

Expansion of Committee functions

- 2.1 As outlined in Chapter 1, the Committee's functions have expanded to allow Committee oversight over various aspects of the counter-terrorism measures passed by the Parliament during the year.
- 2.2 In summary, these expanded functions include:
- Review of the following legislative measures:
 - ⇒ the control order regime, preventative detention order regime, questioning and detention warrant regime and stop, search and seizure powers,
 - ⇒ sections 119.2 and 119.3 of the Criminal Code (relating to declared areas), and
 - ⇒ the data retention scheme.
 - Review of bills introduced as part of the ongoing operation of the data retention scheme.
 - Oversight of the counter-terrorism activities of the Australian Federal Police (AFP).
 - Review of declared areas made under section 119.3 of the Criminal Code.
- 2.3 In addition, the Committee must be notified in a number of circumstances regarding the operation of certain new provisions under the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014 (Cth)* and the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 (Cth)*.
- 2.4 The expanded review and oversight powers and range of events of which the Committee must be notified, have substantially increased the functions of the Committee and its security role in the area of national security.

- 2.5 These new functions are discussed further below. A table of the activities undertaken by the Committee pursuant to these expanded functions is provided at Appendix D.

Scheduled reviews

- 2.6 As part of its new responsibilities, the Committee is required to undertake a series of reviews to track the effectiveness and operation of national security legislative reforms that have been introduced into law.
- 2.7 Certain powers that the Committee reviewed as part of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 will sunset on 7 September 2018. The Committee must review the operation, effectiveness and implications of the following provisions by 7 March 2018:
- ⇒ Special powers relating to terrorism offences (including the issuing of search warrants) under Division 3, Part III of the ASIO Act and related provisions,
 - ⇒ Powers relating to terrorist acts and terrorism offences (including stop, each and seizure powers) under Division 3A of Part IAA of the *Crimes Act 1914* (Cth) and related provisions,
 - ⇒ Control order and preventative detention powers under Division 104 and 105 of the Criminal Code and related provisions, and
 - ⇒ Provisions relating to the offence of entering or remaining in declared areas and the declaration of areas pursuant to sections 119.2 and 119.3 of the Criminal Code, and related provisions.¹
- 2.8 In relation to the Data Retention Act, the Committee must commence a review of the operation of the data retention scheme by 13 April 2019 and complete the review by 13 April 2020.²

Oversight of AFP counter-terrorism activities

- 2.9 In its advisory report into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, the Committee recommended that its

1 *Intelligence Services Act 2001*, s. 29(1)(bb).

2 *Telecommunications (Interception and Access) Act 1979*, s. 187N, (as amended by the Data Retention Act).

functions be extended to encompass the counter-terrorism activities of the AFP, including, but not limited to, anything involving classified material.³

- 2.10 Following the Government's response to the Committee's report,⁴ the Intelligence Services Act was amended to extend the Committee's functions to monitoring and reviewing the performance by the AFP of its functions under Part 5.3 of the Criminal Code.⁵ This section of the Criminal Code contains the Commonwealth terrorism offences, control order and preventative detention order regimes.
- 2.11 In June 2015, the AFP provided its first briefing to the Committee in relation to its functions under Part 5.3 of the Criminal Code, via a private (classified) briefing. The issues raised in that briefing are outlined below, noting that some information provided in that briefing cannot be released publicly due to its sensitive nature.

Emerging issues

- 2.12 The AFP informed the Committee that a large number of issues identified throughout the year had been rectified by the introduction of the *Counter-terrorism Legislation Amendment (Foreign Fighters) Act 2014* and the *Counter-terrorism Legislation Amendment Act (No.1) 2014*.
- 2.13 The AFP identified and discussed a number of emerging issues with the Committee, including:
- operational issues relating to the protection of sensitive information,
 - operational issues relating to monitoring compliance with control orders,
 - the use of state-based preventative detention orders instead of Commonwealth-based preventative detention orders, due to the longer duration of state-based orders, and
 - difficulty in securing prosecutions for terrorism financing under section 102.6 of the *Criminal Code* due to the proof of receipt required.

Activities undertaken in 2014–15

- 2.14 The AFP provided details of its activities from 1 June 2014 to 30 May 2015 in relation to Part 5.3 of the Criminal Code. These are outlined in detail in Appendix C of this report.

3 Recommendation 14, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, p. xv.

4 Attorney-General's Department, *Government Response to committee report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 22 October 2014, www.attorneygeneral.gov.au/mediareleases, viewed 2 July 2015.

5 *Intelligence Services Act 2001*, s. 29(1)(baa).

- 2.15 In summary, the AFP reported that as at 30 May 2015:
- nine prosecutions had been supported by the AFP under terrorism offences (Division 101 of the Criminal Code),
 - no prosecutions had been supported by the AFP under the offences relating to financing terrorism and terrorists (Division 103 of the Criminal Code),
 - three interim control orders had been applied for by the AFP, with none of these control orders yet being confirmed (Division 104),
 - one person had been charged under section 104.27 with the offence of contravening a control order and the matter was currently before the NSW courts, and
 - no preventative detention orders or continued preventative detention orders had been applied for (Division 105).

Review of ‘declared areas’

- 2.16 The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* created a new offence for persons who enter, or remain in, specific overseas areas declared by the Foreign Affairs Minister.⁶
- 2.17 The Committee may conduct a review of the declaration of each area made under proposed section 119.3, within the disallowance period for each declaration (modelled on the process of listing of terrorist organisations under 102.1A of the Criminal Code).⁷
- 2.18 The Committee conducted its first inquiries into declared areas in 2014–15. These were:
- *Review of the declaration of al-Raqqa province, Syria*, tabled in March 2015
 - *Review of the declaration of Mosul district, Ninewa Province, Iraq*, tabled in May 2015
- 2.19 The Committee supported each declaration and recommended that the legislative instruments not be disallowed. The reports can be viewed on the Committee’s website.

6 *Criminal Code Act 1995*, ss. 119.2, 119.3.

7 *Criminal Code Act 1995*, ss. 119.3 (7).

Additional notifications and reviews

- 2.20 Following the commencement of the *Counter-terrorism Legislation Amendment Act (No.1) 2014*, the Inspector-General of Intelligence and Security is required to provide the Committee with a copy of any report produced on the legality or compliance with provisions regarding:
- emergency authorisations made by an agency to conduct certain activities, where a Minister is unavailable to provide the authorisation,⁸ and
 - where agreement to an emergency authorisation from the Attorney-General is required and not obtainable, and instead authorisation is given with the agreement of the Director-General of Security, or without the agreement of either the Attorney-General or the Director-General of Security.⁹
- 2.21 Amendments to the Criminal Code provisions relating to the declaration of terrorist organisations allow the Minister to amend regulations to include aliases or remove former names via legislative instrument. Consistent with its review of the listing and relisting of terrorist organisations, the Committee may also review any legislative instrument making such amendment.¹⁰

Oversight of data retention scheme

- 2.22 The implementation phase of the data retention scheme will commence on 13 October 2015. After this date, the Committee will be required to review:
- any Bill introduced into Parliament that proposes to change the defined set of telecommunications data required and not required to be retained by carriers, carriage service providers and internet service providers for two years,¹¹
 - any Bill introduced to either House that proposes to amend the list of service providers required to retain certain data, within 15 days after the introduction of the Bill,¹²

8 *Intelligence Services Act 2001*, s. 9B (8A).

9 *Intelligence Services Act 2001*, s. 9C(6)(c).

10 *Criminal Code Act 1995*, ss. 102.1AA, 102.1A.

11 *Telecommunications (Interception and Access) Act 1979*, s. 187AA (4) (as amended by the Data Retention Act).

12 *Telecommunications (Interception and Access) Act 1979*, s. 187A(3C)(a) (as amended by the Data Retention Act).

- any Bill introduced to either House that proposes to amend the list of ‘criminal law enforcement agencies’,¹³ and
 - any Bill introduced to either House that proposes to amend the list of ‘enforcement agencies’.¹⁴
- 2.23 The Committee’s expanded functions also include:
- reviewing any matter relating to the retained data activities of ASIO, as reported in its annual report,¹⁵ and
 - reviewing any matter relating to the retained data activities of the AFP regarding offences against Part 5.3 of the Criminal Code, as specified in its annual report to the Minister pursuant to section 94(1) of the *Telecommunications (Interception and Access) Act 1979*.¹⁶
- 2.24 Unlike the Committee’s other functions, in undertaking these reviews, the Committee may review particular operations or investigations of ASIO and the AFP.¹⁷ However, the Committee must conduct its review for the sole purpose of assessing and making recommendations on the overall operation and effectiveness of the new data retention scheme. The Committee may not investigate the data retention activities of service providers.¹⁸
- 2.25 The relevant minister must notify the Committee in the following circumstances:
- should a declaration be made to require a service provider to retain data relating to a relevant service,¹⁹ or
 - should a journalist information warrant be issued to ASIO or a law enforcement agency.²⁰
- 2.26 The relevant minister must provide the Committee with a copy of any report prepared by the Inspector-General of Intelligence and Security or the Commonwealth Ombudsman:

13 *Telecommunications (Interception and Access) Act 1979*, s. 110A (11) (as amended by the Data Retention Act).

14 *Telecommunications (Interception and Access) Act 1979*, s. 176A (11) (as amended by the Data Retention Act).

15 *Intelligence Services Act 2001*, s. 29(1)(bd); *ASIO Act 1979*, s. 94 (1), (2A)(c)–(j) (as amended by the Data Retention Act).

16 *Intelligence Services Act 2001*, s. 29(1)(be) (as amended by the Data Retention Act).

17 *Intelligence Services Act 2001*, s. 29 (4) (as amended by the Data Retention Act).

18 *Intelligence Services Act 2001*, s. 29 (5) (as amended by the Data Retention Act).

19 *Telecommunications (Interception and Access) Act 1979*, s. 187B (7) (as amended by the Data Retention Act).

20 *Telecommunications (Interception and Access) Act 1979*, s. 185D(1)(b), 185D(5)(a)(ii) (as amended by the Data Retention Act).

- relating to a journalist information warrant or an authorisation for the disclosure of information or documents made under the authority of a warrant,²¹ or
 - relating to the purpose or manner of access to retained data by means of one or more authorisations under relevant divisions of the Intelligence Services Act.²²
- 2.27 The Committee may also request a briefing from the Inspector-General of Intelligence and Security, or the Ombudsman, on any report outlined above.²³

Concluding remarks

- 2.28 The Committee completed a substantial number of activities throughout 2014–15, in the context of a heightened security threat to Australia and our interests overseas. In particular, there has been a need to address the increasing threat posed by the potential return of foreign fighters to Australia.
- 2.29 The demanding workload of the Committee during 2014–15 reflects the changing nature of the global security environment and the need for legislative reform to ensure that our intelligence agencies remain equipped with the necessary tools to counter the threats posed to the safety of Australians, both overseas and in Australia. Balanced with this is the need to ensure that individual privacy and other fundamental freedoms and rights we enjoy as Australians remain protected in our laws.
- 2.30 In reviewing the administration and expenditure of the AIC agencies, the Committee considers whether the agencies are equipped with the resources necessary to meet Australia’s current and emerging national security challenges. These reviews also form a key component of the accountability framework that the agencies operate within, noting the highly sensitive nature of their business and operations.
- 2.31 In undertaking reviews of the proposed reforms to national security legislation introduced into the Parliament over the last year, a bipartisan approach was paramount to ensuring that the Committee provided valuable input into the proposed measures.

21 *Telecommunications (Interception and Access) Act 1979*, ss. 185D (3), (7) (as amended by the Data Retention Act).

22 *Telecommunications (Interception and Access) Act 1979*, ss. 185E (1), (3) (as amended by the Data Retention Act).

23 *Telecommunications (Interception and Access) Act 1979*, ss. 185D (4), (8) 185E (2), (4), (as amended by the Data Retention Act).

- 2.32 The enhanced transparency, oversight and review mechanisms that feature in the national security measures, based on the recommendations of the Committee, will help foster public confidence and ensure that the legislative reforms are effective in achieving their stated purpose, while incorporating appropriate safeguards.
- 2.33 The Committee considers that its additional oversight and review functions will play a vital role in ensuring that the reforms operate effectively and with appropriate levels of accountability. The Committee will report further on the exercise of its new functions in annual reports to follow.
- 2.34 Delays in obtaining security clearances can pose difficulties for staffing of the Committee Secretariat. The Committee thanks the intelligence agencies for their assistance with security clearances throughout the reporting period.
- 2.35 The Committee benefitted from the assistance of four technical advisors from the relevant government organisations, who provided specialist expertise to assist the Committee's inquiries into the foreign fighters and data retention legislation. The Committee thanks these officers for their valuable contribution to these inquiries.
- 2.36 Finally, the Committee thanks all stakeholders, including representatives of the intelligence agencies, the Attorney-General's Department and the Office of the Inspector-General of Intelligence and Security, who contributed to the Committee's work throughout the year. Committee members also extend their thanks to the Secretariat for their outstanding work during the year.

Mr Dan Tehan MP

Chair

September 2015