sup>366</sup>

2.470 Finally, an important oversight mechanism will be the review of the use of these powers, particularly given the proposed change to the last resort test. This matter was discussed separately in this chapter in relation to sunset clauses. The Committee’s recommendations on the timing and length of the proposed extension are also outlined above.

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366 Mr Walker SC, *Committee Hansard*, Canberra, 8 October 2014, p. 44.

- 2.471 In relation to the proposed amendments regarding the use of force, the Committee notes the justification provided. The Committee notes that agencies should not be hampered by differing legislative provisions (within the ASIO Act) governing the use of force in the execution of their duties.

## **Amendment to AML/CTF Act – Listing of the Attorney-General’s Department as a ‘designated agency’**

- 2.472 The Bill proposes to amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) to include the Attorney-General’s Department as a ‘designated agency’.

- 2.473 The Explanatory Memorandum states that making the Attorney-General’s Department a designated agency

will enable the AGD to have access to the financial intelligence of AUSTRAC [the Australian Transaction Report and Analysis Centre]. This amendment will result in administrative efficiencies where it is necessary for AGD to consider AUSTRAC information when formulating AML/CTF policy. Access to this information would allow AGD to more efficiently and effectively develop and implement policy around terrorism financing risks, and ensure a more holistic approach to the Government’s foreign fighters national security response...

Enabling the AGD to access AUSTRAC information will enhance AGD’s abilities to bring together whole-of-government resources to properly advise the Government on important questions of counter-terrorism policy.<sup>367</sup>

- 2.474 Currently, the ability of the Attorney-General’s Department to access AUSTRAC information is limited to:

- under section 129 for the purposes of an investigation or a proposed investigation of a possible breach of a law of the Commonwealth, or
- if disclosed by an entrusted public official under section 121 for the purposes of the AML/CTF Act or the Financial Transaction Reports Act 1988, or for the purposes of the performance of the functions of the AUSTRAC CEO.

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367 CTLA(FF) Bill, *Explanatory Memorandum*, p. 10.

This disclosure regime imposes significant constraints on the ability of AGD to efficiently and effectively develop policy to combat money laundering and terrorism financing, and impedes the ability of partner agencies to share AUSTRAC information that is considered relevant to the development of policy with AGD.<sup>368</sup>

- 2.475 The Australian Privacy Commissioner raised doubts about the need for the Department to become a designated agency:

I am concerned that the extension of the definition of a designated agency to include AGD represents a significant shift in the types of entities that are permitted to access AUSTRAC information; specifically, that designated agencies are primarily agencies that have law enforcement functions and activities, whereas AGD is seeking access to assist in its policy making activities.<sup>369</sup>

- 2.476 Noting these concerns, the Attorney-General's Department drew the Committee's attention to the fact that

the Department of Human Services, DFAT, DIBP, and Treasury all currently have designated agency status; these are all policy – rather than law enforcement or operational – agencies.<sup>370</sup>

- 2.477 The Department also noted that AUSTRAC was consulted during the development of the proposal and supports it.<sup>371</sup>

- 2.478 While recognising several important existing privacy and secrecy regimes within the AML/CTF regime,<sup>372</sup> the Privacy Commissioner noted that his concerns related to the possibility of information being able to identify individuals.<sup>373</sup>

- 2.479 In its supplementary submission, the Attorney-General's Department provided further information to justify their need for the type of information they may have access to, and the existing secrecy provisions which would apply to that information:

In addition to the obligations under the Privacy Act, including the requirements to comply with the APPs, Part 11 of the AML/CTF Act contains rigorous secrecy and access provisions which set out limitations on access to and disclosure of AUSTRAC information.

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368 Attorney-General's Department, *Supplementary Submission 8.1*, p. 35.

369 Australian Privacy Commissioner, *Submission 20*, p. 4.

370 Attorney-General's Department, *Supplementary Submission 8.1*, p. 35.

371 Attorney-General's Department, *Supplementary Submission 8.1*, p. 35.

372 Australian Privacy Commissioner, *Supplementary Submission 20.1*, p. 2.

373 Australian Privacy Commissioner, *Submission 20*, pp. 4-5.

These obligations continue to apply regardless of the level of aggregation of personal information.

... It is intended that AGD will only seek to access the minimum amount of information necessary to support its policy functions, and that, where possible, such information will be sufficiently aggregated to ensure that it is de-identified. While it is not possible to predict the types of information likely to be sought by AGD in all future circumstances, AUSTRAC information has previously been sought, by way of example, in relation to the remaking of the AML/CTF countermeasures against Iran under Part 9 of the AML/CTF Act, which allows for regulations to be made regulating or prohibiting transactions with prescribed foreign countries... In order to determine the effectiveness of the existing countermeasures regime and to properly assess the need for any amendments to the prohibited transaction threshold, AGD required access to details of the quantum of all International Funds Transfer Instructions involving Iran, as well as to the types and numbers of entities reporting International Funds Transfer Instructions (including foreign currency services, remittance providers and cash carriers) with Iran.<sup>374</sup>

### **Committee comment**

- 2.480 The Committee accepts that the Attorney-General has a genuine need for access to AUSTRAC information for the purposes of developing whole-of-government policy. However, it is also conscious of the concerns raised by the Privacy Commissioner about the increased access to personal information that this access would enable.
- 2.481 The Committee accepts, based on the evidence presented to it, that the Attorney-General's Department will only seek the minimum amount of information required for its policy functions, and that this information will, where possible, be sufficiently aggregated to ensure that it is de-identified.

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374 Attorney-General's Department, *Supplementary Submission 8.1*, p. 36.

## Suspending, cancelling and refusing to issue passports

- 2.482 The Bill makes two sets of amendments to the *Australian Passports Act 2005*. The first will enable the Minister for Foreign Affairs to suspend a person's travel documents (such as passports) for a period of 14 days if requested by ASIO. The second amendment provides that a person not be notified of the refusal or cancellation of an Australian travel document in certain limited circumstances.
- 2.483 The Bill provides that the Minister for Foreign Affairs has the discretion to suspend a passport for a period of 14 days on receipt of advice and a recommendation from ASIO.<sup>375</sup> Under the amendments, ASIO may request the Minister for Foreign Affairs to suspend all Australian travel documents issued to a person, if it suspects 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
  - all the person's Australian travel documents should be suspended in order to prevent the person from engaging in the conduct.<sup>376</sup>
- 2.484 Mirroring amendments are proposed to the *Foreign Passports (Law Enforcement and Security) Act 2005* to enable the suspension of a person's foreign travel documents (with the same justifications as outlined below).
- 2.485 The Explanatory Memorandum states that:
- Currently, there are no provisions in the Passports Act which allow the Minister for Foreign Affairs to take temporary action in relation to a person's passport where there are security concerns in relation to the person, but there is not enough information and/or time to permit ASIO to make a competent authority request that the person's Australian passport be cancelled under section 14 of the Act.<sup>377</sup>
- 2.486 The purpose of the amendments is to
- enhance the Australian government's capacity to take proactive, swift and proportionate action to mitigate security risks relating to Australians travelling overseas...The amendments provide that ASIO would need to make a further competent authority request

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375 Schedule 1, Part 1, Clause 21 of the CTLA(FF) Bill.

376 Schedule 1, Part 1, Clause 21 of the CTLA(FF) Bill.

377 CTLA(FF) Bill, *Explanatory Memorandum*, p. 81.

recommending passport cancellation to give longer term effect to the disruption of the security threat.<sup>378</sup>

2.487 Under the proposed amendments, Australian travel documents are not valid travel documents while suspended.<sup>379</sup>

2.488 These amendments implement recommendations by the INSLM in his Fourth Annual Report. However, this provision goes further than the INSLM recommendation in enabling a passport to be suspended for 14 days compared with the seven days recommended by the INSLM. In justifying this, the Explanatory Memorandum noted:

While the suspension period is longer than the maximum 7-day suspension period proposed by the INSLM this is necessary to ensure the practical utility of the suspension period with regard to both the security and passports operating environment.<sup>380</sup>

### **Threshold for making an application**

2.489 Under the amendments, ASIO will be able to make a request for the suspension of a passport where it suspects on reasonable grounds that the person *may* leave Australia to engage in conduct that *might* prejudice the security of Australia or a foreign country. This is a lower threshold than required to cancel a passport which, in relation to potential harmful conduct, is where there are reasonable grounds to suspect that a person *would* engage in certain conduct.<sup>381</sup>

2.490 The Explanatory Memorandum justified this threshold on the basis that:

The requisite threshold is commensurate with the temporary nature of the contemplated administrative action by the Minister for Foreign Affairs.<sup>382</sup>

2.491 The Explanatory Memorandum also noted that:

The making of a suspension request by ASIO must be based on credible information which indicates that the person may pose a security risk. The written request will include the security rationale for the making of the request.<sup>383</sup>

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378 CTLA(FF) Bill, *Explanatory Memorandum*, p. 79.

379 Schedule 1, Part 1, Clauses 16-19 of the CTLA(FF) Bill.

380 CTLA(FF) Bill, *Explanatory Memorandum*, p. 81.

381 Section 14, *Australian Passports Act 2005*.

382 CTLA(FF) Bill, *Explanatory Memorandum*, p. 79.

383 CTLA(FF) Bill, *Explanatory Memorandum*, p. 82.

2.492 The Law Council of Australia queried this threshold in its submission:

The Law Council questions whether the threshold for a request under subsection 22A(2) should be lower than that required for a passport refusal or cancellation request under section 14 of the Act as, unlike the latter provision, the former will not be subject to the same level of review.<sup>384</sup>

2.493 The IGIS also expressed concern in her submission that the legislation as drafted does not specify who needs to form the state of mind necessary to make an application. Rather the Bill enables *ASIO* to 'request the Minister to suspend all Australian travel documents issued to a person if *it* suspects on reasonable grounds...'. Specifically, the IGIS noted:

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.<sup>385</sup>

2.494 The IGIS elaborated on this point in evidence before the Committee, outlining:

In my view, it does reduce accountability somewhat because the decision has to be based on a 'suspicion on reasonable grounds'. If it is an individual having a suspicion on reasonable grounds, you can question the individual and identify the individual. If it is an agency making it, you would have to find the person who is actually responsible for the decision, but it is much more transparent to us if there is an individual who is enabled to make these decisions.<sup>386</sup>

## Period of suspension

2.495 As outlined above, the amendments will enable a passport or other travel document to be suspended for 14 days.

2.496 While generally supporting the measure enabling the urgent suspension of passports, some submitters noted that the amendment went further

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384 Law Council of Australia, *Submission 12*, p. 26.

385 Inspector-General of Intelligence and Security, *Submission 1*, p. 7.

386 Dr Vivienne Thom, Inspector-General of Intelligence and Security, *Committee Hansard*, Canberra, 2 October 2014, p. 4.

than that recommended by the INSLM.<sup>387</sup> On this point, the Gilbert + Tobin Centre of Public Law noted in its submission that:

The INSLM did recommend that the government enact a temporary power to suspend passports and travel documents, but he emphasised as a 'trade-off' for this power that it only be permitted for an initial 48-hour period.<sup>388</sup>

2.497 Gilbert + Tobin went on to state that:

If the temporary suspension power is to be enacted, it should be limited to the 7-day period recommended by the INSLM. The government has claimed that the longer 14-day limit is 'necessary to ensure the practical utility of the suspension period'. However, it has not produced sufficient evidence to justify this claim.<sup>389</sup>

2.498 The Law Council of Australia similarly saw the utility in such a power but shared the concerns of Gilbert + Tobin, stating:

The Law Council questions whether a single 14-day time limit, which is not reviewable or necessarily linked to ASIO ultimately resolving a person's security assessment (which is generally reviewable by the AAT), intrudes overly into individual liberties. The least intrusive means which is also practically useful should be adopted and this may indicate that some lesser period is appropriate.<sup>390</sup>

2.499 Further, the Law Council noted that the Bill as drafted leaves it open to multiple suspensions. Specifically:

While the Explanatory Memorandum to the Bill notes that subsection 22A(3) is not intended to allow for consecutive rolling suspensions, which would defeat the purpose of the limited 14-day suspension, the Law Council queries whether there are adequate safeguards in place to avoid this outcome. The Bill should be amended to permit a strict and limited number of multiple requests for suspension.<sup>391</sup>

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387 Councils for civil liberties across Australia, *Submission 25*, p. 18 ; Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 20.

388 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 20.

389 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 20.

390 Law Council of Australia, *Submission 12*, p. 25.

391 Law Council of Australia, *Submission 12*, pp. 26–27.

## Review rights

2.500 Under the amendments, a decision to suspend a person's travel document will not be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). This position was supported by the IGIS who noted:

Limited access to review rights is not unreasonable where the suspension is for 14 days and there is opportunity for merits review of any subsequent cancellation decision.<sup>392</sup>

2.501 However, the IGIS did go on to note that:

Suspension requests are not subject to AAT review and I anticipate that suspension requests, particularly any cases of multiple requests, will be subject to IGIS oversight.<sup>393</sup>

2.502 The Law Council also commented on the benefits of oversight of applications for the suspension of passports given the lack of review rights.<sup>394</sup>

## Delegation of powers

2.503 The amendments will enable the Minister to delegate the power to suspend a passport to a wide range of people including ASIO officers. Noting advice to suspend a passport will come from ASIO, the IGIS noted:

If the power to suspend travel documents based on a recommendation from ASIO is delegated to one or more ASIO employees there will need to be arrangements in place to ensure that the delegates can make an appropriately independent decision.<sup>395</sup>

## Notification of refusal or cancellation of travel documents

2.504 The amendments will enable a person to not be notified of the cancellation of their passport, or refusal of a decision in relation to a travel document 'where it is essential to the security of the nation or where notification would adversely affect a current investigation into a terrorism offence.'<sup>396</sup>

2.505 The Explanatory Memorandum to the Bill outlines that:

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392 Inspector-General of Intelligence and Security, *Submission 1*, p. 8.

393 Inspector-General of Intelligence and Security, *Submission 1*, p. 8.

394 Law Council of Australia, *Submission 12*, p. 27.

395 Inspector-General of Intelligence and Security, *Submission 1*, p. 8.

396 CTLA(FF) Bill, *Explanatory Memorandum*, p. 79.

In some situations, notifying a person that their passport has been cancelled (or that a decision to refuse to issue a passport has been made) will adversely affect the security of the nation or the investigation of a terrorism offence. New section 48A has been inserted to ensure that, in certain limited circumstances, a person does not need to be notified of the decision relating to that person's passport or passport application.<sup>397</sup>

- 2.506 The councils for civil liberties across Australia opposed this amendment, noting:

We have taken a consistent position of opposing the increasing use of devices allowing governments to withhold from citizens the bases of decisions depriving them of basic rights or of the evidence upon which accusation have been made against them.<sup>398</sup>

- 2.507 The Law Council of Australia also expressed concern that a certificate issued by ASIO or the AFP recommending a person not be informed of the refusal or cancellation of a travel document is not subject to review. The Law Council stated that:

Without such a requirement it is likely that a person will receive subsequent refusals or cancellation of an Australian document despite there being a possible change in circumstances which warranted the initial making of the certificate; it is also likely that without such a requirement the person will continue to not receive notification of the refusal or cancellation.<sup>399</sup>

## **Committee comment**

- 2.508 The Committee supports measures directly aimed at preventing persons traveling overseas to participate in conflicts. The Committee sees the reforms in this part as necessary and appropriate to the stated aims of the Bill.
- 2.509 While noting concerns expressed by participants, the Committee supports the lower threshold and lack of review for the suspension of travel documents given the temporary nature of the power and the ability to review any permanent cancellation of a travel document.
- 2.510 However, the Committee considers it is important that the power is only used in a temporary and proportionate way. Accordingly, the Committee
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397 CTLA(FF) Bill, *Explanatory Memorandum*, p. 83.

398 Councils for civil liberties across Australia, *Submission 25*, p. 18.

399 Law Council of Australia, *Submission 12*, p. 28.

makes several recommendations to strengthen accountability in relation to these provisions.

- 2.511 Firstly, in relation to the application, the Committee agrees with the IGIS that it is important that the state of mind necessary to found an application is the state of mind of a specific person – rather than an organisation as currently proposed. On this point, the Committee agrees with the statement made by the IGIS in evidence before the Committee:

It does reduce accountability somewhat because the decision has to be based on a ‘suspicion on reasonable grounds’. If it is an individual having a suspicion on reasonable grounds, you can question the individual and identify the individual. If it is an agency making it, you would have to find the person who is actually responsible for the decision, but it is much more transparent to us if there is an individual who is enabled to make these decisions.<sup>400</sup>

- 2.512 The Committee therefore recommends that the Bill be amended to require applications for passports to be suspended to be made by the Director-General, or one of his deputies, rather than by ASIO as an organisation.

### **Recommendation 26**

**The Committee recommends that proposed subsection 22A(2) of the *Australian Passports Act 2005* and proposed section 15A of the *Foreign Passports (Law Enforcement and Security) Act 2005* be amended so that the Director-General of ASIO or a Deputy Director-General must suspect on reasonable grounds the factors necessary to apply for the suspension of travel documents.**

- 2.513 Secondly, given the request to suspend a travel document can only be made by ASIO, the Committee sees value in ensuring that a decision to suspend a person’s travel document is not also made by an ASIO official, if the Foreign Minister decides to delegate that power. Further, given this decision is not subject to review, the Committee considers that only an appropriately senior person should be able make the decision.

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400 Dr Thom, *Committee Hansard*, Canberra, 2 October 2014, p. 4.

### Recommendation 27

**The Committee recommends the ability of the Foreign Affairs Minister to delegate the power to suspend a travel document be limited to the Secretary of the Department of Foreign Affairs and Trade.**

- 2.514 The Committee also supports the new power to prevent a person being notified of a decision to refuse or cancel their Australian travel documents. This power is premised on a certificate from either the Attorney-General or the Minister for Justice. However, the amendments as they stand do not contain any requirement to review these certificates, meaning a person may never be notified of the refusal or cancellation of their travel documents. The Committee considers the issuing of these certificates should be reviewed to avoid this consequence.

### Recommendation 28

**The Committee recommends that the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 be amended to require the Attorney-General or Minister for Justice to conduct:**

- a review of the decision to issue a certificate under paragraph 38(2)(a) of the *Australian Security Intelligence Organisation Act 1979* or proposed subsection 48A(4) of the *Australian Passports Act 2005* within 12 months of issuing that certificate; and
- ongoing reviews every 12 months for the time period the certificate remains active.

- 2.515 Finally, the Committee notes that the 14 day suspension period is substantially longer than the seven day period recommended by the INSLM. However, the Committee considers that this timeframe appropriately balances the need to allow sufficient time for a full assessment to be made by ASIO (to inform whether cancellation of the travel documents should be requested) with the impacts on the individual, particularly noting the lower threshold that applies and lack of judicial review of such a decision.
- 2.516 The Committee also notes comments made in relation to whether the Bill could more clearly outline whether or not a suspension can be extended, and if so, for how long. The Committee considers that the existing provisions appropriately protect against any extensions to a suspension given:

- there is no power to *extend* a suspension, and
- further requests for suspensions are limited to where new information has been obtained by ASIO *after the end* of the suspension.

2.517 The Committee notes on this basis that these provisions could not be misused to effectively suspend a person's passport indefinitely without seeking cancellation of the passport.

