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Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

**Attorney-General's Department Supplementary Submission,
incorporating contributions from the Australian Federal Police,
Australian Security Intelligence Organisation,
the Department of Immigration and Border Protection, the
Australian Customs and Border Protection Service, and the
Department of Foreign Affairs and Trade**

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Introduction

1. On 2, 3 and 8 October 2014, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) held public hearings for its inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Bill). The Attorney-General's Department (AGD), Australian Federal Police (AFP), Australian Security Intelligence Organisation (ASIO), Department of Immigration and Border Protection (DIBP), Australian Customs and Border Protection Service (Customs), Department of Foreign Affairs and Trade (DFAT) and Department of Social Services attended the inquiry on 3 October 2014 to present evidence.
2. In response to questions from the PJCIS and public submissions to the inquiry, AGD, in consultation with other Commonwealth agencies, has prepared this supplementary submission to further inform the PJCIS's consideration of the Bill.

Supplementary information

COAG Review of Counter-Terrorism Laws

3. On 6 August 2012, the Council of Australian Governments (COAG) commenced its review of counter-terrorism legislation in Australia. The COAG Review of Counter-Terrorism Laws was finalised in 1 March 2013 and tabled on 14 May 2013. COAG requested the Australia and New Zealand Counter-Terrorism Committee develop a response to the COAG Review, to be considered at the COAG meeting to be held on 10 October 2014.

Control orders and preventative detention orders

Further amendments proposed to the control order regime

4. As noted by the AFP at paragraph 24 of its submission, current counter-terrorism investigations continue to inform the Government's view of the adequacy of the control order regime. The Government is closely examining the application process and the purposes for which a control order may be sought with a view to further enhancing the regime and respond to contemporary operational challenges.

Preventative nature of preventative detention orders

5. The preventative detention order regime was inserted into the Criminal Code in 2005 as part of the Government's response to the 2005 London bombings.

6. In his second reading speech on 3 November 2005, when describing the control order and preventative detention order measures in the Bill, the then Attorney-General stated that these measures in the Anti-Terrorism Bill (No. 2) 2005 ensure Australia is ‘in the strongest position possible to prevent new and emerging threats, to stop terrorists carrying out their intended acts’ (emphasis added).

7. This is also reflected at page 36 of the Explanatory Memorandum to that Bill, which provides that ‘New Division 105 of the Criminal Code provides a regime for detaining persons for up to 48 hours for the purposes of preventing a terrorist act or preventing the destruction of evidence relating to a terrorist act’ (emphasis added).

8. In addition, the objects of Division 105 do not include investigation of a terrorism related offence through the questioning of a person in preventative detention. Page 37 of the Explanatory Memorandum clearly provides that the objects are:

to enable the police to take a person into custody and detain that person for a short period of time, being no longer than 48 hours, in order to prevent an imminent terrorist act occurring, or to preserve evidence of, or relating to, a recent terrorist act.

9. While this could serve an investigatory purpose – by ensuring a person in detention is unable to destroy evidence related to a recent terrorist act, and is also unable to contact persons involved in a recent attack to warn them to destroy evidence or to flee – questioning a person under preventative detention is neither authorised nor necessary.

10. The amendments to the preventative detention order regime are designed to clarify and streamline the process for applying for and making a preventative detention order in urgent circumstances.

11. The Bill does not expand the grounds upon which an AFP member can apply for or an issuing authority can make a preventative detention order. Nor does it amend the threshold for an AFP member to apply for or for an issuing authority to make a preventative detention order.

12. An AFP member can only apply for a preventative detention order, and an issuing authority can only make a preventative detention order, where the member or authority has reasonable grounds to suspect¹ that the person:

(a) will engage in a terrorist act

¹ Note that the wording has been changed from ‘reasonable ground to suspect’ to ‘suspects, on reasonable grounds’ for an application. This change was made for grammatical purposes only and does not impact on the threshold for making an application.

- (b) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act, or
- (c) has done an act in preparation for, or planning, a terrorist act.

Questioning of persons under preventative detention

13. The AFP cannot question a person while the person is detained under a detention order other than to confirm a person's identity and ensure the safety and well-being of the person being detained. Questioning by other police and ASIO is also precluded. Questioning of terrorism suspects, as regulated by Part IC of the *Crimes Act 1914* (Crimes Act), can only occur where a person has been arrested on the basis of a reasonable belief (proposed to be reduced to reasonable suspicion by the bill) that the person has committed or is committing an offence. The threshold for obtaining a preventative detention order and taking a person into detention is different, and should not be used to circumvent the requirements in Part IC.

14. When the preventative detention regime was inserted into the Criminal Code in 2005, the issue of questioning persons in detention was considered and rejected as being outside the purposes of the regime. For example, page 37 of the Explanatory Memorandum notes that 'extended questioning is not an object of preventative detention orders'. At that time, it was assessed that existing questioning regimes, including Part IC of the Crimes Act, which contains important statutory safeguards for persons the subject of police investigation, were sufficient. Despite the changing nature and level of the terrorist threat, that has not changed.

15. Subsection 105.26(4) of the Criminal Code specifically authorises the release of a person in preventative detention so that the person may be dealt with under other legislation including for the purposes of arrest and questioning under Part IC of the Crimes Act. This preserves the safeguards afforded a person under Commonwealth law, common law (judges rules) and international law. These protections include the right not to answer questions. There is a real risk that a court would preclude admissions or confessions of a person detained under a preventative order who was questioned without the protections afforded by Part IC on the basis that the evidence was obtained unfairly.

16. The ability to transition from preventative detention to arrest and from arrest to preventative detention is important to both the preventative objects of the preventative detention regime and the ability of the AFP and other police services to investigate and prosecute terrorists. The decision to transition from preventative detention to arrest (and to question the person in accordance with Part IC of the Crimes Act) could occur for a number of reasons. For example, additional evidence or information could be obtained during the detention period that resulted in the AFP member having reasonable grounds to believe (or suspect as amended by the Bill) that

the person had committed a terrorism offence. One such example would be where the detained person made a 'spontaneous' or 'excited' utterance incriminating himself or herself.

Spontaneous utterances form an exception to the hearsay rule and are admissible to prove the truth of the statement itself. In the event a detained person made a spontaneous statement that was contrary to the person's interests, it would be open to the AFP to both record the statement and seek to use it in evidence and to transition to arrest and questioning to ensure the admissibility of any further statements made.

Thresholds for control orders and preventative detention orders

17. During the hearing on Friday 3 October 2014, Mr Byrne asked the following:

Just in terms of the PDOs, the questioning and detention powers for ASIO, the stop and search powers, the control orders: it looks like you have dropped the threshold to access those powers—that is if you look at 'reasonably suspect' to 'reasonably believe'. My question is: when you look at the use of control orders, the use of PDOs, the use of the ASIO questioning and detention powers, were you not using them because the threshold was too high to actually access them? Are you dropping the thresholds so that you have easier access to the use of those powers?

18. Ms Kerri Hartland, Deputy Director-General, ASIO, provided a response in relation to the ASIO powers and Mr Neil Gaughan, Assistant Commissioner, National Manager Counter Terrorism, AFP, provided an operational perspective. However, AGD did not provide a response in relation to those provisions of the Bill.

19. In relation to the ASIO powers, the Bill does not change the threshold for questioning and detention warrants, but does change the threshold for questioning warrants (see paragraph 136 below for further detail). The Bill also does not change the thresholds for making a control order and making a preventative detention order. The Bill would make changes to the application process to streamline that process. In addition, the Bill expands the grounds upon which a control order or preventative detention order can be made.

20. Summaries of the existing processes and the proposed amendments are provided below.

Control Orders

21. The amendments to the control order regime are designed to streamline the application process and include additional grounds for control orders in response to the 'foreign fighters' threat. The amendments do not lower the threshold for making a control order.

22. The Bill would expand the grounds upon which a senior AFP member can seek the Attorney-General's consent to apply for an interim control order and an issuing court can make an interim control order to include where the person has:

- ‘participated’ in training with a terrorist organisation
- engaged in a hostile activity in a foreign country, and
- been convicted of a terrorism related offence.

23. The Bill would also lower the threshold for a senior AFP member seeking the Attorney-General’s consent to apply for an interim control order for one of the grounds. Specifically, the amendment would authorise a senior AFP member to seek consent where he or she ‘suspects’ rather than ‘considers’ that the order would substantially assist in preventing a terrorist act. This amendment would make the threshold for application in relation to this ground consistent with the existing threshold in relation to training.

24. However, the making of a control order requires more than the Attorney-General’s consent, and the Bill does not amend the threshold for an issuing court to make an interim or a confirmed control order. The Bill does not amend the existing threshold that the issuing court must be ‘satisfied on the balance of probabilities’ that making the order would substantially assist in preventing a terrorist act. The Bill would provide for the same threshold to apply to the modified ground that the person has ‘participated’ in terrorist training, and the new grounds that the person has engaged in a hostile activity in a foreign country or been convicted of a terrorism related offence.

Sunset periods and reviews

25. The following information provides factual background regarding the key dates of introduction and review of the control order, preventative detention and ASIO questioning and detention warrant regimes.

Completed reviews

26. The *Anti-Terrorism Act (No. 2) 2005* inserted Divisions 104 (control orders) and 105 (preventative detention) into Part 5.3 of the Criminal Code and inserted Part 1AA Division 3A into the Crimes Act (police stop, search and seizure powers). The Act subjected these provisions to a 10 year sunset period which will expire on 15 December 2015, and required COAG to, after 5 years, review the operation of the provisions. The sunset and review provisions reflected the agreement reached at the COAG Special Meeting on Counter-Terrorism on 27 September 2005.

27. The COAG Review of Counter-Terrorism Laws commenced in August 2012 and was completed in March 2013. The COAG Review Committee recommended the retention of the control order provisions (with additional safeguards and protections). However, it recommended,

by majority, the repeal of the preventative detention order provisions in their current form. It also recommended the stop, search and seizure powers in the Crimes Act be extended for a further five year period.

28. The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* inserted Division 3 Part III into the *Australian Security Intelligence Organisation Act 1979 (Cth)* (ASIO Act) to create a new questioning and detention warrant regime. A sunset clause was included so that the powers expired after three years, and required the PJCIS to review the legislation prior to their expiry. The PJCIS reported on the powers in 2005, and the *Australian Security Intelligence Organisation Legislation Amendment Act 2006* renewed the powers and added a new 10 year sunset clause (the provisions will expire on 22 July 2016), with the PJCIS to review the provisions again before their expiry.

29. The Independent National Security Legislation Monitor (INSLM) reviewed the control order and preventative detention order provisions in his 2012 Report. He recommended the repeal of these provisions or, in the alternative, several changes to the provisions. The INSLM also reviewed the questioning and questioning and detention provisions in the ASIO Act in his 2012 Report.

Proposals in the Bill

30. The attachment to AGD's previous submission sets out how the recommendations of the COAG Review Committee and the INSLM have been implemented in the Bill.

31. Given the enduring nature of the terrorist threat the preferred position of the Government is that the provisions should be made a permanent part of the legislation and should not be subject to a further sunset period. There are realistic and credible circumstances in which these provisions will be necessary for law enforcement and intelligence agencies to perform their functions in protecting Australia and Australians from the threat of terrorism.

32. In accordance with the *Inter-Governmental Agreement on Counter-Terrorism Laws 2004*, state and territories were consulted prior to the introduction of the amendments to Part 5.3 of the Criminal Code as contained in the Bill. Through this consultation process, as well as feedback from the broader Australian community, the Government was persuaded that, while the enduring nature of the threat is well understood, the operation of sunset provisions contributes significantly to community confidence in, and support for, extraordinary investigative and disruption powers. Accordingly, the Bill provides that the operation of the control order, preventative detention order and police powers should be extended for a further ten years until 15 December 2025. We note

a sunset clause will also apply to the new declared area offence in section 119.2 of the Criminal Code.

33. On the same basis, the Bill provides that the operation of the questioning and questioning and detention provisions should be extended for a further 10 years until 22 July 2026, and defer the PJCIS review of those provisions until closer to this time (and by 22 January 2026 at the latest). The deferral of the PJCIS review was made because the Bill proposes a number of amendments to the questioning and detention provisions and there should be a reasonable time to assess the operation of the amended provisions before that review occurs. A review in 2016 would be too soon to examine arrangements likely to come into effect in late 2014/early 2015. A minimum of at least three years from the commencement of the proposed amendments would be needed to allow the PJCIS to properly assess the operation of the questioning and detention powers as part of its review.

34. In addition, the Independent National Security Legislation Monitor will be able to review all of these provisions annually.

Amendment to the definition of ‘advocate’s for the terrorist organisation listing regime

35. The proposed amendment to the definition of ‘advocates’ in subparagraph 102.1(1A)(a) to include the words ‘promote’ and ‘encourage’ is intended to only capture the conduct of an organisation and not an individual. The amendment is intended to ensure that the conduct of an organisation that directly or indirectly counsels, promotes, encourages or urges the doing of a terrorist act, can be relied upon to list the organisation as a terrorist organisation under the Criminal Code.

36. The amendment has been drafted to group the terms ‘promote’ and ‘encourage’ with ‘counsel’ and ‘urge’. While there is some overlap with the existing terms, ‘counsels’ or ‘urges’, the inclusion of ‘promotes’ and ‘encourages’ is aimed at providing certainty and ensuring conduct that may be less direct, is captured by the provision.

37. To ‘encourage’ the doing of a terrorist act may include conduct (or statements) that inspire others to commit a terrorist act. To ‘promote’ may include conduct such as an organisation launching a campaign to commit a terrorist act (or acts).

38. The use of the terms ‘promotes’ and ‘encourages’ is consistent with other terrorist organisation listing regimes, such as in section 3 of the *Terrorism Act 2000* (UK), where an

organisation is ‘concerned in terrorism’ if it ‘promotes or encourages’ terrorism (including the unlawful glorification of terrorism).

39. An organisation may make statements more generally promoting or encouraging terrorism without directly stating ‘you should commit a terrorist act’. The Government considers that an organisation engaging in such conduct should not be able to evade the listing process.

40. The new advocating offence in section 80.2 is directed at those who supply the motivation and imprimatur. The proposed amendment in subparagraph 102.1(1A)(a) is directed in a similar way, only to an organisation which, in a more organised manner, directly or indirectly motivates the doing of a terrorist act.

41. The proposed ‘promotes’ and ‘encourages’ amendments are not designed to capture one-off instances of conduct which may fall within the definition of ‘advocates’ (such as an individual’s statement to carry out terrorism) unless the conduct is considered to have been undertaken by an organisation.

42. The additional requirements in subparagraph 102.1(1A)(c) of ‘praising’ the doing of a terrorist act, where there is a ‘substantial risk’ that such praise might have the effect of leading a person to engage in a terrorist act, was developed to provide clarification as to the connection between any such praise and those who may be influenced. The inclusion of the ground of ‘substantial risk’ in the proposed amendment in subparagraph 102.1(1A)(a) to include ‘promote’ and ‘encourage’, may have the effect of unduly narrowing the provision, which could limit its utility in sending a message to organisations that it is not acceptable to promote or encourage terrorism.

43. We also note that the proposed amendments to subparagraph 102.1(1A)(a) are consistent with the proposed new offence in subsection 80.2C of ‘advocating terrorism’. In this proposed offence, a person (as opposed to an organisation) commits an offence if they intentionally counsel, promote, encourage or urge the doing of a terrorist act.

Foreign Incursions and Recruitment

Declared area offence – section 119.2 of the Criminal Code

Purpose of the offence

44. The ALRC’s Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia, states ‘[t]he main purposes of criminal law are traditionally considered to be deterrence and punishment’.

45. The purpose of the proposed declared area offence is to do both. The measure is designed to deter people from entering or remaining in extremely dangerous areas in foreign countries where listed terrorist organisations are engaged in hostile activity and consequently been 'declared' by the Minister for Foreign Affairs.

46. The offence will also punish those that travel to those areas for reasons other than solely for a 'legitimate purpose or purposes'. *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that criminal offences should be used where the relevant conduct involves, or has the potential to cause, considerable harm to society or individuals, the environment or Australia's national interests, including security interests².

47. As noted by the AFP in its submission:

the Syria and Iraq conflicts have changed the terrorist threat environment, providing a significant opportunity for Australians to travel overseas and develop the necessary capability to undertake terrorist acts. In addition to this capability, the AFP is concerned that Australian foreign fighters will return further radicalised and 'hardened' by their experiences fighting overseas. To that end, we must prevent the creation of a cadre of Australians willing and able to engage in terrorism in Australia, recruit others to travel overseas and engage in hostile activities, and raise funding for terrorist organisations.³

Onus of proof

48. The onus of proof for this offence has not been reversed. The prosecution must prove each element of the offence. The elements are that:

- the person intentionally enters, or remains in, an area in a foreign country,
- the area has been declared by the Minister for Foreign Affairs, and
- the person is reckless that the area was a declared area (i.e. aware of a substantial risk that the area was a declared area by enters or remains anyway).

Offence-specific defence – evidential burden

49. Subsection 119.2(3) provides that subsection 119.2(1) does not apply if the defendant enters or remains in a declared area solely for a legitimate purpose and that the defendant bears the evidential burden in relation to that matter. This means that a defendant who wishes to rely

² *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* p.12

³ Australian Federal Police Submission, Parliamentary Joint Committee on Intelligence and Security Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, p.2-3.

on the offence-specific defence must adduce or point to evidence that suggests a reasonable possibility that their sole legitimate purpose for entering, or remaining in, a declared area exists⁴.

50. *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* provides that a matter should only be included in an offence-specific defence, as opposed to being specified as an element of the offence, where:

- it is peculiarly within the knowledge of the defendant, and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish about the matter.

51. These circumstances apply to this offence. As noted by Professor Gillian Triggs, the Australian Human Rights Commissioner, at her appearance before the PCJIS on 3 October 2014, the defendant has ‘taken the risk and they are in the best position to provide at least a first level of evidence before the persuasive burden is reactivated in terms of the crown’.

52. If a defendant who relies on the offence-specific defence discharges the evidential burden, the prosecution must then disprove that matter (i.e. that the defendant entered or remained in a declared area not solely for a legitimate purpose or purposes) beyond reasonable doubt.

Offence-specific defence – ‘sole’ legitimate purpose or purposes

53. Broad defences, for example the humanitarian aid defence at section 7(1B) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Foreign Incursions Act) are open to exploitation. The ‘sole’ purpose defence will ensure that people cannot point to one small part of broader conduct to enliven the defence. For example, a person could enter, or remain in, a declared area for the purpose of engaging in hostile activities but take a first aid kit with them in order to be able to assert that one of the reasons for being there was to provide humanitarian aid.

List of legitimate purposes

54. The list of legitimate purposes has been purposefully drafted to provide a narrow list of purposes which a person can engage in in a declared area given that doing so is at considerable risk to the person’s own safety. The list of legitimate purposes provided at subsection 119.2(3) has been sourced from both existing legislation and community consultation.

⁴ See section 13.3 —Evidential burden of proof —defence, Criminal Code

Court discretion to determine legitimate purpose or purposes

55. The Law Council has recommended, and the AHRC suggested, that the court could 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 as a way to improve the declared area offence.⁵

56. The intention behind the proposed legitimate purposes defence is to provide a non-exhaustive definition of the matters that could justify a person's entry into, or decision to remain in, a declared area. Limiting the list of legitimate purposes is justified on the basis that it achieves the legitimate objective of deterring 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, given that it is an area in which listed terrorist organisations are engaged in hostile activity, will put their own personal safety at risk.

57. Limiting the list of legitimate purposes in the defence addresses two important issues—the need to provide clear guidance to individuals about the acceptable reasons for entering or remaining in a declared area and the need to ensure the court is not being asked to exercise a legislative function by determining whether particular purposes are legitimate.

58. Adopting a broad defence that provides no guidance to individuals could act as an even greater deterrent to people proposing to travel to or remain in a declared area because of the uncertainty about whether the person would be committing a criminal offence. For example, the defence in relation to making a news report provides professional journalists with a level of reassurance that they can enter a declared area for the purposes of presenting the news, but also sets out the limits of the defence. This is designed to facilitate the reporting of events in a declared area by individuals with appropriate training, who understand the risks associated with that task. It is also designed to discourage individuals without appropriate training and without a full understanding of the risks from entering a declared area in order to record hostile activities on their mobile phone and post it on the internet.

59. Conversely, leaving it open to the court to determine the scope of legitimate purpose could result in purposes not considered of sufficient significance being determined to be legitimate by the court. For example, the list of legitimate purposes does not include study or business activities. The government considers that if an area is dangerous enough to warrant declaration, it will be too dangerous for Australian to enter for business or study purposes.

⁵ Law Council of Australia, Submission, Parliamentary Joint Committee on Intelligence and Security Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, p.6 and Prof Gillian Triggs, Proof Hansard, Parliamentary Joint Committee on Intelligence and Security Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Public Hearing, Canberra, 3 October 2014, p. 8.

60. The ability to prescribe other purposes under regulations as legitimate purposes is an important safeguard, and acknowledges that, although the government has given extensive consideration to the list of purposes and consulted with the community about this list, it is possible that other appropriate purposes may not have included.

General Criminal Code defences available

61. AGD notes that the general defences under Division 10 of the Criminal Code are available to defendants in respect of the declared area offence. These include intervening conduct or event, duress and sudden or extraordinary emergency⁶. In a conflict zone where terrorist organisations are engaged in hostilities, it would be likely that circumstances will arise where an individual can reasonably claim that they have acted under duress (for example, under the threat of physical harm) or in response to a sudden and extraordinary emergency (for example, closure of safe routes of departure).

Declared area 'protocol'

62. It is anticipated that the process for declaring an area will be consistent with existing processes, such as the process for listing a terrorist organisation under the Criminal Code or declaring a terrorist act for the purposes of the *Terrorism Insurance Act 2003*.

63. AGD, DFAT and other relevant agencies are currently developing a protocol which is intended to be made public. It is anticipated that, in forming his or her decision, the Minister for Foreign Affairs will consider advice from DFAT, relevant agencies, including ASIO, and the Attorney-General, given the Attorney-General's responsibility for national security and administration of the Criminal Code.

64. The advice upon which a decision is made to declare an area will be made public except to the extent that it could prejudice national security if released.

Outline of the manner in which the declaration of an area may be communicated to travellers

65. All Australian Government travel advice is communicated to the Australian public through the Smartraveller website (www.smartraveller.gov.au).

66. In the event that the Minister for Foreign Affairs makes a declaration under section 119.3 of the enacted Bill, DFAT would undertake the following:

- Update and reissue the travel advice for affected countries

⁶ See sections 10.1, 10.2 and 10.3 of the Criminal Code respectively.

- this will result in an automatic email notification being sent to any travellers subscribed to the travel advice
- the Australian Federation of Travel Agents will also circulate a link to the updated advice as part of its newsletter, sent three times each week to its members, who represent 40 per cent of Australian travel agents.
- Update the *Declared area overseas* page with information about the declared zones.
- Send a ‘mass mailout’ (email to all Australians registered on Smartraveller as being in affected countries or pending arrival) linking to the relevant travel advice and the *Declared areas overseas* page.
- Provide the same advice in relation to declared areas to all member of the public who make telephone enquiries to DFAT.
- Promote the updated advice on Smartraveller’s Facebook and Twitter pages.
- Australia’s overseas missions and posts would notify registered Australians by email or SMS of updates to travel advisories containing information which could affect the safety and security of Australians abroad.
- Support AGD’s domestic outreach as required (which may include providing Smartraveller content to AGD for translation).

67. The community engagement programme to support countering violent extremism, administered by AGD, will also provide an avenue to provide the public with information about any declared area. AGD Officers will be available to provide information and answer questions at community engagement forums and workshops. Information could also be provided via the Living Safe Together website at www.livingsafetogether.gov.au.

Delayed notification search warrants

68. The Bill has extensive safeguards to ensure that there is appropriate oversight and transparency for the availability and use of delayed notification search warrants. In particular, an application for a delayed notification search warrant will be subject to a two-step authorisation process consisting of internal scrutiny by the AFP Commissioner and, in turn, independent scrutiny by an eligible issuing officer. At both stages, it is necessary to be satisfied that there are reasonable grounds to suspect that eligible offences have been, are being, are about to be or likely to be committed; that entry and search will substantially assist in the prevention of, or

investigation into, those offences; and that there are reasonable grounds to believe that it is necessary for entry and search of the premises to be conducted without the knowledge of any occupier of the premises.

69. Furthermore, rigorous reporting requirements have been imposed on both the executing officers and the AFP Commissioner. The AFP Commissioner has stringent record keeping responsibilities, including reporting to the Ombudsman at six monthly intervals and to the Minister annually (with the report to be tabled in Parliament). Independent oversight will be provided by the Commonwealth Ombudsman, who will be required to inspect the records of the AFP at least once every six months to determine the extent of compliance with the scheme. The Ombudsman will report to the Minister at six monthly intervals on the results of each inspection (with the Minister to table this report in Parliament).

70. These safeguards ensure that the Bill balances the legitimate interests of the Commonwealth in preventing serious terrorism offences with the need to protect important human rights.

Inclusion of Administrative Appeals Tribunal members as issuing officers for delayed notification search warrants

71. Proposed section 3ZZAD of the Bill provides that an eligible issuing officer for a delayed notification search warrant can be a Judge of the Federal Court of Australia, a Judge of the Supreme Court of a state or territory, or a nominated Administrative Appeals Tribunal (AAT) member. Supporting information for the inclusion of AAT members is outlined below.

Consistency with other Commonwealth covert schemes

72. There is strong precedent in Commonwealth legislation for the use of AAT members as issuing officers for surveillance device warrants, telecommunications interception warrants, stored communication warrants, and for extending controlled operation authorisations. Including nominated AAT members as eligible issuing officers for delayed notification search warrants will ensure consistency across Commonwealth covert schemes and align delayed notification search warrant application processes with those for similar warrants.

Operational implications if issuing officers are limited to judicial officers

73. Including nominated AAT members as eligible issuing officers greatly enhances accessibility to the pool of individuals authorised to issue delayed notification search warrants. Limiting the group to judges of the Federal Court and the Supreme Courts of states and territories could be problematic in urgent operational settings, or where operations are being

conducted in remote areas. AAT members have consistently proven to be available out-of-hours to deal with the operational needs of the AFP.

74. AAT members will have the power to issue delayed notification search warrants in relation to premises located anywhere in the country, whereas state and territory judges will be limited to premises located within their jurisdiction. This is particularly relevant in the context of terrorism investigations, where the offending activity is likely to be cross-border in nature. The AFP can reduce the administrative burden on the courts by approaching the same AAT member for warrants in multiple states or territories rather than having to go to separate judges in those jurisdictions. This also serves to improve transparency of the investigation as the same AAT member will have oversight of the extent of delayed notification search warrants and any related warrants being sought.

75. In some circumstances it is possible that the AFP would seek to install a surveillance device at the premise on which the covert search is being conducted. It would be more administratively convenient (and less resource intensive for all parties) for the AAT to be approached to grant both the surveillance device warrant and delayed notification search warrant at the same time. More importantly, however, it would ensure that the issuing officer has a more comprehensive understanding of the powers to be exercised in relation to the warrant premises, increasing transparency and accountability of AFP operations.

Comparison with state schemes

76. State regimes restrict the issue of delayed notification search warrants or covert warrants to judges, while Commonwealth overt search warrants are only issued by magistrates. However, delayed notification search warrants are a covert police power, and as such, other Commonwealth legislation governing covert police powers (particularly the telecommunications interception and surveillance device warrants regimes) provide a useful model for framing the Commonwealth delayed notification search warrant scheme.

77. Difference in issuing officers between Commonwealth and state legislative scheme is not uncommon. For example, the *Surveillance Devices Act 2007* (NSW) provides for judges and magistrates to issue NSW surveillance device warrants. The Commonwealth surveillance device regime allows for AAT members (in addition to Federal Judges) to issue Commonwealth surveillance device warrants.

Border control measures

78. A crucial element of the preventative measures undertaken to limit the threat of foreign fighters is strong and effective border control, to prevent the entry and arrival of persons

engaging in, or intending to engage in, foreign conflicts. Further information regarding these key measures included in the Bill is detailed below.

Expanding the scope of the Customs detention power so they are relevant to the current foreign fighter threat

- **expanding the definition of ‘serious Commonwealth offence’; and**
- **expanding the time before a Customs officer must notify the detainee that he or she has the right to contact a family member.**

79. These provisions are aimed at Customs facilitating other law enforcement agencies to exercise their powers to address national security threats. The enhanced detention powers will also assist law enforcement agencies in relation to the detection and investigation of serious Commonwealth offence. In exercising these powers, the current thresholds whereby an officer of Customs can detain a person if the officer has reasonable grounds to suspect that the person has committed or is committing a serious Commonwealth offence may result in situations where despite information received from partner agencies or the behaviour or documentation presented by the passenger, detention may not be possible. This is why the operation of section 219ZJB is proposed to be amended to include where an officer has reasonable grounds to suspect that a person is intending to commit a serious Commonwealth offence.

80. Further, Customs does not consider that the proposed extension to detention periods from 45 minutes to 4 hours constitutes an unreasonable restriction on correspondence with the detainee’s family. This period has been proposed because the current limit of 45 minutes does not provide Customs officers with sufficient time and opportunity to undertake enquiries once a person is detained.

Creating a power for the Minister for Immigration to cancel the visa of a non-citizen when the non-citizen is offshore and ASIO assesses the person might be a risk to security

81. As detailed in ASIO’s original submission to the PJCIS, these provisions are required in order to ‘fill the gap’ of the current system. Currently, the Minister for Immigration is able to cancel visas held by a non-citizen, following advice from ASIO that the individual is a direct or indirect risk to security (within the meaning of section 4 of the ASIO Act). Whilst this is effective when ASIO has the time and information available, there may be some situations where this is not possible. ASIO has provided the following 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.

82. If ASIO does not furnish a further security assessment within 28 days, the Minister for Immigration must revoke the cancellation, and the visa will be reinstated, as though the cancellation had not occurred.

83. DIBP and ASIO acknowledge the concerns presented to the PJCIS regarding the lowering of the threshold for the cancellation of a visa on security grounds, particularly the proposed use of the word 'suspects' in section 134B, and preferences expressed for the term 'suspects on reasonable grounds' to be used. In response, ASIO has advised that it is their view that it is implicit that this assessment must be based on reasonable grounds, and ASIO will apply this standard when preparing a security assessment for the purposes of the emergency visa cancellation provisions. Further, DIBP considers that mandatory cancellation is appropriate in this context, given that the purpose of the emergency cancellation proposal is to enable a response to the perceived imminent security threat.

84. In response to concerns raised regarding the notification of consequential cancellations, DIBP has advised 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 available.

Expanding the capabilities to identify persons in immigration clearance

- **expanding the collection, use and disclosure of personal identifiers from non-citizens to persons, which includes citizens as well; and**
- **expanding the ability for authorised systems to obtain personal identifiers and a copy of the bio-data page of the passport of all travellers, both citizens and non-citizens.**

85. The proposed amendments are aimed at improving the identification of persons in immigration clearance, including through the use of authorised systems such as SmartGate or eGate.

86. The proposed amendments to the *Migration Act 1958* (Migration Act) contain within them restrictions upon the purposes for which this information will be collected and used by DIBP and Customs. These include collection of personal identifiers for those purposes already set out in subsection 5A(3) of the Migration Act. These purposes include:

- (a) to assist in the identification of, and to authenticate the identity of, any person who can be required under this Act to provide a personal identifier; and
- (b) to assist in identifying, in the future, any such person; and

- (c) to improve the integrity of entry programs, including passenger processing at Australia's border; and
- (d) to facilitate a visa-holder's access to his or her rights under this Act or the regulations; and
- (e) to improve the procedures for determining visa applications; and
- (f) to improve the procedures for determining claims for protection under the Refugees Convention as amended by the Refugees Protocol; and
- (g) to enhance DIBP's ability to identify non-citizens who have a criminal history, who are of character concern or who are of national security concern; and
- (h) to combat document and identity fraud in immigration matters; and
- (i) to detect forum shopping by applicants for visas; and
- (j) to ascertain whether:
 - (i) an applicant for a protection visa; or
 - (ii) an unauthorised maritime arrival who makes a claim for protection under the Refugees Convention as amended by the Refugees Protocol; or
 - (iii) an unauthorised maritime arrival who makes a claim for protection on the basis that the person will suffer significant harm;
 - (iv) had sufficient opportunity to avail himself or herself of protection before arriving in Australia; and
- (k) to complement anti-people smuggling measures; and
- (l) to inform the governments of foreign countries of the identity of non-citizens who are, or are to be, removed or deported from Australia.

87. The Migration Act already specifies purposes for accessing identifying information in section 336D, and the permitted disclosures in sections 336E, 336F and 336FA. These include, amongst others to:

- identify, or authenticate the identity of a person,
- facilitate the processing of persons entering or departing from Australia
- identify non-citizens who have a criminal history, who are of character concern or who are of national security.

88. Amendments will be made to these sections to ensure that it is permissible to disclose identifying information in order to identify, or authenticate the identity of persons (including Australian citizens) who may be a security concern to Australia or a foreign country. DIBP notes that the collection, use and disclosure of the personal identifiers of Australian citizens was of particular interest to the Committee, including the number of citizens this is likely to affect. Whilst

these numbers vary, as a guide, DIBP can confirm that in the 2013-14 programme year there were a total of 8.08 million departures by travellers on Australian travel documents. This departure figure was made up of an estimated 5.48 million individual travellers.

89. In order to ensure the protection of an individual's privacy, including that of citizens and non-citizens, there are a number of safeguards in place. These include the consequences for a non-permitted disclosure under the Migration Act. A person commits an offence and is subject to imprisonment for 2 years or 120 penalty units, or both if they disclose information that is not a permitted disclosure. In addition, Customs officers are required to adhere to Section 16 of the *Customs Act 1901* (Customs Act) and the Australian Privacy Principles, as set out in the *Privacy Act 1988* (Privacy Act).

90. Further, all personal information collected via SmartGate or the eGates (including the photograph), is treated in the same way as information collected manually. Customs stores personal information to securely prevent unauthorised use and maintain its accuracy. Customs will only use or disclose personal information for the purposes for which it was collected or as otherwise required or authorised by law, including where the information is required by other law enforcement or border control authorities.

91. Any collection, storage and disclosure of information will be undertaken in accordance with the Australian Privacy Principles contained in the Privacy Act. Customs will keep records of any disclosures in accordance with section 16 of the Customs Act.

92. The eGates will also comply with the Privacy Act, specifically Australian Privacy Principle 5 (APP5) which requires persons to be notified of a number of matters before personal information is collected (or as soon as practicable after the collection if it is not practicable to inform the person beforehand). Persons will be notified of these through signs, information sheets, and information on DIBP's and Customs' websites.

93. The captured images will be stored in a central server in a 'Protected' environment under the controls and certification as prescribed by the Australian Signals Directorate in the Australian Government Information Security Manual. Images will only be available to authorised officers. Regular systems audits will be undertaken to ensure only authorised officers maintain access. To date, automated border processing has been the focus of a number of internal and external audit reports, including the Australian National Audit Office, the former Office of the Privacy Commissioner and internal review, with all findings being addressed. All images will be kept in accordance with the *Archives Act 1983* and utilised for the purposes of biometric algorithm improvements and improved passenger facilitation while still ensuring border integrity.

Responses to submissions

Law Council of Australia recommendations regarding control orders

94. The Law Council made a number of recommendations for amending the control order regime. Each of the recommendations mentioned in paragraph 108 of the Law Council's submission is addressed briefly below.

(a) Authorise control orders for terrorist convicts who have not been rehabilitated satisfactorily

95. The proposal to limit control orders to 'terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness' would create significant legal and administrative challenges.

96. This proposal would require the formulation of a threshold for 'satisfactory rehabilitation' and 'dangerousness'. Labelling a person as 'not having been satisfactorily rehabilitated' and 'dangerous' could be extremely stigmatising and could have implications for the persons employment and personal life.

97. The fact that a person has been convicted of a terrorism offence, even where there is strong evidence that the person has not been satisfactorily rehabilitated and continues to be dangerous, is not sufficient information on which to base an interim control order. For example, a person convicted of terrorism could be assessed as being a danger only to himself or to members of his family. Accordingly, the issuing court must also be satisfied on the balance of probabilities that the terms of the order are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from terrorism.

(b) and (d) Threshold – 'considers' versus 'suspects' on reasonable grounds

98. The Law Council recommends adopting the threshold of 'considers on reasonable grounds' rather than 'suspects on reasonable grounds' for each of the grounds for seeking the Attorney-General's consent to request an interim control order. This amendment means that an AFP applicant can request the Attorney-General's consent for a control order based on a slightly lower degree of certainty as to whether a control order would 'substantially assist in preventing a terrorist act'.

99. Suspicion on reasonable grounds is more than a mere suspicion. It requires a 'reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence' (Kitto J in *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303 - quoted in *George v Rockett* (1990) 170 CLR 104). This threshold is considered appropriate for the initial stages of the process of seeking consent to apply for an interim control order. However, the same threshold that currently applies to the making of interim control orders – that the issuing court is satisfied on the balance of probabilities that the terms of the order are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from terrorism – must still be satisfied before an interim control order can be made against a person.

(c) Fair trial overseas

100. The Law Council has recommended limiting the availability of control orders in relation to convicted terrorists to situations where the Australian court can 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).

101. When making a request to an issuing court for a control order, the AFP member is required to provide the issuing court with any facts as to why the order should not be made. This would include any relevant information about the foreign investigation and trial process. In any case, as mentioned above, the fact that a person has been convicted of a terrorism offence is not sufficient information on which to base an interim control order. The issuing court must also be satisfied on the balance of probabilities that the terms of the order are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from terrorism.

(e) Other safeguards

102. In response to other Law Council comments regarding the amended requirements in relation to service of control orders, including varied and confirmed control orders, on the person the subject of the order, AGD offers the following observations. These amendments are designed to strengthen the safeguards and protections on the person by enhancing and replicating the requirements to advise and explain certain matters to the person. The AFP proposes to develop a hard copy document to be used by the AFP member when serving control orders and to be provided to the subject of the control order for their future reference that covers all the obligations in relation to explanation of the order.

103. Subsection 104.12(3) of the Criminal Code currently provides that the validity of an interim control order is not affected where the conduct of the person makes it impractical for the AFP member to comply with the requirements to inform a person of their appeal and review rights. The amendment to section 104.17 replicates this safeguard to make it clear that it also applies in relation to a varied or confirmed control order. This provision is designed to protect the integrity of an interim control order served on a person who, for example, is behaving violently towards the AFP member seeking to explain the terms of the order. In contrast, it would not apply in circumstances where the person's limited English skills meant the person did not understand the terms. In such a case it would be reasonably practicable – and expected – that the AFP member would make arrangements for an interpreter to assist in explaining the person's appeal and review rights.

104. The requirement to inform the person of his or her rights to legal representation supplements the existing requirements on the AFP member to serve details required to enable the person to understand and respond to the substance of the order on the person subject to an interim control order (see existing subparagraph 104.12A(2)(iii)), as well as the existing right of the person's lawyer to request a copy of the interim control order (see existing section 104.13).

105. The Criminal Code already requires the person the subject of an interim control order to be provided with information sufficient to dispute the order or the terms it imposes (see existing subparagraph 104.12A(2)(ii)).

106. A decision by the Attorney-General to consent (or not to consent) to a senior AFP member making a request to an issuing court for an interim control order under section 104.2 of the Criminal Code is exempt from review under the *Administrative Decisions (Judicial Review) Act 1977*. This is appropriate because the Attorney-General's decision is one step in the process. It is not until a decision is made by an issuing court to make an interim control order that there are any impacts on the person the subject of the control order. Indeed, the person the subject of the proposed control order would not be aware of any decision by the Attorney-General until an issuing court had also considered the matter and made a decision to issue the interim control order. The only party with visibility of the Attorney-General's decision is the senior AFP member seeking consent. It would not be appropriate for the AFP to seek review of the Attorney-General's decision not to consent to the member requesting a control order from an issuing court.

Inspector-General of Intelligence and Security recommendations

107. The Inspector-General of Intelligence and Security (IGIS) made a number of recommendations in relation to ASIO. The IGIS's recommendations on the scope of the definition of 'security', the suspension of travel documents and on cancelling visas on security grounds are addressed below.

Broadened definition of 'security' in the ASIO Act

108. As noted in the submission from the IGIS, the definition of 'security' in the ASIO Act has been amended, as a consequence of the repeal of the Foreign Incursions Act.

109. Offences under the Foreign Incursions Act have long come within the definition of 'politically motivated violence' (PMV) in the ASIO Act. The offences in the Foreign Incursions Act are being expanded and inserted into the Criminal Code. These Criminal Code offences are now to be included in the definition of PMV in place of the redundant reference to the Foreign Incursions Act. The modification that is material here is the inclusion of the subsidiary defined term 'engage in subverting society' in the Criminal Code. The submission of the Inspector-General considers that these amendments have the effect of expanding the scope of 'security' as defined in the ASIO Act, potentially covering conduct such as going overseas to commit an assault as part of a family dispute, or to rob a bank.

110. However, the proposed amendments do not materially impact on the breadth of the definition of 'security' under the ASIO Act.

111. The reference to PMV in the ASIO Act does not sit in a vacuum. 'Security' (defined as is PMV in section 4 of the ASIO Act) relevantly means

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from PMV;

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to PMV.

112. Entering a foreign country with an intention to engage in conduct which is merely criminal would not of itself be expected to involve the protection of Australians from PMV, or the protection of Australia's border as outlined in paragraphs (a) and (aa) above. It is the Department's view that a mere connection between an offence constituting PMV and the Commonwealth and its people is insufficient. The conduct constituting PMV would need to be

capable of supporting a need to provide protection from that conduct. This leaves for consideration the third arm of the definition of security, paragraph (b).

113. The criminal conduct (eg assault) would only engage paragraph (b) of the definition of 'security' above if Australia had responsibilities to the foreign country, in respect to the relevant act of PMV. While we consider that Australia would have responsibilities in respect of its people engaging in terrorism or other conduct which is hostile to a foreign government, there would only be rare occasions where routine criminal conduct overseas (assault or bank robbery) would engage Australia's responsibilities to a foreign country. This might arise for instance on those occasions in which a foreign country seeks extradition of the alleged perpetrator from Australia.

114. Further, the fact that there is no express political motivation element in the proposed Division 119.1 offence (as constituted by the hostile activity of subverting society) is consistent with the existing conceptual approach taken to defining PMV in the ASIO Act.

115. In particular:

- a number of limbs of the definition of 'hostile activity' in the Foreign Incursions Act do not expressly require a political element. For instance, paragraph 6(3)(b) applies to persons who cause by force or violence the public in the foreign State to be in fear of death or personal injury. Paragraph 6(3)(d) applies to unlawfully destroying or damaging State owned property. A person could engage in these actions in pursuit of purely personal or financial motives and satisfy paragraph (c) of PMV as it applies to the Foreign Incursions Act
- the offences specified in other paragraphs of the definition of PMV similarly do not include an element of political motivation – for instance, the other security offences in paragraph 6(3)(c) and subparagraph 6(3)(d)(i), rather
- the definition of PMV includes those offences and conduct which Parliament has determined – as a matter of policy – to be of an inherently political nature of the purposes of ASIO's functions. This might be said to be because they undermine peace, order or stability in a foreign State in a substantial way.

116. There is no material expansion in practical terms as the conduct covered by the definition of 'hostile activity' in section 6 of the Foreign Incursions Act, as presently recognised in paragraph (c) of the definition of PMV, is similar to that which forms part of the hostile act of 'subverting society' in proposed section 119.1, in respect of conduct causing death or injury. In addition, the application of the hostile act of 'subverting society' in proposed section 119.1 in respect of property damage and interference with an electronic system is a modernisation of the

hostile activity offence in section 6(3)(d) of the Foreign Incursions Act in respect of destroying or damaging property owned by the Government of a foreign State.

117. The Foreign Incursions Act applies to conduct causing the death of or serious injury to a public official, causing members of the public to fear death or personal injury, or overthrowing a government by violence or force and engaging in armed hostilities (which by their nature carry a high risk of causing civilian casualties).

118. The personal injury elements of 'subverting society' in section 117.1(3) applies to conduct that causes serious physical harm, creates serious risks to health or safety of the public or a section thereof, causes death or endangers life.

119. The relevant Foreign Incursions Act offence, as enacted in 1978, is based on the (now outdated) assumption that essential public infrastructure is State-owned, and is physical rather than electronic.

120. If this modernisation measure was not given effect, there would be an arbitrary distinction between conduct that is PMV because it is an offence against the property of a foreign State, and conduct that is not PMV on the basis it was committed against a privately held asset. For example, it seems arbitrary that ASIO could perform functions in relation to PMV constituted by an attack on a government-owned power station in a foreign State (in the absence of overt evidence of political intention) but could not perform functions in relation to the same act committed against a privately owned power station.

121. Similarly there may be an arbitrary distinction between the property of a Government that is physical or tangible (and therefore presently within the definition of PMV by reason of paragraph (c) of the definition by reason of the Foreign Incursions Act offences), and property that is intangible such as an electronic system.

122. ASIO has advised that it has 'no intention nor desire to adopt the broader function suggested by the IGIS'. Should the IGIS's concerns about 'function creep' be realised, the IGIS can investigate and report to that effect.

New offences not captured by the definition of 'security'

123. The offence of 'advocating terrorism' falls outside the definition of 'terrorism offences' in the ASIO Act. The IGIS's submission suggests that, due to this, while the AFP might investigate this new offence, it may not be within ASIO's functions. This is not the case.

124. ASIO is concerned with collecting intelligence that is relevant to security, rather than the investigation of specific criminal offences. A person who is advocating terrorism may well be

engaged in activities prejudicial to security. ASIO would be interesting in exploring the effects of the person's advocacy and considers that it would fall within ASIO's functions to do so, regardless of where the new advocacy offence sits within the Criminal Code.

125. ASIO would not be able to obtain a questioning warrant under the ASIO Act for the purpose of collecting intelligence concerning the advocacy offence in itself. That is because a questioning warrant is only available to collect intelligence that is relevant to a 'terrorism offence' and, as noted by the Inspector-General, the advocacy offence will not be a 'terrorism offence' for the purposes of the ASIO Act. That is not to say that collecting intelligence about persons who are advocating terrorism will necessarily fall outside ASIO's functions. ASIO considers that collecting such intelligence fell within its functions before the new offence was created, and it does not consider this amendment to have altered that position.

Suspension of travel documents

IGIS opinion that decision should be made by the Director-General or another individual, rather than 'ASIO'

126. The proposed framework of ASIO, not the Director-General, requesting the suspension of travel documents is consistent with arrangements relating to passport refusal/cancellation requests under paragraph 14(3)(b)(iii) of the *Australian Passports Act 2005* (Passports Act). These existing arrangements require ASIO, not the Director-General, to make a refusal/cancellation request in relation to passports where ASIO assesses a person is likely to engage in conduct of security concern that relates to a foreign country.

127. Any reasons for requesting suspension of travel documents made by ASIO officials will be recorded. The records of this internal decision making process will be made available to the IGIS to facilitate her review and scrutiny of these decisions.

IGIS concern about multiple suspension requests

128. A person's travel documents will not be able to be suspended indefinitely. New subsection 22A(3) allows ASIO to make an additional request in relation to the person where it has new information that was not before it at the time of the suspension request and during the period of the suspension. The subsection allows ASIO to make a request where there is genuinely new information before it.

129. This is required because there may be circumstances where ASIO needs to make more than one suspension request in relation to the same individual. Where new information is obtained outside of the initial suspension period it is important that ASIO have capacity to make a suspension request on the basis of that new information. For example ASIO might identify an

individual who is associated with a facilitation network and is planning to travel overseas on short notice.

- ASIO could make a suspension request in relation to that person, then determine through its investigations that the intended travel relates to family or business activities which are not of security concern. ASIO would then lift the suspension to enable the individual to undertake that travel.
- Six months later, ASIO might identify further planned travel by that individual which appears to be linked to the activities of the facilitation network. ASIO might seek to again suspend the person's passport in relation to this new, unrelated travel of potential security concern.

130. The IGIS will have oversight of multiple suspension requests in accordance with her functions.

Delegation of Decision to Suspend Passports

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

Cancelling visas on security grounds

IGIS opinion that decision should be made by the Director-General or another individual, rather than 'ASIO'

132. The proposed framework of ASIO, not the Director-General, providing the security assessment to the Minister for Immigration is consistent with the provisions in Part IV of the ASIO Act relating to security assessments, which relevantly defines a security assessment as a statement in writing furnished by ASIO to a Commonwealth agency. It is also consistent with the other provisions relating to cancellation of visas on security grounds contained in the Migration Act.

IGIS concern about multiple cancellation requests

133. As set out in the Explanatory Memorandum it is not intended that this mechanism would be used in a serial fashion to continue extending the period within which ASIO must form an opinion

as to whether a person is directly or indirectly a risk to security. However there may be circumstances where ASIO needs to make more than one emergency visa cancellation request in relation to the same individual. Where new information is obtained it is important that ASIO have capacity to make a visa cancellation request on the basis of that new information. There may also be rare circumstances where ASIO cannot gather the information it needs in respect of the off-shore non-citizen within 28 days to resolve its inquiries.

134. The IGIS will have oversight of multiple suspension requests in accordance with her functions.

Submissions relating to ASIO questioning and questioning and detention warrants

Last resort requirement

135. Item 28 in the Bill amends one of the issuing criteria for questioning warrants in section 34D(4)(b) of the ASIO Act. This item will repeal the requirement that the Attorney-General must be satisfied that 'relying on other methods of collecting the intelligence would be ineffective' prior to issuing a questioning warrant. This requirement will be substituted with a requirement that the Minister must be satisfied that it is reasonable in all the circumstances, including whether other methods of collecting the intelligence would likely be as effective.

136. The INSLM noted in his second annual report that the current criterion operates, in effect, as a 'last resort' requirement, in that consent cannot be granted if there are any other intelligence collection methods available that are not ineffective. The amendment in item 28 implements the Government's response to a recommendation in the INSLM's second annual report. The Government supports the reasoning of the INSLM, who concluded that it would be reasonable to substitute the open 'last resort' requirement in section 30 4D (4) (b) with a 'most effective' requirement, on the basis that the latter requirement would be a 'fair balance of security and liberty' having regard to the range of other safeguards governing the exercise of powers to issue questioning warrants.

137. The proposed amendment would change the issuing criteria in relation to questioning warrants only, and not in relation to questioning and detention warrants which would continue to operate with the current last resort criteria.

138. The AHRC, in its submission to this inquiry, argued that this amendment is not consistent with Australia's human rights obligations, in particular, the rights to liberty and to freedom from arbitrary detention in Article 9 and the right to freedom of movement in Article 12 of the

International Covenant on Civil and Political Rights (ICCPR).⁷ It has been said, for example, a questioning warrant can ‘only be justified when no less intrusive alternatives exist’.⁸

139. Article 9 of the ICCPR provides that no one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedures as are established by law. The United Nations Human Rights Committee has stated that ‘arbitrariness’ includes the elements of inappropriateness, injustice and a lack of stability. Arrest or detention must be reasonable and necessary in all circumstances with reference to the recurrence of crime, interference with evidence and for the prevention of flight.

140. Article 12 of the ICCPR provides that everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement. This right has been restricted by the questioning warrant scheme to the extent that the issuing of a questioning warrant requires a specified person to appear before a prescribed authority for questioning immediately after the person is notified of the issue of the warrant or at a time specified by the warrant. It is permissible to restrict the right to the liberty of movement in circumstances that are reasonable, necessary and proportionate.

141. Under a questioning warrant, the prescribed authority may, at any time when a person is before a prescribed authority for questioning under a warrant, give a direction to detain a person or to further detain a person.

142. The detention permitted under the questioning warrant regime is not ‘arbitrary’. The detention regime under questioning warrants is established by and operates in accordance with the procedures described in Subdivision D of Division 3. Subdivision D sets out a number of requirements that apply to the giving of a direction to detain a person or to further detain a person, including the requirement that the prescribed authority is only to give such directions if satisfied that there are reasonable grounds for believing that, if the person is not detained, the person:

- (a) may alert a person involved in a terrorism offence that the offence is being investigated;
or
- (b) may not continue to appear, or may not appear again, before a prescribed authority; or
- (c) may destroy, damage or alter a record or thing the person has been requested, or may be requested, in accordance with the warrant, to produce.

⁷ Australian Human Rights Commission, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 Submission 7*, p10.

⁸ *Ibid.*

143. The prescribed authority's ability to issue such directions in these circumstances is a reasonable, necessary and proportionate measure in order for ASIO to carry out its statutory obligations, including collecting intelligence relevant to security.

144. The limitation on the right to freedom of movement can be justified on the basis that it achieves a legitimate objective—that the questioning warrant will 'substantially assist in the collection of intelligence that is important in relation to a terrorism offence'.

145. The amendment does not amend the prescribed authority's ability to make such directions under a questioning warrant but rather amends one criterion for issuing a questioning warrant. Before a questioning warrant can be issued, there are extensive requirements to be met including the requirement:

- (a) for the Director-General to seek the Attorney-General's consent to request the issue of a questioning warrant and provide the Attorney-General a draft request which addresses certain requirements including the requirement to provide a statement of the facts and other grounds on which the Director-General considers it necessary that the warrant should be issued;
- (b) for the Attorney-General, before consenting to the request, to be satisfied certain requirements are met including that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and
- (c) for the issuing authority, before issuing the warrant, to be satisfied the Director-General has requested the warrant in the required form and there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

146. The requirements necessary to issue a warrant ensure that its application is not subject to excessive discretion or capriciousness by decision-makers. The questioning warrant scheme enables the collection of importance intelligence relating to terrorism offences which can prove vital in the investigation and prevention of terrorism related offences.

Retaining questioning and detention warrants

147. At least one stakeholder in their submission to the PJCIS has referenced the fact that the Bill does not implement the INSLM's recommendation in his second annual report to repeal the

provisions in the ASIO Act for questioning and detention warrants.⁹ Significantly, however, in addition to recommending the repeal of the questioning and detention warrant provisions, the INSLM recommended enhancing the powers for arrest under existing questioning warrant provisions. In particular, INSLM recommended:

- the provisions of Subdivision C in Division 3 of Part III of the ASIO Act should be repealed; and
- the questioning warrant provisions in Division 3 of Part III of the ASIO Act 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 for questioning, or destroying or tampering with evidence.

148. The Bill does not implement this recommendation. ASIO can identify distinct and realistic circumstances where the need for a questioning and detention warrant would arise, even if the questioning warrants were amended to permit arrest in the manner recommended by the INSLM. For example, where ASIO has intelligence which demonstrates that a particular person presents a serious risk of alerting another person involved in a terrorism offence, failing to attend for questioning, or destroying or tampering with evidence, but that person may not say or do something to demonstrate that risk in the presence of the police officer serving a questioning warrant. If the INSLM recommendations were implemented, ASIO would be required in such a case to appear before a prescribed authority, after a questioning warrant is issued, to seek a direction that the person be detained. In time-critical circumstances, this could cause the opportunity to be lost to prevent the person from alerting another person involved in terrorism offence, fleeing, or destroying or tampering with evidence.

149. The security environment has changed since the questioning and detention regime was introduced and indeed since the INSLM review, such that threats relating to terrorism offences are materialising and developing more quickly than before. The Australian Crime Commission noted in its submission that ‘the modern terrorism threat is highly adaptable and increasingly aware of law enforcement and intelligence tradecraft’.¹⁰ It is necessary that the powers that

⁹ Gilbert + Tobin Centre of Public Law, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 Submission 3*, 2014, p3

¹⁰ Australian Crime Commission, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 Submission 5*, p2,

ASIO may exercise to investigate these threats allow rapid action to investigate and prevent a terrorist act from eventuating.

150. Some stakeholders have suggested that the INSLM recommended the repeal of all types of detention under the questioning warrant regime. For example, it has been said that ‘INSLM recommended the repeal of ...the ASIO regime so far as it relates to detention’.¹¹

151. The Committee is asked to note that the INSLM did not recommend repeal of all avenues by which a person may be detained under a questioning warrant. As described above, instead the INSLM recommended that the questioning and detention warrant provisions be repealed and that the arrest and detention provisions in relation to questioning warrants provide new grounds for arrest by a police officer serving the warrant and for a prescribed authority to direct that the person be detained.

Office of the Australian Information Commissioner concerns about listing AGD as a ‘designated agency’ for the purpose of accessing AUSTRAC information

152. The submission from the Office of the Australian Information Commissioner (OAIC) has raised a number of concerns with the proposal in the Bill to amend the definition of a ‘designated agency’ in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) to include AGD. This amendment will enable AGD to access financial intelligence information held by AUSTRAC (AUSTRAC information), subject to written authorisation provided by the Chief Executive Officer of AUSTRAC (AUSTRAC CEO).

Shift in type of entities permitted access

153. The OAIC has raised a concern that:

the extension of the definition of a designated agency to include AGD represents a significant shift in the types of entities that are permitted to access AUSTRAC information; specifically, that designated agencies are primarily agencies that have law enforcement functions and activities, whereas AGD is seeking access to assist in its policy making activities.

154. AGD is the central policy body responsible for implementing Australia’s AML/CTF regime. Listing AGD aligns with the stated purpose of the AML/CTF Act, being the fulfilment of Australia’s international obligations to combat money laundering and the financing of terrorism (see

¹¹ Gilbert + Tobin Centre of Public Law, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 Submission 3*, p3.

section 3 of the Act), as well as complementing broader criminal justice objectives. Currently, AGD is only able to access AUSTRAC information:

- under section 129 for the purposes of an investigation or a proposed investigation of a possible breach of a law of the Commonwealth, or
- if disclosed by an entrusted public official under section 121 for the purposes of the AML/CTF Act or the Financial Transaction Reports Act 1988, or for the purposes of the performance of the functions of the AUSTRAC CEO.

155. This disclosure regime imposes significant constraints on the ability of AGD to efficiently and effectively develop policy to combat money laundering and terrorism financing, and impedes the ability of partner agencies to share AUSTRAC information that is considered relevant to the development of policy with AGD.

156. AUSTRAC has been consulted on the proposal for AGD to be listed as a designated agency. AUSTRAC supports the proposal, noting that both the functions of AUSTRAC and the issues for consideration by the AUSTRAC CEO in performing his functions are supported by designated agency status being granted to AGD as the central policy agency on AML/CTF (see section 212(3) of the Act). The concern regarding the extension of designated agencies to include policy agencies, rather than law enforcement agencies, is noted. However, the Department of Human Services, DFAT, DIBP, and Treasury all currently have designated agency status; these are all policy—rather than law enforcement or operational—agencies.

Privacy safeguards

157. The OAIC has noted that there are a range of privacy safeguards that apply to the handling of AUSTRAC information, including when the AUSTRAC CEO is considering whether to give a designated agency access to AUSTRAC information. The OAIC recognised that the Statement of Compatibility with Human Rights suggested that the majority of AUSTRAC information accessed by AGD would be considered at an aggregated level and that:

if the information is aggregated to a level where it is no longer about an identifiable individual or an individual who is reasonably identifiable (that is, where the information has been de-identified), the information is no longer personal information and is not regulated by the Privacy Act.

158. The OAIC went on to note that:

whilst it is always preferable from a privacy perspective to de-identify personal information before using or disclosing the information, I recognise that in some circumstances the purpose of the use or disclosure cannot be served by de-identification of information.

159. In addition to the obligations under the Privacy Act, including the requirements to comply with the APPs, Part 11 of the AML/CTF Act contains rigorous secrecy and access provisions which set out limitations on access to and disclosure of AUSTRAC information. These obligations continue to apply regardless of the level of aggregation of personal information.

Nature of information sought by AGD

160. The OAIC has suggested that the PJCIS:

seek further clarification about the nature of the information likely to be sought by AGD and whether any of that information would be sufficiently aggregated to make it de-identified. Further, that the Joint Committee consider whether AGD's collection of AUSTRAC information that is personal information (that is, information that is not sufficiently aggregated to ensure that it is de-identified) is reasonably necessary for, or directly related to, AGD's functions or activities.

161. It is intended that AGD will only seek to access the minimum amount of information necessary to support its policy functions, and that, where possible, such information will be sufficiently aggregated to ensure that it is de-identified. While it is not possible to predict the types of information likely to be sought by AGD in all future circumstances, AUSTRAC information has previously been sought, by way of example, in relation to the remaking of the AML/CTF countermeasures against Iran under Part 9 of the AML/CTF Act, which allows for regulations to be made regulating or prohibiting transactions with prescribed foreign countries. The countermeasures regulations prohibited high-risk transactions of \$20,000 or more, where a party to a transaction is physically in Iran, or is a company incorporated in Iran. In order to determine the effectiveness of the existing countermeasures regime and to properly assess the need for any amendments to the prohibited transaction threshold, AGD required access to details of the quantum of all International Funds Transfer Instructions involving Iran, as well as to the types and numbers of entities reporting International Funds Transfer Instructions (including foreign currency services, remittance providers and cash carriers) with Iran.

Australian Human Rights Commission Recommendation 14 regarding payment nominees for 'parental leave pay', 'dad and partner pay' and 'social security payments'

162. In its Submission to the inquiry, the AHRC correctly noted that that under proposed section 57GJ(2) of the *A New Tax System (Family Assistance) Act 1999*, the Attorney-General may recommend 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*. This is to ensure that where an individual's conduct results in the cancellation of their welfare payments,

where possible, children of the individual are not detrimentally affected, as these family payments are made to a parent or principal carer for and in respect of dependent children.

163. The AHRC recommends that a similar procedure apply to ‘parental leave pay’ ‘dad and partner pay’ or a ‘social security payment’ where the individual has dependent family members, particularly children. However, except for the family assistance payments, the social security system is otherwise based on a scheme of individual entitlements, not dependency based payments, and it is therefore not normally necessary to provide for alternative payment arrangements. For example, in respect of social security payments, where one member of a couple is ineligible for payment there is discretion in the *Social Security Act 1991* to treat that person as not being a member of a couple, making the other partner eligible for the higher single rate of payment.

Conclusion

164. AGD appreciates the opportunity to provide evidence to the PJCIS in support of its inquiry, and particularly to provide this supplementary submission. The PJCIS’s consideration of this Bill is important, especially in the context of the Government’s comprehensive reform agenda to strengthen Australia’s national security and counter terrorism legislation, including the recently passed *National Security Legislation Amendment Act 2014* which was considered by the Committee. In developing the Bill, the dynamic and fluid nature of the current national security environment has required law enforcement, intelligence and border protection agencies to consider how best to address the challenge of foreign fighters and whether existing powers are sufficient to ensure the safety of Australia. Consideration has been given to ensuring the effective use of powers in the current context, while maintaining and, if necessary strengthening, safeguards. The PJCIS inquiry provides additional opportunity to consider this important balance and AGD trusts the information contained within this supplementary submission will further support such consideration.