

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

Further Report

relating to the

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

29 October 2014

Members of the Committee

Current members

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Senator Cory Bernardi	LP, South Australia
Senator the Hon Bill Heffernan	LP, New South Wales
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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.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Further Report relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

The committee presents its *Further Report relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* to the Senate.

The committee initially dealt with this bill in its *Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* which was presented out of sitting on 13 October 2014. This Alert Digest is available on the committee's website at: http://www.aph.gov.au/~/media/Committees/Senate/committee/scrutiny/alerts/2014/pdf/digest_oct14.pdf.

The Attorney-General responded to the committee's comments in a letter dated 21 October 2014. The committee considered this response and presented its *Report relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* out of sitting on 23 October 2014. This Report is available on the committee's website at: http://www.aph.gov.au/~/media/Committees/Senate/committee/scrutiny/bills/2014/pdf/report_oct14.pdf.

The committee then sought further information and the Attorney-General responded in a letter received on 27 October 2014. A copy of this letter is attached to this report. **This Further Report only deals with items where the committee sought further information following the presentation of its report on 23 October 2014.**

The committee's *Fourteenth Report of 2014* will contain a consolidated version of the committee's consideration of this bill.

The committee draws the attention of the Senate to the following clauses of the bill which contain provisions that the committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24.

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

Introduced into the Senate on 24 September 2014

Portfolio: Attorney-General

Introduction

As noted above, this Further Report only deals with items where the committee sought further information following the presentation of its report on 23 October 2014. The committee's previous consideration of this bill is available on the committee's website.

In addition, the committee's *Fourteenth Report of 2014* will contain a consolidated version of the committee's consideration of this bill.

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.

Attorney-General's general comment

Please find attached a response to the Committee's request for advice. I also propose to incorporate in the explanatory memorandum most of the suggestions of the Committee. With respect to the material suggested for inclusion about the sunset periods, I propose to amend the Bill to shorten the sunset periods in line with the recommendation of the Parliament Joint Committee on Intelligence and Security.

I trust this response will assist the Committee and Senators in their further consideration of the Bill.

Committee Response

The committee thanks the Attorney-General for this additional information.

The committee welcomes the Attorney-General's indication that additional information will be incorporated into the explanatory memorandum as requested by the committee.

The committee also welcomes the Attorney-General's indication that the sunset periods in the bill will be shortened in line with the recommendation of the Parliamentary Joint Committee on Intelligence and Security. The committee notes that implementing this recommendation is also relevant in addressing this committee's comments in relation to the sunset provisions in the bill.

Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) - extract

Delegation of administrative power

Schedule 1, 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.

Attorney-General's response - extract

The Minister will be able to delegate the power to suspend an Australian travel document under new paragraph 51(1)(da) of the Passports Act. It is appropriate that the Minister be able to delegate this power as the Minister already has the power to delegate the decision to cancel a person’s Australian travel documents. It would be inconsistent with the current provisions of the Passports Act to allow the Minister to delegate a much more permanent decision (i.e. the decision to cancel an Australian travel document) but not delegate a decision that has a short temporary effect. The Minister has not delegated her power under the Passports Act to cancel an Australian travel document where a refusal/cancellation request has been made under section 14 of the Act and there is no intention to delegate the power to suspend Australian travel documents.

The Government is considering recommendation 27 of the PJCIS report on the Bill which recommends that the Minister is only able to delegate the power to suspend Australian travel documents under proposed section 22A of the Passports Act to the Secretary of the Department of Foreign Affairs and Trade.

Committee Response

The committee thanks the Attorney-General for this response.

The committee notes the Attorney-General's advice that it is appropriate that the Minister be able to delegate the power to suspend a person's Australian travel documents because it would be 'inconsistent with the current provisions of the Passports Act to allow the Minister to delegate a much more permanent decision (i.e. the decision to cancel an Australian travel document) but not delegate a decision that has a short temporary effect'.

The committee also notes recommendation 27 of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* which suggests that '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' (p. 140).

The committee further notes the Attorney-General's advice that the 'Minister has not delegated her power under the Passports Act to cancel an Australian travel document where a refusal/cancellation request has been made under section 14 of the Act' and that 'there is no intention to delegate the power to suspend Australian travel documents'. **Noting this, and given the importance of ensuring that limits are placed on the categories of persons who may be authorised to exercise significant powers, the committee seeks the Attorney-General's further advice as to whether consideration has been given to amending the Passports Act to ensure that the ability of the Foreign Affairs Minister to delegate the power to suspend a travel document and to cancel an Australian travel document where a refusal/cancellation request has been made under section 14 of the Act be limited to the Secretary of the Department of Foreign Affairs and Trade. The committee notes that this would ensure consistency between the power to suspend a travel document and the power to cancel a travel document in equivalent circumstances.**

Attorney-General's further response - extract

The Government has supported PJCIS recommendation 27 to limit the ability of the Minister for Foreign Affairs to delegate the power to suspend a person's Australian travel documents under section 51 of the *Australian Passports Act 2005* (Passports Act) to the Secretary of the Department of Foreign Affairs and Trade. Government amendments to the Bill will be introduced into Parliament to reflect the adoption of this recommendation.

To enable the suspension mechanism to be an effective immediate temporary preventative and disruptive power the threshold for a suspension request is lower than that required for a cancellation. This lower threshold and, as noted in the PJCIS report, the limited review rights for such a decision, support the need to limit the delegation power for the suspension of a person's Australian travel documents.

However, it is not necessary to place similar restrictions on the Minister's power to delegate a decision to cancel a person's Australian travel documents as a result of a cancellation request under section 14 of the Passports Act. The threshold for making a cancellation request under section 14 is higher than that required for a suspension request under new section 22A. A cancellation request by ASIO is an adverse security assessment for the purposes of Part IV of the ASIO Act and is reviewable in the Security Appeals Division of the Administrative Appeals Tribunal (AAT). Further, a decision to cancel a person's Australian travel document is reviewable in the AAT and under the *Administrative Decisions (Judicial Review) Act 1977*. The difference in the request threshold and review rights distinguishes the need to further limit the delegation power under section 51 of the Passports Act for cancellation decisions.

Committee's further response

The committee thanks the Attorney-General for this further response.

The committee welcomes the Attorney-General's indication that the government has supported recommendation 27 of the Parliamentary Joint Committee on Intelligence and Security (PJCIS). The PJCIS recommended that the ability of the Minister for Foreign Affairs to delegate the power to suspend a person's Australian travel documents under section 51 of the *Australian Passports Act 2005* (the Passports Act) be limited to the Secretary of the Department of Foreign Affairs and Trade. The committee notes that implementation of this recommendation will ensure that an appropriate limit is placed on the delegation of this significant power.

(continued)

The committee also notes the Attorney-General's explanation as to why it is not considered necessary to place similar limits on the Minister's power to delegate a decision to cancel a person's Australian travel documents as a result of a cancellation request under section 14 of the Passports Act. In particular the committee notes the higher threshold required for making a cancellation request under section 14 and the review rights which are available in relation to these cancellation decisions. While these factors are relevant, the power to cancel travel documents as a result of a request under section 14 remains a significant power. In this regard, the committee notes the Attorney-General's previous advice that the Minister has not delegated this power. The committee welcomes this approach and, despite the different threshold and review rights applicable to these cancellation decisions, reiterates its view that the power to cancel a travel document as a result of a cancellation request under section 14 of the Passports Act should be appropriately limited in legislation (for example, limited to the Secretary of the Department of Foreign Affairs and Trade). As the committee previously stated this would ensure consistency between the power to suspend a travel document and the power to cancel a travel document in equivalent circumstances.

The committee draws the Minister's current broad power to delegate to an 'officer' the decision to cancel a person's Australian travel documents (as a result of a cancellation request under section 14 of the Passports Act) and the committee's comments in relation to this matter to the attention of Senators. The committee requests that the key information above be included in the explanatory memorandum and leaves the question of whether this broad delegation of administrative power is appropriate to the Senate as a whole.

Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) - extract

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.

Attorney-General's response - extract

For security reasons, the decisions of the Foreign Affairs Minister, Immigration Minister and Attorney-General to issue notices in relation to stopping welfare payments will not be subject to merits review. This is because the decisions to issue the notices will be based on security advice which may be highly classified and could include information that if disclosed to an applicant may put Australia's security at risk.

The decisions of the Foreign Affairs Minister, Immigration Minister and Attorney-General to issue notices in relation to stopping welfare payments will be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*, but for security reasons, there will be no requirement to provide reasons. The reasons for the decisions to issue the notices will be based on security advice which may be highly classified and could include information that if disclosed to an applicant may put Australia's security at risk.

However, given any decision by the Attorney-General to cancel welfare payments is triggered by the cancellation of a visa or the cancellation of, or refusal to issue an Australian passport, an individual will be able to obtain reasons for, and seek review of the decision to cancel a visa or the cancellation of, or refusal to issue, a passport. This would include merits review under the AAT Act of an adverse security assessment made by ASIO in support of those decisions.

Committee Response

The committee thanks the Attorney-General for this response.

The committee remains concerned that the judicial review of a decision to cancel welfare payments will be undermined by the lack of a statement of reasons for the decision.

Further, the committee considers the merits review of a decision to cancel or refuse the issue of a visa to be a separate circumstance from the decision to cancel welfare payments, due to the ministerial discretion involved in the cancellation of welfare payments. **The committee therefore seeks further advice from the Attorney-General as to whether consideration has been given to addressing concerns regarding the review mechanisms, such as the recent recommendation from COAG for a ‘nationwide system of special advocates’ that could participate in review process with all the facts of the case before them.**

Attorney-General's further response - extract

In relation to judicial review, although there will be no requirement to provide reasons for the decision, this will not prevent reasons from being provided to the person, where appropriate. As much information as possible will be provided to the person so long as the disclosure of that information would not prejudice national security.

The COAG Review recommendation for a system of special advocates was in relation to control order proceedings rather than legal proceedings in general. However, COAG recently decided not to pursue that recommendation, noting that the Commonwealth has significant reservations about introducing a regime of special advocates in respect of national security litigation.

Committee further response

The Committee thanks the Attorney-General for this further response.

The response does not address the point raised by the committee that the key decision in the cancellation of welfare payments will not be subject to normal merits review arrangements. The committee therefore restates its concern that merits review of a decision to cancel or refuse the issue of a visa is a separate circumstance from the decision to cancel welfare payments, due to the ministerial discretion involved in the cancellation of welfare payments. Without further justification the committee is not yet convinced that merits review is inappropriate. **The committee draws the matter to the attention of Senators, and in light of the explanation provided by the Attorney-General, leaves the appropriateness of the approach to the Senate as a whole.**

(continued)

In relation to the second point on the provision of reasons for a decision pursuant to the Administrative Decisions (Judicial Review) Act 1977 (Cth), the committee notes the Attorney-General's statement that 'although there will be no requirement to provide reasons for the decision, this will not prevent reasons from being provided to the person, where appropriate. The Committee further notes the Attorney-General's advice that 'as much information as possible will be provided to the person so long as the disclosure of that information would not prejudice national security.' However the committee is not reassured by this response as it remains the case that the provision of reasons is to be determined in the exercise of a discretionary power. The committee's preference is for there to be a right to reasons for such a significant decision, even if it is necessary to provide for limitations to the information which must be disclosed. While it may not be possible to disclose all information, **the committee seeks further advice as to why the problem cannot be adequately resolved through the application of paragraph 14(1)(a) of the Administrative Decisions (Judicial Review) Act.** That paragraph provides that the Attorney-General may certify that disclosure of information concerning a specified matter would be contrary to the public interest 'by reason that it would prejudice the security, defence or international relations of Australia'.

Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) - extract

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:

- 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.**

Attorney-General's response - extract

Section 134F allows for discretionary cancellation of visas held by family members and others whose visas were granted because a visa was held by the person whose visa has been cancelled on security grounds under proposed section 134B. The exclusion of natural

justice in relation to that cohort is a consequence of proposed section 134A which excludes the rules of natural justice from all decisions under proposed Subdivision FB. The justification for excluding natural justice in relation to consequential cancellations under proposed section 134F is that there will be occasions where the family member is outside Australia, in the company of the security target who has been cancelled under section 134B, and where the Department has no means of contacting the person. In those cases, it may be appropriate to cancel without notice in order to prevent the family member returning to Australia, even if the family member is not a security concern. In addition to the exclusion of the rules of natural justice in proposed section 134A, this policy approach is reflected in the wording of proposed subsection 134F(2) which authorises cancellation "without notice". The circumstances which may arise are difficult to predict in advance, but it is advisable to retain flexibility for the Minister or delegate to act quickly and without notice should this be necessary. This approach is consistent with the existing position in relation to consequential cancellations in subsection 140(2) of the Migration Act, which has been in force for over 20 years. It is not the policy intention to authorise bias in decision-making, and to the extent that exclusion of the "rules of natural justice" is understood to amount to exclusion of the requirement for an unbiased decision, that is not the policy intention.

Committee Response

The committee thanks the Attorney-General for this response.

The committee is concerned that the explanation provided has not demonstrated the necessity for the exclusion of the hearing rule of natural justice. The content of the fair hearing rule (i.e. what procedures are required to enable a person to fairly put their case) is applied flexibly. The courts have emphasised that what is fair does not depend upon fixed rules and that regard must be had to the circumstances of the case and statutory context. Indeed, in some instances it has been held that the requirements of natural justice may be reduced to nothingness in the circumstances of a particular case (even though, in general, the exercise of the statutory power is attended by an obligation to comply with the rules of natural justice). If it could, in the circumstances of a particular case, be demonstrated that no hearing could have been afforded without undue prejudice to national security, then the rules of natural justice may require no more than a consideration of the extent to which it is possible give notice to the affected person and how much (if any) detail of the reasons for the proposed decision should be disclosed. (For an illustration, see *Leghaei v Director General of Security* [2005] FCA 1576; [2007] FCAFC 27.) Thus, while there may be some instances where it appropriate to cancel the visa of a family member without notice, it may well be the case that in many other cases giving notice and an opportunity to be heard prior to the decision being made will not unduly prejudice national security. **The committee therefore seeks further advice which explains why the court's flexible approach to determining the content of natural justice obligations is not capable of dealing with the problems identified in the Attorney General's response.**

(continued)

Even if the fair hearing rule is to be excluded the committee is concerned that the very clear statement in section 134A of the bill that states that the rules of natural justice do not apply to this Subdivision, is not consistent with the explanation provided in the response which suggests that 134A does not apply to bias or the appearance of it, which is one of the common law rules of natural justice. The committee notes that in the context of the Migration Act the exclusion of natural justice, in various provisions, is expressly limited to the hearing rule. **The committee therefore seeks further advice from the Attorney-General as to whether the bill could be amended to reflect the explanation provided in the above response.**

Attorney-General's further response - extract

Section 134F allows for discretionary cancellation of visas held by family members and persons whose visas were granted because of another person's visa. As outlined in my previous response, the circumstances which may arise requiring cancellation under s134F are difficult to predict in advance, however it is considered necessary for the Minister or delegate to have the flexibility to act quickly and without notice should this be necessary.

Committee's further response

The Committee thanks the Attorney-General for this further response.

The committee had requested further advice on two issues, the first was concerned with the exclusion of the fair hearing rule, while the second related to the rule against bias.

On the first point, given that the underlying reason for the cancellation of a visa is that the person holds a visa consequential to the person whose visa has been cancelled under 134B, but not on the grounds that the person themselves is considered a security threat, the committee remains unconvinced that a blanket exclusion of the fair hearing rule is necessary, given the flexible approach the courts take to the content of the rules of procedural fairness. **The committee draws the matter to the attention of Senators, and in light of the explanation provided by the Attorney-General, requests that the key information above be included in the explanatory memorandum and leaves the appropriateness of the provision to the Senate as a whole.**

(continued)

The response does not appear to address the second point in relation to the natural justice rule against bias. The committee therefore reiterates its concern that the provision as currently drafted may be read to exclude the rule against bias. Given the statement in the first response that ‘It is not the policy intention to authorise bias in decision-making, and to the extent that exclusion of the “rules of natural justice” is understood to amount to exclusion of the requirement for an unbiased decision, that is not the policy intention’, **the committee seeks the Minister’s further advice as to whether this policy position could be reflected in the bill.**

Senator Helen Polley
Chair



ATTORNEY-GENERAL

CANBERRA

14/11313

27 October 2014

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

via email to scrutiny.sen@aph.gov.au

Dear Chair

I refer to correspondence from the Acting Committee Secretary of 23 October 2014 about the Committee's views and comments in its report relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (23 October 2014).

Please find attached a response to the Committee's request for advice. I also propose to incorporate in the explanatory memorandum most of the suggestions of the Committee. With respect to the material suggested for inclusion about the sunset periods, I propose to amend the Bill to shorten the sunset periods in line with the recommendation of the Parliament Joint Committee on Intelligence and Security.

I trust this response will assist the Committee and Senators in their further consideration of the Bill.

The action officer for this matter is Cameron Gifford who can be contacted on 6141 4129.

Yours faithfully

(George Brandis)

Response to issues raised by the Senate Scrutiny of Bills Committee

Delegation of administrative power

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

Committee question (p12)

The committee seeks the Attorney-General's further advice as to whether consideration has been given to amending the Passports Act to ensure that the ability of the Foreign Affairs Minister to delegate the power to suspend a travel document and to cancel an Australian travel document where a refusal/cancellation request has been made under section 14 of the Act be limited to the Secretary of the Department of Foreign Affairs and Trade.

Attorney-General's response

The Government has supported PJCIS recommendation 27 to limit the ability of the Minister for Foreign Affairs to delegate the power to suspend a person's Australian travel documents under section 51 of the *Australian Passports Act 2005* (Passports Act) to the Secretary of the Department of Foreign Affairs and Trade. Government amendments to the Bill will be introduced into Parliament to reflect the adoption of this recommendation.

To enable the suspension mechanism to be an effective immediate temporary preventative and disruptive power the threshold for a suspension request is lower than that required for a cancellation. This lower threshold and, as noted in the PJCIS report, the limited review rights for such a decision, support the need to limit the delegation power for the suspension of a person's Australian travel documents.

However, it is not necessary to place similar restrictions on the Minister's power to delegate a decision to cancel a person's Australian travel documents as a result of a cancellation request under section 14 of the Passports Act. The threshold for making a cancellation request under section 14 is higher than that required for a suspension request under new section 22A. A cancellation request by ASIO is an adverse security assessment for the purposes of Part IV of the ASIO Act and is reviewable in the Security Appeals Division of the Administrative Appeals Tribunal (AAT). Further, a decision to cancel a person's Australian travel document is reviewable in the AAT and under the *Administrative Decisions (Judicial Review) Act 1977*. The difference in the request threshold and review rights distinguishes the need to further limit the delegation power under section 51 of the Passports Act for cancellation decisions.

Merits review

Schedule 2 – Stopping welfare payments

Committee question (p65)

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.

Attorney-General's response

In relation to judicial review, although there will be no requirement to provide reasons for the decision, this will not prevent reasons from being provided to the person, where appropriate. As much information as possible will be provided to the person so long as the disclosure of that information would not prejudice national security.

The COAG Review recommendation for a system of special advocates was in relation to control order proceedings rather than legal proceedings in general. However, COAG recently decided not to pursue that recommendation, noting that the Commonwealth has significant reservations about introducing a regime of special advocates in respect of national security litigation.

Possible undue trespass on personal rights and liberties – procedural fairness

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

Committee question (p76)

The committee therefore seeks further advice which explains why the court's flexible approach to determining the content of natural justice obligations is not capable of dealing with the problems identified in the Attorney General's response.

The committee therefore seeks further advice from the Attorney-General as to whether the bill could be amended to reflect the explanation provided in the above response.

Attorney-General's response

Section 134F allows for discretionary cancellation of visas held by family members and persons whose visas were granted because of another person's visa. As outlined in my previous response, the circumstances which may arise requiring cancellation under s134F are difficult to predict in advance, however it is considered necessary for the Minister or delegate to have the flexibility to act quickly and without notice should this be necessary.