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Australian Government

Australian Security
Intelligence Organisation

PJCIS Inquiry into the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*

ASIO Submission - October 2014

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Part One

Introduction

The Australian Security Intelligence Organisation (ASIO) welcomes the opportunity to assist the Parliamentary Joint Committee on Intelligence and Security (PJCIS) by providing this submission as part of the Committee's examination of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (the Bill).

This submission is divided into two parts. Part One outlines the role of ASIO, provides an overview of the current threat environment and articulates a number of the key factors within the current threat environment which necessitate the legislative amendments proposed in the Bill. Part Two provides comment on the provisions with the most direct connection to ASIO, being the proposed amendments to the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) and *Intelligence Services Act 2001* (ISA) contained in Schedule 1 of the Bill, and amendments introducing powers that will involve ASIO security assessments (Schedules 1, 2 and 4 of the Bill).

ASIO's role and security intelligence

ASIO is Australia's national security intelligence organisation. ASIO's functions are set out in the ASIO Act and include obtaining, correlating and evaluating intelligence relevant to security. In this context 'security' means:

- a. the protection of, and of the people of, the Commonwealth and the States and Territories from:
 - i. espionage;
 - ii. sabotage;
 - iii. politically motivated violence;
 - iv. promotion of communal violence;
 - v. attacks on Australia's defence system; or
 - vi. acts of foreign interference;whether directed from, or committed within, Australia or not;
- b. the protection of Australia's territorial and border integrity from serious threats; and
- c. the carrying out of Australia's responsibilities to any foreign country in relation to the matters mentioned above.

Overview of the security threat environment and imperative for legislative reform

The general terrorism threat level for Australia was raised in September this year to HIGH – terrorist attack is assessed as likely. The principal terrorist threat to Australia is from Australian Islamist extremists

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who subscribe to a distorted narrative that Australia is at war with Islam, and that the use of violence to support their ideology is not only legitimate but necessary.

Presently, the increased terrorist threat has a range of drivers. Chief amongst these is the Syrian conflict, which has now spread to Iraq. It has attracted would-be fighters and terrorists from around the world and provided an environment in which extremism, in its most abhorrent form, has both spread and flourished. A substantial number of Australians are in Syria and Iraq training and fighting with anti-government groups. Most of these individuals have gravitated to the most extreme groups, Jabhat al-Nusra and Islamic State of Iraq and the Levant.

ASIO is aware of 14 Australians who have died in Syria and Iraq over the last year, including the two suicide bombings conducted by Australians. These events demonstrate one of ASIO's primary concerns with Australians travelling overseas to train and fight with extremist groups – that these individuals will undertake activities overseas causing death and injury. ASIO is also concerned that individuals in Australia will be inspired by the conflict in Syria to commit terrorism here. Returnees from the conflict are likely to be radicalised and to have the knowledge, experience and networks to conduct a mass casualty attack in Australia or other Western countries. They are also likely to have increased influence over vulnerable youth. We have already seen returnees from Syria and Iraq undertake attacks in Europe. A significant proportion of those returning to Australia from fighting or training in Afghanistan in the early 2000s became involved in terrorist planning here, and recruited and encouraged others who had not travelled to join them in their plots. We are concerned that history will repeat itself in Australia.

It could also affect us overseas. The flood of foreign fighters into Syria comes from many parts of the world, including many from our region. The impact of this on the threat to Australian interests overseas is an increase in the potential for terrorist violence from those returning to their home countries or those inspired by the events in the Middle-East. Any such violence could be indiscriminate or, in some places, could be specifically directed at Australians or Australian interests.

Events in Syria and Iraq have also contributed to increased tensions between communities in Australia with links to those countries. This has led to occasional instances of communal violence. ASIO has worked in cooperation with communities and with other Australian Government agencies to try to mitigate these tensions.

ASIO continues to look for ways to mitigate the threat to Australian security posed by the conflicts in Syria and Iraq, and in particular to reduce the number of would-be foreign fighters and the capability they might develop. This challenge is addressed through a range of activities which detect, and disrupt these threats.

An important component of the Australian Government's strategy to address this increased risk to Australian security is the development of legislative reform to enhance the capability of Australia's law enforcement, intelligence and border protection agencies to respond to emerging security threats both globally and domestically. Key reform priorities contained in the Bill to address this increased threat include:

- (a) ensuring law enforcement and intelligence agencies have appropriate tools available to investigate persons posing a threat, including the preservation of existing counter-terrorism tools

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- such as ASIO questioning and detention warrants and police stop, search and seizure powers;
- (b) ensuring appropriate and calibrated mechanisms are available to limit the means of travel for foreign fighters, such as passport suspension;
 - (c) ensuring Australia's borders are appropriately strengthened; and
 - (d) ensuring criminal offences are relevant and address the threat posed by foreign fighters and those who support them.

The amendments to the ASIO Act and ISA will allow ASIO to work more efficiently; the introduction of temporary suspension capabilities for passports and visas will improve ASIO's ability to react quickly to limit travel by would-be foreign fighters; and the power to cancel welfare payments will reduce potential financial support for foreign fighters and their networks.

Part Two

ASIO Act and ISA amendments

Questioning warrants

The Bill amends paragraph 34D(4)(b) of the ASIO Act to implement the Government's response to recommendation IV/1 of the Independent National Security Legislation Monitor's (INSLM) Second Annual Report, to repeal and replace one of the prerequisites for the Attorney-General to consent to the application of a questioning warrant.

Currently in order for the Attorney-General to consent to the Director-General seeking the issue of a questioning warrant, subsection 34D(4) provides that the Attorney-General must be satisfied:

- (a) that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and
- (b) that relying on other methods of collecting the intelligence would be ineffective; and
- (c) that there is in force under section 34C a written statement of procedures to be followed in the exercise of authority under warrant issued under Division 3 of Part III of the ASIO Act.

The requirement in paragraph 34D(4)(b) operates as a 'last resort' requirement in that consent cannot be granted if there are other intelligence collection methods available that are effective. That is, it is not material that other available methods may be significantly less effective than a questioning warrant, may take considerably longer in time critical circumstances, or may involve a considerably greater risk to the lives or safety of persons collecting the intelligence.

The amendment will replace the requirement for the Attorney-General to be satisfied "*that relying on other methods of collecting intelligence would be ineffective*" with the requirement that, "*having regard to*

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other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued".

The proposed amendment would ensure that the Attorney-General could consent to the Director-General seeking a questioning warrant in time-critical operational circumstances, if the Attorney-General is satisfied that the issuing of the warrant request is reasonable in all the circumstances. The new threshold will require the Attorney General, in making this assessment, to have regard to whether there are other methods of collecting the intelligence sought to be collected under the warrant, and whether those other methods are likely to be as effective. The existence of other, less intrusive methods of obtaining the intelligence will continue to be a relevant but non-determinative consideration in decisions made under subsection 34D(4).

Questioning warrants are an important power for ASIO to compel a person to appear before a prescribed authority and answer questions and produce records (or other things). The proposed amendment will improve the effectiveness of these warrants as an intelligence collection tool.

As noted in the INSLM's Second Annual Report, there are significant safeguards in relation to the use by ASIO of questioning warrants, including the Attorney-General's Guidelines, made under section 8A of the ASIO Act, which contain a number of important safeguards with respect to intelligence collection, including requirements that ASIO have regard to proportionality and intrusiveness of its methods of obtaining intelligence. These Guidelines are complemented by the written statement of procedures required in relation to questioning warrants by the Director-General of Security.

Destroying or tampering with records

The Bill inserts a new offence in subsection 34L(10) of the ASIO Act where a person is requested to produce a record or thing under a questioning or questioning and detention warrant and the person engages in conduct which results in the record or thing being unable to be produced or to be produced in a form which is not wholly legible or usable. This amendment implements the Government's response to recommendation IV/6 of the INSLM's Second Annual Report.

The ASIO Act presently contains an offence provision which applies to persons who fail to produce a record or thing to a prescribed authority under a questioning warrant or a questioning and detention warrant; however, there is currently no express prohibition on wilfully destroying or tampering with records which have been requested to be produced. The proposed new offence is intended to address this gap.

The penalty of 5 years' imprisonment is consistent with the existing penalties in section 34L of the ASIO Act and reflects the importance of the information gathered by ASIO and the need to deter obstructionist behaviour.

Use of force by police officer executing a questioning or questioning and detention warrant

The Bill amends paragraph 34V(3)(b) of the ASIO Act by removing the distinction between use of force by police officers when detaining a person for the purposes of a questioning warrant (for instance where a person has failed to appear as required by the warrant) or a questioning and detention warrant and the

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use of force when a person is attempting to escape being taken into custody by a police officer. This amendment implements the Government's response to recommendation IV/3 of the INSLM's Second Annual Report.

The current drafting of section 34V(3)(b) of the ASIO Act limits the action that can be taken by a police officer exercising authority under a questioning or questioning and detention warrant, where a person is attempting to escape being taken into custody by fleeing. These restrictions are inconsistent with the modern law of self defence and defence of others and are duplicating the restrictions already present in the current subsection (s34V(3)(a)). ASIO supports the proposed amendments.

Sunset provision for questioning and questioning and detention warrants

The Bill extends the existing sunset provision in section 34ZZ of the ASIO Act for the questioning and questioning and detention warrant regime (Division 3) from 22 July 2016 to 22 July 2026.

The questioning and questioning and detention warrant regime is an important capability which allows ASIO to fulfil its statutory functions of obtaining, correlating and evaluating intelligence which is relevant to security, specifically, a terrorism offence. The ongoing and persistent threat of terrorism, particularly from Australians involved in and returning from armed conflicts in Syria and Iraq, presents a significant challenge to ASIO and other intelligence agencies. ASIO needs to be equipped with the necessary powers and capabilities to fulfil its statutory functions.

Since the questioning and questioning and detention warrant regime commenced in 2003, ASIO has obtained 16 questioning warrants. ASIO anticipates that in the current environment, the warrant powers issued under Division 3 will continue to play an important role in intelligence collection.

Recommendation V/1 of the INSLM's Second Annual Report recommended the questioning and detention warrant regime be repealed and replaced by additional provisions in the questioning warrant regime. There are realistic and credible circumstances in which it may be necessary to conduct coercive questioning of a person for the purposes of gathering intelligence about a terrorism offence. Since the INSLM published his Second Annual Report, the terrorism threat in Australia has increased, as indicated by the raising of the terrorism threat level in September 2014. Notwithstanding that ASIO has not previously applied for a questioning and detention warrant, ASIO strongly believes the current security environment, including the risk of onshore terrorist attacks, supports the proposed extension of the sunset date for the questioning and questioning and detention warrant regime in Division 3 of Part III of the ASIO Act. In addition, current statutory thresholds ensure these special powers are not used arbitrarily or unnecessarily at any time.

A questioning and detention warrant is important in circumstances where, if a person is not immediately taken into custody and detained, the person may alert a person involved in a terrorism offence that the offence is being investigated, may not appear before a prescribed authority to be questioned or may destroy, damage or alter a record or thing that they may be requested to produce under warrant.

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PJCIS review of questioning and questioning and detention provisions (Schedule 1, Item 133)

The Bill proposes to extend the existing sunset provision in paragraph 29(1)(bb) of the IS Act for the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to review the questioning and questioning and detention warrant regime in Division 3 of Part III of the ASIO Act from 22 January 2016 to 22 January 2026.

ASIO believes that it is appropriate to amend the PJCIS review requirement in paragraph 29(1)(bb) of the IS Act to be consistent with the proposed amendment to the sunset provision in section 34ZZ of the ASIO Act.

Australian Passports Act – temporary passport suspension

As part of its strategy to address the threat posed by foreign fighters, the Australian Government continues to work to discourage and prevent Australians from travelling overseas to train and fight with extremist groups. A key mechanism available to prevent overseas travel is the cancellation of the relevant person's passport. Australian passports can be cancelled by the Foreign Minister following the making of a refusal/cancellation request by ASIO. A refusal/cancellation request can be made by ASIO where ASIO *suspects on reasonable grounds* that if an Australian passport were issued to a person, the person would be *likely to engage* in conduct that might prejudice the security of Australia or a foreign country and that the passport should be cancelled in order to prevent the conduct. This request amounts to an adverse security assessment under the ASIO Act.

With the significant increase in persons travelling overseas to fight in Syria, Iraq and elsewhere we have identified that scenarios can arise where ASIO holds concerns about the travel of an individual but is not in a position to resolve those security concerns prior to the person departing Australia. This can occur, for example, where ASIO has received new intelligence in respect of a person whose overseas travel is imminent, but which requires further analysis and verification before an adverse security assessment can properly be issued.

The proposed amendments to be introduced into the *Australian Passports Act 2005* (Passports Act) will enable the Minister for Foreign Affairs (the Minister) to *temporarily suspend* an Australian passport for 14 days to prevent an onshore individual from travelling overseas on the basis of an ASIO request. To make a request, ASIO will need to *suspect on reasonable grounds* that the person *may* leave Australia to engage in conduct that *might* prejudice the security of Australia or a foreign country, and that the person's Australian travel documents should be suspended in order to prevent the person from engaging in the conduct.

This measure will enhance the Commonwealth's ability to interdict travel of security concern, particularly in circumstances where ASIO becomes aware at short notice of security dimensions to an individual's imminent travel. The proposed 14-day period will allow for necessary additional investigations to be undertaken, and will afford ASIO a reasonable timeframe to resolve its security concerns.

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Notification and review rights

The making of a request for temporary suspension of a passport would, without amendment, amount to a 'security assessment' for the purposes of the ASIO Act. Part IV of the ASIO Act makes provision for certain notification obligations and AAT review rights in respect of adverse or qualified security assessments furnished by ASIO.

In many cases, it would be preferable for the person not to be notified of the temporary decision, as notification may affect law enforcement and security operations in relation to that person and other persons. It may also affect the information that ASIO is able to collect to support the security assessment process.

However, if the person goes to the border and seeks to travel overseas, in order to prevent the travel, there will be a requirement to notify the person that their passport has temporarily been suspended, and to demand the surrender of the document. In such situations the person will be notified by the appropriate authorities at the border of the temporary suspension.

For these reasons, ASIO supports the proposed amendments to section 36 of the ASIO Act which will ensure that the request for a temporary cancellation will not be subject to the notice and review provisions of Part IV of the ASIO Act.

The proposed temporary suspension power is intended as an interim measure until a more permanent decision can be made – such as where ASIO furnishes an adverse security assessment seeking the cancellation of a person's passport.

An ASIO refusal/cancellation request seeking permanent cancellation of a passport will appropriately remain subject to Part IV of the ASIO Act, and the notification and AAT review provisions will apply. Both ASIO's request and a subsequent decision by the Minister to temporarily suspend a person's passport are administrative decisions that the person may seek judicial review of in the Australian Courts.

Human rights considerations

These proposed mechanisms strike the right balance between giving practical effect to a temporary suspension scheme to protect Australia's national security and an individual's rights under the International Covenant on Civil and Political Rights (ICCPR). Under article 12 of the ICCPR a person has the right to leave a country, including their own. The right may be subject to certain restrictions provided by law, including those necessary to protect national security.¹ The proposed scheme provides appropriate and proportionate mechanisms to give effect to the need to prevent people who may be a security risk from travelling overseas at short notice.

Foreign Passports Act – temporary seizure of foreign travel documents

In some situations, persons who have dual citizenship may be in possession of both an Australian passport and foreign travel documents, and seek to travel on their foreign documents if their Australian passport is suspended or cancelled.

¹ ICCPR, Article 12(3)

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Currently, under section 16(1) of the *Foreign Passports (Law Enforcement and Security) Act 2005* (Foreign Passports Act), the Minister has the power to order the seizure of a foreign passport if ASIO makes a request under section 15(1) of the Act. Under section 15(1), ASIO can make a request for a passport to be seized where it suspects on reasonable grounds that unless the passport is seized, the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country. This is the same legal threshold for making a request under section 14(1) of the Passports Act for a passport to be cancelled. Such requests are not characterised as a security assessment (as decisions under the *Foreign Passports Act* are not included in the definition of prescribed administrative action), meaning that the requirements of Part IV of the ASIO Act do not apply. Nonetheless where ASIO has received new intelligence in respect of a person whose overseas travel is imminent, but which requires further analysis and verification before ASIO can properly assess the security relevance of the individual, ASIO may not be in a position to request a surrender order to prevent a person of security interest departing Australia.

The proposed amendments to the Foreign Passports Act complement the amendments to the Australian Passports Act. Where ASIO *suspects on reasonable grounds* that a person *may* leave Australia to engage in conduct that *might* prejudice the security of Australia or a foreign country, the amendments will enable the ASIO to request the Minister to order the temporary surrender/seizure of that person's foreign travel document for a period of 14 days (from the date the Minister makes the order) in order to prevent the person from engaging in such conduct. This is a lower threshold than that required under section 15(1). The lower threshold will enable ASIO to request the short-term surrender request on the basis of credible information that indicates a person may pose a security risk and be planning imminent travel.

Migration Act – emergency visa cancellations

The ability to cancel visas that have been issued to non-citizens intending to travel to Australia is a critical tool available to the Australian Government to prevent, where appropriate, the travel of non-citizens who present a risk to Australia. The *Migration Act 1958* currently permits or requires visa cancellation on a range of grounds, including grounds relating to security.

Under the current legislative regime, in order to pursue the cancellation on security grounds of a visa of a non-citizen who is offshore, ASIO must either advise the Minister for Immigration that an individual is *assessed to be a direct or indirect risk to security*, enabling the person's visa to be cancelled under s.116 or 128 of the Migration Act, or recommend cancellation of the person's visa on the basis of the danger they present to the Australian community under the general character test grounds contained in s.501 of the Migration Act.

This regime is effective where ASIO has the time and information available to conduct an assessment as to whether a person is directly or indirectly a risk to security, or a danger to the Australian community. However, scenarios can arise where the travel of a non-citizen to Australia is imminent, but assessing whether that person presents a direct or indirect risk to security on the basis of new information is not feasible before the person travels. For example, there may be circumstances where ASIO obtains intelligence in respect of a person who is planning to travel to Australia imminently, that indicates the person presents as a security risk. In such circumstances ASIO may be unable to meaningfully assess the extent and nature of the security risk and conduct a security assessment investigation prior to the

person's travel. Depending on the gravity of the potential threat, it may be appropriate to delay that non-citizen's travel to Australia while further investigation is undertaken.

The Bill inserts a new provision that will require the Minister for Immigration to cancel an offshore person's visas (temporary or permanent) for a period of 28 days when ASIO furnishes an adverse security assessment that recommends cancellation having assessed that the *holder of the visa **might be directly or indirectly, a risk to security.*** This is a lower legal threshold than required for other adverse security assessments that inform visa cancellation related decisions.

At the conclusion of the 28-day period the Minister must revoke the cancellation unless ASIO furnishes an adverse security assessment which contains an assessment that the person is directly or indirectly a threat to security and which recommends against the Minister revoking the cancellation of the visa.

This amendment provides an appropriate and proportionate mechanism to respond to potential security threats posed by non-citizens intending to travel to Australia where there is insufficient time for ASIO to assess new information that the person is directly or indirectly a risk to security.

Notification

ASIO envisages that there will be scenarios where it is preferable for the person not to be notified of the visa cancellation. Notification may, for example, affect the information that ASIO is able to collect to support its security assessment of the person. Notification may also affect law enforcement and security operations in relation to that person and other persons.

The Bill provides that notice of an emergency visa cancellation is only required where a visa has been cancelled and the Minister for Immigration decides not to revoke the cancellation on the basis of an adverse security assessment that the person is directly or indirectly a risk to security. Notice may be delayed where it is essential to the security of the nation.

In accordance with the ASIO Act, the provision of notice will be required in regard to an adverse security assessment furnished in respect of a permanent resident visa holder unless an Attorney-General's certificate is obtained that it is essential to the security of the nation that notice of the adverse security assessment not be provided. The Bill amends the ASIO Act to ensure that this applies consistently in respect of persons who would have been permanent visa holders, but for the emergency cancellation of their visas. This will also allow such persons to seek merits review of the ASIO adverse security assessment in the Security Appeals Division of the AAT.

These provisions strike an appropriate balance between the need to collect intelligence in respect of the potential threat to security with the interests of the visa holders. The operation of Part IV of the ASIO Act also appropriately reflects the desirability to provide a greater level of accountability in respect of action affecting permanent visa holders.

Cancellation of welfare payments

Currently, welfare payments can only be suspended or cancelled if the individual no longer meets social security eligibility rules, such as participation, residence (offshore longer than 6 weeks) or portability qualifications. The proposed amendments will enable the Australian Government to cancel the welfare

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payments of persons on security grounds, through a notice issued by the Attorney-General and informed by advice from ASIO. This measure will reduce the potential for the Australian government to be inadvertently funding the activities of extremists.

At the time of furnishing an adverse security assessment recommending passport refusal/cancellation to the Minister for Foreign Affairs, or visa cancellation to the Minister for Immigration, ASIO may include advice that the individual should be referred to the Attorney-General for consideration of welfare cancellation. ASIO may also provide advice directly to the Attorney-General to assist his consideration of welfare cancellation for an individual (following referral from the relevant portfolio Minister).

ASIO supports the discretionary nature of the Attorney-General's power to issue a security notice which can contemplate the requirements of security, including, but not limited to, the impact of a welfare payment cancellation on the operational activity and investigations.

The Attorney-General will retain the discretion to issue a security notice. The discretionary aspect of the Attorney-General's decision making process will enable the requirements of security to be considered on a case by case basis. ASIO will provide advice to the Attorney-General as appropriate which may include advice that the cancellation of a person's welfare payment would adversely impact the requirements of security.

The advice from ASIO will address, for each case, the extent of the nexus between the receipt of welfare payments and the assessed conduct of security concern. ASIO's advice will also address the likely impact of welfare payment cancellation, given the individual's particular circumstances and the security and operational environment, to support the case by case consideration and ensure the best overall security outcome is achieved.

Conclusion

ASIO trusts this information is of assistance to the Committee. ASIO would be pleased to provide the Committee with any further information it may require in completing its inquiry into this important package of proposed reforms.

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