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# **Counter-terrorism Legislation Amendment (Foreign Fighters) Bill 2014**

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**Parliamentary Joint Committee on  
Intelligence and Security**

**3 October 2014**

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## Acknowledgments

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## Summary of Position

1. The Law Council of Australia is grateful for the opportunity to provide the following submission to the Committee's inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters Bill) 2014 (the Bill).
2. This summary outlines the context to the Law Council's position and provides key recommendations. The analysis of the Bill and the rationale behind our recommendations is provided in the detailed submissions.

### Law Council position in context

3. The Law Council supports Parliament's resolve to provide a strong legislative regime to criminalise acts of terrorism and protect Australians from the threat of those who travel overseas, participate in hostile activity and return to Australia.
4. This is in line with Australia's international obligations under United Nations Resolution 1373 which requires Australia to take measures to 'prevent movement of terrorists and terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identify papers and travel documents'.
5. It is also in accordance with United Nations Resolution 2178 (2014) which requires Australia to 'prevent and suppress the recruiting, organising, transporting or equipping of individuals who travel to a State other than their State of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities.'
6. As a peak professional institution committed to the rule of law and the peaceful stability of civil society the Law Council recognises a responsibility in these areas to work constructively with Government in pursuing its security obligations.
7. The reforms introduce significant changes to the national security and counter-terrorism legislative landscape. Many of the reforms contained in the Bill are welcome. Several draw on recommendations made by independent bodies such as the former Independent National Security Legislation Monitor and the COAG Review of Counter-Terrorism Legislation (2013) in a manner designed to strengthen and improve Australia's counter-terrorism legislative framework to respond to the foreign fighter threat.
8. The overarching rationale of the Bill - namely to protect the Australian public from the threat of terrorism- is welcomed. The right to life is a fundamental human right identified in the *International Covenant on Civil and Political Rights* (ICCPR)<sup>1</sup>, as is the right to liberty and security. The primary responsibility of the government in this area is to protect the lives of citizens and preserve parliamentary democracy.
9. Terrorism is also directed at attacking the robustness of our parliamentary democracy and the bulwarks protecting individual freedoms. It manifests a challenge that can provoke a disproportionate response – and such a response itself fulfils that objective of the terrorist organisations.

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<sup>1</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976).

10. If our society is to remain free, it is important to react appropriately to the terrorist threat but not to overreact – to do so undermines the values which underpin our society – the very thing terrorists are trying to do. The keystone to an appropriate response is the concept of proportionality.
11. In this light, the Law Council notes that there are tensions between the primary objectives of the Bill and other commonly accepted individual rights and freedoms most notably, the right to be presumed innocent, the right to freedom from arbitrary detention and the right to liberty of the person, the right to a fair trial, the right to privacy, the right to freedom of movement, freedom of association and freedom of expression, the rights of parents and children, the right to work and the right to social security<sup>2</sup>.
12. These tensions, and the potential impact on accepted freedoms and mean that the reforms require care to ensure the least intrusive means is adopted to achieve the desired result, namely of preventing Australians from engaging in terrorist activity overseas and returning to Australia with increased capability to commit a terrorist act on domestic soil. It is also critical to take careful account of the broad range of existing terrorist-related offences and exceptional law enforcement and intelligence gathering powers already available. The need for new legislation is established only where it can be determined by those with the necessary knowledge that the existing mechanisms of the criminal law are not sufficient to protect our citizens and our institutions. In this submission we seek to identify the existing safeguards and provisions and ask why are they not sufficient.
13. Where a gap exists the response must be proportionate to the risk. Determining proportionality of response is difficult without access to comprehensive data on the intelligence gathered to identify risk.
14. Certain provisions of the Bill do not appear to take into account the broad range of existing terrorist-related offences and exceptional law enforcement and intelligence gathering powers already available. Some provisions of the Bill (such as the proposed new offence of entering a declared area, new powers to suspend travel documents and extended powers to detain and/or question people without charge) have the potential, if misused or mistakenly used, to impact significantly on the lives and rights of Australians who have no criminal intention or pose no risk to national security. The proportionality of the response in these areas must be justified.
15. Accordingly in this submission we draw attention to specific provisions of the Bill which seem to us to require justification on the basis of need and proportionality of response
16. The Law Council's submission recommends that the Bill requires significant amendments to ensure its likely effectiveness and adequate protection of the rule of law and the rights and freedoms of Australians. As a starting point, the Law Council considers that the Bill's measures could be enhanced by further drawing on recommendations by the INSLM and the COAG Review.
17. The Law Council also considers that the issue of radicalisation in the Australian context must be addressed not merely through legislative measures. Finding ways to strengthen positive networks that foster a sense of belonging and identity play an important role in countering violent extremism.

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<sup>2</sup> Article 9 – *International Covenant of Economic, Social and Cultural Rights*, see <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Rightsocialsecurity.aspx>

## Summary of Provisions reviewed in Submission

### New offence of entering or remaining in a 'declared area'

18. Issues which arise in relation to this proposed offence are that it:

- has the potential to significantly affect Australians' freedom of movement;
- is broad in its application;
- may have a disproportionate effect;
- may present undue difficulties for accused persons accessing relevant evidence from the declared area to present to a court in their own defence;
- is contrary to the rule of law principle that offences should not be so broadly framed that they inadvertently capture a wide range of benign conduct; and
- is overly reliant on law enforcement and prosecutorial discretion.

19. The discussion which follows suggests that a preferable approach would be to rely on the proposed offences of entering a foreign country with the intention of engaging in hostile activity, or preparing to do so. These offences are sufficiently broad to prevent a person from travelling to a certain region to engage in terrorist activities.

20. On this basis the Law Council does not support the proposed offence, but if it is pursued, it should be amended to require:

- (a) intention of travelling to a declared area for an illegitimate purpose or purposes as a fault element of the offence (an illegitimate purpose could be defined as a purpose that was not listed or accepted by the court as legitimate);
- (b) that a court be provided with the discretion to determine on a case by case basis whether a person travelled to a declared area for a legitimate purpose. In such a case the power to make regulations under this provision would be removed from the Bill; and
- (c) the following conduct to also be classed as a legitimate purpose for the purposes of the offence:
  - (i) providing legal advice to a client;
  - (ii) making a bona fide visit to a friend, partner or business associate; and
  - (iii) performing bona fide business, teaching and/or research activities.

### New advocacy offence

21. The Law Council considers that certain issues require further consideration in relation to this proposed new offence, including:

- (a) the need for the offence in light of existing offences. Examples should be made publicly available, of the kind of conduct which is sought to be covered

by the advocacy offence, which would not be covered by pre-existing offences such as incitement; and

- (b) further consideration of how the new proposed offence would intersect with the broad potential range of conduct captured under the 'terrorist act' definition, taking into account the potential scope of the section 80.3 defence.

### **Advocacy as a ground for terrorist organisation proscription**

- 22. As explained below, in light of the amendments to the relevant definition of advocacy, either proposed section 102.1(1A) (concerning advocacy of terrorist acts by an organisation) should be repealed or paragraph 102.1(1A)(c) (the 'praise' limb) should be removed. The Law Council questions the need to extend the reach of the section to include the promotion and encouragement of terrorism and draws attention to the problems arising from the current attempt to do so.
- 23. If the proposed measure is implemented, there should be a requirement for the promotion or encouragement to create a *substantial risk* that such promotion or encouragement might lead a person to engage in a terrorist act.

### **Lowering the threshold test for arrest without warrant for terrorism offences**

- 24. The Law Council considers that proposed section 3WA of the Crimes Act should be reconsidered. Further consideration should be given to the general amendment of section 3W.

### **Extension of sunset clauses**

- 25. The Law Council questions the extension of the sunset provisions for the preventative detention order (PDO) regime, the control order (CO) regime, the Australian Security and Intelligence Organisation (ASIO) questioning and detention warrants, questioning warrant powers, or for police stop, search and seizure powers in light of the outcome of independent reviews conducted by the Independent National Security Legislation Monitor (INSLM) and the COAG Counter-Terrorism Review.
- 26. The Law Council questions why the recommendations from these independent reviews have not been adopted.
- 27. If this extension is pursued, the Law Council recommends:
  - (a) ASIO questioning and detention warrants should be repealed and replaced with a detention power narrower in scope, as recommended by the INSLM;
  - (b) PDO reporting requirements should provide that a detailed description of the detainee be provided only where reasonable efforts to determine his or her name have failed; and
  - (c) police, stop, search and seizure powers should cease to exist after five years, as recommended by the COAG Review.

### **Control orders**

- 28. Particularly for COs, the Law Council recommends that:



- (a) the INSLM's suggestion of replacing COs with 'Fardon type provisions'<sup>3</sup> authorising COs against terrorist convicts who have not rehabilitated satisfactorily and remain dangerous should be adopted rather than suspicion-based grounds;
- (b) If CO grounds are extended to conviction of a foreign terrorism offence, the Australian court should be satisfied that the conviction in a foreign country has occurred on the basis of fair trial principles and does not involve matters such as the grounds listed for refusal under the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (Mutual Assistance Act);
- (c) the COAG Review's decision that the threshold for seeking a control order should remain as 'considers on reasonable grounds', rather than 'suspects on reasonable grounds' should be supported; and
- (d) the Law Council welcomes the proposed improved safeguards in the CO regime, but considers that they should be further enhanced as suggested in our detailed discussion below.

## Passport suspension and notification measures

29. The Law Council recognises the need for these measures but suggests that additional safeguards as detailed in the submission below should be considered.
30. The Law Council questions whether amendments to override the requirement in the Passports Act to notify a person of a passport refusal or cancellation decision on security grounds are proportionate. If these are pursued, it considers that:
- (a) a requirement to consider revocation after a reasonable period should apply;
  - (b) the proposed subsection 48A(4) should be amended so that if the Minister administering the *Australian Federal Police Act 1979* (Cth) is satisfied that notifying the person of the decision would be *prejudicial* to a current relevant law enforcement investigation, that the Minister may certify accordingly; and
  - (c) reporting requirements should apply in respect of such requests.

## Migration Act amendments

### Visa cancellation

31. Given the range of powers already available to the Minister for Immigration to cancel visas on these grounds, the Law Council recommends the Committee to seek further information from the Department of Immigration and Border Protection (DIBP) as to why the emergency visa cancellation powers proposed in the Bill are needed.
32. If the proposed amendments are pursued, the Law Council recommends that consideration be given to amending the proposed provisions to:

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<sup>3</sup> The INSLM referred to orders under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD), which the High Court upheld in 2004 as constitutional in *Fardon v Attorney-General* (QLD) (2004) 223 CLR 575. The Act allows a court, if satisfied a prisoner released from custody would otherwise be a serious danger to the community, to order that the prisoner be detained in custody indefinitely for control, care or treatment or that the prisoner be released subject to requirements set out in the order.



- ensure that the emergency cancellation power is discretionary not mandatory, permitting the decision maker to have regard to the circumstances of the case;
- ensure that clear limits are placed on the number of times a person can be subject to the use of the emergency cancellation power; and
- enshrine in legislation the policy principles outlined in the Explanatory Memorandum that are intended to apply to consequential visa cancellations, such as those that seek to implement some of Australia's relevant obligations under the Convention on the Rights of the Child (CROC).<sup>4</sup>

33. The Law Council also recommends that the Committee seek further information about the other proposed changes to the *Migration Act 1958* (Cth) (Migration Act) proposed in Schedules 5 to 7 of Bill, having particular regard to the amendments proposed in the *Migration Amendment (Protection and Other Measures) Bill 2014* and the need for a Privacy Impact Assessment be prepared in relation to the changes to immigration clearance systems proposed in Schedules 5 and 6.

## Foreign Incursions Act amendments

34. The Law Council recommends:

- (a) Lowering the penalties for relevant offences which involve preparatory conduct versus actual harm; and
- (b) Removing from the section 117.1 definition of 'engaging in a hostile activity' the reference to unlawful destruction or damage to government property. The level of culpability involved is too low to warrant potential life imprisonment as proposed for the relevant offences.

## Delayed notification search warrants scheme

35. While accepting independent recommendations have been made in favour of such a scheme, the Law Council recommends further enhancements as detailed in the submissions below

## Foreign evidence

36. The Law Council accepts the necessity of the proposed *Foreign Evidence Act 1994* (Cth) amendments. It considers that they would be improved by:

- (a) tightening the circumstances in which it is not practicable to obtain foreign government material in situations when 'the political circumstances or states of conflict render impracticable the making of a request of the government of the country';
- (b) amending clause 27C(1) so that s27C(2) is applicable to all foreign material and all foreign government material;
- (c) to ensure that the material was not obtained through duress or torture extending mandatory exception to admissibility for material obtained directly as a result of torture or duress to: any situation in which it can be

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<sup>4</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

demonstrated that torture or duress was used, rather than requiring a public official's involvement or acquiescence;

- (d) requiring that where there are concerns about whether evidence was obtained by torture or duress that the onus was on the party seeking to have the evidence admitted to satisfy the court on the balance of probabilities that the material was not obtained by torture or duress;
- (e) extending the definition to 'duress' to:
  - situations which involve threats to a person's associates;
  - threats which are not imminent but real and would cause a reasonable person to provide the relevant material or information; and
  - threats involving serious property damage – such as destroying a person's livelihood or home – which would cause a reasonable person to respond accordingly.
- (f) the AFP member's statement regarding foreign government material should include steps taken to confirm the veracity of the information included in the foreign government material.

## Customs powers

37. The Law Council is not persuaded that a different definition of a 'serious Commonwealth offence' for the *Customs Act 1901* (Cth) applying than that advanced by the *Crimes Act 1914* (Cth) is needed or justified and is concerned that lowering the threshold to offences punishable by only 1 year imprisonment may not be an effective counter-terrorism measure as terrorism offences are punishable by far higher penalties.
38. The Law Council accepts that a customs officer may need sufficient time to undertake enquiries once a person is detained. However, the Law Council questions whether the extension from 45 minutes to 4 hours of detention without being able to contact a family member of another person has been shown to be necessary or reasonable.
39. The Law Council also makes some suggestions for improvements to the proposed amendments that will assist in ensuring that the amendments are proportionate.

## Welfare payments

40. If the proposal is pursued, the Law Council would prefer that the Attorney-General's decision should be made on reasonable grounds, having regard to certain key criteria including:
- (a) whether there are reasonable grounds to suspect that a person is or will be directly involved in activities which are prejudicial to security;<sup>5</sup>
  - (b) whether there are reasonable grounds to suspect that a person's welfare payments are being or will be used to support these activities;

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<sup>5</sup> Based on ASIO's security assessment.

- (c) the necessity and likely effectiveness of cancelling welfare payments in addressing the prejudicial risk, having regard to the availability of alternative responses; and
- (d) the likelihood that the prejudicial risk of the person to security may be increased as a result of issuing the security notice.

41. Potentially:

- (a) merits review should be available by the AAT Security Division in respect of the Attorney-General's decision to issue a security notice;
- (b) a minimum standard of disclosure of information must be given to the subject about the reasons for the allegations against him or her;
- (c) a payment nominee should be required to act in the best interests of the child or dependants; and
- (d) the Attorney-General should be required to regularly consider whether revocation of a security notice is warranted.

## Detailed Submissions

### Available timeframes

42. The Bill being 158 pages in length and amending approximately 20 pieces of legislation, the public was only given 10 days in which to provide a submission. The Law Council considers such a limited timeframe has not allowed for proper public consideration and consultation. This is required to ensure that Australia will indeed be well equipped with the most effective and appropriate counter-terrorism laws
43. Given the short timeframe for the present inquiry, the Law Council has had insufficient time to prepare detailed submissions on all aspects of the Bill. WE have endeavoured to deal with those provisions which seem most significant. Despite it has therefore been necessary for the Law Council's submission to concentrate on only a limited number of the Bill's measures. Given the limited period available the observations made in this submission may be subject to expansion, amendment or clarification.

### New offence of entering or remaining in a 'declared area'

44. Under the Bill, it is proposed that a person will commit an offence, punishable by a maximum of 10 years' imprisonment, where a person enters or remains in an area in a foreign country that is a 'declared area'. The Minister for Foreign Affairs will have the power to declare an area where he or she is satisfied that a terrorist organisation listed under the Criminal Code is engaging in a hostile activity in that area.
45. It would be a defence for the person to show that they entered or remained in the area *solely* for one or more of the limited legitimate purposes provided in the legislation.
46. As noted above, individuals' freedom of movement can be restricted to protect national security but this restriction must be necessary and proportionate and must be the least intrusive means of achieving the desired result. The Explanatory Memorandum provides that:

*The legitimate objective of the new offence is to deter Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity unless they have a legitimate purpose to do so. People who enter, or remain in, a declared area will put their own personal safety at risk. Those that travel to a declared area without a sole legitimate purpose or purposes might engage in a hostile activity with a listed terrorist organisation. These people may return from a declared area with enhanced capabilities which may be employed to facilitate terrorist or other acts in Australia.<sup>6</sup>*

47. The Law Council questions whether proposed section 119.2 has the potential to impact on Australians' freedom of movement. It is possible that people with valid reasons for being in a declared area could have difficulties in accessing or presenting relevant evidence in their own defence.
48. If a person enters or remains in a declared area criminal liability will be *prima facie* established. It will be incumbent upon the defendant to produce evidence that

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<sup>6</sup> Explanatory Memorandum to the Bill, p. 47.

suggests a reasonable possibility that he or she was in the declared area solely for a legitimate purpose.<sup>7</sup>

49. The broad drafting of the provision means that a wide range of individuals with no criminal intent may be caught within the ambit of the proposed offence. The Law Council notes the rule of law principle that offences should not be so broadly framed that they inadvertently capture a wide range of benign conduct and are overly reliant on law enforcement and prosecutorial discretion.
50. There is a risk that the offence may result in people who have failed to keep adequate records being found guilty. The defendant may be unable to show that there is a reasonable possibility that travel was solely for a legitimate reason because of a lack of capacity to explain their reasons due to age, cultural and linguistic background or physical or mental capacity, or a lack of skills in record keeping.
51. As such, the offence may have the unintended effect of preventing and deterring innocent Australians from travelling abroad for legitimate purposes (such as visiting relatives, or providing humanitarian assistance) out of fear that they may be prosecuted for an offence, subjected to a trial and not be able to adequately displace the evidential burden.
52. An unintended consequence of the offence is that it is likely to particularly impact on certain segments within the community which may for example have family connections or trading engagements in declared areas. This impact (when combined with the breadth of the offence and the evidential burden on the accused) risks marginalising precisely those segments of the Australian community whose cooperation and goodwill is most essential to curbing the terrorist threat.
53. Research suggests that marginalisation such as this may be a key vulnerability factor that makes an individual more receptive to extremist ideology.<sup>8</sup> Viewed in this light, the offence has the potential to be counterproductive.
54. Further consideration is required as to the operation of the offence with the ancillary offences under Chapter Two of the Criminal Code, and any unintended consequences which may result. For example, it is an offence for a person to aid, abet, counsel or procure the commission of an offence by another person.<sup>9</sup> A person who acts as a travel agent, or a body corporate which operates aircraft carriers, may be concerned at their potential exposure to these ancillary offences – with the result that even people with legitimate travel reasons will be unable to do so.
55. For the above reasons, the Law Council considers that a preferable approach would be to rely on the proposed offences of entering a foreign country with the intention of engaging in hostile activity (proposed subsection 119.1(1)), or preparing to do so (proposed section 119.4). It is submitted that these offences are sufficiently broad to prevent a person from travelling to a certain region to engage in terrorist activities.
56. Other measures in the Bill are also designed to make it easier to prosecute these foreign offences by more readily permitting foreign evidence to be adduced before the courts. The National Security Legislation (Amendment) Bill 2014 (Cth) is designed to better enable ASIS to collect intelligence on Australians overseas at the request of

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<sup>7</sup> Section 13.3 of the Criminal Code.

<sup>8</sup> See for example Dr Hussein Tahiri and Professor Michele Grossman, *Community and Radicalisation: An examination of perceptions, ideas, beliefs and solutions*, September 2013, p 39. Marginalisation and radicalisation were also linked in the Australian Government's Counter-Terrorism White Paper, 2010, p iv.

<sup>9</sup> Section 11.2, Schedule to the *Criminal Code Act 1995 (Cth)*.

ASIO – which may be communicated to the AFP where it relates to a serious crime<sup>10</sup> – and may also assist in prosecuting foreign offences.

57. If the Law Council's preferred approach is not accepted by the Committee, the Law Council suggests that the offence could be improved as noted below.

58. The offence does not identify a fault element but as the physical element involves a 'circumstance in which conduct occurs' (i.e. being in an area that has been declared for the purpose of the offence), the fault element is recklessness.<sup>11</sup> It is acknowledged that this requires that a person a) must be aware of a substantial risk that the area was declared; and b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. However, it nevertheless means that a person can be caught within the ambit of the offence *without knowing* that the area is declared and *without any intention* of engaging in terrorist activity. This may particularly be the case where a person is uncertain as to the boundaries of the declared area, for example. The Law Council considers that it would be preferable if the offence specified 'intention of travelling to a declared area for an illegitimate purpose or purposes' as a fault element of the offence.<sup>12</sup>

59. The 'legitimate purposes' specified (such as bona fide visits to family members, providing aid of humanitarian nature) are too narrowly defined. They do not permit a range of other legitimate purposes for travel such as:

- a bona fide visit to a friend or partner. The Law Society of New South Wales has noted for example that the proposed provision would not permit a person visiting a dying friend who is not a family member;
- bona fide business, teaching or research purposes – for example, it would seem highly unfair to deprive for three years a person of his or her livelihood through an export or import business purely because a listed terrorist organisation had commenced operating in an area;
- the purposes of providing legal advice to an Australian citizen. For example, if parts of Egypt had been a declared area, Peter Greste's lawyer would not be able to visit him for the purposes of providing legal advice under this offence; or
- missionary work.

60. The requirement for a defendant to establish that there was a reasonable possibility that he or she was in a declared area *solely* for one or more of the listed legitimate purposes also creates difficulties. A person may travel to an area for multiple legitimate purposes although these may not all be covered in the proposed section 119.2 of the Criminal Code. In the example above, a legal representative may travel to Egypt for the dominant reason of providing legal advice to a client (not covered by the defences in proposed section 119.2) with a secondary purpose of a bona fide visit to a family member (currently covered by the defences). However, in such a case the lawyer would be held guilty of an offence liable of 10 years' imprisonment because he or she did not travel to the area *solely* for one or more of the defined legitimate purposes specified in section 119.2.

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<sup>10</sup> Subparagraph 18(3)(b)(i), *Australian Security and Intelligence Organisation Act 1979* (Cth).

<sup>11</sup> Section 5.4 Criminal Code.

<sup>12</sup> An illegitimate purpose could be defined as a purpose that was not listed or accepted by the court as legitimate (see further discussion below regarding the Law Council's recommendation that a court be granted discretion to determine a legitimate purpose).

61. The ability to prescribe further legitimate purposes in regulations will be of no use to a defendant who travelled to an area for a purpose that the community would ordinarily consider to be legitimate but happened not to be covered under proposed section 119.2 (as in the example provided above). A far more flexible approach would be to permit the court to exercise its discretion as to determine whether travel was for a legitimate purpose. This could be achieved by inserting a general terms clause at the beginning of subsection 119.2(3) to provide 'without limiting this subsection'. In such a case the administrative burden of producing regulations would also be removed.

**62. Recommendations:**

- Proposed section 119.2 should be removed from the Bill.
- If this primary recommendation is not accepted by the Committee, proposed section 119.2 should be amended to require:
  - intention of travelling to a declared area for an illegitimate purpose or purposes' as a fault element of the offence;
  - an illegitimate purpose could be defined as a purpose that was not listed or accepted by the court as legitimate;
  - subsection 119.2(3) to provide 'without limiting this subsection' to allow a court the discretion to determine on a case by case basis whether a person travelled to a declared area for a legitimate purpose. In such a case the power to make regulations under this provision would be removed from the Bill; and
  - the following conduct to also be classed as a legitimate purpose for the purposes of the offence:
    - providing legal advice to a client;
    - making a bona fide visit to a friend, partner or business associate; and
    - performing bona fide business, teaching and/or research obligations.

## **New offence for advocating terrorism**

63. Proposed new section 80.2C will provide a maximum penalty of five years' imprisonment where a person intentionally advocates the doing of a terrorist act or terrorism offence and is reckless as to whether another person will engage in that conduct as a result. The definition of 'advocates' is broad and includes situations where a person 'promotes' or 'encourages' the doing of a terrorist act or terrorism offence.

64. In support of introducing this new offence, the Attorney-General has noted that:

*Currently an organisation can be listed as a terrorist organisation if it directly or indirectly counsels or urges the doing of a terrorist act, directly or indirectly provides instruction on the doing of a terrorist act, or directly praises the doing of a terrorist act. However, there is a current gap in the law around individuals promoting terrorism. To address this issue, a person will commit an offence if*



*they intentionally counsel, promote, encourage or urge the doing of a terrorist act or the commission of a terrorism offence.*<sup>13</sup>

65. It is difficult to make an accurate assessment as to the necessity of the advocacy offence in light of the wide range of offences which are currently available (discussed below). The Law Council therefore encourages the Committee to seek examples from the Attorney-General's Department as to what conduct would be captured by the offence which is not already encompassed by pre-existing offences. There is utility in making any such examples publicly available and deferring commencement until the community has had an opportunity to consider its full ramifications. A range of legislative measures already exist which would appear to overlap significantly with the proposed offence. For example, it is already an offence to:

- urge another person to overthrow the Constitution or Government violence;<sup>14</sup>
- urge another person to interfere with parliamentary elections or constitutional referenda by force or violence;<sup>15</sup>
- urge another person to engage in inter-group violence or violence against members of groups;<sup>16</sup>
- recruit persons to join organisations engaging in hostile activities against foreign governments, where 'recruit' includes 'procure, induce and incite' and 'incite' includes to 'urge, aid and encourage';<sup>17</sup>
- recruit for a terrorist organisation where 'recruit' includes 'induce, incite and encourage';<sup>18</sup> and
- collect or make a document that 'is connected with preparation for, the engagement of a person in, or assistance in a terrorist act'.<sup>19</sup>

66. A person who urges the commission of an offence is also guilty of the offence of incitement.<sup>20</sup> Much of the conduct intended to be covered by the proposed offence is therefore already covered by incitement to commit other offences. Some of relevant Commonwealth offences in this regard may include:

- (most notably in the context of the current Bill) offences under the Foreign Incursions Act, including incitement to enter a foreign State with intent to engage in a hostile activity or engaging in such an activity in a foreign State;<sup>21</sup>
- the offence of treason;<sup>22</sup>
- terrorism offences;<sup>23</sup>

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<sup>13</sup> Attorney-General, Second Reading Speech to the Bill, 24 September 2014, p. 4.

<sup>14</sup> Subsection 80.2(1) of the Criminal Code.

<sup>15</sup> Subsection 80.2(3) of the Criminal Code.

<sup>16</sup> Sections 80.2A and 80.2B of the Criminal Code.

<sup>17</sup> Sections 3 and 8 of the Foreign Incursions Act; proposed sections 117.1 and 119.6 of the Criminal Code.

<sup>18</sup> Section 102.4 and subsection 102.1(1) of the Criminal Code.

<sup>19</sup> Section 101.5 of the Criminal Code.

<sup>20</sup> Section 11.4 of the Criminal Code. Subsection 11.4(2) requires that the person must intend that the offence incited be committed.

<sup>21</sup> Subsection 6(1) of the Foreign Incursions Act; proposed section 119.1 of the Criminal Code.

<sup>22</sup> Section 80.1 of the Criminal Code.

<sup>23</sup> Part 5.3 of the Criminal Code.

- the offences of causing harm to Commonwealth officials;<sup>24</sup>
- offences against the Government;<sup>25</sup>
- offences concerning the protection of the Constitution and public services;<sup>26</sup>
- offences under the *Commonwealth Electoral Act 1918* (Cth); and
- ordinary criminal offences prohibiting harm, or threats of harm, against persons or property.

67. The Law Council acknowledges the good faith defence in section 80.3 of the Criminal Code is an important safeguard in that it, for example, addresses legitimate expressions by artists or writers, and allows for genuine debate of issues in the public interest. It also recognises that the encouragement or promotion will be tied to the requirement of the person being aware of a substantial risk that such conduct may have the effect of leading a person to engage in a terrorist act or terrorism offence.

68. Nevertheless, due to uncertainty in the scope of key terms such as ‘promotion’ – which are lower-level than ‘urging’ – the offence may inhibit public commentary on controversial topics, for fear of criminal prosecution – regardless of whether it is illegal or not. The terms ‘encourages’ and ‘promotes’ are not defined in the Bill. The Law Council notes in this regard that these terms would take on their ordinary meaning and that these words are broad in their connotations.

69. The combination of the very broad existing definition of ‘terrorist act’ in the Criminal Code, the low thresholds in the new offence eg. ‘promotion’ for the new proposed advocacy offence, and a lack of clarity within the section 80.3 defence appear to leave open the possibility that an individual may come within the ambit of the offence for promoting the take up of arms against an oppressive foreign regime. In this context, the Law Council notes that its preliminary research indicates that the section 80.3 defence, which relies heavily upon the court’s discretion, does not appear to have been relied upon in court. This raises questions about the likely interpretation of this defence, including what might fall into the category of discussion which is for a genuine purpose in the public interest.

70. While it is arguable that such an individual may already be found guilty of an existing offence eg. under the section 11.4 incitement offence (if he or she ‘urges’ that an individual commit an offence including engaging in a terrorist act), this example does serve to highlight some of the existing problematic features of the terrorism provisions in the advocacy context. It also highlights that shifting public sentiment can affect judgements about whether actions constitute ‘terrorist acts’, what constitutes legitimate public debate and the fact that these judgments can change over time.

71. For the reasons outlined above, the Law Council considers that the precise ambit of the advocacy of terrorism offence should be the subject of further consideration and definition.

## 72. Recommendation:

73. This offence not be progressed until certain issues have been considered and dealt with, including:

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<sup>24</sup> Part 7.8 of the Criminal Code.

<sup>25</sup> Part II of the *Crimes Act 1914* (Cth).

<sup>26</sup> Part IIA of the *Crimes Act 1914* (Cth).

- (a) the need for the offence in light of existing offences. It would assist such deliberations should the Committee seek examples of the kind of conduct which is sought to be covered by the advocacy offence, which would not be covered by pre-existing offences such as incitement. These de-identified examples would be made available to the public to enable full and proper assessment of its necessity and legal ramifications; and
- (b) further consideration of how the new proposed offence would intersect with the broad potential range of conduct captured under the 'terrorist act' definition, taking into account the potential scope of the section 80.3 defence.

## **Advocacy as a ground for terrorist organisation proscription**

74. The Bill would amend the definition of 'advocates' in subsection 102.1(1A) of the Criminal Code to ensure that an organisation can be listed as a terrorist organisation if the organisation 'promotes' or 'encourages' terrorism. Currently, the definition of 'advocacy' includes where the organisation: directly or indirectly counsels or urges the doing of a terrorist act, or 'praises' terrorism where there is a substantial risk that such praise might lead to a person to engage in a terrorist act.
75. A consequence of the proposed measure is that serious offences relating to membership or association with a terrorist organisation will be extended to organisations promoting or encouraging terrorism. The result of the proposed amendment is that, under the Criminal Code, a person who is a member of an organisation could be prosecuted for a criminal offence if another member of that group 'encourages or promotes' a terrorist act,<sup>27</sup> even when the person who encouraged or promoted the terrorist act is not the leader of the group, or when the statement is not accepted by other members as representing the views of the group.<sup>28</sup>
76. As the Law Council has often pointed out, the issue of attribution is significant because the members of any organisation are rarely a homogenous group who think and talk as one. On the contrary, although possibly formed around a common interest or cause, organisations are often a battleground for opposing ideas, and may represent a forum in which some members' tendencies towards violent ideology can be effectively confronted and opposed by other members. The risk is guilt by association.
77. For these reasons, the Law Council maintains the view that the power to proscribe an organisation on the basis of advocacy alone is unjustified and disproportionate and section 102.1(1A) should be repealed.
78. The COAG Review recommended that subsection 102.1(1A) be amended to omit paragraph (c) which deals with a situation where an organisation directly praises the doing of a terrorist act. The Committee considered that the concept of 'advocacy' arising from 'praise' for a terrorist act is too broad and indefinite to warrant legal consequences.<sup>29</sup>
79. The INSLM considered the issue at the hearing into the financing terrorism offences and indicated that he saw problems with not just paragraph (c) but also (b) (the counselling or urging limb) of subsection 102.1(1A).

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<sup>27</sup> For example, if, under the proposed changes, the organisation is proscribed because it encourages or promotes a terrorist act, a person could then be prosecuted for being a member of the terrorist organisation under the section 102.3 offence.

<sup>28</sup> Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at [8.10].

<sup>29</sup> Recommendation 13 of the COAG Review of Counter-Terrorism Legislation Report, 2013.

80. The Law Council supports the COAG recommendation as an important step in addressing its concerns with proscribing organisations on the basis of advocacy. However, it notes that the proposed amendment in the Bill appears to be at odds with the COAG recommendation as it broadens the notion of advocacy rather than limits it.
81. It must also be recognised that what is considered encouragement or promotion of terrorism can be a subjective determination, which depends on a variety of matters including the speaker, the receiving audience and context in which the 'encouragement' occurs. This definition lacks legal certainty and includes unclear terminology (such as 'indirect promotion') that may encompass a very wide spectrum of acts or representations.
82. Further, while it is generally held that the Islamic State would engage in acts that encourage or promote terrorism, this question may not be so readily answered in terms of other organisations and may result in divisive and damaging community outcomes.
83. Clearly, measures to criminalise the encouragement or promotion of terrorism may restrain freedom of association and freedom of speech. The question is whether those restraints are proportionate to the risk and it should be recognised that they may prove counter-productive.
84. The Security Legislation Review (Sheller) Committee (2006) recommended that the advocacy ground be repealed or substantially amended, partly on the basis that it was likely to contribute to alienating Australia's Muslim communities. While the offence has been tightened slightly since the Sheller Committee's review, the Law Council is of the view that the Committee's concerns remain valid.
85. Another effect of this amendment is that there is potential for an organisation to be proscribed for indirectly promoting or encouraging terrorism in circumstances where the relevant conduct is very low risk or of negligible risk of causing others to engage in a terrorist act or terrorism. Preferably, there should be a requirement for the promotion or encouragement to create a *substantial risk* that it might lead a person to engage in a terrorist act.
86. If this measure is implemented, the Law Council suggests that the COAG Review's recommendation 15 should be implemented requiring the Attorney-General's Department to consider whether it is able to enhance its communication methods to ensure that communities are more effectively notified when an organisation has been proscribed.
- 87. Recommendation:**
- Section 102.1(1A) should be repealed, or at least paragraph 102.1(1A)(c) (the 'praise' limb) should be repealed. The section should not be extended to include the promotion and encouragement of terrorism; and
  - if contrary to the Law Council's recommendation, this measure is implemented, at a minimum there should be a requirement for the promotion or encouragement to create a *substantial risk* that such promotion or encouragement might lead a person to engage in a terrorist act. The COAG Counter-Terrorism Review Committee's recommendation 15 should also be implemented.

## Lowering the threshold for arrest without warrant for terrorism offences

88. Section 3W of the Crimes Act currently provides that a police officer may arrest a person without a warrant where he or she 'believes on reasonable grounds' that the person has committed or is committing an offence. The Bill would insert a new section 3WA that would lower the threshold for arrest without warrant for a terrorism offence or offence of advocating terrorism to a 'suspects on reasonable grounds' standard.

89. The Explanatory Memorandum supports this amendment by saying:

*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 indicates that arrest, even under the lower threshold of 'suspicion', is not arbitrary and clear legal standards exist around the necessary mental state required.*

*In his Fourth Annual Report, the INSLM recommended the threshold of 'suspects', noting that the power has a proactive and preventative focus and is of use in a terrorism-related context. An arrest threshold based on suspicion is not a new concept in Australian law and is used in a number of Australian jurisdictions. The arrest threshold in the United Kingdom is 'reasonable grounds for suspecting', a position which is consistent with the European Convention on Human Rights. Lowering the arrest threshold will allow police to intervene and disrupt terrorist activities and the advocating of terrorism at an earlier point that would be possible where the threshold is 'reasonable grounds to believe'.*

*Accordingly, this amendment is a reasonable, necessary and proportionate measure in relation to offences that constitute grave threats to Australia and its national security interests.<sup>30</sup>*

90. The Law Council questions whether a different test for terrorism offences in relation to arrest is desirable. The Law Council notes in this regard that the former INSLM while recommending 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 section 3W of the Crimes Act 1914,<sup>31</sup> a 'special rule for terrorism offences in relation to arrest' would 'be hard to justify'.<sup>32</sup>

91. **Recommendation:**

- Proposed section 3WA of the Crimes Act should be reconsidered. Further consideration should be given to the general amendment of section 3W.

## Extension of sunset clauses

92. The Law Council questions the extension of the sunset provisions for the PDO regime, the CO regime, the ASIO questioning and detention warrants, questioning warrant powers, or for police stop, search and seizure powers in light of the outcome of independent reviews conducted by the INSLM and the COAG Counter-Terrorism

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<sup>30</sup> Bill Explanatory Memorandum, page 21

<sup>31</sup> Recommendation VI/3 of the Monitor's Fourth Report.

<sup>32</sup> Ibid, p. 64.

Review. Further discussion of the Law Council's views on these issues is at Attachment A.

## Control orders

93. Amending the threshold for seeking a control order. The Explanatory Memorandum notes that the amendment is intended to allow an AFP applicant to request the Attorney-General's consent for a control order based on a lower degree of certainty as to whether a control order would 'substantially assist in preventing a terrorist act'.<sup>33</sup>
94. The amendment to the threshold for seeking a control order from 'considers on reasonable grounds' to 'suspects on reasonable grounds' would appear to be inconsistent with the COAG Review's recommendation that the 'considers' test was more appropriate than a " test in relation to both paragraphs 104.2(a) and (b). The Review considered that the Attorney-General should be asked to consent in a situation where the AFP considers on reasonable grounds that a control order application should be made. The COAG Review concluded, 'mere suspicion should not suffice'.<sup>34</sup>
95. In the absence of further reasons to justify the departure from the COAG Review's recommendation, the Law Council questions this amendment.

### Amending the criteria for seeking a control order

96. The Bill proposes to expand the grounds on which a CO can be sought to capture those:
- (a) participating in training with a listed terrorist organisation;
  - (b) engaged in hostile activity in a foreign country; or
  - (c) convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or a terrorist act.

### *Control orders for convictions in Australia of an offence relating to terrorism*

97. As noted in Appendix A, the Law Council opposes the use of control orders. However, if they are to be maintained the Law Council agrees with the former INSLM's suggestion of replacing the control orders regime with narrower 'Fardon type provisions'.<sup>35</sup> These would authorise COs against terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness.<sup>36</sup> The INSLM confirmed this position in the 2013-2014 annual report.
98. To some extent, the current Bill seeks to incorporate the views of the INSLM by allowing an AFP member to seek the Attorney-General's written consent to request an interim CO where the member suspects on reasonable grounds that the person has been convicted in Australia of a terrorism offence. However, the amendment does not

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<sup>33</sup> Explanatory Memorandum to the Bill, p. 34

<sup>34</sup> COAG Review of Counter-Terrorism Legislation Report, 2013, pp. 57-58.

<sup>35</sup> The INSLM referred to orders under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD), which the High Court upheld in 2004 as constitutional in *Fardon v Attorney-General* (QLD) (2004) 223 CLR 575. The Act allows a court, if satisfied a prisoner released from custody would otherwise be a serious danger to the community, to order that the prisoner be detained in custody indefinitely for control, care or treatment or that the prisoner be released subject to requirements set out in the order.

<sup>36</sup> B Walker, Declassified Annual Report, Australian Government Independent National Security Legislation Monitor, Canberra, 20 December 2012, p. 44.



include any requirement for proven continuing dangerousness and unsatisfactory prospects for rehabilitation. Without such a requirement, the Law Council considers that a control order is hard to justify.

99. This mechanism could be enhanced more fully by a provision requiring a court to issue a CO if satisfied that a prisoner released from custody would otherwise be a serious danger to the community, for example by having been shown to have been unsatisfactory with respect to rehabilitation.

*Control orders for conviction in a foreign country of an offence relating to terrorism*

100. Allowing conviction in a foreign country of an offence relating to terrorism to be a ground for permitting the request and making of an interim control order may be problematic. Australia has international human rights obligations which require it not to be complicit in criminal investigations and trials which do not comply with accepted fair trial principles. An example of the operation of this principle are certain safeguards in the *Mutual Assistance in Criminal Matters Act 1987* (Cth) which require that a foreign country's request for assistance must be refused if for example, a person may be punished for a 'political offence', or on the basis of characteristics including race, religion, nationality or political opinions, or could be tortured.<sup>37</sup>

101. If the proposed amendment is to be pursued, the Australian court should be satisfied that the conviction in a foreign country has occurred on the basis of fair trial principles and does not involve matters such as those grounds listed for refusal under the Mutual Assistance Act.

Improving safeguards in the control order regime

102. The Bill seeks to improve the safeguards in the control order regime. The Law Council welcomes the Bill's measures in this regard, but is of the view that the safeguards should be further enhanced in accordance with the recommendations of the COAG Review.
103. The Bill seeks to implement the COAG Review's recommendation that section 104.12 be amended to provide that the information to be given to a person the subject of an interim control order include information as to all appeal rights and review rights available to that person or to the applicant in the event that an interim order is confirmed, varied or revoked.
104. The Law Council believes that this is an important initial step in improving the safeguards in the control order regime.
105. The Law Council suggests that:
- (a) more information is provided about the kind of conduct a person would need to engage in to make it impractical for the AFP member to comply with the proposed measures. It considers that a Court should be empowered to review the circumstances, and where those circumstances are suggesting that it was not in fact impractical for the AFP member to comply that the control order should be ineffective; and

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<sup>37</sup> Section 8, *Mutual Assistance in Criminal Matters Act 1987* (Cth).



- (b) a person should also be informed of his or her rights to legal representation. This would provide greater clarity and certainty to the subject of an order about his or her access to justice rights.

106. The Law Council further encourages the Committee to recommend that further consideration should be given to implementing the remaining COAG Review recommendations relating to control orders with a view to further strengthening the safeguards in the control order regime. For example:

- (a) the ability of the person to challenge the legality of the order is currently severely hampered by their restricted access to information.<sup>38</sup> This issue was recognised by the COAG Review which recommended that a minimum standard of disclosure of information must be given to the subject about the allegations against him or her to enable effective instructions to be given in relation to those allegations;<sup>39</sup> and
- (b) as noted above, decisions made under section 104.2 (interim control orders) of the Criminal Code are excluded from judicial review under the ADJR Act. This needs to be redressed.

107. The steps taken to alert a person to his or her review and appeal rights would be more meaningful if these issues were addressed.

108. **Recommendations:**

- (a) if COs are to be maintained, the Law Council agrees with the former INSLM's suggestion of replacing COs with 'Fardon type provisions'<sup>40</sup> authorising COs against terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness. This requires amendments.
- (b) the Law Council would not, however, support the other extended grounds proposed for issuing control orders on the grounds that they are a suspicion-based form of restricting liberty.
- (c) if CO grounds are extended to conviction in a foreign country of an offence relating to terrorism, the Australian court should be satisfied that the conviction in a foreign country has occurred on the basis of fair trial principles and does not involve matters such as the grounds listed for refusal under the Mutual Assistance Act,
- (d) the Law Council supports the COAG Review's decision that the threshold for seeking a control order should remain as 'considers on reasonable grounds', rather than 'suspects on reasonable grounds'.

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<sup>38</sup> In circumstances where it is claimed that the release of information might prejudice national security, the person subject to the order may be excluded from accessing information relied upon by police to support the control order application. The person subject to the order is only entitled to a summary of the grounds upon which the interim order was made.

<sup>39</sup> Recommendation 31, COAG Review of Counter-Terrorism Legislation Report, 2013.

<sup>40</sup> The INSLM referred to orders under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD), which the High Court upheld in 2004 as constitutional in *Fardon v Attorney-General* (QLD) (2004) 223 CLR 575. The Act allows a court, if satisfied a prisoner released from custody would otherwise be a serious danger to the community, to order that the prisoner be detained in custody indefinitely for control, care or treatment or that the prisoner be released subject to requirements set out in the order.

- (e) the Law Council welcomes the improved safeguards in the CO regime, but considers that they should be further enhanced by:
  - (i) Committee inquiring into the kind of conduct a person would need to engage in to make it impractical for the AFP member to comply with the requirements to inform a person of their appeal and review rights;
  - (ii) a requirement to inform a person of his or her rights to legal representation;
  - (iii) providing for a minimum standard of disclosure of information to be given to the subject about the allegations against him or her to enable effective legal instructions to be given in response; and
  - (iv) providing that decisions made under section 104.2 (interim control orders) of the Criminal Code are subject to judicial review under the ADJR Act.

## Passport measures

### Power to suspend a person's Australian or foreign travel documents

109. The Bill proposes a new power to temporarily suspend or seize a person's Australian or foreign travel documents for 14 days if ASIO suspects on reasonable grounds both 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.
110. The primary purpose of these amendments is to enhance the Australian Government's capacity to take proactive, swift and proportionate action to mitigate security risks relating to Australians travelling overseas.<sup>41</sup>
111. The Law Council recognises the necessity for such a power but notes that it engages the right to freedom of movement under Article 12 of the ICCPR. Article 12(3) sets out the permissible restrictions on this right; they must be provided by law, necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and be consistent with other rights recognised in the ICCPR.
112. The United Nations Human Rights Committee has noted that such restrictive measures:
- ...must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.*
- The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in*

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<sup>41</sup> Explanatory Memorandum to the Bill, p. 11.

*applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.*

*... The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality. These conditions would not be met, for example, if an individual were prevented from leaving a country merely on the ground that he or she is the holder of 'State secrets', or if an individual were prevented from travelling internally without a specific permit. On the other hand, the conditions could be met by restrictions on access to military zones on national security grounds, or limitations on the freedom to settle in areas inhabited by indigenous or minorities communities.<sup>42</sup>*

113. The Law Council considers, however, that the safeguards contained in these measures could be enhanced to ensure proportionality and compliance with Australia's international obligations, particularly that of Article 12 of the ICCPR. The following suggestions are designed to ensure that the measures are *the least intrusive instrument amongst those which might achieve the desired result.*
114. The Law Council notes that the suspension period does not contain an initial 48 hour period, followed by extensions of up to 48 hours at a time for a maximum 7-day period as proposed by the INSLM.<sup>43</sup> The Explanatory Memorandum states that this 'is necessary to ensure the practical utility of the suspension period with regard to both the security and passports operating environment'.<sup>44</sup>
115. The Law Council questions whether a single 14-day time limit, which is not reviewable or necessarily linked to ASIO ultimately resolving a person's security assessment (which is generally reviewable by the AAT), intrudes overly into individual liberties. The least intrusive means which is also practically useful should be adopted and this may indicate that some lesser period is appropriate.
116. The Law Council acknowledges that powers to suspend the use of a passport on very short notice, pending going through the processes that are required for the cancellation of a passport, may be necessary to prevent some travel to engage in terrorist activity.<sup>45</sup>
117. However, recognising that features of the proposal extend existing Executive discretions in this area and limit the right to liberty of movement and potentially the

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<sup>42</sup> United Nations Human Rights Committee, *General Comment 27*, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

<sup>43</sup> See Recommendation V/4 of the INSLM's Fourth Report which states that the ASIO Act and the Passports Act should be amended to enable ASIO, by its Director-General to make a request for an interim passport suspension where ASIO is considering issuing an adverse security assessment. Recommendation V/5 provides that the *Foreign Passports (Law Enforcement and Security Act 2005* (Cth) should be amended so as to include a power to suspend the capacity to use a foreign passport for the purposes of departing Australia in circumstances similar to those that would permit the interim suspension of an Australian passport.

<sup>44</sup> Explanatory Memorandum to the Bill, p. 81.

<sup>45</sup> Under the *Australian Passports Act 2005* (Cth) the Minister for Foreign Affairs may cancel an Australian passport (subsection 22(1)), including where a competent authority has made a request for cancellation (paragraph 22(2)(d)). ASIO as a competent authority (subsection 14(3)) may request on security grounds that an Australian passport be cancelled (subparagraph 14(1)(a)(i)). ASIO can provide security assessment advice to the Department of Foreign Affairs and Trade requesting the Minister for Foreign Affairs cancel or refuse an Australian passport for security reasons. The Minister for Foreign Affairs has a discretionary power to cancel a passport or refuse an application, and must only do so if he or she is satisfied of the relevant prescribed matters.

right to respect for the family, such a suspension should be used sparingly and be tightly controlled.

118. Consideration should be given to amending the Bill in accordance with the Monitor's recommendations and discussion on these measures (except in relation to the issue of a person's travel documents versus a person's passport for the reason outlined above). The Law Council questions whether the threshold for a request under subsection 22A(2) should be lower than that required for a passport refusal or cancellation request under section 14 of the Act as, unlike the latter provision, the former will not be subject to the same level of review.<sup>46</sup> It would be preferable if the same threshold was maintained. Similarly, there is no review available for a person who has their foreign travel documents surrendered under section 16A of the *Foreign Passports (Law Enforcement and Security) Act 2005*.
119. The making of a suspension or surrender request by ASIO must be based on credible information. It would not appear to be an undue administrative burden to require that this credible information should suggest the *potential* for harmful conduct and should provide suspicion on reasonable grounds that the person *is likely* to leave Australia to engage in conduct that *would be likely* to prejudice the security of Australia or a foreign country.
120. The INSLM recommended in this regard that the meaning of 'would be likely' in the Passports Act should be clarified to ensure that officers of ASIO and other competent authorities apply the correct legislative test. The Monitor noted that the appropriate meaning should be determined by reference to the *potential* for harmful conduct and that an amendment should expressly adopt the 'real and not remote possibility' contained in the original Explanatory Memorandum to the Passports Act.<sup>47</sup>
121. Proposed section 24A of the Passports Act and subsection 16A(5) of the Foreign Passports (Law Enforcement and Security) Act also creates an offence for a person who fails to surrender a suspended travel document. Safeguards should be included in this offence to ensure that that the person is informed of what it means to have travel documents suspended (taking into account the person's age, language skills, mental capacity and any other relevant factor), that they are informed of all appeal and review rights available to the person, and that they have a right to seek legal advice in relation to the matter.
122. Paragraph 24A(2)(b) of the Passports Act should also be amended to require the officer to inform the person that the Minister has authorised the surrender of the person's Australian travel document. It is appropriate for the person to be informed of this matter to enable a better understanding of the circumstances of suspension and because proposed paragraph 16A(5)(b) of the Foreign Passports (Law Enforcement and Security) Act contains such information.
123. Another difficulty is that there is no legislative safeguard preventing multiple suspensions of a travel document. As long as new information that was not before ASIO at the time of the suspension request and during the period of the suspension multiple requests of suspension are conceivable. While the Explanatory Memorandum to the Bill notes that subsection 22A(3) is not intended to allow for consecutive rolling

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<sup>46</sup> Item 34 of Schedule 1 of the Bill seeks to ensure 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. Item 1 of Schedule 1 of the Bill seeks to provide that decisions made under new sections 22A and 24A of the Passports Act are not subject to review under the Administrative Decisions Judicial Review Act.

<sup>47</sup> See Recommendation V/6 of the INSLM's Fourth Report, p. 51.

suspensions, which would defeat the purpose of the limited 14-day suspension<sup>48</sup>, the Law Council queries whether there are adequate safeguards in place to avoid this outcome. The Bill should be amended to permit a strict and limited number of multiple requests for suspension.

124. These new suspension powers will require additional IGIS oversight. For example, in the case of an additional request for suspension of a passport, the IGIS will need to look carefully and whether the new information was not before ASIO at the time of the initial suspension request and during the period of the suspension. There are no reporting requirements associated with decisions by ASIO to request a temporary suspension of Australian travel documents. The Law Council considers that it would assist in oversight and transparency if ASIO was required to report on such decisions to the Attorney-General and the IGIS.

125. **Recommendations:**

126. The Law Council understands that the measures to temporarily suspend or require the surrender of a person's travel documents may be necessary to prevent travel where a person intends to travel overseas to engage in terrorist or foreign incursions activities.

127. However, the Law Council considers that the safeguards for these passport suspension measures should be amended to require:

- (a) A lesser initial period of suspension than 14 days;
- (b) ASIO must have the approval of the Director-General of Security in order to request the temporary suspension of a passport;
- (c) that a request should only be made where the Director-General of Security suspects on reasonable grounds that the person is likely to leave Australia to engage in conduct that would be likely to prejudice the security of Australia or a foreign country'. The meaning of 'would be likely' should be clarified by reference to the potential for harmful conduct and should expressly adopt the 'real and not remote possibility' test recommended by the INSLM.
- (d) a person to be informed that the suspension has been made and of the effect of the travel document suspension (taking into account the person's age, language skills, mental capacity and any other relevant factor) when an officer demands that a person surrender a suspended travel document;
- (e) a person to be informed of appeal and review rights available to the person, and the availability of legal advice when an officer demands that a person surrender a suspended travel document;
- (f) paragraph 24A(2)(b) of the Passports Act should also be amended to require the officer to inform the person that the Minister has authorised the surrender of the person's Australian travel document;
- (g) a strict and limited number of multiple requests for suspension;
- (h) ASIO to report to the Attorney-General and the IGIS on whether any temporary suspensions of passport were requested, the reasons for the request, and the result of the request, including whether an adverse security

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<sup>48</sup> See Explanatory Memorandum to the Bill, p. 82.



assessment was issued. In the case of subsequent request for the temporary suspension of a passport, ASIO should be required to report on the new information that initiated the subsequent request and the time period in which the new information was discovered.

No requirement of notification for a passport refusal or cancellation

128. Proposed amendments will also override the requirement in the Passport Act 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.<sup>49</sup>
129. While such a provision may well be necessary, The Law Council notes that the lack of a requirement for a passport refusal or cancellation notification may contravene the proportionality principle required of Article 12 of the ICCPR. The United Nations Human Rights Committee has interpreted (see above) this to require that *reasons for the application of restrictive measures be provided*. On this basis, the Law Council questions whether proposed section 48A of the Passports Act should be progressed in the absence of a clearer expression of the reason that the measure is needed.
130. In the event that the Committee does not consider that the measure contravenes Article 12 of the ICCPR, the Law Council makes the following observations and suggestions to help ensure the proportionality of proposed 48A of the Passports Act.
131. The Law Council notes that there is no requirement for the Attorney-General or the Minister for Justice to consider revoking a certificate under paragraph 38(2)(a) of the ASIO Act or under proposed subsection 48A(4) of the Foreign Fighters Bill. Without such a requirement it is likely that a person will receive subsequent refusals or cancellation of an Australian document despite there being a possible change in circumstances which warranted the initial making of the certificate; it is also likely that without such a requirement the person will continue to not receive notification of the refusal or cancellation.
132. The threshold for a certificate issued under the ASIO Act would appear to be higher than that required for the AFP under proposed subsection 48A(4). There would appear to be a great disparity between the withholding of a notice on the grounds that it is 'essential' to the security of the nation (as per paragraph 38(2)(a) of the ASIO Act) compared to 'adversely affecting' a current relevant law enforcement investigation (as per proposed subsection 48A(4)). The latter is much broader and could potentially cover minimal adverse effects, despite the clear infringement on a person's right to procedural fairness that this provision entails. In the Law Council's view, a higher threshold test which appears to have been also recommended by the Monitor of a 'prejudicial to' would be more appropriate and more consistent with the test which applies in the case of ASIO.
133. There are also a lack of reporting requirements for ASIO to report to the Attorney-General and the IGIS for when a request is made to the Minister for Foreign Affairs under proposed subsection 48A(2). Similarly, there is no requirement for the AFP to report to the Ombudsman under proposed subsection 48A(4). The Law Council considers that such requirements would enhance accountability and assist oversight for this measure which significantly impacts on the rights of a person.

134. **Recommendations:**

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<sup>49</sup> Proposed 48A, *Australian Passports Act 2005* (Cth).

- Proposed section 48A of the Passports Act should not be progressed.
- In the event that this recommendation above is not adopted, the Law Council recommends:
  - The Attorney-General and the Minister for Justice should be required to consider revoking a certificate in force under paragraph 38(2)(a) of the ASIO Act and proposed subsection 48A(4) of the Foreign Fighters Bill 2014. Such consideration should occur after a reasonable period to ensure that a person's travel documents are not refused or cancelled when no longer appropriate and to prevent a person not receiving notification of the refusal or cancellation.
  - The proposed subsection 48A(4) should be amended so that if the Minister administering the *Australian Federal Police Act 1979* is satisfied that notifying the person of the decision would be prejudicial to a current relevant law enforcement investigation, that the Minister may, by signed writing, certify accordingly.
  - ASIO should be required to report to the Attorney-General and the IGIS on any requests made to the Minister for Foreign Affairs under proposed subsection 48A(2).
  - The AFP should be required to report to the Ombudsman on any requests made to the Minister for Foreign Affairs under proposed subsection 48A(4).

## Migration Act amendments

135. Schedules 4-7 of the Bill contain amendments to the Migration Act and related legislation. These amendments propose complex new systems that will impact on the privacy and other rights of many individuals, including those that pose no threat to national security. The Law Council has not had time to carefully analyse these proposed changes but makes the following preliminary observations and recommendations.

### Emergency Visa Cancellation Powers

136. The Migration Act already contains a number of powers that enable the Minister to cancel the visa of a non-citizen who might pose a threat to the Australian community.<sup>50</sup>

137. The Explanatory Memorandum to the Bill states that these provisions:

*...do not adequately address the situation where ASIO receives intelligence about a permanent or temporary visa holder who is outside Australia, where that intelligence raises the possibility that that visa holder is a risk to the Australian community, but that intelligence alone is not sufficient to enable ASIO to furnish an*

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<sup>50</sup> For example, where ASIO makes an assessment that a permanent visa holder is a direct or indirect risk to national security, existing section 501 of the Migration Act provides the capacity for a permanent visa holder in Australia to be considered for visa cancellation. Further, section 116 of the Migration Act provides for the cancellation of a temporary visa onshore, and a temporary or permanent visa offshore on the grounds that the visa holder has been assessed as posing a direct or indirect risk to the Australian community (within the meaning of the ASIO Act).



*adverse security assessment to meet existing legal thresholds in the Migration Act.*<sup>51</sup>

138. As a result, the Bill proposes to amend Division 3 of Part 2 of the Migration Act to insert a new section providing for the mandatory cancellation of any visa (temporary or permanent) where ASIO forms a reasonable suspicion that the visa holder might be a risk to security.<sup>52</sup>
139. If a visa is cancelled on these grounds:
- the non-citizen will be prohibited from entering Australia for a limited period of 28 days to enable ASIO additional time to further consider the security risk posed by that individual; and
  - visa cancellation will be revoked unless ASIO furnishes a subsequent security assessment that recommends against revocation having assessed that the person is, directly or indirectly, a risk to security within 28 days of the original cancellation decision.
140. The law council accepts that the need for these amendments can be demonstrated but queries the safeguards on their implementation.
141. Cancellation of a visa on these grounds may have serious consequences for the visa holder and his or her family<sup>53</sup> in circumstances where the visa holder is later found to pose no security risk to Australia.
142. Cancellation under the proposed provision will be mandatory, will be without notice or notification, not required to adhere to the principles of natural justice<sup>54</sup> and will not be merits reviewable. These features of the proposal challenge rule of law principles, which require the use of Executive power to be subject to independent oversight and used in a way that respects procedural fairness, including the right of a person to be notified of a decision that impacts directly on his or her most basic individual rights.
143. The proposed amendments will also impact on the visa holder's family (including dependents) particularly if the visa holder subject to the emergency cancellation power is subsequently assessed by ASIO to pose a risk to national security. As the Explanatory Memorandum provides:

*While members of the family unit of the visa holder will not be subject to the emergency cancellation pursuant to the new provisions outlined above, the proposed amendments do include a consequential cancellation power that would*

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<sup>51</sup> Explanatory Memorandum to the Bill, at [300].

<sup>52</sup> Under the Bill, the cancellation power will apply to any visa (temporary or permanent) held by a non-citizen where that person is outside Australia and where ASIO provides advice that the person might be, directly or indirectly, a risk to security (within the meaning of section 4 of the ASIO Act), and recommendations that the visa be cancelled under the new emergency cancellation power on the basis of the intelligence currently held by ASIO.

<sup>53</sup> This amendment will also include consequential discretionary cancellation provisions for family unit members where the visa remains cancelled based on an assessment by ASIO that the person is, directly or indirectly, a risk to security. Family unit members' visas will not be considered for cancellation until and unless the main visa holder's visa cancellation has not been revoked. Explanatory Memorandum to the Bill, [301].

<sup>54</sup> New section 134A provides that the rules of natural justice do not apply to a decision made under this Subdivision. The section puts beyond doubt that there are no natural justice requirements applicable to the exercise of the emergency cancellation power in section 134B. This is already apparent from the terms of section 134B, which provide that cancellation is mandatory once ASIO issues an assessment for the purpose of the section.

*see their visas considered for discretionary cancellation in the event that ASIO provides a final assessment that the primary visa holder is a risk to security.*<sup>55</sup>

144. While the Explanatory Memorandum suggests that the decision to cancel the visas of family members would 'be discretionary and merits reviewable and a range of factors will be considered under policy – this includes consideration of family unity principles, the best interests of the child and possible legal consequences of the cancellation decision such as detention and removal', the Bill does not seek to enshrine these principles into the Migration Act.<sup>56</sup>
145. The Law Council notes that the Explanatory Memorandum provides that 'for visas cancelled consequentially it is intended that former visa holders will be notified of the cancellation of their visa, the grounds on which their visa was cancelled and the effect of that visa cancellation on their status, including review rights if relevant'.<sup>57</sup> The Law Council recommends that these safeguards be explicitly included in the relevant provisions of the Migration Act.
146. Without legislative safeguards in place, there is also a risk that the proposed amendments abrogate Australia's obligations under the CROC,<sup>58</sup> and in particular, the principle that the best interests of the child be a primary consideration in all decisions concerning the rights of the child.
147. The Law Council recommends that consideration be given to amending the proposed provisions to:
- ensure that the emergency cancellation power is discretionary not mandatory, permitting the decision maker to have regard to the circumstances of the case; and
  - enshrine in legislation the policy principles outlined in the Explanatory Memorandum that are intended to apply to consequential visa cancellations, such as those that seek to implement some of Australia's relevant obligations under the CROC.

#### Changes to border control systems and passenger processing

148. The Law Council has not had time to consider the amendments proposed in Schedules 5 and 6 in any detail but notes that the measures proposed in Schedule 5 (use of automated border processing control systems to identify persons in immigration clearance)<sup>59</sup> and Schedule 6 (extending Advance Passenger Processing (APP) have the potential to impact on the privacy of a vast array of individuals, including those that pose no risk to Australia's national security.

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<sup>55</sup> Explanatory Memorandum to the Bill, [305].

<sup>56</sup> Explanatory Memorandum to the Bill, at [306].

<sup>57</sup> Explanatory Memorandum to the Bill, at [325].

<sup>58</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>59</sup> Automated Border Clearance systems (SmartGate and eGates) are 'authorised systems' to perform the immigration clearance function for arriving passengers, and border processing for departing passengers. The authorised system confirms the identity of a traveller by biometrically comparing the photograph contained in the passport to a live image of the traveller's face and conducts visa and alert checks. Currently, for both arrivals and departures, the Migration Act only allows an 'authorised officer' (not an 'authorised system') to obtain personal identifiers from non-citizens by way of an identification test under section 166, 170 and 175 of the Migration Act. DIBP relies on the Privacy Act 1988 to obtain personal identifiers from citizens and non-citizens using an 'authorised system'.

149. For these reasons, the Law Council recommends Committee to ensure that these Schedules are reviewed by the Office of the Privacy Commissioner and that a Privacy Impact Assessment is prepared to enable the public to have a clear sense as to what impact these changes will have on their privacy rights.<sup>60</sup>
150. The Law Council notes that it has previously provided views to the (then) Department of Immigration and Citizenship on the use of biometric material in immigration clearance systems that may be of interest to the Committee.<sup>61</sup>

#### Changes to handling of migration documents

151. Schedule 7 seeks to introduce a measure into the Migration Act to retain documents presented or provided to the Department of Immigration and Border Protection (DIBP). This Schedule also amends the Citizenship Act 2007 (Citizenship Act) to include introducing a definition of 'bogus documents' and related documents.
152. The Law Council has not had time to consider these proposed amendments in detail but questions whether they may either seek to replicate or replace the amendments proposed in the *Migration Amendment (Protection and Other Measures) Bill 2014* that is currently before Parliament and that has been subject to an extensive inquiry by the Senate Committee on Legal and Constitutional Affairs
153. The Law Council strongly recommends the Committee to have regard to the evidence provided to the Senate Committee on Legal and Constitutional Affairs' inquiry before enacting these proposed reforms.<sup>62</sup>

#### **Foreign Incursions Act amalgamation into the Criminal Code**

154. The Law Council has not focused on these provisions in detail, which seek to incorporate the provisions of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (the Foreign Incursions Act) into the Criminal Code with certain amendments.
155. However, it notes that the Bill responds to the INSLM's recommendation that there should be parity between the penalties for comparable Criminal Code and Foreign Incursions Act offences. However, he did not recommend what those comparable maximum penalties should be.
156. The Bill therefore takes the approach of increasing the existing Foreign Incursions Act offences to a maximum penalty of life imprisonment, which is applicable for:

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<sup>60</sup> The Law Council notes that in 2004-05 the Department of Foreign Affairs and Trade and the then Department of Immigration, Migration and Indigenous Affairs each conducted an assessment of the privacy impact of their respective Biometrics for Border Control projects utilising the Privacy Commissioner's draft privacy impact assessment guidelines, *Managing Privacy Risk – An Introductory Guide to Privacy Impact Assessment for Australian Government and ACT Government Agencies*. These assessments are considered by the Office of the Privacy Commissioner in its October 2005 Information Privacy Principles Audit of the ePassport and Smartgate Trial available at <http://www.oaic.gov.au/images/documents/migrated/migrated/audrep0605.pdf>. A number of recommendations for improvements were made. Following this Audit of the trial it appears that a Privacy Impact Assessment has not been undertaken of the projects, or of the amendments proposed in this Bill. The Law Council notes that a Privacy Impact Assessment has been conducted of similar schemes in the United States [https://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_cbpapis.pdf](https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbpapis.pdf).

<sup>61</sup> A copy of this submission, prepared in 2011 is available at <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2400-2499/2444%20Biometrics%20and%20Offshore%20Processing%20of%20Asylum%20Seekers.pdf>.

<sup>62</sup> Details of the inquiry, including the Law Council's submission are at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Protection\\_and\\_other\\_measures\\_bill](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Protection_and_other_measures_bill).

- (a) actually engaging in hostile activity<sup>63</sup>; and
- (b) for preparatory conduct— both entering a foreign country with the intention of engaging in hostile activity;<sup>64</sup> and engaging in conduct which is preparatory to section 119.1.<sup>65</sup> For the latter offence, the penalty has increased from 10 years.

157. This approach brings these offences into line with relevant Criminal Code penalties apply a maximum life penalty for *both* engaging in a terrorist act, and acts which are preparatory to a terrorist act.<sup>66</sup>

158. However, the Law Council questions this approach as it would seem appropriate to distinguish between the maximum penalties between actual and preparatory conduct. This provides an incentive for youths who arrive in a foreign country with the intention of engaging in hostile activity, but who wish to withdraw, to do so. If the penalties are the same for both, they may feel that they have little to lose.

159. The Law Council considers that a distinction would best be made in the maximum penalties applying to offences which have involved preparatory conduct versus actual conduct. This would lower the penalties for new sections 119.1(1) and 119.4, and existing section 101.6 of the Criminal Code.

160. Further, the Law Council notes that the definition of ‘engaging in a hostile activity’ may include ‘unlawfully destroying or damaging any real or personal property belonging to a foreign government’ (section 117.1). Technically, this means that a person may be subject to life imprisonment for entering a country with the intention of (or actually) defacing a government building (section 119.1). This penalty is not commensurate with the level of culpability involved. It recommends that this aspect of the definition be reconsidered – noting that it may be unnecessary given that the new ‘engaging in subverting society aspect of the definition extends to ‘serious property damage.’

161. **Recommendations:**

- (a) Lower the penalties for relevant offences which involve preparatory conduct versus actual harm; and
- (b) Remove from the section 117.1 definition of ‘engaging in a hostile activity’ the reference to unlawful destruction or damage to government property.

## **Delayed notification search warrants scheme**

162. The Bill proposes a delayed notification search warrants scheme which would enable law enforcement officers to search premises covertly and seize or copy items without notifying the occupier for a period of up to six months.

163. The Law Council questions proposals for a delayed notification warrant scheme, noting that:

- such a scheme would constitute a substantial departure from the ordinary search warrant scheme, which ensures that a person whose premises are

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<sup>63</sup> Proposed new subsection 119.1(2) of the Criminal Code.

<sup>64</sup> Proposed new subsection 119.1(1) of the Criminal Code.

<sup>65</sup> Proposed new section 119.4 of the Criminal Code.

<sup>66</sup> Under sections 101.1 and 101.6 of the Criminal Code.

searched is aware of the basis and the authority for the search, and is in a position to challenge or make a complaint about the issue of the warrant and/or its method of execution. A covert warrant denies those individuals with the greatest interest in ensuring that the issue and execution occurs strictly in accordance with the law this ability;<sup>67</sup> and

- law enforcement agencies already have significant powers with which to combat serious crime, including terrorism.<sup>68</sup>

164. However, the Law Council accepts that the former INSLM has recommended that a scheme should be introduced to assist the investigation of terrorism offences.<sup>69</sup>

165. The Law Council recognises that there are important safeguards in relation to the proposed scheme, including:

- authorisation by an independent issuing officer;<sup>70</sup>
- the requirement that the issuing officer have regard to a number of factors including any alternative means of obtaining information, the impact on the privacy of any person, and the nature and seriousness of the offences;<sup>71</sup>
- the restriction of such a scheme to terrorism offences which are punishable by seven years or more;
- oversight by the Commonwealth Ombudsman; and
- detailed reporting requirements.

166. It does, however, consider that enhancements could be made to the notification timeframe, compensation, legal professional privilege, and the non-disclosure offence for the scheme. Similar concerns have been raised in relation to equivalent NSW laws by expert Committees of the Law Society of New South Wales.<sup>72</sup>

#### Notification period

167. The Law Council notes that a person may not be notified of a warrant until six months after it is issued (which may be extended in six month blocks up to a maximum of 18 months – or beyond in exceptional circumstances).<sup>73</sup> This timeframe needs to be proportionate given that such a warrant is intended to investigate a relevant offence, and is not a general intelligence gathering exercise.

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<sup>67</sup> Existing search warrant provisions require the officer executing the warrant to provide a copy of the warrant to the occupier and enable them to observe the search.

<sup>68</sup> For example, law enforcement agencies can: obtain a warrant to enter premises covertly for the purposes of installing a surveillance device; obtain a warrant to intercept communications and access stored communications; the Australian Crime Commission has a range of coercive powers including the power to compel a person to provide self-incriminating documents or provide self-incriminating answers under examination. ASIO can already obtain a warrant which allows covert entry onto premises for the purposes of accessing records or other things which will substantially assist the collection of intelligence on a matter which is important in relation to security.

<sup>69</sup> Recommendation VI/2, INSLM Fourth Annual Report, March 2014

<sup>70</sup> An issuing officer may be a Federal or Supreme Court Judge, or Administrative Appeals Tribunal member

<sup>71</sup> Proposed section 3ZZBD(2)

<sup>72</sup> Law Society of New South Wales, *Statutory Review of the Terrorism (Police Powers) Act 2002*, Submission to the NSW Attorney-General's Department, May 2007.

<sup>73</sup> Paragraphs 3ZZBE(1)(i); 3ZZDC(5) and (6). The notification must not be extended beyond 18 months unless the Minister is satisfied on reasonable grounds that there are exceptional circumstances justifying the extension and it is in the public interest to do so.



168. If such a search results in charges being laid against the occupier, the greater the delay between the search execution and the notification, the greater the potential prejudice to him or her in preparing his defence. The Law Council considers that:

- (a) A shorter period be considered, potentially one-month, with a longer period requiring approval from a Judge or AAT member. ; and
- (b) regardless of the notification period, if the person is charged with an offence, he or she should be immediately notified of the details of the search.

#### Compensation

169. There are compensation provisions in the Bill dealing with damage to electronic equipment,<sup>74</sup> however:

- (a) these do not extend to compensation for broader property damage or personal injury; and
- (b) it is unclear how an affected person would be in a position to demonstrate loss or damage when it may be unclear to the person how the property damage occurred.

170. The Law Council considers that compensation should be considered in respect of serious property damage or personal injury caused as a result of the exercise of a delayed notification search warrant.

171. In this regard it may be desirable for the AFP to report to the Ombudsman and the Minister the details of any loss or damage to property or personal injury which has occurred as a result of a warrant execution. Record keeping requirements under Division 6 should contain similar information. Affected individuals should be promptly notified in such a situation.<sup>75</sup>

#### Legal professional privilege

172. Section 3ZZIB ensures that the law relating to legal professional privilege is maintained. During an ordinary search warrant, this would mean that an occupier of the premises has a right to assert a claim of legal professional privilege over relevant items which are covered by the warrant.<sup>76</sup> It means that if the person is charged with a criminal offence as a result of material obtained during an investigation, a person should have the opportunity to claim legal professional privilege and any such documents claimed under such privilege should accordingly not be able to be used in those or subsequent legal proceedings.

173. However, under the delayed notification warrant system, the occupier will be unaware of the search, and he or she will not be in a position to assess a claim of privilege at the time that the warrant is executed. In these circumstances, section 3ZZIB is less effective protection.

174. It is difficult to re-frame these powers in such a way as to provide robust protection for a claim of privilege if they are to remain covert. However, enhancements could be

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<sup>74</sup> Proposed section 3ZZCI.

<sup>75</sup> For example, section 15HG of the *Crimes Act 1914* (Cth) includes requirements to notify affected individuals in the case of personal injury or property damage in relation to a controlled operations scheme.

<sup>76</sup> These would be provided to the court or a third party, where they are held until the claim for privilege is resolved.

made to subsection 3ZZBD(2) to provide that when considering whether to issue a delayed notification search warrant the eligible issuing officer must have regard to the extent to which the exercise of the powers under the warrant would give rise to the risk of the abrogation of legal professional privilege, and if so, the nature and extent of that risk. A similar amendment could be made to section 3ZZBE.

175. These changes would provide the issuing authority with the scope to refuse to issue a delayed notification warrant in cases where a real and serious risk to legal professional privilege has been identified. Such changes would assist in oversighting these powers if this information was included in reporting requirements (such as those outlined in sections 3ZZFA, 3ZZFB, 3ZZFC and 3ZZFE).

#### Disclosure Offence

176. Division 8 contains an offence for the unauthorised disclosure of information relating to a delayed notification search warrant (punishable by two years). While it contains a number of exceptions, two further exceptions may be desirable for:

- the purposes of obtaining or providing legal advice (as opposed to legal proceedings). This will be important in ensuring that an individual affected by the warrant eg. due to property damage or injury can seek redress; and
- referring matters for consideration/making complaints to the Ombudsman.

177. **Recommendations:**

- (a) With respect to the notification to an occupier of a delayed notification search warrant:
  - (i) The six month period should be reduced, with a longer period requiring approval from a Judge or AAT member; and
  - (ii) regardless of the notification period, if the person is charged with an offence, he or she should be immediately notified of the details of the search.
- (b) Considerable be given to the Commonwealth compensation provisions for damage to electronic equipment being extended to cover serious property damage or personal injury caused as a result of the exercise of a delayed notification search warrant.
- (c) The AFP should report to the Ombudsman and the Minister the details of any serious loss or damage to property or personal injury which has occurred as a result of a warrant execution. Record keeping requirements under Division 6 should contain similar information. The occupier should be promptly notified in such a situation, if practicable.
- (d) The matters to which the issuing officer must have regard under proposed section 3ZZBD(2) of the Crimes Act in authorising a warrant should include the likelihood that items seized or copied may include materials that could be subject to a claim for legal professional privilege.
- (e) The disclosure offence at proposed section 3ZZHA should include exceptions for:
  - (i) the purposes of obtaining or providing legal advice; and



- (ii) referring matters for consideration/making complaints to the Ombudsman.

## Foreign Evidence

178. Division 2 of Part 3 of the Foreign Evidence Act 1994 (Cth) (the Foreign Evidence Act) requires that 'foreign material' must be only obtained as a result of a request made by or on behalf of the Attorney-General to a foreign country for the testimony of a person. The testimony must be on oath, obligation, or under some other kind of obligation to tell the truth etc. It must be signed or certified by a judge in the foreign country.
179. There are specific discretions available to the court to prevent foreign material being adduced. Most of the terrorism offences in the terrorism context would fall under existing section 25A of the Foreign Evidence Act (for 'declared offences'), which provides that the court may direct that the foreign material not be adduced as evidence if it is satisfied that adducing the foreign material would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing.
180. The INSLM recommended in his fourth report that these provisions were unrealistic in relation to adducing foreign material for the purposes of a terrorism offence, given the varying degrees to which functioning governments operate in relevant countries.
181. He considered that:
- a different approach should be considered where political circumstances or states of conflict render impracticable the making of a request of the government of that country, for assistance in gathering evidence – eg. using Ministerial certificates;
  - the court's 'substantial adverse effect' discretion was a critical safeguard to ensure common law fairness; and
  - the admission of such evidence should be conditioned on specially adapted warnings to the jury.
182. In response to these recommendations, the Bill's amendments provide for a different approach in relation to a 'terrorism related proceeding' (which includes a proceeding under Division 104 – COs). They provide that as well as 'foreign material' obtained in the usual manner being able to be adduced, 'foreign government material' (material which is provided by a foreign authority to a Commonwealth authority) may also be adduced if it is:
- annexed to a written statement by a senior AFP member which is verified on oath or affirmation (this states what the material is, and to the best of the AFP member's knowledge, how it was obtained by the foreign authority, and how it came into the AFP's possession); and
  - accompanied by a certificate by the Attorney-General stating that he is satisfied that it was not practicable to obtain the foreign government material or the information in the foreign government material as foreign material.
183. The court retains the discretion to prevent the foreign material or foreign government material from being adduced as evidence if it is satisfied that it would have a substantial adverse effect on the right of another party to the proceeding to

receive a fair hearing. In addition, such material is not admissible if it was obtained as a result of torture or duress by a person:

- in the capacity of a public official; or
- acting in an official capacity; or
- acting at the instigation, or with the consent or acquiescence of a public official or other person acting in an official capacity.

184. The retention of the discretion of the court and the ban on the admissibility of evidence obtained by torture or duress are both welcome safeguards. The Part could be enhanced as follows:

- the INSLM referred to the need for a different process of obtaining material where ‘political circumstances or states of conflict render impracticable the making of a request of the government of the country’. However, to provide a certificate, the AG need only be satisfied that ‘it was not practicable to obtain the foreign government material as foreign material’. This leaves open broader possibilities, such as where AFP resources were otherwise engaged. The certificate should only be issued in line with the INSLM’s tighter proposed restriction.
- the discretion of a court to direct that foreign material or foreign government material not be adduced in a proceeding if it ‘would have a substantial adverse effect on the right of [a] party to the proceeding to receive a fair hearing’ (cl 27C(2)) is only available in the circumstances specified in s 27C(1)). It is proposed that –s 27C(2) should be applicable to all foreign material and foreign government material.
- to ensure that the material was not obtained through duress or torture the ban on evidence obtained by torture or duress only relates to situations where a public official has been involved or acquiescent (s 27D(2)). It is proposed that evidence obtained by torture or duress, directly or indirectly, should *never* be acceptable, regardless of the actors involved.<sup>77</sup>
- the onus is placed on the party seeking to have the evidence excluded to prove that the evidence ‘was obtained directly as a result of torture or duress’. In circumstances where there are concerns that evidence has been obtained by torture or duress it would be more regular under the common law and the uniform evidence legislation, for the onus to be on the party seeking to have the evidence admitted to satisfy the court on the balance of probabilities that the material was not obtained by torture or duress.
- the definition of ‘duress’ might be better extended to situations which involve threats which would cause imminent death or serious injury to a person or a family member; threats to a person’s associates eg. a colleague should also be included; threats which are not imminent, but which nevertheless are very real and would cause a reasonable person to provide the material or information should also be included; threats involving serious property damage should also be considered, provided that they would cause the reasonable person to respond accordingly – eg. threats to burn down a person’s business or home.

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<sup>77</sup> See s 84 of the uniform evidence law.

185. It may also assist the court if the AFP member's statement included steps taken to confirm the veracity of the information included in the foreign government material.
186. Similar concerns have been raised in relation to equivalent NSW laws by expert Committees of the Law Society of New South Wales.<sup>78</sup>
187. **Recommendations:**
188. The Foreign Evidence Act amendments in Schedule 1 would be improved by:
- (a) tightening the circumstances in which it is not practicable to obtain foreign government material in situations when 'the political circumstances or states of conflict render impracticable the making of a request of the government of the country';
  - (b) amending clause 27C(1) so that s27C(2) is applicable to all foreign material and all foreign government material;
  - (c) extending mandatory exception to admissibility for material obtained directly as a result of torture or duress to: any situation in which it can be demonstrated that torture or duress was involved, rather than requiring a public official's involvement or acquiescence;
  - (d) requiring that where there are concerns about whether evidence was obtained by torture or duress that the onus should be on the party seeking to have the evidence admitted to satisfy the court on the balance of probabilities that the material was not obtained by torture or duress;
  - (e) extending the definition to 'duress' to:
    - situations which involve threats to a person's associates;
    - threats which are not imminent but real and would cause a reasonable person to provide the relevant material or information;
    - threats involving serious property damage – such as destroying a person's livelihood or home – which would cause a reasonable person to respond accordingly.
  - (f) the AFP member's statement in respect of foreign government material should include steps taken to confirm the veracity of the information included in the foreign government material.

## Customs powers

189. Currently, section 219ZJB of the *Customs Act 1901* (Cth) empowers Customs officers to detain a person if the officer suspects on reasonable grounds that the person has committed, or is committing, a serious Commonwealth offence, or a prescribed State or Territory offence. A serious Commonwealth offence is defined as one that involves a range of matters (including for example espionage, sabotage or threats to national security, violence, firearms, importation and exportation of prohibited imports, theft, fraud, money laundering, harbouring criminals, forgery) and is

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<sup>78</sup> Law Society of New South Wales, *Statutory Review of the Terrorism (Police Powers) Act 2002*, Submission to the NSW Attorney-General's Department, May 2007.

punishable by at least three years' imprisonment.<sup>79</sup> Subsection 219ZJB requires that where a person is detained for more than 45 minutes, the Customs officer must inform the person that they are allowed to notify a family member or another person that they are being detained.

190. Under current subsection 219ZJB(7) a Customs officer may refuse to notify a family member or another 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.

191. The Bill seeks to amend these powers by:

- (a) defining a serious Commonwealth offence as one punishable by at least 1 year's imprisonment;
- (b) expanding the applicability of the detention powers to include where an officer has reasonable grounds to suspect that the person is intending to commit a serious Commonwealth offence; or where the person is, or is likely to be, involved in an activity that is a threat to national security<sup>80</sup> or the security of a foreign country;
- (c) permitting 4 hours of detention before the customs officer must inform the detained person that they are allowed to notify a family member or another person;
- (d) allowing a customs officer to refuse to notify a family member or another person if the officer believes on reasonable grounds that the notification should not be made to safeguard national security or the security of a foreign country; and
- (e) allowing a customs officer to detain a person if the officer suspects 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.

192. The Explanatory Memorandum to the Bill explains that these measures are being implemented to 'overcome vulnerabilities in the detention powers of Customs.' It notes that:

*'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. Customs detention powers constitute an important preventative and disruption mechanism'.<sup>81</sup>*

193. However, it is not clear why the definition of a 'serious Commonwealth offence' is being redefined in a manner which is inconsistent with the Crimes Act definition when the Bill is concerned with improving 'Australia's counter-terrorism legislative framework to respond to the foreign fighter threat' and terrorism offences are punishable by far higher penalties.

194. The potential effect of the proposed provision will be that Customs officers will be able to detain people for comparatively minor offences. Given the proposed

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<sup>79</sup> Section 219ZJA of the Customs Act and section 15GE of the *Crimes Act 1914* (Cth).

<sup>80</sup> National security is defined to have the same meaning in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

<sup>81</sup> Explanatory Memorandum to the Bill, p. 8.

amendment to paragraph 219ZJB(1)(b) a Customs officer will also be able to detain a person where the officer suspects on reasonable grounds that the person is *intending* to commit a minor offence. In the Law Council's view, this measure is extraordinary and must be properly justified. It notes that the police are only permitted to arrest a person without a warrant if they are believed to have committed or be committing an offence – not if they are suspected to be intending to commit an offence.<sup>82</sup>

195. The Law Council questions whether 219ZJCA of the Customs Act is necessary given that an activity that is a threat to national security or the security of a foreign country is likely to fall within the definition of a serious Commonwealth offence (both the current and proposed definition).<sup>83</sup> In this context, the Law Council notes that the definition of 'national security' is very broad and would rest on Customs officers making judgments about whether a matter was a threat to Australia's international relations, defence, law enforcement and security interests. It encourages the Committee to recommend that de-identified examples of conduct that would fall within proposed section 219ZJCA but not section 219ZJB of the *Customs Act 1901* be made available to the public to enable a proper assessment of the necessity of the former provision and its likely legal ramifications.
196. The Law Council accepts that a Customs officer may need sufficient time to undertake enquiries once a person is detained, especially in order to refer a matter to ASIO for an immediate visa suspension decision, or to determine whether the notification to a family member or other person should or should not be made. However, the Law Council questions whether 4 hours of detention without being able to contact a family member or another person is a reasonable restriction as claimed in the Explanatory Memorandum.<sup>84</sup>
197. The Law Council further considers that a detained person should be informed of his or her right to consult a legal adviser.<sup>85</sup>
198. Finally, provisions should be included which provide for reporting and oversight – by either/both of the IGIS or the Ombudsman, as appropriate - in relation to Customs' detention powers.

#### Requirement to deliver person to a police officer

199. The existing offence-based customs detention power provides that an officer who is detaining a person must ensure that the person is *delivered, as soon as practicable, into the custody of a police officer* to be dealt with according to the law (subsection 219ZJB (3(b))).
200. This is an important and appropriate limitation on the Customs detention power. It also emphasises the strictly temporary nature of the Customs detention power.
201. The amendments proposed in the Bill would change this provision to provide that that Customs must merely ensure that a person is *made available, as soon as practicable to a police officer* (item 4). The Explanatory Memorandum states only that 'this amendment reflects current practice whereby the person is made available to a

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<sup>82</sup> Section 3W of the *Crimes Act 1914* (Cth).

<sup>83</sup> For example, a Customs officer could detain a person who is reasonably suspected of the new proposed offence of doing an act in preparation to entering a foreign country with the intention of engaging in a hostile activity (proposed new section 119.4).

<sup>84</sup> Explanatory Memorandum to the Bill, p. 60.

<sup>85</sup> Principle 3(h), Law Council, *Policy Principles on Detention in the Criminal Context*, 22 June 2013.

police officer from Customs detention'.<sup>86</sup> This new wording is replicated in relation to the proposed new security-based detention power (proposed section 219JCA).

202. The Law Council questions why this change in wording has been adopted and what change it would give rise to in practice. It would be of concern, for example, if this wording was interpreted as simply letting a police officer know that a person is being detained and asking if the police intend to respond. If so, this could undermine the strictly temporary nature of the Customs detention power, especially when combined with the proposed increased timeframe (45 minutes to 4 hours) after which a person may be informed of his or her rights to contact another person. If the intention behind this amendment is to allow a situation in which the police collect the individual, rather than Customs taking him or her to the nearest police station, then a different amendment could be included which clarifies that as well as delivery, the police may collect the individual from Customs.
203. The potential interpretations of this proposed amendment highlights concerns relating to the absence of a maximum detention period imposed on detention by Customs officials in current section 219ZJB.
204. For these reasons, the Law Council recommends that further information be made available about why the requirement to deliver a person into police custody has not been retained or clarified and recommends that consideration be given to prescribing a maximum period of detention for the purposes of both existing section 219ZJB and proposed section 219ZJCA.
205. **Recommendations:**
- (a) The current definition of a 'serious Commonwealth offence' should be maintained in the Customs Act;
  - (b) de-identified examples of conduct that would fall within proposed section 219ZJCA but not section 219ZJB of the *Customs Act 1901* would assist if made available to the public;
  - (c) the extension from 45 minutes to 4 hours of detention before the Customs officer must inform the detained person that they are allowed to notify a family member or another person is reconsidered to a shorter period;
  - (d) detained persons should be informed of their right to a legal adviser of their choice both under subsection 219ZJB, and proposed new 219ZJCA;
  - (e) reporting and oversight provisions should be considered. The Customs Act could be amended to place a positive obligation on Customs to report to the Commonwealth Ombudsman on when a person has been detained under section 219 ZJB of the Customs Act, whether, and at what period during the detention, the officer informed the person that he or she is allowed to notify a family member or other person that they are being detained, and the result of the detention, including whether the matter was referred to a law enforcement officer; and
  - (f) further information is required as to why the requirement to deliver a person into police custody has not been retained or clarified. If these proposed amendments are pursued, the Law Council's recommends that consideration

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<sup>86</sup> Explanatory Memorandum to the Bill, p. 182.



be given to prescribing a maximum period of detention for both existing section 219ZJB and proposed section 219ZJCA.

## **Welfare payments**

206. Schedule 2 provides that welfare payments can be cancelled for individuals whose passports have been cancelled or refused, or whose visas have been refused, on national security grounds. The rationale 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 certain requirements including participation and residence requirements.

207. The Law Council recognises that this measure has been introduced following public outrage that Khaled Sharrouf, who has allegedly been photographed executing Iraqi soldiers, received a disability support pension for several months. It understands the community's, and the Government's, concern that public funds should not be used to finance terrorist activities.

### Grounds for decision

208. A security notice given to the Minister in relation to an individual recommends that payments of family assistance of the individual be paid to a payment nominee of the individual under Part 8B of the Family Assistance Administration Act; and apart from subsections (1) to (3), the individual would be eligible for the whole or a part of that family assistance; then that whole or part may be paid to a payment nominee of the individual under that Part.

209. The Bill provides that if a security notice is issued by the Attorney-General to the Minister for Social Services, a person's welfare payments must be cancelled.<sup>87</sup> (although for certain family assistance payments, there is the discretion to pay the whole or part of the amount to a payment nominee. This measure is designed to protect the interests of individual's dependants).<sup>88</sup>

210. The Attorney-General has the discretion<sup>89</sup> as to whether to provide a security notice if:

- (a) the Foreign Affairs Minister has refused to issue or has cancelled an individual's Australian passport on security grounds;<sup>90</sup> or
- (b) the Immigration Minister has cancelled an individual's visa on security grounds.<sup>91</sup>

211. The Law Council's questions the lack of separate criteria on which the Minister would issue a security notice for welfare payment cancellation.

### Attorney-General's discretion to issue security notice

212. The decision to cancel an individual's welfare payments is triggered by a security notice issued by the Attorney-General, following notification of the passport or visa cancellation/refusal.

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<sup>87</sup> See for example, proposed section 57GI.

<sup>88</sup> Proposed section 57GI(4).

<sup>89</sup> See for example, proposed section 57GJ.

<sup>90</sup> See for example proposed section 57GK.

<sup>91</sup> See for example proposed section 57GL.

213. The Explanatory Memorandum notes that it is not intended that every relevant passport/visa cancellation/refusal will result in the Attorney-General issuing a security notice. However, there is no limitation upon his or her discretion to do so.<sup>92</sup>
214. The Law Council considers that if this measure is pursued, the Attorney-General's decision should be made on reasonable grounds, having regard to criteria including:
- (a) whether there are reasonable grounds to suspect that a person is or will be directly involved in activities which are prejudicial to security;<sup>93</sup>
  - (b) whether there are reasonable grounds to suspect that a person's welfare payments are being or will be used to support these activities;
  - (c) the necessity and likely effectiveness of cancelling welfare payments in addressing the prejudicial risk, having regard to the availability of alternative responses; and
  - (d) the likelihood that the prejudicial risk of the person to security may be increased as a result of issuing the security notice.

#### Review and reasons

215. The decisions of the relevant Ministers to issue notices will be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*(Cth). There will not, however, be a requirement to provide reasons for the decision.<sup>94</sup> The EM states that to do so could present a risk to security.<sup>95</sup>
216. This lack of reasons may reduce the effectiveness of judicial review.<sup>96</sup>
217. Further, the EM notes that merits review is not required as:
- (a) an individual will be able to seek merits review of the decision to cancel a visa or the cancellation of, or refusal to issue, a passport; and
  - (b) this would include merits review under by the AAT's Security Division of an adverse security assessment made by ASIO in support of those decisions.
218. However, the Law Council questions whether this is sufficient as:
- (a) the decision to cancel a person's welfare is separate to, with arguably more serious consequences than, a decision to cancel their passport or visa. It should be subject to merits review in its own right. If one decision is taken (eg. passport cancellation of an individual who has not yet left Australia), the other (to remove welfare payments) may be unnecessary; and
  - (b) proposed new section 48A of the Australian Passports Act seeks to remove the requirement to notify a person of a passport cancellation or refusal decision on security grounds.

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<sup>92</sup> See for example proposed section 57GJ

<sup>93</sup> Based on ASIO's security assessment.

<sup>94</sup> Item 8, part 2, Schedule 2 of the Bill.

<sup>95</sup> Explanatory Memorandum to the Bill, p. 180.

<sup>96</sup> Decisions to cancel welfare payments will be subject to judicial review under section 39B of the *Judiciary Act 1903* or section 75(v) of the Constitution.

219. The Law Council considers that the Bill would be enhanced if it provided that merits review will be available by the AAT Security Division in respect of the Attorney-General's decision to issue a security notice.

220. Consideration could also be given to ensuring that a minimum standard of disclosure of information must be given to the subject about the reasons for the allegations against him or her. This would be sufficient to enable effective instructions to be given in relation to those allegations.<sup>97</sup>

#### Further issues

221. The Law Council further considers that if Schedule 2 is passed, it would be enhanced by amendments that:

- (a) A payment nominee be required to act in the best interests of the child or dependants (family assistance payments may be redirected to the nominee instead of the subject of the cancellation order); and
- (b) Provisions to enable revocation of a security notice<sup>98</sup> also require that the Attorney-General must consider whether a revocation is warranted on a regular basis.

222. **Recommendations:**

223. If the proposal is pursued, the Law Council would prefer that the Attorney-General's decision should be expressly required to be made on reasonable grounds, having regard to certain key criteria including:

- 1. whether there are reasonable grounds to suspect that a person is or will be directly involved in activities which are prejudicial to security;<sup>99</sup>
  - 2. whether there are reasonable grounds to suspect that a person's welfare payments are being or will be used to support these activities;
  - 3. the necessity and likely effectiveness of cancelling welfare payments in addressing the prejudicial risk, having regard to the availability of alternative responses; and
  - 4. the likelihood that the prejudicial risk of the person to security may be increased as a result of issuing the security notice.
- (b) merits review should be available by the AAT Security Division in respect of the Attorney-General's decision to issue a security notice;
  - (c) a minimum standard of disclosure of information must be given to the subject about the reasons for the allegations against him or her;
  - (d) a payment nominee should be required to act in the best interests of the child or dependants; and

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<sup>97</sup> Recommendation 31, COAG Review of Counter-Terrorism Legislation Report, 2013.

<sup>98</sup> Proposed section 38T.

<sup>99</sup> Based on ASIO's security assessment.

- (e) the Attorney-General should be required to regularly consider whether revocation of a security notice is warranted.

## **Conclusion**

224. The community is rightly concerned at the threat posed by Australians travelling overseas to engage in terrorist activities returning to Australia with increased capabilities to conduct a terrorist act on domestic soil. The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) seeks to address this concern by implementing a range of new measures and extending existing law enforcement and security agency powers.
225. The significance of the changes proposed in this Bill should not be understated. Along with the National Security Legislation Amendment Bill 2014, this Bill constitutes the most significant modification to Australia's counter-terrorism regime for over a decade, and as such demands careful public and parliamentary scrutiny of its many detailed and complex provisions.
226. The Law Council regrets that it had only limited time to consider the Bill, but has nonetheless attempted to provide constructive recommendations for improvements to help ensure that the Bill is likely to be effective at achieving its legitimate counter-terrorism aims while appropriately protecting the rule of law and the rights and freedoms of Australians

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## Attachment A:

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### Preventative detention orders

227. PDOs enable a person to be detained by the AFP for up to 48 hours without the person being charged, convicted or suspected of having committed a criminal offence.<sup>100</sup> They run counter to the long standing common law principle that orders restricting liberty should only be made following an independent and impartial trial by judge or jury.

228. The Law Council remains concerned that:

- (a) despite the recent anti-terrorism operation in Sydney on 18 September 2014 (involving the first use of PDOs), questions remain about the demonstrated necessity for these powers; and
- (b) PDOs undermine key safeguards of the criminal justice system.<sup>101</sup> For example,
  - (i) they restrict a person's liberty based on suspicion not charge – PDOs are not based on the fact that a person is suspected or alleged to have committed a particular offence, but on the basis that they *might* commit or facilitate the commission of an offence;
  - (ii) a person's liberty may be removed before the person is told of the allegations against him or her or afforded the opportunity to challenge that restriction of liberty;<sup>102</sup>
  - (iii) PDOs restrict detainee's rights to legal representation;<sup>103</sup> and
  - (iv) their inadequate structures for independent review.<sup>104</sup>

229. Both the COAG Review and the INSLM have recommended that PDOs should be abolished. The COAG Review recommended, by majority, that the Commonwealth, State and Territory 'preventative detention' legislation be repealed. If any form of preventative detention were to be retained, the Committee was of the view that it would require a complete restructuring of the legislation at Commonwealth, State and Territory level, a process which, in the view of the majority of the Committee, may further reduce its operational effectiveness. The Committee noted the views of several law enforcement agencies that the regime was onerous, cumbersome and did not allow for questioning during detention. These agencies expressed a preference for arrest, interrogation and charge.

230. The INSLM recommended that the provisions of Division 105 of Part 5.3 of the Code should be repealed as there was no demonstrated necessity for such

extraordinary powers in view of the ability to arrest, charge and prosecute people involved in terrorism.<sup>105</sup> The latter processes, which provide fair trial and due process rights, are more effective than powers which do not allow police to question a person while they are being detained. In the INSLM's view, discussions with the AFP 'strongly suggested that 'in a real, practical, urgent sense' the ability to arrest a person is a more efficient and effective process for dealing with imminent terrorist threats than the complex and time consuming process of a PDO'.<sup>106</sup> Similar concerns have been raised in relation to equivalent NSW laws by expert Committees of the Law Society of New South Wales.<sup>107</sup>

231. In the absence of a justification as to why existing powers of arrest are not sufficient – particularly if the threshold for arrest for terrorism offences is lowered as proposed under the Bill, and particularly given the early stage of offending that is captured by terrorism offences, the Law Council considers these recommendations appropriate in light of the detailed reasons provided in those reviews. It also notes that there are no comparable PDO provisions in jurisdictions such as the United Kingdom and the United States, which are subject to a significant terrorist threat. Accordingly, the Law Council questions the Bill's extension of the sunset provisions to 2025 and considers that the PDO regime should be repealed.

232. If the Law Council's recommendation is not adopted, the following enhancement is suggested:

- The Bill amends PDOs so that instead of recording the name of the detainee, a description may instead be provided. The Explanatory Memorandum notes that this is necessary to detain a person whose full name is not known. The Law Council considers that the recording of a detainee's name is important for oversight purposes. Therefore, the amendments should require that a description is only given where reasonable efforts to determine the detainee's name have failed. In that instance, a 'detailed' description should be provided.

#### Control orders

233. Control orders (COs) allow for a person's liberty, freedom of movement and freedom of association to be limited in a number of ways, such as a prohibition on a person being at specified places or leaving Australia, or a requirement to: remain at specified premises; wear a tracking device; associate with specified individuals; and so on.

234. The Law Council considers that COs are extraordinary powers. Its concerns about them are based on:

- (a) questions about their demonstrated necessity – COs have been used twice only;
- (b) their restriction of liberty based on suspicion rather than charge - for example, there is no need to demonstrate a link between the person subject to the order and any particular or likely terrorist offence.<sup>108</sup> This removes the right to be presumed innocent until proven guilty according to law;<sup>109</sup>



- (c) their undermining of key criminal justice safeguards – for example, COs remove the right to be presumed innocent until proved guilty according to law.<sup>110</sup> They also limit the right of the person subject to the order to challenge its legality by restricting access to relevant information; and
- (d) their inadequate structures for independent review.<sup>111</sup>

235. The Law Council questions the extension of the sunset provision for COs to 2025 and considers that the regime should be repealed for the reasons outlined by the Monitor, namely that:

- COs are less effective and present poorer value for money than surveillance and other investigatory techniques;
- the evidence required in support for an application for a CO is practically the same ‘kind and cogency’ of evidence to justify the laying of charges, particularly given the preparatory conduct captured by the terrorism offences;
- the UK experience suggests they are not effective as a preventative mechanism and using a CO against a person pre-charge can have a negative impact on the investigation;
- the most serious category of people for whom a CO could be sought is for those individuals who cannot be prosecuted because there is insufficient evidence to support a prosecution – this is not a justification for COs as the rule of law requires that the possibility that someone has committed a criminal offence produces consideration of prosecution and nothing else in terms of official action to restrain that person’s liberty; and
- the philosophical problem with the use of a quasi-punitive power to restrict liberty to prevent predicted future conduct.<sup>112</sup>

236. If contrary to the LCA’s views, the CO regime is maintained the Law Council suggests that at a minimum the recommendations made by the Monitor and/or the COAG review should be considered to improve the regime.

#### ASIO’s special powers relating to terrorism offences

237. The Law Council questions the extension of the sunset clause for ASIO’s special powers relating to terrorism offences (questioning warrant powers, and questioning and detention warrant powers).

238. In particular, the Law Council questions ASIO’s extended questioning and detention warrant powers which enable persons to be detained – for up to seven days and in conditions of secrecy, with only limited access to a lawyer – who have not been charged with a criminal offence.

239. The Law Council remains concerned that:

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- (a) these powers may not be necessary or a proportionate response to the threats to national security facing Australia – the questioning and detention warrants have not, to the Law Council’s knowledge, been used;
- (b) they are excessive in their breadth and reach - the basis for detention is so broad in scope that it gives rise to arbitrary application;<sup>113</sup>
- (c) the secrecy surrounding detention under an ASIO warrant makes it very difficult for a detained person to both know and challenge the grounds for their detention;<sup>114</sup>
- (d) provide for only limited access to a lawyer;<sup>115</sup> and
- (e) undermine the right to silence and freedom from self-incrimination.

240. The Law Council notes that Executive officers have no common law power to detain arrested persons for the purpose of furthering their investigations, notwithstanding any detrimental effects this may have on the investigation of criminal conduct or the collection of intelligence. The terrorism provisions of Part 1C of the *Crimes Act 1914* (Cth) and the questioning and detention powers under Part III Division 3 of the ASIO Act both abrogate this common law principle.

241. The Law Council is particularly concerned that, when faced with the choice between these two extraordinary investigative powers, officers of the Executive may be motivated to utilise questioning and detention warrants, which are subject to less effective oversight.

242. The former INSLM recommended that:

- (a) ASIO’s questioning and detention warrants should be repealed;<sup>116</sup> and
- (b) the questioning warrant provisions should be amended to permit arrest if the police officer serving the warrant believes on reasonable grounds from anything said or done by the person served that there is a serious possibility that he or she intends not to comply with the warrant, and also to permit the prescribed authority to direct detention after service of a questioning warrant but before the time specified in it for attendance if it appears on reasonable grounds that there is an unacceptable risk of the person tipping off another involved in terrorism, failing to attend or destroying or tampering with evidence.<sup>117</sup>

243. The INSLM observed that such amendments would provide a detention power narrower in scope than the power under questioning and detention warrants, recognising the legitimate need of ASIO to ensure the attendance of a person for questioning while balancing individuals’ rights not to be unnecessarily detained on a pre-emptive basis.

244. The Law Council suggests this recommendation be adopted.

Police, stop, search and seizure powers

245. The Law Council does not support the extension of the sunset clause for police, stop, search and seizure powers. It retains of the view that Division 3A of Part 1AA, including section 3UEA, of the Crimes Act should be repealed. In particular, it retains the following concerns regarding section 3UAE:

- the power to enter and search premises, and seize property without the occupier's consent, is a breach of privacy. Accordingly, the Law Council submitted that this power should be carefully confined and subject to strictly enforced conditions. The warrant system ensures that police search and seizure powers are subject to independent and external supervision and may only be exercised where prescribed statutory criteria are satisfied. Allowing police to enter and search premises without a warrant and under their own authority increases the risk that such powers may be misused or mistakenly used. Moreover, it increases the risk that individual's privacy will be breached in circumstances not justified by the necessary pursuit of a legitimate law enforcement imperative.<sup>118</sup>
- continuing concern about the necessity for this power, particularly given the ability to obtain a warrant by telephone or fax in exigent circumstances.<sup>119</sup> If these existing measures did not operate effectively in emergency situations, the Law Council submitted that consideration should first be given to improving the logistics of how and to whom a warrant application can be made in an emergency before introducing a warrantless entry power.

246. Notwithstanding these concerns, the Law Council has acknowledged that if the need for a narrowly drafted emergency entry power for the AFP could be demonstrated, it would not oppose this per se, provided appropriate safeguards were put in place.

247. The Law Council notes that the COAG Review shared a number of its concerns about section 3UEA and recommended that police authorities exercising power under this section should report annually to Parliament on the use of the power.

248. The COAG Review recommended that if the police search and seizure powers in the Crimes Act are renewed in 2016, that section 3UK should be amended to provide that the relevant provisions should cease to exist as at the expiry date, which will be a *five year* period. It made this recommendation on the basis that this time limit would enhance scrutiny, but also allow a sufficient time to pass in which evidence as to the Division's efficacy could accumulate.

249. In light of this COAG recommendation, the Law Council questions why the significant extension of the sunset clause is required.

250. **Recommendations:**

- (a) The Law Council questions the extension of sunset provisions for the PDO regime, the CO regime, the ASIO special powers, or for police stop, search and seizure powers.
- (b) If the PDO regime is extended, the Law Council considers that PDO reporting requirements should only be relaxed so that a description of the detainee should be provided only where reasonable efforts to determine his or her name have failed. A detailed description should be provided.
- (c) If the CO regime is extended, further recommendations for improvements are set out in the section below
- (d) If ASIO questioning and detention warrant, and questioning warrant powers are extended, the Law Council recommends that the questioning and detention warrants should be repealed and replaced with a detention power narrower in scope, as recommended by the INSLM.
- (e) If police, stop, search and seizure powers are extended, the Law Council recommends that they should cease to exist after five years, as recommended by the COAG Review.

## **Attachment B: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

