

**SENATE STANDING COMMITTEE FOR THE
SCRUTINY OF BILLS**

Alert Digest

relating to the

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

13 October 2014

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Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
- (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.
- (c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

Introduced into the Senate on 24 September 2014

Portfolio: Attorney-General

Background

The bill seeks to amend several Acts relating to counter-terrorism including:

- amending Australia's counter-terrorism legislative framework to provide additional powers to security agencies;
- introducing a new offence of 'advocating terrorism';
- creating a new offence of entering a declared area overseas where terrorist organisations are active;
- expanding existing Customs detention powers;
- allowing the Department of Immigration and Border Protection to collect, access, use and disclose personal identifiers for purposes of identification of persons who may be a security concern to Australia or a foreign country;
- amending the arrest threshold for foreign incursion and terrorism offences to allow police to arrest individuals on reasonable suspicion;
- cancelling welfare payments for individuals of security concern;
- enabling the Minister for Immigration to cancel the visa of a person who is offshore where ASIO suspects that the person might be a risk to security;
- enabling the Minister for Foreign Affairs to temporarily suspend a passport to prevent a person who is onshore in Australia from travelling overseas where ASIO has unresolved security concerns.

Exclusion of judicial review

Schedule 1, item 1, proposed paragraphs (dc) and (dd) in Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977*

This item provides that decisions made under provisions which are proposed to be inserted into the *Australian Passports Act 2005* (the Passports Act) (by items 21 and 23 of the bill) and the *Foreign Passports (Law Enforcement and Security) Act 2005* (the Foreign Passports Act) (by items 129 and 139 of the bill) are not reviewable decisions under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). This is achieved by including the decisions in Schedule 1 of the ADJR Act. The decisions thereby excluded from ADJR Act review are decisions made under proposed provisions of the Passports Act that enable the suspension and surrender of Australian travel documents for 14 days and decisions made under proposed provisions of the Foreign Passports Act that enable the surrender of a person's foreign travel documents for 14 days.

The explanatory memorandum (at p. 77) contains a justification for the excluding these decisions from ADJR Act review:

It is necessary to exclude all decisions listed in new paragraphs (dc) and (dd) from review under the ADJR Act as judicial review under the Act may compromise the operations of security agencies and defeat the national security purpose of the new mechanisms. For example, the new mechanisms would be made redundant if a court were to make an injunction order allowing the person of security concern to travel on an Australian travel document despite that document being suspended. The exclusion of the decisions from review under the ADJR Act is balanced by the fact that the effect of the decision is for a short temporary period of 14 days.

The exclusion of these decisions from ADJR Act review implements Recommendations V/4 and V/5 of the [Independent National Security Legislation Monitor's] (INSLM's) Fourth Annual Report. The INSLM noted that for the temporary passport suspension to be an effective counter-terrorism measure a decision to request a passport suspension should not be subject to judicial review (except under the Constitution) or merits review.

The exclusion of these decisions from ADJR Act review does not prevent the decisions from being judicially reviewed under paragraph 75(v) of the Constitution. Additionally, the IGIS will have oversight of any decision by ASIO to make a request under the new provisions in the Passports Act and the Foreign Passports Act.

The committee notes that the excluded decisions are operative for 14 days, and that further suspension decisions can only be made on the basis of requests if the evidence in support includes information which was obtained after the end of the initial suspension decision (see item 21, proposed subsection 22A(3) and item 129, proposed subsection 15A(2)). **In light of the above justification, the committee leaves the appropriateness of excluding the operation of the ADJR Act in relation to these decisions to the Senate as a whole.**

The committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

**Possible undue trespass on personal rights and liberties—privacy
Schedule 1, items 5–7, proposed amendments to *Anti-Money
Laundering and Counter-Terrorism Financing Act 2006***

According to the statement of compatibility (at p. 10), items 5–7 propose amendments that would ‘enhance’ the ability of AUSTRAC to share information it obtains under section 49 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act):

Currently information obtained by AUSTRAC under section 49 is subject to different requirements compared to other information obtained under the AML/CTF Act. This amendment will enhance the value of information collected by AUSTRAC under section 49 as they will facilitate access to this information by all AUSTRAC’s partner agencies, rather than requiring such information to be quarantined.

As acknowledged in the statement of compatibility, these provisions engage privacy interests. However, it is suggested (at p. 11) that:

The provision of this information will be clearly established by the AML/CTF Act and will be undertaken in accordance with that regime, which has significant safeguards to protect information. The sharing of AUSTRAC information better enables AUSTRAC to carry out its statutory objectives of being a regulator and a gatherer of financial intelligence to assist in the prevention, detection and prosecution of crime. The sharing of relevant information to partner agencies enhances the value of information obtained by AUSTRAC. Accordingly, this amendment cannot be characterised as arbitrary and is a reasonable, necessary and proportionate measure to better facilitate the work of AUSTRAC and its partner agencies.

Unfortunately, the explanatory memorandum itself (at p. 78) merely repeats the effect of the provisions. **The committee's consideration of these provisions would be facilitated with more information being provided about why the information obtained under section 49 was, pursuant to the current provisions, treated differently. The justification for the changes provided in the statement of compatibility is stated at a very general level which makes it difficult to assess (for example, it is not clear how the sharing of relevant information to partner agencies enhances the value of information obtained by AUSTRAC). Noting the above, the committee seeks the Attorney-General's further advice as to the purpose and effect of these changes, and why they are considered necessary.**

Pending the Attorney-General's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Broad discretionary power

Possible undue trespass on personal rights and liberties

Item 21, proposed section 22A of the *Australian Passports Act 2005*

This item will enable the Minister for Foreign Affairs to suspend a person's Australian travel documents, under the Passports Act, for a period of 14 days if requested by ASIO.

The Minister's power under proposed subsection 22A(1) is framed as a broad discretionary power, though the power to suspend may only be exercised if a request by ASIO has been made pursuant to proposed subsection 22A(2), which can be made only if ASIO 'suspects on reasonable grounds that (a) the person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country; and (b) all the person's Australian travel documents should be suspended in order to prevent the person from engaging in the conduct'. Proposed subsection 22A(3) provides that further requests under subsection 22A(2) can only be made if the 'grounds for ASIO's suspicion mentioned in subsection (2) include information ASIO obtained after the end of the suspension'. The explanatory memorandum (at p. 82) confirms that the provision is not 'intended to allow for consecutive rolling suspensions, which would defeat the purpose of the limited 14 day suspension period'. It should be noted that a decision to cancel (as opposed to

a decision to suspend) a passport would need to be made under existing provisions in the legislation. The threshold requirement for cancellation is higher than that for the proposed suspension power.

The explanatory memorandum provides a detailed explanation of the operation and rationale for the introduction of section 22A (see pages 79 and 81). There is also a justification for these provisions offered in the statement of compatibility (at pages 12–13).

Overall, the amendments are said to ‘strengthen the Australian Government’s capacity to proactively mitigate the security risk arising from travel overseas by Australians who may be planning to engage in activities of security concern by providing a lower threshold for the making of a request’ (p. 79). The lower threshold for suspension, as opposed to cancellation decisions is justified by reference to the temporary nature of the decision (p. 82). It is also noted that a request for suspension decision can only be made where there is ‘credible information which indicates that the person may pose a security risk’ (p. 82).

The explanatory memorandum (at p. 81) notes that the proposed period of suspension ‘is longer than the maximum 7-day suspension period proposed by the INSLM [in recommendation V/4 of the fourth annual report (28 March 2014)]’. According to the explanatory memorandum, this is considered necessary ‘to ensure the practical utility of the suspension period with regard to both the security and passports operating environment’. Further, it is argued that this ‘time period also ensures that, on balance, a person’s travel rights are not unduly impinged upon in the interests in national security’.

The committee notes the INSLM’s statement that there ‘would need to be a strict timeframe on the interim cancellation [scheme]’ (p. 48 of the fourth annual report). The INSLM then went on to suggest that an initial period of 48 hours, followed by extensions of up to 48 hours at a time for a maximum period of seven days may be appropriate. **The committee draws Senators’ attention to the significant difference between the INSLM’s proposal of rolling 48 hour suspensions (up to a maximum of seven days), with the 14-day suspension period as proposed in the bill. The only justification for this difference is that this is ‘necessary to ensure the practical utility of the suspension period with regard to both the security and passports operating environment’ (p. 81). It appears that neither the explanatory memorandum nor the statement of compatibility provide further**

elaboration of this point. The committee therefore seeks the Attorney-General's further advice as to the rationale for requiring a 14-day suspension period.

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Possible undue trespass on personal rights and liberties—level of penalty

Item 23, proposed section 24A of the *Australian Passports Act 2005*

This proposed provision creates an offence for failure to comply with a demand to surrender an Australian travel document if it has been suspended under section 22A. The penalty for this offence is six months imprisonment or ten penalty units, or both. The committee notes that its examination of this provision would have been assisted by a justification of the penalty in light of similar Commonwealth offences. The explanatory memorandum merely describes the penalty to be imposed for the offence. It is noted, however, that Annexure A of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), lists examples of offences related to the refusal or failure to comply with a notice which attract penalties of 6 months imprisonment or 30 penalty units. **In the circumstances, the committee leaves the appropriateness of this penalty to the Senate as a whole.**

The committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Possible undue trespass on personal rights and liberties—procedural fairness

Item 25, proposed section 48A of the *Australian Passports Act 2005*

This proposed amendment will 'override the requirement to notify a person of the Minister's passport cancellation or refusal decision where it is essential to the security of the nation or where notification would adversely affect a current investigation into a terrorism offence' (explanatory memorandum at p. 79). This will be achieved by providing for circumstances where the

notification provisions under section 27A of the AAT Act and section 38 of the ASIO Act do not apply.

The explanatory memorandum states that ‘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’ (at p. 83).

As a result of this provision a person may be denied their effective right to travel without receiving notice of the decision having been made. It appears to be the case that a person who attempts to exit the country on a passport that has been cancelled will be denied that right and without an explanation or practical means for seeking review. In circumstances where a person has been actively denied the right to leave the country, it less clear how not notifying them of the cancellation decision relates to the underlying purposes of the provision. **The committee therefore seeks further clarification of the operation of proposed section 48A in these circumstances. In particular, the committee is interested in further information in relation to the availability of review rights and what, if any, notice obligations will apply in circumstances where a person who has not been notified of a cancellation decision is actively prevented from travelling on their (cancelled) passport.**

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Delegation of administrative power

Item 26, proposed paragraph 51(1)(da) of the *Australian Passports Act 2005*

The effect of this item is to allow the Minister to delegate (to ‘an officer’) the exercise of his or her power to suspend a person’s Australian travel documents under new section 22A. The justification given for this approach is that ‘the Minister is already able to delegate the decision to cancel a person’s Australian travel documents’ (p. 84).

The definition of an officer for these purposes does not appear to limit delegations to officers with appropriate seniority or qualifications and

includes ‘a person, or a person who is one of a class of persons, authorised in writing by the Minister under section 52’. The committee’s general preference is that limits are placed on the categories of persons who may be authorised to exercise significant powers (such as the power to suspend a person’s travel documents). The committee notes that this suspension power may be exercised on the basis of an ASIO assessment of risk which is based on lower threshold requirements than those applicable in relation to cancellation decisions. It is not, therefore, obvious that limitations on this broadly framed power of delegation should not be required. **The committee therefore seeks the Attorney-General’s further advice as to the justification for the proposed approach. In particular, the committee is interested in the rationale for not further limiting the categories of officers and persons to whom the Minister may delegate his or her suspension powers under proposed section 22A.**

Pending the Attorney-General’s reply, the committee draws Senators’ attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee’s terms of reference.

Possible undue trespass on personal rights and liberties—freedom of movement and privacy
Item 28, paragraph 34D(4)(b) of the *Australian Security Intelligence Organisation Act 1979*

This item will replace existing paragraph 34D(4)(b) thereby amending one of the issuing criteria for questioning warrants. The purpose of this amendment is to remove what has been referred to as the ‘last resort’ requirement. Under current paragraph 34D(4)(b), the Attorney-General must be satisfied that relying on other methods of collecting the intelligence sought would be ineffective. The proposed revised paragraph provides that the Attorney-General must 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’ (p. 85).

The explanatory memorandum (at p. 85) helpfully characterises the change as follows:

This 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).

The change thus clearly lowers the existing threshold requirements for the issue of a questioning warrant and therefore poses a greater threat to personal rights and liberties. In justifying the amendment it is suggested that the proposed provision better balances security and liberty, having regard to the range of other (existing) ‘safeguards governing the exercise of powers to issue question warrants’ (explanatory memorandum at p. 85; see also statement of compatibility at pages 14–15). The safeguards are detailed in the explanatory memorandum (at pages 85–86):

These safeguards 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 warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence. They also include the Attorney-General’s Guidelines to ASIO, which are made under section 8A of the ASIO Act, and the ability for Statement of Procedures for the exercise of authority under Part III, Division 3 to be issued by the Director-General of Security in accordance with section 34C of the ASIO Act. Importantly, the Attorney-General’s Guidelines require ASIO to undertake inquiries and investigations, wherever possible, using the least intrusive techniques to collect information.

Further, the legality and propriety of ASIO’s activities, including in making requests for questioning warrants, is subject to the oversight of the IGIS under the IGIS Act. The IGIS also has a specific oversight function in relation to the execution of questioning and questioning and detention warrants under Division 3 of Part III of the ASIO Act. This includes an obligation on the Director-General of Security, under section 34ZI, to furnish the IGIS, as soon as practicable, with a copy of any draft requests for warrants given to the Attorney-General under section 34D(3). The IGIS will therefore have visibility of the statement of facts and other grounds on which ASIO considers it necessary that the warrant should be issued.

The statement of compatibility further notes that that the INSLM characterised the Attorney-General’s Guidelines and statement of procedures as ‘formidable and reassuring prerequisites for the issue and control of the execution of a [questioning warrant]’ (at p. 15). Both the statement of compatibility and the explanatory memorandum characterise the proposed amendment as implementing a recommendation in the INSLM’s second annual report (20 December 2012, p. 74).

It should be noted, however that the INSLM's recommendation was based on the assumption that the safeguards contained in the Attorney-General's Guidelines and procedures would be maintained. Although the explanatory memorandum does not suggest that the Guidelines or procedures will be changed, it should be emphasised that the Guidelines do not have statutory force and the written statement of procedures, although a legislative instrument, is not subject to the disallowance provisions of the *Legislative Instruments Act 2003* (see subsection 34C(5) of the ASIO Act). The legal infirmities of these safeguards means that lowering the threshold requirements increases the risk that questioning warrants will be used when other less invasive means could also have reasonably been used to collect intelligence. **The committee therefore seeks further advice from the Attorney-General as to the rationale for the proposed approach, including an explanation as to why the criteria and requirements set out in the Attorney-General's Guidelines and written statement of procedures should not be included in primary legislation or disallowable legislative instruments.**

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

**Possible undue trespass on personal rights and liberties—
appropriateness of fault element of offence
Schedule 1, item 30, proposed subsection 34L(10) of the *Australian
Security Intelligence Organisation Act 1979***

This item creates a new offence in relation to conduct that results in a record or a thing which has been requested to be produced under a warrant being unable to be produced or produced in a wholly legible or useable form. The explanatory memorandum (at p. 86) states that this item 'implements a recommendation in the INSLM's second annual report to introduce a new offence in relation to the wilful destruction of, or tampering with, records or things which have been requested to be produced under a questioning warrant.'

Notably, the fault element of recklessness is applied to the physical element of this offence. The explanatory memorandum (at p. 87) states that this 'reflects the Government's view that persons who have been placed on notice to produce materials under a warrant are held to an appropriate standard of

conduct in ensuring that the materials are able to be produced'. It is then suggested that:

It would be counter-productive to require the prosecution to specifically prove that the person intended to destroy or otherwise interfere with a thing or record, and that the person engaged in that conduct with the specific intention of preventing the thing or record from being produced under a warrant. The inclusion of such elements in the proposed offence would create an arbitrary distinction between culpable and non-culpable conduct on the basis of evidence in relation to a person's specific intent in engaging in the relevant conduct, and the particular nature of his or her actions, notwithstanding that the result of conduct is an inability to produce the records or things specifically requested under the warrant.

The committee is concerned about the lack of a requirement that the result of the evidence tampering be intended by the accused person for a number of reasons. First, the penalty is five years imprisonment, a significant custodial penalty. Second, the explanation provided states that the distinction between intentional and reckless conduct is, in this context, 'arbitrary' but does not elaborate the reasons for this conclusion. Third, a similar offence (with an identical penalty) in section 39 of the *Crimes Act 1914* requires that the conduct (i.e. the destruction of a document or thing) be done with the intent that it could not be used in evidence. Finally, the recommendation of the INSLM, upon which the proposed amendment is said to be based, was that the elements of the offence include there be 'intent to prevent [the record or thing] from being produced, or from being produced in a legible form' (Second report, 20 December 2012, p. 83). **Noting the above comments, the committee seeks further advice from the Attorney-General as to the rationale for the proposed approach.**

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Retrospective commencement

Schedule 1, item 31, application of proposed subsection 34L(10) of the *Australian Security Intelligence Organisation Act 1979*

This item provides that the new offence in proposed subsection 34L(10) applies to conduct occurring on or after the commencement of that provision. However, the offence applies in relation to warrants issued before the

commencement of the offence provision. The explanatory memorandum (at p. 88) states:

The fact that a warrant may have been issued prior to the commencement of section 34L(10) is not considered material to a person's culpability because, in any case, it has served to place the person on notice that he or she is under a legal obligation to produce the records or things specified in the warrant, and that failure to comply is the subject of criminal penalty. Limiting the new offence to warrants issued on or after the commencement of section 34L(10) would produce an arbitrary distinction between culpable and non-culpable conduct on the basis of the time at which the warrant was issued, notwithstanding that the conduct which resulted in non-production would be identical in either scenario.

While it is true that a person will have been on notice that failure to comply is the subject of criminal penalty, they will not have been put on notice of the new offence contained in proposed subsection 34L(10). In circumstances where they are not notified of the new offence provision, there will arguably be unfairness. The safeguards listed at p. 88 of the explanatory memorandum do not meet this objection. Further, given that warrants may only be in force for a maximum of 28 days, it is not clear that applying the offence to warrants issued prior to commencement responds to a significant practical problem.

The committee draws this matter to the attention of Senators, and seeks further advice from the Attorney-General as to the appropriateness (and necessity) of applying the new offence to warrants issued prior to the commencement of the offence provision.

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Extension of sunset provisions

Schedule 1, item 33, section 34ZZ of the *Australian Security Intelligence Organisation Act 1979*

Schedule 1, items 43–45, section 3UK of the *Crimes Act 1914*

Schedule 1, items 107–108, section 105.53 of the *Criminal Code*

Item 33 has the effect of extending the 'sunset' provision which applies to Division 3 of Part III of the ASIO Act, from 22 July 2016 to 22 July 2026. It may be apprehended that the reason for including a sunset provision when

these powers were originally enacted was that they were considered a response to extraordinary circumstances and that, given the potential for the powers to trespass on personal rights and liberties, they should not be permanently enacted into law.

The explanatory memorandum (at p. 89) makes a general case for extending the operation of these provisions:

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. The threat of terrorism is pervasive and has not abated since the enactment of Division 3 of Part III in 2003. On this basis, the Government is satisfied that there is a continued need for these powers.

Similarly, items 43–45 extend the ability for police officers to exercise powers and duties under Division 3A of part IAA of the *Crimes Act 1914* until 15 December 2025; and items 107–108 extend the operation of the preventative detention orders regime until 15 December 2025.

The committee's consideration of these items would be assisted by a detailed explanation, in light of relevant evidence, of the operation of these provisions and of the need for the retention of each provision. The committee notes it is particularly appropriate to consider this issue in some detail as the relevant provisions will not cease to operate until either December 2015 or July 2016. **The committee therefore requests the Attorney-General's advice in relation to the above matters.**

Pending the Attorney-General's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

**Exclusion of merits review requirements
Schedule 1, item 34, proposed paragraph 36(ba) of the *Australian Security Intelligence Organisation Act 1979***

This item inserts new paragraph (ba) to make a security assessment that is also a request under section 22A of the Passports Act not subject to the notification and merits review requirements in Part IV of the ASIO Act (other than subsections 37(1), (3) and (4) of the ASIO Act).

The explanatory memorandum (at p. 90) explains that:

New section 22A enables the Minister to suspend a person's Australian travel documents for a period of 14 days where ASIO makes a request under new subsection 22A(2). Similar to a request by ASIO for the cancellation of a passport under section 14(1) of the Passports Act, the request for suspension of Australian travel documents falls within the definition of prescribed administrative action within section 35 of the ASIO Act. The making of a request by ASIO in writing recommending the taking of prescribed administrative action to suspend a person's Australian travel documents will amount to a security assessment as defined within section 35 of the ASIO Act.

The amendments operate on the basis that a request by ASIO under new section 22A is not also subject to the notification and merits review requirements contained in Part IV of the ASIO Act. Under the new suspension scheme, it is intended that a person only have judicial review rights under the Constitution. This is to reduce the operational security risk that arises from making such decisions reviewable, in addition to being proportionate to the strict 14-day timeframe that applies where an order is made for the suspension and surrender of a person's Australian travel documents on the basis of ASIO's request. If ASIO makes a cancellation request under section 14 of the Passports Act following a suspension request in relation to the person, that person will have merits review and notification rights under Part IV in relation to that request.

In light of this explanation, the committee leaves the appropriateness of excluding the operation of the notification and merits review requirements in Part IV of the ASIO Act in relation to these decisions to the Senate as a whole.

The committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

**Possible undue trespass on personal rights and liberties—
retrospective commencement
Schedule 1, item 38**

Item 38 is an application provision. It provides that the new (expanded) definition of terrorism offence in subsection 3(1) of the *Crimes Act 1914* will apply in relation to any terrorism offence, whether the offence occurs before, on or after commencement of this item. The proposed amendment will have the effect that a number of provisions in the Crimes Act concerning terrorism offences will apply in relation to an expanded number of offences. For example, the application of fixed non-parole periods will apply in relation to certain offences which occurred prior to the commencement (i.e. prior to them being included in the expanded definition of terrorism offences).

As the explanatory memorandum does not address the fairness of applying this expanded definition in relation to offences committed prior to commencement, the committee seeks further advice from the Attorney-General as to the rationale for the proposed approach.

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

**Possible undue trespass on personal rights and liberties—power of
arrest
Schedule 1, item 47, proposed new section 3WA of the *Crimes Act 1914***

This item would lower the threshold required to empower constables to arrest a person for a terrorism offence without a warrant (including the proposed new 'advocating terrorism' offence, section 80.2C of the *Criminal Code*). Currently, arrest without a warrant is authorised where a constable 'believes on reasonable grounds' that the person has committed or is committing an offence. The proposed new requirement is that a constable 'suspects on reasonable grounds' that the person has committed or is committing an offence.

The explanatory materials state that the lower threshold is used in a number of Australian jurisdictions, the United Kingdom, and is 'a position which is

consistent with the European Convention of Human Rights’ (statement of compatibility at p. 21). However, the main justification provided for lowering the threshold requirement for arrest is that it will allow earlier intervention to enable a proactive and preventative focus which is of use in a terrorism related context and given the extraordinary risk posed by terrorism.

The statement of compatibility (at p. 21) appears to indicate that this approach was recommended by the INSLM. It should be noted, however, that the INSLM emphasised that a special rule for terrorism offences in relation to arrest would ‘be hard to justify’, and his recommendation was that ‘consideration should be given to examining the merits of the “reasonable grounds to believe” grounds for the power of arrest, with a view to generally amending it to “reasonable grounds to suspect”, in sec 3W of the *Crimes Act 1914*’ (Fourth Annual Report, 28 March 2014, p. 64).

The statement of compatibility further suggests the requirement of ‘suspects on reasonable grounds’ requires “something more than ‘a mere idle wondering’ and must have a ‘positive feeling of actual apprehension or mistrust, amounting to a ‘slight opinion’”. This, it is concluded, ‘indicates that arrest, even under the lower threshold of ‘suspicion’, is not arbitrary and clear legal standards exist around the necessary mental state required’ (p. 21). It is of concern to the committee that the statement of compatibility indicates that the application of the proposed threshold will only require that a constable form a ‘slight opinion’. In this respect it is noted that, although a distinction is drawn between the two threshold requirements little by way of explanation or analysis of the practical differences between the two tests is offered nor are concrete examples given.

In light of the above comments, the committee requests a more detailed explanation from the Attorney-General as to the difference between the tests and why it is considered necessary that the threshold requirement for arrest be lowered for terrorism offences. In particular, the committee’s consideration of this provision would likely be assisted by further explanation as to the extent to which the existing test is impeding proactive and preventative policing.

Pending the Attorney-General’s reply, the committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee’s terms of reference.

Possible undue trespass on personal rights and liberties—sufficient time to comply with notice**Schedule 1, item 50, paragraph 3ZQN(3)(e) of the *Crimes Act 1914***

Item 50 proposes to replace current paragraph 3ZQN(3)(e) of the *Crimes Act 1914*. The effect of this provision is that a notice requiring the production of documents relevant to the investigation of a serious terrorism offence under section 3ZQN must specify a day by which a person must comply with the notice which is at least 14 days after the notice was given or, if the officer believes that it is appropriate, having regard to the urgency of the situation, an earlier day being at least 3 days from the giving of the notice.

Section 3ZQS provides for an offence for failure to comply with a notice under section 3ZQN. As the current paragraph 3ZQN(3)(e) provides that a person must comply with a notice ‘as soon as practicable’, it may be that the proposed change could lead to an offence being made out in circumstances where a person was unable to comply with a notice to produce that stipulated a return date of just a few days despite, in the circumstances, lacking the practical capacity to produce the requested documents.

The committee notes that the explanatory memorandum (at p. 95) states that this item ‘implements Recommendation VI/4 of the INSLM’s fourth annual report’. However, the INSLM recommended that the ‘power to obtain documents relating to serious terrorism offences in sec 3ZQN of the Crimes Act 1914 should provide for compliance with the notice as soon as practicable and no later than 14 days’ (Fourth Annual Report, 28 March 2014, p. 64). It therefore appears that the INSLM did not consider it necessary to make special provision for urgent situations.

Noting the above comments, the committee requests further advice from the Attorney-General as to the rationale for the proposed approach.

Pending the Attorney-General’s reply, the committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee’s terms of reference.

**Possible undue trespass on personal rights and liberties—general comment on delayed notification search warrant scheme
Schedule 1, item 51, proposed Part IAAA of the *Crimes Act 1914***

This item will establish a delayed notification search warrant scheme. The explanatory memorandum (at p. 95) explains that:

Under current Commonwealth search warrant provisions in the Crimes Act, the occupier of searched premises or their representative must be given a copy of the warrant if they are present (section 3H), which ensures that a search cannot occur without the occupier being made aware that the search is taking place. A delayed notification search warrant scheme will allow 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, with the occupier to be given notice at a later time.

Delaying notification of a search warrant will 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. If members of a terrorist group are alerted to investigator's knowledge of their activities, the success of the law enforcement operation could be jeopardised. For example, a suspect whose premises are searched under the current regime would be notified of police interest in their activities. A suspect could then undertake counter-surveillance measures, change their plans to avoid further detection, relocate their operations, or relocate or destroy evidence of their activities. It would also provide a suspect with the opportunity to notify their associates, who may not yet be known to police, allowing the associates to cease their involvement with the known suspect, destroy evidence or avoid detection in other ways. Delaying notification of a search warrant will also enable the AFP, when executing the warrant, to gather information about a planned operation with a view to preventing a terrorism offence from being committed.

Introducing a delayed notification search warrant regime is consistent with other covert Commonwealth schemes, such as telecommunications interception, surveillance devices and controlled operations schemes, which already allow law enforcement agencies to collect evidence covertly. In addition, 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.

Given the potential for a delayed notification search warrant scheme to trespass on personal rights and liberties (by allowing AFP officers to covertly enter and search premises, without the knowledge of the occupier of the premises), the committee draws this proposed scheme to the attention of the Senate. In light of the explanation provided as to the rationale for the proposed scheme, the committee leaves the general question of whether implementing the scheme is appropriate to the Senate as a whole.

The committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

**Possible undue trespass on personal rights and liberties—
authorisation of coercive powers
Schedule 1, item 51, proposed sections 3ZZAD and 3ZZAF of the
*Crimes Act 1914***

Proposed section 3ZZAD specifies the 'eligible issuing officers' for the purposes of issuing delayed notification warrants. The category of such officers includes a person who is a Judge of the Federal Court of Australia, a Judge of the Supreme Court of a State or Territory Supreme Court, and 'a nominated AAT member'.

Subsection 3ZZAF(1) provides that the Minister may, nominate a Deputy President, a full-time senior member, a part-time senior member or a member of the AAT to issue delayed notification search warrants. However, subsection 3ZZAF(2) provides that the Minister must not nominate a part-time senior member or member under subsection 3ZZAF(1) unless the person is 'enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or of the Australian Capital Territory' and 'has been so enrolled for not less than 5 years'.

The committee prefers that the power to issue warrants to enter and search premises only be conferred upon judicial officers. In light of this principle, the sensitivity of delayed notification search warrants, and the legal complexity of the relevant provisions in proposed Part IAAA, **the committee seeks the Attorney-General's advice in relation to (1) why the categories of eligible issuing officers should not be limited to persons who hold judicial office, and (2) why, if members of the AAT who do not hold judicial office are**

eligible, the nomination of full-time senior members should not (as is the case for part-time senior members and members) be subject to the requirement that the person has been enrolled for at least 5 years as a legal practitioner.

Pending the Attorney-General's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

**Possible undue trespass on personal rights and liberties—privilege against self-incrimination
Schedule 1, item 51, proposed section 3ZZGE**

This section provides, inter alia, that a person is not excused from giving information, answering a question, or giving access to a document as required in an inspection by the Ombudsman, on the ground that so doing 'might tend to incriminate the person or make the person liable to a penalty' (paragraph 3ZZGE(1)(c)).

Subsection 3ZZGE(2), however, provides natural persons both a use and derivative use immunity which means that the information, answer given or the fact that the person has given access to a document is 'not admissible in evidence against the person' (except in a proceeding by way of a prosecution for an offence against section 3ZZHA or against Part 7.4 or 7.7 of the *Criminal Code*). Section 3ZZHA creates an offence of unauthorised disclosure of information about delayed notification search warrants. Part 7.4 of the *Criminal Code* provides for offences for false and misleading statements, and part 7.7 for forgery and related offences.

The explanatory memorandum justifies the abrogation of the privilege against self-incrimination (subject to a use and derivative use immunity) by pointing to the 'public interest in the effective monitoring of the use of delayed notification search warrants to ensure that civil liberties are not unduly breached' (p. 115). This public interest is significant in view of the invasive nature of these powers and the risk that they may be misused with the consequence that there may be disproportionate or unnecessary trespass on other personal rights (such as rights to privacy and property). **Noting this, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

The committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Undue trespass on personal rights and liberties—breadth of offence provision

Schedule 1, item 51, proposed subsection 3ZZHA(1) of the *Crimes Act 1914*

Proposed subsection 3ZZHA(1) creates an offence for unauthorised disclosure of information relating to a delayed notification search warrant. The offence carries a maximum penalty of two years imprisonment.

The offence is said to mirror a similar offence for disclosing information relating to a controlled operation (section 15HK of the *Crimes Act 1914*). The Crimes Act offence, however, includes an exception relating, generally speaking, to the disclosure of misconduct associated with a controlled operation. **The committee therefore seeks the Attorney-General's advice as to why a similar exception has not been included in relation to the offence in proposed subsection 3ZZHA(1).**

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Possible undue trespass on personal rights and liberties—evidential burden of proof

Schedule 1, item 51, proposed subsection 3ZZHA(2)

Subsection 3ZZHA(2) specifies exceptions (to the offence created by subsection 3ZZHA(1)) whereby lawful disclosure of information relating to a delayed notification search warrant can be made. The committee notes that there is no justification in the explanatory material for the imposition of an evidential burden on defendants in relation to the exceptions. **The committee therefore seeks the Attorney-General's advice as to the rationale for the proposed approach.**

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Delegation of administrative power

Schedule 1, item 51, proposed subsection 3ZZIA(1) of the *Crimes Act 1914*

This provision will allow the chief officer of an authorised agency or eligible agency to delegate all or any of his or her powers, functions or duties under proposed Part IAAA of the *Crimes Act 1914* to a Deputy Commissioner of the AFP or a senior executive AFP employee who is a member of the AFP and who is authorised in writing by the Commissioner for the purposes of this paragraph.

The explanatory memorandum (at p. 116) states that this power of delegation 'will allow the Commissioner to delegate the power to the person most appropriately placed to handle the return of the item', which is 'necessary due to the large amount of seized material that the police officers deal with'. However, it appears that the powers of the chief officer under proposed Part IAAA are not limited to powers to received seized material. **The committee therefore seeks clarification from the Attorney-General as to why a broad power of delegation in proposed subsection 3ZZIA(1) is necessary.**

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Possible undue trespass on personal rights and liberties—freedom of speech

Schedule 1, item 61, proposed section 80.2C of the *Criminal Code*

This item relates to the new offence of 'advocating terrorism'. Proposed subsection 80.2C(1) creates a new offence for advocating the doing of a terrorist act or the commission of a terrorism offence where the person engages in the conduct reckless as to whether another person will engage in a terrorist act or commit a terrorism offence.

It is noted that there is an existing defence in section 80.3 of the *Criminal Code* for acts done in good faith. According to the explanatory memorandum (at p. 119) this defence ‘protects the implied freedom of political communication, and specifically excludes from the offence, among other things, publishing a report or commentary about a matter of public interest in good faith.’

However, proposed subsection 80.2C(3) defines ‘advocates’ as counselling, promoting, encouraging or urging the doing of a terrorist act or the commission of a terrorism offence. This is a broad definition and may therefore amount to an undue trespass on personal rights and liberties as it is not sufficiently clear what the law prohibits. Given the substantial custodial penalty (5 years imprisonment), the provision may have a chilling effect on the exercise of the right of free expression.

The committee also notes that there are already a number of offences in the *Criminal Code* which may already cover conduct intended to be captured by this proposed offence. For example, section 80.2 (urging violence against the Constitution, etc.), section 80.2A (urging violence against groups), section 80.2B (urging violence against members of groups), section 101.5 (collecting or making documents likely to facilitate terrorist acts), and section 102.4 (recruiting for a terrorist organisation).

The committee therefore seeks the Attorney-General’s advice in relation to (1) whether ‘advocates’ may be able to be defined with more specificity, and (2) detail as to what conduct is intended to be captured by this proposed offence that is not already captured by current offences.

Pending the Attorney-General’s reply, the committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee’s terms of reference.

Possible undue trespass on personal rights and liberties—control orders: general comment and proposed extension of sunset provision

Schedule 1, items 70–87, amendments to Division 104 of the *Criminal Code*

The control order regime established by Division 104 of Part 5.3 of the *Criminal Code* constitutes what is generally acknowledged to be a substantial departure from the traditional approach to restraining and detaining persons on the basis of a criminal conviction. That traditional approach involves a number of steps: investigation, arrest, charge, remand in custody or bail, and then sentence upon a conviction.

In contrast, control orders provide for the restraint on personal liberty without there being any criminal conviction (or without even a charge being laid) on the basis of a court being satisfied on the balance of probabilities that the threshold requirements for the issue of the orders have been satisfied. Protections of individual liberty built into ordinary criminal processes are necessarily compromised (at least, as a matter of degree). The extraordinary nature of the control order regime is recognised in the current legislation by the setting of a sunset period, due to expire in December 2015.

In view of this general concern, the committee does not consider that the proposal to extend the operation of the control order regime for a further ten years (in items 86–87) to be adequately justified. Other than general statements about the ongoing nature of the terrorist threat, the appropriate time frame for any extension of the regime is not specifically and rigorously addressed. It is further noted that current laws will not expire for a little over 12 months. In light of this, the committee considers that before accepting a proposal to place the existing regime (which involves a substantial departure from the traditional criminal law model) on the statute books for what will amount to a period of at least 20 years, that an evidence-based inquiry be undertaken into the continuing necessity of the regime. In this respect it may be noted that neither the statement of compatibility nor explanatory memorandum expressly address, for example, the objections raised by the INSLM to the existing regime (see chapter II of second annual report, 20 December 2012, pp 6–44).

The committee therefore requests the Attorney-General’s advice in relation to the above matters, including in relation to the rationale for

concluding that ten years is the appropriate timeframe for the proposed extension of the control order regime.

Pending the Attorney-General's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Possible undue trespass on personal rights and liberties—control orders

Schedule 1, item 70, paragraph 104.2(2)(a) of the *Criminal Code*

Item 70 lowers the threshold for a senior AFP member seeking the Attorney-General's consent to request an interim control order. The proposal is that a senior AFP member must *suspect*, rather than *consider*, on reasonable grounds that the order requested would substantially assist in preventing a terrorist act. The statement of compatibility discusses this proposed amendment, noting that it would enable a request to be made for a control order based on a lower degree of certainty as to whether the order would substantially assist in preventing a terrorist act. The committee notes the brief and general justification for this amendment in the statement of compatibility (at p. 36), which states the conclusion that there is a 'heightened threat posed by foreign fighters'. **The committee draws this provision to the attention of Senators, and in order to assess the appropriateness of this proposed amendment the committee requests a more detailed explanation from the Attorney-General in relation to how the changed threshold will assist law enforcement agencies (beyond what the current provision allows).**

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Possible undue trespass on personal rights and liberties—control orders

Schedule 1, item 71, paragraph 104.2(2)(b) of the *Criminal Code*

Schedule 1, item 73, subparagraph 104.4(1)(c)(ii) of the *Criminal Code*

Item 71 amends the criteria for seeking the Attorney-General's consent to request an interim control order. The new criteria are that the AFP member reasonably suspects the person has participated in training with a listed terrorist organisation, has engaged in a hostile activity in a foreign country or has been convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or a terrorist act. The result is to increase the circumstances in which control orders may be available. The explanatory memorandum (at p. 123) justifies this amendment briefly by pointing to 'law enforcement advice' that these criteria will fill a gap in the current regime.

In order to assess the appropriateness of this proposed amendment, the committee seeks a more detailed explanation from the Attorney-General in relation to the conclusion that 'these additional criteria will facilitate the placing of appropriate controls over such individuals where this would substantially assist in preventing a terrorist act' (explanatory memorandum at p. 123).

The committee also seeks similar advice from the Attorney-General in relation to item 73, which sets out expanded criteria for making an interim control order.

Pending the Attorney-General's reply, the committee draws Senators' attention to these provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Possible undue trespass on personal rights and liberties—evidential burden of proof

Schedule 1, item 110, proposed subsection 119.1(4)

Proposed subsection 119.1(1) creates an offence for intentionally entering a foreign country with the intention of engaging in a hostile activity in that country or in any other foreign country and proposed subsection 119.1(2) creates an offence for intentionally engaging in a hostile activity in a foreign

country. Proposed subsection 119.1(4) creates a defence to these two offences. The defence applies to an act done by a person in the course of, and as part of, the person's service in any capacity in or with either the armed forces of the government of a foreign country or any other armed force the subject of a declaration made under subsection 119.8(1), provided that declaration covers the person and the circumstances of the person's service in or with the force.

The committee notes that there is no explanation in the explanatory memorandum (see p. 139) as to why it is appropriate for the defendant to bear an evidential burden in relation to the exceptions in paragraphs 119.1(4)(a) and 119.1(4)(b). **The committee therefore requests the Attorney-General's advice in this regard.**

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Possible undue trespass on personal rights and liberties—broad scope of offence

Schedule 1, item 110, proposed subsection 119.2

This proposed section establishes a new offence for entering, or remaining in, declared areas.

A person commits an offence if they enter, or remain in, an area in a foreign country and the area is an area declared by the Foreign Affairs Minister under proposed section 119.3. (Jurisdictional elements of the offence are that the person is one or other of the following: an Australian citizen, resident of Australia, holder of a visa under the *Migration Act 1958*, or has voluntarily put himself or herself under the protection of Australia.)

One concern with the proposed offence is that it is very broad in scope. To the extent that it may apply despite any intentional wrongdoing, it may be considered to unduly trespass on personal rights and liberties. In particular, it is not necessary for the person to specifically know that an area has been declared under section 119.3. Moreover, there is no requirement that the person intend to commit any particular crime or undertake any specific action when in the territory. It appears that the offence is made out simply for being in a declared area (even where there is no actual knowledge that the area has

been declared). Given the significant penalty associated with the offence (10 years imprisonment) the committee is concerned that neither intent to commit a wrongful act (beyond being in a declared area) nor actual knowledge that an area has been declared are required elements of the offence.

However, the committee notes that it may be argued that the exceptions to the offence ameliorate these concerns. Proposed subsection 119.2(3) creates a defence for a person who enters or remains in a declared area solely for a legitimate purpose. The potential difficulty with this provision, however, is that the legitimate purposes are listed and it is not clear that the listed purposes cover the field of purposes which would demonstrate that there was no intent to support terrorist groups or engage in terrorist activities overseas. Indeed, this is recognised by paragraph 119.2(3)(h) which enables further legitimate purposes to be prescribed by the regulations. The explanatory memorandum (at p. 140) suggests that this ‘is an important safeguard in the event other purposes that should be covered by the defence emerge over time’. There are, however, potential difficulties in relation to this ‘important safeguard’. First, the absence of a purpose on the list (e.g. business travel) will limit personal freedom of movement until such time as it is included in the regulations. Secondly, it remains the case that persons may be prosecuted for travel which is ‘legitimate’ until such time as it has been included on the list (even where they have no intent to commit a wrongful act and are not aware that an area is a declared area).

The committee brings this issue to the attention of Senators, expresses concern that the offence as currently drafted may unduly trespass on personal rights and liberties, and seeks advice from the Attorney-General as to why it is not possible to draft the offence in a way that more directly targets culpable and intentional actions.

Pending the Attorney-General’s reply, the committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee’s terms of reference.

Possible undue trespass on personal rights and liberties—evidential burden of proof

Schedule 1, item 110, proposed subsection 119.2(3)

A defendant bears an evidential burden in relation to the ‘legitimate purposes’ listed in the paragraphs of subsection 119.2(3).

This appropriateness of this approach is discussed in the statement of compatibility (at pp 47–48):

The new offence does not reverse the onus of proof as guilt is not presumed. However, it requires the defendant to provide evidence of a sole legitimate reason for entering a declared area which shifts an evidential burden to the defendant. This requires the defendant to adduce evidence that suggests a reasonable possibility that they have a sole legitimate purpose or purposes for entering the declared area. Once that evidence has been advanced by the defendant, the burden shifts back to the prosecution to disprove that evidence beyond reasonable doubt.

The defendant may adduce evidence to justify his or her presence in a declared area on two bases. The first is where the individual is solely there in the course of the person’s service in any capacity with the armed forces of the government of a foreign country or any other armed force if a declaration under subsection 119.8(1) covers the person and the circumstances of the person’s service in or with the force. The second is where the defendant is in the declared area solely for one or more ‘legitimate purposes’. A list of legitimate purposes is outlined in subsection 119.2(3).

The new offence under section 119.2 does not reverse the onus of proof or limit the presumption of innocence. To the extent that there is a limitation on Article 14 of the ICCPR, those limitations are reasonable, necessary and proportionate to countering the threat posed to Australia and its national security interests by foreign fighters returning to Australia from areas where the Foreign Affairs Minister is satisfied that a listed terrorist organisation is engaging in a hostile activity.

It may be accepted that imposing an evidential burden of proof in relation to an offence-specific defence, is consistent with the normal rules for criminal prosecutions (see statement of compatibility, p. 46) and may be appropriate in particular circumstances. Further, it may also be accepted that the purpose(s) as to why a person enters a particular area are matters peculiarly within the knowledge of the defendant. On the other hand, it may be argued that placing an evidential burden on a defendant in relation to exceptions requiring them to show a legitimate purpose is problematic where the prosecution is not

required to demonstrate any intentional wrongdoing (other than being in a declared place). Although the structure of the approach is familiar (i.e. imposing an evidential burden in relation to matters contained in an offence-specific defence), the committee is concerned about its application to an offence which is framed so broadly and, in particular, where the offence does not require an intention to engage in a defined illegitimate purpose. **The committee therefore draws this provision and the above comments to the attention of Senators. The committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

The committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Delegation of legislative power

Broad discretionary power

Schedule 1, item 110, proposed subsection 119.3(1)

This proposed subsection provides that the Foreign Affairs Minister may, by legislative instrument, declare an area for the purposes of section 119.2 (i.e. the offence provision) 'if he or she is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country'.

Once any area is declared under this subsection it specifies an element of a serious criminal offence. It is a matter of concern to the committee that there is little to guide the Minister in exercising this power other than whether or not a terrorist organisation is engaging in 'a hostile activity'.

The committee therefore seeks the Attorney-General's advice in relation to (1) why the legislation can not specify with more clarity the circumstances in which an area may be declared for the purposes of proposed section 119.2 (for example, this may be achieved through some limits being placed on what constitutes 'hostile activity'), and (2) whether the declaration is disallowable, and if it is not, an explanation of why that is so given that it forms part of the elements of a serious offence provision.

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Broad discretionary powers Schedule 2

The explanatory memorandum gives a succinct summary of the purpose and effect of Schedule 2 as follows:

This Schedule amends the Family Assistance Act, the PPL Act, the Social Security Act and the Social Security (Administration) Act to provide that welfare payments can be cancelled for individuals whose passports have been cancelled or refused, or whose visas have been cancelled, on national security grounds. This is to ensure that the Government does not support individuals who are fighting or training with extremist groups.

Currently, welfare payments can only be suspended or cancelled if the individual no longer meets social security eligibility rules, such as participation requirements, and residence or portability qualifications. The new provisions will require the cancellation of a person's welfare payment when the Attorney-General provides a security notice to the Minister for Social Services. The Attorney-General will have discretion whether to issue a security notice where either:

- the Foreign Affairs Minister has notified the Attorney-General that the individual has had their application for a passport refused or had their passport cancelled on the basis that the individual would be likely to engage in conduct that might prejudice the security of Australia or a foreign country, or
- the Immigration Minister has notified the Attorney-General that an individual has had their visa cancelled on security grounds.

The Foreign Affairs Minister and the Immigration Minister will also have a discretion whether to advise the Attorney-General of the passport or visa cancellation.

Welfare payments will only be cancelled in circumstances where the receipt of welfare payments was relevant to the assessed security risk posed by the individual and the cancellation of welfare would not adversely impact the requirements of security. This is to ensure that those individuals assessed to be engaged in politically motivated violence overseas, fighting or actively supporting extremist groups are captured. It is not intended that every person

whose passport or visa has been cancelled on security grounds would have their welfare payments cancelled, but would occur only in cases where it is appropriate and justified.

Although the above explanation indicates that '[w]elfare payments will only be cancelled in circumstances where the receipt of welfare payments was relevant to the assessed security risk posed by the individual and the cancellation of welfare would not adversely impact the requirements of security', this does not appear to be a requirement of the legislative provisions. It appears that whether or not payments will be cancelled is based on what appears to be discretionary judgments by ministers.

In light of the broad discretion provided to ministers (as outlined above), the committee seeks the Attorney-General's advice as to (1) whether it may be possible to explicitly provide in the bill that the cancellation of payments is contingent on their connection with an assessed security risk; and (2) whether any consideration has been given to other ways in which the exercise of these discretionary powers may be confined.

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Merits review

Schedule 2

The above question in relation to the broad discretion provided to ministers is of considerable importance given that it appears that the key decisions leading to the cancellation of payments will not be subject to normal merits review arrangements. (See, for example, item 2, proposed section 57GR of the *A New Tax System (Family Assistance) Act 1999*; item 3, proposed section 278K of the *Paid Parental Leave Act 2010*). It should also be noted that the requirement to give reasons under the ADJR Act will not apply in relation to these decisions by virtue of item 8 of Schedule 2. Without a statement of reasons for the decisions resulting in the cancellation of payments the practical utility of any judicial review would be negligible. The explanatory memorandum simply restates the effect of the provision other than to say that 'the reviewability of decisions [...] is limited for security reasons'.

The committee therefore seeks further advice from the Attorney-General as to the justification for the limitations on the reviewability of these decisions, and whether removing the obligation to provide reasons will undermine what review procedures remain.

Pending the Attorney-General's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

**Possible undue trespass on personal rights and liberties—
availability of coercive powers
Schedule 3, item 2, section 219ZJA of the *Customs Act 1901***

This item seeks to repeal and substitute the definition of 'serious Commonwealth offence' for the purposes of Division 1BA of Part XII of the *Customs Act 1901*. As a result of this change, the detention powers in section 219ZJB will be available in relation to a greater range of Commonwealth offences. In particular, to any offence against a law of the Commonwealth that is punishable on conviction by imprisonment for 12 months or more (currently these powers are limited to offences that relate to specified subject matters that are punishable by imprisonment for three years or more).

The only justification for this amendment to be found in the explanatory material is in the statement of compatibility (at p. 58). It is suggested that the expanded scope of application of the Customs detention power:

...is established by law and its use is in accordance with the requirements of section 219ZJB. The new section that provides for detention in respect of those who pose a national security threat also applies only in respect of actions that potentially impact Australia's national security interests. These detention powers are appropriate in that they are applicable in respect of only Commonwealth offences where imprisonment is for a period of twelve months or greater or to national security matters which pose the gravest threats to the welfare of Australians.

The enhanced detention powers are part of the targeted response to the threat posed by foreign fighters. A crucial element of the preventative measures undertaken to limit the threat of returning foreign fighters is to prevent Australians leaving Australia to engage in foreign conflicts in the first instance. The detention powers of Customs constitute an important preventative and disruption mechanism. Preventing individuals travelling

outside of Australia where their intention is to commit acts of violence in a foreign country assists in preventing terrorists acts overseas and prevents these individuals returning to Australia with greater capabilities to carry out terrorist acts on Australian soil.

The explanation provided for this particular change is brief, general, and not illustrated through the use of examples that demonstrate how changing this definition is necessary to respond to the threat posed by foreign fighters. It is not clear precisely how increasing the scope of ‘serious Commonwealth offence’ for the purposes of triggering the exercise of detention powers—under current paragraph 219ZJB(1)(b)) the powers are triggered if a customs officer suspects that the person has committed, or is committing, a serious Commonwealth offence—is a necessary response to the problem of foreign fighters. **The committee therefore seeks a more detailed explanation of the reasons why it is considered necessary to change the definition of ‘serious Commonwealth offence’.**

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Possible undue trespass on personal rights and liberties—availability of coercive powers

Schedule 3, item 3, paragraph 219ZJB(1)(b) of the *Customs Act 1901*

This item seeks to amend paragraph 219ZJB(1)(b). Currently, detention powers are triggered where an officer has reasonable grounds to suspect that a person has committed, or is committing, a serious Commonwealth offence. This amendment extends the availability of detention powers to circumstances where an officer has reasonable grounds to suspect that a person is *intending* to commit such an offence.

This significant extension of the applicability of the Customs detention powers is justified in the same general terms set out above (in relation to the expanded definition of ‘serious Commonwealth offence’).

In this case the statement of compatibility (at p. 58) connects the nature of the particular amendment with the specific problem of foreign fighters. Nevertheless, given the brevity of the explanation for the necessity of the power, **the committee seeks the Attorney-General's advice as to the**

justification for the extension of the operation of these powers as provided for in proposed paragraph 219JZB(1)(b).

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Possible undue trespass on personal rights and liberties—right to notify another person of detention

Schedule 3, item 6, subsection 219ZJB(5) of the *Customs Act 1901*

Under current subsection 219JZB(5), if a person is detained for a period of greater than 45 minutes, the person has the right to have a family member or another person notified of the person's detention. This item increases the time that a person may be detained, without anyone being notified of their detention, from 45 minutes to four hours.

The explanatory memorandum (at p. 183) states that under current provisions in the *Customs Act 1901* 'an officer may refuse to notify a family member or other person if the officer believes on reasonable grounds that the notification should not be made to safeguard law enforcement processes, or to protect the life and safety of another person.' The explanatory memorandum also outlines, in general terms, the rationale for increasing the timeframe in which no one is required to be notified:

It is considered that there may ... be vulnerabilities with regard to the time and opportunity for the officer of Customs to undertake sufficient enquiries once a person is detained, especially in order to determine whether the notification to a family member or other person should or should not be made.

The committee notes this general explanation, however the committee seeks further specific advice from the Attorney-General as to why it was considered necessary to increase the timeframe to four hours in particular (i.e. over five times the current timeframe).

Pending the Attorney-General's reply, the committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Undue trespass on personal rights and liberties—availability of coercive powers

Schedule 3, item 8, section 219JCA of the *Customs Act 1901*

Schedule 3, item 9, subsection 219ZJD(1) of the *Customs Act 1901*

These items provide for an extension of the applicability of the Customs detention powers. This is justified in the same general terms as previously (in relation to the expanded definition of ‘serious Commonwealth offence’). Notably, the amendment in item 9 means that persons detained pursuant to this new power may be subjected to existing frisk or ordinary search powers where an officer believes on reasonable grounds that the search is necessary for a purpose specified in existing paragraphs 219ZJD(1)(c) and (d).

The justification for the search and frisk powers is set out in the statement of compatibility (at p. 59). The committee recognises that this is a significant extension of the application of Customs powers, and **draws the provisions to the attention of Senators. However in light of the explanatory material, leaves its appropriateness to the Senate as a whole.**

The committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee’s terms of reference.

Review rights—reasons

Schedule 3, item 12, subsection 219ZJF(1) of the *Customs Act 1901*

The amendment proposed by this item will mean that the obligation to give reasons for detaining a person under section 219ZJB or 219ZJC will not apply in relation to a person detained under new section 219ZJCA, that is, on the basis that an officer ‘is satisfied on reasonable grounds that the person is, or is likely to be, involved in an activity that is a threat to national security or the security of a foreign country’.

The explanatory memorandum (at p. 185) states that the reason for this approach is that ‘it is not considered appropriate that a person be given reasons for their detention under section 219ZJCA at this point’. **In light of this statement the committee seeks a detailed explanation for this conclusion from the Attorney-General.**

Pending the Attorney-General's reply the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

**Possible undue trespass on personal rights and liberties—
procedural fairness**

Schedule 4, item 4, proposed new subdivision FB of the *Migration Act 1958*

This proposed new subdivision provides for the emergency cancellation of temporary and permanent visas on security grounds in relation to persons outside Australia.

The explanatory memorandum (at p. 187) contains a detailed explanation of the new powers:

This Schedule creates a new obligation on the Minister for Immigration to cancel a visa held by a non-citizen who is outside Australia. These amendments will strengthen the government's capacity to proactively mitigate security risks posed by individuals located offshore who may be seeking to travel to Australia and might be planning to engage in activities of security concern.

The obligation to cancel the visa will arise if the ASIO suspects that the person might be a risk to security and recommends cancellation of the person's visas. The power would be used in circumstances where ASIO suspects that a person located offshore may pose a risk to security but has either insufficient information and/or time to furnish a security assessment in advance of the person's anticipated travel. It will enable ASIO to furnish a security assessment where it suspects the person might be, directly or indirectly a risk to security and require the Minister to cancel the visa/s held by the person for a temporary and limited period of 28 days.

The visa cancellation would be revoked where ASIO, after further consideration, recommends the cancellation be revoked or if ASIO does not provide an adverse security assessment that the person is, directly or indirectly, a risk to security within the 28 day period.

The current visa cancellation provisions in the *Migration Act 1958* are said to be inadequate because:

The existing provisions do not adequately provide for a situation where ASIO has information that indicates a person located outside Australia may be a risk to security but is unable to furnish a security assessment that meets existing legal thresholds in the Migration Act due to insufficient information and/or time constraints linked to the nature of security threat. (p. 187)

A significant feature of the scheme is that the rules of natural justice are expressly excluded by proposed section 134A in relation to decisions made under proposed subdivision FB.

Given the explanatory material outlined above, the committee leaves the general question of the appropriateness of the overall scheme, including the exclusion of the rules of natural justice which would require a fair hearing prior to the exercise powers which directly affect rights or interests, to the Senate as a whole.

However, the committee seeks further information in relation to the following specific issues:

- First, although it is noted that these powers are styled as emergency powers, it appears that the exclusion of natural justice requirements is also intended to enable a decision which is affected by apparent or even *actual* bias. **The committee therefore seeks the Attorney-General's advice as to why the rule against bias should not apply to decisions made under proposed subdivision FB.**
- Secondly, the threshold requirement which triggers the mandatory cancellation of a visa under subsection 134B(b) is written in wholly subjective terms: ASIO must advise that ASIO 'suspects that the person might be, directly or indirectly, a risk to security'. Significantly, the suspicion that must be held does not relate to whether a person *is* a risk to security but that they *might* be a risk to security. This is a very low threshold requirement for the exercise of a power which has such a significant impact on important personal rights and freedoms. A requirement that there be *reasonable grounds* for the suspicion might partially ameliorate these concerns. Noting that a person is not entitled to a hearing prior to the exercise of the power, **the committee seeks further advice from the Attorney-General as to why the usual requirement associated with such powers (i.e. a requirement that an officer hold a suspicion that is based on 'reasonable grounds') is not provided for in the bill as currently drafted.**

- Thirdly, it is unclear why the rules of natural justice are excluded in relation to the consequential cancellation decision which may be made pursuant to section 134F. These decisions are discretionary and the explanatory memorandum does not address why the well-established aspects of the rules of natural justice (procedural fairness and rules against bias) should not be applicable. **The committee therefore seeks the Attorney-General's advice as to the justification for the proposed approach.**
- Finally, the statement of compatibility (at p. 62) and the explanatory memorandum (at p. 191) state that decisions made under section 134F will be merits reviewable, however they do not identify the specific legislative provision that would allow this to happen. The committee is also unclear as to whether merits review would be available to a person whose visa has been cancelled under proposed section 134F if that person were not in Australia at the time. **The committee therefore seeks the Attorney-General's advice as to the legislative provision that will allow merits review of decisions made under proposed section 134F, and further, whether merits review would be available for cancellation decisions in circumstances where the visa holder is not in Australia at the time of the decision.**

Pending the Attorney-General's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference, and may also be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Delegation of legislative power

Schedule 5, item 3, proposed subparagraph 166(1)(d)(ii)

This proposed subparagraph will allow additional personal identifiers to be prescribed by regulations. The explanatory memorandum (at p. 193) states that the amendments made by this item will 'ensure that authorised systems such as eGate can collect and retain personal identifiers without having to 'require' a person to provide those personal identifiers'. This proposed subparagraph may facilitate the retention of personal identifiers in addition to facial images. The nature of the biometric information that may be collected

and stored in this manner raises potentially significant policy questions. **Given the sensitivity of the information which may be prescribed, the committee seeks the Attorney-General's advice as to why it is not more appropriate to require that such additions be authorised by primary, rather than delegated, legislation.**

Pending the Attorney-General's reply, the committee draws Senators' attention to the approach as it may be considered to delegate legislative powers inappropriately in breach of principle 1(a)(iv) of the committee's terms of reference.