SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTEENTH REPORT

OF

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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

FOURTEENTH REPORT OF 2014

The committee presents its *Fourteenth Report of 2014* to the Senate.

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

Australian Education Amendment Bill 2014

Introduced into the House of Representatives on 25 September 2014
Portfolio: Education

Introduction

The committee dealt with this bill in *Alert Digest No. 13 of 2014*. The Minister responded to the committee's comments in a letter dated 20 October 2014. A copy of the letter is attached to this report.

Alert Digest No. 13 of 2014 - extract

Background

This bill seeks to amend the *Australian Education Act 2013* to:

- allow payment of additional funding in 2014 to schools with large numbers of Indigenous boarding students from remote areas;
- ensure transitional funding to students with disabilities and to other students in some independent special schools and special assistance schools; and
- corrects a number of errors and omissions in the Act.

Retrospective commencement
Schedule 2

The explanatory memorandum explains that the amendments in Schedule 2 will 'correct errors and omissions that have become apparent since the introduction of the Act' and will 'ensure significant errors in relation to the calculation of Commonwealth funding entitlements for certain approved authorities are corrected' (at p. 14). The items in this schedule will commence retrospectively, from 1 January 2014.

The explanatory memorandum (at p. 14) argues that retrospective commencement is 'necessary to ensure that the correct Commonwealth funding entitlements for 2014 are calculated for approved authorities for participating schools, including by ensuring that:

- the Commonwealth is only required to pay its share of the total public funding for approved authorities for participating schools that receive funding above the schooling resource standard

- the correct pro-rating of Commonwealth funding entitlements can be calculated for, as an example, approved authorities that have had one or more participating schools cease to provide primary or secondary education during 2014

- participating schools that move between approved authorities during 2014 are not financially advantaged or disadvantaged.'

The explanatory memorandum explains in detail the nature of the errors and omissions that the bill seeks to correct and the impact that the proposed changes will have on the complex funding arrangements under the *Australian Education Act 2013*. Although the proposed retrospectivity of the changes does not appear to produce unfairness, in light of the manifest complexity of the funding arrangements, **the committee seeks the Minister's advice as to whether the proposed amendments may produce unfair outcomes for approved authorities or participating schools, who may have reasonably relied on the existing provisions of the legislation.**

> *Pending the Minister'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.*

Minister's response - extract

I can assure the Committee the retrospective amendments to the *Australian Education Act 2013* (the Act), which are necessary to correct errors relating to the calculation of funding entitlements, will not produce unfair outcomes for approved authorities for schools. My department has undertaken a detailed process throughout 2014, in consultation with system authorities and independent schools, to produce estimates of 2014 funding entitlements on the basis of the intended operation of the Act and using the correct data for each element of the funding formulas. Consequently, the final 2014 funding entitlements that will be determined for each affected authority following passage of the Bill will be consistent with expectations.

Committee Response

The committee thanks the Minister for this response and for his direct assurance that the retrospective effect of the bill will not produce unfair outcomes for approved authorities for schools.

Alert Digest No. 13 of 2014 - extract

Delegation of legislative power
Schedule 1, item 19, proposed section 69A

This item will insert a new section into the Act, the purpose of which is to provide for the establishment of funding programs for schools by regulation under the Act. The explanatory memorandum notes (at p. 9) that the Government intends only to introduce one such program for 2014, the Indigenous Boarding Initiative. It is also noted that the regulations facilitating this program will be made before the end of 2014.

The explanatory memorandum also notes that parliamentary oversight of funding programs established under the proposed new section 69A will be facilitated, as various subsections of section 69A require the details of the program to be determined by the regulations. Nevertheless, there is no explanation as to why these additional funding requirements, including eligibility requirements, to be prescribed for the purposes of subsection 69A(1), are to be determined by regulations. As there is no justification as to why these significant issues cannot be dealt with in the primary legislation, **the committee seeks the Minister's further advice as to the justification for the proposed approach**.

> *Pending the Minister'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.*

Minister's response - extract

In relation to the delegation of legislative power under proposed section 69A (prescribed circumstances), the intent of this provision is for it to be used from time-to-time to support targeted programmes. It is appropriate and more efficient to manage this through regulation rather than to detail each programme in the Act itself.

Regulations for any such programme must exist before the minister can make payment determinations, and will detail matters related to funding amounts, use of funding and eligibility criteria. As each regulation is subject to scrutiny and disallowance the Parliament will retain overall control of the use of this provision. To support the Committee's understanding of the intended operation of regulations under section 69A an example of proposed regulations to underpin payments for the Government's Indigenous Boarding Initiative is attached. *[Note: this is reproduced along with the Minister's full response included at page 839 of this Report, below.]*

Committee Response

The committee thanks the Minister for this response, which includes an example of a draft regulation.

The committee notes that, in general, the fact that new policy initiatives may be more efficiently managed through regulations (rather than primary legislation) is not a sufficient reason for the delegation of legislative power. The committee prefers that Parliament set the policy framework, particularly in areas of potential policy controversy. In this instance, the committee is therefore concerned about the appropriateness of the delegation of legislative power as it does not contain any standards or guiding principles for the exercise of the power.

The committee draws this issue to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

The committee also draws this issue to the attention of the Regulations and Ordinances Committee for information.

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

Introduced into the Senate on 24 September 2014
Portfolio: Attorney-General

Introduction

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. The Attorney-General responded to the committee's comments in a letter dated 21 October 2014. The committee then sought further information and the Attorney-General responded in a letter received 27 October 2014. Copies of both letters are attached to this report.

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 [from further response]

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

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.*

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

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.

Attorney-General's response - extract

The amendment in items 5 to 7 of Schedule 1 of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill (the Bill) are intended to clarify the ability to share information obtained by AUSTRAC under section 49 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act).

Greater clarity will enhance current information sharing arrangements and allow AUSTRAC's partner agencies, particularly law enforcement and national security agencies to assess AUSTRAC information in light of their own information holdings.

Current regime

Section 49 of the AML/CTF Act provides that the AUSTRAC CEO and certain other listed officials[1] may issue a written notice requiring a reporting entity or any other person to give further information or to produce documents as specified in the notice regarding information a reporting entity has communicated to the AUSTRAC CEO under sections 41 (suspicious matter reports), 43 (reports of threshold transactions) and 45 (reports of international funds transfer instructions) of the AML/CTF Act.

Section 122 of the AML/CTF Act then restricts what a recipient of section 49 information (an entrusted investigating official) may do with that information. AUSTRAC entrusted investigating officials listed under paragraphs 122(1)(a) to (d) may only disclose information for the purposes of, or in connection with the performance of their duties under, the AML/CTF Act or the *Financial Transaction Reports Act 1988*, or for the purposes of the performance of the functions of the AUSTRAC CEO. These are the same exceptions to the prohibition on disclosure that apply to other AUSTRAC information in section 121.

Entrusted investigating officials from the other agencies able to receive information under section 49 are also restricted to disclosing such information for the purposes of, or in connection with, the performance of the duties of another official of the same agency or another entrusted investigating official (from a different agency).

[1] The Commissioner of the Australian Federal Police (or an investigating officer), the CEO of the Australian Crime Commission (or an investigating officer), the Commissioner of Taxation (or an investigating officer), the CEO of Customs (or an investigating officer) and the Integrity Commissioner.

The initial rationale for this secrecy regime was to minimise the risk that the person or entity that was the subject of a section 49 notice would become aware that they were of interest to an investigating agency, and to prevent investigations from being prejudiced by the disclosure of the fact that a section 49 notice was in existence.

However, Division 4 of Part 11 of the AML/CTF Act clearly allows 'designated agencies' (as defined in section 5 of the AML/CTF Act)[2] to access AUSTRAC info1mation, which includes all information obtained under the AML/CTF Act. Division 4 of Part 11 does not differentiate between section 49 information and other AUSTRAC information, except in the case of section 49 information about a suspicious matter report or a suspect transaction.[3]

Since the AML/CTF Act came into operation, there has been interpretative ambiguity around the operation of section 122 and its interaction with Division 4 of Part 11 of the AML/CTF Act. Cautious statutory interpretation has had the unintended consequence of hampering the sharing of information amongst AUSTRAC and its partner agencies for their intelligence and investigative purposes. Agencies, including AUSTRAC, have 'quarantined' information obtained under section 49 in order to ensure that it is only made available to entrusted investigating officials specified in section 122. Consequently, designated agencies have sought to clarify their ability to obtain section 49 information under Division 4 of Part 11.

Proposed amendments

The proposed amendments would clarify that information obtained by AUSTRAC under section 49 may be disseminated in the same way as other AUSTRAC information. The amendments effectively remove AUSTRAC from the requirements of section 122 and place section 49 information collected by AUSTRAC under the secrecy regime set out at section 121.

The requirements for agencies other than AUSTRAC to restrict the dissemination of section 49 information will remain unchanged.

Effect of the amendments

As part of whole-of-government measures to respond to the threat of terrorism, including threats posed by Australians involved in foreign conflicts, the amendments in items 5 to 7 of the Bill are intended to provide clarity and certainty around AUSTRAC's ability to disseminate any further information it obtains under section 49 with its partner intelligence and law enforcement agencies.

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2 'Designated agency' is use in Part 11 (Secrecy and Access) of the AML/CTF Act which deals with access to AUSTRAC Information. The definition at section 5 lists Federal, State and Territory agencies which have access to AUSTRAC Information under Part 11.

3 See subsections 128(4) and 128(9).

Committee Response

The committee thanks the Attorney-General for this response and **requests that the key information above be included in the explanatory memorandum.**

The committee notes that the effect of these proposed amendments would be to make it clear that AUSTRAC is permitted to disseminate further information obtained under section 49 of the AML/CTF Act (which includes information relating to 'suspicious matter reports', transfers of money or currency over a certain threshold, and certain international funds transfers) to all of its partner agencies. 'Designated agencies' for this purpose include, among others, the Department of Human Services, the Department of Immigration and Border Protection, and State and Territory police forces and corruption agencies. Currently the dissemination of such information is restricted to the Australian Federal Police, Australian Crime Commission, Commissioner of Taxation, Customs and the Integrity Commissioner.

The committee draws this matter to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

Broad discretionary power
Possible undue trespass on personal rights and liberties
Schedule 1, 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.*

Attorney-General's response - extract

The purpose of the suspension power is to provide a temporary preventative measure while further information is obtained to determine whether more permanent action should be taken (that is, the cancellation of a person's travel documents). The temporary suspension provision would be used in cases where the Australian Security Intelligence Organisation (ASIO) has high concerns related to the travel of the individual, but needs more time to further investigate and seek to resolve those concerns. Activities to support this, which take between days and weeks, may include seeking formal release of intelligence to include in the assessment. New intelligence can also put older reporting in a new context (positive or negative), meaning there is a requirement for ASIO to review and re-evaluate its holdings, which takes time. Further, in some cases it may be that an in-depth intelligence investigation may be required, involving a range of activity.

The fourth annual report of the Independent National Security Legislation Monitor (INSLM) noted that the suggested 7-day timeframe was somewhat arbitrary and should be the subject of further discussion. In most circumstances the INSLM's proposed timeframe of up to 7 days would not allow ASIO sufficient time to assess whether to make a cancellation request and would not allow the Minister for Foreign Affairs appropriate time to consider whether to cancel a person's travel documents. A period of 14 days seeks to strike the right balance between the rights of an individual to travel and the need to ensure Australia's national security.

In its report on the Bill, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) considered (at 2.515) that the 14-day timeframe appropriately balances the need to allow sufficient time for a full assessment to be made by ASIO with the impact on the individual.

Committee Response

The committee thanks the Attorney-General for this response and **requests that the key information above be included in the explanatory memorandum.**

The committee notes the Attorney-General's statement that the Independent National Security Legislation Monitor's (INSLM's) proposed timeframe of up to seven days 'would not allow ASIO sufficient time to assess whether to make a cancellation request and would not allow the Minister for Foreign Affairs appropriate time to consider whether to cancel a person's travel documents'.

The committee draws the INSLM's proposal and the Attorney-General's comments to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

Possible undue trespass on personal rights and liberties—level of penalty
Schedule 1, 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.*

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

Possible undue trespass on personal rights and liberties—procedural fairness
Schedule 1, 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.*

Attorney-General's response - extract

Proposed section 48A of the Passports Act does not affect a person's right to have a cancellation decision reviewed. Once a person is informed of the decision the person will be able to have the decision reviewed.

A person who is actively prevented from travelling at the border and has not previously been advised of the cancellation will be given a letter by border officials advising that their Australian passport/travel document is invalid and to contact the Australian Passport Information Service/Department of Foreign Affairs and Trade (DFAT). Border officials will also request the person surrender their passport. The letter provided at this time will include advice regarding the right to seek internal review of the decision to demand the surrender of the invalid passport/travel document. In these circumstances ASIO will then recommend to the Attorney-General that the certificate issued under section 38(2) of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) be revoked at it is no longer 'essential to the security of the nation' to withhold notice of the making of the assessment. Once the certificate is revoked, DFAT will write to the person advising of the cancellation decision and the reason(s) for the cancellation. DFAT will also advise the person of their review rights in relation to the cancellation decision and the adverse security assessment.

Committee Response

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

The committee notes the Attorney-General's clarification that 'proposed section 48A of the Passports Act will not affect a person's right to have a cancellation decision reviewed' and the steps that will be taken to inform a person of their review rights.

The committee requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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).

(continued)

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.

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

Possible undue trespass on personal rights and liberties—freedom of movement and privacy
Schedule 1, 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.*

Attorney-General's response - extract

As noted in the Explanatory Memorandum (EM) to the Bill (at pp. 85-86), the proposed amendment to the issuing criterion in paragraph 34D(4)(b) of the ASIO Act requires the Attorney-General to be satisfied that it is reasonable, in all of the circumstances, for a questioning warrant to be issued, having regard to other methods (if any) of collecting the relevant intelligence that are likely to be as effective in the circumstances. This replaces the existing 'last resort' styled requirement, which provides that the Attorney-General must be satisfied that reliance on other methods of collecting that intelligence would be ineffective. The proposed amendment would mean that the availability and relative effectiveness of other intelligence-collection methods is a relevant, but non-determinative, consideration in the Attorney-General's assessment of the reasonableness of issuing a questioning warrant in particular circumstances.

As further noted in the EM (at p. 86) the application of this issuing criterion is subject to numerous safeguards, including a requirement in paragraph 10.4(d) of the Attorney-General's Guidelines to ASIO (Guidelines), issued under section 8A of the ASIO Act, that ASIO must undertake its inquiries and investigations, wherever possible, using the least intrusive techniques of information collection before more intrusive techniques.

As the EM identifies, the application of all issuing criteria, including paragraph 34D(4)(b), must also be assessed in the broader context of the statutory framework within which Division 3 of Part III of the ASIO Act operates, and the accountability and oversight framework under which ASIO performs its functions and exercises its powers. This includes such matters as:

- the determination of questioning warrant applications by an independent issuing authority (a judge of a court created by the Parliament, who has been appointed, in a personal capacity, by the Attorney-General);

- the independent oversight of the Inspector-General of Intelligence and Security (IGIS), including general oversight under the *Inspector-General of Intelligence and Security Act 1986*, and specific oversight functions in relation to Division 3 of Part III of the ASIO Act; and

- the requirement that ASIO must follow the written statement of procedures issued under section 34C (Statement of Procedures) in the exercise of authority under questioning or questioning and detention warrants.

The Committee has, nonetheless, questioned whether the nature of the Guidelines (as a non-legislative instrument) or the Statement of Procedures (as a non-disallowable legislative instrument by reason of subsection 34C(5)) could create a risk that questioning warrants may be sought and issued in circumstances in which other less intrusive means

could reasonably have been used to collect intelligence relevant to a terrorism offence (at p. 10 of the Alert Digest).

This comment appears to relate to a concern that the requirements in the Guidelines and Statement of Procedures, including existing safeguards, are not subject to the same degree of Parliamentary control (in relation to both their making and amendment) as primary legislation or disallowable legislative instruments. As a means of removing a perceived risk that existing safeguards in the Guidelines and Statement of Procedures could be removed or lowered without the endorsement, or potentially scrutiny, of the Parliament, the Committee has sought my advice as to why relevant content in these documents should not be included in primary legislation, or in disallowable legislative instruments.

Potential for the issuing of questioning warrants in circumstances in which other, less intrusive means of intelligence collection are reasonably open

'Least intrusive' requirement in paragraph 10.4(d) of the Guidelines

As I have observed above, paragraph 10.4(d) of the Guidelines contains a requirement that ASIO must, wherever possible, use the least intrusive techniques of intelligence collection before using more intrusive techniques. By reason of subsection 8A(l) of the ASIO Act, ASIO is required to adhere to these Guidelines in the performance' of its functions and in the exercise of its powers, including in the making of decisions about whether to seek a questioning warrant. ASIO's adherence to the Guidelines is subject to the independent oversight of the IGIS, and could also be a relevant consideration for the Attorney-General in providing his or her consent to the making of an application for a questioning warrant, in determining whether or not the issuing of a questioning warrant would be reasonable in all of the circumstances under proposed paragraph 34D(4)(d).

Enduring nature of the Guidelines

I confirm that I have no intention to remove or otherwise limit the safeguard in paragraph 10.4(d) of the Guidelines, which has been present since they were issued in their present form in 2008, following a review initiated in 2007 by my predecessor, the Hon Philip Ruddock MP.

I further note that the importance of the procedural safeguards in the Guidelines, including those in part 10.4, was recently acknowledged by the PJCIS in its inquiry into the (then) National Security Legislation Amendment Bill (No 1) 2014 (now Act 128 of 2014). Consistent with a recommendation of the PJCIS in that inquiry, I have requested my Department and ASIO to undertake a review of the Guidelines to ensure that they continue to provide adequate operational guidance and safeguards in the contemporary environment, including as a result of the new powers conferred or amended by the 2014 Act.

Parliamentary and IGIS oversight of the Guidelines

Should a future Attorney-General be minded to consider removing or otherwise amending the requirement in paragraph 10.4(d), any such amended Guidelines would be subject to the requirements in subsections 8A(3) to (6) of the ASIO Act, which provide for appropriate Parliamentary and independent oversight.

This includes requirements in subsections 8A(3) and (4) that the Attorney-General must table the Guidelines in both Houses of Parliament within 15 sitting days (excluding any content that would be prejudicial to the security, defence or international affairs of the Commonwealth, or to individual privacy). The Attorney-General is further required, under subsection 8A(5), to make available to the Leader of the Opposition copies of any confidential Guidelines. The Attorney-General must also provide copies of all Guidelines to the IGIS under subsection 8A(6).

In practice, these requirements provide significant opportunities for the Parliament and IGIS to conduct oversight and scrutiny of the Guidelines, while managing the operational and security considerations that make it inappropriate for them to be incorporated in primary legislation, or to have the status of a legislative instrument. (Matters concerning the status of the Guidelines as a non-legislative instrument are addressed separately below.)

Safeguards inherent in the 'reasonableness' requirement in proposed paragraph 34D(4)(b)

In addition, consideration of the matters specified in paragraph 10.4(d) of the Guidelines is, in my view, substantially encompassed by the requirement in proposed paragraph 34D(4)(b) that the Attorney-General must be satisfied that the issuing of a questioning warrant is reasonable in all of the circumstances attending a particular case.

In assessing whether it is reasonable to issue a questioning warrant in the circumstances of a particular case, proposed paragraph 34D(4)(b) specifically requires the Attorney-General to have regard to whether any other equally or comparably effective means of collecting the relevant intelligence are available. The express identification of this matter as a relevant, but non-determinative, consideration to the assessment of reasonableness conveys an intention that it should be afforded particular weight in the balancing of all relevant considerations.

This is, in my view, consistent with paragraph 10.4(d) of the Guidelines, which does not oblige ASIO to exhaust or rule out categorically the least intrusive means of collecting intelligence relevant to security in all cases. Rather, the Guidelines require ASIO to utilise the least intrusive means wherever that is possible. This qualification is necessary to accommodate those cases in which there are strong operational considerations tending against the use of the least intrusive means of intelligence collection.

Such considerations can include an assessment of the effectiveness of the least intrusive technique relative to that of a more intrusive technique; the compatibility of each technique with the degree of urgency attaching to an operation; and the relative levels of risk associated with each technique, both in terms of the effective conduct of an operation and the safety of participants. The considerations that may be taken into account for the purpose of making an assessment under paragraph 10.4(d) of the Guidelines are, therefore, also capable of being taken into account in the assessment of the reasonableness of a questioning warrant under proposed paragraph 34D(4)(b), including discharging the requirement to have specific regard to the availability of other means of collecting the intelligence of the same or comparable effectiveness.

Consequently, even if proposed paragraph 34D(4)(b) were to be read in isolation from the requirements of paragraph 10.4(d) of the Guidelines, the proposed provision is not capable of supporting a conclusion that questioning warrants could be issued in a materially broader range of cases than would be possible if the provision were read in conjunction with paragraph 10.4(d) of the Guidelines. That is to say, the existence of other, equally effective and less intrusive intelligence collection methods is a consideration that tends against an assessment, under paragraph 34D(4)(b), that the issuing of a questioning warrant would be reasonable in all of the circumstances. It would be necessary to weigh this consideration against any other relevant considerations arising in the particular case to determine whether, on balance, the issuing of a questioning warrant satisfies the reasonableness requirement.

Such an exercise involves the same or substantially similar considerations to those involved in making an assessment under paragraph 10.4(d) of the Guidelines as to whether the least intrusive means of collecting intelligence is possible in the circumstances of the particular case. I therefore do not agree with the apparent premise of the Committee's concern, articulated at p. 10 of the Alert Digest, that the status of the Guidelines as a non-legislative instrument presents a risk of substantively weakening the safeguards applying to decision making under proposed paragraph 34D(4)(b).

Non-legislative nature of the Attorney-General's Guidelines to ASIO

History of section 8A

As the Committee has observed, the Guidelines are not a legislative instrument. It has been the longstanding position since the enactment of section 8A in 1986 that the Guidelines are of an administrative rather than a legislative character, in that they do not confer legal rights or impose legal obligations upon individuals, but rather provide guidance on the practical application of statutory requirements under the ASIO Act. The Guidelines are binding on ASIO in an administrative sense, in that their contravention represents breach of a lawful Ministerial direction, with the appropriate sanction being administrative accountability.

This is consistent with the recommendations of the Hope Royal Commission on Australia's Security and Intelligence Agencies in its 1984 *Report on ASIO*, which recommended the

enactment of section 8A, including a specific recommendation that the Guidelines should not be of a legislative character (pp. 321-322).

Justice Hope concluded that "there should be clear provision in the Act enabling the Attorney-General to lay down guidelines governing ASIO's activities in particular areas" (at p. 321). He expressed a view that the Guidelines are appropriately the province of the Attorney-General as the Minister responsible for ASIO, on the basis that "within the framework of the legislation, there will inevitably be areas of broad discretion and judgment where the setting by the responsible Minister from time-to-time of standards will be proper and appropriate ... the performance of that function would give substance to the notion of Ministerial control and responsibility and provide valuable guidance to ASIO" (at p. 321). Justice Hope specifically recommended that the Guidelines should be of an administrative character, in that they were not intended to confer legal rights or obligations, but rather provide practical guidance on the operation of the Act, with administrative accountability the sanction for breach (at p. 322).

In addition to the non-legislative character of the Guidelines for the purpose of subsections 5(1) and 5(2) of *the Legislative Instruments Act 2003*, the Government has no intention to invoke subsection 5(4) of that Act and transform the Guidelines into a legislative instrument by way of registration on the Federal Register of Legislative Instruments. The retention of the Guidelines as a non-legislative instrument is necessary to reflect their operational character for two main reasons, applying to the public nature of registered legislative instruments, and their exposure to Parliamentary disallowance.

Problematic issues arising from any registration of the Guidelines

The registration on the Federal Register of Legislative Instruments of all Guidelines issued under section 8A of the ASIO Act would disclose publicly sensitive operational details, including those pertaining to methodology. It is for this reason subsection 8A(4) provides that the Attorney-General is not required to table in Parliament those portions of the Guidelines that would prejudice security, defence or international affairs. A public registration requirement would hinder the ability of ASIO to collect intelligence in accordance with its statutory mandate. In particular, such information may enable entities of security concern, including hostile foreign intelligence organisations, to identify covert operations conducted by ASIO and engage in counter-intelligence measures. The compromise of covert activities in this way could also serve to erode the confidence of Australia's foreign intelligence partners, and may risk the safety of intelligence personnel supporting ASIO in the performance of its statutory functions. As the Guidelines apply to all of ASIO's activities in the performance of its functions, the adverse impacts of such disclosure would be extensive.

Inappropriateness of subjecting the Guidelines to Parliamentary disallowance

It would further be inappropriate to subject the Guidelines to Parliamentary disallowance (or to require Parliamentary approval of any amendments as would be the case if they were included in primary legislation). The operational practices and procedures of ASIO that are the subject of the Guidelines are internal functions that are properly a matter for the Attorney-General as the Minister responsible for ASIO and the Director-General of Security, under whose control the Organisation reposed by sections 8 and 20 of the ASIO Act. This reflects the fact that the determination of operational requirements necessitates a detailed awareness and understanding of the overall security environment in which ASIO operates, and the conduct of security intelligence operations.

Accordingly, since the enactment of section 8A in 1986, the Act has made provision for Parliamentary and IGIS oversight in other ways - namely, via the Parliamentary tabling and notification requirements in subsections 8A(3) to (6) as noted above. This reflects the recommendation of the Hope Royal Commission in its 1984 *Report on ASIO,* in which it was specifically recommended that the Guidelines should be tabled in Parliament except for security or other cogent reasons, in which case a copy should be made available to the Opposition Leader (at p. 322).

Comments on the Statement of Procedures

Purpose of the Statement of Procedures - execution of warrants rather than issuing decisions

The Committee has also referred to the Statement of Procedures issued under section 34C. The Statement of Procedures governs the execution of questioning and questioning and detention warrants, rather than the making of issuing decisions. The Statement of Procedures operates as a safeguard to ensure that Division 3 of Part III is reasonable and proportionate to the legitimate objective to which it is directed (being the collection of intelligence in relation to terrorism offences), and does not impose any greater limitations on individual rights or liberties than is reasonably necessary to achieve that legitimate objective.

While the Statement of Procedures is relevant to an overall assessment of the proportionality of the warrants regime established under Division 3 of Part III, it does not provide operational guidance on the application of the statutory issuing criteria, as this function is performed by the Guidelines. Accordingly, I do not agree with the assessment at p. 10 of the Alert Digest that any perceived 'legal infirmity' in the Statement of Procedures (by reason of its non-disallowable nature) could increase any perceived risk in relation to the circumstances in which questioning warrants may be issued pursuant to proposed paragraph 34D(4)(d).

Non-disallowable nature of the Statement of Procedures: subsection 34C(5)

In any case, it is appropriate that the Statement of Procedures is not subject to Parliamentary disallowance, given its inherently operational character. As the Explanatory Memorandum to the ASIO Legislation Amendment Bill 2006 (Act of 2006) indicates, the Statement of Procedures was deemed to be a legislative instrument in subsection 34C(5) to ensure its public visibility, and for the purpose of promoting compliance with Australia's international human rights obligations (particularly with respect to the prohibition on acts of torture and cruel, inhuman and degrading treatment or punishment).

The non-disallowable character of the Statement of Procedures was explained in the following terms at p. 3 of the EM:

> *The Protocol will be a legislative instrument that is exempted from disallowance that would ordinarily apply under section 42 of the Legislative Instruments Act 2003. This is because the instrument has been developed as a policy document giving effect to Parliament's intent for the basic standards applicable when a person is questioned, or questioned and detained, under a warrant issued under Division 3.*

This approach was found acceptable to the Parliament in 2006. The Senate Standing Committee for the Scrutiny of Bills, as constituted in 2006, noted the relevant clause in the (then) Bill in its Alert Digest No 4 of 2006, and made no comment in relation to it (pp. 9-10).

Committee Response

The committee thanks the Attorney-General for this response and **requests that the key information above be included in the explanatory memorandum**.

The committee notes the Attorney-General's detailed explanation as to rationale for the current status of the Attorney-General's Guidelines and the Statement of Procedures.

The committee also notes the advice that the application of the requirements of paragraph 10.4(d) of the Guidelines (i.e. the requirement that ASIO must, wherever possible, use the least intrusive techniques of intelligence collection before using more intrusive techniques) 'involves the same or substantially similar considerations to those involved in making an assessment' under proposed paragraph 34D(4)(b) and that the Statement of Procedures 'does not provide guidance on the application of statutory issuing criteria'. For this reason, the committee questions whether the relevant Guideline or the Statement of Procedures can be considered to assuage concerns about the proposal to lower the existing threshold requirements for the issue of a questioning warrant.

(continued)

The committee draws this provision to the attention of Senators because, as noted above, as it lowers the existing threshold requirements for the issue of a questioning warrant. Currently questioning warrants are only available if the Attorney-General is satisfied that they are the sole means of collecting intelligence, however, under the proposed amendment 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. Thus, the existence of other, less intrusive methods of obtaining intelligence will be a relevant but non-determinative consideration in the issuing of questioning warrants under the revised provision.

The committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

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.*

Attorney-General's response - extract

As the Committee has observed, the offence in proposed subsection 34L(10) is based on the physical element of a person's inability to produce the relevant thing or record requested under a warrant, as a result of his or her conduct. The standard fault element of recklessness applies to this element by reason of section 5.6 of the *Criminal Code 1995* (Criminal Code).

The proposed offence has deliberately been drafted on the basis of a physical element of a result of conduct, in preference to a physical element of a person's conduct with a specific 'ulterior intent' to prevent the production of the thing or record requested under the warrant. Further to the justification for this approach provided at pp. 86-87 of the Explanatory Memorandum, I provide the following remarks in response to the four issues raised by the Committee at p. 11 of the Alert Digest.

Issue 1 - proposed maximum penalty-five years' imprisonment

The Committee has identified the proposed maximum penalty of five years' imprisonment as a basis for its concern that the offence does not include a physical element of conduct in relation to a thing or a record, with an element of 'ulterior intent' that the person meant to prevent production of the thing or record in accordance with the warrant.

The maximum penalty of five years is appropriate and proportionate to the wrongdoing inherent in the offence, which is to deter and penalise appropriately persons who are individually placed on notice – by the personal service of a questioning warrant upon them – of a legal obligation to produce particular documents and records. Coercive question under warrants issued under Division 3 of Part 3 is designed to substantially assist in the collection of important intelligence in relation to a terrorism offence. Such intelligence can be vital to prevent significant loss of life and limb, or major disruption of social and economic activities if a terrorist act was carried out. Any reduction of maximum penalty would significantly reduce the denunciatory and deterrent effect of the provisions in relation to such persons. This is not acceptable given the grave circumstances in which Division 3 of Part III is intended to operate.

A lesser penalty would also be inconsistent with the maximum penalties of five years' imprisonment which apply to other offences in Division 3 of Part III, including offences in section 34L for failure to appear before a prescribed authority in accordance with a warrant; failure to provide any information requested in the course of questioning in accordance with a warrant; failure to produce any record or thing requested under the warrant; and the making of a statement that is false or misleading in a material particular in the course of questioning in accordance with a warrant. A uniform penalty structure in section 34L is considered appropriate, having regard to the common denunciatory and deterrent objective sought to be achieved by all of these offences as outlined in my remarks above.

In addition, I note that a maximum penalty of five years' imprisonment also applies in relation to persons who are reckless as to a circumstance in two offences in Division 3 of Part III of the ASIO Act. Sections 34X and 34Z create offence for persons who are, respectively, the subject of a warrant request, or who are specified in a warrant, and who leave Australia without the written permission of the Director-General of Security. The person must be reckless as to the circumstance that he or she has been notified of the warrant request or the issuing of warrant, and the circumstance that he or she does not have written permission to leave. The prosecution is not required to prove a person's specific intent to frustrate the operation of a warrant in leaving Australia.

It is also important to recognise that the penalty applying to proposed subsection 34L(10) is a maximum. It is for sentencing courts to determine the appropriate penalties to apply in individual cases, in accordance with ordinary principles of sentencing. A figure of five years' imprisonment is considered an appropriate maximum to provide sentencing courts with adequate discretion to impose a penalty that reflects the gravity of wrongdoing at both

the lower and upper ends of the spectrum in respect of persons who are convicted of offences against subsection 34L(10).

Issue 3 - divergence from section 39 of the Crimes Act 1914

The Committee has further identified the offence in section 39 of the *Crimes Act 1914* (Crimes Act) as a basis for its concern in relation to the elements of proposed subsection 34L(10).

As acknowledged in the Explanatory Memorandum, the offence in proposed subsection 34L(10) intentionally diverges from the offence in section 39 of the Crimes Act in respect of persons who intentionally destroy materials with the intention of preventing their use in evidence in federal judicial proceedings.

The offence in the Crimes Act relevantly requires the prosecution to prove that the person:

- specifically intended to destroy a book, document or thing; or render that book, document or thing illegible, undecipherable or incapable of identification; and

- engaged in the above conduct with the intention of preventing the book, document or thing from being produced in judicial proceedings.

Neither of these elements is appropriate for inclusion in proposed subsection 34L(10) because the circumstances to which the proposed offence applies are materially different to those targeted by the offence in section 39 of the Crimes Act in two respects.

First, the offence in section 39 of the Crimes Act applies to any person who knows that the relevant materials are, or may be, required to be produced in evidence in a judicial proceeding. That is to say, the offence could apply to the world at large. Such persons need not be parties to the proceeding, nor specifically advised by the court (such as by way of service of a subpoena) as to the status of the documents. Given this broad application, it may be considered appropriate to require the prosecution to prove a person's specific intention in relation to both the particular conduct (such as specifically proving intent to destroy or render illegible) and the ulterior intent to prevent use of the thing in judicial proceedings.

In contrast, the offence in proposed subsection 34L(10) is limited to persons who are personally served with a questioning warrant (the service and execution of which are not disclosed publicly), and are therefore expressly, and individually, informed of their obligation to produce particular things or records itemised in the warrant, and that criminal penalties apply for failing to do so. The Government considers this to be adequate notification to justify holding the person to a high standard of conduct in relation to his or her dealings with those records or things, to ensure that they are able to be produced in accordance with a warrant. (In particular, the person is obliged to refrain from engaging in conduct that he or she is aware will carry a substantial risk of resulting in non-production,

where it would be unjustifiable in the circumstances to take that risk by engaging in the relevant conduct.)

Secondly, the offence in section 39 of the Crimes Act can apply to judicial proceedings in relation to matters of any kind, including those in which there will be no demonstrable harm to vital national interests, such as those in national security, as a result of a person's conduct that leads to the relevant materials being unable to be produced in those proceedings. In contrast, the proposed offence in subsection 34L(10) is specifically limited to circumstances of critical importance to national security, including time critical circumstances in which intelligence is sought to be collected to prevent the commission of a terrorist act, which may otherwise result in significant loss of life, injury and major community disruption.

The potentially grave consequences of preventing the collection of intelligence in relation to a terrorism offence provide, in my view, an appropriate policy justification on which to hold persons who are subject to production obligations under a questioning warrant to a high standard of conduct in relation to the relevant things or records. (That is, it is appropriate to impose upon such persons a legal obligation not to engage in conduct in relation to the thing or record specified in the warrant, being reckless as to whether that conduct would result in the person being unable to produce the thing or record in accordance with the questioning warrant.)

There is precedent for an offence with similar elements in section 6K of the *Royal Commissions Act 1902.* The offence in section 6K applies to persons who know that, or are reckless as to whether, production of a record is or may be required by a commission as constituted under that Act; who intentionally engage in conduct; and who are reckless as to whether that conduct will result in the concealment, mutilation, destruction, rendering incapable of identification, or rendering illegible or indecipherable a document or thing.

The Explanatory Memorandum to the relevant amending legislation, the Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Bill 2001 (Act of 2001), indicated that the amendments were designed to modernise and remove inappropriate fault elements in the offence provision. Prior to 2001, the offence provision applied the fault element of ‘wilfulness’ (broadly equivalent to the standard fault element of intention under the Criminal Code) to all of these elements. The 2001 amendments updated both the physical and fault elements to reflect those used in the Criminal Code and, in doing so, updated the physical elements to include non-production as a result of conduct (with the result that the fault element of recklessness applies by reason of section 5.6 of the Criminal Code).

This structure was found acceptable to the Parliament in passing the relevant Bill in 2001. The Senate Standing Committee for the Scrutiny of Bills, as constituted in 2001, did not make any comment on the relevant offence provision in section 6K of the Royal Commissions Act in its review of the amending legislation. (Alert Digest No 4 of 2001 at pp. 19-20, and Report No 6 of 2001 at pp. 227-229.)

Issue 2 - arbitrary distinction between fault elements of intention and recklessness; and Issue 4 - recommendation of the INSLM

The Committee has sought further explanation of the statement at p. 87 of the Explanatory Memorandum that:

> *It would be counter-productive to require the prosecution to specifically prove that the person intended to destroy or otherwise inte1fere 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.*

In particular, the Committee has commented that the above explanation "states that the distinction between intentional and reckless conduct is, in this context, 'arbitrary' but does not elaborate on the reasons for this conclusion". In addition, the Committee has expressed concern about the structure of the proposed offence, on the basis that it does not accord precisely with the relevant recommendation of the INSLM, which suggested the enactment of an offence in respect of persons who destroy or tamper with a record or thing, intending to prevent that record or thing from being produced under a wan-ant, or to prevent the record or thing from being produced in legible form. The following remarks address these issues collectively, as the explanation accompanying the second issue is the basis for the approach taken to implementing the relevant recommendation of the INSLM as mentioned in the Committee's fourth identified issue.

The Explanatory Memorandum notes that replicating the structure of section 39 of the Crimes Act in proposed subsection 34L(10) would result in an arbitrary distinction between culpable and non-culpable conduct. As noted above, the adoption of an offence structure in the nature of that in section 39 of the Crimes Act would require the prosecution to specifically prove the following physical and attendant fault elements in relation to a person who is the subject of a questioning wan-ant, which requires him or her to produce a thing or record:

- *Conduct* - the person intentionally engaged in the destruction of a thing or record specified in a wan-ant, or in the rendering of a thing or record unusable or illegible.
- *Ulterior intent* - the person engaged in the conduct intending to prevent the production of the record or thing in accordance with the warrant.

This means that a person who is issued with a questioning warrant requiring the production of a thing or record would not be subject to any criminal liability if he or she:

- was aware of a substantial risk that engaging in certain conduct would result in his or her inability to produce (or produce in legible or useable form) the relevant thing or record specified in the warrant;

- nonetheless, and unjustifiably in the circumstances, took the risk of engaging in the relevant conduct; and
- the relevant conduct, in fact, resulted in his or her inability to produce (or produce in legible or useable form) the relevant thing or record specified in the warrant, contrary to his or her legal obligation to do so as a result of the issuing of the warrant.

In both scenarios, ASIO would be unable to collect potentially vital intelligence, in circumstances in which it has been adjudged that such intelligence is needed in relation to terrorism-related activity, and in circumstances in which the person has expressly been placed on notice as to his or her legal obligation to produce by reason of the issuing and service upon him or her of a questioning warrant. However, if the first offence structure was adopted, a penalty could only be imposed – and the denunciatory and deterrence-related objectives of the offence realised – if the prosecution can prove, beyond reasonable doubt, a person's specific intention in relation to both:

- the specific form of conduct (for example, proof of intentional destruction or rendering illegible, to the exclusion of an intentional attempt at some other form of modification that went awry); and
- in relation to the ulterior intent (for example, proof that a person specifically meant to prevent production entirely, to the exclusion of an intention to cause inconvenience by late production or threatened non-production, or that a person had no intention at all.)

Consistent with my comments above, the Government is of the view that the culpable conduct inherent in the proposed offence in section 34L(10) is found in a person's engagement in conduct in breach of an obligation imposed under a questioning warrant, to which he or she has been alerted by the issuing of the warrant, while aware of a substantial risk that his or her conduct would result in non-production.

Committee Response

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

The committee requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

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.*

Attorney-General's response - extract

It is appropriate and necessary that the proposed offence in subsection 34L(10) should apply to conduct occurring on or after the commencement of the proposed offence provision, including in respect of questioning warrants that are issued before the commencement of the offence provision.

Appropriateness of the application provision in amending item 31

As to the issue of appropriateness, I consider remote the risk that "there will arguably be unfairness" if a person who is the subject of a questioning warrant issued before the commencement of subsection 34L(10) is made subject to the offence in that provision if he or she engages in conduct on or after the commencement of that offence provision. Consistent with my remarks above and the justification at p. 88 of the Explanatory Memorandum, the issuing of the warrant (and any appearance before a prescribed authority for questioning) mean that a person is placed on notice of his or her legal obligation to produce the relevant thing or record, and that criminal penalties apply for failure to comply with that obligation.

It is, in my view, sufficient that a person is placed on notice of the fact that he or she may be criminally liable for failing to comply with his or her obligation to produce the relevant thing or document. I do not consider it material that a person is not expressly warned that he or she may be subject to criminal liability as a result of failure to comply with his or her production obligations in the specific circumstances contemplated by proposed subsection 34L(10), which are effectively a variant or targeted extension of the offence in subsection 34L(6) for persons who fail to comply with a production obligation under a warrant.

That is, I do not consider that there would be a manifestly unfair result if a person was simply placed on notice that criminal penalties apply to persons who fail to comply with production obligations under a warrant, unless the person was also specifically placed on notice about potential criminal liability that might arise if the person is aware of a substantial risk that his or her conduct in relation to a thing or a record will result in its non-production, but nonetheless and unjustifiably in the circumstances engages in conduct that results in its nonproduction.

In addition, it would be possible to make arrangements for persons who are issued with questioning warrants before the commencement of proposed subsection 34L(10) to be made aware of this offence, in those cases in which the relevant warrant will, or is likely to be, in effect on or after the commencement date for the proposed new offence. This could include by ensuring that the imminent commencement of subsection 34L(l0) and the application provision is brought to the attention of a prescribed authority before whom the person is appearing. The prescribed authority could then note the application of subsection

34L(10) when explaining the warrant to the person, including the effect of subsection 34L, in accordance with the requirement in section 34J.

Necessity of the application provision in amending item 31

As to the issue of necessity, I acknowledge that the 28-day maximum duration of a questioning warrant means that the application provision in relation to subsection 34L(10) will be of effect – in relation to questioning warrants issued before the commencement of subsection 34L(10) – for a very limited period after the offence provision commences. This point is also acknowledged at p. 88 of the Explanatory Memorandum.

The offences in section 34L are all directed to ensuring that ASIO can collect vital intelligence in relation to a terrorism offence in respect of which a questioning warrant is issued, by creating strong incentives for persons who are subject to these warrants to comply with their obligations under them. As was documented extensively in the extrinsic materials to the originating legislation enacting Division 3 of Part III in 2002, amending it in 2003 and renewing it in 2006, the scheme is designed to ensure ASIO's ability to collect intelligence to assist in the prevention of terrorist acts that could have catastrophic effects on life, limb, property and social order, and in circumstances in which threats of such action could arise at short notice or without any notice. The offences in section 34 are therefore of considerable importance in achieving the legitimate objective served by Division 3 of Part III.

As such, ensuring their ability to operate effectively at all times - including by ensuring that there are no unintended gaps in their coverage - is of considerable importance. The introduction of proposed subsection 34L(10) was prompted by a recommendation of the INSLM, which was made to address a risk that there may be an unintended gap in the coverage of the existing offence of failure to produce things or records specified in a warrant, under subsection 34L(6), in relation to persons who destroy or tamper with the relevant things or records. It is therefore important that subsection 34L(10) takes effect to address this potential gap as soon as possible.

Committee Response

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

The committee requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

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.

Attorney-General's response - extract

During consultation on the Bill, it was proposed that the existing provisions that sunset the relevant regimes would be removed in light of the enduring terrorist threat and the important role these regimes play in mitigating and responding to that threat. However, during consultation with states and territories, the Government received a clear message that sunsetting of these regimes should be extended rather than repealed. Extending rather than repealing the sunset provisions would allow future governments to reassess the security environment and dete1mine whether the powers are still reasonably necessary, appropriate and adapted to combatting the terrorist threat.

Crimes Act Powers

The powers in relation to terrorist acts and terrorism offences in Division 3A of Part IAA of the Crimes Act have been used sparingly since they were enacted in December 2005. The Government has decided, in light of the enduring terrorist threat, that it is appropriate to continue their operation for a further ten years, to ensure that the agencies can respond effectively to ensure that the agencies can respond effectively to the increased terrorism threat level.

Preventative Detention Orders

Despite having been in operation for almost nine years, only one preventative detention order has been made to date. This demonstrates both the extraordinary nature of the regime and the approach of Australia's police service to utilise the other law enforcement tools available to them, relying on preventative detention only when absolutely necessary.

Given the Government has decided to make a range of enhancements to the preventative detention order regime in this Bill, providing the opportunity for both relevant Committees and the community to consider the regime now, it is considered appropriate to extend the sunset provision now, rather than developing a separate bill in 2015. Further review mechanisms are provided by the INSLM's ongoing review role in relation to each of the powers.

The decision to propose an additional period of 10 years is the result of consultation with States and Territories, and reflects the anticipation that the terrorist threat is an enduring one.

ASIO Act Powers

As indicated at p. 89 of the Explanatory Memorandum, the Government is of the view that there are realistic and credible circumstances in which coercive questioning of a person may be necessary for the purpose of collecting important intelligence about a terrorism offence.

This view is based on advice from intelligence agencies about the overall terrorism threat assessment, as well as specific threats. The Government accepts agencies' advice that, for the foreseeable future, there are threats of possible terrorist attacks in Australia, and that some people in Australia might be inclined or induced to participate in such activity. As the (then) Parliamentary Committee on ASIS, ASIO and DSD (now the PJCIS) concluded in its 2005 review of Division 3 of Part III, which recommended the renewal of the scheme for a further period, the existence of the regime has proven useful on the limited occasions on which it has been utilised. (This has comprised the issuing of questioning warrants on 16 occasions).

I note that the PJCIS report on the Bill has recommended a reduction in the proposed sunset period for these powers as well as the establishment of review by the INSLM and PJCIS. The Government is currently considering these recommendations

Committee Response

The committee thanks the Attorney-General for this response and **requests that the key information above be included in the explanatory memorandum**.

The committee notes, with approval, the decision of the government (following consultation with the States and Territories) to extend, rather than repeal, these sunset provisions. As the Attorney-General notes the sunset provisions will 'allow future governments to reassess the security environment and determine whether the powers are still reasonably necessary, appropriate and adapted to combatting the terrorist threat'.

The committee also concurs with the views expressed by (and recommendations of) the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (recommendation 13, pp 77–79). In particular, the committee agrees that:

(a) given the nature of these powers, it is important that their use and ongoing need is assessed within a reasonable timeframe (noting that this is particularly relevant given that this bill proposes to alter the grounds on which some of these powers could be used);

(b) a sunset date 24 months after the next federal election would balance the need for agencies to have access to each of these powers in response to the current and emerging threat environment and ongoing justification for the existence of these powers;

(continued)

(c) it is essential that the Parliament has sufficient time to consider whether these powers need to be further amended, repealed, extended or made permanent prior to the powers being due to sunset (and that this should be done through a thorough public review of each power by the PJCIS to be completed 18 months after the next federal election); and

(d) that the use of each of these powers be subject to ongoing scrutiny (including by way of a review by the Independent National Security Legislation Monitor of the operation of the powers to be completed 12 months after the next federal election).

The committee draws these provisions (and the PJCIS recommendations) to the attention of Senators and leaves the question of whether the proposed approach to the sunsetting of these significant powers is appropriate to the Senate as a whole.

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

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.

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

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.

Attorney-General's response - extract

The expansion of the definition of terrorism offence in the Crimes Act implements a recommendation of the INSLM. The amendment will apply to terrorism offences committed before and after the commencement of the Bill.

The Explanatory Memorandum to the Bill highlights the regimes to which the definition applies. The Government considers it appropriate that individuals who engage in the very serious conduct that is contrary to Australia's international Counter-Terrorism obligations regarding terrorism funding activity or conduct contrary to the *Crimes (Foreign Incursions and Recruitment) Act 1978* should face the same consequences as an individual who commits a terrorism offence contrary to the Criminal Code.

The application provision will not, however, have 'retrospective' effect in the sense that a person who has been convicted and sentenced for an offence that was not a terrorism offence at the time of sentencing will not be subject to re-sentencing and the imposition of a longer non-parole period. However, it is appropriate that a person who has committed such an offence before the commencement of the amendments and is convicted and sentenced after their commencement should be subject to the possibility of a longer parole period. Similarly, it is appropriate for the Australian Federal Police (AFP) to use the new delayed notification search warrant powers after the commencement of the amendments to collect evidence in relation to an offence committed before commencement.

Committee Response

The committee thanks the Attorney-General for this response.

The committee draws this provision to the attention of Senators, requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

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.

Attorney-General's response - extract

Lowering the threshold is appropriate for terrorism related offences due to the extraordinary risk posed to the Australian community by acts of terrorism, and the time critical nature that a response to such acts is needed.

Under the existing threshold, police must have sufficient evidence that a person has committed an offence before they can arrest them. In situations where police have to act in response to a real and immediate threat of serious harm, they may not hold that level of evidential material at the time they need to act. Lowering the threshold of arrest for terrorism matters will enable police to intervene earlier in terrorism investigations where appropriate. This is particularly important from a prevention perspective given that terrorist attacks can be planned and executed rapidly. It will not always be appropriate or in the public's interest to delay action until sufficient evidence has been obtained to meet the threshold of reasonable belief. Lowering the threshold is appropriate for terrorism related offences due to the extraordinary risk posed to the Australian community by acts of terrorism, and the time critical nature that a response to such acts is needed.

The INSLM acknowledged the operational utility of the reform as well founded, sensible and of some practical utility.

Committee Response

The committee thanks the Attorney-General for this response.

The committee draws this provision to the attention of Senators, requests that the key information above be included in the explanatory memorandum and leaves the question of whether lowering the threshold for arrest without a warrant (for terrorism related offences) is appropriate to the Senate as a whole.

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

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.*

Attorney-General's response - extract

Schedule 1, item 50, provides that in a notice issued under section 3ZQN a day may be specified by which a person is required to produce documents. This prescribed timeframe will be appropriate to the circumstances and will not unduly impact on personal rights and liberties.

To exercise the power under section 3ZQN, an authorised AFP officer must consider on *reasonable grounds* that the person has relevant documents in their possession. Section 3ZQP *Crimes Act 1900* sets out the matters to which a notice issued under section 3ZQN must relate. Section 3ZQN notices are primarily issued to financial institutions and utility companies, as the matters listed in section 3ZQN relate to financial and utility account details. Section 3ZQP also refers to travel activities and residential requirements. These requests are rarely progressed under s 3ZQN as they can be obtained under other provisions or directly from Government agencies.

If a person holds a relevant account with an institution the information about that person's account-related activities would ordinarily be available to these institutions. It is therefore expected that these institutions would have the practical capacity to produce this information within a reasonable time period. Information requested under a section 3ZQN notice is ordinarily internally generated by institutions.

Requests for information under section 3ZQN are made where documents are relevant to and will assist with a serious terrorism offence. Commonly, this will involve circumstances where it is believed that a person has been involved in financing or otherwise supporting terrorist activities. In circumstances where the commission of a terrorist act is imminent but the precise timeframe is unknown, it might be necessary in the circumstances to request information within a shorter timeframe. This information may indicate whether the person has the financial capacity to carry out the attack.

This item amends section 3ZQN(3)(e) so that it is similar to subsection 214(1)(e) of the *Proceeds of Crime Act 2002* (POCA) which relates to notices to produce financial information in relation to proceedings or actions under POCA. Under section 214(1)(e) an earlier time period, being no earlier than 3 days after giving the notice, may be prescribed if considered appropriate in the circumstances.

The decisions of an APP officer to request documents would be subject to internal review as well as internal and external accountability regimes such as the APP Values and Code of conduct; statutory based internal professional standards and independent oversight by the Ombudsman and the Australian Commission for Law Enforcement Integrity.

Committee Response

The committee thanks the Attorney-General for this response.

The committee draws this provision (and the apparent difference between the Independent National Security Legislation Monitor's recommendation and the provision as drafted in the bill) 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 the proposed approach is appropriate to the Senate as a whole.

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

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.

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

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 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.*

Attorney-General's response - extract

There is strong precedent in Commonwealth legislation for extending eligibility to act as an issuing officer for instruments relating to covert police powers to members of the AAT. AAT members are already eligible to act as issuing officers for the purposes of surveillance device (SD) warrants, telecommunications interception warrants, stored communication warrants, and for extending controlled operation authorisations. These examples provide a useful model for framing the delayed notification search warrant (DNSW) scheme. There are also strong operational reasons for including AAT members within the categories of eligible issuing officers for DNSWs. The APP has advised that limiting the persons who could issue DNSW s to judicial officers would reduce the number of eligible issuing officers and could result in difficulties in obtaining DNSW s, particularly in urgent operational contexts, or where operations are being conducted in remote areas. The APP advises that AAT members have consistently proven to be available out-of-hours to deal with the operational needs of the APP. The APP has further advised that in many cases, they would seek to install a SD at the same premises for which a DNSW is sought arid it would therefore be administratively convenient and less resource intensive to approach the AAT for both warrants, rather than approach the AAT for the SD warrant and a separate judicial officer for the DNSW.

I note the PJCIS report on the Bill recommends amending the Bill to remove the ability of 'members' or 'part-time senior members' of the AAT to be eligible issuing officers for DNSWs. The Government is considering this recommendation.

Committee Response

The committee thanks the Attorney-General for this response and **requests that the key information above be included in the explanatory memorandum**.

As noted above, the committee's consistent preference is that the power to issue warrants to enter and search premises only be conferred upon judicial officers. The committee generally does not regard factors such as 'administrative convenience' as being sufficient justification for conferring such power on non-judicial officers. The committee does, however, note the potential operational benefits of allowing AAT members to issue warrants as outlined by the Attorney-General.

On balance, the committee concurs with recommendation 1 of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* that it would be appropriate 'to remove the ability of "members" or "part-time senior members" of the Administrative Appeals Tribunal to be eligible issuing officers for a delayed notification search warrant' (p. 24).

The committee draws this provision (and the PJCIS recommendation) to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

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.*

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

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.*

Attorney-General's response - extract

I note recommendation 3 of the PJCIS report on the Bill, which would provide the following exemptions to the offence provision:

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

The Government is considering this recommendation.

Committee Response

The committee thanks the Attorney-General for this response.

The committee notes that implementing recommendation 3 of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (p. 28) would answer the committee's concerns in relation to the disclosure of misconduct associated with delayed notification search warrants.

The committee therefore draws this provision (and the PJCIS recommendation) to the attention of Senators and makes no further comment at this stage.

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

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.*

Attorney-General's response - extract

The defendant bears the evidential burden of proof if they seek to rely on one of the exceptions set out in subsection 3ZZHA(2). This is consistent with Commonwealth criminal law policy and with subsection 13.3(3) of the Criminal Code, which provides that a defendant who wishes to rely on an exception bears an evidential burden in relation to that matter. It is appropriate that where a matter is peculiarly within the knowledge of the defendant, and it would be significantly more difficult for the prosecution to disprove that matter than for the defendant to establish it, the defendant should be required to adduce evidence on that matter. The defendant is responsible for adducing, or pointing to, evidence that suggests a reasonable possibility that the exception is made out. The prosecution must then refute the exception beyond reasonable doubt.

Committee Response

The committee thanks the Attorney-General for this response.

The committee notes that the response does not specifically address how any of the exceptions set out in proposed subsection 3ZZHA(2) are matters peculiarly within the knowledge of the defendant or how they would be significantly more difficult for the prosecution to disprove. **The committee notes that the explanatory memorandum to the bill would be improved by providing some detail in this regard.**

The committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

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.

Attorney-General's response - extract

It is necessary and appropriate for the Commissioner to be able to delegate powers under Part IAAA to appropriate senior AFP staff members.

Many powers, functions or duties vested in the AFP Commissioner can, by necessity, be delegated to a range of subordinate officers. This includes the Commissioner's responsibilities under the *Surveillance Devices Act 2004* (section 63) and parts of the Crimes Act (such as section 3ZW). The delegation in proposed subsection 3ZZIA(1) is consistent with these covert schemes. This section will allow the AFP Commissioner to delegate all or any of his/her powers, functions or duties under Part IAAA to a Deputy Commissioner of the AFP or a senior executive AFP employee who is an AFP member and authorised in writing by the Commissioner. This provision will allow the Commissioner to delegate the power to the person most appropriately placed to handle the return of the item. This is necessary due to the large amounts of seized material that police officers deal with. It will also enable the Commissioner to delegate other powers under Part IAAA, such as the power to authorise an eligible officer to apply for a delayed notification search warrant (section 3ZZBB) or the power to seek an extension for the time for giving warrant premise occupier's notice or adjoining occupier's notice (section 3ZZDC); This ability to delegate is required to ensure that seeking a delayed notification search warrant and/or seeking an extension of the notice period is not delayed or frustrated where the AFP Commissioner is unavailable. The list of delegated officials is limited appropriately to senior staff members within the AFP to ensure that there is sufficient accountability for decisions made under delegated powers.

Committee Response

The committee thanks the Attorney-General for this response.

In order to clarify the scope of this delegation power, the committee requests that the key information above be included in the explanatory memorandum. The committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

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.*

Attorney-General's response - extract

Terrorist acts and foreign incursion offences generally require a person to have three things: the capability to act, the motivation to act, and the imprimatur to act (eg endorsement from a person with authority). The new advocating terrorism offence is directed at those who supply the motivation and imprimatur. This is particularly the case where the person advocating terrorism holds significant influence over other people who sympathise with, and are prepared to fight for, the terrorist cause.

Where the AFP has sufficient evidence, the existing offences of incitement (section 11.4 of the Criminal Code) or the urging violence offences (in Division 80 of the Criminal Code) would be pursued. However, these offences require the AFP to *prove* that the person intended the crime or violence to be committed. There will not always be sufficient evidence to meet the threshold of intention. This is because persons advocating terrorism can be very sophisticated about the precise language they use, even though their overall message still has the impact of encouraging others to engage in terrorist acts.

In the current threat environment, returning foreign fighters, and the use of social media, is accelerating the speed at which persons can become radicalised and prepare to carry out terrorist acts. It is no longer the case that explicit statements (which would provide evidence to meet the threshold of intention) are required to inspire others to take potentially devastating action in Australia or overseas. The cumulative effect of more generalised statements when made by a person in a position of influence and authority can still have the impact of directly encouraging others to go overseas and fight or commit terrorist acts domestically. This effect is compounded with the circulation of graphic violent imagery (such as beheading videos) in the same online forums as the statements are being made. The AFP therefore require tools (such as the new advocating terrorism offence) to intervene earlier in the radicalisation process to prevent and disrupt further engagement in terrorist activity.

The terms ‘promote’ and ‘encourage’ are not defined in the Bill and will be defined according to their ordinary meaning. The purpose of the offence is to criminalise and deter acts other than direct incitement to commit terrorist activity. Including the terms will ensure that the offence is interpreted by the courts to sufficiently capture activity which increases the threat of terrorism.

Committee Response

The committee thanks the Attorney-General for this response and **requests that the key information above be included in the explanatory memorandum**.

(continued)

The committee notes that recommendations 5 and 6 of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* address similar issues raised by this committee in relation to definition of 'advocates' (pp 41–42). While the committee acknowledges that it may be appropriate for the AFP to have tools 'to intervene earlier in the radicalisation process to prevent and disrupt further engagement in terrorist activity', the committee concurs with the recommendation of the PJCIS that, on balance, it would also be appropriate to further clarify the meaning of the terms 'encourage', 'advocacy' and 'promotion' by amendment to either the bill or the explanatory memorandum. As the PCJIS noted 'further clarity on the terms "encourage" and "promote" would assist people in prospectively knowing the scope of their potential criminal liability'.

The committee draws this provision (and the PJCIS recommendations) to the attention of Senators and makes no further comment at this stage.

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

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.*

Attorney-General's response - extract

The very nature of the terrorist threat to public safety requires a response which is proactive and prevention focused. The ability of the AFP to move swiftly in this prevention role is particularly important given that terrorist attacks can be planned and executed rapidly. It will not always be appropriate for police to delay traditional criminal justice action (ie arrest) until sufficient evidence has been obtained to meet relevant threshold tests. There is a need for special preventative powers (including control orders) to operate alongside traditional criminal justice processes in order to effectively respond to and manage terrorist threats.

Operational agencies anticipate that control orders will be a key element in reducing the risk posed by foreign fighters who return to Australia further radicalised by their experiences, overseas. In this context control orders will allow police to act preventively where they have a reasonable suspicion that a person has been involved in hostile activity overseas or was involved in training with a terrorist organisation. In circumstances where evidence that would enable prosecutions for relevant offences would be difficult or impossible to obtain, control orders allow police to mitigate a suspected threat without having to wait for successful terrorist activity.

The threat of terrorism is unlikely to diminish in the foreseeable future and there is no indication that the current threat environment will dramatically reduce such that control order powers will not have a place in this preventative role.

During consultation on the Bill, it was proposed that the existing provisions that would sunset the control order regime would be removed in light of the enduring terrorist threat, the new threat posed by Australians fighting overseas and returning to Australia, and the important role these regimes play in mitigating and responding to those threats. However, during community consultation, the Government received the clear message that sunsetting of the control order regime should be extended rather than repealed. Extending rather than repealing the sunset provision would allow future governments to reassess the security environment and determine whether the powers are still reasonably necessary, appropriate and adapted to combatting the terrorist threat.

Despite having been in operation for almost nine years, only two control orders have been requested or made to ·date. This demonstrates both the extraordinary nature of the regime and the approach of Australia's police service to utilise traditional law enforcement tools where appropriate, relying on control orders only when absolutely necessary.

Given the Government has decided to make a range of enhancements to the control order regime in this Bill, providing the opportunity for Parliamentary Committees and the community to consider the regime now, it is considered appropriate to extend the sunset provision now, rather than developing a separate bill in 2015.

Each parliament has the ability to review the need for the control order provisions as with every other statutory provision. The sunset period does not affect this ability, but merely provide a timeframe in which future Parliaments must tum their minds to the powers. Further review mechanisms are provided by the INSLM's ongoing review role in relation to the powers.

Committee Response

The committee thanks the Attorney-General for this response and **requests that the key information above be included in the explanatory memorandum**.

The committee notes, with approval, the decision of the government to extend, rather than repeal, the provision which 'sunsets' the control order regime. As the Attorney-General notes the sunset provision will 'allow future governments to reassess the security environment and determine whether the powers are still reasonably necessary, appropriate and adapted to combatting the terrorist threat'.

(continued)

The committee also concurs with the views expressed by (and recommendations of) the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, (recommendation 13, pp 77–79). In particular, the committee agrees that:

(a) given the nature of these powers, it is important that their use and ongoing need is assessed within a reasonable timeframe (noting that this is particularly relevant given that this bill proposes to alter the grounds on which some of these powers could be used);

(b) a sunset date 24 months after the next federal election would balance the need for agencies to have access to each of these powers in response to the current and emerging threat environment and ongoing justification for the existence of these powers;

(c) it is essential that the Parliament has sufficient time to consider whether these powers need to be further amended, repealed, extended or made permanent prior to the powers being due to sunset (and that this should be done through a thorough public review of each power by the PJCIS to be completed 18 months after the next federal election); and

(d) that the use of each of these powers be subject to ongoing scrutiny (including by way of a review by the Independent National Security Legislation Monitor of the operation of the powers to be completed 12 months after the next federal election).

The committee draws this provision (and the PJCIS recommendations) to the attention of Senators and leaves the question of whether the proposed approach to the sunsetting of the control order regime is appropriate to the Senate as a whole.

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

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.

Attorney-General's response - extract

Reducing the threshold for seeking the Attorney-General's consent to request an interim control order brings the threshold for that ground in line with the threshold for the other existing and proposed new grounds.

The change follows a recommendation of the Council of Australian Governments (COAG) that there should be uniformity between the statutory pre-conditions (para 229). COAG initially recommended 'considers' for both, but 'suspects' has been adopted.

While technically this lowers the threshold for the applicant to seek consent, it does not change the threshold of which the court needs to be satisfied prior to making an interim order.

The issuing court must still be satisfied on the balance of probabilities when making an interim control order that the order would substantially assist in preventing a terrorist act.

Committee Response

The committee thanks the Attorney-General for this response and notes that the proposed amendment does not change the threshold of which the court needs to be satisfied prior to making an interim control order.

The committee requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

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.*

Attorney-General's response - extract

Regardless of the ground on which the AFP member requesting the control order is relying, it is always necessary for the issuing court to be satisfied that imposing the obligations, prohibitions and restrictions sought to be imposed on the person is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.

The amendments tailor the regime to:

- address the issue of the risk posed by returning foreign fighters, and
- respond to the recommendation of the INSLM to extend the regime to those convicted of terrorism offences.

These enhancements will better enable the AFP to mitigate the threat posed by individuals who have engaged in hostile activities overseas, developed capabilities or otherwise demonstrated their commitment to a terrorist cause. It will also be available against those convicted of terrorism offences and who may re-engage with terrorism.

For example, persons who have not merely participated in training with a terrorist organisation, but actually engaged in hostile activities in a foreign country, have demonstrated both the ability and propensity to engage in conduct akin to terrorist acts. A person who has been convicted of a terrorism offence in Australia or overseas has similarly demonstrated both the ability and propensity to engage in terrorism.

Committee Response

The committee thanks the Attorney-General for this response and **requests that the key information above be included in the explanatory memorandum**.

The committee draws these provisions to the attention of Senators and, in particular, the committee highlights the fact that the proposed amendment in item 73 will expand the criteria available for the making an interim control order. The committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

Possible undue trespass on personal rights and liberties—evidential burden of proof
Schedule 1, item 110, proposed subsection 119.1(4) of the *Criminal Code*

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.*

Attorney-General's response - extract

The offences in section 119.1 prohibit individuals with a strong connection to Australia (eg, citizen) entering a foreign country and intentionally engaging in a hostile activity or with the intention of engaging in such an activity. There is a defence where the conduct is undertaken 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).

It is appropriate for the defendant to be required to point to evidence that suggests a reasonable possibility that the person's conduct comes within a declaration. This is because the person is better placed to provide that preliminary evidence. For example, the prosecution is unlikely to hold information about the particular person's dual citizenship or the fact that the person's service with the specific foreign armed forces comes within a particular declaration. Once the person has provided preliminary information suggesting they were serving pursuant to a declaration, the prosecution would need to disprove that evidence beyond reasonable doubt.

There are many other examples in the law where a person is required to point to evidence that may or could not be held or accessible by the prosecution. For the current proposal, the prosecution always has the persuasive burden of proof. But it is appropriate to require a preliminary level of evidence to be provided by the person concerned in circumstances where that person has the best evidence available about the purposes of their travel.

Committee Response

The committee thanks the Attorney-General for this response.

The committee requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

Possible undue trespass on personal rights and liberties—broad scope of offence
Schedule 1, item 110, proposed section 119.2 of the *Criminal Code*

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 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 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.*

Attorney-General's response - extract

The offence requires the prosecution to prove beyond reasonable doubt, not only that the person 'intentionally' entered or remained in an area, but that the person was aware of a substantial risk that the area was declared and intentionally entered or remained despite that.

The application of intention to the conduct (entering or remaining) ensures a person who inadvertently travels to a declared area – for example in a bus on route to another location – or who is injured and unable to leave a declared area does not commit the offence. Furthermore, the application of recklessness to the fact that the area is a declared area means a person who is, for example, in a remote area without access to communications and with no reasonable way of knowing the area has become a declared area, does not commit the offence.

I draw to the Committee's attention the supplementary submission provided by my department to the PJCIS inquiry into the Bill. In particular, paragraphs 44-67 of the supplementary submission addresses the operation of the declared area offence. The PJCIS report on the Bill made a number of recommendations about the declared area offence which the government is considering. Relevantly, the PJCIS stated:

2.382 The areas targeted by the 'declared area' provisions are extremely dangerous locations in which terrorist organisations are actively engaging in hostile activities. The Committee notes the declared area provisions are designed to act as a deterrent to prevent people from travelling to declared areas. The Committee considers it is a legitimate policy intent for the Government to do this and to require persons who choose to travel to such places despite the warnings to provide evidence of a legitimate purpose for their travel. This is particularly the case given the risk individuals returning to Australia who have fought for or been involved with terrorist organisations present to the community. Additionally, there is a high cost to taxpayers in providing assistance to any persons who become trapped in a dangerous situation in a declared area.

Committee Response

The Committee thanks the Attorney-General for this response and **requests that the key information above be included in the explanatory memorandum**.

The committee notes recommendations 18–21 of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (pp 107–109) relating to the 'declared area' offence. In particular, the committee agrees that it would be appropriate:

(a) for proposed paragraph 119.3(2)(b), which explicitly enables the Minister to declare an entire country for the purposes of prohibiting persons from entering, or remaining, in that country, to be removed from the bill;

(b) for the PJCIS to conduct a review of the declaration of each area made under proposed section 119.3, within the disallowance period for each declaration;

(c) that the proposed offence for entering, or remaining in, a declared area, sunset two years after the next federal election;

(d) that the PJCIS complete a public inquiry into the 'declared area' provisions (to be completed 18 months after the next federal election); and

(e) that the Independent National Security Legislation Monitor review and report on the operation of the 'declared area' provisions (by 12 months after the next federal election).

The committee draws this provision, the recommendations of the PJCIS, and the explanation of the 'declared area' offence in paragraphs 44–67 of the Attorney-General's Department supplementary submission to the PJCIS inquiry to the attention of Senators. The committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

Possible undue trespass on personal rights and liberties—evidential burden of proof
Schedule 1, item 110, proposed subsection 119.2(3) of the *Criminal Code*

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.

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

Delegation of legislative power
Broad discretionary power
Schedule 1, item 110, proposed subsection 119.3(1) of the *Criminal Code*

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.

Attorney-General's response - extract

The Bill limits the circumstances in which an area can be declared for the purposes of section 119.2 to where one or more listed terrorist organisations are engaged in hostile activities in a foreign country. AGD is working with other relevant agencies to develop a protocol that sets out the steps and processes for making a declaration. The process for listing terrorist organisation under Division 102 of the Criminal Code is being used as the starting point for the development of that protocol.

A declaration made for the purposes of section 119.2 will be a disallowable instrument.

Committee Response

The committee thanks the Attorney-General for this response and notes that the Attorney-General's Department 'is working with other relevant agencies to develop a protocol that sets out the steps and processes for making a declaration'. The committee also notes that a declaration made for the purposes of section 119.2 will be a disallowable instrument.

The committee draws this provision to the attention of Senators and in particular the fact that, while a protocol is to be developed within government in relation to the declaration of an area for the purposes of the 'declared area' offence in section 119.2, there will be little guidance in the legislation itself in relation to how the Minister is to exercise this power. Noting this, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

The committee also draws this matter to the attention of the Regulations and Ordinances Committee for information.

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

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.*

Attorney-General's response - extract

Recommendation 29 of the PJCIS report on the Bill raises similar issues. The Government is favourably considering implementation of that recommendation which would clarify the types of considerations the Attorney-General could have regard to when deciding whether to issue a security notice.

Committee Response

The committee thanks the Attorney-General for this response.

The committee notes recommendation 29 of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (p. 153). In particular, the committee notes that the proposed amendments (in relation to section 57GJ of the *A New Tax System (Family Assistance) Act 1999*, section 278C of the *Paid Parental Leave Act 2010* and section 38N of the *Social Security Act 1991*) would address the committee's concerns by ensuring that the decision of whether to issue a security notice, and subsequent cancellation of welfare payments, is subject to a connection with an assessed security risk. The committee also welcomes the recommendation that consideration of 'the likely effect of the cancellation of welfare payments on any dependents' should also be required.

(continued)

The committee draws this provision (and the PJCIS recommendation) to the attention of Senators and makes no further comment at this stage.

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's 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.**

In relation to the second point on the provision of reasons for a decision pursuant to the *Administrative Decisions (Judicial Review) Act 1977*, 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 1977*. 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—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.

Attorney-General's response - extract

The expanded and new detention powers, including the new definition of 'serious Commonwealth offence,' are part of the targeted response to the threat posed by foreign fighters. The extension of the detention power, which is only a temporary power, is aimed at the Australian Customs and Border Protection Service facilitating other law enforcement agencies to exercise their powers to address national security threats. The current power may limit this facilitation across the full range of offences that are relevant to addressing national security threats. The new definition of 'serious Commonwealth offence' will, for example, allow officers of Customs to detain a person in respect of an offence under the *Australian Passports Act 2005* of using a passport that was not issued to the person.

The enhanced detention powers will also assist law enforcement agencies more generally in relation to the detection and investigation of serious Commonwealth offences.

I note recommendation 31 of the PJCIS report on the Bill relates to this proposal. The Government is considering this recommendation.

Committee Response

The committee thanks the Attorney-General for this response.

The committee notes recommendation 31 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 definition of 'serious Commonwealth offence' for the purposes of the *Customs Act 1901* be removed from the bill (p. 165). In light of the statement that the government is considering this recommendation, **the committee draws this provision (and the PJCIS recommendation) to the attention of Senators and makes no further comment at this stage.**

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

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.*

Attorney-General's response - extract

In exercising these powers, the current thresholds limit detention to where an officer of Customs can detain a person if the officer has reasonable grounds to suspect that the person has committing or is committing a serious Commonwealth offence. This limitation may result in situations where despite information received from partner agencies or the behaviour or documentation presented by the passenger, detention may not be possible. This power does not allow detention where there is the potential to commit and serious Commonwealth offence, which in the context of current terrorist threats, may limit the ability to effectively deal with such threats. Recognising that the detention power is only a temporary power and is designed to facilitate other law enforcement agencies dealing with

such threats, this is why the operation of section 219ZJB is proposed to be amended to include where an officer has reasonable grounds to suspect that a person is intending to commit a serious Commonwealth offence.

I note recommendation 32 of the PJCIS report on the Bill relates to this proposal. The Government is considering this recommendation.

Committee Response

The committee thanks the Attorney-General for this response.

The committee notes that the government is considering recommendation 32 of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (p. 166). However that recommendation only goes to the allowable period of detention without the officer notifying another person. It does not consider the grounds upon which the detention is based.

The committee therefore draws this provision to the attention of Senators and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

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.*

Attorney-General's response - extract

It is not considered that the extension proposed from 45 minutes to 4 hours constitutes an unreasonable restriction on correspondence with the detainee's family. This increase of time is only in respect of Commonwealth offences which carry imprisonment of twelve months or greater as penalty. It is a temporary period which has been proposed because the current limit of 45 minutes does not provide Customs officers with sufficient time and opportunity to undertake enquiries once a person is detained. It is considered that the 4 hour time period is a more appropriate period for this purpose, particularly given the extended circumstances in which an officer may refuse to notify a family member or other person under amended subsection 219ZJB(7).

I note recommendation 32 of the PJCIS report on the Bill relates to this proposal. The Government is considering this recommendation.

Committee Response

The committee thanks the Attorney-General for this response.

The committee notes recommendation 32 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 allowable period of detention by a Customs officer without notification to a family member or other person be extended from 45 minutes to two hours, rather than four hours as proposed in the bill (p. 166). In light of the statement that the government is considering this recommendation, **the committee draws this provision (and the PJCIS recommendation) to the attention of Senators and makes no further comment at this stage.**

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

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.*

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

Review rights—reasons
Schedule 3, item 12, subsection 219ZFJ(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.*

Attorney-General's response - extract

It is not considered appropriate that a person be given reasons for detention under section 219ZJCA for the following reason. The grounds upon which the relevant suspicion is based may rely on information from a range of sources which may include highly classified material. If a person was entitled to be given the reasons for their detention, this may require the disclosure to the person of this highly classified material which could compromise the activities of other agencies.

Committee Response

The committee thanks the Attorney-General for this response.

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 question of whether the proposed approach is appropriate to the Senate as a whole.

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:

- 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.**

Attorney-General's response - extract

Proposed section 134B provides for mandatory cancellation of a visa held by a person who is outside Australia if ASIO provide an assessment for the purposes of section 134B which contains advice that ASIO suspects that the person might be, directly or indirectly, a risk to security (within the meaning of section 4 of the ASIO Act), and which recommends that all visas held by the person be cancelled under section 134B. The role of the Minister or delegate in this situation is limited to confirming that the assessment by ASIO satisfies the formal requirements of section 134B. This is an objective question. As such, the exclusion of the rule against bias, if that is a consequence of the exclusion of "the rules of natural justice" in proposed section 134A, does not adversely affect the non-citizen. There is no scope for the Minister or delegate to act in a way which would give effect to bias.

In relation to discretionary cancellation under proposed section 134F, please see our answer below in relation to that section.

Committee Response

The committee thanks the Attorney-General for this response.

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 question of whether the proposed approach is appropriate to the Senate as a whole.

- 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 be based on 'reasonable grounds') is not provided for in the bill as currently drafted.**

Attorney-General's response - extract

It is implicit in ASIO's capacity to issue security assessments under the ASIO Act that any suspicion it holds will be based on reasonable grounds and ASIO will apply this standard when preparing a security assessment for the purposes of the emergency visa cancellation provisions. In situations where a requirement for reasonable grounds does not appear on the face of legislation, it will readily be inferred by the courts. Proposed section 134B is not the source of ASIO's power to issue the security assessment. The source of the power is Part IV of the ASIO Act. In setting out a statutory formula which must be included in the assessment to trigger visa cancellation under the *Migration Act 1958* (Migration Act), proposed section 134B does not thereby authorise ASIO to issue an assessment in cases where the relevant suspicion is not based on reasonable grounds.

Committee Response

The committee thanks the Attorney-General for this response.

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 leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

- 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 Attorney-General's 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.**

- 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.

Attorney-General's response - extract

Section 338 which deals with decisions reviewable by the Migration Review Tribunal (MRT), states at subsection 338(3) that a decision to cancel a visa held by a non-citizen who is in the migration zone at the time of the cancellation is an MRT-reviewable decision unless the decision:

a) is covered by subsection 338(4); or

b) is made at a time when the non-citizen was in immigration clearance; or

c) was made under subsection 134(1), (3A) or (4) or section 501.

In effect this means that a decision to cancel a visa under proposed section 134F of a person who holds a visa only because the relevant person held a visa that was cancelled under section 134B (and the Minister decided not to revoke the cancellation under subsection 134C(3), and the Minister has given notice to the relevant person under section 134E), that this decision would be an MRT-reviewable decision, provided the person was in the migration zone and not in immigration clearance at the time the decision was made.

In circumstances where the visa holder is not in Australia at the time of the decision, then they could not be said to be in the migration zone, and the decision would not be an MRT-reviewable decision in accordance with subsection 338(3) of the Migration Act. The decision would, however, be judicially reviewable.

In relation to Protection visa holders, section 411 similarly sets out which decisions are reviewable by the Refugee Review Tribunal (RRT). Subsection 411(1) allows that a decision to cancel a Protection visa (other than a decision that was made relying on paragraph 36(2C)(a) or (b)) is an RRT-reviewable decision. Subsection 411(2) clarifies that where the non-citizen is not physically present in the migration zone when the decision is made, then the decision is not an RRT-reviewable decision. This means that a decision to cancel a Protection visa under section 134F is an RRT-reviewable decision, provided the noncitizen is physically in the migration zone (including in immigration clearance) at the time the decision was made. In circumstances where the visa holder is not in Australia at the time of the decision, then they could not be said to be physically present in the migration zone, and the decision would not be an RRT-reviewable decision in accordance with subsection 411(1) of the Migration Act. The decision would, however, be judicially reviewable.

The position as outlined above reflects the policy settings for merits review of visa· cancellation decisions which have been in place for over 20 years, since the commencement of the *Migration Reform Act 1992*, which commenced on 1 September 1994.

Committee Response

The committee thanks the Attorney-General for this response.

The committee draws the matter to the attention of Senators, requests that the key information above be included in the explanatory memorandum and leaves the question of whether the proposed approach is appropriate to the Senate as a whole.

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

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.*

Attorney-General's response - extract

The authority to prescribe other personal identifiers in the regulations ensures it is possible to respond to new and emerging risks flexibly and within a short timeframe if required.

Prior to amending the regulations to prescribe other personal identifier/s, extensive consultation would be undertaken with relevant Commonwealth Government Departments, including the Department of Foreign Affairs and Trade and the Attorney-General's Department, and with the Privacy Commissioner. In addition, a full Privacy Impact Assessment would be undertaken in relation to any proposal.

Regulations are subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances and may be subject to disallowance.

I note recommendation 35 of the PJCIS report on the Bill relates to this proposal. The Government is considering this recommendation.

Committee Response

The committee thanks the Attorney-General for this response.

The committee notes recommendation 35 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 bill 'be amended to remove the ability to prescribe the collection of additional categories of biometric information within the Migration Regulations' (p. 184). In light of the statement that the government is considering this recommendation, **the committee draws this provision (and the PJCIS recommendation) to the attention of Senators and makes no further comment at this stage.**

Fair Entitlements Guarantee Amendment Bill 2014

Introduced into the House of Representatives on 4 September 2014
Portfolio: Employment

Introduction

The committee dealt with this bill in *Alert Digest No. 12 of 2014*. The Minister responded to the committee's comments in a letter dated 8 October 2014. A copy of the letter is attached to this report.

Alert Digest No. 12 of 2014 - extract

Background

This bill seeks to amend the *Fair Entitlements Guarantee Act 2012* (the Act) to align the maximum redundancy pay entitlement under the Fair Entitlements Guarantee scheme with the maximum set by the National Employment Standards contained in the *Fair Work Act 2009*.

The bill also makes a number of technical amendments to clarify the operation of the Act.

Standing Appropriation
Schedule 1, item 13, proposed section 51

Proposed section 51 provides for payments to be made from the Consolidated Revenue Fund for the purposes of payments under section 50 of the Act. Section 50 provides for the establishment of a scheme for the assistance of workers who were not employees, and for payment of certain legal costs incurred by the department in relation to an application to the Administrative Appeals Tribunal.

The committee is not questioning the ability for payments to be made, only whether the use of a standing appropriation is an appropriate mechanism. In scrutinising standing appropriations, the committee looks to the explanatory memorandum for an explanation of the reason for the proposed approach. In addition, the committee considers whether the bill:

- places a limitation on the amount of funds that may be so appropriated; and
- includes a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to Parliament.

In this instance the explanatory memorandum simply repeats the effect of the provision and does not provide an explanation. **The committee therefore seeks the Minister's advice as to the justification for including a standing appropriation in the bill.**

> *Pending the Minister's advice, the committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.*

Minister's response - extract

The Committee has noted that the proposed section 51 of the Fair Entitlements Guarantee Bill 2014 provides for payments from the Consolidated Revenue Fund for the purposes of payments under section 50 of the *Fair Entitlements Guarantee Act 2012.* The Committee also noted that in deciding the appropriateness of such appropriations it considers whether there is a limitation on the amount of funds that may be appropriated and whether there is sunset clause that ensures the appropriation cannot continue indefinitely without further reference to Parliament. I note that the Committee raised a similar issue in respect of the Fair Entitlements Guarantee Bill 2012.

The Act currently provides for the Consolidated Revenue Fund to be appropriated for the purpose of making payments under the Act and section 50. Section 50 of the Act provides for the establishment of a scheme of assistance for workers who are not employees. While the Fair Entitlements Guarantee Bill 2014 repeals the current section 51 of the Act and inserts a new provision, the only effective change is to enable the Consolidated Revenue Fund to also be appropriated for legal costs incurred by the department in relation to applications made to the Administrative Appeals Tribunal or an appeal to a court in respect of such an application.

It is appropriate to use a standing appropriation in cases where there is a legal entitlement established which is paid to people on the basis of specific criteria. This is the case for payments made under the Fair Entitlements Guarantee, including where those payments are made in accordance with a regulation made under section 50. Such payments arc determined on the basis of the strict framework set out in the legislation for assessment of an individual's entitlement for payment.

Historically it has not been possible to predict precise costs that will be incurred under the Fair Entitlements Guarantee each year. Demand for assistance under the scheme in any given year is impacted by a wide range of factors. These include the number of insolvencies that occur in that year, the number of claims for assistance resulting from those insolvencies and each claimant's individual entitlements (based on the employment conditions and length of service of those claimants).

The integrity of the scheme would be compromised if assessment decisions were influenced or limited by the availability of funding in the appropriation.

I also note that demand for the scheme has increased from 8,626 claimants being paid $72.97 million in 2006-07 to 16,019 claimants being paid $261.65 million in 2012-13. This is an increase of 259 per cent.

I note that only one scheme has been approved under section 50 since the Act commenced on 5 December 2012, covering contract outworkers in the clothing, textile and footwear industry. This scheme took effect on 15 May 2013 and to date, no claims have been made under that scheme. The Regulation establishing this scheme was tabled before Parliament and subject to the usual disallowance arrangement. Any new scheme which is sought to be established under section 50 of the Act will similarly be via a regulation and subject to disallowance by Parliament.

I hope this information assists the Committee.

Committee Response

The committee thanks the Minister for this detailed response.

The committee notes that the key information relating to the justification for the use of the standing appropriation would be useful in the explanatory memorandum and requests that it be included.

Marine Safety (Domestic Commercial Vessel) National Law Amendment Bill 2014

Introduced into the House of Representatives on 16 July 2014
Portfolio: Infrastructure and Regional Development

Introduction

The committee dealt with this bill in *Alert Digest No. 10 of 2014*. The Minister responded to the committee's comments in a letter dated 1 October 2014. A copy of the letter is attached to this report.

Alert Digest No. 10 of 2014 - extract

Background

This bill amends the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* to:

- ensure the National Marine Safety Regulator is able to exercise discretion when considering the suspension, revocation and variation of vessel certificates;
- clarify one of the National Regulator's functions as the function of surveying vessels;
- allow for the sub-delegation of powers to accommodate the range of organisational arrangements within each jurisdiction; and
- consistently and correctly use legislative referencing, correct minor grammatical errors of the Act and clarify review rights within the Act.

The bill also provides minor amendments to ensure the definition of 'defence vessel' aligns with the *Navigation Act 2012*, which also deals with marine safety.

Delegation of legislative power—sub-delegation
Schedule 1, item 4, subsection 11(3)

Current subsection 11(3) of the Marine Safety (Domestic Commercial Vessel) National Law allows a delegate of the National Regulator to sub-delegate any of their powers or functions to another officer or employee of *the agency of which the delegate is an officer or employee*. The bill proposes to amend subsection 11(3) to broaden the sub-delegation power of a delegate who is an employee of a State or the Northern Territory to enable them

to sub-delegate their powers or functions to an officer or employee of *any agency of their State or Territory*.

The committee commented on the original version of this provision in its *Alert Digest No. 6 of 2012* (pp 47–48). The committee draws Senators' attention to its comments on the question of accountability arrangements in relation to decisions made by delegates who are officers of a State or Territory in that Digest.

The explanatory memorandum states in relation to the revised item that it is necessary to broaden the sub-delegation power in this provision to include employees or officers of any agency of a delegate's State or Territory 'to ensure the appropriate National Regulator functions can be delegated to any officer regardless of the various organisational structures within their jurisdictions' (p. 4). It is also noted that sub-delegations are subject to subsections 11(2) and 11(5), which provide the National Regulator with the authority to establish conditions relating to how the sub-delegate is to exercise their functions and delegated powers.

In light of the above explanation, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.

> *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.*

Minister's response - extract

Delegation of legislative power–sub-delegation
Schedule 1, item 4, subsection 11(3)

The amendment to sub-section 11(3) will ensure that the delegation arrangements can accommodate the variety of organisational structures within the States and Northern Territory. The effect of the amendment is to enable a delegate of the National Regulator to sub-delegate any of their powers or functions to any appropriate officer or employee of an agency of their State or Northern Territory.

These amendments make clearer the originally-intended flexibility for officers and employees in the jurisdictions to be sub-delegated powers of the National Regulator. This flexibility was intended to arise out of the inclusive rather than exhaustive definition of 'agency' in section 6 of Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (the Act).

The delegation arrangements in the Act also include safe-guards to ensure the consistent and accountable use of delegated powers. For example:

1. The instrument of delegation provides for:
    a. the criteria for appointment for sub-delegates;
    b. directions for the exercise of specified delegated and sub-delegated powers of the National Regulator; and,
    c. general directions of the exercise of the delegated and sub-delegated powers and functions.
2. The Australian Maritime Safety Authority (AMSA) stores information on delegates and sub-delegates on an internal database. The database contains information about the National Regulator functions being exercised by the delegates and sub-delegates. The database is updated and maintained on a regular basis. This ensures AMSA has appropriate visibility of the National Regulator delegations and sub-delegations in each jurisdiction.
3. The National Regulator can only delegate a power or function if the jurisdiction agrees to the delegation. This ensures that jurisdictions will only exercise delegated powers which they have the requisite experience and expertise to exercise.
4. The Act includes strong review rights in relation to the exercise of delegated and sub-delegated powers. Sub-section 34AB(l)(c) of the *Acts Interpretation Act 1901* clarifies decisions made by the delegates and sub-delegates of the National Regulator are decisions of the National Regulator and are therefore subject to applicable Commonwealth judicial and merits review rights. Section 139 of the Act sets out the decisions which are reviewable under the Act. Section 140 establishes an internal review process by the National Regulator. Section 141 allows for applications to be made to the Administrative Appeals Tribunal following the internal review of a reviewable decision. Additionally, the exercise of powers delegated under the Act would be reviewable under the *Administrative Decisions (Judicial Review) Act 1977.*

Committee Response

The committee thanks the Minister for taking the opportunity to provide this detailed additional information.

The committee notes that the key information relating to the justification for these delegation arrangements would be useful in the explanatory memorandum and requests that it be included.

Senator Helen Polley
Chair

THE HON CHRISTOPHER PYNE MP
MINISTER FOR EDUCATION
LEADER OF THE HOUSE
MEMBER FOR STURT

Our Ref MC14-010696

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

20 OCT 2014

Dear Senator Helen,

I refer to the letter of 2 October 2014 from the Acting Committee Secretary for the Senate Standing Committee for the Scrutiny of Bills (the Committee) requesting additional information regarding the Australian Education Amendment Bill 2014 (the Bill).

I can assure the Committee the retrospective amendments to the *Australian Education Act 2013* (the Act), which are necessary to correct errors relating to the calculation of funding entitlements, will not produce unfair outcomes for approved authorities for schools. My department has undertaken a detailed process throughout 2014, in consultation with system authorities and independent schools, to produce estimates of 2014 funding entitlements on the basis of the intended operation of the Act and using the correct data for each element of the funding formulas. Consequently, the final 2014 funding entitlements that will be determined for each affected authority following passage of the Bill will be consistent with expectations.

In relation to the delegation of legislative power under proposed section 69A (prescribed circumstances), the intent of this provision is for it to be used from time-to-time to support targeted programmes. It is appropriate and more efficient to manage this through regulation rather than to detail each programme in the Act itself.

Regulations for any such programme must exist before the minister can make payment determinations, and will detail matters related to funding amounts, use of funding and eligibility criteria. As each regulation is subject to scrutiny and disallowance the Parliament will retain overall control of the use of this provision. To support the Committee's understanding of the intended operation of regulations under section 69A an example of proposed regulations to underpin payments for the Government's Indigenous Boarding Initiative is attached.

Yours sincerely

Christopher Pyne MP
Encl.

Parliament House Canberra ACT 2600 Telephone (02) 6277 7350 Fax (02) 6273 4134

EXPOSURE DRAFT

Inserts for

Australian Education Amendment (2014 Measures No. 1) Regulation 2014: Schedule 2

Schedule 2—Amendments relating to Indigenous boarders

Australian Education Regulation 2013

1 Subsection 4(1)

Insert:

boarding Aboriginal and Torres Strait Islander student, in relation to a school, means an Aboriginal and Torres Strait Islander student who:

(a) boards at the school; and

(b) when the student is not boarding—has a residential address located in remote Australia or very remote Australia, as described in Volume 5 (Remoteness Structure) of the Australian Statistical Geography Standard.

2 Part 4 (heading)

Repeal the heading, substitute:

Part 4—Capital and other funding

3 After section 25

Insert:

Division 3—Funding in prescribed circumstances

25A Indigenous boarders at non-government schools—circumstances

For subsection 69A(1) of the Act, the circumstances for a school for 2014 are:

(a) the school is a non-government school; and

(b) the number of boarding Aboriginal and Torres Strait Islander students at the school for 2014 is at least:

(i) 51; or

(ii) 50% of the number of students who board at the school.

Note: For the definition of *boarding Aboriginal and Torres Strait Islander student*, see subsection 4(1).

25B Indigenous boarders at non-government schools—amounts payable

Maximum amount payable for a school

(1) For paragraph 69A(2)(b) of the Act, if the circumstances mentioned in section 25A of this regulation apply in relation to a school, the maximum amount that is payable for the school (the ***relevant school***) for 2014 is the amount worked out using the formula:

$$0.4 \times \text{sum of ATSI loading for 2014} \times \frac{\text{total entitlement for 2014}}{\text{total public funding for 2014}}$$

where:

sum of ATSI loading for 2014 means the sum of the Aboriginal and Torres Strait Islander loading for 2014 for all schools for which the approved authority of the relevant school (the ***relevant approved authority***) is the approved authority.

total entitlement for 2014 means the relevant approved authority's total entitlement for 2014.

total public funding for 2014 means the relevant approved authority's total public funding amount (within the meaning of subsection 58(4) of the Act) for 2014.

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(2) For the definition of *sum of ATSI loading for 2014* in subsection (1), a reference to the Aboriginal and Torres Strait Islander loading for a school includes a reference to the Aboriginal and Torres Strait Islander loading that would be worked out for the school if section 37 of the Act were to apply to the school.

Total amount of funding for 2014

(3) For paragraph 69A(4)(b) of the Act, the total of the amounts determined by the Minister for 2014, in relation to the circumstances mentioned in section 25A of this regulation, is the amount that is the sum of all the maximum amounts worked out under subsection (1) for 2014 for all relevant schools.

25C Indigenous boarders at non-government schools—matters that Minister must have regard to

(1) For paragraph 130(2)(b) of the Act, this section sets out matters that the Minister must have regard to in making a decision under subsection 69A(1) of the Act about the amount of financial assistance that is payable for a school for 2014 in the circumstances mentioned in section 25A of this regulation.

(2) The matters are the following:

(a) the amount of financial assistance that:

(i) is payable to the approved authority for the school for 2014 under Division 5 of Part 3 of the Act; and

(ii) the Minister is satisfied is attributable to the school;

(b) if section 37 of the Act does not apply to the school for 2014—the amount of financial assistance mentioned in paragraph (a) that the Minister is satisfied would be attributable to the Aboriginal and Torres Strait Islander loading for the school for 2014 if section 37 of the Act were to apply to the school.

25D Indigenous boarders at non-government schools—purpose for which funding is spent or committed to be spent

(1) For paragraph 78(2)(a) of the Act, an approved authority for a school must spend, or commit to spend, financial assistance that is payable for the school under subsection 69A(1) of the Act in the circumstances mentioned in section 25A of this regulation:

(a) for the purpose of providing school education; and

EXPOSURE DRAFT

(b) in accordance with any written directions of the Minister.

(2) Subsections 29(2) and (3) have effect as if a reference in those subsections to subsection (1) included a reference to subsection (1) of this section.

(3) For the purposes of paragraph (1)(b), the Minister may give written directions to an approved authority.

(4) A direction given under subsection (3) is not a legislative instrument.

(5) Financial assistance mentioned in subsection (1) must be spent, or committed to be spent:

(a) in the year in which the financial assistance is paid to the approved authority; or

(b) as otherwise directed by the Minister under paragraph (1)(b).

4 Subsection 29(4)

Omit "Division 3 of Part 5", substitute "section 69".

5 Subparagraph 34(3)(a)(i)

After "31", insert "or Division 3 of Part 4".

EXPOSURE DRAFT

ATTORNEY-GENERAL

CANBERRA

21 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 13 October 2014 regarding the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill (the Bill), which was introduced into the Senate on Wednesday 24 September 2014.

Please find attached a response to the range of issues raised in *Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* presented to the President of the Senate on 13 October 2014. I trust this response will assist the Committee in its further consideration of the Bill.

The action officer for this matter is Karen Horsfall who can be contacted by email at karen.horsfall@ag.gov.au or telephone on 02 6141 3034.

Yours faithfully

(George Brandis)

Encl: Response to issues raised in *Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

Attachment

Response to issues raised by the Senate Scrutiny of Bills Committee

Information sharing

Schedule 1, items 5–7, proposed amendments to Anti-Money Laundering and Counter-Terrorism Financing Act 2006

Committee question (pp. 3-4)

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.

Attorney-General's response

The amendment in items 5 to 7 of Schedule 1 of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill (the Bill) are intended to clarify the ability to share information obtained by AUSTRAC under section 49 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act).

Greater clarity will enhance current information sharing arrangements and allow AUSTRAC's partner agencies, particularly law enforcement and national security agencies to assess AUSTRAC information in light of their own information holdings.

Current regime

Section 49 of the AML/CTF Act provides that the AUSTRAC CEO and certain other listed officials[1] may issue a written notice requiring a reporting entity or any other person to give further information or to produce documents as specified in the notice regarding information a reporting entity has communicated to the AUSTRAC CEO under sections 41 (suspicious matter reports), 43 (reports of threshold transactions) and 45 (reports of international funds transfer instructions) of the AML/CTF Act.

Section 122 of the AML/CTF Act then restricts what a recipient of section 49 information (an entrusted investigating official) may do with that information. AUSTRAC entrusted investigating officials listed under paragraphs 122(1)(a) to (d) may only disclose information for the purposes of, or in connection with the performance of their duties under, the AML/CTF Act or the *Financial Transaction Reports Act 1988*, or for the purposes of the performance of the functions of the AUSTRAC CEO. These are the same exceptions to the prohibition on disclosure that apply to other AUSTRAC information in section 121.

[1] The Commissioner of the Australian Federal Police (or an investigating officer), the CEO of the Australian Crime Commission (or an investigating officer), the Commissioner of Taxation (or an investigating officer), the CEO of Customs (or an investigating officer) and the Integrity Commissioner.

Entrusted investigating officials from the other agencies able to receive information under section 49 are also restricted to disclosing such information for the purposes of, or in connection with, the performance of the duties of another official of the same agency or another entrusted investigating official (from a different agency).

The initial rationale for this secrecy regime was to minimise the risk that the person or entity that was the subject of a section 49 notice would become aware that they were of interest to an investigating agency, and to prevent investigations from being prejudiced by the disclosure of the fact that a section 49 notice was in existence.

However, Division 4 of Part 11 of the AML/CTF Act clearly allows 'designated agencies' (as defined in section 5 of the AML/CTF Act)[2] to access AUSTRAC information, which includes all information obtained under the AML/CTF Act. Division 4 of Part 11 does not differentiate between section 49 information and other AUSTRAC information, except in the case of section 49 information about a suspicious matter report or a suspect transaction.[3]

Since the AML/CTF Act came into operation, there has been interpretative ambiguity around the operation of section 122 and its interaction with Division 4 of Part 11 of the AML/CTF Act. Cautious statutory interpretation has had the unintended consequence of hampering the sharing of information amongst AUSTRAC and its partner agencies for their intelligence and investigative purposes. Agencies, including AUSTRAC, have 'quarantined' information obtained under section 49 in order to ensure that it is only made available to entrusted investigating officials specified in section 122. Consequently, designated agencies have sought to clarify their ability to obtain section 49 information under Division 4 of Part 11.

Proposed amendments

The proposed amendments would clarify that information obtained by AUSTRAC under section 49 may be disseminated in the same way as other AUSTRAC information. The amendments effectively remove AUSTRAC from the requirements of section 122 and place section 49 information collected by AUSTRAC under the secrecy regime set out at section 121.

The requirements for agencies other than AUSTRAC to restrict the dissemination of section 49 information will remain unchanged.

Effect of the amendments

As part of whole-of-government measures to respond to the threat of terrorism, including threats posed by Australians involved in foreign conflicts, the amendments in items 5 to 7 of the Bill are intended to provide clarity and certainty around AUSTRAC's ability to disseminate any further information it obtains under section 49 with its partner intelligence and law enforcement agencies.

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[2] 'Designated agency' is use in Part 11 (Secrecy and Access) of the AML/CTF Act which deals with access to AUSTRAC Information. The definition at section 5 lists Federal, State and Territory agencies which have access to AUSTRAC Information under Part 11.

[3] See subsections 128(4) and 128(9).

Broad discretionary power

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

Committee question (pp. 4-6)

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.

Attorney-General's response

The purpose of the suspension power is to provide a temporary preventative measure while further information is obtained to determine whether more permanent action should be taken (that is, the cancellation of a person's travel documents). The temporary suspension provision would be used in cases where the Australian Security Intelligence Organisation (ASIO) has high concerns related to the travel of the individual, but needs more time to further investigate and seek to resolve those concerns. Activities to support this, which take between days and weeks, may include seeking formal release of intelligence to include in the assessment. New intelligence can also put older reporting in a new context (positive or negative), meaning there is a requirement for ASIO to review and re-evaluate its holdings, which takes time. Further, in some cases it may be that an in-depth intelligence investigation may be required, involving a range of activity.

The fourth annual report of the Independent National Security Legislation Monitor (INSLM) noted that the suggested 7-day timeframe was somewhat arbitrary and should be the subject of further discussion. In most circumstances the INSLM's proposed timeframe of up to 7 days would not allow ASIO sufficient time to assess whether to make a cancellation request and would not allow the Minister for Foreign Affairs appropriate time to consider whether to cancel a person's travel documents. A period of 14 days seeks to strike the right balance between the rights of an individual to travel and the need to ensure Australia's national security.

In its report on the Bill, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) considered (at 2.515) that the 14-day timeframe appropriately balances the need to allow sufficient time for a full assessment to be made by ASIO with the impact on the individual.

Review rights

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

Committee question (pp. 6-7)

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.

Attorney-General's response

Proposed section 48A of the Passports Act does not affect a person's right to have a cancellation decision reviewed. Once a person is informed of the decision the person will be able to have the decision reviewed.

A person who is actively prevented from travelling at the border and has not previously been advised of the cancellation will be given a letter by border officials advising that their Australian passport/travel document is invalid and to contact the Australian Passport Information Service/Department of Foreign Affairs and Trade (DFAT). Border officials will also request the person surrender their passport. The letter provided at this time will include advice regarding the right to seek internal review of the decision to demand the surrender of the invalid passport/travel document. In these circumstances ASIO will then recommend to the Attorney-General that the certificate issued under section 38(2) of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) be revoked at it is no longer 'essential to the security of the nation' to withhold notice of the making of the assessment. Once the certificate is revoked, DFAT will write to the person advising of the cancellation decision and the reason(s) for the cancellation. DFAT will also advise the person of their review rights in relation to the cancellation decision and the adverse security assessment.

Delegation of administrative power

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

Committee question (pp. 7-8)

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.

Attorney-General's response

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.

Issuing criteria – questioning warrants

Item 28, paragraph 34D(4)(b) of the *Australian Security Intelligence Organisation Act 1979*

Committee question (pp. 8-10)

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.

Attorney-General's response

As noted in the Explanatory Memorandum (EM) to the Bill (at pp. 85-86), the proposed amendment to the issuing criterion in paragraph 34D(4)(b) of the ASIO Act requires the Attorney-General to be satisfied that it is reasonable, in all of the circumstances, for a questioning warrant to be issued, having regard to other methods (if any) of collecting the relevant intelligence that are likely to be as effective in the circumstances. This replaces the existing 'last resort' styled requirement, which provides that the Attorney-General must be satisfied that reliance on other methods of collecting that intelligence would be ineffective. The proposed amendment would mean that the availability and relative effectiveness of other intelligence-collection methods is a relevant, but non-determinative, consideration in the Attorney-General's assessment of the reasonableness of issuing a questioning warrant in particular circumstances.

As further noted in the EM (at p. 86) the application of this issuing criterion is subject to numerous safeguards, including a requirement in paragraph 10.4(d) of the Attorney-General's Guidelines to ASIO (Guidelines), issued under section 8A of the ASIO Act, that ASIO must undertake its inquiries and investigations, wherever possible, using the least intrusive techniques of information collection before more intrusive techniques.

As the EM identifies, the application of all issuing criteria, including paragraph 34D(4)(b), must also be assessed in the broader context of the statutory framework within which Division 3 of Part III of the ASIO Act operates, and the accountability and oversight framework under which ASIO performs its functions and exercises its powers. This includes such matters as:

- the determination of questioning warrant applications by an independent issuing authority (a judge of a court created by the Parliament, who has been appointed, in a personal capacity, by the Attorney-General);
- the independent oversight of the Inspector-General of Intelligence and Security (IGIS), including general oversight under the *Inspector-General of Intelligence and Security Act 1986*, and specific oversight functions in relation to Division 3 of Part III of the ASIO Act; and

- the requirement that ASIO must follow the written statement of procedures issued under section 34C (Statement of Procedures) in the exercise of authority under questioning or questioning and detention warrants.

The Committee has, nonetheless, questioned whether the nature of the Guidelines (as a non-legislative instrument) or the Statement of Procedures (as a non-disallowable legislative instrument by reason of subsection 34C(5)) could create a risk that questioning warrants may be sought and issued in circumstances in which other less intrusive means could reasonably have been used to collect intelligence relevant to a terrorism offence (at p. 10 of the Alert Digest).

This comment appears to relate to a concern that the requirements in the Guidelines and Statement of Procedures, including existing safeguards, are not subject to the same degree of Parliamentary control (in relation to both their making and amendment) as primary legislation or disallowable legislative instruments. As a means of removing a perceived risk that existing safeguards in the Guidelines and Statement of Procedures could be removed or lowered without the endorsement, or potentially scrutiny, of the Parliament, the Committee has sought my advice as to why relevant content in these documents should not be included in primary legislation, or in disallowable legislative instruments.

Potential for the issuing of questioning warrants in circumstances in which other, less intrusive means of intelligence collection are reasonably open

'Least intrusive' requirement in paragraph 10.4(d) of the Guidelines

As I have observed above, paragraph 10.4(d) of the Guidelines contains a requirement that ASIO must, wherever possible, use the least intrusive techniques of intelligence collection before using more intrusive techniques. By reason of subsection 8A(1) of the ASIO Act, ASIO is required to adhere to these Guidelines in the performance of its functions and in the exercise of its powers, including in the making of decisions about whether to seek a questioning warrant. ASIO's adherence to the Guidelines is subject to the independent oversight of the IGIS, and could also be a relevant consideration for the Attorney-General in providing his or her consent to the making of an application for a questioning warrant, in determining whether or not the issuing of a questioning warrant would be reasonable in all of the circumstances under proposed paragraph 34D(4)(d).

Enduring nature of the Guidelines

I confirm that I have no intention to remove or otherwise limit the safeguard in paragraph 10.4(d) of the Guidelines, which has been present since they were issued in their present form in 2008, following a review initiated in 2007 by my predecessor, the Hon Philip Ruddock MP.

I further note that the importance of the procedural safeguards in the Guidelines, including those in part 10.4, was recently acknowledged by the PJCIS in its inquiry into the (then) National Security Legislation Amendment Bill (No 1) 2014 (now Act 128 of 2014). Consistent with a recommendation of the PJCIS in that inquiry, I have requested my Department and ASIO to undertake a review of the Guidelines to ensure that they continue to provide adequate operational guidance and safeguards in the contemporary environment, including as a result of the new powers conferred or amended by the 2014 Act.

Parliamentary and IGIS oversight of the Guidelines

Should a future Attorney-General be minded to consider removing or otherwise amending the requirement in paragraph 10.4(d), any such amended Guidelines would be subject to the requirements in subsections 8A(3) to (6) of the ASIO Act, which provide for appropriate Parliamentary and independent oversight.

This includes requirements in subsections 8A(3) and (4) that the Attorney-General must table the Guidelines in both Houses of Parliament within 15 sitting days (excluding any content that would be prejudicial to the security, defence or international affairs of the Commonwealth, or to individual privacy). The Attorney-General is further required, under subsection 8A(5), to make available to the Leader of the Opposition copies of any confidential Guidelines. The Attorney-General must also provide copies of all Guidelines to the IGIS under subsection 8A(6).

In practice, these requirements provide significant opportunities for the Parliament and IGIS to conduct oversight and scrutiny of the Guidelines, while managing the operational and security considerations that make it inappropriate for them to be incorporated in primary legislation, or to have the status of a legislative instrument. (Matters concerning the status of the Guidelines as a non-legislative instrument are addressed separately below.)

Safeguards inherent in the 'reasonableness' requirement in proposed paragraph 34D(4)(b)

In addition, consideration of the matters specified in paragraph 10.4(d) of the Guidelines is, in my view, substantially encompassed by the requirement in proposed paragraph 34D(4)(b) that the Attorney-General must be satisfied that the issuing of a questioning warrant is reasonable in all of the circumstances attending a particular case.

In assessing whether it is reasonable to issue a questioning warrant in the circumstances of a particular case, proposed paragraph 34D(4)(b) specifically requires the Attorney-General to have regard to whether any other equally or comparably effective means of collecting the relevant intelligence are available. The express identification of this matter as a relevant, but non-determinative, consideration to the assessment of reasonableness conveys an intention that it should be afforded particular weight in the balancing of all relevant considerations.

This is, in my view, consistent with paragraph 10.4(d) of the Guidelines, which does not oblige ASIO to exhaust or rule out categorically the least intrusive means of collecting intelligence relevant to security in all cases. Rather, the Guidelines require ASIO to utilise the least intrusive means wherever that is possible. This qualification is necessary to accommodate those cases in which there are strong operational considerations tending against the use of the least intrusive means of intelligence collection.

Such considerations can include an assessment of the effectiveness of the least intrusive technique relative to that of a more intrusive technique; the compatibility of each technique with the degree of urgency attaching to an operation; and the relative levels of risk associated with each technique, both in terms of the effective conduct of an operation and the safety of participants. The considerations that may be taken into account for the purpose of making an assessment under paragraph 10.4(d) of the Guidelines are, therefore, also capable of being taken into account in the assessment of the reasonableness of a questioning warrant under proposed paragraph 34D(4)(b), including discharging the requirement to have specific regard to the availability of other means of collecting the intelligence of the same or comparable effectiveness.

Consequently, even if proposed paragraph 34D(4)(b) were to be read in isolation from the requirements of paragraph 10.4(d) of the Guidelines, the proposed provision is not capable of supporting a conclusion that questioning warrants could be issued in a materially broader range of cases than would be possible if the provision were read in conjunction with paragraph 10.4(d) of the Guidelines. That is to say, the existence of other, equally effective and less intrusive intelligence collection methods is a consideration that tends against an assessment, under paragraph 34D(4)(b), that the issuing of a questioning warrant would be reasonable in all of the circumstances. It would be necessary to weigh this consideration against any other relevant considerations arising in the particular case to determine whether, on balance, the issuing of a questioning warrant satisfies the reasonableness requirement.

Such an exercise involves the same or substantially similar considerations to those involved in making an assessment under paragraph 10.4(d) of the Guidelines as to whether the least intrusive means of collecting intelligence is possible in the circumstances of the particular case. I therefore do not agree with the apparent premise of the Committee's concern, articulated at p. 10 of the Alert Digest, that the status of the Guidelines as a non-legislative instrument presents a risk of substantively weakening the safeguards applying to decision making under proposed paragraph 34D(4)(b).

Non-legislative nature of the Attorney-General's Guidelines to ASIO

History of section 8A

As the Committee has observed, the Guidelines are not a legislative instrument. It has been the longstanding position since the enactment of section 8A in 1986 that the Guidelines are of an administrative rather than a legislative character, in that they do not confer legal rights or impose legal obligations upon individuals, but rather provide guidance on the practical application of statutory requirements under the ASIO Act. The Guidelines are binding on ASIO in an administrative sense, in that their contravention represents breach of a lawful Ministerial direction, with the appropriate sanction being administrative accountability.

This is consistent with the recommendations of the Hope Royal Commission on Australia's Security and Intelligence Agencies in its 1984 *Report on ASIO*, which recommended the enactment of section 8A, including a specific recommendation that the Guidelines should not be of a legislative character (pp. 321-322).

Justice Hope concluded that "there should be clear provision in the Act enabling the Attorney-General to lay down guidelines governing ASIO's activities in particular areas" (at p. 321). He expressed a view that the Guidelines are appropriately the province of the Attorney-General as the Minister responsible for ASIO, on the basis that "within the framework of the legislation, there will inevitably be areas of broad discretion and judgment where the setting by the responsible Minister from time-to-time of standards will be proper and appropriate ... the performance of that function would give substance to the notion of Ministerial control and responsibility and provide valuable guidance to ASIO" (at p. 321). Justice Hope specifically recommended that the Guidelines should be of an administrative character, in that they were not intended to confer legal rights or obligations, but rather provide practical guidance on the operation of the Act, with administrative accountability the sanction for breach (at p. 322).

In addition to the non-legislative character of the Guidelines for the purpose of subsections 5(1) and 5(2) of the *Legislative Instruments Act 2003*, the Government has no intention to invoke subsection 5(4) of that Act and transform the Guidelines into a legislative

instrument by way of registration on the Federal Register of Legislative Instruments. The retention of the Guidelines as a non-legislative instrument is necessary to reflect their operational character for two main reasons, applying to the public nature of registered legislative instruments, and their exposure to Parliamentary disallowance.

Problematic issues arising from any registration of the Guidelines

The registration on the Federal Register of Legislative Instruments of all Guidelines issued under section 8A of the ASIO Act would disclose publicly sensitive operational details, including those pertaining to methodology. It is for this reason subsection 8A(4) provides that the Attorney-General is not required to table in Parliament those portions of the Guidelines that would prejudice security, defence or international affairs. A public registration requirement would hinder the ability of ASIO to collect intelligence in accordance with its statutory mandate. In particular, such information may enable entities of security concern, including hostile foreign intelligence organisations, to identify covert operations conducted by ASIO and engage in counter-intelligence measures.
The compromise of covert activities in this way could also serve to erode the confidence of Australia's foreign intelligence partners, and may risk the safety of intelligence personnel supporting ASIO in the performance of its statutory functions. As the Guidelines apply to all of ASIO's activities in the performance of its functions, the adverse impacts of such disclosure would be extensive.

Inappropriateness of subjecting the Guidelines to Parliamentary disallowance

It would further be inappropriate to subject the Guidelines to Parliamentary disallowance (or to require Parliamentary approval of any amendments as would be the case if they were included in primary legislation). The operational practices and procedures of ASIO that are the subject of the Guidelines are internal functions that are properly a matter for the Attorney-General as the Minister responsible for ASIO and the Director-General of Security, under whose control the Organisation reposed by sections 8 and 20 of the ASIO Act. This reflects the fact that the determination of operational requirements necessitates a detailed awareness and understanding of the overall security environment in which ASIO operates, and the conduct of security intelligence operations.

Accordingly, since the enactment of section 8A in 1986, the Act has made provision for Parliamentary and IGIS oversight in other ways – namely, via the Parliamentary tabling and notification requirements in subsections 8A(3) to (6) as noted above. This reflects the recommendation of the Hope Royal Commission in its 1984 *Report on ASIO*, in which it was specifically recommended that the Guidelines should be tabled in Parliament except for security or other cogent reasons, in which case a copy should be made available to the Opposition Leader (at p. 322).

<u>Comments on the Statement of Procedures</u>

Purpose of the Statement of Procedures – execution of warrants rather than issuing decisions

The Committee has also referred to the Statement of Procedures issued under section 34C. The Statement of Procedures governs the execution of questioning and questioning and detention warrants, rather than the making of issuing decisions. The Statement of Procedures operates as a safeguard to ensure that Division 3 of Part III is reasonable and proportionate to the legitimate objective to which it is directed (being the collection of intelligence in relation

to terrorism offences), and does not impose any greater limitations on individual rights or liberties than is reasonably necessary to achieve that legitimate objective.

While the Statement of Procedures is relevant to an overall assessment of the proportionality of the warrants regime established under Division 3 of Part III, it does not provide operational guidance on the application of the statutory issuing criteria, as this function is performed by the Guidelines. Accordingly, I do not agree with the assessment at p. 10 of the Alert Digest that any perceived 'legal infirmity' in the Statement of Procedures (by reason of its non-disallowable nature) could increase any perceived risk in relation to the circumstances in which questioning warrants may be issued pursuant to proposed paragraph 34D(4)(d).

Non-disallowable nature of the Statement of Procedures: subsection 34C(5)

In any case, it is appropriate that the Statement of Procedures is not subject to Parliamentary disallowance, given its inherently operational character. As the Explanatory Memorandum to the ASIO Legislation Amendment Bill 2006 (Act of 2006) indicates, the Statement of Procedures was deemed to be a legislative instrument in subsection 34C(5) to ensure its public visibility, and for the purpose of promoting compliance with Australia's international human rights obligations (particularly with respect to the prohibition on acts of torture and cruel, inhuman and degrading treatment or punishment).

The non-disallowable character of the Statement of Procedures was explained in the following terms at p. 3 of the EM:

> *The Protocol will be a legislative instrument that is exempted from disallowance that would ordinarily apply under section 42 of the Legislative Instruments Act 2003. This is because the instrument has been developed as a policy document giving effect to Parliament's intent for the basic standards applicable when a person is questioned, or questioned and detained, under a warrant issued under Division 3.*

This approach was found acceptable to the Parliament in 2006. The Senate Standing Committee for the Scrutiny of Bills, as constituted in 2006, noted the relevant clause in the (then) Bill in its Alert Digest No 4 of 2006, and made no comment in relation to it (pp. 9-10).

Destruction etc of things under warrant

Schedule 1, item 30, proposed subsection 34L(10) of the *Australian Security Intelligence Organisation Act 1979*

Committee question (pp. 10-11)

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.

Attorney-General's response

As the Committee has observed, the offence in proposed subsection 34L(10) is based on the physical element of a person's inability to produce the relevant thing or record requested under a warrant, as a result of his or her conduct. The standard fault element of recklessness applies to this element by reason of section 5.6 of the *Criminal Code 1995* (Criminal Code).

The proposed offence has deliberately been drafted on the basis of a physical element of a result of conduct, in preference to a physical element of a person's conduct with a specific 'ulterior intent' to prevent the production of the thing or record requested under the warrant. Further to the justification for this approach provided at pp. 86-87 of the Explanatory Memorandum, I provide the following remarks in response to the four issues raised by the Committee at p. 11 of the Alert Digest.

Issue 1 – proposed maximum penalty – five years' imprisonment

The Committee has identified the proposed maximum penalty of five years' imprisonment as a basis for its concern that the offence does not include a physical element of conduct in relation to a thing or a record, with an element of 'ulterior intent' that the person meant to prevent production of the thing or record in accordance with the warrant.

The maximum penalty of five years is appropriate and proportionate to the wrongdoing inherent in the offence, which is to deter and penalise appropriately persons who are individually placed on notice – by the personal service of a questioning warrant upon them – of a legal obligation to produce particular documents and records. Coercive question under warrants issued under Division 3 of Part 3 is designed to substantially assist in the collection of important intelligence in relation to a terrorism offence. Such intelligence can be vital to prevent significant loss of life and limb, or major disruption of social and economic activities if a terrorist act was carried out. Any reduction of maximum penalty would significantly reduce the denunciatory and deterrent effect of the provisions in relation to such persons. This is not acceptable given the grave circumstances in which Division 3 of Part III is intended to operate.

A lesser penalty would also be inconsistent with the maximum penalties of five years' imprisonment which apply to other offences in Division 3 of Part III, including offences in section 34L for failure to appear before a prescribed authority in accordance with a warrant; failure to provide any information requested in the course of questioning in accordance with a warrant; failure to produce any record or thing requested under the warrant; and the making of a statement that is false or misleading in a material particular in the course of questioning in accordance with a warrant. A uniform penalty structure in section 34L is considered appropriate, having regard to the common denunciatory and deterrent objective sought to be achieved by all of these offences as outlined in my remarks above.

In addition, I note that a maximum penalty of five years' imprisonment also applies in relation to persons who are reckless as to a circumstance in two offences in Division 3 of Part III of the ASIO Act. Sections 34X and 34Z create offences for persons who are, respectively, the subject of a warrant request, or who are specified in a warrant, and who

leave Australia without the written permission of the Director-General of Security. The person must be reckless as to the circumstance that he or she has been notified of the warrant request or the issuing of warrant, and the circumstance that he or she does not have written permission to leave. The prosecution is not required to prove a person's specific intent to frustrate the operation of a warrant in leaving Australia.

It is also important to recognise that the penalty applying to proposed subsection 34L(10) is a maximum. It is for sentencing courts to determine the appropriate penalties to apply in individual cases, in accordance with ordinary principles of sentencing. A figure of five years' imprisonment is considered an appropriate maximum to provide sentencing courts with adequate discretion to impose a penalty that reflects the gravity of wrongdoing at both the lower and upper ends of the spectrum in respect of persons who are convicted of offences against subsection 34L(10).

Issue 3 – divergence from section 39 of the Crimes Act 1914

The Committee has further identified the offence in section 39 of the *Crimes Act 1914* (Crimes Act) as a basis for its concern in relation to the elements of proposed subsection 34L(10).

As acknowledged in the Explanatory Memorandum, the offence in proposed subsection 34L(10) intentionally diverges from the offence in section 39 of the Crimes Act in respect of persons who intentionally destroy materials with the intention of preventing their use in evidence in federal judicial proceedings.

The offence in the Crimes Act relevantly requires the prosecution to prove that the person:

- specifically intended to destroy a book, document or thing; or render that book, document or thing illegible, undecipherable or incapable of identification; and
- engaged in the above conduct with the intention of preventing the book, document or thing from being produced in judicial proceedings.

Neither of these elements is appropriate for inclusion in proposed subsection 34L(10) because the circumstances to which the proposed offence applies are materially different to those targeted by the offence in section 39 of the Crimes Act in two respects.

First, the offence in section 39 of the Crimes Act applies to any person who knows that the relevant materials are, or may be, required to be produced in evidence in a judicial proceeding. That is to say, the offence could apply to the world at large. Such persons need not be parties to the proceeding, nor specifically advised by the court (such as by way of service of a subpoena) as to the status of the documents. Given this broad application, it may be considered appropriate to require the prosecution to prove a person's specific intention in relation to both the particular conduct (such as specifically proving intent to destroy or render illegible) and the ulterior intent to prevent use of the thing in judicial proceedings.

In contrast, the offence in proposed subsection 34L(10) is limited to persons who are personally served with a questioning warrant (the service and execution of which are not disclosed publicly), and are therefore expressly, and individually, informed of their obligation to produce particular things or records itemised in the warrant, and that criminal penalties apply for failing to do so. The Government considers this to be adequate notification to justify holding the person to a high standard of conduct in relation to his or her dealings with those records or things, to ensure that they are able to be produced in accordance with a

warrant. (In particular, the person is obliged to refrain from engaging in conduct that he or she is aware will carry a substantial risk of resulting in non-production, where it would be unjustifiable in the circumstances to take that risk by engaging in the relevant conduct.)

Secondly, the offence in section 39 of the Crimes Act can apply to judicial proceedings in relation to matters of any kind, including those in which there will be no demonstrable harm to vital national interests, such as those in national security, as a result of a person's conduct that leads to the relevant materials being unable to be produced in those proceedings. In contrast, the proposed offence in subsection 34L(10) is specifically limited to circumstances of critical importance to national security, including time critical circumstances in which intelligence is sought to be collected to prevent the commission of a terrorist act, which may otherwise result in significant loss of life, injury and major community disruption.

The potentially grave consequences of preventing the collection of intelligence in relation to a terrorism offence provide, in my view, an appropriate policy justification on which to hold persons who are subject to production obligations under a questioning warrant to a high standard of conduct in relation to the relevant things or records. (That is, it is appropriate to impose upon such persons a legal obligation not to engage in conduct in relation to the thing or record specified in the warrant, being reckless as to whether that conduct would result in the person being unable to produce the thing or record in accordance with the questioning warrant.)

There is precedent for an offence with similar elements in section 6K of the *Royal Commissions Act 1902*. The offence in section 6K applies to persons who know that, or are reckless as to whether, production of a record is or may be required by a commission as constituted under that Act; who intentionally engage in conduct; and who are reckless as to whether that conduct will result in the concealment, mutilation, destruction, rendering incapable of identification, or rendering illegible or indecipherable a document or thing.

The Explanatory Memorandum to the relevant amending legislation, the Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Bill 2001 (Act of 2001), indicated that the amendments were designed to modernise and remove inappropriate fault elements in the offence provision. Prior to 2001, the offence provision applied the fault element of 'wilfulness' (broadly equivalent to the standard fault element of intention under the Criminal Code) to all of these elements. The 2001 amendments updated both the physical and fault elements to reflect those used in the Criminal Code and, in doing so, updated the physical elements to include non-production as a result of conduct (with the result that the fault element of recklessness applies by reason of section 5.6 of the Criminal Code).

This structure was found acceptable to the Parliament in passing the relevant Bill in 2001. The Senate Standing Committee for the Scrutiny of Bills, as constituted in 2001, did not make any comment on the relevant offence provision in section 6K of the Royal Commissions Act in its review of the amending legislation. (Alert Digest No 4 of 2001 at pp. 19-20, and Report No 6 of 2001 at pp. 227-229.)

<u>Issue 2 – arbitrary distinction between fault elements of intention and recklessness; and Issue 4 – recommendation of the INSLM</u>

The Committee has sought further explanation of the statement at p. 87 of the Explanatory Memorandum 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.

In particular, the Committee has commented that the above explanation "states that the distinction between intentional and reckless conduct is, in this context, 'arbitrary' but does not elaborate on the reasons for this conclusion". In addition, the Committee has expressed concern about the structure of the proposed offence, on the basis that it does not accord precisely with the relevant recommendation of the INSLM, which suggested the enactment of an offence in respect of persons who destroy or tamper with a record or thing, intending to prevent that record or thing from being produced under a warrant, or to prevent the record or thing from being produced in legible form. The following remarks address these issues collectively, as the explanation accompanying the second issue is the basis for the approach taken to implementing the relevant recommendation of the INSLM as mentioned in the Committee's fourth identified issue.

The Explanatory Memorandum notes that replicating the structure of section 39 of the Crimes Act in proposed subsection 34L(10) would result in an arbitrary distinction between culpable and non-culpable conduct. As noted above, the adoption of an offence structure in the nature of that in section 39 of the Crimes Act would require the prosecution to specifically prove the following physical and attendant fault elements in relation to a person who is the subject of a questioning warrant, which requires him or her to produce a thing or record:

- *Conduct* – the person intentionally engaged in the destruction of a thing or record specified in a warrant, or in the rendering of a thing or record unusable or illegible.
- *Ulterior intent* – the person engaged in the conduct intending to prevent the production of the record or thing in accordance with the warrant.

This means that a person who is issued with a questioning warrant requiring the production of a thing or record would not be subject to any criminal liability if he or she:

- was aware of a substantial risk that engaging in certain conduct would result in his or her inability to produce (or produce in legible or useable form) the relevant thing or record specified in the warrant;
- nonetheless, and unjustifiably in the circumstances, took the risk of engaging in the relevant conduct; and
- the relevant conduct, in fact, resulted in his or her inability to produce (or produce in legible or useable form) the relevant thing or record specified in the warrant, contrary to his or her legal obligation to do so as a result of the issuing of the warrant.

In both scenarios, ASIO would be unable to collect potentially vital intelligence, in circumstances in which it has been adjudged that such intelligence is needed in relation to

terrorism-related activity, and in circumstances in which the person has expressly been placed on notice as to his or her legal obligation to produce by reason of the issuing and service upon him or her of a questioning warrant. However, if the first offence structure was adopted, a penalty could only be imposed – and the denunciatory and deterrence-related objectives of the offence realised – if the prosecution can prove, beyond reasonable doubt, a person's specific intention in relation to both:

- the specific form of conduct (for example, proof of intentional destruction or rendering illegible, to the exclusion of an intentional attempt at some other form of modification that went awry); and

- in relation to the ulterior intent (for example, proof that a person specifically meant to prevent production entirely, to the exclusion of an intention to cause inconvenience by late production or threatened non-production, or that a person had no intention at all.)

Consistent with my comments above, the Government is of the view that the culpable conduct inherent in the proposed offence in section 34L(10) is found in a person's engagement in conduct in breach of an obligation imposed under a questioning warrant, to which he or she has been alerted by the issuing of the warrant, while aware of a substantial risk that his or her conduct would result in non-production.

Retrospective commencement

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

Committee question (pp. 11-12)

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.

Attorney-General's response

It is appropriate and necessary that the proposed offence in subsection 34L(10) should apply to conduct occurring on or after the commencement of the proposed offence provision, including in respect of questioning warrants that are issued before the commencement of the offence provision.

Appropriateness of the application provision in amending item 31

As to the issue of appropriateness, I consider remote the risk that "there will arguably be unfairness" if a person who is the subject of a questioning warrant issued before the

commencement of subsection 34L(10) is made subject to the offence in that provision if he or she engages in conduct on or after the commencement of that offence provision. Consistent with my remarks above and the justification at p. 88 of the Explanatory Memorandum, the issuing of the warrant (and any appearance before a prescribed authority for questioning) mean that a person is placed on notice of his or her legal obligation to produce the relevant thing or record, and that criminal penalties apply for failure to comply with that obligation.

It is, in my view, sufficient that a person is placed on notice of the fact that he or she may be criminally liable for failing to comply with his or her obligation to produce the relevant thing or document. I do not consider it material that a person is not expressly warned that he or she may be subject to criminal liability as a result of failure to comply with his or her production obligations in the specific circumstances contemplated by proposed subsection 34L(10), which are effectively a variant or targeted extension of the offence in subsection 34L(6) for persons who fail to comply with a production obligation under a warrant.

That is, I do not consider that there would be a manifestly unfair result if a person was simply placed on notice that criminal penalties apply to persons who fail to comply with production obligations under a warrant, unless the person was also specifically placed on notice about potential criminal liability that might arise if the person is aware of a substantial risk that his or her conduct in relation to a thing or a record will result in its non-production, but nonetheless and unjustifiably in the circumstances engages in conduct that results in its non-production.

In addition, it would be possible to make arrangements for persons who are issued with questioning warrants before the commencement of proposed subsection 34L(10) to be made aware of this offence, in those cases in which the relevant warrant will, or is likely to be, in effect on or after the commencement date for the proposed new offence. This could include by ensuring that the imminent commencement of subsection 34L(10) and the application provision is brought to the attention of a prescribed authority before whom the person is appearing. The prescribed authority could then note the application of subsection 34L(10) when explaining the warrant to the person, including the effect of subsection 34L, in accordance with the requirement in section 34J.

Necessity of the application provision in amending item 31

As to the issue of necessity, I acknowledge that the 28-day maximum duration of a questioning warrant means that the application provision in relation to subsection 34L(10) will be of effect – in relation to questioning warrants issued before the commencement of subsection 34L(10) – for a very limited period after the offence provision commences. This point is also acknowledged at p. 88 of the Explanatory Memorandum.

The offences in section 34L are all directed to ensuring that ASIO can collect vital intelligence in relation to a terrorism offence in respect of which a questioning warrant is issued, by creating strong incentives for persons who are subject to these warrants to comply with their obligations under them. As was documented extensively in the extrinsic materials to the originating legislation enacting Division 3 of Part III in 2002, amending it in 2003 and renewing it in 2006, the scheme is designed to ensure ASIO's ability to collect intelligence to assist in the prevention of terrorist acts that could have catastrophic effects on life, limb, property and social order, and in circumstances in which threats of such action could arise at short notice or without any notice. The offences in section 34 are therefore of considerable importance in achieving the legitimate objective served by Division 3 of Part III.

As such, ensuring their ability to operate effectively at all times – including by ensuring that there are no unintended gaps in their coverage – is of considerable importance. The introduction of proposed subsection 34L(10) was prompted by a recommendation of the INSLM, which was made to address a risk that there may be an unintended gap in the coverage of the existing offence of failure to produce things or records specified in a warrant, under subsection 34L(6), in relation to persons who destroy or tamper with the relevant things or records. It is therefore important that subsection 34L(10) takes effect to address this potential gap as soon as possible.

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*

Committee question (pp. 12-13)

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.

Attorney-General's response

During consultation on the Bill, it was proposed that the existing provisions that sunset the relevant regimes would be removed in light of the enduring terrorist threat and the important role these regimes play in mitigating and responding to that threat. However, during consultation with states and territories, the Government received a clear message that sunsetting of these regimes should be extended rather than repealed. Extending rather than repealing the sunset provisions would allow future governments to reassess the security environment and determine whether the powers are still reasonably necessary, appropriate and adapted to combatting the terrorist threat.

Crimes Act Powers

The powers in relation to terrorist acts and terrorism offences in Division 3A of Part IAA of the Crimes Act have been used sparingly since they were enacted in December 2005. The Government has decided, in light of the enduring terrorist threat, that it is appropriate to continue their operation for a further ten years, to ensure that the agencies can respond effectively to ensure that the agencies can respond effectively to the increased terrorism threat level.

Preventative Detention Orders

Despite having been in operation for almost nine years, only one preventative detention order has been made to date. This demonstrates both the extraordinary nature of the regime and the

approach of Australia's police service to utilise the other law enforcement tools available to them, relying on preventative detention only when absolutely necessary.

Given the Government has decided to make a range of enhancements to the preventative detention order regime in this Bill, providing the opportunity for both relevant Committees and the community to consider the regime now, it is considered appropriate to extend the sunset provision now, rather than developing a separate bill in 2015. Further review mechanisms are provided by the INSLM's ongoing review role in relation to each of the powers.

The decision to propose an additional period of 10 years is the result of consultation with States and Territories, and reflects the anticipation that the terrorist threat is an enduring one.

ASIO Act Powers

As indicated at p. 89 of the Explanatory Memorandum, the Government is of the view that there are realistic and credible circumstances in which coercive questioning of a person may be necessary for the purpose of collecting important intelligence about a terrorism offence.

This view is based on advice from intelligence agencies about the overall terrorism threat assessment, as well as specific threats. The Government accepts agencies' advice that, for the foreseeable future, there are threats of possible terrorist attacks in Australia, and that some people in Australia might be inclined or induced to participate in such activity. As the (then) Parliamentary Committee on ASIS, ASIO and DSD (now the PJCIS) concluded in its 2005 review of Division 3 of Part III, which recommended the renewal of the scheme for a further period, the existence of the regime has proven useful on the limited occasions on which it has been utilised. (This has comprised the issuing of questioning warrants on 16 occasions).

I note that the PJCIS report on the Bill has recommended a reduction in the proposed sunset period for these powers as well as the establishment of review by the INSLM and PJCIS. The Government is currently considering these recommendations

Retrospective commencement

Schedule 1, item 38

Committee question (p. 15)

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.

Attorney-General's response

The expansion of the definition of terrorism offence in the Crimes Act implements a recommendation of the INSLM. The amendment will apply to terrorism offences committed before and after the commencement of the Bill.

The Explanatory Memorandum to the Bill highlights the regimes to which the definition applies. The Government considers it appropriate that individuals who engage in the very serious conduct that is contrary to Australia's international Counter-Terrorism obligations regarding terrorism funding activity or conduct contrary to the *Crimes (Foreign Incursions*

and Recruitment) Act 1978 should face the same consequences as an individual who commits a terrorism offence contrary to the Criminal Code.

The application provision will not, however, have 'retrospective' effect in the sense that a person who has been convicted and sentenced for an offence that was not a terrorism offence at the time of sentencing will not be subject to re-sentencing and the imposition of a longer non-parole period. However, it is appropriate that a person who has committed such an offence before the commencement of the amendments and is convicted and sentenced after their commencement should be subject to the possibility of a longer parole period. Similarly, it is appropriate for the Australian Federal Police (AFP) to use the new delayed notification search warrant powers after the commencement of the amendments to collect evidence in relation to an offence committed before commencement.

Power of arrest

Schedule 1, item 47, proposed new section 3WA of the *Crimes Act 1914*

Committee question (pp. 15-16)

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.

Attorney-General's response

Lowering the threshold is appropriate for terrorism related offences due to the extraordinary risk posed to the Australian community by acts of terrorism, and the time critical nature that a response to such acts is needed.

Under the existing threshold, police must have sufficient evidence that a person has committed an offence before they can arrest them. In situations where police have to act in response to a real and immediate threat of serious harm, they may not hold that level of evidential material at the time they need to act. Lowering the threshold of arrest for terrorism matters will enable police to intervene earlier in terrorism investigations where appropriate. This is particularly important from a prevention perspective given that terrorist attacks can be planned and executed rapidly. It will not always be appropriate or in the public's interest to delay action until sufficient evidence has been obtained to meet the threshold of reasonable belief. Lowering the threshold is appropriate for terrorism related offences due to the extraordinary risk posed to the Australian community by acts of terrorism, and the time critical nature that a response to such acts is needed.

The INSLM acknowledged the operational utility of the reform as well founded, sensible and of some practical utility.

Sufficient time to comply with notice

Schedule 1, item 50, paragraph 3ZQN(3)(e) of the *Crimes Act 1914*

Committee question (p. 17)

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

Attorney-General's response

Schedule 1, item 50, provides that in a notice issued under section 3ZQN a day may be specified by which a person is required to produce documents. This prescribed timeframe will be appropriate to the circumstances and will not unduly impact on personal rights and liberties.

To exercise the power under section 3ZQN, an authorised AFP officer must consider on *reasonable grounds* that the person has relevant documents in their possession. Section 3ZQP *Crimes Act 1900* sets out the matters to which a notice issued under section 3ZQN must relate. Section 3ZQN notices are primarily issued to financial institutions and utility companies, as the matters listed in section 3ZQN relate to financial and utility account details. Section 3ZQP also refers to travel activities and residential requirements. These requests are rarely progressed under s3ZQN as they can be obtained under other provisions or directly from Government agencies.

If a person holds a relevant account with an institution, the information about that person's account-related activities would ordinarily be available to these institutions. It is therefore expected that these institutions would have the practical capacity to produce this information within a reasonable time period. Information requested under a section 3ZQN notice is ordinarily internally generated by institutions.

Requests for information under section 3ZQN are made where documents are relevant to and will assist with a serious terrorism offence. Commonly, this will involve circumstances where it is believed that a person has been involved in financing or otherwise supporting terrorist activities. In circumstances where the commission of a terrorist act is imminent but the precise timeframe is unknown, it might be necessary in the circumstances to request information within a shorter timeframe. This information may indicate whether the person has the financial capacity to carry out the attack.

This item amends section 3ZQN (3)(e) so that it is similar to subsection 214(1)(e) of the *Proceeds of Crime Act 2002* (POCA) which relates to notices to produce financial information in relation to proceedings or actions under POCA. Under section 214(1)(e) an earlier time period, being no earlier than 3 days after giving the notice, may be prescribed if considered appropriate in the circumstances.

The decisions of an AFP officer to request documents would be subject to internal review as well as internal and external accountability regimes such as the AFP Values and Code of conduct; statutory based internal professional standards and independent oversight by the Ombudsman and the Australian Commission for Law Enforcement Integrity.

Authorisation of coercive power

Schedule 1, item 51, proposed sections 3ZZAD and 3ZZAF of the *Crimes Act 1914*

Committee question (pp. 19-20)

The committee seeks the Attorney-General's advice in relation to (1) why the categories of eligible issuing officers should not 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.

Attorney-General's response

There is strong precedent in Commonwealth legislation for extending eligibility to act as an issuing officer for instruments relating to covert police powers to members of the AAT. AAT members are already eligible to act as issuing officers for the purposes of surveillance device (SD) warrants, telecommunications interception warrants, stored communication warrants, and for extending controlled operation authorisations. These examples provide a useful model for framing the delayed notification search warrant (DNSW) scheme. There are also strong operational reasons for including AAT members within the categories of eligible issuing officers for DNSWs. The AFP has advised that limiting the persons who could issue DNSWs to judicial officers would reduce the number of eligible issuing officers and could result in difficulties in obtaining DNSWs, particularly in urgent operational contexts, or where operations are being conducted in remote areas. The AFP advises that AAT members have consistently proven to be available out-of-hours to deal with the operational needs of the AFP. The AFP has further advised that in many cases, they would seek to install a SD at the same premises for which a DNSW is sought and it would therefore be administratively convenient and less resource intensive to approach the AAT for both warrants, rather than approach the AAT for the SD warrant and a separate judicial officer for the DNSW.

I note the PJCIS report on the Bill recommends amending the Bill to remove the ability of 'members' or part-time senior members' of the AAT to be eligible issuing officers for DNSWs. The Government is considering this recommendation.

Breadth of offence provision

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

Committee question (p. 21)

Proposed subsection 3ZZHA(1) creates an offence for unauthorised disclosure of information relating to a delayed notification search warrant. The similar for controlled operations (section 15KH of the Crimes Act 1914) includes an exception relating 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).

Attorney-General's response

I note recommendation 3 of the PJCIS report on the Bill, which would provide the following exemptions to the offence provision:

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

The Government is considering this recommendation.

Evidential burden of proof

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

Committee question (p. 21)

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 in subsection 3ZZHA(2).

The committee therefore seeks the Attorney-General's advice as to the rationale for the proposed approach.

Attorney-General's response

The defendant bears the evidential burden of proof if they seek to rely on one of the exceptions set out in subsection 3ZZHA(2). This is consistent with Commonwealth criminal law policy and with subsection 13.3(3) of the Criminal Code, which provides that a defendant who wishes to rely on an exception bears an evidential burden in relation to that matter. It is appropriate that where a matter is peculiarly within the knowledge of the defendant, and it would be significantly more difficult for the prosecution to disprove that matter than for the defendant to establish it, the defendant should be required to adduce evidence on that matter. The defendant is responsible for adducing, or pointing to, evidence that suggests a reasonable possibility that the exception is made out. The prosecution must then refute the exception beyond reasonable doubt.

Delegation of administrative power

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

Committee question (p. 22)

The committee therefore seeks clarification from the Attorney-General as to why a broad power of delegation in proposed subsection 3ZZIA(1) is necessary.

Attorney-General's response

It is necessary and appropriate for the Commissioner to be able to delegate powers under Part IAAA to appropriate senior AFP staff members.

Many powers, functions or duties vested in the AFP Commissioner can, by necessity, be delegated to a range of subordinate officers. This includes the Commissioner's responsibilities under the *Surveillance Devices Act 2004* (section 63) and parts of the Crimes Act (such as section 3ZW). The delegation in proposed subsection 3ZZIA(1) is consistent with these covert schemes. This section will allow the AFP Commissioner to delegate all or any of his/her powers, functions or duties under Part 1AAA to a Deputy Commissioner of the AFP or a senior executive AFP employee who is an AFP member and authorised in writing by the Commissioner. This provision will allow the Commissioner to delegate the power to the person most appropriately placed to handle the return of the item. This is necessary due to the large amounts of seized material that police officers deal with. It will also enable the Commissioner to delegate other powers under Part IAAA, such as the power to authorise an eligible officer to apply for a delayed notification search warrant (section 3ZZBB) or the power to seek an extension for the time for giving warrant premise occupier's notice or adjoining occupier's notice (section 3ZZDC). This ability to delegate is required to ensure that seeking a delayed notification search warrant and/or seeking an extension of the notice period is not delayed or frustrated where the AFP Commissioner is unavailable. The list of delegated officials is limited appropriately to senior staff members within the AFP to ensure that there is sufficient accountability for decisions made under delegated powers.

Freedom of speech

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

Committee question (p. 22)

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.

Attorney-General's response

Terrorist acts and foreign incursion offences generally require a person to have three things: the capability to act, the motivation to act, and the imprimatur to act (eg endorsement from a person with authority). The new advocating terrorism offence is directed at those who supply the motivation and imprimatur. This is particularly the case where the person advocating

terrorism holds significant influence over other people who sympathise with, and are prepared to fight for, the terrorist cause.

Where the AFP has sufficient evidence, the existing offences of incitement (section 11.4 of the Criminal Code) or the urging violence offences (in Division 80 of the Criminal Code) would be pursued. However, these offences require the AFP to *prove* that the person intended the crime or violence to be committed. There will not always be sufficient evidence to meet the threshold of intention. This is because persons advocating terrorism can be very sophisticated about the precise language they use, even though their overall message still has the impact of encouraging others to engage in terrorist acts.

In the current threat environment, returning foreign fighters, and the use of social media, is accelerating the speed at which persons can become radicalised and prepare to carry out terrorist acts. It is no longer the case that explicit statements (which would provide evidence to meet the threshold of intention) are required to inspire others to take potentially devastating action in Australia or overseas. The cumulative effect of more generalised statements when made by a person in a position of influence and authority can still have the impact of directly encouraging others to go overseas and fight or commit terrorist acts domestically. This effect is compounded with the circulation of graphic violent imagery (such as beheading videos) in the same online forums as the statements are being made. The AFP therefore require tools (such as the new advocating terrorism offence) to intervene earlier in the radicalisation process to prevent and disrupt further engagement in terrorist activity.

The terms 'promote' and 'encourage' are not defined in the Bill and will be defined according to their ordinary meaning. The purpose of the offence is to criminalise and deter acts other than direct incitement to commit terrorist activity. Including the terms will ensure that the offence is interpreted by the courts to sufficiently capture activity which increases the threat of terrorism.

Control orders: general comments and extension of sunset provision

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

Committee question (pp. 24-25)

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.

Attorney-General's response

The very nature of the terrorist threat to public safety requires a response which is proactive and prevention focused. The ability of the AFP to move swiftly in this prevention role is particularly important given that terrorist attacks can be planned and executed rapidly. It will not always be appropriate for police to delay traditional criminal justice action (ie arrest) until sufficient evidence has been obtained to meet relevant threshold tests. There is a need for special preventative powers (including control orders) to operate alongside traditional criminal justice processes in order to effectively respond to and manage terrorist threats.

Operational agencies anticipate that control orders will be a key element in reducing the risk posed by foreign fighters who return to Australia further radicalised by their experiences, overseas. In this context control orders will allow police to act preventively where they have a reasonable suspicion that a person has been involved in hostile activity overseas or was involved in training with a terrorist organisation. In circumstances where evidence that would enable prosecutions for relevant offences would be difficult or impossible to obtain, control orders allow police to mitigate a suspected threat without having to wait for successful terrorist activity.

The threat of terrorism is unlikely to diminish in the foreseeable future and there is no indication that the current threat environment will dramatically reduce such that control order powers will not have a place in this preventative role.

During consultation on the Bill, it was proposed that the existing provisions that would sunset the control order regime would be removed in light of the enduring terrorist threat, the new threat posed by Australian's fighting overseas and returning to Australia, and the important role these regimes play in mitigating and responding to those threats. However, during community consultation, the Government received the clear message that sunsetting of the control order regime should be extended rather than repealed. Extending rather than repealing the sunset provision would allow future governments to reassess the security environment and determine whether the powers are still reasonably necessary, appropriate and adapted to combatting the terrorist threat.

Despite having been in operation for almost nine years, only two control orders have been requested or made to date. This demonstrates both the extraordinary nature of the regime and the approach of Australia's police service to utilise traditional law enforcement tools where appropriate, relying on control orders only when absolutely necessary.

Given the Government has decided to make a range of enhancements to the control order regime in this Bill, providing the opportunity for Parliamentary Committees and the community to consider the regime now, it is considered appropriate to extend the sunset provision now, rather than developing a separate bill in 2015.

Each parliament has the ability to review the need for the control order provisions as with every other statutory provision. The sunset period does not affect this ability, but merely provide a timeframe in which future Parliaments must turn their minds to the powers. Further review mechanisms are provided by the INSLM's ongoing review role in relation to the powers.

Control orders

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

Committee question (pp. 25)

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).

Attorney-General's response

Reducing the threshold for seeking the Attorney-General's consent to request an interim control order brings the threshold for that ground in line with the threshold for the other existing and proposed new grounds.

The change follows a recommendation of the Council of Australian Governments (COAG) that there should be uniformity between the statutory pre-conditions (para 229). COAG initially recommended 'considers' for both, but 'suspects' has been adopted.

While technically this lowers the threshold for the applicant to seek consent, it does not change the threshold of which the court needs to be satisfied prior to making an interim order.

The issuing court must still be satisfied on the balance of probabilities when making an interim control order that the order would substantially assist in preventing a terrorist act.

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*

Committee question (p. 26)

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.

Attorney-General's response

Regardless of the ground on which the AFP member requesting the control order is relying, it is always necessary for the issuing court to be satisfied that imposing the obligations, prohibitions and restrictions sought to be imposed on the person is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.

The amendments tailor the regime to:

- address the issue of the risk posed by returning foreign fighters, and
- respond to the recommendation of the INSLM to extend the regime to those convicted of terrorism offences.

These enhancements will better enable the AFP to mitigate the threat posed by individuals who have engaged in hostile activities overseas, developed capabilities or otherwise demonstrated their commitment to a terrorist cause. It will also be available against those convicted of terrorism offences and who may re-engage with terrorism.

For example, persons who have not merely participated in training with a terrorist organisation, but actually engaged in hostile activities in a foreign country, have demonstrated both the ability and propensity to engage in conduct akin to terrorist acts. A person who has been convicted of a terrorism offence in Australia or overseas has similarly demonstrated both the ability and propensity to engage in terrorism.

Evidential burden of proof

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

Committee question (pp. 26-27)

The committee therefore requests the Attorney-General's advice in this regard.

Attorney-General's response

The offences in section 119.1 prohibit individuals with a strong connection to Australia (eg, citizen) entering a foreign country and intentionally engaging in a hostile activity or with the intention of engaging in such an activity. There is a defence where the conduct is undertaken 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).

It is appropriate for the defendant to be required to point to evidence that suggests a reasonable possibility that the person's conduct comes within a declaration. This is because the person is better placed to provide that preliminary evidence. For example, the prosecution is unlikely to hold information about the particular person's dual citizenship or the fact that the person's service with the specific foreign armed forces comes within a particular declaration. Once the person has provided preliminary information suggesting they were serving pursuant to a declaration, the prosecution would need to disprove that evidence beyond reasonable doubt.

There are many other examples in the law where a person is required to point to evidence that may or could not be held or accessible by the prosecution. For the current proposal, the prosecution always has the persuasive burden of proof. But it is appropriate to require a preliminary level of evidence to be provided by the person concerned in circumstances where that person has the best evidence available about the purposes of their travel.

Broad scope of offence

Schedule 1, item 110, proposed subsection 119.2

Committee question (pp. 27-28)

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.

Attorney-General's response

The offence requires the prosecution to prove beyond reasonable doubt, not only that the person 'intentionally' entered or remained in an area, but that the person was aware of a substantial risk that the area was declared and intentionally entered or remained despite that.

The application of intention to the conduct (entering or remaining) ensures a person who inadvertently travels to a declared area – for example in a bus on route to another location – or who is injured and unable to leave a declared area does not commit the offence. Furthermore, the application of recklessness to the fact that the area is a declared area means a person who is, for example, in a remote area without access to communications and with no reasonable way of knowing the area has become a declared area, does not commit the offence.

I draw to the Committee's attention the supplementary submission provided by my department to the PJCIS inquiry into the Bill. In particular, paragraphs 44-67 of the supplementary submission addresses the operation of the declared area offence. The PJCIS report on the Bill made a number of recommendations about the declared area offence which the government is considering. Relevantly, the PJCIS stated:

> 2.382 The areas targeted by the 'declared area' provisions are extremely dangerous locations in which terrorist organisations are actively engaging in hostile activities. The Committee notes the declared area provisions are designed to act as a deterrent to prevent people from travelling to declared areas. The Committee considers it is a legitimate policy intent for the Government to do this and to require persons who choose to travel to such places despite the warnings to provide evidence of a legitimate purpose for their travel. This is particularly the case given the risk individuals returning to Australia who have fought for or been involved with terrorist organisations present to the community. Additionally, there is a high cost to taxpayers in providing assistance to any persons who become trapped in a dangerous situation in a declared area.

Broad discretionary power

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

Committee question (p. 30)

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.

Attorney-General's response

The Bill limits the circumstances in which an area can be declared for the purposes of section 119.2 to where one or more listed terrorist organisations are engaged in hostile activities in a foreign country. AGD is working with other relevant agencies to develop a protocol that sets out the steps and processes for making a declaration. The process for

listing terrorist organisation under Division 102 of the Criminal Code is being used as the starting point for the development of that protocol.

A declaration made for the purposes of section 119.2 will be a disallowable instrument.

Broad discretionary powers

Schedule 2

Committee question (pp. 31-32)

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.

Attorney-General's response

Recommendation 29 of the PJCIS report on the Bill raises similar issues. The Government is favourably considering implementation of that recommendation which would clarify the types of considerations the Attorney-General could have regard to when deciding whether to issue a security notice.

Merits review

Schedule 2

Committee question (pp. 32-33)

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.

Attorney-General's response

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.

Availability of coercive powers

Schedule 3, item 2, section 219ZJA of the *Customs Act 1901*

Committee question (pp. 33-34)

The committee therefore seeks a more detailed explanation of the reasons why it is considered necessary to change the definition of 'serious Commonwealth offence'.

Attorney-General's response

The expanded and new detention powers, including the new definition of 'serious Commonwealth offence,' are part of the targeted response to the threat posed by foreign fighters. The extension of the detention power, which is only a temporary power, is aimed at the Australian Customs and Border Protection Service facilitating other law enforcement agencies to exercise their powers to address national security threats. The current power may limit this facilitation across the full range of offences that are relevant to addressing national security threats. The new definition of 'serious Commonwealth offence' will, for example, allow officers of Customs to detain a person in respect of an offence under the *Australian Passports Act 2005* of using a passport that was not issued to the person.

The enhanced detention powers will also assist law enforcement agencies more generally in relation to the detection and investigation of serious Commonwealth offences.

I note recommendation 31 of the PJCIS report on the Bill relates to this proposal. The Government is considering this recommendation.

Availability of coercive powers

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

Committee question (pp. 33-34)

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).

Attorney-General's response

In exercising these powers, the current thresholds limit detention to where an officer of Customs can detain a person if the officer has reasonable grounds to suspect that the person has committing or is committing a serious Commonwealth offence. This limitation may result in situations where despite information received from partner agencies or the behaviour or documentation presented by the passenger, detention may not be possible. This power does not allow detention where there is the potential to commit and serious Commonwealth offence, which in the context of current terrorist threats, may limit the ability to effectively deal with such threats. Recognising that the detention power is only a temporary power and is designed to facilitate other law enforcement agencies dealing with such threats, this is why the operation of section 219ZJB is proposed to be amended to include where an officer has reasonable grounds to suspect that a person is intending to commit a serious Commonwealth offence.

I note recommendation 32 of the PJCIS report on the Bill relates to this proposal. The Government is considering this recommendation.

Right to notify another person of detention

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

Committee question (p. 35)

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).

Attorney-General's response

It is not considered that the extension proposed from 45 minutes to 4 hours constitutes an unreasonable restriction on correspondence with the detainee's family. This increase of time is only in respect of Commonwealth offences which carry imprisonment of twelve months or greater as penalty. It is a temporary period which has been proposed because the current limit of 45 minutes does not provide Customs officers with sufficient time and opportunity to undertake enquiries once a person is detained. It is considered that the 4 hour time period is a more appropriate period for this purpose, particularly given the extended circumstances in which an officer may refuse to notify a family member or other person under amended subsection 219ZJB(7).

I note recommendation 32 of the PJCIS report on the Bill relates to this proposal. The Government is considering this recommendation.

Review rights

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

Committee question (p. 36)

In light of this statement the committee seeks a detailed explanation for this conclusion from the Attorney-General.

Attorney-General's response

It is not considered appropriate that a person be given reasons for detention under section 219ZJCA for the following reason. The grounds upon which the relevant suspicion is based may rely on information from a range of sources which may include highly classified material. If a person was entitled to be given the reasons for their detention, this may require the disclosure to the person of this highly classified material which could compromise the activities of other agencies.

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

Committee question (p. 38)

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.

Attorney-General's response

Proposed section 134B provides for mandatory cancellation of a visa held by a person who is outside Australia if ASIO provide an assessment for the purposes of section 134B which contains advice that ASIO suspects that the person might be, directly or indirectly, a risk to security (within the meaning of section 4 of the ASIO Act), and which recommends that all visas held by the person be cancelled under section 134B. The role of the Minister or delegate in this situation is limited to confirming that the assessment by ASIO satisfies the formal requirements of section 134B. This is an objective question. As such, the exclusion of the rule against bias, if that is a consequence of the exclusion of "the rules of natural justice" in proposed section 134A, does not adversely affect the non-citizen. There is no scope for the Minister or delegate to act in a way which would give effect to bias.

In relation to discretionary cancellation under proposed section 134F, please see our answer below in relation to that section.

Committee question (p. 39)

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 be based on 'reasonable grounds') is not provided for in the bill as currently drafted.

Attorney-General's response

It is implicit in ASIO's capacity to issue security assessments under the ASIO Act that any suspicion it holds will be based on reasonable grounds and ASIO will apply this standard when preparing a security assessment for the purposes of the emergency visa cancellation

provisions. In situations where a requirement for reasonable grounds does not appear on the face of legislation, it will readily be inferred by the courts. Proposed section 134B is not the source of ASIO's power to issue the security assessment. The source of the power is Part IV of the ASIO Act. In setting out a statutory formula which must be included in the assessment to trigger visa cancellation under the *Migration Act 1958* (Migration Act), proposed section 134B does not thereby authorise ASIO to issue an assessment in cases where the relevant suspicion is not based on reasonable grounds.

Committee question (p. 39)

The committee therefore seeks the Attorney-General's advice as to the justification for the proposed approach.

Attorney-General's response

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 question (p. 39)

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.

Attorney-General's response

Section 338 which deals with decisions reviewable by the Migration Review Tribunal (MRT), states at subsection 338(3) that a decision to cancel a visa held by a non-citizen who is in the migration zone at the time of the cancellation is an MRT-reviewable decision unless the decision:

a) is covered by subsection 338(4); or

b) is made at a time when the non-citizen was in immigration clearance; or

c) was made under subsection 134(1), (3A) or (4) or section 501.

In effect this means that a decision to cancel a visa under proposed section 134F of a person who holds a visa only because the relevant person held a visa that was cancelled under section 134B (and the Minister decided not to revoke the cancellation under subsection 134C(3), and the Minister has given notice to the relevant person under section 134E), that this decision would be an MRT-reviewable decision, provided the person was in the migration zone and not in immigration clearance at the time the decision was made.

In circumstances where the visa holder is not in Australia at the time of the decision, then they could not be said to be in the migration zone, and the decision would not be an MRT-reviewable decision in accordance with subsection 338(3) of the Migration Act. The decision would, however, be judicially reviewable.

In relation to Protection visa holders, section 411 similarly sets out which decisions are reviewable by the Refugee Review Tribunal (RRT). Subsection 411(1) allows that a decision to cancel a Protection visa (other than a decision that was made relying on paragraph 36(2C)(a) or (b)) is an RRT-reviewable decision. Subsection 411(2) clarifies that where the non-citizen is not physically present in the migration zone when the decision is made, then the decision is not an RRT-reviewable decision. This means that a decision to cancel a Protection visa under section 134F is an RRT-reviewable decision, provided the non-citizen is physically in the migration zone (including in immigration clearance) at the time the decision was made. In circumstances where the visa holder is not in Australia at the time of the decision, then they could not be said to be physically present in the migration zone, and the decision would not be an RRT-reviewable decision in accordance with subsection 411(1) of the Migration Act. The decision would, however, be judicially reviewable.

The position as outlined above reflects the policy settings for merits review of visa cancellation decisions which have been in place for over 20 years, since the commencement of the *Migration Reform Act 1992*, which commenced on 1 September 1994.

Delegation of legislative power

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

Committee question (pp. 39-40)

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.

Attorney-General's response

The authority to prescribe other personal identifiers in the regulations ensures it is possible to respond to new and emerging risks flexibly and within a short timeframe if required.

Prior to amending the regulations to prescribe other personal identifier/s, extensive consultation would be undertaken with relevant Commonwealth Government Departments, including the Department of Foreign Affairs and Trade and the Attorney-General's

Department, and with the Privacy Commissioner. In addition, a full Privacy Impact Assessment would be undertaken in relation to any proposal.

Regulations are subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances and may be subject to disallowance.

I note recommendation 35 of the PJCIS report on the Bill relates to this proposal. The Government is considering this recommendation.

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)

Attachment

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.

SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

8 OCT 2014

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

Dear Senator

I refer to correspondence of 25 September 2014 from Mr Gerry McInally, Acting Committee Secretary, requesting advice in relation to the Scrutiny of Bills Committee's consideration of the Fair Entitlements Guarantee Bill 2014.

The Committee has noted that the proposed section 51 of the Fair Entitlements Guarantee Bill 2014 provides for payments from the Consolidated Revenue Fund for the purposes of payments under section 50 of the *Fair Entitlements Guarantee Act 2012*. The Committee also noted that in deciding the appropriateness of such appropriations it considers whether there is a limitation on the amount of funds that may be appropriated and whether there is sunset clause that ensures the appropriation cannot continue indefinitely without further reference to Parliament. I note that the Committee raised a similar issue in respect of the Fair Entitlements Guarantee Bill 2012.

The Act currently provides for the Consolidated Revenue Fund to be appropriated for the purpose of making payments under the Act and section 50. Section 50 of the Act provides for the establishment of a scheme of assistance for workers who are not employees. While the Fair Entitlements Guarantee Bill 2014 repeals the current section 51 of the Act and inserts a new provision, the only effective change is to enable the Consolidated Revenue Fund to also be appropriated for legal costs incurred by the department in relation to applications made to the Administrative Appeals Tribunal or an appeal to a court in respect of such an application.

It is appropriate to use a standing appropriation in cases where there is a legal entitlement established which is paid to people on the basis of specific criteria. This is the case for payments made under the Fair Entitlements Guarantee, including where those payments are made in accordance with a regulation made under section 50. Such payments are determined on the basis of the strict framework set out in the legislation for assessment of an individual's entitlement for payment.

Historically it has not been possible to predict precise costs that will be incurred under the Fair Entitlements Guarantee each year. Demand for assistance under the scheme in any given year is impacted by a wide range of factors. These include the number of insolvencies that occur in that year, the number of claims for assistance resulting from those insolvencies and each claimant's individual entitlements (based on the employment conditions and length of service of those claimants).

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Our Ref MC14-010427

The integrity of the scheme would be compromised if assessment decisions were influenced or limited by the availability of funding in the appropriation.

I also note that demand for the scheme has increased from 8,626 claimants being paid $72.97 million in 2006-07 to 16,019 claimants being paid $261.65 million in 2012-13. This is an increase of 259 per cent.

I note that only one scheme has been approved under section 50 since the Act commenced on 5 December 2012, covering contract outworkers in the clothing, textile and footwear industry. This scheme took effect on 15 May 2013 and to date, no claims have been made under that scheme. The Regulation establishing this scheme was tabled before Parliament and subject to the usual disallowance arrangement. Any new scheme which is sought to be established under section 50 of the Act will similarly be via a regulation and subject to disallowance by Parliament.

I hope this information assists the Committee.

Yours sincerely

The Hon Warren Truss MP
Deputy Prime Minister
Minister for Infrastructure and Regional Development
Leader of The Nationals
Member for Wide Bay

01 OCT 2014

PDR ID: MS14-001206

Senator the Hon Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

I am writing to you in response to the Senate Standing Committee for the Scrutiny of Bills' (the Committee) comments contained in the *Alert Digest No 10 of 2014* (27 August 2014) on the Marine Safety (Domestic Commercial Vessel) National Law Amendment Bill 2014.

My responses to the matters raised by the Committee are found at the Attachment to this letter. A copy of responses will be emailed to the Committee Secretariat at <*scrutiny.sen@aph.gov.au*>.

I trust this information will address the Committee's concerns.

Yours sincerely

WARREN TRUSS

Enc

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Response to the Senate Standing Committee for the Scrutiny of Bills **Attachment**

Alert Digest 10/14 (pg26/27)

Marine Safety (Domestic Commercial Vessel) National Law Amendment Bill 2014

Delegation of legislative power—sub-delegation

Schedule 1, item 4, subsection 11(3)

The amendment to sub-section 11(3) will ensure that the delegation arrangements can accommodate the variety of organisational structures within the States and Northern Territory. The effect of the amendment is to enable a delegate of the National Regulator to sub-delegate any of their powers or functions to any appropriate officer or employee of an agency of their State or Northern Territory.

These amendments make clearer the originally-intended flexibility for officers and employees in the jurisdictions to be sub-delegated powers of the National Regulator. This flexibility was intended to arise out of the inclusive rather than exhaustive definition of 'agency' in section 6 of Schedule 1 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (the Act).

The delegation arrangements in the Act also include safe-guards to ensure the consistent and accountable use of delegated powers. For example:

1. The instrument of delegation provides for:
    a. the criteria for appointment for sub-delegates;
    b. directions for the exercise of specified delegated and sub-delegated powers of the National Regulator; and,
    c. general directions of the exercise of the delegated and sub-delegated powers and functions.

2. The Australian Maritime Safety Authority (AMSA) stores information on delegates and sub-delegates on an internal database. The database contains information about the National Regulator functions being exercised by the delegates and sub-delegates. The database is updated and maintained on a regular basis. This ensures AMSA has appropriate visibility of the National Regulator delegations and sub-delegations in each jurisdiction.

3. The National Regulator can only delegate a power or function if the jurisdiction agrees to the delegation. This ensures that jurisdictions will only exercise delegated powers which they have the requisite experience and expertise to exercise.

4. The Act includes strong review rights in relation to the exercise of delegated and sub-delegated powers. Sub-section 34AB(1)(c) of the *Acts Interpretation Act 1901* clarifies decisions made by the delegates and sub-delegates of the National Regulator are decisions of the National Regulator and are therefore subject to applicable Commonwealth judicial and merits review rights. Section 139 of the Act sets out the decisions which are reviewable under the Act. Section 140 establishes an internal review process by the National Regulator. Section 141 allows for applications to be made to the Administrative Appeals Tribunal following the internal review of a reviewable decision. Additionally, the exercise of powers delegated under the Act would be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.